Duquesne Law Review

Volume 51
Number 2 *Articles from the Current Constitutional Issues in the Americas Seminar*
Article 6

2013

Constitutional Review in Chile Revisited: A Revolution in the Making

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I. INTRODUCTION

The purpose of this article is to present the main developments of Chilean constitutional law during recent times, specifically regarding the historical evolution of the constitutional review of statutes. This article advances the thesis that the latest trajectory of constitutional review in Chile shows that the Chilean constitutionality control system has advanced far from peacefully, from a diffuse review system pivoting around the Supreme Court of Justice toward a concentrated constitutional review scheme characterized by the primacy of the Constitutional Tribunal. Accordingly, the paper will review: (i) the main differences between civil and common law systems concerning judicial review; (ii) the his-

torical evolution of the constitutionality control in that country before and after the creation of the Constitutional Tribunal in 1970; (iii) the main changes introduced by the constitutional amendment of 2005 to the functions and prerogatives of the Chilean Constitutional Tribunal; (iv) the juridical conundrums arising from writs of inapplicability, specifically the application of an "abstract control" instead of "a concrete control"; and (v) to illustrate the provocative title of this article, this paper will examine the ongoing conflicting situations that have arisen between the Supreme Court of Justice and the Constitutional Tribunal focusing on the most important cases dealing with pressing constitutional issues in that country.

II. BRIEF REFERENCE TO THE DIFFERENCES BETWEEN CONSTITUTIONAL REVIEW IN COMMON AND CIVIL LAW SYSTEMS

Both civil and common law recognize the supremacy of the constitution as the supreme law of the land.[1] In fact, the second clause of Article VI of the United States Constitution is known as the Supremacy Clause,[2] and Article 6 of the Chilean Constitution states Chile's Constitutional Supremacy Principle.[3] In the United States, Justice Marshall and the Court established the concept of judicial review in *Marbury v. Madison*[4]: when a conflict exists between an act of the legislature and the Constitution, judges have the duty to apply the latter, based on the doctrine that "the constitution is superior to any ordinary act of the legislature."[5] In Chile,

1. Gustavo Fernandes de Andrade, *Comparative Constitutional Law: Judicial Review*, 3 U. PA. J. CONST. L. 977, 977 (2001).

2. U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

3. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] art. 6 ("The organisms of the State shall act according with the Constitution and the rules passed in accordance with it, and they shall guarantee the institutional order of the Republic. The provisions of this Constitution oblige either to the members of those organisms as to any other person, institution or group. The infringement of this provision will result in the liabilities and sanctions determined by the statute.")

4. 5 U.S. 137 (1803).

5. Phillip Hamburger, *Law and Judicial Duty*, 72 GEO. WASH. L. REV 1, 1 (2003); *see also* Daniel Gamaas-Holmes, *Judicial Review: Fostering Judicial Independence and Rule of Law* (Law and Justice in the Americas, Working Paper Series, Paper No. 5., 2007), *available at* http://lawdigitalcommons.bc.edu/ljawps/5.

the supremacy of the Constitution has been recognized in greater or lesser degree since the first constitutions of that country.[6]

It is possible to identify three constitutional review systems in both civil and common law jurisdictions:[7] the political review, the judicial review, and a mixed review system.[8] In the political review system, which is used in England and the Netherlands—a common law and a civil law country, respectively—the legislature controls the constitutionality of its own legislation.[9] In contrast, under a judicial review system, the courts have the power to decide whether or not the statutes violate the constitution.[10] Finally, the mixed system—used in Switzerland, for example—employs judicial review with respect to cantonal laws and a political control regarding federal statutes.[11]

Judicial review is the most widely used constitutionality control mechanism in both civil and common law countries. However, several differences exist between the structure of European civil law countries and the U.S. common law system. In fact, these differences are reflected in the way judicial review is conducted among these countries. There are differences concerning the courts in charge of carrying out the review; the procedures aimed at determining the constitutionality of a statute;[12] the type of control—abstract or concrete—used by judges for that purpose; and, finally, the effects of decisions establishing that a statute violates the Constitution.[13]

First, the courts that carry out the constitutionality review in each system differ in nature. In the United States, there is a dif-

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6. MARIO VERDUGO MARINKOVIC, NOTAS SOBRE EL PRINCIPIO DE LA SUPREMACÍA CONSTITUCIONAL Y DE LOS DECRETOS SUPREMOS DE EJECUCÍON [NOTES ABOUT THE CONSTITUTIONAL SUPREMACY PRINCIPLE AND THE SUPREME DECREES OF EXECUTION] 387-88 (Revista del Centro de Estudios Constitucionales Universidad de Talca, Santiago, Chile, 2003).

7. Fernandes, *supra* note 1, at 978.

8. *Id.*

9. Javier Couso, Models of Democracy and Models of Constitutionalism: The Case of Chile's Constitutional Court, 1970-2010, 89 TEX. L. REV. 1517, 1518 (2011); *see also* Sandra Day O'Connor, *Reflections on Preclusion of Judicial Review in England and the United States*, 27 WM. & MARY L. REV. 643 (1986).

10. Allan R. Brewer-Carías, *Judicial Review in Venezuela*, 45 DUQ. L. REV. 439, 439 (2007).

11. Mauro Cappelletti & John Clarke Adams, *Judicial Review of Legislation: European Antecedents and Adaptations*, 79 HARV. L. REV. 1207, 1216 (1966); *see also* Fernandes, *supra* note 1, at 978.

12. Mark Tushnet, Marbury v. Madison *Around the World*, 71 TENN. L. REV. 251, 254 (2004).

13. Fernandes, *supra* note 1, at 979-86.

fused system where "either state or federal courts may hear constitutional claims."[14] Therefore, regular judges have the authority to review the constitutionality of laws.[15] In contrast, in civil law countries, such as France, Germany, Italy, and Austria, there are "special courts, which stay outside the ordinary judicial system and retain a jurisdictional monopoly over constitutional issues."[16] These special tribunals, known as "constitutional tribunals" or "constitutional courts," were created in Europe starting in 1920, based on the work of Hans Kelsen. Kelsen promoted the creation of an independent tribunal to review the constitutionality of statutes.[17]

The lack of *stare decisis* in civil law systems has been identified as the reason that judicial review is an exclusive prerogative of the constitutional courts in the civil law world.[18] Unlike the United States, in civil law countries, the highest courts' decisions generally are not binding for lower courts. Therefore, in order to avoid contradictory decisions among regular tribunals that generate uncertainty in the legal system, civil law countries allocate the exclusive power to invalidate statutory norms to special courts.[19] Furthermore, constitutional courts were created in Europe where most countries have parliamentary systems. Under parliamentary systems, the executive and legislative powers were merged because the government is comprised of members of the Parliament. This affects the traditional principle of separation of powers. Therefore, creating "a 'fourth' branch of government [which was] conceived as a check on that majority" was necessary.[20]

Another difference between the civil and common law constitutional review systems is the kind of procedure used to carry out the constitutional review.[21] On the one hand, in the U.S. common law system there is no special constitutional procedure, so judges use regular procedures to that effect. As an author explains, "[a]ll courts, for example, applying the same procedures, decide either

14. *Id.* at 979.

15. Tushnet, *supra* note 12, at 252.

16. Fernandes, *supra* note 1, at 980-81; *see also* Raúl Letelier Wartenberg, *Jueces Ordinarios y Justicia Constitucional* [*Regular Judges and Constitutional Justice*], 34 REV. CH. DE DER. 539, 561 (2007).

17. Enrique Navarro Beltrán, *El Control De Constitucionalidad De La Leyes En Chile (1811-2011)* [*The Constitutionality Review of Laws in Chile (1811-2011)*], 43 CUADERNOS DEL TRIBUNAL CONSTITUCIONAL 31 (2011).

18. Cappelletti & Adams, *supra* note 11, at 1218.

19. Fernandes, *supra* note 1, at 983-84.

20. *Id.* at 984-85.

