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Vulnerable witnesses in Chilean criminal proceedings: New developments

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Abstract

Common law countries have long been implementing legal reforms that recognise the special needs of vulnerable witnesses. While these issues have been the subject of considerable scrutiny and debate in evidence law scholarship, this is not the case across Latin American legal systems. This article intends to contribute to such a debate. Chile recently enacted two special laws that significantly amended the general evidentiary regime in an effort to account for the challenges facing children and victims of sex crimes. This article provides an account and analysis of these recent legal reforms. We contend that while both laws address critical issues impacting specific classes of victims, the lawgivers failed to recognise that there is conflict between the rights of the victims and the rights of the accused, generating legal reforms that have unreasonably restricted the right of defendants to confront witnesses.

Keywords

children, right to confrontation, sexual crimes, vulnerable witnesses, witnesses

Introduction

In common law countries such as Canada, the United Kingdom and the United States, evidence law has long afforded vulnerable witnesses special treatment. Responding to victim rights advocates while ensuring the successful prosecution of serious crimes, ever since the 1970s these countries have amended general evidentiary rules in order to mitigate the impact of criminal proceedings on specific classes of victims. In Latin America, however, a similar tradition and developments are absent. Although some

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countries have adopted Gesell chambers and other protective arrangements,[1] no significant changes to evidentiary rules protecting specific classes of victims have been introduced.

The exception is Chile, where recent legislation substantially amended general evidentiary rules in order to shield vulnerable witnesses, notably children and victims of serious sex and other crimes. Law 21.057, passed in January 2018 and adopted nationwide in 2022, introduced a system of intermediaries and recorded interviews that changed the way child victims testify at criminal proceedings. Law 21.523, which took effect in December 2022, gave sex crime victims new rights (notably the right '… not to be judged, stigmatized, discriminated or challenged over their account of events, behavior or lifestyle') and amended key features of the general evidentiary rules with a view to preventing secondary victimisation.

In this article we examine these pieces of legislation. We argue that while both meant to achieve commendable goals and address critical criminal justice issues impacting specific classes of victims, they have unreasonably restricted the right of defendants to confront witnesses. It is further argued that lawgivers failed to recognise that these laws would trigger a clash of rights.

This article has five sections. The first section briefly covers Chile's general regulations on submission of witness evidence at trial. The next section explores the notion of the vulnerable witness, notably the protective instruments adopted by other jurisdictions. The following section addresses the changes to the Code of Criminal Procedure introduced by Laws 21.057 and 21.523, while section after that discusses whether these laws restrict a defendant's right to confront a witness and whether such restrictions are reasonable. The article ends with conclusions.

Chile's system of criminal procedure and evidentiary rules

Chile's Code of Criminal Procedure (CCP) requires prosecutors to conduct an investigation intended to decide whether to indict or discharge. Indicted respondents appear before a supervisory judge (*juez de garantía*) in a pretrial hearing designed to ensure an effective trial hearing by guaranteeing that all issues concerning the lawfulness of the process and the admissibility of evidence are debated in advance. Once this stage is completed, a trial hearing takes place in front of the *Tribunal Oral en lo Penal*, a panel of three judges from separate criminal court who rule on the accused's guilt. The entire process of presenting and testing evidence is adversarial. As noted by lead CCP framer Cristián Riego (2008: 345), the original draft was revised several times in order to underscore the adversarial nature of the trial hearing:

> A series of regulations based on common law legal practice were introduced in order to create a version of oral hearings that significantly departs from most continental European and Latin American legal traditions. (…) The key regulations of the adversarial oral hearing system introduced in Chile include (a) Restricting court access to the case file; (b) Outlining a sequence for submission of evidence that is determined by the parties to the case and begins with the laying of charges and concludes with the defense; (c) A method for direct examination and cross-examination by the parties; (d) Keeping judges' probative activity to a minimum; (e) Strict standards on the use at trial of earlier statements; (f) Setting a ten-day limit for deferment of proceedings; and (g) Requiring courts to render a decision at the close of the hearing and issue a sentence no later than five days from the end of trial (pp. 346–347).

1. Indeed, some countries have enacted practice guides on the matter, especially for Children victim of sex crimes. See as example Organismo Judicial de Guatemala (2019); Corte Suprema de Nicaragua (2020) and for Panama the United Nations Office on Drugs and Crime directed a Technical Consultative Opinion on the matter entitled 'The use of anticipated evidence to reduce the victimization of children and adolescents in the Republic of Panama', UNODC (2014).

This new method of introducing evidence, which is generally under the control of the parties, restricted the court from having prior contact with the evidence, assigning it a more passive role,[2] and heavily relied on the parties' capacity to test each other's evidence during cross-examination. Building on the general directive in CCP art. 296 that courts only base their decisions on evidence introduced at trial, CCP art. 329 provided a statute on witness evidence, notably the duty to appear at trial to be questioned in person, and generally barred recourse to written depositions. Chilean scholars (Duce, 2014: 124–125; Horvitz and López, 2002: 268; San Martín, 2007: 283) hold CPP art. 329 to adequately reflect the principles of immediacy and of right to defence, two of the foundations of the Code of Criminal Procedure. However, arts. 331 and 332 did contemplate exceptions on the use of depositions.

