LAW AND DEVELOPMENT THEORY: A CASE STUDY OF THE CHILEAN LAND REFORM EFFORTS

JENNIFER M. TOOLIN

In this article Jennifer Toolin takes a thought-provoking look at law and development by analyzing the breakdown of land reform efforts in Chile as a failure of the Chilean legal system to function as an effective instrument of change. She argues that in Chile, despite the ascendancy of elected governments dedicated to land reform, legal institutions traditionally opposed to change — such as the judiciary — were able to thwart actual legislated reform. As a result, she asserts, the legal institutions themselves must undergo a transformation if popular demands for change are to be accommodated and stable development is to occur. Theorists of law and development must go beyond the instrumental and the culture-specific view of the role of law in change and recognize the need for fundamental changes in the legal thinking in contemporary Latin American society to better reflect the real customary law dictated by human needs and better facilitate the inevitable process of change.

> Law in a state of social evolution is less and less the recorder of established social, commercial and other customs, rather it becomes a pioneer in the articulated expression of the new forces that seek to mold the life of the community according to new patterns.[1]
>
> Wolfgang Friedman

INTRODUCTION

With the assassination of President Salvador Allende Gossens in 1973 came the death of an era of dynamic change in Chile. The ambitious reform program championed by Allende and his immediate predecessors had been aimed primarily at revitalizing Chile's sagging productivity and increasing her stature in the international economic arena. It also attempted

---

Jennifer Toolin is currently employed at Chemical Bank in New York.

1. Wolfgang Friedmann, "The Role of Law and the Functioning of the Lawyers in Developing Countries," *Vanderbilt Law Review* 17 (December 1963): 183.

to institute a fundamental reordering of the traditional social structure and to work toward a more equitable distribution of the country's resources.

The period of reform, however, had emerged long before Allende came to power in 1970. Conservatives had begun to lose support in the late 1950s as Chilean society as a whole began to press for change. Reforms instituted under Allende's administration thus were not radical in the sense that they were imposed on an unwitting and recalcitrant public; in fact, the reforms of Frei and his Christian Democratic Party were more radical in both scope and timing. Allende's reforms were, instead, a product of a steadily intensifying reform ethos that had pervaded Chilean society for the preceding decade and a half.

Agrarian reform was a major plank in the reformist platform and represented perhaps the most obvious threat to the traditional social structure (characterized by strict class divisions and large private landholdings in the hands of a small elite). As the Chilean peasantry grew as a political force, pressures for agrarian reform strengthened and those in power responded with various reform efforts.

Today, agrarian reform in Chile has come full circle. Under Pinochet, the traditional privileges of the landowners have been restored, and a revitalized system of *latifundia* — large privately owned landholdings — working within the free-market dynamic is now being reinstituted. It might well be asked why? The reform was undertaken over a period of fifteen years, within the limits of institutional democracy and with defined elements of policy continuity. It was undertaken to promote the stability of Chilean society by appeasing growing demands for change from both the rural and urban populace. But as demands for change gained momentum and change itself developed its own powerful internal dynamic, certain events proved to be stronger than the institutional and legal capacity for the fulfillment of those demands. How can this downward spiral, that begins with positive change and ends in a disruption of society, be explained in the Chilean context?

One answer not commonly offered among political and economic theorists is that Chilean agrarian reform measures may have been impeded by legal and institutional obstacles. In this case, it would be beneficial to rexamine how Chilean law reacted to and nurtured change, whether law and legal institutions interfered with the reform process, facilitated too rapid change, or were merely incidental to the societal dynamics of the country. The inattentiveness of law and development theory to the change process in Latin America is surprising. Many issues remain unaddressed. Theorists must analyze the role of institutions and the legal system in societies where reform efforts have failed. Analyses of such efforts will have major implications and raise important questions about the status of law and

development in quasi-developed countries with advanced political, economic and social frameworks such as those found in Latin America.[2]

Change in the Latin American context has generally led to institutional overloads and political chaos — virtually destroying the foundations of the society upon which it was meant to improve. Yet change can occur, albeit unpredictably, without the tragic and violent disruption of society. Many theorists and practitioners, however, are all too ready to accept the status quo, the established pyramidal and hierarchical structure in Latin America which offers, on the one hand, stability, but retards change and ignores human dignity on the other.

In the academic and political literature of the 1970s and early 1980s there has emerged a tacit acceptance of the stability factor and the emergence of authoritarian regimes. While not explicitly lauding repression in the name of stability, writers such as Guillermo O'Donnell, Samuel Huntington, and Jeanne Kirkpatrick implicitly recognize its legitimacy and function though always, of course, in a foreign context.[3] Blind acceptance of this line of reasoning, however, has profound philosophical and sociological repercussions for human dignity and the right of each individual to the "good life."

Law and development theory is in its present state both unprepared and unable to solve this far-reaching dilemma. It offers no answers to the historic patterns of change in middle-developed countries such as Chile, Brazil and Argentina in the 1970s and El Salvador in the 1980s.

Both the instrumentalist view — which advocates the creation of laws and institutions by rule-makers — and the culture-specific view[4] — which looks to a society's legal culture to facilitate and accommodate change —

---

2. Morris David Morris, in *Measuring the Condition of the World's Poor* (New York: Pergamon Press, 1979), p. 23, describes this category of LDC as "those developing countries whose historical involvement in urban and international economic activities in the 19th and 20th century has been sufficiently persuasive to produce essentially modern economic structures throughout much of their societies. The bulk of their productive activity is carried on through the market. These countries have modern public and private institutions, including highly integrated urban links with the countryside . . . Some sectors are quite efficient by world standards . . . One might call this the "Latin American model" because many Latin American countries fit this pattern — e.g., Argentina, Brazil, Chile, Mexico. Others also fit the model; among them South Africa, Lebanon, and possibly Turkey."
3. Guillermo O'Donnell, *Modernization and Bureaucratic Authoritarianism: Studies in South American Politics* (Berkeley: Berkeley Press, 1979); Samuel Huntington, *Political Order in Changing Societies* (New Haven: Yale University Press, 1968); Jeanne Kirkpatrick, "US Security and Latin America," *Commentary* (January 1981): 35.
4. The instrumentalist view is propounded by Robert B. Seidman, "Law and Development: A General Model and Agenda for Research," paper presented to at the University School Sciences Council Conference, University College, Nairobi, Kenya, December 1969. The culture-specific view is propounded by R. F. Meagher, David Silverstein and Lawrence Friedman, "Law and Development: A Premature Burial" (unpublished).

are valid theories for the less-developed societies, whose political and economic systems are less complex. Many of the societies which have been studied by law and development theorists do not have evolved sociological infrastructures, i.e., a participatory democracy, urbanization, active labor unions and participation in the international economic system. Furthermore, neither the instrumentalist view nor the culture-specific model deals with the exogenous factor, i.e., the pressure of international politics, which took such a drastic toll on the reform policies of Allende and were, perhaps, ultimately responsible for his downfall.