21. Cappelletti & Adams, *supra* note 11, at 1219.

the validity of a contract or the right to an abortion."[22] On the other hand, civil law countries have created special procedures for constitutional litigation.[23]

As a consequence of the aforementioned situation, the type of control exercised by the courts is, in general, also different. In fact, in the U.S. common law system, courts carry out concrete constitutional control because they only determine the constitutionality of a rule when deciding actual cases.[24] Instead, in European civil law countries, constitutional courts make an "abstract" control implemented "by contrasting the challenged legislation with a provision of the constitution,"[25] without considering any facts from a given case.[26]

Finally, regarding the effects of the decisions, in non-European civil law systems, court decisions are binding only for the parties involved in a particular case; thus, they only produce particular effects, also called "*inter partes*."[27] Contrarily, in European civil law systems the decisions issued by the courts have *erga omnes* effects as they are binding for the parties to a particular litigation and also for third parties.[28] However, this difference is more theoretical than real when the U.S. Supreme Court decides a case because its decisions are not only binding for the parties, but also for the lower courts under *stare decisis*.[29]

III. BRIEF REFERENCE TO JUDICIAL REVIEW IN CHILE BEFORE 1970 (DATE OF THE CONSTITUTIONAL AMENDMENT CREATING THE CONSTITUTIONAL COURT)

A. Constitutional Review Under the Constitution of 1833

Under the Chilean Constitution of 1833, ordinary judges could not review the constitutionality of laws.[30] The Constitution only allowed a political review by the National Congress,[31] establishing

22. Fernandes, *supra* note 1, at 979.
23. *Id.*
24. Tushnet, *supra* note 12, at 254-55.
25. Fernandes, *supra* note 1, at 983.
26. Alec Stone Sweet, *Why Europe Rejected American Judicial Review-And Why It May Not Matter*, 101 MICH. L. REV. 2744, 2770 (2003).
27. *See* Cappelletti & Adams, *supra* note 11, at 1222.
28. *Id.*
29. Fernandes, *supra* note 1, at 980.
30. Edith Z. Friedler, *Judicial Review in Chile*, 7 SW. J. L. & TRADE AM. 321, 326-27 (2000).
31. Couso, *supra* note 9, at 1523.

in Article 164 that "[o]nly the Congress, according with articles 44 *et seq*, can solve doubts concerning the understanding of any of its sections."[32]

Consequently, scholars and the Supreme Court understood that the judiciary had to apply a statute when deciding cases, regardless if the statute were constitutional or not.[33] For instance, a scholar of that time wrote that judges "in charge of issuing a decision, cannot refuse to apply a statute, even if, in their opinion, it is unconstitutional."[34] In sum, judges could not "judge" the law, they could only apply it. However, this general approach of the judiciary and constitutional scholars started changing by the end of the nineteenth century. For instance, the Supreme Court of Justice in a written communication to court of appeals throughout the country, dated January 2, 1867, stated that:

> No court in charge of applying the laws has the authority to declare a law unconstitutional . . . . [However,] the authorities in charge of applying a statute or a rule to a particular case, shall, nevertheless, give preference to the Constitution on that specific matter, if the statute or rule clearly violates the Constitution.[35]

Furthermore, a minority group of scholars thought that if a statute violated the Constitution, judges could not apply the statute in order to apply the Constitution, under the principle of the primacy of the latter.[36] As an author of that time explained, there were those "who believe that in the case of a contradiction between an ordinary statute and the Constitution, the tribunal would not be able to not apply the latter with preference. They base their opinion in that the constitutional provisions have a superior status than the statutory provisions. . . ."[37]

In sum, during the period under analysis, the constitutional review system that governed was the "political review" system, where the legislature itself controlled the constitutionality of its actions. At the beginning, the Supreme Court understood that it

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32. Enrique Navarro Beltrán, *Notas Sobre La Evolución Histórica Del Control De Constitucionalidad De Las Leyes En Chile [Notes Concerning the Historical Evolution of the Constitutionality Review in Chile]*, 2 REV. CH. DE HIST. DEL DER. 1231, 1233 (2010).

33. *See* Friedler, *supra* note 30, at 327 & n.24.

34. Navarro, *supra* note 32, at 1233.

35. *Id.* at 1234.

36. *Id.* at 1235.

37. *Id.*

had to apply the statutes notwithstanding their unconstitutionality—otherwise, they would be judging an act of the Congress without the authority to do so. However, the opinion of the Supreme Court and of a minority group of scholars evolved into a new theory. The new theory followed the rule that when there was a statute that contradicted the Constitution, judges had to prefer the application of the Constitution because it had a superior status within the Chilean legal system.

B. The Constitutional Review System in the Period 1925 to 1970

The Constitution of 1925, which ruled Chile until 1973, established important changes regarding the constitutionality review system extant under the Constitution of 1833. Specifically, the new Constitution established a judicial constitutionality review, which was conferred to the Chilean Supreme Court. In effect, the second paragraph of Article 86 of the Constitution of 1925 prescribed that: "The Supreme Court, when deciding particular cases or cases from other tribunals, which are brought before her through a Writ, may declare the inapplicability, in that particular case, of any statute that violates the Constitution."[38] This provision introduced a new mechanism to carry out constitutional review in Chile, by means of the "Writ of Inapplicability." Under this new legal institution, the Supreme Court gained the authority to determine whether a statute was unconstitutional, and thus whether it should be applied in a particular case.

Under the new authority, the Supreme Court had to carry out an "abstract constitutionality control." As it was explained by the Supreme Court itself in 1961:

> This writ, as it has been frequently repeated, has an abstract and doctrinaire character, thus when deciding the case the tribunal cannot analyze the facts, since constitutionality is a matter of law . . . and the Supreme Court in that case has to decide it merely analyzing the challenged statute and the constitutional provision allegedly violated.[39]

As explained by Chilean scholars, this new system received inspiration from the U.S. judicial review system, where, under *Marbury v. Madison*, the judiciary, as a whole, possesses the authority

38. *See* Friedler, *supra* note 30, at 328.
39. Navarro, *supra* note 17, at 26 n. 68.

to control the constitutionality of laws,[40] and the U.S. Supreme Court is the main authority to decide whether a statute violates the U.S. Constitution.[41] The decisions of the Chilean Supreme Court concerning the constitutionality of a statute—stemming from its new power designed upon the U.S. review system—were only afforded particular effects, binding only for the litigants in a given case.

However, the Constitution also adopted some elements from the European civil law system, such as the existence of a special procedure to solve constitutionality issues presented before the Supreme Court.[42] In addition, during the 1925-1970 period, judicial review was concentrated and not diffuse, as is the case in the U.S. judicial review scheme where the whole judiciary can carry out the judicial review. Namely, the Supreme Court was the only tribunal authorized to decline the application of an otherwise validly enacted statute in Chile.[43]

Regarding the practical application of the Writ of Inapplicability, a debate arose during the 1950s and 1960s concerning the possibility of rejecting the application of a statute based on defects in its creation when those statutes were not enacted in accordance with the requirements established by the Constitution.[44] The Supreme Court stated that the Writ of Inapplicability had to be construed restrictively, and that legislative policy could not be judged through this mechanism. Therefore, the Supreme Court could only declare that a statute was inapplicable when it had substantive defects of unconstitutionality.[45] In this sense, the Supreme Court gave deference to the political branches of government: the executive and the legislative.

On the other hand, Congress continued playing an important role (particularly the Senate Committee on Constitution, Legislation, and Justice) in reviewing the constitutionality of bills.[46] As an author points out, the Committee "was the functional equivalent of a constitutional court, with abstract and a priori powers of review."[47] In sum, during this period, Chilean constitutionality

40. Jonathan R. Siegel, *The Institutional Case for Judicial Review*, 97 IOWA L. REV. 1147, 1153-54 (2012).
41. Navarro, *supra* note 32, at 1236.
42. Letelier, supra note 16, at 552.
43. Friedler, *supra* note 30, at 329.
44. Navarro, *supra* note 32, at 1239.
45. *Id.*
46. Couso, *supra* note 9, at 1525.
47. *Id.*

control passed from an exclusive political review to a system that included judicial review, where the Supreme Court was the organism in charge of carrying out constitutional review. This newly adopted system was influenced not only by the U.S. judicial review paradigm, but also by the European system, which was reflected in the fact that only one tribunal was in charge of the constitutional review characterized by the existence of a special writ (with its own procedure) to determine whether a statute was inapplicable in a particular case.

