CHILEAN JUDGES UNDER DEMOCRATIC RULE: PROPORTIONALITY ANALYSIS AND CONSTITUTIONAL RIGHTS

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ABSTRACT

Globalized western legal thought portrays the central legal figure as the judge; the legal core as human rights (ranging from individual and corporate private property rights to social rights); and the legal ideal as a pluralist society that recognizes and manages difference.[1] The Chilean example seems to be at odds with this description.

This dissertation outlines why this is so, through the judges' own "voices". Decisions adopted by the Constitutional Court since its creation in 1981 allow for an assessment of the role played by the Court in Chile's recent political history and in particular the role the Court has played after its full "democratic makeover" in 2005. The challenge posed (but not yet fulfilled) has been to achieve rights protection in a context of legal continuity with an authoritarian regime.

In explaining the traditional approach to rights adjudication, this thesis concludes that either (1) the view that some rights are absolute and therefore limitless, or (2) the concept of rights only as rules to be applied according to a categorical deductive method, has left judges ill-equipped to interpret the 1980 Constitution through a democratic lens.

This dissertation offers an assessment of the reasons why the Constitutional Court will benefit from adopting proportionality analysis. This approach requires the Court to

[1] Duncan Kennedy, "Three Globalizations of Law and Legal Thought: 1950-2000" in David Trubek and Alvaro Santos, eds., *The New Law and Economic Development. A critical appraisal* (New York: Cambridge University Press, 2006), at 66.

confront the fact that different interests in society may collide and the resolution of the conflict cannot rely on disembodied analyses of constitutional text. Rather, it thrusts the Court in into the role of balancing constitutional rights, the will of an elected legislature, the interests of society as a whole and the interests of individuals. This thesis uses the framework developed by the German scholar, Robert Alexy, in order to evaluate the use of the proportionality approach by the Constitutional Court. An analysis of the Court's recent judgments shows that Court has yet to apply the test properly.

In the coming years, the Court should make a cleaner break with the authoritarian past and articulate a more coherent vision of its role in promoting democracy and protecting human rights.

TO MY FATHER HERNAN ALVEZ WHO TAUGHT ME TO BE CURIOUS
AND TO MY MOTHER BERTA MARIN WHO TAUGHT ME TO SEARCH WITH COMMON SENSE

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INTRODUCTION

My personal history has partially defined the subject matter of this doctoral dissertation. My law studies began during the last year of Pinochet's dictatorship in 1989. It was a year of turmoil and hope as the Chilean people emerged from sixteen years of authoritarian rule. There were two important steps in the transition to a democracy in that year. First, a referendum in July approved the first changes to the 1980 Constitution that had been drafted under Pinochet. Second, in December, Chile held its first democratic election since 1973. Oddly, my law faculty seemed to be indifferent to these events. In Chile, law was considered an "independent" and "scientific" field that should ideally be indifferent to politics. Law professors treated political events occurring in Chile with some disdain. The return to a democratic regime in 1990 had no consequences for the way law was studied or, how it was taught: no major curricular changes, no critical perspectives of the legal framework constructed by the authoritarian regime, and no new readings challenging the censorship imposed by Pinochet. It seemed that the legal order, even in the constitutional realm, was untouched by changes in the political regime. The concept of law as detached from politics was entrenched in Chile and it had been exploited by the authoritarian regime to legitimate its repressive legal framework.

A second element on my dissertation was learning about the role of judges in the Canadian legal system I was impressed by the reasoning of judicial decisions by the Supreme Court of Canada, the references to previous decisions and, the careful consideration of the Canadian legal context, and the willingness to consider foreign law In Chile, judges were not well respected and acted more as bureaucratic administrators than as jurists I studied law without referring once to a judge's opinion and without ever reading a judicial decision The law that was taught was the text of written norms created either by the executive or by the National Congress, with no distinction between the different institutions that implemented the norm [1] The role of judges was strictly limited to solving the particular case before them and therefore their judgments lacked precedential relevance [2] After the return to democracy, however, Chilean judges were criticized for this "deferential attitude" towards the military dictatorship, as if they should have played a different role During my graduate studies I tried to understand the general indifference of the legal community with respect to the role played by the judiciary in Chile with the intention of challenging the idea that judges are simple law-appliers with no creative role to play

Globalized western legal thought portrays the central legal figure as the judge, the

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[1] For example, to illustrate how law has been taught in Chile, the mandatory final oral and formal degree exam required the student to know by heart most of the 2,525 sections of the 1855 Civil Code

