Second Congress
World Conference on Constitutional Justice
Theme II: Operating Procedures of the Constitutional Courts.

Public hearings in proceedings unconstitutionality of the law: The experience of the Court Chile's Constitutional

Marisol Peña Torres
Judge
Constitutional Court of Chile

I. The procedure of unconstitutionality of the law: stronger attribution of the Constitutional Courts.

1. Introduction.

The processes developed by the courts or constitutional courts seek to ensure the full observance of the principle of the supremacy of the Constitution and fundamental rights enshrined therein. In addition, the Courts or Constitutional Courts usually conferred the resolution of conflicts between various State agencies.

If the Constitutional Court of Chile, the latter function was particularly important when establishing this body, for the first time, through the constitutional reform of 1970. As argued by the first President of our Judiciary, Enrique Silva Cimma, the idea of establishing a Constitutional Court in Chile is generated as a result of difficulties between the President and the Congress when the constitutional reform promoted the right of property in 1966. According to Professor Silva Cimma, "the facts demonstrated the clear need to create an organization that, in the court, were brought to the solution of legal and institutional conflicts between the Executive and Congress (...). To this end, the January 17, 1969, President Frei sent the Senate a new draft constitutional amendment, which specifically looked at "the establishment of effective mechanisms to resolve conflicts of powers" and basing his initiative specifically stated the following "a cause that undermines the effectiveness of the action of public authorities, is the discrepancy that often arises between the Executive and Congress (...). To this end, added later, pending consultation draft of the Constitutional Court building, in charge of settling disputes is rooted in a found interpretation of the Constitution (...). "

For its part, in the case of the action of unconstitutionality, the Supreme Court entrusted by the Constitution of 1925, as an expression of concrete and subsequent control of the constitutionality of the law, the discussions that gave rise to the corresponding provision realize that it was mindful of the need for this institution would combine two purposes: to

avoid conflict of powers and also "provide sufficient guarantee of constitutional supremacy with respect to individuals who are affected by an unconstitutional law."

In the discussion preceding the enactment of the Constitution of 1925, there is evidence that progress was not considered appropriate in the declaration of unconstitutionality with general effect, arguing that "it would amount to contradiction to the judiciary with the legislature and could stimulate a frequent Supreme Court intervention in legislative affairs, which ultimately could escalate into abuse. "

In turn, the discussions that give rise to the 1980 Constitution can be seen that, again, we tried to move from a specific control of the constitutionality of the law to an abstract and erga omnes identified with the declaration of unconstitutionality of the law . It was proposed, in due course, once declared the inapplicability of a legal rule through three successive failures uniform, could be declared unconstitutional, with general effect, either by the Supreme Court itself or by the Constitutional Court.

However, this mode of control of the constitutionality of the law only came to be drafted by the constitutional reform of 2005 which entrusted to the Constitutional Court to resolve the allocation for four-fifths of its members in office, the unconstitutionality of a legal precept had previously been declared unenforceable (Article 93, paragraph one, No. 7 of the Constitution).

The delay in establishing a procedure in Chile to declare the unconstitutionality of a legal rule with its consequent removal of the legal system serve to demonstrate the difficulty in our country, as in the rest of the world, has led the development of such processes constitutional. This difficulty can be traced precisely to the tension of the "guarantor" of the Constitution, a Constitutional Court, Tribunal or repeal an expression of will by citizens legitimate body to represent it in making the decisions that to influence the progress of collective affairs. A fortiori, when the courts or constitutional courts do not usually arise in the popular election to suffer from a kind of "democratic deficit" that would prevent the legislature to cancel the work.

Seen from this perspective, the existence of a process to declare unconstitutional a law seems to stand as an exception to the principle of separation of state functions at least as traditionally conceived by Montesquieu in The Spirit of Laws ".

In the context of the overall theme of this Congress, this paper aims to remember that the creator of the constitutional court, Hans Kelsen concentrated never intended to give life to an institution that manifest a conflict with the principle of separation of functions but rather to emerge as a complement to it from the point of view of strengthening the rule of law.

In this context, the unconstitutionality of the law not only must give due place to the expression of the will of the co-legislators, but also to the citizens themselves, either through the provision of public action to initiate or their active participation throughout the constitutional process. This predicament has been especially concerned, in recent times by

the Constitutional Court of Chile, which has driven the development of public hearings prior to the hearing of the case, to hear the views of different sectors of society interested in declaration of unconstitutionality of the law. We intend to report the results of that experience under the assumption that it helps reinforce the idea that the constitutional procedure of the law not only helps to strengthen the rule of law but the same democratic system.

2. Looking back at the thought of Kelsen.

Hans Kelsen conceived the action of the Constitutional Court as a guarantee of the Constitution, that is, as a guarantee of the correctness of the rules immediately subordinate to the Constitution, ie guarantees the constitutionality of laws. He added that "the Constitution provides, in substance, that laws should not only be prepared according to the procedures it prescribes, but also could not contain any provision that undermines equality, liberty, property, etc. Thus, the Constitution is not merely a procedural rule, but also a substantive rule. "Remained, and granted the idea that the legal guarantee of the Constitution, represented by the Constitutional Courts, covering both the protection of constitutionality so as to the constitutionality of the fund.

The relationship between the activity of constitutional courts and the rule of law is an important point in the thought of Kelsen. Held in this connection that "the politico-legal claim of the Constitution guarantees, ie institutions through which controls the constitutionality of the behavior of state organs immediately subordinate to it, such as Parliament or Government responds to the specific principle of maximum legality of the state function, the rule of law itself. "

It follows, then, that the very idea of establishing a special court designed to control the constitutionality of the law is a guarantee of the submission of power to law. This idea is associated with the same origin of the written constitution as a way to control or limit the power, especially that which is exercised through acts of Parliament or the Government. That is why Kelsen rule out this control and, therefore, the guarantee of the Constitution, be delegated to those bodies to which the Constitution gives the full or partial exercise of power by putting forward the principle that "no can be judge in his own cause. " Based on this idea is that the lawyer has been promoting the idea that only a court can assume the delicate task of confronting the acts of the bodies exercising state power (government, parliament).

