



3rd Congress of the World Conference on Constitutional Justice
'Constitutional Justice and Social Integration'
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Questionnaire
Reply by the Constitutional Court of Chile

A. Court description¹

The Constitutional Court of Chile has already provided a description for the CODICES database (www.CODICES.coe.int).

B. Social integration

1. Challenges of social integration in a globalized world²

1.1. What challenges has your Court encountered in the past, for example in the field of asylum law, taxation law or social security law?

¹ The Court or Tribunal which has duly provided a description for the CODICES database is not compelled to provide it herein.

² Please give two or three typical examples (please refer to the précis in the CODICES database, when you have already contributed these cases. Otherwise, please consider sending précis / summaries to be included in the CODICES database).

In this context, it should be noted, several challenges have emerged in the Chilean society that have had an impact on the issues that have been addressed by the Constitutional Court.

Firstly, it's worth noticing the role played by the Constitutional Court during the transition to democracy. In the 1980s, and in face off the impending plebiscite by which the continuity of the military government was decided, the Court played an important role regarding the so-called "political laws", i.e. the laws on electoral justice, political parties, popular vote and electoral registration. The importance of the Court's decisions in such laws was reflected in the peaceful process which lead to the return of democracy.

In 1985, the Court decided on the constitutionality of the Constitutional Organic Law of the Electoral Court, demanding the Court to be installed prior to the presidential (1988) and constitutional reforms' (1989) referendums (Constitutional Court Decision No. 33).

Meanwhile, in 1987, the Court judicially reviewed the draft of the Constitutional Organic Law Concerning Political Parties [(Political Parties Law)], declaring various of its provisions unconstitutional, given that they affected [the right to] freedom of association, due process of law and typification of the punitive action (Constitutional Court Decision No. 43).

Later, in 1988, the Court judicially reviewed the Constitutional Organic Law on Popular Voting and Scrutiny [(Electoral Law)], highlighting the need to legislate about political advertising and publicity, equality – independents and members of political parties candidates – and presidential and parliamentary election dates, subjects that were welcomed by the Military Junta of the time (Constitutional Court Decision No. 53).

Secondly, it should be noted that the Constitutional Court has had to examine cases concerning immigration, the right to health and the rights of indigenous communities in the country. It has also seen the need to resolve issues regarding the recognition of equal marriage and maternity leave.

For example, regarding immigration issues, the Court has had to rule on the constitutionality of rules governing immigration in the country. Thus, according to the Constitutional Court Decisions' No. 2273 and 2257 (see CODICES), the Court judicially reviewed the rules that allow the Ministry of the Interior to determine whether to grant visas. The Court held that the way in

which that power was delivered to the authority was contrary to the principle of equal treatment between nationals and foreigners.

Another example can be observed with regard to a requirement that sought to challenge the provisions of the civil marriage law, particularly regarding the definition of marriage between a man and a woman. In this case, the Court ruled that there was no violation of the principle of equality and it is for the National Congress to regulate marriage (Constitutional Court Decision No. 1881, see CODICES).

Increasingly, the Court has been called to decide on issues concerning indigenous communities, their right to consultation under the ILO Convention No. 169 and subsequent legislation on aspects of the exploitation of natural resources, and how this affects the various communities. For instance, the discussion concerning the ratification by Congress of the International Convention for the Protection of New Varieties of Plants (UPOV) 1991 Act, which regulates various matters regarding the granting to breeders of new plant varieties of an intellectual property right; in addition to the new fishing regulations and their compatibility with the interests of indigenous communities whose main activity is fisheries exploitation. In these cases the Court has ordered the holding of public hearings with the stakeholders, particularly with the indigenous communities. The Court ruled that although the state must abide the provisions of ILO Convention No. 169, it is for the National Congress to decide the means to do it, since such rules (of the International Instrument) are of a non-self-executing character and those that are not of a constitutional hierarchy, thereby preventing this court from confirming its violation (cases in the CODICES database).

Likewise, the Constitutional Court has had to rule on the new postnatal parental leave and its impact on public officials. In the judgment, in view of the allegations of the requesting party claiming that the legislation harmed the professional public sector workers, the Court decided that the new postnatal parental leave was not discriminatory, considering that, although improvable, it is a new social security institution which pursued the legitimate aim of seeking a greater bonding relationship between the mother and her child (Constitutional Court Decision No. 2250, case in the CODICES database).