[2] The Chilean Civil Code adopted in 1855 in section 3 suggests a limited role for courts "Only the legislator can explain or interpret the law with general normative effects
Judicial decisions only have mandatory effects among the parties of the case in which they are adopted "

legal core as human rights, ranging from individual and corporate private property rights to social rights, and the legal ideal as a pluralist society that recognizes and manages difference [3] The Chilean example seems to be at odds with this description This dissertation outlines why this is so, through the judges' own "voices" Decisions adopted by the Chilean Constitutional Court since its creation in 1981 allow for an assessment of the role played by the Court in Chile's recent political history and in particular the role the Court has played after its full "democratic makeover" in 2005

Most Chilean academic work in the realm of constitutional law deals only with doctrinal materials, leaving out the 1980 Constitution's political and ideological compromises This dissertation opens a discussion on the role that the Constitutional Court should play in democratic Chile a role that takes judges beyond technical interpretations of the law toward a more active engagement with enforcing human rights and balancing competing interests

METHODOLOGY

In general, court judgments have not been held in high regard in Chile Partly, this was due to the civil law tradition in which the judges "are not personally responsible for the

[3] Duncan Kennedy, "Three Globalizations of Law and Legal Thought 1950 2000" in David Trubek and Alvaro Santos, eds , *The New Law and Economic Development A critical appraisal* (New York Cambridge University Press, 2006), at 66

doctrine they produce" [4] It is not mandatory to publish all court judgments, but some are chosen for publication by commercial publishers [5] Consequently, it has been difficult to provide a systematic review of decisions in the court system in Chile, and scholarly analyses of judgments, to the extent that they exist at all, have been largely based on judgments that happened to be selected for publication [6]

The Constitutional Court of Chile, however, has decided to publish all of its decisions on its official website[7] and recently began publishing a digital version of the entire file before the Court [8] This has allowed me access to the most pertinent decisions for my dissertation and allowed me to evaluate the Court's performance based on a representative sample of all decisions rendered by the Court My analysis of the Court decisions has been supplemented with statistical data from the annual report of the Constitutional Court [9]

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[4] Lasser, Mitchel de S -O -L'E , *Judicial Deliberations A comparative analysis of Judicial Transparency and Legitimacy* (Oxford University Press, 2004), at 36-7

[5] In Chile they are three main private jurisprudential journals *Gaceta Juridica Fallos del Mes y Revista de Derecho y Jurisprudencia* Since 2004 the right wing think tank 'Libertad y Desarrollo' published a yearbook of the most relevant judicial decisions called *Sentencias Destacadas*.

[6] This methodological problem in the Chilean jurisdiction is underlined by Lisa Hilbink, *Judges Beyond Politics in Democracy and Dictatorship Lessons from Chile*, Cambridge Studies in Law and Society (Cambridge University Press, 2007), at 9

[7] Official website of the Chilean Constitutional Court online <http // www tribunalconstitucional cl>

[8] This option, available on the Court's website since file No 1400 presented before the Court on may 29th, 2008 includes the presentation filed by the parties, evidence and all decisions adopted by the Court

[9] Annual report of the Chilean Constitutional Court since 2005, online
< http //www tribunalconstitucional cl/index php/documentos/memorias_cuentas>

I have used secondary sources such as journal articles, books, law school theses and newspapers to provide the legal and political context to the decisions. I discovered that there is a lack of connection between the scholarship published in English - mostly referring to other secondary sources published in English - and the existing Spanish sources. I have tried to build a bridge between the two bodies of scholarship by using as many Spanish sources as possible. The translations of primary sources, judicial decisions and legislation that appear in the dissertation, are mine.

OUTLINE OF THE ARGUMENT

This dissertation seeks to explain why Chilean judges have not been seriously concerned with democracy, and at the same time show why they should be.

The first chapter aims to establish the legal context in Chile. In 1980, seven years after a military coup, the military dictatorship drafted a new Constitution. In 1990, after the return to democracy a political decision was made to continue relying on the 1980 Constitution, recognizing its illegitimate origins, but opening up a process of legitimation through its application. This "democracy of agreements" was a pact by political elites to achieve a consensus between the political antagonists. Subsequent amendments and interpretation over the last two decades, has made for a peculiar constitution-building process for Chile. The use of constitutional amendments, 28 to date, as the primarily

mechanisms for legitimating the Constitution has achieved some important democratic objectives, mainly in civilian oversight over military institutions. However, I argue that this post-conflict setting has hindered popular participation in constitutional transformations and debate about fundamental societal values in the form of constitutional rights and it has left the Constitutional Court ill-equipped to perform a democratic role as the legitimate interpreter of the 1980 Constitution.

Chapter Two aims to problematize the role of the Chilean Constitutional Court in a democratic post-conflict setting. In Chile in the 1980s, the Court adopted a highly deferential institutional attitude, effectively shielding the legal framework created by the military government. However, the Court also played a role in establishing basic standards to allow the transition to a democracy during this time.