Do not know here the sharp criticism that sparked this thought in the beginning, it was thought to be attributed to the courts guaranteed by the Constitution meant to engage in political matters tend inevitably to distort the judicial function. Kelsen himself preferred to ignore this argument, holding that "the annulment of a legislative act by a body other than the legislative body is an invasion of" legislative power ", as commonly stated. But the problematic nature of this argument is most clearly seen when one considers that the organ entrusted with the nullification of unconstitutional laws, not exercised properly, a true judicial function, even if it has, for the independence of its members, the organization of the

court. As much as they can distinguish the difference between the judicial function and the legislative branch, consists primarily in that it creates general law, while the other, but does not create individual standards. "

However, an appropriate approach to understanding why the control of the constitutionality of the law is a legal control which can be attributed, without problems, the courts found in the reasoning of Chief Justice John Marshall in the famous case "Marbury vs. Madison, decided by the Supreme Court of the United States in 1803, which starts the system of judicial review. Argued, Justice Marshall that "the Constitution is a law and, therefore, it is the duty of each judge to proceed with the interpretation of the law to decide disputes submitted to it, also the Supreme Court has the right and duty to interpret the Constitution to resolve every possible antinomy or conflict between the rules. So, since the Constitution places the Constitution itself, as the source, on a higher plane than the other laws, by the Supreme Court (and the rest of the judges) to verify whether a law is in line ("in pursuance ") before considering it applicable to the case. If such conformity does not exist, the judge can not help but declare it null and void. "

Is clear is that the creator of the constitutional court ruled that concentrated control of constitutionality of the law mattered a violation of the principle of separation of state functions. Categorically stated that "the institution of judicial review is in no way contradicts the principle of separation, but on the contrary, it is an affirmation of it." Hence, the thesis aims to design the declaration of unconstitutionality law, by the Constitutional Court as a division of power between different bodies, so as to allow a reciprocal control on each other. And this, not only to prevent the excessive concentration of power in the hands of a single organ but also to ensure the orderly functioning of various organs.

If control of the constitutionality of the law matters a constitutional court control over the legislature can then be argued that it is an expression of the checks and balances characteristic of a rule of law. This was stated precisely the Constitutional Court of Chile in the first sentence that declared unconstitutional a legal provision (Article 116 of the Tax Code) after being entrusted this power by the constitutional reform of 2005:

"(...) Should be considered that the declaration of unconstitutionality of a legal precept previously declared inapplicable in specific cases, but in no way infringes on the contrary, reflects and guarantees the necessary respect for the work of the co-legislators and the full effect the presumption of constitutionality of the law generated by the bodies entitled to do so within a democratic state. This principle, reiterated in the jurisprudence of this Court, is a concrete expression of the respective roles of government and its allocation to the bodies, which is expressly provided for in Article 7, paragraph two, of the Constitution.

Also, subsequent control of the constitutionality of the law, which may result, as in this case, the removal of a provision of positive law, is a competition that seeks to regulate the proper functioning and effectiveness of the rule of law, achieving thus the continued strengthening of systems of checks and balances on the actions of state bodies in a manner

consistent with this division of functions provided for in Articles 6 and 7 of the Constitution. "

Match, at this point, the Constitutional Court of Chile by asserting Capeletti Mauro in the sense that "it is precisely the guarantee of a higher law, that judicial review of constitutionality of laws is its reason for being: and it is a guarantee that it is now considered by many as an important, if not necessary, crowning the rule of law and that, in contrast to the conception of absolute state, is one of the most precious values of contemporary legal and political thought. "

In regard now to the effects produced by the declaration of unconstitutionality of laws, is generally held that the difference between the American system (of judicial review) and Austria (own constitutional jurisdiction concentrated) is that, In the first, that declaration has a simple declarative verification of a pre-existing void ex tunc or retroactive effect, while in the Austrian system, the statement has a constitutive effect of disability, that is, a cancellation effect with effect ex nunc or the future that prevents retroactive.

The Austrian system reflects clearly the thought of Kelsen on the effects of the declaration of unconstitutionality of the law. He argued, in effect, it would be desirable in the interest of legal security itself, not attributed, in principle, no effect, retroactive to the cancellation of general rules. He admitted, however, that certain situations may necessitate a retroactive cancellation, but only in exceptional cases limited to certain types of acts or a certain category of cases. "

The obvious gap generated by the declaration of unconstitutionality of the law has led in several countries (Austria, Germany) is entrusted to the Constitutional Court the power to model the effects of the declaration by way of deferring, in time, the reporting purposes, in order to allow the legislature to assume its responsibility towards the production of the gap.

II. Procedural requirements of unconstitutionality of the law. The case of Chile

1. Comparative law.

Questions of constitutionality of a law with general effect can be promoted by certain constitutional bodies, by the Constitutional Court acting ex officio or through public action. In other words, depending on the particular legal system, the right to bring an action of unconstitutionality before the Constitutional Court or Court is usually not restricted only to certain constitutional bodies.

In many legal systems restrict the possibility of bringing the issue of unconstitutionality until a certain time after the entry into force of the law being challenged.

The general rule, for its part, is that, admitting to handling the question of constitutionality is granted transfer to the co-legislators to express their views on the possible expulsion of legal provision of the legal question within a specified period.

However, the process in motion is usually filed in the Constitutional Court, considering the public interest involved in the eventual declaration of unconstitutionality. Constitutional Procedural Code of Peru has in this sense that "accepting the demand and attention to public interest in the claim at issue, the Constitutional Court officially drive the process regardless of the activity or interest of the parties (...)" (Article 106). The public interest involved in the processes of unconstitutionality of a law relates, certainly, with the clearance of law in respect of constitutional supremacy which is such pronouncements.