It is imperative that the role of law in change in the Latin American context be examined. Currently, law and development theorists stand idly by as the cycle of reform, instability and repression takes its course. The experience in Chile (as well as in Brazil and Argentina) illustrates the tragic consequences of the insufficiency of this theory. These nations have suffered bloodshed, demoralizing instability and brutal repression as a result of attempted reforms and have seen little or no improvement in social welfare.

The ensuing examination of these issues does not purport to offer ready-made solutions to these complex dilemmas. It will, however, attempt to raise some relevant questions which may further the analysis of the relationship between law and change in these societies.

This article briefly describes the land reform process in Chile as it has evolved through three administrations. The focus of the analysis is not an in-depth study of the political dynamics nor a comprehensive view of the Chilean situation during these years. Rather, it is to serve as general background, with the role of law and the courts in the process of agrarian reform predominant. The article then examines current law and development theory and attempts to show that new theories are necessary in order to answer the needs for change in middle-developed countries — and not to shrink from the challenge by condoning repressive regimes whose political legitimacy is derived from the fiction of stability.

Agrarian Reform Under Alessandri 1958-1964

While rumblings for land reform were felt in Latin America throughout the 1950s and limited land reform measures had previously been passed, it was under the Alessandri administration that the first comprehensive, albeit cosmetic, agrarian reform program was both legislated and instituted. Chile's agrarian reforms in the late 1950s marked the beginning of substantial changes in the legal and philosophical foundations of society in that, until then, the sanctity of individual private property had not been questioned. Conservatives could no longer indiscriminately defend the traditional legal, social and economic structure of landholding. Agrarian reform, simply,

was an issue that demanded action and reformists made repeated efforts prior to 1960 to enact land tenure legislation that would reduce the vast discrepancies in land holding. Political factors, however, made passage of such legislation virtually impossible. Controlled by a coalition of the center party and two rightist parties, the Chilean government was virtually immobilized from action on the issue of property. The rightist groups, dominated by landowner interests, consistently opposed strong reform measures. Also, fiscal dislocations in the Chilean economy posed additional obstacles to land reform.[5]

Two salient factors, however, militated for a softening of the Alessandri administration's position and resulted in a greater push toward agrarian reform. The first was the speedy diminution of the entrenched political position of the right, hitherto staunch defenders of the status quo. The free election of 1958 produced a degree of anxiety in the ranks of the right. The vote was virtually split three ways, giving Alessandri's centralist party only a slim popular mandate in the Chilean Congress. The Partido Unido (UP), the leftist party which had supported the candidacy of Allende, came very close to victory through the strength of an ever-growing peasant vote. This unexpected and unprecedented showing of the peasants in the electoral process was significant enough to put great pressure on the right to accommodate increasing demands for reform. More critical, however, was the fact that the right lost its long-held control of the Congress, causing a substantial reduction in its power to legislate. The centralist party, in alliance with the leftists, adopted agrarian reform as a central feature of its electoral platform in an attempt to capture a share of the increasingly important populist element. Thus, immediate political pressure served as a sufficient catalyst for governmental action on agrarian reform which would include the participation of the right.

A second major impetus for agrarian reform evident to the Alessandri regime was external to the system. The Cuban Revolution of 1959 had dramatically underscored the urgency of social concession as a means to preserve basic elements of the status quo. Given the newly demonstrated power of the peasantry, the Alessandri Administration clearly saw that a modicum of change was necessary as a stabilizing factor in Chilean society.

The United States, in partial response to the Cuban Revolution, had launched its ambitious Alliance for Progress program which offered significant financial assistance to Latin American countries if they agreed to implement reforms. The three main objectives of the Alliance were 1) to promote economic growth; 2) to modify the trade infrastructure of Latin American

5. Note, "The Chilean Land Reform: A Laboratory for Alliance for Progress Techniques," *Yale Law Journal* 73 (December 1963).

societies; and 3) to accelerate the process of democratization of political practices and foster a development consciousness regarding the promotion of economic growth.[6] Agrarian reform was one of the major planks in the Alliance program. Thus, the program played a vital role in encouraging structural reform in Latin America.

A third factor in the decision to undertake agrarian reform was the international pressure from various United Nations organizations on most developing countries to implement land reform as a means to development. Endorsement of the idea of land reform as well as the provision of technical and economic arrangements by reputable agencies such as the Food and Agriculture Organization (FAO) and the Economic Commission for Latin America (ECLA) lent respectability to the drive for change in the land tenure situation. As Enrique Bledel points out, at the end of the 1950s and the beginning of the 1960s, Latin American and other developing countries began to understand that the solution to the problem of increasing economic difficulties was not to be found solely in external help, but rather through "improved and expanded agricultural and industrial production which would satisfy local needs and create more competitive exports essential for independent and continuing development."[7]

In 1962 — with growing internal pressure from the peasantry and external pressure from the United States and the United Nations — the Chilean Congress, after much debate, passed agrarian reform Law 15020. This was indeed a major victory for reformists throughout Latin America. The change that was to be forthcoming, however, was not dramatic. The law itself was conservative by nature, owing to the participation and influence of the right in the legislative process. Although Law 15020 enumerated elaborate provisions regarding categories of expropriated land, it did not provide clear criteria as to when and under what circumstances expropriation could be applied.

A major innovation of the new law was the creation of two new institutions to execute the agrarian reform measures: the Corporacion de Reforma Agraria, Agrarian Reform Corporation (CORA), and the Instituto de Desarollo Agropecario, Institute of Agricultural Development (INDAP). These programs replaced the Caja de Colonizacion Agricola, Agricultural Colonization Bank (CCA), the instrument of agricultural reform policy in previous administrations. These two institutions were given new and better-defined powers and functions, the most important of which was the granting of legal powers to expropriate land, a power not previously given to the CCA. CORA was solely responsible for carrying out the land

6. Ibid.
7. Enrique Bledel, "The Latin American Development Process and the New Legislative Trends," *Georgia Journal of International and Comparative Law* 10 (Summer 1980): 329.

reform while INDAP supervised credit and assistance to established small farmers. Both had a limited degree of autonomy and fell under the administrative umbrella of the Ministry of Agriculture.

