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MINI-CONFERENCE ON "THE RULE OF LAW"

REPORT

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1. Introduction

The background of the Constitutional Tribunal in Chile is found in a speech given by former President Balmaceda on April 20th 1891. This speech was made during the bloody Chilean civil war, three decades before Kelsen. Considering the conflicts of competence between State powers and the constitutional conflicts of laws, Balmaceda stated that "*it would be convenient to create a special Tribunal composed of three members designed by the President of the Republic, three other members designed by the Congress and three by the Supreme Court, to settle, without appeal, the conflicts occurring between State powers, in the cases and ways established by the Constitution";* because *"it is not natural, nor just, that in case of conflict between State powers one of these organs is the one called to judge, because it creates a supremacy of authority disadvantaging the other, and it would never be convenient that one public power is simultaneously party and judge in a conflict*".[1]

The Constitution of 1925 did not originally establish such an institution. Rather, the Constitutional Tribunal was created by a constitutional reform in 1970, which gave it power to resolve the questions of constitutionality brought forward during the legislative process.[2]

The first Constitutional Tribunal functioned for about two years. In 1973, the Military Junta disbanded the Tribunal because it was considered "*unnecessary*", which may be comprehensible only given that the National Congress had already been closed.[3]

Afterwards, the original text of the Constitution of 1980 established a shared judicial review system in constitutional matters. The Constitutional Tribunal reviewed laws before they were enacted and the Supreme Court reviewed them ex post in the "inapplicability" actions.

During the Chilean transition, the Constitutional Tribunal played a role in increasing democratic institutionalism, particularly regarding citizen participation and the mechanism of judicial review. In fact, it had a fundamental role in the constitutional review of the so-called "*political laws*" promulgated during the 1980's.[4]

After the Chilean transition to democracy in 1990, the Constitutional Tribunal continued its work primarily on the constitutional review of constitutional organic laws, as in the original French model. It was also entitled to make constitutional rulings when requested to do so by parliamentary minorities, whether about decrees or bills.
The constitutional reform of 2005 changed the composition and powers of the Tribunal. Its functioning, whether seated in plenary fashion or in panels, has been explicitly determined. The general rule in any case is plenary decision making.

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1 Speech given by President José Manuel Balmaceda at the National Congress on April 20th, 1891, in BALMACEDA, JOSÉ MANUEL. *Discursos de José Manuel Balmaceda: Iconografía*. Santiago: Dirección de Bibliotecas, Archivos y Museos, 1991-1992. 3 v. en Vol. II p. 369.

2 The constitutional reform of 1970 established that the Constitutional Tribunal had to resolve, among other issues the "*questions of constitutionality that are brought forward during the legislative process and the process of approval of international treaties by the Congress*", as well as those issues "*regarding the constitutionality of decrees having force of law*" and "*the claims submitted in case the President of the Republic does not promulgate a law when he has to do, or promulgates a different text from the one that constitutionally corresponds*".

3 Decree Nº 119, published in Official Bulletin of November 10th of 1973, dissolved the Constitutional Tribunal, referring to "*the dissolution of National Congress established in Decree Nº 27 of September 21 of current year*" and the fact that the Constitutional Tribunal "*has as primary function the solution of the conflicts between Executive and Legislative Power, that are impossible to occur since the National Congress is dissolved",* and therefore, it was considered that *"the existence of a Constitutional Tribunal [i]s unnecessary*".

4 The so-called "*political laws*" are those corresponding to Elections Tribunal, Political Parties, Popular elections, Electoral Service and state of emergency.

Among the new powers that are granted to the Chilean Constitutional Tribunal, it seems important to emphasize preventive review of some international treaties, when they involve constitutional organic law matters.

The Constitutional Tribunal has maintained its jurisdiction for the preventive examination of the constitutionality of laws, either constitutional organic laws, or questions regarding a bill during its processing. In several cases, the National Congress´ role in certain bills has been raised. Of course it should be noted that the fact of having participated in a rule´s approval does not disqualify parliamentarians from submitting it for constitutional review. It should also be noted that questions of constitutionality can be made during the bill´s processing, *"which implies that this period starts when the draft bill is accounted in the House of origin and extends to its enactment"*.[5]

It should be noted that in the Chilean constitutional system, the hearing of habeas corpus actions and the protection of constitutional guarantees belong to the ordinary courts (Courts of Appeal) and not to the Constitutional Tribunal.