IV. THE CONSTITUTIONAL REVIEW EXPERIENCE FROM 1970 TO 1980

During the mid-1960s, a group of constitutional scholars promoted the idea of creating a Constitutional Tribunal in the Chilean system that would control the constitutionality of statutes before they took effect.[48] That idea was embodied in Law No. 17,284 of January 23, 1970, which, for the first time in its history, created the Chilean Constitutional Tribunal.[49]

There were two main reasons to create this tribunal. The first was the lack of an authority empowered to solve the disputes between the Congress and the Executive Branch.[50] This was an idea originally expressed by President Balmaceda in 1891[51] (in the middle of a political crisis with Congress that caused a civil war and ended up with that President committing suicide while in office) and later by President Eduardo Frei-Montalva in 1969.[52] The second reason derived from the constitutional review experiences of other countries, which showed the necessity of reviewing the constitutionality of statutes in a general manner, that is, before bills become statutes and also after their enactment.[53]

As already mentioned, the Constitutional Tribunal was created in 1970 to review the constitutionality of bills through an "abstract," without a "case or controversy" requirement by means of a comparison between the bill and the Constitution. This prerogative was inspired by the French *Conseil Constitutionnel* (Constitu-

48. *See* Friedler, *supra* note 30, at 330.

49. JORGE MARIO QUINZIO FIGUEIREDO, 1 TRATADO DE DERECHO CONSTITUCIONAL [1 CONSTITUTIONAL LAW TREATY] 157 (LexisNexis, 2003).

50. Letelier, *supra* note 16, at 552

51. Navarro, *supra* note 32, at 1236.

52. Letelier, *supra* note 16, at 552.

53. *Id.*

tional Council),[54] which "can examine the constitutionality of a proposed statute only *before* it becomes law."[55]

According to Chilean scholars, the constitutional review structure created in 1970 was a dual but concentrated system, where the Supreme Court controlled the constitutionality of the statutes through the Writ of Inapplicability, and the Constitutional Tribunal reviewed the constitutionality of bills.[56] This new Constitutional Tribunal was short-lived (1971-1973) and dissolved by the military government together with the National Congress.[57] The new military *Junta* concentrated the executive and legislative powers, and the government legislated through a mechanism known as *Decreto Ley* (decree-law, or "D.L"). D.L. was also the case in other *de facto* governments throughout Latin America during the fourth quarter of the twentieth century.[58] A D.L. is an executive decree that regulates a topic that normally would be regulated by a statute, that is, regular legislation, but without the authorization of the Congress. A D.L. is generally regarded as possessing the same binding authority as a valid statute.

A former member of the Constitutional Tribunal has explained the role of the Supreme Court during the military government, by stating that "the relevance of the Writ of Inapplicability from 1973 to 1980 was almost null as a consequence of the effects of the enactment of D.L. No. 788 of 1974."[59] In effect, article 1 of this D.L. established that if there were a conflict between the legislation passed by the Administration and the Constitution, government norms would amend the constitutional provisions.[60] As a consequence, the Supreme Court could not enforce the Constitution of

54. Couso, *supra* note 9, 1528.

55. Fernandes, *supra* note 1, 982 (emphasis added).

56. Letelier, *supra* note 16, at 552.

57. Friedler, *supra* note 30, 331.

58. Alberto Borea Odría, *Nuevas Perspectivas Para El Tratemiento De Los Decretos Leyes De Los Gobiernos De Facto* [*New Perspectives for the Treatment of Decree Law of De Facto Governments*], 22 REVISTA INSTITUTO INTERAMERICANO DE DERECHOS HUMANOS 51, 51 (1995).

59. Eugenio Valenzuela Somarriva, *Labor Jurisdiccional De La Corte Suprema: Ámbito de su Competencia en la Práctica y Funciones de sus Ministros en otros Organismos* [*Jurisdictional Work of the Supreme Court: Scope of its Competence in Practice and Function of its Justices in Other Organisms*], 40 CENTRO DE ESTUDIOS PÚBLICOS [JOURNAL OF PUBLIC POLICY] 137, 152 (1990).

60. Law No. 788, art. 1, Diciembre 4, 1974, DIARIO OFICIAL [D.O.] (Chile) ("It is declared that if the decree-laws passed until this date by the Government Board, are contrary or opposite, or different, to any provision of the Political Constitution of the State, they have had and have the authority of amending rules, either expressly or tacitly, wholly or partially, of the particular provision of the Constitution.").

1925, since the executive decrees had the power to amend that Constitution.

V. CONSTITUTIONAL REVIEW FROM 1980 TO 2005

In the 1970s, the military *Junta* created a commission in charge of drawing a new Constitution for Chile. This commission, known as *Comisión de Estudios de la Nueva Constitución* (Study Commission for the New Constitution, *CENC* in its Spanish acronym), was comprised of the most important scholars in the constitutional law field (all sympathetic to the regime). Their work was the basis of the Constitution of 1980, which, with some important amendments, is the Constitution that still governs Chile today.

During the Commission's work sessions, the members discussed the characteristics of judicial review, particularly regarding the Writ of Inapplicability. The discussion centered, first, on the topic of whether the Writ of Inapplicability should proceed when a statute had a formal defect of constitutionality, namely, that it was not passed in accordance with the requirements established by the Constitution; or, on the other hand, only when the statute had a substantive constitutionality defect, that is, that the content of its dispositions violates the Constitution.[61] The second point of deliberation concerned whether it was necessary that a pending case exists for the Writ to be declared admissible, thus mirroring the "case or controversy" requirement of U.S. constitutional law. And the last matter in debate, and the most controversial, was whether the effects of the Supreme Court's decision should have general or particular effects.[62]

Several proposals were advanced to regulate this last issue. For instance, a proposal was made to establish that after three decisions of the Supreme Court declaring the inapplicability of a statute, "the inapplicability would produce general effects."[63] This proposal was criticized because it would have altered the principle of balance among the three powers of government by establishing a Supreme Court with the power to repeal a statute passed by another branch of government (Congress).[64] Additionally, there was

61. Navarro, *supra* note 32, at 1241.

62. *Id.* at 1242.

63. Mariela Rubano Lapasta, *Valor Juridico De Las Sentencias De Inaplicabilidad De Las Leyes* [*Juridical Value of the Decisions of Inapplicability of the Laws*], 202 REVISTA DE DERECHO UNIVERSIDAD DE CONCEPCIÓN 225, 226 (1997).

64. Navarro, *supra* note 32, at 1242.

also a proposal to establish that the Constitutional Tribunal could declare the unconstitutionality of a statute if the Supreme Court had previously declared the inapplicability of that statute in three cases.[65] This proposal was also rejected by the military *Junta* who preferred the original proposal of the *CENC*, which did not contemplate the declaration of unconstitutionality with general effects either by the Supreme Court or by the Constitutional Tribunal.[66] Consequently, the final text of the Constitution of 1980 established the same constitutional review system that existed during the early seventies, namely, that the Supreme Court was in charge of reviewing the constitutionality of statutes through the Writ of Inapplicability, and the Constitutional Tribunal was in charge of reviewing the constitutionality of bills.[67]

A. The Role of the Supreme Court during the 1980-2005 Period

On its own initiative, and pursuant to its constitutional powers, the Supreme Court developed admissibility requirements for the Writ of Inapplicability. First, it required the existence of a pending issue before a tribunal;[68] second, that the challenged rule had to have the same binding authority as a statute within the Chilean legal system, which excluded lower ranked rules, such as government regulations;[69] third, that the challenged statute had to be directly related to the issue pending before the tribunal that initially was deciding the case;[70] fourth, that there had to be *"an absolute contradiction between the statute and the Constitution;"*[71] and, fifth, that the challenged statute could not have been de-

65. *Id.* at 1243.

66. Sergio Verdugo Ramírez, *La Declaración De Inconstitucionalidad De Las Leyes Como Control Represivo Abstracto. Una Especie De Nulidad De Derecho Público Atenuada En Sus Efectos* [*The Unconstitutionality Declaration of Statutes as an Abstract Repressive Control. A Kind of Public Voidance Lessened in its Effects*], 18 REVISTA ACTUALIDAD JURÍDICA UNIVERSIDAD DEL DESARROLLO 247, 249 (2008).

67. Teodoro Ribera Neumann, *El Tribunal Constitucional Y Su Aporte Desarrollo Del Derecho* [*The Constitutional Court and Its Contribution to the Development of the Law*], 34 CENTRO DE ESTUDIOS PÚBLICOS [PUBLIC POLICY JOURNAL] 195, 196 (1989).

68. Gustavo Heise Burgos, *Mecanismos de Control de Constitucionalidad en el Derecho Chileno y su Evolución* [*Control Mechanisms of Constitutionality Review in the Chilean Law and Its Evolution*] (Dec. 6, 2006), 7, http://www.derecho.uchile.cl/jornadasdp/archivos/Gustavo%20Heise%20Burgos.pdf.