Despite both the social and institutional innovations, Law 15020 had little effect on the land tenure structure. Among its major impediments were the ill-defined and cumbersome expropriation procedures which made real acquisition and redistribution of land a practical impossibility. Provisions limited expropriation to abandoned or inefficient property, but there was no clear distinction between "efficient" and "inefficient" land. As legal theorist Joseph Thome writes: "Indeed, the plethora of exceptions to expropriation caused procedural complexities which were extremely time consuming."[8] He adds that Law 15020 fell into a pattern of Latin American land reform laws:

> . . . invariably long, complicated and detailed which makes implementation difficult. The laws are badly drafted, provided too many safeguards to landlords, had too limited objectives [small family farms], did not solve the issue of prior compensation, and were poorly implemented.[9]

Other major obstacles to implementation of land reform included compensation and the jurisdiction of the court. Law 15020 made provisions neither for prior compensation to the landowners for expropriated property, nor for a system of deferred payments. CORA's determination on expropriation matters was subject to judicial review by special administrative agrarian courts set up by the Alessandri Administration to expedite the process of adjudication. Expropriated farmers could, however, then appeal these court decisions to the already overloaded appellate court system, ensuring significant delays in the expropriation proceedings. As Thome has commented:

> One of the dangers seen in reform is that it would permit a massive agrarian reform. This cannot happen because of recourse to Tribunals of Justice . . . which impede a massive agrarian reform by the very limitations of the proceedings.[10]

As a result, Law 15020 evoked strong criticism from reformists in the government who claimed that the legislation was cumbersome and ill-defined, requiring elaborate court proceedings. Moreover, they claimed that the amendment had been too conservative and that an original goal

8. Ibid., p. 496.
9. Joseph R. Thome, "Expropriation in Chile Under the Frei Agrarian Reform," *American Journal of Comparative Law* 19 (Summer 1971): 497.
10. Ibid., p. 496.

of 7,000 expropriations was too small. In the end actual enactment fell far short of the 7,000; the most generous estimate of land distribution under the Alessandri government was that CORA had effected only 1,345 land divisions totaling 51,442 hectares.[11]

In retrospect, Law 15020 was important less for what it achieved than for the processes it set in motion. The agrarian reform was weak and watered down, but it is extremely significant that the reform in Chile passed with the support of the conservatives, when other Latin American governments had not even begun to consider such laws. The right had realized, with a relatively sophisticated analysis of political realities, that objectives of increased production and stability could be — and indeed, had to be — balanced against the need for social concessions. It must also be emphasized that, in spite of the ambiguities rendering the law ineffective, it *did* establish a legal precedent, signifying a substantive shift from the legal tradition which indiscriminately defended the right of ownership of private property.

In addition to difficulties created by the substantive shortcomings of Law 15020, the limited success of agrarian reform in the early 1960s was the result of an apparent lack of will on the part of the Alessandri government to administer the law. Agrarian reform under the Alessandri Administration should be seen perhaps as a political gesture, a reorientation of political stands in the face of a changing reality in Chilean society, rather than as a concerted effort to institute profound social reorganization. Thus, while no major alteration occurred in the landholding structure, the fact that Alessandri (and more importantly the Chilean right) did react to the dynamism of the time should be viewed as a major step forward in the reform process.

Agrarian Reform Under Frei 1964-1969

The mere fact that the Alessandri Administration had already organized and instituted a land reform program proved immensely valuable to Frei's program after 1964. The legal, institutional and political processes had been set in motion and Frei capitalized on the momentum. Domestically, power shifted increasingly to the left. Frei was elected on an essentially populist program, and one of his major promises was to implement a more extensive agrarian reform than did the previous administration. Internationally, the United States, UN organizations and the Organization of American States (OAS) continued to endorse strongly land reforms to mitigate rural discontent.[12]

---

11. Ibid.
12. Kyle Steenland, "Rural Strategy under Allende," *Latin American Perspectives* 2 (Summer 1974): 133.

Frei presented a detailed message to the Chilean Congress saying that it had become "urgent and imperative to enact an authentic and effective agrarian reform." The time had come to alter a land tenure system "characterized by the concentration of land and water resources in a few hands . . . monopolization of credit . . . an inadequate use of land resources and a paternalistic labor system which abused the peasant and prevented the development of a middle class." He stated, in addition, that the system "was directly responsible for the stagnation of agriculture and cattle production as well as other social and economic problems which had long been present in the rural areas of Chile."[13]

In the history of land reform in Chile, Frei's program was the most radical and sweeping. As political analyst Robert Kaufman points out, it served to "surprise even the Chilean left."[14] He adds that the the challenge to the basic values of the society was unprecedented in that "all parts of the ruling party were willing to impose sacrifices on the landowning classes."[15] Proposals for a new agrarian reform law provided that the expropriated land would not be distributed to individuals — as under the Allesandri Administration — but rather, the land would be divided into *asentamientos*, or cooperatives. The *asentamiento* would be owned jointly by CORA and the new group of owners for three to five years, after which time the land was to be divided among the associates of the cooperative.[16]

The Frei platform also granted both CORA and INDAP the legal power to adjudicate expropriation cases and to decide which section of the land the landowner was entitled to keep.[17] In addition, CORA was granted the power to take immediate possession of the property without waiting for any affirmative court decision. It was able to request from the government the use of military force if the landowner refused to cooperate. The landowner was given 80 days in which to oppose a CORA decree by petitioning CORA to reconsider, or by challenging it before a Provincial Agricultural Tribunal. Judicial review prevented CORA from taking possession of the property until a final judgment had been issued.[18]

New tribunals were created under Frei to cut through many of the procedures which had snarled the application of the Law 15020 and to expedite the resolution of legal conflicts. Two agricultural engineers and

13. Eduardo Frei, quoted in Thome, "Expropriation in Chile," p. 489.
14. Robert Kaufman, "The Chilean Political Right and Agrarian Reform: Resistance and Moderation" (Washington, D.C.: Institute for the Comparative Study of Political Systems, Political Study Series #2, 1967), p. 27.
15. Ibid.
16. The main objectives of the *asentamiento* were to train the campesinos to manage their own farms, to maintain full production during the first crucial years after expropriation and to encourage the *asentados* to maintain a cooperative type of operation once the land is distributed to them.
17. Kaufman, "The Chilean Political Right and Agrarian Reform," p. 25.
18. Thome, "Expropriation in Chile," p. 500.

one local judge would constitute a special tribunal. Two magistrates from the ordinary courts and one agrarian engineer would compose regional appellate tribunals. No appeal to the regular courts was allowed.

Reformers established this special court system in an attempt (1) to keep land reform conflicts out of the jurisdiction of the regular civil court system, which was slow and conservative; and (2) to get expropriated properties into CORA's possession as quickly as possible. The technical expertise of the members of the agrarian tribunals was designed to ensure a more rapid expropriation process "while guaranteeing the right of the affected individual," according to Thome. The Supreme Court, however, he continues "was quick to accept jurisdiction over land reform conflicts where the landowners claimed that the transitory articles of [the proposed agrarian reform] law 16640 were unconstitutional."[19] Thus, Frei was unable to keep the expropriation cases solely under the jurisdiction of the administrative tribunals.