In the unconstitutionality of the law is not intended as a general rule, the expression of interest of members of civil society, without having participated in the build process of law, may have an interest in maintaining its validity or, on the contrary, in its declaration of unconstitutionality with the consequent disappearance of the legal system. It can be speculated that the possibility of direct participation of civil society in the constitutional process would own systems only semi-direct democracy, but not representative democracies as abound in our states, characterized by entitling citizens responsibilities training of law to the co-legislators who are obligated to respect the principle of constitutional supremacy.

Then examined the systems compared, there are frequent cases where constitutional courts are empowered to convene public hearings aimed to hear, but not as part of the process, to different people, sectors and entities of civil society and that may have an interest in the process of the law unconstitutional. Decree 2067, 1991, which regulates the constitutional process in Colombia provides for the possibility of a Constitutional Court judge proposes to convene a hearing to which he rendered the contested provision or participated in its elaboration, by itself or by an attorney, and the applicant attend to answer questions designed to delve into the written arguments or clarify facts relevant to the decision. The Court, by a majority of those present, decide whether to convene the hearing.

A broader concept of public hearing on the constitutional process can be found in the Law on Amparo, Habeas Corpus and Constitutionality of Guatemala, Article 139 states: "Hearing, sight and resolution. If there is no temporary suspension or, where appropriate, it decreed, shall be heard for fifteen calendar days to prosecution authorities and any authorities or entities that the Constitutional Court deems appropriate, after which, has been evacuated or not the hearing of office is the date and time for the hearing within a period of twenty days. "Referring to" entities "we mean, in any case that natural persons were prohibited them an opportunity to be heard in the constitutional process, unless it is the plaintiff or applicant who is a party.

Although it has been argued that the processes aimed at addressing the possible unconstitutionality of a law, the trial becomes unnecessary, can not deny the importance for the Court, the determination of all possible scenarios of application of the rule, to conclude

if they all translate into a conflict with the Constitution, the only hypothesis that can eject the legal standard as the product of an abstract review of this nature. Hence, for the Spanish Constitutional Court, the importance of hearing in the phase of the trial, can not be minimized by reducing it to a mere formality devoid of transcendence.

That is why it seems that the process for the declaration of unconstitutionality of a law should not be restricted to a hearing in which only reiterate the claims of the parties. On the contrary, all advised hear other points of view concerning, for example, the effects can lead to the declaration of unconstitutionality in society and, obviously, can go beyond mere interest of the parties.

2. The proceedings on constitutionality of a legal precept previously declared inapplicable in Chile.

The "question of the constitutionality of the law" can be conceptualized as the power of the Constitutional Court declared unconstitutional in the abstract, with effect ex nunc and erga omnes, a legal precept and hereby declared that power can be exercised via trade or driven public action.

In accordance with the provisions of Article 93, paragraph one, No. 7 of the Chilean Constitution, is vested with the Constitutional Court "to resolve the majority of four fifths of its members in office, the unconstitutionality of a legal provision declared unenforceable" and as provided in subsection twelfth of the same article, "Once settled in a pre-sentence declaration of inapplicability of a legal provision (...), public action will require the Court declared unconstitutional, without prejudice to the right of it for declare it officially. Correspond to the respective constitutional organic law establishing the eligibility requirements in the event that public action is pursued, as well as regulate the procedure to be followed to act on its own. "

The law referred to this provision of the Constitution remain with the Law No. 17,997, the Constitutional Organic Law of the Constitutional Court, which consolidated text, coordinated and was recently set by Decree-Law No. 5 of 2010, the Ministry General Secretariat of the Presidency, and that Articles 93 to 104 of Paragraph 7, entitled "Questions of constitutionality of a statutory provision declared unenforceable," regulates the procedure.

As general characteristics of the issue of unconstitutionality of the law, it may indicate the following:

a) It is a constitutional ex post control, and acting on current legal requirements and aims to repeal the law unconstitutional;
b) is a general purpose mechanism or erga omnes, debugger regulatory system, the rule declared unconstitutional is expelled from the legal system;
c) is a control with effect ex nunc or retroactivity, as is what the Chilean Constitution, stating in its Article 94 which declared unconstitutional the legal provision "shall be

revoked since the publication in the Official Journal of the sentence to house the claim , which produce no retroactive effect; "
d) The procedure can be started automatically by the Court, or solicitation of an active subject in the exercise of public action under the Constitution to seek a declaration of unconstitutionality;
e) requires as a precondition a sentence that may be received at least one relapse inapplicable in the same legal principle and
f) requires a quorum to resolve increased, as the Constitution requires a majority of four fifths of the Justices of the Court, unlike the inapplicability of the law, which requires only an absolute majority.

Regarding their origin, can be obtained on current legal requirements, before or after the 2005 constitutional reform, or part thereof, to the extent that at least once they have been previously declared inapplicable. The second paragraph of Article 93 of the Constitutional Organic Law of the Constitutional Court (LOCTC) clarifies that "this issue can not be promoted to a treaty or of one or more of its provisions."

The active subject of the action of unconstitutionality, as noted, may be the Constitutional Court, ex officio, or any person by way of public action, and this will determine the form of initiation of proceedings: (i) If it was initiated trade, LOCTC Article 94 provides that the Tribunal "so declared in a preliminary ruling founded, which individualize the sentence that serves as inapplicable livelihoods and breached constitutional provisions." That is, the Court must issue an order founded by which an order to open the process, known as the "indictment" on the other hand, (ii) if it is started by way of prosecution, Article 95 states that LOCTC "the person or persons or corporations that exercise must be found reasonably request, stating precisely the inapplicability previous sentence is based and constitutional arguments that serve as support."