1.2. How were issues of social integration or conflict transformed into legal issues?

The Constitutional Court has powers expressly granted by the Constitution. Among them, the most important ones are those concerning the pre-emptive and compulsory review of bills which contain interpretative provisions of the Constitution or those which rule on matters that the Constitution has stipulated that shall be governed by an organic constitutional law, as well as the optional pre-emptive review triggered by a parliamentary motion or by the President of the Republic regarding bills that have not yet been enacted as law. Moreover, the legal standing of any natural person or legal entity to file an inapplicability action to the Constitutional Court so as to disregard a potentially applicable legal provision in a case pending before a court, has allowed the Court to resolve conflictive issues within Chilean society.

1.3. Is there a trend towards an increase in cases on legal issues relating to social integration? If so, what were the dominant questions before your Court in the past and what are they at present?

As mentioned in section 1.1., the Court has had to deal, with increasing frequency, with issues concerning the rights of indigenous communities, particularly their integration into national life as of the possibility of participation in the decisions of the State that could directly impact the socio-economic life of these communities.

2. International standards for social integration³

2.1. What are the international influences on the Constitution regarding issues of social integration/social issues?

The Constitution recognizes a number of fundamental rights which have been recognised in various international human rights treaties, among others, the

³ Please indicate a few typical examples (if possible by reference to cases in the CODICES database).

International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

However, it should be noted that despite the recognition of those rights, the structure of judicial remedies for these rights is restrictive, since the Constitution does not provide a direct remedy that renders them justiciable.

According to the background arising from the drafting of the Constitution, the exclusion of the enforceability of social rights reflects the idea that they are understood as rights that the State shall provide for to the extent of its economic capabilities and in accordance with priorities defined by public policy.

2.2. Does your Court apply specific provisions on social integration that have an international source or background?

See below response to question 2.4.

2.3. Does your Court directly apply international instruments in the field of social integration?

No. See the answer to question 2.5.

2.4. Does your Court implicitly take account of international instruments or expressly refer to them in the application of constitutional law?

There have been cases where the Court has explicitly referred to international instruments as *obiter dicta*, among them, the Constitutional Court Decision No. 1340, which recognizes the right to personal identity. Although it has not been included in the Constitution, it has been recognized in international treaties, particularly in the Convention on the Rights of the Child. In this particular case, the Court had to examine the constitutionality of a provision of the Civil Code which limits the possibility of exercising the Acknowledgment of Paternity Action against the heirs of the deceased alleged father. The Court held that the provision was contrary to the right to identity, since by denying the child the opportunity to claim paternity in the case indicated, the legitimate exercise of

the right to identity was denied, along with subjecting the claimant of affiliation to unequal treatment.

2.5. Has your Court ever encountered conflicts between the standards applicable on the national and on the international level? If so, how were these conflicts solved?

The Constitutional Court, regarding the hierarchy of international treaties against the constitutional provisions, said that "the constitutional provisions in domestic law take precedence over the provisions of international treaties." (Constitutional Court Decision No. 46-1988, 27th recital).

However, regarding the hierarchy that international treaties have within the legal system, the Court has clarified that the law cannot repeal the provisions of such international instruments. Thus, Constitutional Court Decision No. 804-2007, 14th recital, states that the 5th paragraph of Article 54 of the Constitution stipulates that "the provisions of a treaty may be repealed, amended or suspended in the manner contemplated by the treaties themselves or according to the general rules of international law", recognizing that "the repeal, modification or suspension of international treaties ratified by Chile and currently enforceable, shall be made in the manner provided in the treaties themselves, that is, according to the agreements reached by the concelebrants, given the conventional nature or according to the general rules of international law, namely international treaties that the Republic of Chile has ratified or acceded to. International treaties ratified by Chile and currently enforceable, are legal rules that enjoy special constitutional protection.

In such circumstances, a domestic law that is inconsistent with the treaty has no power to repeal, modify or suspend it, because it is not a valid law, inasmuch as it has been enacted in violation of the Constitution.