Chilean scholars (Baytelman and Duce, 2004: 233; Hernández, 2014: 6) regard CCP art. 331 as a key such exception, since in the specific circumstances described in the law, it does allow the use of depositions in lieu of live evidence.[3] A general exemption in art. 332 also allowed recourse to depositions in order to jog a witness's memory or bring inconsistencies to light, although it did not allow them to replace live testimony or be admitted into evidence. Under specific circumstances, art. 332 further allowed confronting witnesses with their depositions so the court could observe and draw inferences from the resulting interaction. Under art. 329, general evidentiary rules involved face-to-face interaction, i.e., a requirement for witnesses to appear in person and testify in front of defendants. This rule allowed witnesses to appear by videoconference or similar means when unable to do so in person for compelling reasons. The CCP expressly required courts to ensure that any alternative methods of witness appearance guaranteed proper examination and cross-examination.[4]

If witness safety was a concern, CCP art. 308 let the court prevent personal contact by allowing deponents to appear by video link from a separate location. The rule further restricted face-to-face interactions by allowing the use of screens that let the court observe witness demeanour while ensuring defendants could not see them. Modes of questioning, an issue dealt with in arts. 329 and 330, is one of the elements Riego notes as having been revised in order to underscore the adversarial nature of a trial. Art. 329(3) goes over the dynamics of witness examination, noting that the process should generally be in the control of the examining parties. The rule required witnesses to be questioned first by the party offering their testimony as evidence, then be cross-examined by the opposite party. Only after witnesses have been questioned by both parties did the court have a chance to query them, with the proviso that such questions must only be intended to clarify issues coming up during questioning. Legal scholars (Baytelman and Duce, 2004: 58; Decap, 2019: 224–231) concur that judges should keep questions brief and precise and refrain from raising new issues.

CPP art. 330, which regulated the questions that can and cannot be asked, was the most relevant statute on the matter. This rule clearly stated that counsel questioning their own witnesses must refrain from posing leading questions, yet could have recourse to them when cross-examining other witnesses. The

2. In the last decade, given the ballooning caseload of criminal courts, the flat performance of the pretrial system (Duce, 2018) and the rise of megacases that drag on for months, judicial case management practices seem to have found their stride. See Fuentes (2021: 726–729).
3. Article 331 allows four exceptions to appearing at trial: (a) Death, major physical or mental breakdown, being overseas or unaccounted for, or other compelling reasons. In these cases the court may admit a deposition if the parties request, through the start of the trial, that such witnesses testify under the general rules of examination at a special hearing; (b) When the parties agree to introduce out-of-court statements as evidence; (c) When the actions of a defendant prevent a witness, expert or co-defendant from appearing, and (d) When a co-defendant who has testified before a supervisory judge does not appear at trial. A subsequent exception (e) addressed the specific issue of witnesses becoming unable to appear between the pretrial stage and the beginning of trial. Exception (e) lets the court replace live evidence with a previous written statement if the court, upon request, agrees that the witness testimony or expert opinion is essential.
4. Under a 2016 reform, medical examiners and other experts unable to testify at trial due to death or incapacity can be replaced by other experts from the same agency having comparable knowledge. Art. 229.

scholarship (Baytelman and Duce, 2004: 137; Blanco et al., 2021: 195; Decap, 2019: 232) is aligned in this respect.

Vulnerable witnesses in comparative law

Because of their intrinsic or extrinsic circumstances, vulnerable witnesses are more likely to be intimidated, misled or unable to testify under the adversarial system. These circumstances may render them unable to share what they know and/or result in their statements having an adverse impact on them (Roberts and Zuckerman, 2010: 442: 'In recent times, personal characteristics associated with vulnerability have been yoked together with circumstantially experienced intimidation to produce a new class of intended beneficiaries of procedural reform, "vulnerable and intimidated witnesses"'; Ward, 2017: 38). Categories archetypical of such intrinsic and extrinsic circumstances include sex crime victims and victimised children in general (Ward, 2017: 38). Because of their young age and limited experience, children often lack the tools to manage the testifying process. They are on an unequal footing vis-à-vis the adults asking the questions and are easier to throw off in conventional settings (Roberts and Zuckerman, 2010: 453; Ward, 2017: 37). Moreover, research conducted since the eighties has found that asking children leading questions during a crime investigation or trial risks planting inaccurate or downright false memories. As Choo notes, the evidence suggests that children's recollections are '…dependent to a great extent upon the manner in which he or she was questioned' (Choo, 2009: 366; Henderson and Andrews, 2017: 107–108). Likewise, developmental research has shown that children present different features that increase the likelihood of miscommunication during testimony, such as a more literal and less descriptive vocabulary, face more complications producing comprehensive narratives, show a reluctance to seek clarification and sometimes are not able to understand more complex questions (Henderson and Lamb, 2018: 3).[5]

For sex crime victims, the consequences may spread to the entire trial and turn testimony under general rules into an ordeal. *Gani v. Spain*, a case brought before the European Court of Human Rights on behalf of a woman who was molested, kidnapped, coerced and raped by a former partner and his accomplices,[6] is a case in point. Although the Spanish trial court ordered psychological support and adjourned several times to give the victim time to recover, she ultimately broke down and was unable to face cross-examination. The court agreed that the victim, who was subsequently diagnosed with PTSD, could not testify, and ordered live evidence substituted by her previous statement to an investigating judge.