The constitutional reform of 2005 settled exclusively in the Constitutional Tribunal the review of the constitutionality of laws. So, the Tribunal will not only verify the constitutionality of laws during their legislative process (for all organic and interpretative laws, and at the request of parliamentarians) but it also will deal with the "inapplicability" action.

The "inapplicability" action is not identical to the "inapplicability" action that was previously carried out in the Supreme Court, since under the new action the Constitutional Tribunal must declare the inapplicability of a legal rule whose application is contrary to the Constitution, which is a specific rather than a general control.

The Supreme Court maintains the review of decisions for violation of the law through the appeal in cassation, which ensures uniformity in its application, while the Constitutional Tribunal verifies any contravention of the Constitution by the law in particular cases.[6]

In other words, the inapplicability action aims to exclude from judicial application the challenged legal precept for being unconstitutional in that specific case, rather than to set the correct meaning and scope of the rule, which is an exclusive attribution of the common jurisdiction and, in particular, of the appeal in cassation.

The inapplicability shall not only be requested by the parties of a trial, but also by the judge himself. In addition, the reform of 2005 empowered the Constitutional Tribunal to determine the constitutionality of legal dispositions for which inapplicability has been previously declared in specific cases.

That decision must be adopted by 4/5 of the judges. The procedure can be initiated by the Tribunal itself or by the request of a member of the public.

Finally, it should be noted that the Tribunal has no obligation to declare the unconstitutionality of a legal disposition previously declared inapplicable, since this is an "*ultima ratio*" measure. In fact, on three occasions the Tribunal has dismissed a case in such circumstances.

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5 Case N°1655-10, April 1st 2010, paragraph 3rd.

6 Indeed, as this Tribunal has sustained *"in the inapplicability by unconstitutionality the Constitutional Tribunal has only been authorized by the Constitution to make specific control of constitutionality of the impugned legal provisions and therefore has not been called to resolve on the application and interpretation of legal rules, which is competence of the ordinary judges, in accordance to the extensive jurisprudence of inapplicability's requirements,"* (Roles N°s 1314-09 y 1351-09).

2. The concept of Rule of Law in the Constitutional Tribunal´s case law

The Constitutional Tribunal of Chile was created to be the organ that protects the supremacy of the Constitution, assuring that the authorities would adequately exercise national sovereignty as well as respect and promote fundamental rights.

It is important to emphasize the "Rule of Law" concept, which concerns such diverse subjects as limits on government powers, respect of fundamental rights, absence of corruption, and effective access to justice. In this paper, it will be treated as the principle of constitutional supremacy.

That concept, according to the Constitutional Tribunal of Chile, is implicit in the 6th article of the Chilean Constitution. This means that every state body, individual person, institution, or group is bound by the Constitution and must obey its rules, which are also applicable to the internal functioning of political organizations as well as to their public actions[7]. The Constitutional Tribunal is one of the institutions created by the Constitution to fulfill the obligations of the 6th article[8], and it is bound by its contents, especially when exercising judicial review[9].

In fact, the Constitutional Tribunal is able to interpret the Constitution, but not to give constitutional status to laws dictated by the legislature, since the Constitution itself establishes the mechanisms for its own reform[10].

This idea reflects on the way the Court understands fundamental rights, for they must be respected unreservedly[11] and guaranteed even if there is no certainty about their technical aspects[12]. The protection of constitutional rights also justifies the adoption of an extensive interpretation of the Constitution, in order to allow the challenging of a norm based both on material or formal flaws[13]. This way, the Tribunal also allows the challenging of procedural rules, as long as they show some relevance for the case´s decision-making (not sure what this means)[14].

