

The Downfall of a Constitutional Court

Jorge Contesse

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The Constitutional Court of Chile faces the worst crisis in its history. In an [interview](#) with a local newspaper, current Chief Justice María Luisa Brahm – elected in 2019 to replace Justice Iván Aróstica – accused Aróstica of intentionally delaying cases, particularly cases on human rights violations from the Pinochet years. (In Chile, Chief Justices are elected by their peers and rotate every two years). Brahm further claimed that this practice generated “business opportunities” for attorneys who would continue to charge clients a fee despite the fact that their cases were put on hold. One such attorney is a former member of the Court, who is related to a sitting Justice. Following the interview, a prominent human rights lawyer, currently a member of Congress, filed a criminal complaint for bribery and perversion of justice, and the Attorney General launched a criminal investigation. Justice Aróstica – who denies the accusations – said he might file a criminal complaint for libel against Chief Justice Brahm. In a [leaked audio](#) of a secret session of the Constitutional Court’s Grand Chamber, another member of the Court called on Brahm to resign, fearing that “the Court would not be able to get back on its feet”.

The unprecedented crisis largely stems from the way the Court has exercised its powers in recent years. Beyond institutional design problems on which there is extended consensus among both constitutional lawyers and policy-makers, the Court has become known – and strongly criticized – as the country’s “*tercera cámara*”: the “Third Chamber”. The label uses the Spanish acronym “TC” (*Tribunal Constitucional*) and highlights the Court’s tendency to act as a lawmaker rather than as a tribunal. In the words of Justice Aróstica, the Court “[has become a consequential body](#)”. What the current crisis shows, however, is that the Court has probably risen in prominence for the wrong reasons.

Justice delayed

The Chilean Constitutional Court has the power to declare a legal norm “inapplicable” to a case or controversy that is pending before a lower court (Art. 93 (6) of the Chilean Constitution).¹⁾ Unlike other constitutional courts, the Chilean Court’s main power is not to strike down legislation, but rather to render a norm inapplicable, without affecting the that norm’s validity (although it is possible to request that the Court, after declaring a norm inapplicable, addresses the norm’s constitutionality). See Art. 93 (7) of the Chilean Constitution. The procedure is known as “*requerimiento de inaplicabilidad*” (“inapplicability injunction”). When a party in a case before a lower court resorts to the Constitutional Court under this mechanism, the Constitutional Court may put the legal proceedings on hold while it examines the petition. Pursuant to Art. 93 (6) of the Chilean Constitution, and Article 79 of the Constitutional Court Act, the basic requisite is that there be *pending* litigation before a lower tribunal. Chief Justice Brahm asserts that, under her predecessor’s

tenure, lawyers found a fertile ground to have cases suspended. Many of these cases concerned human rights violations committed during the Pinochet dictatorship (see [2018 Annual Human Rights Report, Diego Portales University](#), at 66). The phenomenon is striking for at least two reasons: first, although the injunctions had the same legal reasoning – many times, filed by the same petitioners – which the Court would routinely reject, the Court would nonetheless open a new case for each new petition as if it was hearing a new argument. As a result, injunctions that would inevitably be rejected still managed to delay criminal cases. Second, these injunctions concerned criminal investigations for crimes committed more than forty years ago. In some cases, criminal investigations had been conducted for ten or even fifteen years. Survivors (or the victims' next of kin) have waited for decades for justice to be served. The Court's delay added insult to their injury.

The Court's statistics seem to confirm Chief Justice Brahm's accusation of delayed proceedings. In 2015, the Court received one hundred and fifty inapplicability injunctions. [In 2019](#), the number spiked to 2,181. What caused litigants to use the Court as "[an instrument for the suspension of cases](#)"? How did the Court become a "business opportunity" for attorneys? Why would Aróstica exercise his powers as Chief Justice to assign petitions and suspend cases in such a way? What happened between 2015 and 2019?

In August 2015, the Court's conservative minority became the majority, with the appointment of José Ignacio Vásquez. The Supreme Court of Justice – which has the power to appoint three members to the Constitutional Court – had to flip a coin to break a tie among the candidates. Vásquez, then Head of the Supreme Court's Research Unit, was "selected" to replace socialist jurist Francisco Fernández. Justice Vásquez, a part-time lecturer at the University of Chile, describes himself as an independent, but [his past as member of a journal](#) that the Chilean National Intelligence Agency included in a list of national socialist and anti-Zionist organizations raises concerns about his judicial philosophy. Upon his arrival at the Court, Vásquez joined the Court's conservative camp, led by Justice Aróstica and Juan José Romero, a member of the Court since 2013.

Reporting for the *Global Review of Constitutional Law*, Justice Aróstica (along with two legal scholars) explains the spike of inapplicability injunctions with the Court becoming "[a significant forum for fundamental rights litigation](#)". Their assessment, however, obscures that in human rights cases, the forum has effectively served the interests of perpetrators of the most atrocious crimes committed in the history of the country. Human rights lawyers point to Aróstica's biography as key to understand his doctrinal positions: while in law school, in the 1970s, he was a member of a nationalist right-wing organization that actively supported the Pinochet's coup, and upon graduation, he started to work for the regime. He is said to be [an admirer of Jaime Guzmán](#), Pinochet's closest legal advisor and the main ideologue behind the 1980 Constitution. According to media reports, Aróstica [allegedly said to his law students](#) that Chilean "detained-disappeared individuals in fact lived in Europe". He is also known for his large collection of *corvos*, a bladed knife used by the Chilean Army in the 19th century, which became infamous when the police used it to behead three members of the Communist Party, in 1985.²⁾The event is one of the most

salient crimes committed by Pinochet's security forces. See Mark Ensalaco, *Chile Under Pinochet: Recovering the Truth* 142 (2000). In an address in front of the members of the German Constitutional Court, who made a visit to Chile in 2018, [Aróstica stated](#) that Chile's "traumatic institutional rupture *ended* in 1973", the year Pinochet overthrew the Allende government and initiated a 17-year-long dictatorship.