In the second event described, that is, if the process is initiated by public action, it should be a review of admissibility by the Court. So, if you do not meet the new requirements set for public action, the requirement "will not be accepted for processing and have not filed for all legal purposes" (Article 95, paragraph two LOCTC), decision to be be established and issued within 3 days since the account of the requirement in the Full Court. Notwithstanding the foregoing, if a defect in form or omission of information, the Court will issue a resolution which "shall allow interested parties within three days to remedy those or complete them, under penalty that "if they do not, the request will not be submitted for all legal purposes" (Article 95, paragraph three LOCTC).

If the process initiated by public action passed the admissibility stage, is undergoing a second examination at the admissibility stage, the Court must decide in this regard within 10 days after received for processing. LOCTC Article 96 authorizes the applicant to apply for eligibility allegations, optional for the Court to grant them, but if it does, the same legal provision to be given transfer orders for 10 days "who appear as parties to the issue of unconstitutionality" , to make their comments within that period.

Article 97 provides that LOCTC shall declare the inadmissibility of the question of unconstitutionality promoted through public action in the following two cases: (i) if no previous statement declaring the contested legal rule is inapplicable, and (ii) the question is based on a different constitutional defect which led to the declaration of inapplicability of the contested provision.

In accordance with Article 94 of the Constitution, it states that Article 97 LOCTC against the resolution declaring the inadmissibility no further recourse, thereby ending this event, the constitutional process. In any case, the decision to declare the inadmissibility must be established and its effect is that "the requirement will not be submitted for all legal purposes, must also be communicated to the Chamber of Deputies, the Senate and the Speaker of the Republic.

In the event that the request is declared admissible, or when this has been initiated ex officio by the Court, the procedure continues by placing the relevant decision-that is, declaring permissible for public and initiates the process of trade - to the attention of both Houses of Congress and the President of the Republic who, as of constitutional bodies concerned, to make observations and accompanying background may deem appropriate, within twenty days (Article 98 LOCTC).

The procedure continues with the hearing of the case. Thus, once made the observations or the background accompanied by constitutional bodies concerned or deadlines have passed for this, the President of the Court order to bring the car on and the cause will be added to Role in State Affairs Board. Then proceed to public hearing of the trial, which starts with the relationship and continue with the arguments of the parties so request.

As explained below, is of the utmost importance to note that the Chilean Constitutional Court has held that, ensuring the democratic principle and applied by the right of petition set out in Article 19 N ° 14 of the Constitution of Chile, is arranged in these processes, in addition, conducting public hearings prior to the hearing of the case, allowing any person or institution interested in providing background to contribute to resolving the matter might go to make present what the Court deems appropriate, allowed to also make written submissions to that effect. The immediate foundation of the resolution ordering public hearings will be found in Article 37 of the Constitutional Act of the Constitutional Court can "enact it deems necessary measures aimed at the most appropriate conduct and outcome of the case before it."

Experience shows that these public hearings and input from the general public, directly influenced the judgments of the Constitutional Court, as exemplified below.

After hearing of the case, the Full Court should adopt the agreement and appoint the Minister editor of failure, without prejudice to be understood before it could also enact measures for adjudication. The deadline for passing sentence, under Article 100 LOCTC, is thirty days from the end of the handling of the case, and may be extended up to another fortnight, by resolution of the Tribunal.

In the event that the ruling declaring the unconstitutionality of all or part of the challenged statute, which must rely solely on infringement of the constitutional requirements or which were deemed violated by the previous statement of inapplicability that serves as support- , as stipulated under Article 94 of the Constitution shall be published in full in the Official Gazette within three days, after which time produce their effects, which consist of the legal provision declared unconstitutional shall be revoked, without retroactive effect, This means that acts done under the provision declared unconstitutional prior to the publication of the statement are valid.

It has been noted in this connection that "in other words, the sentence does not affect the rights acquired or legal positions under the provision is declared unconstitutional, before the publication of the decision" (Ríos Alvarez, Lautaro, El Nuevo Constitutional Court, "Constitutional Reform", LexisNexis, 2005, p. 642).

Regarding the effect of the decision declaring the unconstitutionality, the Constitutional Court in its ruling Roll N ° 1710 indicated:

"That the doctrine and the same sentence have pointed out that this provision expressly stipulates that the Constitutional Court's ruling only prospective effect (Nogueira, Humberto, abstract repressive control of the constitutionality of laws in the 2005 constitutional reform the powers of the Court Constitutional and effects of their decisions, in: Francisco Zúñiga (coordinator), Constitutional reform, LexisNexis Publishing, 2005, p. 615), ie effects from the Entry of Judgement "to the future, not affecting the above situations produced under that provision "(op. cit., p. 608). In this way, 'or the Constitutional Court or the Constitutional Organic legislature may give retroactive effect to the decisions to expel our legal constitutional rules' (op. cit., P. 615).
The Constitutional Court, meanwhile, said that the fact that his sentence is without retroactive effect means that does not affect situations occurring or actions taken prior to its publication in the Official Journal (Judgement Role 597, paragraph 5 º) (Paragraph 167 º) ";

"That as a result of this we can conclude that the retroactivity means that the decision can not affect 'previous situations produced under this rule' (Nogueira, Humberto, abstract repressive control of the constitutionality of laws on constitutional reform 2005 of the Constitutional Court's jurisdiction and the effects of its judgments, op. cit., p. 467), or 'situations or acts occurring before' (Judgement Role 597). Thus, the ruling handed down by the Constitutional Court can not affect consolidated, that is, born and completed under the rule of rules declared unconstitutional or (whereas 168 º) "

And the Court has concluded in the same sentence, "the constitutional rule that marked the result of adequate consideration between legal certainty and constitutional supremacy. While the supremacy of the Constitution would require the expulsion of all rules which conflict with the Constitution, the legal certainty required to limit such effects do not affect

those who acted under the expectation that the existing legal framework was regular (whereas 169 º) "

Clarifying the scope of the effect of the ruling of unconstitutionality, the Constitutional Court also has held in the aforementioned statement that "it should be noted that the repeal or removal of a standard by a declaration of unconstitutionality has a different scope than repeal of a rule by the legislature. The Constitutional Court is an organ failure according to law (Article 92 of the Constitution), not a deliberative body to decide on policy issues of merit, such as co-legislators. Thus, his declaration of unconstitutionality is based on the rule has a vice. Instead, the repeal by the legislature based on a new political assessment of the situation. Merit is a political decision. In fact, it is possible to draw a parallel between the repeal of unconstitutionality made by the Constitutional Court and the repeal made by the legislature, with the invalidation and revocation of an administrative act performed by the Administration. Some situations are based on a defect and the other, however, on an assessment of merit "(paragraph 171 °).