Policy considerations based on ensuring successful prosecution of serious crimes while responding to demands from victim rights advocates have led to the gradual acceptance of the notion of the vulnerable witness, reflecting the need to ensure that complainants not be dissuaded from testifying or filing charges (Paciocco and Stuesser, 2008: 476; Roberts and Zuckerman, 2010: 442). The concept has been subsequently expanded to include, *inter alia*, seniors and deponents with mental illnesses or learning disabilities (Choo, 2009: 369; Keane and McKeown, 2016: 174). But beyond the gradual recognition of categories of vulnerable witnesses, there remains tension concerning the adversarial system of witness testimony, especially as regards the role of cross-examination in systems that strive to hand down appropriate decisions (Henderson and Andrews, 2017: 121–124; Ward, 2017: 38).

In their adversarial practice, lawyers assert a practically unlimited right to cross-examine. They ask questions clearly meant to demean and stress witnesses, with little evidentiary supporting basis and

5. Despite the research regarding the particularities of children as witnesses, when the child who is taking the stand is the defendant many of these procedural measures are not available. For example, the use of intermediaries for child defendants is only available in Northern Ireland (Cooper and Mattison, 2017: 361) and not in the case England and Wales. Likewise, the use of live link for child victims and witnesses is an automatic possibility if they meet the age requirement, while in the case of child defendants they must additionally show an inability to participate effectively (Fairclough, 2017: 211).

6. See European Court of Human Rights, *Gani* v. *Spain*, Case No. 61800/08, Judgment of February 2, 2013, pp. 6–19.

often based on gender stereotypes (Rhode, 2000: 100–105). At the same time, grilling witnesses can intimidate them, sometimes to the point of being unable to respond. As a result, valuable sources of information risk being left out of the pool of evidence available to the court, thereby increasing the chances of a flawed outcome (Ward, 2017: 38).

New developments on the notion of fair proceedings have helped raise the profile of vulnerable witnesses. In addition to facing issues such as the negative impact of testifying, the basic human rights of witnesses testifying at trial may well be placed at risk. This is indicative of the existence of a clash between a defendant's right to due process and a witness's right to psychological integrity. As Ward (2017: 44–46) notes, national and international tribunals, notably the European Court of Human Rights, have put forward a notion of fair proceedings that encompasses the rights of defendants, the interest of the State and the interest of victims, witnesses and the public at large. The European Court upheld this notion in *Y.* v. *Slovenia*:

> 103. As regards the conflicts between the interests of the defence and those of witnesses in criminal proceedings, the Court has already held on several occasions *that criminal proceedings should be organised in such a way as not to unjustifiably imperil the life, liberty or security of witnesses, and in particular those of victims called upon to testify*, or their interests coming generally within the ambit of Article 8 of the Convention. *Thus, the interests of the defence are to be balanced against those of witnesses or victims called upon to testify.* Notably, criminal proceedings concerning sex crimes are often conceived as an ordeal by the victim, in particular when the latter is unwillingly confronted with the defendant. These features are even more prominent in a case involving a minor. *Therefore, in such proceedings certain measures may be taken for the purpose of protecting the victim, provided that they can be reconciled with an adequate and effective exercise of the rights of the defence*.[7]

These developments prompted some jurisdictions to enact statutes that protect witnesses and ensure their appearance in court while still safeguarding defendant rights (Armenta Deu, 2023: 230–232; Ulloa et al., 2022: 224–228). Sections 16 and 17 of the England and Wales Youth Justice and Criminal Evidence Act of 1999, for example, identify four classes of witnesses eligible for options other than the general evidentiary rules. The first class includes witnesses under 18 at the time of the hearing. The second class are those who have a mental disorder or significant intellectual or social impairment. The third class includes individuals with physical disabilities, while the fourth class includes those to whom testifying in court may cause fear or distress. To allow witnesses to testify under the alternatives offered in the Act, a court must first find that the specific circumstances might weaken the 'quality of evidence' if given under the general rules (Choo, 2009: 369).

With some restrictions, English and Welsh courts can order any one or more of the special measures contemplated in the Act. These range from having witnesses testify behind a screen or by video link and ordering the public or certain individuals to leave the courtroom, to dispensing with wigs and gowns, accepting videotaped interviews as evidence-in-chief and the use of intermediaries (Choo, 2009: 370–374; Roberts and Zuckerman, 2010: 456–460; Cooper and Mattison, 2017: 354; Henderson et al., 2019: 260–262). Similar options are available in Canada (Paciocco and Stuesser, 2008: 476–477) and Australia (Ligertwood and Edmond, 2017: 736–741). The legal standard can be less strict in the case of children, but some options do not apply to every category. For example, witnesses in class four, typically victims of sex crimes, are not eligible for a proxy (Choo, 2009: 373). Conversely, some options are only available to victims of specific offenses, notably sex crimes, in which defendants have a limited right to personally cross-examine a complainant (Roberts and Zuckerman, 2010: 450).

As regards children, Ulloa et al. note that England and Wales, Northern Ireland, Australia, New Zealand, South Africa and Taiwan all allow intermediaries (Ulloa et al., 2022: 225–227), although

7. Eur. Ct. H.R., *Y.* v. *Slovenia*, Case No. 41107/10, Judgment of May 28, 2015 (emphasis added).

with different eligibility criteria among other variations (Cooper and Mattison, 2017: 360–363), while other countries such as Israel, Norway and Sweden have a related model in which a third person intervenes and assist the Court in gathering children's evidence (Cooper and Mattison, 2017: 354). For children testifying in sex crimes, some Latin American countries use Gesell chambers and CCTV.[8] Other restrictions can also apply, especially rape shield laws that limit the ability of counsel to introduce evidence on or cross-examine complainants about their past sexual conduct (Paciocco and Stuesser, 2008: 95–98; Roberts and Zuckerman, 2010: 443–452). Though more than two decades late, Chile embraced the drive towards statutes that adapt general evidentiary rules in the interest of vulnerable witnesses.