69. Navarro, *supra* note 17, at 38.

70. *Id.*

71. Heise, *supra* note 68, at 7 (emphasis added).

clared constitutional by the Constitutional Tribunal in exercise of its preemptive constitutionality review powers over bills.[72]

With respect to the second requirement, the Supreme Court included norms that in the Chilean System have the same binding authority as legislation, that is, rules whose value is inferior to the Constitution but superior to government regulations. Examples include the *decretos ley* (decrees-law), *decretos con fuerza de ley* (decrees with force of laws),[73] and even international treaties. Furthermore, the challenged rule had to be limited to a specific provision, that is, it was not possible to challenge an entire statute.[74] As stated by the Supreme Court in one decision in 1994, "[t]he writ of inapplicability for unconstitutionality restrains the power of this Court to declare such unconstitutionality, allowing it only regarding precise and certain provisions of a statute . . . and prohibits its declaration when the intention is to extend it to an entire legal body."[75]

Regarding the fifth requirement, the last paragraph of Article 83 of the Constitution prohibited the Supreme Court from declaring the inapplicability of a statute based on an alleged defect that the Constitutional Tribunal had previously declared as according with the Constitution. However, the Supreme Court understood that it had the authority to issue such a declaration if the statutes in question were challenged based on other defects.[76] Furthermore, there were several discussions concerning practical matters, such as whether the Supreme Court had to declare the inapplicability of a statute enacted prior to the entry into effect of the Constitution of 1980 and with some provisions having been deemed contrary to that Constitution.[77] In addition, there was also a discussion concerning the possibility of filing a Writ of Inapplicability regarding a statute that had formal constitutionality defects, such as not being passed in accordance with the constitutional requirements.[78]

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72. Navarro, *supra* note 17, at 39.

73. *Decretos con fuerza de ley* are governmental decrees that regulate a topic that normally is governed by a statute, authorized by the Congress.

74. Navarro, *supra* note 17, at 38.

75. *Id.*

76. *Id.* at 39.

77. Francisco Vega & Francisco Zúñiga, *El Nuevo Recurso de Inaplicabilidad por Inconstitucionalidad ante el Tribunal Constitucional. Teoría y Práctica* [*The New Writ of Inapplicability for Reason of Unconstitutionality before the Constitutional Court. Theory and Practice*], 4 ESTUDIOS CONSTITUCIONALES UNIVERSIDAD DE TALCA 135, 145 (2006).

78. *Id.*

Concerning the possibility of declaring the inapplicability of a statute implicitly repealed by a subsequent constitutional provision, the Supreme Court had two different approaches. From 1981 to 1990, the Supreme Court considered that if a contradiction existed between a statute passed before the Constitution of 1980, that statute was tacitly repealed by the Constitution. As the Supreme Court put it, "the writ of inapplicability for unconstitutionality is not admissible if a statute contradicts the Constitution passed afterwards."[79] The Court stated that in those cases the problem was not the constitutionality of a statute, but the survival of a statute in time, and that this was an issue left to resolution by regular judges when deciding the initial cases where the issue of constitutionality arose.[80] However, from 1990 to 2005, the Supreme Court changed its mind, and decided that it could declare the inapplicability in those cases.[81] As explained in one case by the Supreme Court:

> If trial judges can decide that the general law . . . which is the Constitution . . . has repealed an ordinary special statute ordinary or special [sic], also the Supreme Court can declare the unconstitutionality of the latter according with article 80 of the Constitution, which does not differentiate between statutes passed before or after it.[82]

The Supreme Court rejected the possibility of declaring the inapplicability of a statute based on formal constitutionality defects. The reason was that such power would entail that the Supreme Court had the authority to repeal a statute passed by Congress, which would affect the principle of separation of powers established by the Constitution.[83]

B. The Role of The Constitutional Tribunal During the 1980-2005 Period

The most prominent role of the Constitutional Tribunal during the late 1980s and early 1990s was its contribution to the political transition in Chile from an authoritarian regime to a democratic system. In the late 1980s, the Constitutional Tribunal had a cen-

79. Navarro, *supra* note 17, at 40 n.135.
80. Navarro, *supra* note 32, at 1246.
81. Vega & Zúñiga, *supra* note 77, at 145.
82. Navarro, *supra* note 17, at 40 n.136.
83. Friedler, *supra* note 30, at 343.

tral role in reviewing a set of statutes known as "political statutes," which regulated basic aspects of the democratic process in Chile such as the tribunal in charge of supervising the future elections, the procedure to create political parties, and topics related to the voting system.[84]

An example of the Constitutional Tribunal's relevant contribution to the restoration of a democratic regime in that country is found in the Bill of Political Parties of 1987, where the Tribunal determined that that bill "violated several provisions of the Constitution, such as the right of political association, the autonomy of the political parties, and the constitutional guarantee of due process of law."[85]

Moreover, in 1987, the Constitutional Tribunal declared the unconstitutionality of the bill that created the *Tribunal Calificador de Elecciones* (Electoral Court, which is in charge of supervising the elections).[86] In this case, the Constitution of 1980 established that a plebiscite had to be held in 1988 to determine whether a candidate proposed by the military *Junta* would be president for a period of eight years (1989-1997). According to the Constitution, if the candidate lost the election, the military *Junta* had to call for parliamentary and presidential elections for the next year.

The Constitutional Tribunal declared the unconstitutionality of the Bill creating the Electoral Court because one of its provisions established that the new Electoral Court had to start functioning for the first parliamentary and presidential election, that was going to be held on December 1989. Instead, the Tribunal established that the Electoral Court had to start functioning before the above-mentioned election, particularly for the plebiscite of 1988.[87] The reasoning was that this bill contradicted the constitutional provisions that regulated the public electoral system in Chile, because, according to the Constitutional Tribunal, the Electoral Court was in charge of verifying that the plebiscites were made in accordance with the Constitution. Therefore, the Electoral Court had to start its functioning for the plebiscite of 1988.[88]

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84. Navarro, *supra* note 17, at 43.
85. *Id.* at 44.
86. Couso, *supra* note 9, at 1531.
87. *Id.*
88. Tribunal Constitucional [T.C] [Constitutional Court], 1985, No. 33 (Chile).

VI. CONSTITUTIONAL REVIEW SINCE 2005

A. *New Powers Granted to the Constitutional Tribunal*

Law No. 20,050 of 2005 introduced several amendments to the Constitution of 1980. Among the main changes, new powers were given to the Constitutional Tribunal, which centered on its exclusive jurisdiction to exercise judicial review of bills and enacted legislation. On the one hand, the 2005 amendments granted the Constitutional Tribunal the prerogative of exercising a preemptive constitutionality control, that is, before a bill is approved by Congress and enacted into law. Likewise, the amendments established new types of rules and legislation that are subject to the Constitutional Tribunal's review powers. Concerning the Tribunal's *a posteriori* remedial review powers, that is, after the statute takes effect, the amendments conferred two tools to the Constitutional Tribunal: (1) the Writ of Inapplicability for Unconstitutionality, which was previously under the jurisdiction of the Chilean Supreme Court, and (2) the new Writ of Unconstitutionality.[89]

1. *New Matters Subject to the Preemptive Constitutionality Control*

As was the case with the original text of the Constitution of 1980, the 2005 amendments subjected some bills to mandatory review by the Constitutional Tribunal. Others, instead, are subject to discretionary review. During the period 1980 to 2005 the following bills were subject to mandatory constitutional review: *Leyes Interpretativas de la Constitución* (Statutes Interpreting the Constitution) and *Leyes Orgánicas Constitucionales* (Constitutional Organic Statutes, namely, special statutes that require a special voting quorum to be passed by Congress).[90] The 2005 amendments added another category of bills subject to mandatory review, that is, "the provisions of international treaties that regulate topics belonging to a Constitutional Organic Statute."[91] The rationale was that Constitutional Organic Statutes regulate the most relevant areas of societal life such as education, political par-

89. CARLOS CRUZ-COKE OSSA, INSTITUCIONES POLÍTICAS Y DERECHO CONSTITUCIONAL [POLITICAL INSTITUTIONS AND CONSTITUTIONAL LAW] ch. II 663-64 (Universidad Finis Terrae, 2009).