III .- The public hearings on the unconstitutionality of the law: the Chilean experience.

As seen in the previous section, the procedure in relation to the issue of unconstitutionality of a legal precept previously contemplated hereby declared, as provided in Articles 97 and 98 LOCTC, intervention in the process of which it has recourse in the case has started the question in the exercise of public action and, therefore in this case as one in which the matter has been initiated ex officio by the Constitutional Court ", the Chamber of Deputies, the Senate and the President of the Republic , who will be notified, as a constitutional organ concerned, the existence of this constitutional process for their comments or join the history they deem appropriate, within 20 days.

In relation to the above, Article 44 provides that LOCTC "are those bodies and persons entitled, in accordance with Article 93 of the Constitution of the Republic, are enabled to promote before the Court each of the issues and matters jurisdiction, "adding that" those interested are constitutional bodies, in accordance with this law, may be involved in each of the issues to be promoted to the Court, whether in defense of the exercise of its powers, whether in defense of order existing legal "and that" parties to the proceedings before the Court on or organs and the person or persons who, being constitutionally entitled, have promoted a matter before it (...). They may also be interested constitutional bodies, with the right to intervene in an issue, express their desire to be taken as part of the same date that gives rise to comment and make history. "

Interestingly, given the constitutional supremacy involved in the process of unconstitutionality of the law and the impact of any declaration of unconstitutionality, one would think that in addition to the constitutional bodies concerned and the applicant, if any, might be relevant hearing in the process to other people, institutions or groups who may be interested in resolving the issue or even not having it, can contribute to the debate, both legally and technically. In this sense the doctrine already stated, even before the

amendment of the LOCTC and the establishment of the special procedure applicable to the question of the constitutionality of the Act, for example, Gastón Gómez Bernales argued that the legitimacy conferred by both the reform Constitutional Court and any person, to claim the unconstitutionality assuming the inapplicability previous works on the basis that "there is a public interest in determining whether unconstitutional or not the policy statement that covers the provision and, This opens a broad legitimacy (which excludes those who obtained the favorable ruling inapplicable.) (...) In such a case, the plenary would vote on the repeal of the provision in a manner which gives assurances that there will be debate on the subject. (...) The LOCTC should establish, for the Constitutional Court determines the constitutionality socially open proceedings with extensive involvement of those whose constitutional views on the disputed law (not the representation of private interests) "(Gómez Bernales, Gaston, The Constitutional reform to the Constitutional Court, on "Constitutional Reform", LexisNexis, 2005, p. 681).

Is it the case that the Constitutional Court has adopted this reasoning and, even when not required LOCTC has included procedures unconstitutional legal provisions of the existence of public hearings open to bodies and persons who are not entitled under the terms Article 44 LOCTC, including the public at large all, and allowing those who are not party to the proceedings as he may attend, orally or in writing, to express their interests and insights on the constitutionality of the legal precept questioned. This has become such an extent interest and assist in the task of the Constitutional Court can even see who has come to influence the decisions made by the Judiciary in the constitutional processes of the law, as seen in cases are cited below.

"Case Isapres"

The Role of the Constitutional Court ruling No. 1710 of August 6, 2010, resolved that the numerals 1, 2, 3 and 4 of the third paragraph of Article 38 ter of Law No. 18,933 on Salud (ISAPRES) were unconstitutional.

Article 38 ter is a legal precept quite large (has seven paragraphs) and regulates a range of issues on the pricing of health plans that the member is obligated to pay to the respective Isapre. Specifically, the numerals 1, 2, 3 and 4 of paragraph three, which were declared unconstitutional, setting out the rules that would subject the establishment of age ranges in instructions issued by the Superintendence of Health. The observance of these rules was foreseen in the law as a condition of exercise, both the authority of the Superintendent to set the table structure of regulatory factors in the second paragraph, and the free determination of the factors in the table by the Private Health Insurance, pursuant to paragraph four of this article.

In relation to the above, it is worth noting that in the current system in Chile, the tables of factors are incorporated into the scheme adopted by the legislature determines that the value Isapre can charge by the health plan, is composed of the product multiplying the base price allocated to the respective plan, which represents the overall costs, depending on their coverage and benefits, "the factor that applies to the table of factors established by and

incorporated into the plan Isapre each member chooses, and that represents the specific costs associated with the person who hires, given by age, sex and condition of contributors or cargo. What the Court held unconstitutional, then, were the rules that fix the above paragraphs of the third paragraph of Article 38 ter, in relation to the power of the Superintendency of Health to define, by instructions of general application, the structure of the aforementioned tables of factors.

The process is initiated ex officio by the Court, having previously held the same legal rule inapplicable on four occasions (Case roles N ° s 976, 1218, 1273 and 1287). And in compliance with due process in the Constitutional Act of the Constitutional Court, the ruling that ordered the opening of the process is made known to the President, the Senate and House of Representatives, in their qualities of constitutional bodies concerned , making the President exercised his right to submit comments and calling for a declaration that the legal provision was not unconstitutional and also be heard in the hearing of the case to the allegations of an attorney on behalf of the Executive.