In 1990, the new scenario found the Constitutional Court unfit to serve in a democratic setting and unwilling to challenge the "status quo". Therefore, a major restructuring of the system of constitutional adjudication was necessary. The political choice in 2005 was to give the Court strong powers of judicial review. This chapter discusses two major barriers to the development of a rights-based constitutionalism: a misguided desire of the Constitutional Court for institutional continuity on the one hand, and the use of an originalist method of constitutional interpretation on the other.

Chapter Three explores the link between a doctrinal conception of constitutional rights as rules and principles and methodologies of rights adjudication. My view is that judges should play a creative role in adjudication. Judicial discretion - the power to choose among two or more options - needs to relate to the legal and political context. The ideal constitutional judge is a partner in the configuration of a democratic system of law. Using the theoretical framework provided by Robert Alexy, the chapter focuses on two doctrinal developments that can potentially develop a substantive threshold to the limitation of constitutionally-protected rights as interpretative tools in the hands of judges: limitation clauses and the protection of the core essence of rights.

The chapter underlines how the methodology for the adjudication of rights used until 2005 by the Chilean Constitutional Court, adjudication of rights as absolute and adjudication of rights through categorization, left judges ill-equipped to perform their role in a democratic legal regime. There has been the lack of a debate about the democratic role of the Constitutional Court, avoidance of a close examination of justiciable rights, and the exclusion of a methodology that balances competing interests.

Chapter Four offers a doctrinal framework for the methodology of proportionality as it has expanded in the last 50 years throughout the world and in particular, how it has been adopted by the Chilean Constitutional Court since 2006. The aim is to give an assessment of the theoretical structure of proportionality analysis, the reasons for its

expansion, the critiques of it as a judicial interpretative tool. Proportionality analysis has proven to be a highly contested subject considered by some scholars to be "the ultimate rule of law" but dismissed by others as just a "cult in constitutional rights scholarship" or even an "assault on human rights".[10]

The basis for this chapter is the "migration path" followed by the Chilean Constitutional Court. The modern origin of proportionality analysis is located in the jurisprudence of the German Federal Constitutional Court in the '50s. Spain adopted this proportionality framework in the '80s, and explicitly acknowledged Germany as the main source. The Chilean situation is dissimilar. Proportionality analysis has been used as a reference in constitutional rights adjudication since 2006, but the Constitutional Court has not recognized the migration of the mechanism as such, has not yet developed a full three-pronged test and has not constructed the necessary theoretical underpinnings. This chapter aims to address these problems.

In Chapter Five, the analysis is focused on how comparative law can be a way to expand horizons and accept the cross-fertilization of ideas across legal systems. Particular attention will be devoted in this chapter to the requirements and consequences of a growing interest in the use of foreign law as demonstrated by the Chilean Constitutional

[10] References made at the chapter's title and abstract correspond to: David Beatty, *The Ultimate Rule of Law*, (New York: Oxford University Press, 2004); Grégoire Webber, "The Cult of Constitutional Rights' Scholarship: Proportionality and Balancing" (2010) 23:1 Canadian Journal of Law and Jurisprudence, 179; and, Stavros Tsakyrakis, "Proportionality: As Assault on Human Rights?" (2009) 7 INT'L J. Const. L., 468.

Court. The migration of proportionality analysis as a rights adjudication mechanism in 2006 has made an inquiry into foreign cross-fertilization more relevant. This chapter offers some evidence to support the view that Spain has so far been the main reference point for proportionality analysis in Chile. However, this thesis does not aim to offer a definitive comparative inquiry between Spain and Chile.

Finally, Chapter Six aims to assess what can be considered the leading cases before the Constitutional Court since the Court's transformation through a constitutional amendment in 2005. This amendment transformed the Constitutional Court into the institution in charge of guaranteeing the application and interpretation of the 1980 Constitution in the context of a democracy. This chapter will evaluate whether proportionality methodology has been able to overcome the limitation of other methodologies traditionally used by Chilean judges, such as the view that rights are limitless or that rights are subject to rules resulting from categorization of rights. So far the Court only uses the first steps of a proportionality framework - requiring a legitimate purpose for the statute and the requirement of a relationship between the means and the aims. Rarely has the court referred to the possibility of scrutiny for the least restrictive means that would achieve the same aim, and the Court has never applied the proportionality "stricto senso" step. I conclude by reflecting on what the full application of the proportionality test in rights adjudication in Chile would entail.

CHAPTER 1.

CONSTITUTION –BUILDING PROCESS IN CHILE IN A POST-CONLICT ERA: A "DEMOCRACY OF AGREEMENTS"

Chile's transition to a democratic regime in the early 1990's had paradoxical effects on constitutional politics. The catalogue of justiciable human rights was extremely restricted between September 1973 and March 1990 because of the legal state of emergency under which Chile was governed. The government's actions were, nevertheless, criticized through the language of human rights by victims of abuse, political actors, and the wider population.[11] Following the restoration of democratic rule, the catalogue of rights and freedoms used to seek justice and redress was derived from the 1980 Constitution, which ironically was originally constructed by the Military Junta.