Other salient departures of the proposed bill from Law 15020 included: (1) the size of property as well as the state of cultivation was to be an important factor in the expropriation process; (2) expropriation of efficient as well as inefficient property was to be paid for partly in bonds; and (3) the property of those who may have escaped the limits by dividing land among sons or relatives since November of 1962 were also subject to expropriation.[20]

Despite the seemingly radical nature of the Frei reform program, which represented the clearest ideological break with the old land ownership regime, Law 16640 passed in 1967 without much opposition. As political analyst Kyle Steenland points out, the large landowners (whose inefficient land was expropriated) were able to use their financial remuneration to invest elsewhere. Those landowners with further land reserves were paid for the expropriation and were still able to maintain the best land, along with all the machinery and livestock. "All in all," Steenland writes, "the law was an attempt to modernize capitalism in the countryside, an attempt of which most sectors of the bourgeoisie were heartily in favor."[21]

The worsening economic climate also militated for more expansive reform in the agricultural sector. A continued scarcity of agricultural products, despite large imports, was one of the main factors in Chile's chronic inflation, and led to increased working class unrest. The agrarian sector under the existing system was becoming increasingly inefficient

19. Ibid., p. 509. He goes on to add that although the court in most cases found that the applications of Law 16640 did not violate the constitution, nevertheless, the appeals did postpone the taking of possession of the affected properties by CORA.
20. Kaufman, "The Chilean Political Right and Agrarian Reform," p. 26.
21. Steenland, "Rural Strategy," p. 142.

and unproductive due to unused land and a preference by the wealthy to invest in urban and industrial ventures rather than in agricultural production. This contributed to worsening food shortages. As Thome describes:

> . . . while in 1939 there was a favorable balance in the value of agricultural exports and imports ($24 million vs $11 million) . . . by 1964 Chile was exporting only $39 million and agricultural imports had ballooned to $159 million. Furthermore $122 million of these imports represented products which can be produced in Chile, such as wheat, milk, butter, sugar, and others. This low level of efficiency is illustrated by the fact that while in 1964 slightly less than 30 percent of the active population in Chile was involved in agriculture, this sector contributed only 8-10 percent of the annual gross national income produced in the country."[22]

Frei constantly stressed that the traditional land tenure patterns remained primarily responsible for the low living standards of the peasants. These living standards included unemployment, a high rate of illiteracy, inadequate housing and sanitation, undernourishment, and a high rate of rural-urban migration; all problems "with repercussions in the urban population and which affect the entire social and economic welfare of the country."[23] Remarkably, the *National Agricultural Society* (SNA), a political force of the extreme Right, did not deny this.

During this period, in fact, the SNA abandoned the traditional argument that private property was sacred, and began to argue that "private ownership of land is more efficient than inept state control."[24] The SNA did not oppose Law 16640 directly but, as Steenland writes, "recognizing that they could scarcely claim that private ownership of the big *latifundia* had proved efficient," they pressured instead for more flexibility, such as a clause prohibiting the expropriation of farms under 80 basic irrigated hectares (BIH).[25]

The SNA wanted to restrict the debate to the congressional arena — feeling that more widespread action would exacerbate the rising fear and insecurity in the countryside which might further affect production. They thus urged strict compliance by their members with all social legislation and confined their struggle to the legal battlefield, arguing only specific points of the reform bill.[26] As Kaufman points out in his analysis, however,

---

22. Thome, "Expropriations in Chile," p. 490.
23. Ibid.
24. Steenland, "Rural Strategy," p. 142.
25. Ibid.
26. Kaufman, "The Chilean Political Right and Agrarian Reform," p. 28.

"the charge that SNA was only trying to stalemate agrarian reform by subtle legal modifications instead of by frontal attack is probably false. Even if legal modifications were to create serious legal obstacles," he adds:

> this is not necessarily because they are designed to obstruct, but because they were proposed within the context of a generally cumbersome legal structure accepted by all elements of Chilean society.[27]

On the ideologically explosive issue of *asentamientos* the SNA was cautious. They criticized certain aspects of the plan but did not condemn the idea outright, nor did they question the democratic motives of the government.[28]

Even centrist groups advocated more public criticism of Frei's legislation. They were especially concerned that, with the implementation of the *asentamiento* program, Frei's Christian Democratic Party (PDC) might have had the chance to establish for itself a system which could "guarantee them a permanent base of votes just as the *latifundia* system had done for the Right."[29]

Clearly, the government did not have an obstacle-free path toward either passage of the bill or its subsequent implementation. There was, in fact, a great deal of compromise on the agrarian and constitutional reforms in return for the support of the right on the copper issue. Frei's government wanted an alternative to the nationalization of the copper industry by "Chileanization" or acquiring large blocks of stock in a number of key mines.[30] After internal struggles within both the right and the left, the copper provisions were supported by the right. Shortly afterwards, a series of changes were made in both constitutional and agrarian reforms.

When implemented, the actual reform was not as sweeping as the government had originally projected. Of the goal set by Frei, only 15 percent of the basic irrigated hectares was actually expropiated. This benefited only 20,000 peasants, substantially fewer than Frei's original goal of 100,000.[31] Also, the great majority of the 20,000 were *inquilinos* — tenant farmers who worked for wages — and not the truly landless subsistence farmers. Moreover, the expropriated land was of lower quality than had been expected. Half of the land was inefficient and was voluntarily offered by the landowners to CORA for payment. Nonetheless, as political analysts Arpad Von Lazar and L.Q. Varela point out, this record for

27. Ibid., p. 31.
28. Ibid., p. 32.
29. Ibid., p. 35.
30. Ibid., p. 39.
31. Steenland, "Rural Strategy," p. 134.

expropriation "is more substantial than for any comparable period between 1928 and 1963."[32]

The Frei reform efforts, though limited, did both reflect and further momentum for reform. Faced with chronic inflation and falling productivity, most sectors of society recognized the need for change. Significantly, this change came about through the democratic means of the legislative process. With the inclusion of the right in the debate it was, quite remarkably, a comprehensive reform effort involving practically the entire political spectrum. Law 16640 was drafted with social and political stability as the foremost concern of all parties. As Kaufman indicates, the stabilizing feature of the reform bill was the "retention of institutional and legal channels through which the opposition was able to defend itself at the government level."[33]

Agrarian Reform Under Allende 1970-1973

When Allende assumed power in 1970 he inherited an inflationary economy, sagging agricultural production, and a tense political environment exacerbated by urban proletarian unrest and an ethos of rising expectations among the rural peasantry. Allende's party failed to win control of the Congress, which seriously hindered many policies that Allende had intended to implement. The chances of Allende guiding a more radical agrarian reform measure through a Congress controlled by rightist opposition were very slim. Allende was thus limited to the already existing institutions and programs of the agrarian reform implemented under the Frei Administration. His only option, then, was to push the Frei reforms to the furthest possible extent. This was the "radical" nature of Allende's reform.

Frei's agrarian reform, however, was marked by inherent problems with which Allende had to contend. There were three obvious deficiencies, according to Steenland, which clearly undermined its effectiveness: (1) it enabled the government to expropriate only the land of large landholders, which served to strengthen the influence of medium-sized landholders; (2) it created a reformed sector which consisted of only a small percentage of the peasantry and did not encourage collective ownership of the land, but rather supported its division; and (3) it permitted the expropriation of only the land, while the original owners were allowed to keep all livestock and machinery.[34]

---

32. Arpad Von Lazar and L. Q. Varela, "Chilean Christian Democracy: Lessons in the Politics of Reform Management." *Inter-American Economic Affairs* 21 (1968).
33. Kaufman, "The Chilean Political Right and Agrarian Reform," p. 45.
34. Steenland, "Rural Strategy," p. 131.