But, in addition, Constitutional Judiciary ordered the holding of public hearings before the day of the hearing of the case, which could provide written and oral comments from interested institutions and organizations representing the interests involved in the subject matter of this process constitutional, setting a deadline for that purpose. Public hearings attended these various individuals and organizations the most extensive range, including the same ISAPRES, associations, academics and even individuals.

As noted, the LOCTC does not require that attend the process which was opened officially by the constitutional court, but the bodies concerned. However, using the option provided for in Article 37 LOCTC, by order of May 11, 2010, declared that "the Constitutional Judiciary believes it can contribute to the best resolution of this hearing process, too, to those institutions and organizations representing the interests involved in the constitutional process, with specialized information on the subject of cars, want to go with or exposed in the form and opportunity available. " Then decided to open the file in a special notebook to add presentations to formulate the aforementioned institutions and organizations, which contain comments and history, citing a public hearing to be held two days before the hearing of the case, in which could expose all the organs and institutions who so requested and previously made written submissions to the Tribunal.

Thus attended, and were heard by the Court, stating its findings against the declaration of unconstitutionality

- A lawyer representing the Isapre Consalud SA;
- A lawyer representing the Isapres Banmédica SA and Vida Tres SA;
- A lawyer representing the Association of Chile AG Isapres;
- The President of the Private Health Insurance Association of Chile AG;
- A lawyer representing the Isapre Cruz Blanca SA, and
- A lawyer representing the Isapre Colmena Golden Cross SA

For their part, were present and were heard at public hearings, expressing his opinion in favor of the declaration of unconstitutionality

- One representative of the Society Javier Fuenzalida and Company;
- A lawyer representing several deputies of the Socialist Party
- A lawyer for himself and on behalf of InfoLex Limited;
- A lawyer representing the Corporation Human;
- Two doctors on behalf of the Society of Geriatrics and Gerontology in Chile, and
- Four lawyers in their capacity as professors of constitutional law.

Furthermore, the process appeared accompanying reports, without having asked to be heard in the audience pointed out:

- Height Management, represented by two directors;
- The Isapre Masvida SA, through its general manager, and
- The Medical College of Chile (A.G.).

The text of the statement Rol N ° 1710, whose length reaches 215 pages, you can discern that the decision has been relevant, in addition to the large number of national and foreign doctrine cited the legislative history of article 38 ter, that has undergone several modifications over time. This part was also important intervention in the process did the President, through written comments, urging the rejection of the declaration of unconstitutionality and on whose behalf, agreed to plead at the hearing on the causes attorney.

After extensive analysis, the Constitutional Court declared unconstitutional the numerals 1, 2, 3 and 4 of the third paragraph of Article 38 ter of the Private Health Insurance Act, holding that the text was contrary to equality before the law, the right to health protection and the right to social security, constitutional guarantees contained in Nos. 2, 9 and 18 of Article 19 of the Chilean Constitution, as follows:

"That, consistent with the method described in the present case the Magistrate has considered whether Article 38 ter of Law No. 18,933, subject to the constitutional process: a) conforms to be appropriate for the constitutional purposes of protecting equality before the law, especially between men and women, to protect the health of the people involved in the private health system in which the act Salud, especially in regard to state preferential role in ensuring the implementation of actions health and protect the free and equal access to them all these people, and ensuring that people have access to the enjoyment of the uniform basic benefit social security, guaranteed by the State; b) conforms to be indispensable to achieve the specified purposes, and c) if out of proportion to those objectives "(paragraph 143 º)

"That, as a corollary of the analysis, the Court has been convinced about the numbers 1, 2, 3 and 4 of the third paragraph of Article 38 ter of Law No. 18,933 do not meet the conditions described in the paragraph above and are therefore incompatible with the right to

equality before the law, especially between men and women, and injured, also the right to health protection and the right to social security, in the sense that they are all recognized and secured in our Constitution "(paragraph 144 º)

(...) "That, in the same order of consideration, it is essential to indicate that the contract holds an affiliate with a particular Isapre not amount to a mere individual health insurance, governed by the principle of autonomy, because it operates in relation to a constitutionally guaranteed right to persons under social security and that the private entity that provides insurance, is assured by law, a quote, or a guaranteed income. Thus, the rules governing the legal relationship of public policy "(paragraph 154 °)

(...) "That, consistent with the rationale to this point and noting the express recognition in the case said the body co-executive, the judiciary finds that the wording of paragraphs 1, 2, 3 and 4 of paragraph three of article 38 ter, whose correlate of the latter is in the second transitory article of Law No. 20,015, as might be found in any other regulation to be issued under the broad mandate for delivery, is contrary to the Constitution of the Republic affected, as the cause of present concerns, the numbers 2 °, 9 ° and 18 ° of Article 19, and so will be declared "(paragraph 162 º)

Finally, it highlights the appeal made to the legislature that is contained in paragraph 163 º of the sentence, by stating that "the Magistrate considers it necessary to also do this to determine the structure of the tables of factors and setting factors each must conform to establish, in exercise of its powers, the co-legislators to give full effect to the decision in this ruling. "

This statement Rol No. 1710 contains two dissenting votes, the Minister of the Court Marisol Peña Torres, and the Minister Mr. Enrique Navarro Beltran. In the first dissent, the Minister Peña who was held to deny the declaration of unconstitutionality of article 38 ter, are taken into consideration explicitly to file a report with the Isapre Banmédica SA, which provides a model or example structure factor table, concluding that it did not stem, in constitutional terms, lack of reasonable differences. The same dissenting opinion argues on the basis of a report by the Health Superintendence was escorted to the Court by the President of the Republic, in relation to the impacts that would eliminate the factor table, and another report containing Private Health Insurance Association, documents also realize the international experience at the point in debate.