Since the Constitutional Tribunal has the last word in the constitutional interpretation, this important task must be carried out in a comprehensive way, considering both the literal text and the values, principles and the spirit of the Fundamental Law, in order to assure the effectiveness of constitutional supremacy, which is what guarantees the efficiency of the Constitutional Rule of Law and the respect for the individual´s fundamental rights[15]. In some cases, the Tribunal must go even further, and take into account factual circumstances if the proof of a violation of fundamental rights depends on them[16]. Additionally, in order to develop its

[7] Case No. 567, paragraph 4th.
[8] Case No. 260, paragraph 22nd.
[9] Case No. 521, paragraph 27th, and Case No. 1284, paragraph 5th.
[10] Case No. 1284, paragraph 6th.
[11] Case No. 521, paragraph 27th.
[12] Case No. 740, paragraph 63rd. In this case, the Court faces a profound disparity of points of view referring the moment when human life begins and, consequently, the real effects of emergency contraceptive methods. Yet, the Court takes a decision, based on the defense of the fundamental rights and of the constitutional supremacy, and also on its inexcusable duty to judge the filled cases.
[13] Case No. 1191, paragraphs 6th, 10th and 11th, referring to the possibility of submitting an Action of Inapplicability against a Decree Having Force of Law.
[14] Cases No. 792, paragraph 5th; 616, paragraph 6th; 946, paragraph 13th; 499, paragraphs 12th and 13th; 1061, paragraph 9th; 1145, paragraph 15th.
[15] Case No. 591, paragraphs 3rd to 6th.
[16] Considerations regarding factual circumstances are more common in Action of Inapplicability decisions. However, it also may be present in Action of Unconstitutionality decisions. For example, in Case No. 740, paragraphs 9th and 21st, the Tribunal had to "examine scientific and technical matters in order to achieve a solution that really assures the material and formal supremacy of the Fundamental Charter".

role in an integral and exact manner, the Tribunal may have to examine certain issues of constitutionality, even if not expressly asked to do so[17].

The Action of Inapplicability, which today constitutes the Tribunal´s main caseload, is a mechanism designed to guarantee constitutional supremacy and the Republic´s institutional order since its purpose is to impede the application of a certain rule in a specific case, avoiding a potential constitutional infringement and consequently protecting the individual´s fundamental rights[18]. To decide this action, the Tribunal checks the conformity of the challenged norm with the Constitutional Charter[19]. Sometimes, the incompatibility will be clear from the rule´s text. Other times, it will emerge from the peculiarities of its application to the concrete situation. In any case, the Constitutional Tribunal decides constitutional supremacy, while legal interpretation is exclusively performed by the courts of law, whether they are in charge of ordinary or specific issues, and by the Supreme Court[20].

The possibility of the Action of Inapplicability being submitted by a judge of an ordinary court of law is new in the Chilean legal system and is inspired by other legal systems, where the judge is able to present to the Constitutional Court his or her doubts about the constitutionality of a norm (Germany, Italy, Spain). Yet, it is clear that the legitimate interest that grounds the Action is not the same when the submission is presented by an individual and when it is presented by a judge. The former acts in defense of a personal right or interest, while the latter seeks to protect constitutional supremacy, according to the 6th article of the Constitution, since his or her job is to solve a controversy between parties in an impartial way, in agreement with the Constitution and the laws[21].

The Tribunal emphasizes that the Constitution can be directly enforced and no rule can be valid contrary to its supremacy[22]. Yet, this Court recognizes and respects the range of action exclusively given to the legislature by the Constitution, as long as its exercise acknowledges constitutional values, principles and rules[23], avoiding disproportionate and unjust measures that could trespass reasonable and prudent limits[24].

Therefore, the Tribunal must always search for the legal interpretation that fits the Constitution, since a declaration of unconstitutionality is an exceptional measure, reserved for those cases when the law contravenes the Constitution in every possible way. That is to say, the Tribunal reserves a declaration of unconstitutionality for when a law violates the supremacy and direct enforcement of the Constitution, as well as the principle of equality under the law and legal certainty[25]. This doctrine is based on the fact that a declaration of unconstitutionality entails not only the repeal of an act of the legislative organ, which is an irrefutable expression of the popular sovereignty, but also a certain degree of legal uncertainty. Such a repeal can cause a loophole, and the replacement of the rule becomes uncertain.[26]. The best method for determining those cases is to attempt to predict of the consequences of the norm´s disappearing. If a declaration of unconstitutionality leads to more harmful consequences than