90. These laws require a quorum of 3/5 and 4/7 of the representatives and senators in office, respectively.

91. CRUZ-COKE, *supra* note 89, at 668.

ties, the functioning of tribunals, mining concessions, and armed forces, among others. A Chilean author has advanced the idea that this amendment recognized the theory that international treaties have the same legal authority as a statute[92] and thus, must be in accordance with the Chilean Constitution. In regards to this issue, the Constitutional Tribunal had already exercised its review powers over several international treaties regulating topics normally covered by a Constitutional Organic Statute such as International Labor Organization Convention No. 169 about Indigenous and Tribal Peoples ("ILO Convention 169").[93] In this case, in 2008 a group of Members of Congress filed a constitutionality review request before the Constitutional Tribunal indicating that the topics covered by ILO Convention 169 pertained to an organic constitutional statute and that, in consequence, its constitutional review by the Constitutional Tribunal was mandatory. The Constitutional Tribunal held that "the rules under review . . . regulate topics reserved by the Constitution to organic constitutional statutes, since, in the special cases referred to in the Convention, they establish ways of participation for indigenous peoples at national, regional, and municipal levels . . . ."[94]

On the other hand, there are statutes which do not require a mandatory, previous, constitutional review, *inter alia*, ordinary laws, and *leyes de quorum calificado* (qualified-quorum statutes, which have to be approved by the absolute majority of representatives and senators in office).[95] In these cases, the Constitutional Tribunal cannot act *sua sponte* (on its own initiative). Instead, its intervention must be requested by "the President of the Republic; by any of the Houses of the National Congress; or by a fourth of the members in office of any of the Houses of Congress."[96]

2. *Writ of Inapplicability for Unconstitutionality*

In an effort to concentrate the function of constitutional review in one organism, in 2005, new Article 93, Section 6 of the Constitution granted the Constitutional Tribunal the power to decide constitutional challenges brought by means of the Writ of Inap-

92. *Id.*; *see also* José Luis Cea Egaña, *La Praxis Del Control De Constitucionalidad En Chile* [*The Praxis of the Constitutionality Review in Chile*] (2007) (part of a conference offered before the Federal Supreme Tribunal of Brazil).

93. Navarro, *supra* note 17, at 46.

94. Tribunal Constitucional [T.C] [Constitutional Court], 2008, No. 1050 (Chile).

95. CRUZ-COKE, *supra* note 89, at 670.

96. *Id.*

plicability for Unconstitutionality.[97] Article 93, Section 6 establishes that the Constitutional Tribunal shall: "[d]ecide, by the majority of its active members, the inapplicability of a statute whose application in any matter pending before an ordinary or special tribunal, is contrary to the Constitution."[98]

Furthermore, Article 93, Section 10 prescribes that the Writ of Inapplicability can be filed by any of the litigants or by the judge of the case. The criteria to determine the admissibility of the Writ are the following: (1) a pending issue before an ordinary or special tribunal must exist; (2) the application of the challenged statute must be outcome-determinative in a particular case; (3) the challenge has to be reasonably founded; and (4) there must be compliance with the remaining requirements established by the applicable statutes. While exercising its powers, the Tribunal may decide whether to suspend the original procedure where the issue is being discussed.

Article 47(g) of the Constitutional Organic Statute of the Constitutional Tribunal established the grounds for the declaration of inadmissibility of a given Writ of Inapplicability: (1) for lack of standing; (2) when the challenged statute has been already declared constitutional by the Constitutional Tribunal, regarding the same alleged defect; (3) when there is no pending issue before another court, or the issue was already solved by another court; (4) when the challenged rule is not a statute (for example, an executive decree); (5) when from the circumstances it can be determined that the statute will not be applied or will not be decisive in solving the issue (the U.S. doctrine of "mootness"); or (6) when the Writ is not reasonably founded.

Before 2005, former Article 80 of the Constitution of 1980 established that the Supreme Court could declare the inapplicability "of a statute contrary to the Constitution" in a particular case.[99] After the 2005 amendment, Article 93, Section 6 authorizes the Constitutional Tribunal to declare "the inapplicability of a statute whose application in any matter before a regular or special tribunal, is contrary to the Constitution."[100] Chilean authors have highlighted the considerable difference between these two provisions. In effect, while before 2005 a challenged statute had to be contrary to

97. Navarro, *supra* note 17, at 49.

98. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] art. 93, § 6 (Constitution of 1980, as amended in 2005).

99. *Id.* at art. 80.

100. *Id.* at art. 93, § 6.

the Constitution in a general or abstract sense[101] (that is, without the need of a "case or controversy"), after 2005 the inapplicability can be declared when the consequences of the application of the statute to the particular case are unconstitutional, even if the statute, on face value, accords with the Constitution.[102]

Moreover, the Constitutional Tribunal had stated in 2006 that

> [W]hile before 2005 a direct confrontation between the statute and the Constitution had to occur, now we are in the presence of a different situation. In fact, what can be declared unconstitutional nowadays is the application of a statute, which relativizes the abstract exam of constitutionality, establishing a clear difference with the previous constitutional text.[103]

Therefore, when reviewing the constitutionality of a statute, the Constitutional Tribunal has to carry out a concrete constitutionality control, that is, determine if the result of the application of a statute to a particular case is contrary to the Constitution.[104]

3. *Writ of Unconstitutionality*

Since the late 1970s, the idea of having a legal mechanism to declare the unconstitutionality of a statute *erga omnes*, with general effects, was subject to heated discussions. The *CENC* proposed this idea without success.[105] Eventually, the Writ of Unconstitutionality was the main novelty brought about by the amendments of 2005, since it was the first time that the Chilean legal system had a mechanism to allow a tribunal to repeal a statute for violating the Constitution.[106]

This was a huge reform because it departed from the French traditional view of judges as the "mouthpiece of the law"[107] and from the French theory of strong separation of powers—which has

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101. Javier Couso Salas & Alberto Coddou MacManus, *La Naturaleza Jurídica De La Acción De Inaplicabilidad En La Jurisprudencia Del Tribunal Constitucional: Un Desafío Pendiente* [*The Legal Nature of The Writ of Inapplicability in the Jurisprudence of the Constitutional Court: A Challenge Pending*], 8 ESTUDIOS CONSTITUCIONALES 389, 396 (2010).

102. Cea, *supra* note 92, at 6; *see also* Navarro, *supra* note 32, at 1251.

103. Tribunal Constitucional [T.C.] [Constitutional Court], 2006, No. 546 (Chile).

104. Couso & Coddou, *supra* note 101, at 396.

105. Navarro, *supra* note 17, at 120.

106. Navarro, *supra* note 32, at 1253.

107. Dante Figueroa, *Twenty-one Theses on the Legal Legacy of the French Revolution in Latin America*, 39 GA. J. INT'L & COMP. L. 39, 81 (2010); *see also* Robert S. Barker, *Judicial Review in Costa Rica: Evolution and Recent Developments*, 7 SW. J. L. & TRADE AM. 267, 267-68 (2000).

deeply influenced the Latin legal systems since the early eighteenth century[108]—under which judges did not have the authority to overrule the legislature. The amendments of 2005 incorporated a new Article 93, Section 7 establishing that the Constitutional Tribunal can "[d]ecide, by the majority of four fifths of its active members, the unconstitutionality of a statute declared inapplicable according to the previous section."[109] Article 93, Section 11 adds that:

> Once the declaration of inapplicability of a statute in accordance with section 6 of this article is decided in a previous decision, there will be public action to request the declaration of that statute's unconstitutionality to the Tribunal, notwithstanding the power of the Tribunal to declare it on its own initiative.[110]

From the aforementioned provisions, the following requirements can be deduced: (1) the challenged rule has to be a statute;[111] (2) that statute has to have been declared inapplicable by the Constitutional Tribunal prior to the unconstitutionality request;[112] (3) the declaration of unconstitutionality can be requested by any person (public action) or declared by the Constitutional Tribunal *sua sponte*;[113] and (4) there has to be "an absolute contradiction between the challenged statute and the provisions of the Constitution."[114]

Regarding the effects of the unconstitutionality declaration, Article 94, Section 3 of the Constitution prescribes that the statute will be repealed from the moment of publication of the decision that declared the unconstitutionality in the Official Gazette. Such declaration does not have retroactive effect. Furthermore, Article 94, Section 4 establishes that the decision must be published within three days of its issuance.

As explained by a Chilean author, the new constitutional system "accepts the provisional constitutionality and validity of the unconstitutional rules unless and until 'repealed' by the Constitu-

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108. Figueroa, *supra* note 107, at 71.
109. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] art. 93, § 7.
110. *Id.* at art. 93 § 11.
111. Vega & Zúñiga, *supra* note 77, at 153.
112. Navarro, *supra* note 32, at 1254.
113. Vega & Zúñiga, *supra* note 77, at 149.
114. Navarro, *supra* note 32, at 1254.

tional Tribunal."[115] That is to say, the unconstitutionality declaration of a statute does not produce retroactive effects. Therefore, the statute that was declared unconstitutional is considered repealed as of the publication of the Constitutional Tribunal's opinion declaring the statute's unconstitutionality in the Official Gazette, but it is otherwise considered valid regarding the cases where the statute was applied before such publication. However, as it will be discussed later, the issue of when the unconstitutionality declaration produces effects is still controversial.