When Allende first came to power, however, the rightist-central parties, the largest block of opposition in Congress, and the urban and rural bourgeoisie were still relatively weak and unorganized. This allowed Allende to move quickly and without substantial opposition in the direction of reform, and he immediately attempted to increase the rate of property expropriation to levels approaching the goals set by the Frei Administration. This act engendered massive resistance from the newly strenthened middle-sized landowners, the new rural class which had essentially been created as a result of both the Alessandri and Frei reforms. These landowners attempted to stop the process of rapid expropriation in whatever way possible. The conservative SNA, with new found power in the Congress, tried to block the expropriations by legal means. To accomplish this goal they used the Agrarian Tribunals, which were composed of judges and right-wing agronomists, and maintained several offices in Santiago that were permanently staffed with lawyers.[35]

In 1973 CORA announced the expropriation of some 40 farms. The Agrarian Tribunals immediately issued staying orders, preventing CORA from taking possession of them. With the help of SNA lawyers, landowners gradually perfected their legal tools until they were capable of paralyzing the expropriations process.[36] Though increased expropriations practically eliminated farms over 80 BIH, the landowners maintained control of large sectors of farms between 20 and 80 BIH. These medium-sized farms became the bastion of the landowner class and allowed them to maintain powerful influence in the rural sector.

The peasants, recalling the unfulfilled promises of reform throughout the 1960s and perceiving the bias of the courts towards the landholding interests, began organizing into peasant councils and tribunals. This newly emergent sector, previously an unorganized and politically uncommitted group, gradually became a pivotal force in Chilean politics. Since neither Allende's party (the UP) nor the opposition enjoyed complete control, and since the worsening urban situation kept pushing the country into a deadlock, each side battled to win the support of the peasantry. With the increasing "proletarianization" of the UP, however, it became clear which side was most likely to be successful in that effort.

The economy in the early 1970s was in serious trouble. The years 1972 and 1973 were characterized by rising inflation and increased food shortages. This was extremely important for the right which utilized tactics such as blocking food distribution, thereby exacerbating an already grave economic situation. The shortages which resulted involved basic commodities such as cooking oil, bread, sugar, meat, rice, and milk.

35. Ibid., p. 142.
36. Ibid.

The plight of the Chilean economy at this point was also due in part to the U.S. credit blockade instituted in 1971. The United States perceived an increasing radicalization of the situation and, with threats of nationalization that had appeared previously under Frei, it feared that its foreign enterprises were in danger of expropriation. The credit blockade made U.S. dollars scarce, further undermining the ability of the Chilean government to import food.

With the worsening situation, the peasants engaged in new tactics, reflecting political theorist Alfred Hirschman's notion of the power of "rising expectations." Still dissatisfied with the slowness of expropriation procedures, they began a series of illegal, but bloodless, *tomas*, or land seizures. Though it would have been politically dangerous to condone such *tomas* publicly, the government did nothing either to prevent their actions or to evict them once they were entrenched. This tacit approval aided Allende in increasing the rate of land transfer. Since there was no payment for the seizure of land, the landowner often opted to sell the land to CORA rather than lose it by force or risk a two to three year expropriation review by the agrarian tribunal.

In a short time, however, the medium-sized landowners had been able to organize themselves and the *tomas* did not occur without reprisal. Steenland writes:

> In the military realm, the Right used their shield of the corrupt and class-based court system to attack and kill peasants with impunity. Of the some 15 murders of peasants during the Allende government, not one resulted in the conviction of a landowner, despite the fact that in almost all the cases the landowners were clearly identified by many witnesses.[37]

In 1973, the right introduced a constitutional reform which required that: (1) CORA divide up the cooperatives into individual plots two years after expropriation; and (2) CORA give a land reserve to every expropriated owner of at least 40 BIH.[38] The Chilean Congress, with an influential rightist contingent, approved the law. Allende vetoed it. Congress then rejected Allende's veto. The bill, as Steenland views it, "was one more consideration in the institutional crisis provoked by the Congress in order to force the capitulation or the outright overthrow of Allende."[39] Hence the legal implementation of the reform was at a stalemate. By 1973 there were 3,000 cases before the agrarian tribunals in which expropriated owners were contesting either the expropriation itself or the amount of compensation

37. Ibid.
38. Ibid.
39. Ibid.

on the size of the reserve. Approximately one quarter of all expropriated farms were involved in judicial action with the agrarian tribunals.[40]

The ensuing institutional struggle between the presidency, the Congress and the courts, combined with skyrocketing inflation, food shortages, lack of foreign exchange, and a near crisis situation in the urban areas, all contributed to the toppling of the Allende Administration. The military seized control of the government and announced an end to all expropriations and the process of land reform. The experiment in social progress which had begun two decades earlier came to an abrupt and violent end.

Chile in Contemporary Law and Change Theory

The land reform effort in Chile, instituted on an incremental basis over a span of 15 years and 3 administrations, failed to bring about desired changes. Despite its emphasis on stabilizing society by appeasing demands for change, the land reform effort contributed to the disruption and eventual dysfunction of Chilean society as a whole. Analysis of the role of law in change is necessary if we are to understand the phenomena of the recent past and anticipate and forestall similar developments in the future.

In many ways, the land reforms instituted between 1953 and 1973 reflect Robert Seidman's "instrumentalist approach" to development and change. This approach advocates the creation of new norms of law as a medium for change, wherein "organized political communities effect purposeful social change mainly through the state."[41] Drawing upon the theory of Hans Kelsen, Seidman writes:

> The state and the legal order everywhere in this epoch appear as opposite sides of the same coin. The authority of bureaucrats, policemen, legislators, all found their formal source in norms that the state laid down to prescribe their behavior, that is, in rules of law. The rules induce various sorts of behavior and buttress existing institutions and sometimes change them . . . Development requires much new behavior, and therefore a great deal of new law. Laws [should then be] enacted to change various economic, social and political institutions.[42]

Change, for Seidman, is imposed from the top by rulemakers and implemented through institutions created to achieve certain predetermined

40. Ibid., p. 136.
41. Robert Seidman, "Development Planning and the Legal Order in Black Anglophonic Africa," *Studies in Comparative International Development* 14 (Summer 1979): 4.
42. Ibid.

ends. In an attempt to institute the land reform measures, the Chilean Congress passed legislation creating institutional mechanisms (i.e., CORA and INDAP) which would implement the new agrarian reform laws. These mechanisms were endowed with the legal authority to determine which land would be expropriated.