[17] Case No. 186, paragraph 8th, and Cases No. 176, 180 y 184. In the case of the Constitutional Organic Laws, the Tribunal understands it is not limited by the request, if the challenged rules depend on other rules to conform an organic and systematic whole, in which case the Tribunal can extend its analysis to norms that weren´t originally part of the submission.
[18] Case No. 1295, paragraph 26th.
[19] Case No. 1284, paragraphs 5th and 6th.
[20] Case No. 810, paragraphs 9th, 10th, 14th, 15th and 16th.
[21] Case No. 1029, paragraphs 5th and 6th.
[22] Case No. 1287, paragraph 36th.
[23] Case No. 1287, paragraph 62nd, related to the health care agencies´ legal power to determine contractual clauses.
[24] Case No. 280, paragraph 19th, related to the impossibility of establishing “manifestly disproportionate” tributes.
[25] Case No. 558, paragraphs 6th and 7th.
[26] Case No. 1173, paragraph 5th; Case No. 558, paragraph 18th.

those that follow from leaving the law as it stands, the voiding of the norm will not benefit the public interest and will not further the Rule of Law[27] generally.

The Constitutional Tribunal also recognizes its role in the checks and balances system established by the Chilean Constitution. Thus, it must ensure adequate performance of the state bodies´ functions (by correcting any improper actions or refusals to comply with duties that emanate from the Constitution[2829]) or even interpret the constitutional rules that set these attributions[30].
Referring to the judicial review, the Court understands that judging the contents of a law, even if not done explicitly, would violate the exclusive division of powers and functions and the principle of constitutional supremacy[31].

Regarding its supervisory power over the drafting of bills, the Tribunal understands that it should cover both formal and substantive aspects in order to fulfill and respect the constitutional supremacy principle[32].

As previously stated, in 2005 a constitutional amendment increased the Constitutional Tribunal´s catalog of functions, transferring from the Supreme Court to the Constitutional Court the power to entertain the Inapplicability petitions and creating a new Unconstitutionality Action. The former soon came to represent the largest part of the Tribunal´s case load.[33] The latter was a completely novel action in the Chilean legal system because until that moment nobody, except for the legislative branch itself, had power to derogate a law.

3. **The impact of declarations of unconstitutionality.**

Constitutional review has two primary functions. First, it functions as a supervisory, ex ante control over the drafting process of legislative acts (decrees, bills, etc.). Second, after a law has been promulgated, it functions as an ex post control; this stage is where the inapplicability and unconstitutional actions have a primary role. The difference between the inapplicability and unconstitutionality faculties remains of importance. The decision regarding an inapplicability petition will only affect that particular case and the decision will not void the norm; it remains valid, though the judge cannot apply it to the case at hand. In contrast, a judgment that declares unconstitutionality –the Tribunal's abstract control- has a general effect, i.e. *erga omnes*, since a norm declared unconstitutional is entirely excised from the legal system. The law will cease to have any validity or effect.

As one can see, the Tribunal's power to declare unconstitutionality has far-reaching effects. For that reason it is important to highlight the effects of nullification:

First, the Tribunal's decision differs from the legislature's modification or rescission of a law. As the Tribunal itself recognizes, a judgment affirms an allegation of unconstitutionality, but lacks the political legitimacy of the latter process.

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[27] Case No. 558, paragraph 19th.
[28] Case No. 1320, paragraph 16th, referring to a jurisdiction conflict between an ordinary court and the organ equivalent to the District Attorney.
[29] Case No. 567, paragraphs 5th to 7th, referring to the compliance of political parties to the constitutional supremacy principle.
[30] Case No. 259, in which the Court states an extensive interpretation to the constitutional rule that allows the Senate to recur to the constitutional justice.
[31] Case No. 282, paragraph 27th and Case No. 254, paragraphs 11th and 12th.
[32] Case No. 383, paragraph 6th.
[33] During the year of 2007, 286 Inapplicability Actions were submitted before the Constitutional Tribunal, which represented an increase of 233% in its case load, in relation to the previous year, when only 86 Inapplicability cases were submitted. In 2008, the Tribunal received 235 Inapplicability petitions, and in 2009 242 cases were submitted, which represented the 83.8% of the total of cases submitted that year.

