THE CONSTITUTIONAL JUSTICE IN CHILE

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In Chile there exists a concentrated and shared system of Constitutional Justice. It is concentrated because the common judges lack on constitutional jurisdiction and shared because there exists a group of tribunals to solve constitutional conflicts: The Constitutional Tribunal; The Supreme Court which for the moment controls laws in force and the Courts of Appeal which handles the actions for relief and the electoral justice that controls the electoral processes.

The origins of Constitutional Justice rose in 1925 when the new Constitution handed the Supreme Court the attribution of declaring laws inapplicable due to unconstitutional vice with the effect inter partes, creating the Censor Tribunal of Elections and handing the Court of Appeal the attribution to handle actions and actions for relief of freedom.

The Constitution of 1970 was modified in 1980 establishing the first Constitutional Tribunal with a limited competence for solving constitutional conflicts.

Thus, By the end of the Fifties, various professors of Constitutional Law, politicians of diverse tendencies manifested the necessity of incorporation of a Constitutional Tribunal into the legal code, as in other countries, such as Italy, Germany, Austria and France.

The doctrinal and political restlessness was, basically, due to the circumstances that in Chile there did not exist an instance to solve the legal – constitutional conflicts that could arise and which, in fact had provoked a misunderstanding between the President of the Republic and the National Congress, and in the convenience of creating a juridical, autonomous and independent organism which would solve in a preventive form on the constitutionality of laws at the request of the Head of the State or by certain number of congressmen or by the Congress through its respective Chambers.

In 1964 and 1965 the former presidents of the Republic, Jorge Alessandri and Eduardo Frei sent their individual projects on Constitutional Reform, in which, although expressed in a different manner, they both proposed a solution on eventual conflicts between the Executive and Legislative authorities due to the

unequal interpretation of constitutional regulations. Nevertheless, the National Congress approved neither of these two projects.

In the beginning of 1969 and towards the end of his mandate, the President of the Republic Frei Montalva sent a new Constitutional Reform project which was to be in force from November 4th 1970 onwards, tending to, among other issues, create with a clear and defined characteristics, a Constitutional Tribunal. The message that accompanied the project sent to the Legislative authorities underlined the presidential initiative on this matter. The message indicated that "one of the causes that reduces the effectiveness of public authorities is the discrepancy that tends to arise between the executive authorities and the Congress. I do not need to remind about the number of facts that corroborate this affirmation about which, moreover, there exists consensus. Regarding to the conflicts of these two State authorities, many are surpassed by political agreements, obtained within the free game of our institutions. But the problem appears when those agreements are not obtained because our system does not provide the means to settle the dispute."

The project was finally approved by the National Congress with a high majority and introduced important modifications to our constitution, giving origin to what denominated the "Reform of 1970". This included the incorporation of Articles 78 a), 78 b) and 78 c) into the Constitution of 1925, norms by which a "Constitutional Tribunal" was created, formed by five members. Three of them designated by the President of the Republic with the agreement of the Senate and two by the Supreme Court of Justice chosen among its members.

The Tribunal thus had a short juridical life, since constituted on September 10th 1971. It was not able to avoid the severe crisis that the country was facing and led into a military take-over. The Tribunal was dissolved by the Government Board that seized power through a military uprising on September 11th 1973, according to the Decree Law N. 119, published in the Official Newspaper on November 10th of that year. In other words, the Tribunal exerted its functions only during two years, expressing its decisions through seventeen sentences, during a period when extraordinarily difficult political events took place in the Chilean institutional life.

The Supreme Court and the Courts of Appeal continued maintaining their attributions.

THE CONSTITUTIONAL TRIBUNAL AND BASIC PRINCIPLES IN WHICH ITS JURISDICTION RESTS

In the Constitution of 1980 the Constitutional Tribunal is re-established and its attributions and independence are strengthened.

The Constitutional Tribunal is established by the Chapter Seven of the Constitution, which under this designation contains the sections 81, 82 and 83 which are the Constitutional previsions that rule it. There also must be taken into account the Law 17.997 of May 19th 1981, the Basic Constitutional Law of the Tribunal which in ninety permanent sections and four transitory one regulates, by order of Section 81 previously quoted, the organisation and performance of the Tribunal and establishes the facilities, compensations and the functions of its personnel. Moreover, the Section 90 of the Basic Law quoted allows the Tribunal by means of juridical decree agreements, dictated in sessions held especially

on this matter, to regulate the subjects referred by this law. In practise of this faculty, the Tribunal has pronounced twelve juridical decree agreements about regulations that complement aspects not considered by the respective law.