By the time Allende assumed power, "feedback mechanisms" were registering a strong demand on the part of an increasingly mobilized peasantry for agrarian reform and, over time, the peasantry appeared more threatening than did the rightist resistance. The peasantry was a strong power base of the Allende regime, and yet its increasing radicalization and growing impatience with the slow pace of the expropriation process threatened Allende's position of power. In response to a process set in motion during previous administrations, the Allende regime passed more legislation (and created more institutions) to fulfill the instrumentalist dictum: to change society, those in power must change both the legal norms and thereby the behavior patterns of society. Yet this attempted creation of legal norms clashed with the legal process on the local level, where the strong tradition of defense of private property against seemingly arbitrary governmental decrees was still predominant.

Furthermore, lengthy delays in implementation caused by appeals from the decisions of CORA and INDAP proved damaging and ultimately resulted in low numbers of hectares actually being expropriated. Simple enactment of agrarian reform statutes by legislators, or "rule-makers" to use Seidman's term, proved ineffectual and initiated a process of change which was to cause an eventual breakdown of the system. Given the strong vested interests of local adjudicators who, as a class represented the threatened status quo, court action on the local level effectively impeded change. The legal order refused to carry out its task of implementing rules enacted by legislation. Seidman's "top-down" approach simply proved inimical to the legal process on the local level and resulted in a stalemate between two potentially powerful groups — an increasingly demanding populace and an entrenched, conservative class of adjudicators and landowners defending the status quo. The legal order failed to ensure a legislatively-ordained change of behavior. Seidman himself, in a study of structural change in African society, stated that "far from a free good in unlimited supply the legal order became a very limited, very expensive, critical element in implementing policies necessary for successful plans."[43]

In Chile, as well, the courts were extremely important in inhibiting change. Successful planning involves much more than creation of norms and the artificial forging of repetitive behavior patterns. It is thus easy

43. Ibid., p. 9.

to see the limitations and question the applicability of the instrumentalist approach when the legal order fails to facilitate political change. Seidman admits, "Plans almost always provide detailed information about *what* is to be achieved, but not about *how* to go about securing development objectives or targets or about *who* in government, or elsewhere, should be responsible for carrying out the required tasks."[44]

The lack of success of agrarian reform legislation stems directly from such deficiency. In Chile, laws enacted to achieve a more equitable land distribution came in direct conflict with the tradititonal precepts of adjudicatory law which protected the landowners and wealthy classes. Because of the courts, these laws did not serve the people for whom the agrarian reform was intended.

It is here that the culture-specific school in law and development theory takes on a special relevance. Culture-specific theorists look to the many linkages between law and society and argue that constructive change (i.e. development) can only occur with the active consent of the society. For these theorists, the Chilean legislation and its implementation failed to take the "legal culture" into full consideration.[45] For them, the legislation did not take into account the long-standing tradition of the social order. In their critique of Seidman's analysis of law and change, Robert Meagher and David Silverstein, major proponents of the culture-specific viewpoint, pose the question: "Is the limitation of societal values so blithely dismissed [by Seidman] more substantial than he would lead others to believe?"[46] Indeed, this is a valid question and the notion of the determinism of the legal culture is a compelling one. Some writers would argue with Seidman's generic definition of change, postulating instead that real change in Latin American society does not usually come through direct planning, but rather "through fits and starts and through the repeated crises and alternations of government that Latin American nations are popularly known for . . . ad hoc rebuilding, day to day decisions and non-decisions." It comes "through a willingness to abide by the rules and be absorbed in the system."[47]

Howard Wiarda, a well-known writer on Latin America, describes the structure of Latin American society as a:

> . . . well-defined, rigid yet adaptable, hierarchically and vertically segmented pattern of class and caste stratifications, social rank

---

44. Ibid., p. 13.
45. A concept elaborated upon by Lawrence Friedman in "Legal Culture and Social Development," in *Law and the Behavioral Sciences* (Indianapolis: Bobbs-Merrill, 1969), pp. 1000-17.
46. Meagher and Silverstein, "Law and Development," p. 22.
47. Howard Wiarda, "Law and Political Development in Latin America: Toward a Framework for Aanalysis," *American Journal of Comparative Law* 19 (Summer 1971): 463.

> orders, estates, juridical groupings, guilds, corporate bodies and *intereses*. The various groups and sectors revolve around, are tied to, and derive legitimacy from, the authority of the central state or its patrimonial leader.[48]

According to Wiarda, for change to occur in this corporatist Latin American society, the agent of change or the new institutional apparati must be "coopted," assimilated into, or grafted onto this traditional structure.

The traditional order can accommodate institutional change. In regard to modernization, Wiarda writes:

> The traditional order has proved not to be so rigid and immutable as we sometimes imagine but, in fact, flexible, permeable, and almost infinitely malleable, bending enough to absorb such features of "modernization" that were required without, in the process, undermining the basic order itself.[49]

Yet as pressure steadily mounted for more rapid implementation of reformist legislation, the land reform process became a challenge to and, indeed, undermined that "basic order." The traditional corporatist model simply failed to accommodate demands for change. Even Wiarda concedes that if a challenge to the basic order, the system of *latifundia,* became recognized as essential for social progress, the entire foundation of the corporate pyramid would be threatened.[50]

Wiarda writes that:

> Up until recently the whole process of elite integration, assimilation and systemic adaptation took place relatively smoothly, almost naturally, and without provoking systemic breakdowns. At present, however, under the increasing pressures of the contemporary period, with the change processes speeded up enormously and with the number of *intereses*, or corporate entitities rapidly expanding, the traditional style and structure has become far more tenuous and the capacity of the sociopolitical system to cope with and manage these changes is far more uncertain.
>
> . . . In Brazil [for example] as in other Latin American nations, the failure of the old reconciliationist system has tended to

48. Ibid., p. 437.
49. Ibid., p. 452.
50. Ibid., p. 442.

> pave the way for increased conflict, breakdown, and military authoritarianism.[51]

From the culture-specific view, the basic failure of the land reform program stemmed from its very inattentiveness to the traditions and culture, and the important links between the law and the society as reified in Wiarda's corporatist model. The success of the new rules, Meagher and Silverstein write:

> going beyond the boundary of prevailing customary law . . . depends upon the relative degree of organization and power of *non-consenting elements* of society. In the long run, such measures will eventually be subsumed by an expanded customary law unless the government is first overthrown.[52] (emphasis added)

Indeed, this was the case in Chile. The "non-consenting elements" of society were the well-organized protectors of the status quo, defenders of the "customary law" and "legal culture."

The preservation of the foundation of the legal culture within which people have ordered their lives, deriving security and predictability, is important to the culture-specific theorists. The problem at hand is the determination of what defines the "legal culture" and who and what define "customary law" for a given society. On this point, Meagher and Silverstein write:

> Customary law is the foundation of every legal system. It is in human interaction that one finds the social context for all existing law and probable parameters for new law. . . . Customary law is the foundation and legitimation for all other categories of law. . . . which, in turn, determines the parameters of adjudicative law.[53]

Is the hierarchical, corporatist system described by Wiarda and elaborated upon by legal theorist Roberto Unger, the immutable "social context" for existing law and is it a given that it must determine the parameters of new law?[54] In essence, must we accept this as the definition of the legal and social context in Latin America? Even Wiarda is beginning to doubt this premise in the face of new demands and a changing world. There are indications from the lower echelons of the hierarchy that inequity, etc., is perhaps not as "organic" as Wiarda and Unger would have us believe.