Dissent of the Peña Minister also refers to the content of these same reports, regarding the possible effects that would produce the declaration of unconstitutionality of article 38 ter, to conclude, based on data contained in them which repealed the table factors, would create the effect of leaving Isapres at liberty to determine these weighting factors, generating a scenario of uncertainty and concluded that it could generate an effect greater than that unconstitutionality to be avoided through the statement unconstitutional.

"Civil Code Case 2331"

The experience of the "case Isapres" is repeated in the present Rol No. 1723, currently pending before the Constitutional Court, have also been initiated ex officio by the latter, which dealt with questions of constitutionality of Article 2331 of the Chilean Civil Code.

The disputed legal provision establishing the illegality of compensation for moral damage in case of injuries, making an exception to the general rule on tort liability contained in the Civil Code, under which the harm is compensable, a provision already has been declared unenforceable for two particular cases, roles Case No. 943 and 1185, thus fulfilling the prerequisite for the start of the issue of unconstitutionality of trade. In previous statements are considered inapplicable to Article 2331 Civil Code was contrary to the Constitution in specific cases where it was challenged by injury to the right to honor the person and his family that the Constitution guarantees.

This process has been made aware of the constitutional bodies concerned, not used their right to make comments or accompany a history in time. However, since there is a lawyer who has accompanied a presentation and the President of the Federation of Social Media, has also submitted a report entitled, which prompted a decision dated September 28, 2010, the court called citizenship, extending the possibility that attend to the cause by providing background information and comment not only legitimate bodies. In that resolution, using the powers conferred by Article 37 of Constitutional Law, the Court taking the view "that can contribute to the best resolution of this process (resolved) to hear also to those persons, institutions and organizations representative of the interests involved in the constitutional process, with specialized information on the subject of cars, want to go with or exposed in the manner and timing identified in this resolution "This ordered the file opened in a special notebook to adding the presentations submitted in this connection, citing a public hearing to be held in the two days preceding the hearing of the case, which may be heard the people, institutions and organizations that request it.

The Constitutional Court, understanding that, as in the case Isapres, is faced with resolving an issue of high-impact media and citizen, has been chosen again for convening these hearings and, of course, one could argue that without challenging the content of what they expose, in addition to the written record that has been gathered the process, whether legal or technical, will provide the final resolution of the matter.

"Case Pill"

Finally, it is interesting to refer to a statement that while no impact on the declaration of unconstitutionality of a legal rule, but in the unconstitutionality of a statutory Decree approved by the President of the Republic, demonstrates the role played by public hearings in constitutional procedures substantiated by the Constitutional Court of Chile.

The Constitutional Court in Case Roll N º 740 of April 18, 2008, and after a process of high impact city, political and media, found unconstitutional the free distribution to the public health system of the so-called "pill the day after. "

The process was initiated by request of thirty-six deputies in the exercise to the Constitutional Court, according to the competition that gives the No. 16 of Article 93 of the Constitution, declared unconstitutional all or part of Supreme Decree N º 48, 2007, the Ministry of Health, which approved the "national norms on fertility regulation" and that the distribution consulted in the offices of the National Health Service, free of charge, the "morning-after pill." In this case, you can see how influential these hearings and the records that were added to the process in the Court's final decision, taking into consideration that the constitutional issue in question was linked strongly with the scientific debate is still not peaceful on the effects abortion or the pill and the levonorgestrel component.

In this process, submitted comments in their respective qualities of constitutional bodies interested in the question of the constitutionality of a bill by the ruling, the then President of the Republic, Michelle Bachelet, who urged its rejection, considering constitutional decree rules challenged and the Comptroller General of the Republic, who issued an opinion rather from the formal point of view.

Also, the Deputies requesting accompanied a series of reports prepared by lawyers, doctors and college houses. Also, and although not eligible parties, several people, including several Members and bodies representing different sectors of national life, made presentations to the Tribunal, which decided to add to the file history or, where appropriate, considering the arguments made enforced.

The submissions received by the Court in favor of constitutional requirement were:

- The Chairman and Secretary of the Citizens Movement Move Chile;
- A representative of the Network for Life and Family;
- A representative of the Foundation Institute of Evangelicals;
- A lawyer in his capacity as professor of constitutional law;
- A lawyer and two physicians in their capacity as professors at the Catholic University of the Holy Conception and
- The Bishop of Rancagua in his capacity as President of the Episcopal Conference of Chile.

For his part, made presentations against the requirement:

- Two lawyers representing 358 people who were classified as users of contraceptives;
- A doctor, for itself and on behalf of the Chilean Institute for Reproductive Medicine;
- A lawyer representing 49 Members;
- A lawyer representing 30 Members;
- President and Treasurer of the Chilean Association for Protection of the Family;
- The Dean of the Faculty of Medicine of the University of Chile;
- A doctor in his capacity as National President of the College of Pharmacists of Chile (AG)
- A doctor in his capacity as President of the Association of Gynaecologists and Obstetricians of the Metropolitan Region AG;
- A doctor and President of the Chilean Society of Obstetrics and Young Child;

- A lawyer representing several Deputies
- An attorney representing the Chilean Association for Family Protection and
- One representative of the Association for Civil Rights.

Several of the people, institutions, agencies and groups who made presentations, attended public hearings later that the Court proceeded to hear prior to the hearing of the case.