Second, a judgment of unconstitutionality has no retroactive effect, i.e. it may only be applied to future cases. Article 94 of the Constitution establishes that a judgment that declares unconstitutionality has to be published on the Official Bulletin within three days of the Tribunal's decision. However, this *ex nunc* effect has produced problems with respect to interpretation, since the question remains: what will happen in the pending trials where the unconstitutional norm could have been applied, especially when an inapplicability petition is pending to be resolved by the Tribunal.

The following analysis delivers an overview of the reception of decisions that have declared laws void due to their unconstitutionality. Particularly interesting is the behavior of other state organs and also the Tribunal's own explanation of the effects of nullification.

Since the amendment to the Constitution of 2005, which established the Tribunal's power to declare the unconstitutionality of legal provisions, there have been just a few decisions that have dealt with this particular action. Our analysis will focus on two particular judgments. The first of them was the first decision that dealt with unconstitutionality, and came out of several actions of inapplicability, and therefore had a special impact on Chilean law. The decision presented several problems with respect to the particular effects of nullification of a law by the Tribunal. The second decision in analysis deals with the constitutionality of a norm that sustained the private health care system, and the nullification of which had particular impact in the health care/social security system, and therefore an enormous general impact on society. It is important to stress that both cases were initiated by the Tribunal itself.

The first decision addressed Article 116 of the Tax Code. This Article allowed the Director of Tax Services to delegate to other civil servants under his supervision, through an administrative act, the power to judge conflicts between the institution and tax payers. The Constitutional Tribunal determined that the delegation was unconstitutional, since it affected the rule of law and due process principles. That particular norm had previously had several inapplicability actions, all of which were affirmed.

The Tribunal also ruled on some particular effects of the nullification of that norm, stating that former versions of the Article, which were modified by the legislative branch when it promulgated the eventually derogated norm, could not replace the voided Article in order to fill the resultant legal vacuum.

Nevertheless, that declaration of unconstitutionality left open several questions. First, it remained unclear what would occur after the publication of the judgment in the Official Bulletin with respect to the pending trials of inapplicability that were currently under review by the Tribunal. Furthermore, it was unclear what would happen to trials pending in the other courts of the judicial branch.

To answer those questions required an interpretation of the Constitution –specifically, Article 94. The Tribunal partially solved the question of pending inapplicability petitions by declaring them all resolved and dismissing them because the law in contention was no longer in existence. The ordinary courts could not apply a derogated norm; thus the petitions did not fulfill the legal requirement that the legal rule being challenged in an inapplicability action would indeed be applicable or would be decisive in the resolution of the pending case.

The Tribunal, in response to a formal question from the Supreme Court, affirmed that the resolution of the second situation is up to the courts of the judicial branch, which were then obliged to resolve the pending trials under the assumption that Article 116 of the Tax code was void. The Constitutional Tribunal emphasized that its powers are limited to judgments as to the validity of a law and that it cannot resolve the particularities of pending cases, nor affect other courts' ability to do so.

Nevertheless, the Supreme Court rejected the Constitutional Tribunal's reasoning, finding instead that prospective nullification of the law in question led to its unequal application. While the law would be voided only prospectively, the courts of the judicial branch would have to apply the Article as if it were fully valid in any pending cases.

Two years after the Constitutional Tribunal struck Article 116 of the Tax Code for unconstitutionality, the National Congress promulgated a new law determining the scope of the powers accorded to civil servants within Tax Services when delegating adjudicatory authority. The new procedure incorporated the doctrine proclaimed by the Constitutional Tribunal, respecting the constitutional principle of due process.

The second case we will discuss is the decision that declared the unconstitutionality of Article 38 ter of the "Health Care Institutions Law." This article regulated the factors table that the health care institutions apply to each individual private health insurance contract. According to this table, the health plan´s premium varies with the individual's age and sex. The judgment declared the partial unconstitutionality of the Article, voiding the section that allowed the Health Care Agency to determine the structure that the factors table must obey.

In this case, the Tribunal changed its view about the effects of the nullification of the law in pending and also in new inapplicability petitions. The Court stated that the derogated norm could be applied by the other courts of law, because at the time of the signing of the health insurance contract, that legal precept was completely valid and in force. Therefore, it could be applied to pending trials. Thus, the Tribunal admitted all the inapplicability petitions presented after the declaration of unconstitutionality.
Thank you very much for the attention.