The fundamental principles on which the Constitutional Tribunal rests and on which its structure is based, are, basically, the following;

1. Independence and autonomy

As stated in the Section One of its Basic Law, the Constitutional Tribunal is an instrument of the State, autonomous and "independent from any other authority or power", to which the Constitution has handed over specific functions that escape to the orbit from the competency of Executive, Legislative and legal powers and from any other constitutional instruments.

Against the decisions pronounced by the Tribunal, there does not exist appeal before any other court.

A clear demonstration of the disposition of the Legislator, by assuring the Tribunal a maximum independence in the practise of its faculties, are the diverse regulations of its Basic Law that assure its members that the decisions, decrees and reports that expedite in the issues that they are involved in, do not impose them any responsibility, specifying the foreseen incompetence or the impediments that disqualify them from performing their duties which will be judged by the Tribunal, establishing that no member of the Tribunal can be prosecuted while the Court of Appeal of Santiago does not previously declare to be cause for the development of the motive and finally, prescribing that no member can be arrested except by an order of a competent court, only in the case of a crime or a simple flagrant crime and only to be brought before a corresponding court.

On the other hand, the Tribunal enjoys economic independence, as the fact that within the State Budget it has its own budget appropriation, stated in the Section 80 of the Law Nº 17.997. It is important to underline that in this aspect, the rigor on which the legislator preoccupied to protect the economic independence of the Tribunal to assure it a normal operation. Preventing any contingence that could pall the pursued purpose, in the Section 81

of the quoted law, it disposed imperatively that "the State Budget should consider as a minimum, for the operation of the Tribunal, the designated amount of the previous year, expressed in the currency of same value".

2. Immovability

The members of the Tribunal are immovable as it is clearly established in the Constitution. This means that they enjoy the right to not be dismissed or suspended from their duties except by reasons and in regulations determined by the Constitution and its Basic Law. They can only desist from their duties in the following cases:

a) Resignation accepted by the Tribunal.

b) Expiry of term of the appointment.

c) Having attained to the age of seventy-five years and

d) By a decision of the Tribunal agreed by the majority of the members in duty, with exclusion of one or those affected, when

presenting an impediment that by common consent with constitutional regulations or by legal relevance disqualifies one or more of the members appointed to perform their duties, or affecting one or more its ministers a causal of a foreseen incompetence, with the conformity as disposed in the Section 81, second clause of the Constitution.

On their behalf, the members of the Tribunal who are ministers of the Supreme Court also desist from their duties if they withdraw from the Court for any reason.

3. Responsibility

The Constitution does not establish a clear responsibility to the members of the Tribunal. However, it is evident that the principle of responsibility is present and has been developed by the Basic Law of the Tribunal.

There should be mentioned that as a necessary complement to the independence of the Tribunal, the Basic Law states that the ministers do not hold responsibility for the decisions, decrees or reports that they expedite in the issues that they are involved in,

this must be understood without prejudice of what they may have for the committed crimes with the pretext of their practice.

Nevertheless, by the will expressed by the constituent, the members of the Tribunal can not be accused constitutionally for a remarkable abandonment of their duties, as in the case of the Magistrates of the Superior Tribunals of Justice and the General Controller of the Republic. The reason for this exception is explained by Professor Raúl Bertelsen to the Commission of Study of the New Constitution: "The anomaly consists in the principal function of the Constitutional Tribunal which is to appreciate the constitutionality of the laws, which is where the problem lays, as the members of are exposed to become constitutionally accused by the Congress". (Session N:o 365, page 2461).

Nevertheless, it must be taken into account that the Ministers of the Constitutional Tribunal whom also practice their duties as Ministers of the Supreme Court can be constitutionally accused in the position and for acts committed in duty, in the case of this, if dismissed, they will desist from their duties as members of the Constitutional Tribunal with the conformity as disposed in the Section 81, fifth clause of the Constitution.

4. Public Record

The acts of the Tribunal are matter of public record as stated by the article Nº 4 of the Basic Law of the Tribunal and allegations from other interested parties are permitted.

However, there is an important exception to this, the Tribunal on majority of votes can decree on specific judicial proceedings the resolutions to be reserved.