In the sentence Roll N º 740-which reaches 277 folios, is contained a complete section for the emergency hormonal contraception, stating that in deciding on the constitutionality of Presidential Decree contested essential to specify what constitutes such contraception (recital 25 º). This relates to the finding of the Tribunal in paragraph 21 °, which held that "it is clear that the nature of constitutional conflict to be resolved on this occasion by the Constitutional Court has the necessary basis for the effects on rights constitutional cause hormonal contraceptive methods that object, not considered in isolation but as part of the contents of the contested mandatory standard, which is far from a mere abstract review of constitutionality is reduced exclusively to the contrast between a standard infra and former top hierarchy positive. And is that the increasing complexity of the issues to be addressed, at present, the constitutional courts means that, in cases like that of the species, the tribunal must weigh certain facts related to science or technology, to arrive at a solution that effectively ensures the material and formal supremacy of the Constitution (...). "

In this effect, provides a comprehensive analysis of the reports that accompanied the process and realize the state of medical science on the subject, and concludes, among other things, that:
"(...) As you can see, there are opposing views about the effects of emergency contraception when they relate to prevent implantation, since the evidence provided by medical science is contradictory and is surrounded by elements that definitely convinced order that it will not affect the life of a human being conceived but not born that deserves full constitutional protection as discussed below. This is particularly remarkable if, as has become evident in this process, studies to demonstrate-or rule "that effect have been reduced to animals, resulting questionable in the opinion of these specialists, their practice in humans (...) "(point 33 º)

And that "(...) to these judges, and those who have been mentioned, the lack of consensus among experts and thus, the lack of certainty about one of the possible consequences of emergency contraception, as is impedes the establishment of a human being with such characteristics is obvious. Such evidence has a decisive impact on the effects of this ruling, it affects neither more nor less than at the time of the beginning of the life of a human being, as explained below, the Prudential seeks constitutional preferential manner "(paragraph 36 º).

Finally, the Court determined that "in light of the foregoing, the Judiciary can only note that the scientific evidence related facility to this process can not exclude, categorically and conclusive, the possibility that the intake of so-called 'morning after pill after ', either in its pure version of progestin or combined or the Yuzpe method, is not able to affect the

implantation of a fertilized egg or embryo and, ultimately, a human being, in terms have been defined by medical science itself "(paragraph 39 º).

Considerations alluded to in the preceding paragraph are of utmost importance given that the Court ruled finally that, having weighed the views of the scientific world in his own merit, and "outside any connotation outside legal standard-constitutional" (point 62 º), there was reasonable doubt about the abortifacient nature of the pill and therefore the possible involvement of the right to life is a person who already since its inception and, taking into account the principles "pro homine" or "favor libertatis" should be "(...) favor this interpretation that favors the right of 'person' to life against any other interpretation involving override that law" (paragraph 67 º), thus accepting the request, declaring unconstitutional the morning after pill.

In the concurring opinion of the Minister Marcelo Venegas Palacios, also appreciated the use of scientific information submitted during the proceedings, based on which concludes that there is a real possibility of causing abortion in a proportion of pill users.

The sentence was agreed with the dissenting opinion of Judge Juan Colombo Campbell, Hernán Vodanovic Schnake, Jorge Correa Sutil, and Francisco Fernández Fredes, highlighting the dissent of the latter two Ministers to the effects that interest us, because they reject the constitutional requirement in all the parties because:

"(...) We came to the belief that hormonal methods of emergency contraception that are contained in section 3.3. Decree mentioned, no attempt against the life of the unborn and against human dignity. " They add that "there are, however, the positions on this debate that we have to agree this dissent, but the conviction that the evidence cited by the applicant and the accumulated or referenced in this process can not sustain even a question reasonable about the two methods of emergency hormonal contraception contained in Section 3.3. Supreme Decree challenged are able to prevent the development of a human embryo. In the chapters that follow develop how we got to that conviction. We do not deny that scientists hold a debate on the effects of the emergency hormonal contraceptive system, but the existence of such controversy is not sufficient to argue that there is reasonable doubt about the effects antianidatorios or hold back the development of human embryo. Neither are the legends or labels of the products concerned. Reasonable doubts about the harmful effects of a drug product, when it has already been validly authorized by competent authority can not rely on the utterance of a doubt, the finding of a debate or a legend declared as an effect not ruled out a sign, but the existence of scientific evidence so warrants "(paragraph 1), to conclude that" the proper functioning of democratic institutions and decision-making bodies requires, according to These dissidents, who are contesting the distribution of such products convince with evidence that they are capable of acting effectively against life. In the species do not succeed and therefore disagree with the decision "(paragraph 1).

I. Conclusions from the point of view of democracy and the constitutionalization of the law.

Nohlen Dieter has held that "the constitutional court has an effect on the consolidation of democracy in Latin America, but it exerts itself undergoing the effect of a number of factors that influence his work, especially the state of their own consolidation."

Is traditionally thought that constitutional courts can support democracy by contributing to the country to be governed democratically. However, one approach would seem to follow attached to the idea of the Constitution as merely a limit on the exercise of state power.

However, the development of the so-called "constitutionalization of law" has made the transition from a state-centered constitutionalism to one focused on the individual. This is essentially a change of axis that affects the very idea of the Constitution and, indeed, tends to strengthen democracy, since it requires an appreciation of human dignity and the rights deriving from it.

In this context, it seems that the processes that seek to declare unconstitutional the law can no longer reduced to a contest between parties that support a given claim proceedings. On the contrary, it is crucial for broad consideration of the people who make civil society is taken into account, therefore, inevitably be impacted by the possible expulsion of legal provision unconstitutional. Do not forget that these constitutional processes, the primacy of public interest identified by the need to purge the legal system and effectively ensure the supremacy of the Constitution creates a broad consensus.

How do you consider such interests without the people that embody them are parties to the constitutional process? A concrete way of doing this is, just opening the possibility of being heard in public hearings within the constitutional process. The opinions and views expressed in them can not be considered binding on the Court, but may be valuable evidence to resolve the regulatory conflict that have been submitted. This approach is, moreover, consistent with the idea that, in constitutional processes, attended mainly normative conflict posed, no proof is necessary.

That is the approach that has done recently the Chilean Constitutional Court on the conviction that through this approach, the constitutional process legitimate fully in society, while contributing to the new conception of the citizen as co-agent, co -venturer and co-head of the collective issues in a substantive rather than formal democracy where constitutional jurisdiction is also an active role in strengthening the rule of law, but also of democracy.