As of this date the Constitutional Tribunal has declared the unconstitutionality of four statutory provisions: (1) Article 116 of the Tax Code, which allowed the Regional Director of the Chilean Internal Revenue Service (formerly a first instance court in the tax trials) to delegate its jurisdiction in an employee of its office;[116] (2) Article 171 of the Sanitary Code, which required that in order to file a claim against a penalty established by the National Health Service, the claimant had to present a receipt proving payment of the fine imposed (thus the sanction had to be complied with in order to be challenged);[117] (3) Article 595 of the Organic Code of Tribunals, which prescribed that the *abogados de turno* (lawyers on duty), which is a system where Chilean lawyers are appointed, *pro bono*, for one month a year to represent indigent clients (only the phrase "*pro bono*" was declared unconstitutional);[118] and (4) Article 38 of the Health Care Law, which made it permissible "to increase the health care plan according to the sex and age [of the people] ."[119]

B. *Problems Concerning the Application of Article 93 § 6 of the Chilean Constitution: An Abstract Constitutionality Control in Lieu of a Concrete Constitutionality Control When Deciding Writs of Inapplicability*

As previously mentioned, the Writ of Inapplicability in Chile passed from an abstract constitutionality control under the original text of the 1980 Constitution, to a concrete constitutionality

115. CRUZ-COKE, *supra* note 89, at 675.
116. Navarro, *supra* note 32, at 1254.
117. *Id.*
118. *Id.*
119. Luis Alejandro Silva Irarrázaval, *¿Es El Tribunal Constitucional El Supremo Intérprete De La Constitución?* ["*Is The Constitutional Tribunal the Supreme Interpreter of the Constitution?*"], XXXVII REVISTA DE DERECHO DE LA PONTIFICIA UNIVERSIDAD CATÓLICA DE VALPARAÍSO 573, 585 (2012).

control after the 2005 amendments. Several authors suggest that this change is the consequence of the repeated criticisms by scholars who considered that under the original text of the Constitution of 1980 the declaration of inapplicability was discriminatory. In effect, the charge was that since the Supreme Court declared the inapplicability when a statute generally violated the Constitution (for having an objective defect of constitutionality) such declaration was valid exclusively for the particular case where the Writ was filed. The resulting outcome was that the same statute was deemed to be in accordance with the Constitution in all other cases, unless the affected party filed another independent Writ of Inapplicability against the same statute.[120]

The criticism centered on the fact that the Constitutional Tribunal exercised constitutionality review without distinguishing between an abstract and a concrete constitutionality control.[121] For example, in one case the Tribunal stated that the application of a statute can be unconstitutional based on two circumstances: (1) when the statute is intrinsically unconstitutional, and thus its application would violate the constitution; or (2) when the statute is constitutional in a general sense, but when applied to a particular case it produces a result that is unconstitutional.[122]

According to some authors, the Tribunal's declaration that a statute is inapplicable because it intrinsically violates the Constitution, is, in practice, an "abstract control" because the statute is only confronted with the Constitution, without considering the results of its application to the particular case.[123] According to Couso and Coddou, the Constitutional Tribunal is applying two constitutionality controls when deciding a Writ of Inapplicability: (1) a previous abstract constitutionality control, and (2) a subsequent concrete constitutionality control. This double constitutionality test was deemed with Article 93, Section 6 of the Constitution, which only authorizes the inapplicability of a statute "whose application . . . is contrary to the Constitution", that is, it only authorizes a concrete constitutionality control.

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120. Fernando Atria Lemaitre, *Inaplicabilidad Y Coherencia: Contra La Ideologia Del Legalismo [Inapplicability and Coherence: Against the Idea of Legalism]*, XII REVISTA DE DERECHO UNIVERSIDAD AUSTRAL DE CHILE 119, 120 (2001).

121. Couso & Coddou, *supra* note 101, at 402.

122. Tribunal Constitucional [T.C] [Constitutional Court], 2008, No. 1038 (Chile).

123. Alan Bronfman, *El Carácter Privado Del Proceso De Inaplicabilidad Por Inconstitucionalidad [The Private Nature of the Process of Inapplicability Due to Unconstitutionality]* XXXVII REVISTA DE DERECHO DE LA PONTIFICIA UNIVERSIDAD CATÓLICA DE VALPARAÍSO 243, 256 (2011).

To illustrate this difficult point further, in 2008 the Constitutional Tribunal decided a case in which a law professor who worked for a State-sponsored university was fired based on his representation of a client charged with drug trafficking. The university relied on a statute prohibiting lawyers hired with public funds from undertaking the representation of clients accused of drug trafficking.[124] The petitioner argued that the statute violated several constitutional guarantees, such as the freedom to work, the right to counsel, and the prohibition of arbitrary discrimination. Moreover, he claimed that a lawyer not working for a publicly funded university may represent a client under drug trafficking charges.[125] The Constitutional Tribunal dismissed the request based on "the goal protected by the statute, the severity of the moral reproach against the crimes related to the prohibition, and the liberty of legislators when determining the content of the [concerned] statutes."[126] Dissenting judges were of the opinion that the prohibition of performing specific professional services did not violate the constitution when it is "[r]easonable to consider that these particular services would undermine any of the unique four values on which the prohibition can be based (that is, contrary to the public morals, public safety and public healthiness, or when the national interest requires it pursuant to a statutory provision)."[127] As a consequence, the dissenting judges manifested that it was necessary to undertake a reasonability test to determine whether the prohibition was unconstitutional in that particular case. The judges concluded that

> the prohibition and the penalty of dismissal . . . are unreasonable since they do not seem to be an appropriate means to fight drug trafficking or to promote administrative probity . . . in the case of a lawyer that performs a public function as a part-time professor in a public university; moreover . . . it is not the institutional mission of a university to fight drug trafficking.[128]

124. Couso & Coddou, *supra* note 101, at 406.
125. *Id.* at 407.
126. *Id.*
127. *Id.*
128. *Id.* at 408.

In this case, the dissenting vote carried out a concrete control of the constitutionality of the statute applied to the circumstances of the particular case.

As it may be appreciated in the aforementioned case, authors contend that the problem in the application of a proper constitutionality control in the Writ of Inapplicability is caused by the flawed design of the constitutional review system.[129] In fact, the Chilean model contemplates a dual constitutionality control in charge of the Constitutional Tribunal: (1) an abstract control for the constitutionality review of bills and for the Writ of Unconstitutionality, and (2) a concrete control for the Writ of Inapplicability. In consequence, the Tribunal has had enormous practical difficulties when differentiating both types of controls.

VII. THE DEVELOPMENT OF NEW CONSTITUTIONAL TESTS BY THE CHILEAN CONSTITUTIONAL TRIBUNAL

After the 2005 amendments, the Constitutional Tribunal adopted a new constitutionality litmus test, namely, the Proportionality Principle (or Proportionality Test), to conduct its constitutional review responsibilities. Extensive borrowing from the experiences of the German and Spanish constitutional tribunals took place during the early years after the amendments.[130] Under this principle, the legislature must restrict constitutional rights in an appropriate way, that is, there has to be a relationship of proportionality between the intensity of the restriction and the importance of the limited rights.

For a determination of whether a proper relationship between the restriction and the affected rights exists, the Proportionality Test is used under two requirements: (1) that the restriction pursues the fulfillment of a social objective of certain importance;[131] and (2) that it is demonstrated "that the means used to restrict the right are reasonable and justifiable."[132] Regarding this second requirement, a restriction on constitutional rights can be consid-

129. *Id.* at 420.

130. José Francisco García García, *El Tribunal Constitucional Y El Uso De "Tests": Una Metodología Necesaria Para Fortalecer La Revisión Judicial Económica [The Constitutional Court and the Use of Tests: A Necessary Methodology for Strengthening Economic Judicial Review]*, 38 REV. CH. DE DER. 101, 104 (2011).

131. Dante Figueroa & Arturo Fernandois, *Comparative Constitutional Protection of Contracts in the United States and Chile*, INT'L LEGAL RESEARCH INFORMER 9, (Summer 2012), http://www.asil.org/pdfs/IG/ILRIG_Informer_Issue%204_Final.pdf.