However, with regards to international treaties on human rights, the 2nd paragraph of Article 5 of the Constitution must be taken into account: "The exercise of the sovereignty acknowledges as limitations the respect for the essential rights emanating from human nature. It is the duty of the governmental institutions to respect and promote such rights, guaranteed by this Constitution, and also by international treaties ratified by Chile and currently enforceable."

Drawing from this constitutional provision, the Constitutional Court has stated that "it is not possible to argue that a treaty on essential rights that emanate from human nature amend the Constitution when there are inconsistencies between them, or that they have the same legal hierarchy. Thus, if the treaty contains provisions contrary to the Constitution, it can only be validly incorporated into domestic law after a constitutional reform" (Constitutional Court Decision No. 346-2002).

However, the Constitutional Court has also said that "the reading alone of the provisions contained in Articles 5, second paragraph, 32 N° 17 and 54 N°1 of the Chilean Constitution, which refer to international treaties, it is sufficient to conclude that our fundamental text does not contain an explicit declaration about the hierarchical status of international treaties, even when they deal with essential rights that emanate from the human nature.

Nonetheless, from its context it is inferred that international treaties have a status that is inferior to the Constitution, because they are subject to mandatory prior constitutionality review when dealing matters of organic constitutional law, according to Article 93, 1st paragraph, No. 1, of the Constitution, which would not be possible if the treaties had equal or greater status than the Constitution itself.

Precisely this was the conclusion that the Constitutional Court reached in Constitutional Court Decision No. 346-2002, when ruling on the constitutionality of the Rome Statute of the International Criminal Court, adopting the thesis explained by Professor Alejandro Silva Bascuñán in the Drafting Commission of the New Constitution. The Court held that: "It is then established that the status of treaties is inferior to the Constitution but superior to any other legal rule and that "the previous declarations are fully applicable even to treaties about essential rights. These have a legal force that is superior to the statutes, although formally they share the same status due to the fact that, according to the Constitution, every regulation of the rights of the people should be done by law" (75th recital). The Constitutional Court, in this judgment, repeated the criterion previously adopted in its decision No. 46 of 1987, where it had warned that Chapter XIV of the Constitution, which deals with the process of constitutional reform, would become partly meaningless if the Constitution could be amended by international treaties on human rights (70th recital), thus rejecting the thesis that such treaties had constitutional hierarchy;

That it is necessary to reflect on Article 5, 2nd paragraph, of the Constitution, which particularly highlights the duty of all governmental institutions to respect and promote the fundamental rights that emanate from human nature guaranteed by the Constitution as well as by international treaties ratified by Chile currently enforceable, as it is the case of the above-mentioned ILO Convention No. 169.

Actually, that obligation or duty would fall upon the governmental institutions even if that specific rule would not exist, in virtue of the international principle *pacta sunt servanda* – which derives from Article 26 of the Vienna Convention on the Law of Treaties – which requires all institutions of the parties to fulfil in good faith the obligations assumed under the treaty, thus excluding excuses based on the application of domestic law (Article 27 of the Vienna Convention).

What that constitutional provision does, then, is to enhance, by means of a specific statement, that obligation on the field of human rights, but it does not – and could not, because they were not approved in the exercise of the Constitutional Power - give such treaties constitutional status;

That the duty to "respect" the rights enshrined in international treaties ratified by Chile and currently enforceable, refers to the obligation of the governmental institutions to enforce the rules that contain those rights when they are sufficiently autonomous so as to be executed with no need of additional regulation. In contrast, the obligation to "promote" such rights refers to the need of removing the obstacles to their free exercise" (Constitutional Court Decision No. 2387-2012, 11th to 13th recitals).

3. Constitutional instruments enhancing/dealing with/for social integration⁴

3.1. What kind of constitutional law does your Court apply in cases of social integration – e.g. fundamental rights, principles of the Constitution ("social state"), "objective law", Staatszielbestimmungen,...?

⁴ Please provide a few typical examples (if possible also by reference to cases in the CODICES database).

3.2. In cases where there is access of individuals to the Constitutional Court: to what extent can the various types of constitutional law provisions be invoked by individuals?

For individuals there are two ways to access the Constitutional Court: the legal standing of any natural person or legal entity to file an inapplicability action to the Constitutional Court so as to disregard a potentially applicable legal provision in a case pending before a court (*inter partes* judgment effect), and a public action to repeal a legal rule previously declared inapplicable (*erga omnes* effect).