Vulnerable witnesses in Chilean criminal procedure

Law 21.057

Before Law 21.057 was passed, only three out of 483 articles in the Code of Criminal Procedure (191(2), 308 and 310) addressed vulnerable witnesses. Art. 310, in particular, requires child witnesses to be examined only by presiding judges, and counsel must submit their questions through them. However, as some writers note (Rosatti, 2021: 338), this rule is not always enforced. Some judges, citing a range of criteria, do allow counsel to directly examine and cross-examine child witnesses.[9] Art. 310 contemplates no further special treatment of children, such as moving them to another room, providing proxies or support people, explicitly restricting the type of questions that can be asked, regulating face-to-face interactions or requiring lawyers and judges to undergo special training in questioning children.

This does not mean that no one cares about how children testify in Chilean courts (Rosatti, 2021: 339; Ulloa et al., 2022: 228). The system does have protocols and separate rooms for these purposes, and prosecutors, in coordination with the court, will often arrange for video links. That said, most such measures remain optional. This state of affairs was the driving force behind the adoption of Law 21.057. The law, which became effective nationwide in October 2022, completely changed how child victims of specific crimes testify at trial.[10] Intended to prevent revictimisation and judicial error and driven by the right to be heard enshrined in the Convention on the Rights of the Child (Rosatti and Iturra, 2021: 15–33), Law 21.057 instituted an intermediary system that replaced standard examination and cross-examination (Ulloa et al., 2022: 228).

Intermediaries, who are certified and accredited by the Justice Ministry (arts. 6 and 15), drastically altered the way child victims testify by greatly reducing the number of people who can interview them during an investigation and trial. Arts. 20 and 21 require children to be interviewed in a separate room in the sole company of a designated proxy, and such rooms must ensure their privacy and safety and be appropriate for their needs and age level. These rooms are equipped with audio and video links that relay a child's statement to the courtroom and enable direct communication with the presiding judge, effectively preventing face-to-face interactions with defendants, the court and other actors.

Furthermore, only intermediaries can convey questions to children (art. 13). Lawyers must channel their questions through the presiding judge, who in turn communicates them to the intermediary.

8. A recent Inter-American Court decision notes that Argentina, Bolivia, Brazil, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Paraguay, Peru, the Dominican Republic and Uruguay have all adopted these mechanisms as best practice. Inter-Am. Ct. H.R., *Angulo Losada* v. *Bolivia*, Judgment of November 18, 2022, Case No. C475, footnote 194.
9. A decade ago, as a legal clinic lawyer, I handled a criminal case involving an underage witness. Judges and lawyers had little idea on how to approach the issue. The presiding judge eventually opted to set up a round table in the middle of the courtroom and have all participants sit around. Lawyers were allowed to pose questions directly to the child in an age-appropriate manner and tone. At the time there were no clear steps for courts to follow in such cases. It went well, but nobody knew the future impact on the child, if any.
10. These include sex crimes, human trafficking, kidnapping and other serious crimes such as parricide, homicide, aggravated assault and armed robbery. Art. 1, Law 21.057. See details in Rosatti and Iturra (2021: 40).

Intermediaries are required to couch all questions in age-appropriate language designed to prevent adverse reactions (art. 17). Overly complex or leading questions are screened out by both the presiding judge and the proxy. Although Law 21.057 allows parties to confront child witnesses with videotaped statements given at the start of an investigation (arts. 7 and 18), such confrontations differ from the usual cross-examination dynamics in which witnesses are shown their previous statements and relentlessly questioned about them. Under Law 21.057, the parties and the court can watch videotaped statements only after child witnesses have made their statement through a proxy. The law explicitly bars querying children on contradictions becoming apparent after a video recording is shown.

Law 21.057 also helps keep child victims from appearing at trial by admitting videotaped pretrial statements made to supervisory judges, an option that can be requested by a prosecutor or guardian *ad litem* (art. 16). While the law does not specify the grounds for allowing such requests, once granted, children will not testify at trial unless they expressly ask to do so or if new evidence makes it advisable due to the risk of relevant omissions impacting the outcome of the proceedings. The law also allows trial judges to admit interviews videotaped during the investigative stage in lieu of testimony if a child witness dies or becomes mentally or physically unable to appear or to keep testifying (art. 18). Art. 14 further allows witnesses aged 14 to 18 to ask the court to testify without proxy assistance. If the court agrees, these witnesses can testify in a separate room before a presiding judge who will ask questions relayed by the parties through an earpiece. The law does not allow child victims of any age to testify under standard evidentiary rules, even if they request to do so.

Law 21.523

During the recent pandemic, Chilean public opinion was shaken by the case of Antonia Barra, a victim of rape who subsequently took her own life. A police investigation identified one Martín Pradenas, who had raped Barra while she was intoxicated, as the culprit. A further criminal investigation found him to have perpetrated other sex crimes under similar circumstances.[11] In the wake of the uproar triggered by the case, a group of congressional representatives introduced a bill to reform both the Criminal Code and the Code of Criminal Procedure so as to '…enhance the rights of sex crime victims, improve procedural guarantees, and prevent revictimization'.[12] While the bill did propose amending procedural rules on victims testifying in court, the public debate centred chiefly on the proposed amendments to the Criminal Code. The bill passed in November 2022 and became Law 21.523 in December 2022.