132. *Id.*

ered reasonable and justifiable when the challenged measure: (a) "is carefully designed to achieve the legislative purpose;"[133] (b) impairs the exercise of the concerned right "as little as possible;"[134] and (c) is proportional as compared to the purpose sought and "considering the importance of the right at stake."[135]

The Constitutional Tribunal has used this Proportionality Test in different contexts including when determining "whether a civil penalty is constitutional," "whether an administrative measure deprives a citizen of a welfare benefit," "and whether the modification of a contract produces unconstitutional effects concerning property rights."[136] In the landmark case of *HQI Transelec S.A. v. Empresa Eléctrica Panguipulli S.A.* decided in 2006,[137] the petitioner filed a Writ of Inapplicability against a statute that changed the manner in which it calculated the prices of its services pursuant to the contract established by the parties.[138] Article 19, Section 24 of the Chilean Constitution guarantees ownership rights regarding corporal and incorporeal assets, and the latter have long been deemed to include contractual rights. Consequently, the petitioner claimed that this new statute violated its constitutionally-protected ownership rights under the contract. The Constitutional Tribunal, however, decided in favor of the constitutionality of the statute, holding that even though the price is an essential element of the contract, the economic consequences of the change were not sufficient to consider the legislative measure as a violation of property rights.[139]

Moreover, in 2008, the President of the Chilean Bar Association (*Colegio de Abogados*) filed a writ of unconstitutionality challenging Article 575 of the Organic Code of Tribunals, which established the institution called *abogados de turno* under which lawyers had to work *pro bono* representing indigent clients in trial for one month in a given calendar year, as already mentioned. The petitioner argued that Article 575 violated the constitutional right to equality before the law and also the right of equality vis-à-vis

133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.*
137. Tribunal Constitucional [T.C.] [Constitutional Court], 6 marzo 2007, "HQI Transelec C.S. v. Empresa Eléctrica Panguipulli S.A..," Rol de la causa: 505-06 (Chile), *available at* http://www.tribunalconstitucional.cl/wp/descargar_expediente.php?id=22955.
138. Figueroa & Fernandois, *supra* note 131, at 8 n.20.
139. *Id.*

public burdens.[140] The Constitutional Tribunal carried out a proportionality test of Article 595 of the Organic Code of Tribunals,[141] concluding that "the lawfulness of the goals pursued by the legislator does not justify the use of disproportionate and burdensome means, which affect the property of the lawyers appointed to be on duty, who certainly have the right to a just remuneration for their professional services."[142] In addition, the Tribunal reasoned that the *pro bono* burden "does not seem to be a necessary or justifiable means to achieve the constitutional goal pursued."[143] Consequently, the Constitutional Tribunal struck down the ancient *pro bono* obligation formerly established for lawyers by the Organic Code of Tribunals.[144]

As an author rightly points out, the adoption of the proportionality test by the Constitutional Tribunal

> has become a sort of "legal revolution" in a country with such a legalistic culture as Chile [but that] [i]n spite of the arguments against this new criterion, the application of the proportionality test to measure the constitutionality of legislative and administrative decisions has enriched the debate about rights limitations.[145]

VIII. THE JURISDICTIONAL CONFLICTS BETWEEN THE CHILEAN SUPREME COURT AND THE CONSTITUTIONAL TRIBUNAL

A. *Debate Between the Constitutional Tribunal and the Supreme Court Concerning the Possibility of Declaring the Inapplicability of the Repealed Article 116 of the Tax Code*

In 2007, the Constitutional Tribunal, *sua sponte*, declared the unconstitutionality of Article 116 of the Chilean Tax Code, which allowed the Regional Director of the Chilean Internal Revenue Service (formerly a first instance court in tax trials) to delegate its

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140. Rainer Arnold, José Ignacio Martinez Estay & Francisco Zúñiga Urbina, *El Principio De Proporcionalidad En La Jurisprudencia Del Tribunal Constitucional [The Principle of Proportionality in the Jurisprudence of the Constitutional Tribunal]*, 10 ESTUDIOS CONSTITUCIONALES UNIVERSIDAD DE TALCA 65, 90 (2012).

141. *Id.*

142. Tribunal Constitucional [T.C.] [Constitutional Court], 2009, No. 1254 (Chile).

143. Arnold, Martinez & Zúñiga, *supra* note 140, at 90.

144. Tribunal Constitucional [T.C.] [Constitutional Court], 2009, No. 1254 (Chile).

145. Figueroa & Fernandois, *supra* note 131, at 9.

jurisdiction in an employee of its office.[146] This was the first time that the Constitutional Tribunal declared the unconstitutionality of any statutes under the new prerogatives granted by the 2005 amendments.[147] Since the repeal of Article 116 in 2007, several claims were filed challenging the validity of administrative trials where delegates of the Regional Director of the Internal Revenue Service (SII) acted as administrative judges.[148] For example, in 2007, a circuit court (the Court of Appeals of Rancagua) declared in one case that the acts of the SII's employees under the delegation scheme were void, because they became illegal after the repeal of Article 116.[149] In 2007 the Supreme Court adopted a different criterion, establishing that the unconstitutionality declaration of Article 116 does not produce retroactive effects; the implicit consequence of this opinion was to uphold the validity of the application of Article 116 before its repeal.[150] In view of this conundrum, the Supreme Court decided to request the Constitutional Tribunal to declare the inapplicability of Article 116 in those cases, and to use that declaration as the basis for denying effects to the actions of the delegates.[151]

The Constitutional Tribunal, however, refused to issue an opinion on several writs of inapplicability brought by the Supreme Court in cases initiated before the declaration of unconstitutionality of Article 116 of the Chilean Tax Code in 2007, which were pending before the Supreme Court; the Constitutional Tribunal reasoned that there was no statute to apply in those particular cases.[152] Moreover, in 2006 the Internal Revenue Service had issued a resolution declaring without effect any delegation made by a Regional Director to an employee of its office.[153]

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146. Tribunal Constitucional [T.C.] [Constitutional Court], 2007, No. 681 (Chile). The reasons why this provision was considered unconstitutional are the following: (i) According to Article 76 of the Chilean Constitution, the authority to judge only belongs to the Courts established by law; (ii) Article 19 N°3 prescribes that nobody can be judge by special commissions, instead there should be a Court previously established by law; (iii) according to Article 5 of the Constitution, the authority to judge is an attribute of sovereignty, and sovereignty only can be exercised by the authorities established in the Constitution; therefore the authority to judge cannot be delegated.

147. Cea, *supra* note 92, at 19.

148. Verdugo, *supra* note 66, at 280-81.

149. *Id.* at 281.

150. *Id.* at 282.

151. *Id.*

152. Tribunal Constitucional [T.C.] [Constitutional Court], 2008, No. 901 (Chile).

153. Gonzalo Guerrero V., *La Fuerza Vinculante De Las Sentencias Del Tribunal Constitucional Chileno. Una Aproximación Desde La Reforma Constitucional De 2005* [*The Binding Force of the Decisions of the Chilean Constitutional Tribunal. An Approach from*

The importance of the constitutional conflict that arose between the two courts lay in that, one the one hand, Article 94 of the Constitution provides that once a statute is declared unconstitutional it is considered repealed from the date of publication of the Tribunal's opinion in the Official Gazette. Therefore, despite its virtual unconstitutionality, a statute retains its validity and must be applied to the cases decided prior to the declaration of unconstitutionality.[154] Accordingly, the Supreme Court argued that the Constitutional Tribunal "when refusing this request, actually . . . leaves the petitioner in an unequal situation regarding other petitioners that, in the same legal situation, had obtained a declaration holding that the provision [article 116] is inapplicable."[155]

On the other hand, as already said, the Constitutional Tribunal determined that Article 116 could not be applied retroactively because: (1) the statute was repealed only in 2007, and (2) in 2006 the Internal Revenue Service had issued a resolution declaring without effect any delegation made by a Regional Director to an employee of its office. [156] Accordingly, the Tribunal held that the Supreme Court had the constitutional authority to judge the validity of the decisions of delegate tax judges issued before the repeal of Article 116.[157] In other words, the Constitutional Tribunal told the Supreme Court that they could not declare the inapplicability of a statute that had been already applied.