It is easy to understand this exception when in twenty years of existence of this regulation this has never occurred. The nature of the issues which the Tribunal must submit to makes it advisable in some occasions, to restrict or not permit the access to public records in specific cases, whether because of supreme national interest or because the information might damage an investigation by the Tribunal, knowing, for instance about acts or behaviour of people or organisations who attend against the basic foundations of the Constitution.

5. Liability

The principal of liability of the Constitutional Tribunal is established in the Section Three, first clause of the Basic Law which indicates "The Tribunal can only practise its jurisdiction by requisition of constitutional instruments interested or by people who attempt the public action, in terms indicated by the Section 82 of the Political Constitution."

Nevertheless, it must be mentioned that the legislator has established important exceptions to the principal of liability, underlining, among them, the generality of application and the wideness of the regulations, as prescribed by the Section 30 of the Basic Law of the Constitutional Tribunal " The Tribunal can decree the measures that estimate the case to find the most suitable hearing of a case and resolution."

"It can require therefore, from any power, public instrument or authority, organisation and movement or political party, as corresponding, the antecedents that it estimates convenient and these are obligated to submit the information opportunely".

6. Inexcusability

This principle is found in the Section Three, second clause of the Basic Law which established that the claimed intervention of the Tribunal by legal means and in issues of its competence "can not excuse from practising its authority even because of lack of a law that solves the issue subjected to its decision".

The inexcusability holds, in this case, an extraordinary importance. This is evident if we think about what would occur in the case of a conflict between the authorities which have called the Constitutional Tribunal to intervene as a supreme arbitrator in the matters of jurisdiction and this would decline its jurisdiction by the lack of a law to solve the case. We would probably find ourselves facing a serious political and institutional crisis without a constitutional solution. The Tribunal would have abdicated the functions that constitute to its very existence: solve the conflicts that occur between the Powers of the State.

7. Due and just constitutional process which when answering to the double objective of solving a sub lite conflict and as its natural consequence, re-establishing the empire of law, it must adjust strictly the regulations of proceeding pre-established for its

transaction, every time that these laws contain regulations that allow the process, once established, reaches its objectives and qualifies as "due". If the due process is constitutional, apart from fulfilling with the both tasks mentioned, it produces as a natural result the imperative application of the principle of the Constitutional Supremacy, guaranteeing therefore its real efficiency.

THE SITUATION OF THE CONSTITUTIONAL JUSTICE TODAY

The jurisdictional competence of the Constitutional Tribunal is found in following characteristics:

a) It is from a constitutional origin and therefore must not be suppressed by law.
b) It is restricted and only refers to matters related to constitutional conflicts.
c) It is privative of the tribunal and as such, can not be prorogued nor delegated.
d) It is of forced or eventual practise, according to the material subjected to.

e) A specialised principle is required as the Tribunal is a State organism, autonomous and independent of any other authority or power.

f) Its competence is ruled by the regulation of inexcusability.

g) The lack of competence or the incompetence due to a lack of jurisdiction is only solved by the Tribunal itself.

h) The competence that hands it the control of constitutionality of the laws, it fulfils other similar tasks: contributes to the pacification of political life, giving certainty to the opposition to count with a mean to respect the constitutional limits by majority of the Parliament, assuring the regulation and authentication of the changes and political alternates, avoiding a "turn of the pendulum" too hard, susceptible to break the constitutional balance and channelling the wave of reforms of the new majority and strengthening the cohesion of the political society. When in the use of its competence it must interpret a regulation decisoria litis, it must rule by the regulations that inspire the constitutional interpretation and that they are vaguely known.

i) Its verdicts produce a judgement which a derived consequence of its jurisdiction.

j) Finally, its competence allows it to work essentially in the adaptation of the Constitution to the national reality, in cases

the its rigidity provokes problems of alteration of guarantees or the functions of juridical system.

In order to understand the competence of the Tribunal within the new structure created by the Constitution of the 80 a new type of law is established: the Basic Law, referring to concrete and specific matters that the same Constitution indicates, for example the Electoral System; the political parties, the organisation and attributions of the justice courts, the administration of the State; etc.

For any approval, modification or derogation of the Basic Law there is required three fourth parts of the parliamentarians and before any promulgation it requires a previous control of constitutionality on the behalf of the Constitutional Tribunal.