The law provides for sex crime victims to be heard by trained judges and requires the Judicial Academy to teach courses on gender stereotyping and secondary victimisation. Significantly, Law 21.523 added CCP art. 109(b), giving victims a new, albeit murky, right 'not to be judged, stigmatized, discriminated or challenged over their account of events, behavior or lifestyle'. How this is going to play out in actual practice remains an open question; it could be a general statement directed at judges or it could provide a basis for restricting lines of questioning.[13] As to victims testifying at trial, Law

11. Pradenas was tried and sentenced. Later he appealed on grounds of breach of due process and was granted a new trial, in which he was again convicted in July 2023 to 17 years of imprisonment for seven sexual crimes.
12. The bill was introduced on August 4, 2020 by congressional representatives Fuenzalida, Núñez, Sabat, Yeomans, Orsini and Díaz.
13. A review of the history of the bill highlights these concerns. The bill sought to address revictimisation and the fears women face (of filing a complaint, of their attackers, of being judged, of being disparaged by society and the justice system). As congresswoman Orsini noted, women '…are subject to humiliating, upsetting and revictimizing proceedings that lack a gender perspective and in which they are questioned and blamed. Cases often turn into a media circus. Women and their account of events, lifestyles and dress are publicly criticized. They are forced to endlessly retell their stories and relive the horror'. The specific right 'not to be challenged' merited no particular discussion save for a brief remark by congressman Fuenzalida, who warned at the start of the debate to be careful with art. 109(bis) as '…good intentions could affect due process and the examination and cross-examination processes'. This was the only time that this specific right merited debate. See Library of Chilean Congress, Official History of Law 21.523 at p. 58 and 157.

21.523 specifically amended the general evidentiary rules contained in the Code of Criminal Procedure. Without identifying the grounds or setting legal standards, a new CCP art. 109(bis) gave victims the right to request that certain individuals be barred from the courtroom, that others be asked to leave, or to have the courtroom vacated altogether. These provisions changed the general regulations in CCP art. 289, which restricted the public nature of a trial based only on reputational, privacy or safety grounds.

Law 21.523 also amended CCP art. 330, regarding the questions witnesses can be asked, by adding a second paragraph that lays out new grounds for victims to object. Since art. 330(2) does not specify victims of which crimes, the addition must be construed as supplementing general evidentiary rules. On examination-in-chief and cross-examination, the amendment bars questions that '…humiliate, cause suffering, intimidate, or harm a victim's dignity'. As definitions are not provided, determining the extent of the new grounds for objection will be a matter of practice and precedent. To prevent revictimisation, the law also added art. 191(3), allowing victims who do not wish to testify in front of a defendant to do so in advance before a supervisory judge. This option can be requested by the prosecution and requires court approval.

While any advance testimony remains subject to the dynamics of examination and cross-examination, within the above limits, it does help complainants avoid testifying at trial. Most importantly, and unlike standard procedure, the new pretrial statement rule does not require defendants to be present, which further helps prevent face-to-face interactions. Pretrial statements provided by complainants are exhibited at trial. Law 21.523 also adds a new art. 331(f), allowing witnesses who do not wish to appear or victims who have recanted their testimony to depose in advance. In so deciding, judges are to carefully evaluate the likelihood of risk to victims based on psychological and other relevant reports provided. If the court is convinced, it can exempt victims from appearing and allow statements made during the investigative stage to be admitted into evidence.

Vulnerable witnesses in Chile: Restricting defendants' right to confront

The new Chilean legislation restricts a defendant's right to confront witnesses in several ways. First, both laws change the setting in which victim statements are normally provided. For witnesses who testify in open court, Law 21.523 requires courtrooms to guarantee their safety, and especially their privacy, and gives them an unfettered right to appear in private or without the presence of specific individuals. As a key proponent (Rosatti, 2021: 337) notes, Law 21.057 also introduces radical changes. Having a child testify now requires the attendance of an intermediary and a room equipped with audio and video links while all other actors sit in a separate courtroom. The contents of a child's statement are kept from the public and the parties are barred from disclosing them. Second, by constraining or substituting examination-in-chief and cross-examination, these laws have significantly changed the overall dynamics of witness evidence. Examination and cross-examination seem to have survived the changes in Law 21.523, albeit with significant restrictions, as the new right of victims '…not to be challenged over their account of events, behavior or lifestyle' hinders these dynamics in several ways. Subject to how judges will construe this right, it might lead to disallowing certain lines of cross-examination, thereby restricting defence efforts. As such, before enforcing it discretionally, judges would be well advised to open a debate on this new right. Time will tell.