---

51. Ibid., pp. 452, 459.
52. Meagher and Silverstein, "Law and Development," p. 9.
53. Ibid., p. 9.
54. Roberto M. Unger, *Law in Modern Society* (New York: MacMillan Press, 1976).

Retaining the hierarchical and corporatist structure of Latin American society may help to maintain stability in turbulent times but, it remains to be asked, at what cost to human dignity?

The essential problem for law and development analysts is one of defining the *real* customary law and recognizing the *actual* baselines against which people now order their lives in Latin America. It becomes one of properly identifying the present human needs and interactions that are reflected in the "living laws" in contrast to the question of merely defense of the status quo, a traditional and entrenched elite with a "legal culture" all its own. Yet this elite has the ultimate power of adjudication of the law, which is often thought of as the embodiment of the "customary law." There arise, then, ostensibly two forms of "customary law."

The Chilean situation gives rise to questions such as: Is the legal culture, or the assumed customary law per se, always a true reflection of the needs of society? Are there different strata of legal cultures? Can the "legal culture" change? Is the accepted "legal culture" a symptom of, or perhaps even a cause of, the social malady in Latin America today? In Chile, were the baselines against which people were ordering their lives actually shifting while the myth of the monolithic corporate pyramid and the sanctity of the status quo remained untrammeled?

The role of law should be one of mediation, a role which facilitates social interaction, regulates conflicts and helps restore an equilibrium. In Chile, it became evident that the legal culture and the "customary law" — if we were to accept its reification in the corporatist model — became increasingly divorced from the reality of Chilean society. Given the demands upon it, the accepted "legal culture" becomes less conducive to bringing about change.

The situation in Chile elucidates the critical interdependence of law, politics, economics and social forces. In Chile, during the reformist years, all these forces were gaining strong momemtum. There were sharp demands for change from society at large. Alessandri, Frei and Allende all recognized these demands and attempted to institute change from the top down. The role of Chilean adjudicatory law, however, impeded that change, as the adjudicators, the protectors of the established "legal culture," belonged to that segment of society which stood to lose the most from agrarian reform. The modernizing elements in society and the demand for change confronted the strength of the traditional structure. Law, rather than resolving the conflict, merely aggravated and contributed to the crisis.

The situation in Chile became an example of Samuel Huntington's praetorianism, the demand for change far outstripping the capacity of the bureaucratic and judicial institutions to accommodate those demands. The result was a breakdown of the system, and a conspicuous absence of effective

political and legal institutions capable of mediating, refining and moderating the political and legal conflict. This introduced serious distortions into formerly democratic political institutions.[55]

Elaborating on this theory, Guillermo O'Donnell in his book *Modernization and Bureaucratic Authoritarianism* proposes a new conceptualization of political modernization in Latin America. He rejects the so-called "optimistic equation," the dominant paradigm until the early 1970s, which equates socio-economic development with an increased likelihood of political democracy. Abandoning the teleological approach of the "optimistic equation," O'Donnell suggests that in certain countries with newly attained high levels of modernization, such as those found in Latin America, there is a strong tendency toward a new type of political authoritarianism which he labels "bureaucratic authoritarianism."

Using an in-depth analysis of recent histories of Brazil and Argentina, O'Donnell underscores the following process of an institutional overload, an elaboration of which may prove helpful in understanding the Chilean situation:

> — A relatively high level of modernization leads to heightened patterns of political activity by the popular sector and creates a strong demand for change. Existing insitutions are unable to accommodate those demands.
>
> — With heightened demand for change, established sectors become increasingly rigid, exacerbating the already difficult "developmental bottlenecks" of high modernization.
>
> — The result is the weakening of political institutions.
>
> — This induces the formation of a coalition in which the powerful sectors agree that the political exclusion of the popular sector is a requisite for overcoming a situation of stagnation and continuing conflict. Elimination of the electoral arena, and with it, political parties, seems essential to achieving that goal.
>
> — The triumph of the coalition leads to the inauguration of a new authoritarianism which attempts to extend even further the highly inequitable distribution of resources that has made its emergence possible, in order to consolidate further its own power base.[56]

---

55. Huntington, *Political Order in Changing Societies*, p. 192.
56. O'Donnell, *Bureaucratic Authoritarianism*, p. 198.

O'Donnell believes that the "manifold tensions of high modernization do not increase the probability of the emergence of open political systems or collective action which will diminish the inequalities or injustices of the society."[57] Bureaucratic authoritarianism, he feels, is a much more likely response. Indeed, as O'Donnell points out, one of the basic failings of the "democratic" systems which preceded bureaucratic authoritarianism was their inability to formulate and implement public policy. But, as he also points out, "whatever advantages that bureaucratic-authoritarianism might have in this respect are more than outweighed by their own inherent flaws."[58]

Did Chile's political system end in failure as a result of its reform efforts? If so, this institutional overload and resultant downward spiral which grips societies in the midst of change raises a series of concerns. To accept this description of the political change process in Latin America has serious consequences for both political and institutional theory, not to mention the societies involved in the process of change. To accept this process as empirical and therefore inevitable would eliminate the political and legal options available to these countries either to avert the process or to stem an increasing consolidation of authoritarian power which further heightens the inequitable distribution of resources.

The problem, then, was not merely in Chile's reform program, in an ignorance of the legal culture, nor in a simple failure to acknowledge long-standing norms. Political and economic exigencies, as well as legal and social conflicts contributed to the dysfunctioning reform program.

Both the instrumental and culture specific models are too limited for a useful analysis of Chilean land reform and for Latin American modernization in general. Both are simple models for less-modernized society and not for societies with developed political, social and economic structures.

Neither model deals with a *strong* demand from the people for change which necessarily entails a radical departure from established ways. While the bottom-up component is the linchpin of the culture-specific argument, it deals only with the recognized need for change evolving through customary law and not the powerful demands of participants in an advanced electoral process, a situation which exists in many Latin American societies today. As Von Lazar and Varela point out, Chile is a "highly politicized country with an articulate, and easy to mobilize urban population . . . it has a well developed vociferous and often over-agitated communication network and one of the highest educational standards in Latin America."[59]

Both the instrumental and culture-specific arguments also leave out an

57. Ibid., p. 197.
58. Ibid., p. 199.
59. Von Lazar and Varela, "Chilean Christian Democracy," p. 324.

extremely important factor in the change process of middle-developed countries, i.e., the exogenous factors of geopolitical power plays which, due to the current composition of the international economic framework, often prescribe and shape the process of development in countries which are either of strategic importance or are a perceived threat to global stability. Such was the case with the economic quarantine that was imposed on Chile by the United States because its policies were becoming alarmingly leftist. The economic blockade of 1972-1973 caused foreign exchange earnings to plunge, which contributed to the breakdown of the Chilean economy and which, in turn, affected its political and social structure.