The inapplicability of a legal rule is declared on the basis of a breach of any provision of the Constitution; particularly those that guarantee fundamental rights, so the Constitutional Court shall decide by contrasting the contested statute with the fundamental right.

3.3. Does your Court have direct competence to deal with social groups in conflict (possibly mediated by individuals as claimants/applicants)?

The Constitutional Court does not have that kind of jurisdiction.

3.4. How does your Court settle social conflicts, when such cases are brought before it (e.g. by annulling legal provisions or by not applying them when they contradict the principle of equality and non-discrimination)?

In cases of high public impact, the Court has deemed necessary holding public hearings, in which the social actors involved in the conflict can give their opinions on certain regulations and their impact on their aspirations.

Such has been the case for review by the Court of the new regulations on industrial and artisanal fisheries (CASE in CODICES). In this matter, the Court decided to convene a public hearing at which various indigenous communities and fisherfolk organizations gave their views on the impact of the new regulations on fishing in the economic development of their communities.

3.5. Can your Court act preventively to avoid social conflict, e.g. by providing a specific interpretation, which has to be applied by all state bodies?

Among the powers granted by the Constitution to the Constitutional Court are the pre-emptive ones, through which it reviews the constitutionality of certain provisions of bills before its enactments. This may occur in two ways: namely, regarding those which rule on matters that the Constitution has stipulated that shall be governed by an organic constitutional law; the Court must pre-emptively and compulsory review the bills. Also, at the behest of a certain group of congressmen, the Court shall review the provisions being challenged as unconstitutional by those members of Congress.

The Court's decisions in this regard should be observed by all state organs. As a pre-emptive control, those provisions declared unconstitutional shall not have effect in political life. An example is the situation that emerged after the examination of the so-called "political laws", to which reference was made in section 1.1.

3.6. Has your Court ever encountered difficulties in applying these tools?

Congress may declare that the provisions of a bill are common or ordinary and approve them with a simple majority quorum, despite the Constitution having stipulated that those provisions shall be governed by an organic constitutional law. Under these circumstances, the said bill would not be sent to the Constitutional Court for pre-emptive constitutional review. Situations like these have occurred in the past (Example: New Criminal Procedure Code, which contains numerous articles that affect the organization and powers of the courts and prosecutors, which according to our Constitution its provisions shall be governed by an organic constitutional law and therefore, should be passed by Congress with a higher quorum).

3.7. Are there limitations in the access to your Court (for example only by State powers), which prevent it from settling social conflicts?

While there is the possibility for individuals to have access to the Constitutional Court, this access is restricted. As noted in section 3.2, individuals have access to the Court by filing an inapplicability action so as to disregard a potentially applicable legal provision in a particular case. This requirement, while allowing the access of individuals to the Court, should be understood as a mechanism of “concrete” judicial review of legal rules as would be applied in the specific case, and thus the decision will only be applicable to that pending case.

4. The role of constitutional justice in social integration⁵

4.1. Does your Constitution enable your Court to act effectively in settling or avoiding social conflict?

The conflicts that the Court is called to resolve concern the constitutionality of laws, bills or decrees issued by the Executive Power.

4.2. Does your Court de facto act as ‘social mediator’, or/and has such a role been attributed to it?

The Court lacks the powers needed to fulfil this type of role. It is not within its function to act as a social mediator.

4.3. Have there been cases, when social actors, political parties could not find any agreement, they would ‘send’ the issue to your Court which had to find a ‘legal’ solution, which normally should have been found in the political arena?

During the processing of the bill establishing a new post-natal parental leave, added to the existing maternity leave, there was a debate in Congress regarding the cap of the subsidy which the State was to deliver during the period in which the worker would make use of the post-natal parental leave. The problem that arose during the discussion was that some members of that Senate committee

⁵ Please provide a few typical examples (if possible by reference to cases in the CODICES database).

resolved to vote separately the article on the cap of the subsidy, in order to increase the amount to a sum greater than that proposed by the Executive. In response, the President appealed to the Court arguing that the Senate had exceeded its powers, since it is the exclusive prerogative of the Executive to initiate laws involving public expenditure. The Court upheld the view of the President, noting that there was a violation of the Constitution in the voting procedure of the bill (Constitutional Court Decision No. 2025/11, see CODICES database).