Introduction of CPP art. 330(2), a bar on questions that humiliate, cause suffering, intimidate or harm a victim's dignity, may deter aggressive styles of cross-examination. That said, if read in tandem with art. 109(b), art. 330(2) could result in parties and judges objecting to or excluding certain lines or styles of cross-examination on grounds of dignity or humiliation—concepts which the law does not define. As noted, Law 21.057 substitutes the examination and cross-examination dynamics for an intermediary system. Ulloa et al. (2022: 242) illustrate the conflicts the new dynamics have created:

> Focus groups participants note that in some courts or proceedings, parties fail to collaborate or take heed of the best interest and special needs of children and adolescents. This hinders, obstructs and slows down the trial dynamics. They also point to difficult situations created when defense lawyers, especially private counsel not usually trained to interact with child victims, act inappropriately. Conduct noted as inappropriate include excessively long or complex questions, objections or arguments; using legal jargon; multiple, vague or repetitive questions; insisting on details victims are unable to provide, such as the timeline of events; repeatedly objecting to the wording or content of questions phrased by proxies, and questioning their very role.

Ulloa et al. cite this feedback as both part of the smattering of empirical data available on the matter and a sign of the issues the system is facing. The authors quite evidently fault some actors, especially untrained private lawyers, for failing to keep children's rights top of mind. Their report also shows that lawyers are applying the examination and cross-examination methods allowed under general evidentiary rules, which is clearly not possible under the new guidelines.[14] Law 21.057, for example, now bars the use of leading questions in cross-examination.

For victims who have recanted, art. 331(f) in Law 21.523 admits pretrial statements in lieu of testifying at trial. Such statements differ from those provided to a supervisory judge, as they include written depositions made to police or prosecutors during an investigation, when the presence of the defence is a highly unusual event. Law 21.523 requires these interviews to take place as soon as practicable, preferably at the start of the investigation. Similarly, under Law 21.057, a child's interview made during an investigation can be recorded, without defence involvement, by interviewers appointed by prosecutors under art. 6. As interviews are meant to take place at the start of the investigation, subsequent developments are not covered. In short, both laws increase the chances of witnesses not testifying at all, thus depriving the defence of the opportunity to test the evidence.

In sum, Laws 21.057 and 21.523 limit different dimensions of the defendant's right to confrontation; they heavily restrict face-to-face interaction in a public forum, they alter or suppress the examination and cross-examination dynamic, prevent specific lines and forms of cross-examination and allow depositions to replace live testimony at trial.

Are these restrictions consistent with a defendant's right to confront a witness?

The issue with Laws 21.057 and 21.523 is not just that they may constrain a defendant's right to confront. As with any other human right, the rights to defence and confrontation may be restricted as warranted, and both laws do in fact cite good reasons to do so. The root issue is that by unreasonably restricting the right to confront, these laws can seriously undermine the standing of a defendant. This is quite evident if examined under the sole or decisive evidence standard set by the Inter-American Court of Human Rights in *Norín Catrimán et al.* v. *Chile*,[15] a case in which the Court ruled on Chilean criminal procedures[16] that allowed anonymous witnesses. The Court, like its European counterpart, found a clash between a defendant's right to confront a witness and the right of victims and witnesses to physical and psychological safety, as guaranteed under arts. 5 and 8 of the American Convention. In finding a clash of rights, the Court borrowed from the European Court of Human Rights in *Doorson and Van Michelan*

14. While beyond the scope of this article, we note that the criticism levelled at private defence lawyers for not having the best interest of children in mind seems to evince a certain bias, as Ulloa et al. fail to recognise that the role of defence lawyers is to ensure the rights of their clients, especially to defence.
15. The Inter-American Court borrowed the sole or decisive evidence standard from European Court case law, which has evolved in significant ways since. For an excellent summary, see Arslan (2002: 220–228).
16. Inter-Am. Ct. H.R., *Case of Norín Catrimán et al. (Leaders, Members and Activists of the Mapuche Indigenous People)* v. *Chile*, Judgment of May 29, 2014, Case No. C279.

v. *Netherlands* and *Al-Khawaja and Tahery* v. *The United Kingdom*.[17] The Inter-American Court adopted a modified, three-pronged standard that requires judicial oversight of any restrictions to the right to confront witnesses plus the use of countermeasures, and calls on courts to refrain from convicting solely or to a decisive degree on the resulting evidence. The issue with the new Chilean legislation become evident in this light. Law 21.057, for example, applies the intermediary system to victims under 14 without judicial oversight and allows older children to choose whether to be assisted by a proxy. If they opt out, they still will not testify under general evidentiary rules; instead, parties must submit their questions to a presiding judge who alone will interact with the child witness in a separate area. There is no provision for examination of a child's specific circumstances, let alone for debating the actual need for an intermediary.[18] And contrary to what the Inter-American Court has held, it is not necessary that there be a discussion based on the principles of necessity and proportionality.

Although Law 21.523 requires a court order to constrain the right of confrontation, this proviso is rendered trivial by stripping the courts of the latitude needed to ponder necessity and proportionality. CCP art. 109(b), which accords victims several rights, directs judges to order one or more protective measures from a catalogue that includes barring specific individuals or the public at large from the courtroom or using at least one of the measures in CCP art. 308. Under art. 109(b), some victims can altogether skirt the general regulations in CCP arts. 289 and 308, which require judges to weigh victim rights against key precepts such as defendant rights or the public nature of court proceedings. Judges retain some leeway to decide which measure in art. 308 to order, but are required to allow a complainant's request to hold a trial behind closed doors. The provisions in Laws 21.057 and 21.523 that admit into evidence victim statements made during the investigation in lieu of taking the stand are particularly problematic, since the defence is absent during an investigation and has no opportunity to test the evidence. Moreover, this is a stage at which practically no countermeasures are possible. Based on Inter-American Court case law, this could result in unwarranted restrictions to the right of confrontation. These very concerns were raised in *Norín Catrimán et al.* v. *Chile*:

> 246. In order to rule in the instant case, the Court will also take into consideration whether, in the specific cases, the State ensured that the effects on the right of defense of the accused that result from the use of the measure of preserving the anonymity of witnesses were sufficiently offset by counterbalancing measures, such as: (a) the judicial authority must be aware of the identity of the witness and be able to observe his demeanor under questioning in order to form its own impression of the reliability of the witness and of his testimony, and (b) *the defense must be granted every opportunity to examine the witness directly at some stage of the proceedings on matters that are not related to his identity or current residence; this is so that the defense may assess the demeanor of the witness while under cross-examination in order to be able to dispute his version or, at least, raise doubts about the reliability of the testimony*. (emphasis added)

An especially challenging issue is the failure of Law 21.523 to specify a method of recording victim statements made during an investigation. As a consequence, the courts, unable to observe witness demeanour, ask questions, allow cross-examination or test the evidence for reliability, could well wind up issuing a finding of guilt solely on the strength of written statements. Where child victims are concerned, proponents of the intermediary system beg to differ that it impermissibly restricts the right to confront. They argue that the law requires videotaping investigative proxy interviews, thereby giving the court plenty of opportunity to assess a child's behaviour. They further claim that intermediary training and the conditions of interviews in themselves help ensure the reliability of evidence (Rosatti and

17. See Inter-Am. Ct. H.R., *Norín Catrimán et al.* v. *Chile* at 86.
18. The mandatory use of the intermediary system seems to be a salient characteristic of the Chilean model. (cf. Cooper and Mattison, 2017: 360–361; Ulloa et al., 2022: 228).

Iturra, 2021: 24). Although these provisions are not devoid of merit, none give defendants a chance to test the evidence presented against them or the court a chance to query witnesses. The right to confront serves two interconnected purposes; in this scenario, one is completely excised.

The Inter-American Court's sole or decisive evidence standard further complicates things. The Court's decision in *Norín Catrimán* notes that even if restrictions on the right to confront are subject to judicial oversight, victim and defendant rights balanced and countermeasures adopted, convictions based solely or to a decisive extent on evidence tarnished by a limited right to confront constitute an unwarranted restriction of defendant rights.[19] This is clearly possible under laws that apply these measures to sex crimes, where complainant testimony is often the main source of evidence. It could be argued that the European Court of Human Rights has recently relaxed the sole or decisive evidence standard by de-emphasising the order in which its elements are to be applied and upholding convictions in which evidence so obtained was decisive,[20] but this is not the case with the Inter-American Court. As noted in *Norín Catrimán*, its standard involves a three-pronged examination of the restriction, and the Court has yet to relax the notion of sole or decisive evidence. Both of Chile's new laws allow for convictions to rely solely or decisively on evidence defendants will have no chance to properly test. As such, both can unreasonably restrict their right to confront.

The underlying issue: The absence of a balanced approach

The issue with Laws 21.057 and 21.523 is their failure to take proper account of defendant rights. While the drafters creditably sought to shield certain victims from the ordeal of a criminal trial, they failed to discern the resulting clash between a victim's rights to judicial access and to avoid revictimisation, and a defendant's right to defence, notably to confront a witness. While the intent is certainly not questionable, the chosen procedural vehicles seriously undermine or totally fail to have proper regard for defendant rights. The approach used by Laws 21.057 and 21.523 does not let judges balance defendant and victim rights in any given situation. By directing the courts to adopt specific measures, lawgivers pre-emptively settled the clash of rights in favour of victims and took away court discretion and latitude.[21] Note that recourse to the intermediary system is mandatory, even against the will of teenagers who may wish to testify under general evidentiary rules. If such teenagers choose to dispense with a proxy, still their only contact is a judge who will pre-screen all questions, thereby precluding the standard examination and cross-examination dynamics.

Law 21.523 lets victims ask to testify behind closed doors, but by not requiring the court to weigh other values or interests, it effectively forces judges to allow all such requests. Moreover, art. 191(3) allows victims to choose between taking the stand or testifying at a special hearing the defendants are not required to attend. These provisions give judges but one issue to consider: preventing revictimisation. The language is clear: if requested by the prosecution, judges are to compel the presence of all other actors and hold a special hearing. Defendants have no chance to contest the decision. Both laws also limit a court's power to make exceptions by barring judges from finding that a provision may be inappropriate or bears adapting to the particulars of the case. As noted, these special provisions give judges just

19. '247. Even when counterbalancing procedures have been adopted that appear to be sufficient, a conviction should not be based either solely or to a decisive extent on anonymous statements. To the contrary, it would be possible to convict the accused by the disproportionate use of a probative measure that was obtained while impairing this right of defense.' Inter-Am. Ct. H.R., *Norín Catrimán et al.* v. *Chile* at 86.
20. See Arslan (2002).
21. Likewise, the lawgivers' goals (mostly preventing revictimisation) and drafting technique has closed the door for extending these special procedural measures to those who are not victims, but who still are vulnerable, such children witness in general and vulnerable defendants. As examined, almost every special measure contemplates either explicitly or implicitly the status of victim as a requirement.

one consideration to weigh: the plight of the victim. Practically, under no scenario is the court required to strike a balance between victim and defendant rights. Such absence of a balanced approach is plain to see against the experience of other countries that apply similar measures. To be sure, reforms that adapt general evidentiary rules to accommodate vulnerable witnesses are far from unheard of in comparative law. Many countries have intermediary/proxy systems, rape shield laws and other such restrictions in place, yet the new Chilean laws differ in significant ways, possibly because their primary focus is preventing secondary victimisation and not addressing other sources of vulnerability.