Aróstica is thus seen as a civilian ally of military officials, and his eagerness to suspend human rights cases seems to confirm this perception. The multiple delays of human rights proceedings are a demonstration that "showed disregard for the law" (see [2018 Annual Human Rights Report, Diego Portales University](#), at 72). In a case concerning the conviction of three Army officials for the extrajudicial killings of prisoners perpetrated days after the 1973 military coup, Aróstica put the case on hold despite the case being *terminated* – that is, despite there not being any *pending* litigation. Human rights lawyers denounced the action, claiming that the Constitutional Court was effectively giving the murderers an opportunity to flee and avoid prison. Ultimately, at the insistence of such lawyers, the Court heard the petition and – unsurprisingly – rejected the injunction ([id](#), at 70). In the words of a leading human rights lawyer, the Aróstica Court became "[a trench of impunity](#)".

Judicial self-restraint: "A useless category"

In 2017, right before commencing his tenure as Chief Justice, Aróstica made a [stunning assertion](#): "This Court will not only look at the cold text of the Constitution and its evident errors – because there are errors in the Constitution..." The remarks were correctly read as an indication of the unleashed judicial activism that would come: if constitutional judges believe that there is an error in the Constitution, judges – not Congress – should fix it.

Pursuant to Art. 93 (1) & (3) of the Chilean Constitution, the Court can also exert a *preventive* review of legislation, that is, it may strike down legislation *before* its enactment. The controversy surrounding the Constitutional Court also involves its power to preventively review legislation. To mention just one example: in the preventive review of the abortion law, Aróstica (not yet Chief Justice) co-wrote the opinion that struck out the words "under no circumstance" from the provision on conscientious objection, resulting in a judicial re-enactment of the law ([Decision No. 3729-2007 of Aug. 28, 2017](#), para. 138). The original statute stated that conscientious objection was "personal" and "*under no circumstance* could be invoked by an institution" (para. 135). The Court, however, did not give Congress a chance to fix the matter: it directly rewrote the provision, upending the will of the people.

The conservative members of the Court seem unconcerned with this form of activism. At a [plenary session of the 2019 ICON-S Annual Meeting](#), in Santiago, Justice Juan José Romero reflected on the strategies that the Court may use in order "to reconcile the need to protect its legitimacy vis-à-vis political parties". The question is of paramount importance. And, normally, judges are cautious if and when they address it. Romero was not. He candidly referred to judicial activism and judicial

self-restraint as “[ubiquitous and useless categories](#)”. It is uncommon to hear a sitting judge be so blunt about his or her court’s intrusiveness in the political process.

Recently, conservative members of the Senate asked the Court to declare that a COVID-19-emergency pardon for petty criminals was unconstitutional because it excluded individuals convicted for human rights violations. Due to the imminent need to release inmates from heavily crowded prisons, Chief Justice Brahm refused to wait for a similar challenge filed by members of the House of Representatives, as requested by Justices Aróstica, Romero and Vásquez, because such measure would have caused the case to be delayed while the situation in prisons was, according to a report by the Supreme Court, “[a time bomb](#)”. (Pursuant to Article 35 of the Constitutional Court Act, the Court *may*, but is not *required* to, group petitions that concern similar pleadings.) The Court heard the case and found the law constitutional, as it contained objective criteria excluding individuals convicted for serious offenses, including human rights violations ([Decision No. 8574-2020](#) (Apr. 16, 2020), para. 44). Aróstica, Romero and Vásquez wrote a dissent, in which they strongly criticized the Chief Justice for allegedly causing the Court to anticipate its opinion, and prompting the House members to withdraw their own petition to the Court. In a text message that was leaked to the press, Justice Vásquez attacked Chief Justice Brahm, accusing her of “abuse of power and trickery” (printed in *El Mercurio*, C2, Apr. 15, 2020). A couple of days later, Brahm went public.

What’s next?

The blend of judicial activism and an utter disdain for rules had seriously undermined the Court’s reputation. But the novel corruption accusations may very well be the beginning of the Court’s end as we know it. Beyond the course of criminal investigations, there fortunately is a *constitutional* escape valve: Chile’s constituent process. Hopefully, the process will address the matter in a way that allows Chileans to devise a constitutional court that guards a democratic Constitution, not Pinochet’s legacy. In the meantime, we have yet to see how this Court weathers the storm, and whether or not it will be able to get back on its feet.

References

- 1. Unlike other constitutional courts, the Chilean Court’s main power is not to strike down legislation, but rather to render a norm inapplicable, without affecting the that norm’s validity (although it is possible to request that the Court, after declaring a norm inapplicable, addresses the norm’s constitutionality). See Art. 93 (7) of the Chilean Constitution.
- 2. The event is one of the most salient crimes committed by Pinochet’s security forces. See Mark Ensalaco, *Chile Under Pinochet: Recovering the Truth* 142 (2000).