A dissenting justice of the Constitutional Tribunal argued that the Constitutional Tribunal should have issued a decision in those cases because: (1) the repeal of a statute is not an impediment to declare its inapplicability;[158] (2) the repeal of a statute does not prevent the fact that the statute can be decisive in solving the cases that were initiated when the statute was valid;[159] and (3) as already stated, before Article 116 was repealed the Constitutional Tribunal had declared the inapplicability of this provision in more than thirty cases pending before regular tribunals where Article 116 had been already applied.[160]

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the Amendment of 2005], 17, http://www.congresoconstitucional.cl/upload/69/Gonzalo%20Guerrero_1252881542.pdf.

154. Verdugo, *supra* note 66, at 279.
155. Cea, *supra* note 92, at 20.
156. Guerrero, *supra* note 153, at 18.
157. Cea, *supra* note 92, at 19-20.
158. Tribunal Constitucional [T.C.] [Constitutional Court], 2008, No. 901 (Chile).
159. *Id.*
160. *Id.*

Finally, since 2008 the Supreme Court has solved this issue by voiding, *sua sponte*, the tax trials where SII's employees acted as tax judges.[161] The argument used by the Supreme Court has been that: (1) the procedure requires three elements to be valid: the parties, a conflict, and a tribunal;[162] and (2) the repealed Article 116—which gave jurisdiction to the delegates—was a procedural norm which applied during the entire procedure. As a consequence, the repeal of Article 116 implies that it can no longer be applied in those procedures, and having lost their jurisdiction over the cases, the tribunals were invalid and the procedures became void.[163]

B. *According to the Supreme Court, in Certain Cases the Declaration of Inapplicability of a Statute by the Constitutional Tribunal Does Not Bind the Supreme Court When Deciding a Writ of Protection*

Article 19 of the Chilean Constitution establishes several constitutional rights within sections 1 to 26, *inter alia*, the right to life and to physical and psychological integrity,[164] equality before the law,[165] freedom of conscience and religion,[166] and the right to property.[167] Article 20 of the Constitution prescribes that a person can file a writ of protection before a Court of Appeals if that person is "deprived, disturbed or threatened in the legitimate exercise of the rights and guarantees established" in some of these sections (not all of them are covered) by an "arbitrary and illegal act or omission."[168] The Court of Appeals must "immediately adopt all the necessary measures to reestablish the rule of law and to ensure a proper protection for the affected person."[169] The decisions of the Court of Appeals can be appealed before the Supreme Court according with Article 98 of the Organic Code of Tribunals.

A dilemma arose in 2011 when the Supreme Court "rejected a writ of protection, applying a statute that had been declared inap-

161. Verdugo, *supra* note 66, at 282.
162. *Id.* at 282 n.98.
163. *Id.*
164. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] art. 19, § 1.
165. *Id.* at art. 19, § 2.
166. *Id.* at art. 19, § 6
167. *Id.* at art. 19, § 24.
168. *Id.* at art. 20.
169. *Id.*

plicable by the Constitutional Tribunal."[170] In that case, the Administrative Corporation of the Judicial Power refused to pay an appellate judge his performance bonuses because he did not comply with the legal requirement of working for more than six months in a calendar year.[171] The judge claimed that he could not work because he had a catastrophic illness, which could be proved with medical certificates.[172] However, he did not receive his bonuses because a statute (Article 4, section 5 of Law No. 19,531) established that the only approved exceptions were medical certificates for labor accidents or maternal leave.[173] Consequently, the judge filed a writ of protection before the Court of Appeals for Valparaíso.

The Court of Appeals requested the Constitutional Tribunal to declare the inapplicability of the aforementioned provision, on the grounds that it violated the petitioner's rights of equality before the law and to property.[174] The Constitutional Tribunal declared the inapplicability of the provision and the Court of Appeals granted the writ of protection, ordering the payment of the bonuses to the judge.[175] On appeal from the Court of Appeals, the Supreme Court stated that the declaration of inapplicability was not binding for the Supreme Court when deciding the case because the challenged provision was applied before the inapplicability declaration.[176] Namely, when the Administrative Corporation refused to pay, it had the legal obligation to do so because the challenged statute did not allow to pay bonuses if a person did not work at least six months a year due to a catastrophic illness. Thus, when taken, the act was not illegal and, consequently, one of the criteria to grant the writ of protection (illegal act) was not fulfilled.[177] Accordingly, the Supreme Court denied the writ of protection.[178]

As previously mentioned, the Constitutional Tribunal declared the unconstitutionality of Article 575 of the Organic Code of Tri-

170. Silva, *supra* note 119, at 592; *see also* Libertad y Desarrollo, *Vinculatoriedad del Precedente del Tribunal Constitucional para la Corte Suprema* [*Binding Nature of the Constitutional Tribunal's Precedent for the Supreme Court*] 21 FALLOS PÚBLICOS 1 (Jan. 2012), *available at* http://www.lyd.com/wp-content/files_mf/fallospublicos21tconstitucionalycsuprema.pdf.

171. Silva, *supra* note 119, at 592.

172. *Id.*

173. *Id.*

174. *Id.*

175. Libertad y Desarrollo, *supra* note 170, at 3.

176. Silva, *supra* note 119, at 593.

177. Libertad y Desarrollo, *supra* note 170, at 4.

178. *Id.* at 3-4.

bunals establishing the "*pro bono*" obligation of lawyers. In 2008, a lawyer had filed a writ of inapplicability against his appointment as *abogado de turno* by two family judges in the city of Osorno, a claim which was rejected by the respective Court of Appeals.[179] The decision was challenged by an appeal at the Supreme Court and a writ of inapplicability at the Constitutional Tribunal.

The Constitutional Tribunal declared that Article 575 of the Organic Code of Tribunals was inapplicable because the word pro bono made the *abogados de turno* institution "disproportionately burdensome."[180] Despite the inapplicability declaration, the Supreme Court rejected the appeal of the writ of protection, holding that the only unconstitutional problem of the appointment was the pro bono aspect, but the lawyer had all the legal mechanisms to charge for his work.[181]

IX. CONCLUSION

During its almost 180 years, the Chilean constitutional review system has experienced a very important revolution, passing from review by the legislature to the current system where a special tribunal is in charge of the constitutionality control. The different systems adopted by the Chilean Constitutions have been influenced by the experiences of other countries, such as the U.S. judicial review (since the Constitution of 1925) and the European judicial review (since the creation in 1970 of the Constitutional Tribunal). The resulting model is one that combines elements of both models: (1) a special tribunal in charge of carrying out the constitutionality review (as in the European system); (2) a concrete constitutionality control approach when deciding writs of inapplicability (as in the U.S. system), and an abstract constitutionality control approach when reviewing the constitutionality of bills and when deciding writs of constitutionality (as in the European System); and (3) regarding the effects of the decisions of the Chilean Constitutional Tribunal, where (as in the U.S. system) the declaration of inapplicability produces *inter partes* effects, and where, (as in the European system) the unconstitutionality declaration produces *erga omnes* effects.

179. Silva, *supra* note 119, at 593-94.
180. *Id.* at 594.
181. *Id.*

On the other hand, despite the fact that in the 1973-80 period judicial review was nonexistent in Chile, the Constitutional Tribunal played during the late 1980s, under the Constitution of 1980, a very important role in the transition to democracy by ensuring that the statutes that governed that process were made in accordance with the principles and values established in the Constitution. Moreover, the 2005 amendments constituted a huge step towards a concentrated system of constitutional review, by granting the Constitutional Tribunal not only the Writ of Inapplicability (previously under the jurisdiction of the Supreme Court), but also the Writ of Unconstitutionality, which allowed the Tribunal to repeal the statutes passed the Congress, thus changing the traditional relationship between the judiciary and the legislature in that country.

Overall, this paradigm change has also created new challenges and debates regarding the binding authority and the effects of the Constitutional Tribunal's decisions, particularly regarding how the Supreme Court has to deal with them. The Supreme Court still retains constitutional jurisdiction to decide Writs of Protection, which often entails that the Court take into account the constitutionality of a statute under the color of which the respondent's action or omission is challenged.

Furthermore, after the 2005 amendments, the Constitutional Tribunal has adopted new tests to determine whether a law restricts a constitutional right or guarantee. Therefore, the proportionality test has been a very efficient tool to guide the Tribunal's reasoning when deciding Writs of Inapplicability and Unconstitutionality.

In sum, the Chilean judicial review system is a revolution in the making, where despite the apparent improvements, new challenges will arise in the future that will likely contribute to enhance the mechanisms aimed at ensuring the effective implementation of the Constitutional Supremacy Principle in Chile.