For example, Law 21.057 overlooks the fact that other jurisdictions using intermediary systems require an ad hoc court ruling. In England and Wales, Section 29.1 of the Youth Justice and Criminal Evidence Act of 1999 specifies that '…direction may be provided for any examination of witnesses to be conducted through an intermediary'. In Australia, the New South Wales Criminal Procedure Act of 2015 contains a similar provision. Under Part 29, Division 3(a), the general rule is to appoint a proxy for all children under 16, but Subsection 4 enables the court to dispense with such an appointment if '(b) It is otherwise not practical to appoint a children's champion, or (c) It is unnecessary or inappropriate to appoint a children's champion, or (d) It is not otherwise in the interest of justice to appoint a children's champion'. Law 21.057 gives the courts no such discretion.

Law 21.523, for its part, gives complainants the right '…not to be challenged over their account of events, behavior or lifestyle', a provision similar to the role played elsewhere by rape shield laws that bar defence counsel from questioning a victim's reputation, past sexual conduct and/or history of relationships. Specifics vary from place to place, but most such regulations share one proviso: they all admit exceptions. A case in point is US Federal Rule of Evidence 412, which disallows evidence on alleged sexual misconduct (a) if offered to prove that a victim engaged in other sexual behaviour, or (b) if offered to prove a victim's sexual predisposition. Section 276 of the Canadian Criminal Code similarly notes that evidence that a complainant has previously engaged in sexual activity with the accused or with anyone else is not admissible if adduced to support an inference that the complainant (a) is more likely to have consented to the sexual activity that forms the subject matter of the charge, or (b) is less worthy of belief.

These rules all allow for exceptions. In criminal cases, Federal Rule 412 admits evidence of a complainant's sexual misconduct (a) if offered to prove that someone other than the defendant was the source of semen, injury or other physical evidence; (b) if offered by the defendant to prove consent or if offered by the prosecutor, and (c) if it is evidence whose exclusion would violate the defendant's constitutional rights. Section 276 of the Canadian Criminal Code comparably allows the court to admit evidence of a complainant's sexual conduct, provided that (a) it is adduced for purposes other than supporting an inadmissible inference; (b) it is relevant to an issue at trial; (c) it refers to specific instances of sexual activity; and (d) its probative value is significant and is not outweighed by the danger of prejudice to the proper administration of justice. The contrast with an unspecific right 'not to be challenged' is striking. While Law 21.523 frames this new limitation as an enhancement of victim rights and not as an amendment to evidentiary rules, it fails to call for, let alone regulate, a need to restrict or balance it against other crucial rights or values. Moreover, if read concurrently with art. 330(2), this new right can effectively result in an all-encompassing bar on the admissibility of evidence that allows no exceptions. Comparison to other jurisdictions clearly shows that Chilean regulations on vulnerable witnesses do not require judges to balance victim and defendant rights, much less contemplate exceptions. In sum, by stripping the courts of the ability to make warranted distinctions, the resulting imbalance has set the stage for miscarriages of justice that more nuanced rules would otherwise prevent.

Conclusion

Replicating international trends, and in an effort to shield victims of certain crimes and/or individuals meeting certain criteria from the effects of taking part in a trial, these revisions to the Chilean criminal

justice system have significantly altered general evidentiary rules. The new legislation has transformed these rules by inhibiting the examination and cross-examination process, allowing depositions to substitute for complainant testimony at trial, changing the point in time when such statements are made, limiting lines of examination and giving complainants new rights. These provisions have translated into restrictions to defendant rights, notably the right to confront. That said, restrictions alone are not the issue, as all human rights, including the right to due process, are potentially subject to limitations. Instead, in this article we argue that the manner in which these new laws have restricted defendant rights is abusive or unreasonable.

To be sure, key provisions in these laws (i.e., restricting the public nature of trials in Law 21.523, the intermediary system in Law 21.057) are placed beyond the reach of judicial oversight. Courts cannot examine cases and rule on the necessity or proportionality of measures and neither law contemplates countermeasures capable of mitigating the impact of restrictions on defendant rights. Most crucially, both allow the courts to dispense with live evidence and render decisions solely on the strength of a victim's deposition, thus stripping the defence of the opportunity to test the evidence in court. Yet, *per* the standard adopted by the Inter-American Court of Human Rights in *Norín Catrimán et al.* v. *Chile*, using a complainant's deposition as the sole or decisive evidence against defendants can well result in an unwarranted restriction of their right of confrontation.

The criticism levelled at these pieces of legislation does not involve their intent. Both are grounded on reasonable motives, such as enhancing victim rights, preventing revictimisation and ensuring that serious crimes are effectively prosecuted. Their Achilles' heel is that the specifics fail to give due consideration to defendant rights, as evident when contrasted to comparable legislation enacted elsewhere. The new Chilean laws do not acknowledge the resulting clash of rights, do not allow the courts to strike a balance of rights in specific contexts and cases and strip judges of the power to grant exceptions or apply more nuanced provisions. This restricts defendant rights to an unreasonable degree and provides a setting for potential miscarriages of justice.

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