This way, since the Constitution in force, the Constitutional Tribunal has practised preventive control of constitutionality in approximately 330 opportunities, which has helped to design an institutional structure.

Nevertheless, another fundamental task of the Constitutional Tribunal is to dissolve the referred conflicts of constitutionality on projects of law and the acts of the administration. In this instance, one fourth part of the parliamentarians in practise and each one of the Chambers, or the President of the Republic can require the Constitutional Tribunal in some of these situations, when it is considered that the project of law or the act of administration violates the Constitution.

The court has dissolved forty-four matters of constitutionality in this type of conflicts. In summary, for purpose of definition on the competition of the Constitutional Tribunal, in the Constitution of 1980, as by the prevailing political conditions, the Constitutional Tribunal has dictated 410 verdicts since its creation. Such amount reflects, in essence, the characteristics of the process of political transition that has been carried out in Chile, the great stability and co-operation between all political powers, as much the Government as the opposition, in the creation of the institutional bases of the country.

REFORMS AT THE CONSTITUTIONAL TRIBUNAL

This situation is soon to be modified as the constitutional reforms referring to Constitutional Justice are being approved.

In effect, one of the greatest modifications that is currently being studied related to this subject, is submitting the remedy of inapplicability by unconstitutionality from the Supreme Court to the Constitutional Tribunal, that is to say, from the control to posteriori of the constitutionality of law. At the moment this type of control belongs to the Supreme Court, though an unanimous opinion supports the change of this attribution to the Constitutional Tribunal as it constitutes a natural and an obvious branch of the Constitutional Justice in such a concentrated and shared system as the Chilean.

With that modification, among others, the Chilean Constitutional Tribunal concentrates most of its own faculties of a guardian of the Constitution in order to make Constitutional Justice effective. In relation to the constitutional reform, law that indicates that after several attempts of modification of the Constitution in this matter, apparently it already is now in conditions for indicating that such

changes finally will be approved, significantly extending the attributions of the Constitutional Tribunal and heightening its work of preventive control and to posteriori of the constitutionality, that is to say, making the principle of Constitutional Justice effective for the population.

Thus, in relation to its structure; from seven members, it is lifted to nine, with designation made by each one of the powers of the State; having such designation to find to people who meet the exact requirements of high preparation that is required by a constitutional judge.

With necessary adjustments within the same structure, its procedure is not affected; having to work in two chambers for the constitutionality control and a plenary session for matters of constitutionality on regulations in force.

By submitting the Tribunal a priori control of legal regulations, this would open a possibility that individuals affected could require the Constitutional Tribunal as this is not being permitted at the moment.

This issue, that is yet a matter of discussion, there has been considered the necessity of three verdicts of the same tenor of unconstitutionality which would allow the definitive expulsion of the legislative system of any law that violates the Constitution in concrete cases of its application.

Such an issue is not a pacific one, since there are opinions opposing to this, in the sense that single a verdict of the Constitutional Tribunal would be enough declare it violating the Constitution and expel the law from the system. The reasons according to my criterion, are important because we believe that a single unconstitutional vice is enough to affect the rights of the people.

It shall, nevertheless, always be the greatest criticism towards the proposed reform is about inequality that would rise among those who maintain that the law is not applied to them in the concrete case for being unconstitutional and the rest of the Chileans who would be subjected to such a precept.

In spite of this development, it is evident that the reforms of 1980 Constitution as far as perfecting constitutional justice, it is a great

advance in our ordering, and demonstrates the fact that with exception previously mentioned, all the proposed modifications are supported by the unanimity of institutional political powers who participate in the proposal.

Nevertheless, it is necessary to underline that these reforms also include other matters, such as the modification of the electoral system, on which there is no sufficient political agreement which has affected the approval of other modifications on which already exists an agreement.

Finally, we believe, that with respect to Constitutional Justice, the changes shall provoke an extension the attributions of the Constitutional Tribunal. Its final intention is to make the constitution and its guarantees effective in the daily life of the Chileans.

I am one of those who believes that if the Constitutional Tribunal should have existed in our country under the same conditions that it exists today, the crisis of September 1973 would have not taken place.

Finally, I take advantage of this opportunity to share the news that were given to me by the Prime Minister on the vivid interest of Chile to fully participate in the Commission of Venice and in order to accomplish this the Government will be taking all the necessary decisions.

Venice, June 2004.