Examined in this light, the development process has passed into another dimension. It is precisely because external changes coincide with internal changes that developing societies face so many problems. The external changes are tied to a transformation of an international system which has become inescapably interdependent. Internal changes stem from social mobilization and changing values. Consequently, it is no longer simply internal dynamics within a country which makes it either receptive to change or reluctant to accept it. The external dynamics of geopolitics and economic warfare can now seriously affect the process of change. Since both the instrumental and culture-specific arguments are limited in their understanding of development and change in present day Latin America, the study of the role of law is essential. Legislative law and judicial law are working at cross purposes. On the one hand, there is the demand for change and the promulgation of laws and statutes through legally sanctioned democratic institutions; on the other, there is judicial resistance to change based on a tradition which favors the landed class.

Law in Latin America has long been an impediment to change, with vast segments of the population denied access to courts or judges. In cases where access has been granted, decisions usually have favored the powerful. This phenomenon is not new, nor specific to the Latin American setting.

The issue, then, is whether one can implement change through an obdurate and inflexible judicial system which is composed of and works for a small though powerful segment of the population. The culture-specific approach rightfully recognizes that "even legislation not contradicted by customary law still may not be implemented if there are weaknesses in the legal administrative structure."[60] In Chile, as in other developing and quasi-developed countries, the two components, enacted law and adjudicative law, operated side by side, and the latter served to nullify the efficacy of the former. Such problems with the judicial system are a major stumbling block to change in societies with developed legal and

60. Meagher and Silverstein, "Law and Development," p. 41.

political infrastructures. If society is to advance in these countries, adjudicative law (the established legal structure favoring the powerful) *must* be reactive to enacted law (in participatory democracy — bottom-up).

This brings questions to the fore that are inescapably normative. Can the means and goals for development, change, justice, etc., be determined by society at-large? What is the dynamic in moderately developed countries and who has the right or duty to guide that dynamic? What is an appropriate pace of change? The culture-specific theorists state that:

> People are more amenable to change which promises steady progress toward economic development and at a pace which is compatible with acceptable rates of change in political and social sectors. . . .
>
> If change takes inordinately long, it must be because society itself, despite protestations to the contrary, does not really want to change more rapidly.[61]

Yet these societies are caught in a whirlwind, a kind of downward spiral. It is important to assess how the rate of change is to be controlled in a participatory democracy. Huntington might argue that participatory democracy should be sacrificed for stability, for only a stable society can progress and develop. But such an argument is tautological and helps neither academics nor developers, nor, most importantly, societies, out of their dilemma.

Recognizing that these countries have a need for rapid social and economic change, the role of the lawyer, according to Wolfgang Friedmann, should be to innovate, to draft, and to express social reform as legal reform. Legal theorist Kenneth Karst agrees. Karst refers to the lawyer as a development broker, an instigator, and a proponent of change.[62] He believes that:

> There is a fundamental misconception of the role of the legal system in maintaining stability. It should work also through the creation and perfection of institutions designed to reward, guide and otherwise facilitate favored conduct. The positive contribution which law can make to constructive change is typically ignored or minimized.[63]

This is not, however, an easy step. Karst proceeds to argue that:

---

61. Ibid., p. 27.
62. Kenneth Karst and K. S. Rosenn, "Law and Development in Latin America," *American Journal of Comparative Law* 19 (Summer 1971): 431.
63. Kenneth Karst, "Law in Developing Countries," *Law Library Journal* 60 (1966): 13.

> In older LDC's, lawyers have not been trained in a policy-oriented legal science. The criticism of rules and principles in their social context (which comes naturally to lawyers in the U.S.) is beyond the scope of legal education.[64]

One must therefore recognize the law's needs for personnel in developing countries "who perceive law as more than a body of rules, that law has a positive, creative role to play."[65] Politicians should heed Seidman when he admonishes that "whatever their political will, without [a proper] knowledge of the uses and limits of the legal power, the political elite cannot accomplish social change."[66]

The medium for change in this complex interaction of modern and traditional political, economic and social dynamics lies in the legal process. The demands for change, however, far outstrip available institutional and human legal resources. The relationship between law and development must adapt to these needs. New inroads must be made in the study of law and development of quasi-developed countries. Current theories are simply inadequate for solving the dilemma of legal adjustment to the participatory imperative and its dynamic of change.

The issue, then, is how to make law, lawyers and legal institutions be more responsive to the needs of the majority, who are usually landless and poor, and who have ineffective and unequal access to the legal systems which administer justice. The combination of political activity and inaccessibility of the judicial system sets the stage for an incendiary situation. The task for legal theorists is to find the institutional and legal fulcrum between change, on the one hand, and stability on the other. They must then adapt the legal system to a society in which the quest for stability preempts rather than encourages change. Inherent in this problem are cultural, political and economic factors. The solutions must therefore consider all these elements and treat them concurrently. Herein lies the only hope for peaceful and bloodless change in Latin American countries.

CONCLUSION

Chile's attempts to reform its land tenure system provide an illustration of the ways in which a socio-cultural context may both shape and be shaped by legal institutions. This article attempts to underscore the role of law in the breakdown of the Chilean land reform effort. It focuses on two dimensions of the legal process which worked at cross purposes and strained the capacity of the Chilean nation to function efficiently.

---

64. Ibid., p. 19.
65. Ibid.
66. Seidman, "Development Planning and the Legal Order," p. 3.

The first dimension is the legislative process, the enacted law of democratically elected legal institutions responding to an increasingly radicalized popular mandate. The second dimension is the adjudicative process, the protector of the traditional way of life and the defender of the status quo. Through effective blockage in the courts on the local level, the legal order served to neutralize and nullify the changes initiated in the legislative halls. The result was a disintegration of a functioning participatory society, adhering to O'Donnell's model of process toward bureaucratic authoritarianism brought on by institutional crisis and leading to a dysfunctioning of the system.

This article highlights a process which has occurred repeatedly in Latin American countries, a process which is a current crisis facing most "quasi-developed" countries, (i.e., industrializing countries with advanced political, social and economic systems.) In highlighting this phenomenon, the analysis probes the inadequacy of law and development theory in its present state of the art, including the instrumental and culture specific viewpoints, to help quasi-developed countries through the cycle of reform, instability and authoritarianism.

The answer to the crisis in Latin American countries, which is the result of political, social, economic and exogenous factors, may perhaps be found in law and in the modification of Latin American legal institutions — the very institutions which have served for so long to inhibit change. For this to come about, however, law in Latin America must be transformed from the institutional guardian of the status quo. The task is not an easy one; indeed, the very face of legal education in Latin America must change. Until that is done, however, these countries will continue in their "relentless but frustrated search for democracy" suffering political decay, social disintegration and the vertiginous spiral of institutional crisis, violence and military dictatorship.[67]

---

67. Wiarda, "Law and Political Development."