1.1. THE 1980 CONSTITUTION AS AN IMPOSED LEGALITY

On 11th September 1973, the heads of the Army, Navy, Air Force and Police installed

[11] There were 3,195 murders or disappearances by state organs and 28,459 cases where individuals or collective arrests for political motives were subjected to torture, as documented in First Annual Report on the Human Rights Situation in Chile (December, 2010) National Human Rights Institute, 153, online <http://www.indh.cl>

themselves in power through a coup d'état President Salvador Allende's socialist government ended with his suicide in his office at the Presidential Palace [12] The immediate constitutional consequence of the coup d'état was the partial derogation of the 1925 Constitution, as the Military Junta assumed the executive, legislative and constituent power replacing the institution of the Presidency and National Congress The judiciary was the only institution of the old constitutional order to be left untouched Shortly after, the Military Junta banned political parties that constituted Allende's coalition, the "Popular Unity", dissolved Congress, and declared all political parties to be suspended The military justified the coup d'etat as an effort to "re-establish the broken institutional order" However, because the 1925 Constitution did not allow for assuming power through a coup, new laws were required to provide a "constitutional basis" for its actions As a result, decree laws were enacted by the Military Junta, bypassing the necessity of a legislative process Renato Cristi has described this as a "revolutionary path" rooted in a national security doctrine that considered communism

[12] Only recently as part of new investigations into 726 human rights-related crimes in which the victims or their relatives never filed suit judge Mario Carroza opened the first official investigation into the death of former President Salvador Allende

and its supporters as "the enemy".[13] The understanding of who constituted the enemy was broadened over time to include any person who opposed the regime, including academics peasants and workers who believed that the previous regime would have helped them overcome the permanent adverse economic and social situation.[14]

Following the "foundational path", understood as the will to create a new constitutional legal order detached from the previous one in place, the drafting of a new constitution began days after the military coup. This drafting process followed three steps. The first step saw a commission of jurists work on a draft between September 1973 and August 1978. This commission was predominantly composed of university professors of constitutional and political science and was commonly referred to as the "Ortúzar Commission" named after its President Enrique Ortúzar.[15] Initially recognised as a "constituent commission", the Commission later renamed itself the *Comision de Estudio de la Nueva Constitución* having realised that the constituent power was in the hands of the Military Junta. The sessions held by the Commission were the only stage of

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[13] Renato Cristi, *El pensamiento político de Jaime Guzmán Autoridad y Libertad* (Santiago: Editorial LOM, 2000), at 81

[14] Those considered "enemies of the regime" were also forced into exile Decree Law 81 published in the Official Gazette on Nov 6, 1973 established that the right to live in Chile depended upon administrative decisions Decree law 604 published in the Official Gazette on August 10, 1974 authorized the government to deny access to Chilean territory to Chilean citizens considered a "danger to national security".

[15] The members of the "Committee for the study of the new constitution" were all lawyers and most of them university professors Sergio Diez, Jaime Guzmán, Enrique Ortúzar, Jorge Ovalle, Rafael Eyzaguirre, Enrique Evans, Gustavo Lorca, Alejandro Silva, Alicia Romo, Rafael Larraín In 1977 Jorge Ovalle, Enrique Evans y Alejandro Silva resigned and were replaced by Luz Bulnes, Raúl Bertelsen and Juan de Dios Carmona.

the drafting process that were made public.[16] The Commissioners' individual opinions, given during the drafting process, have been used by legal scholars, lawyers and judges, to offer originalist constitutional interpretations of the text. As it will be argued later using these individual opinions in this manner is problematic as the members of the "*Committee for the study of the new constitution*" were designated by the authoritarian regime with no democratic accountability. As a result, the use of these opinions under a democratic regime to interpret the views of the "constituent power" during the drafting of a constitutional provision is problematic. This is part of the legitimacy problem that the 1980 Constitution suffers from and, as a result of its authoritarian origin, interpretation needs to evolve to take into account the democratic framework Chile has enjoyed since 1990.

The second step in the drafting process of the constitution was a study of the proposed constitution by the State Council. This consultative body was created in 1976 and was composed of the former Presidents of the Republic, former members of the Supreme Court, the armed forces, civil servants, academics and representatives of different areas of society. The Military Junta designated a total of 18 members. Of the former presidents still alive, Jorge Alessandri and Gabriel Gonzalez Videla agreed to participate with only one former president, Eduardo Frei Montalva, declining the offer

[16] The sessions of the "Committee for the study of the new constitution" can be accessed at the library of the National Congress online.
<http://www.bcn.cl/lc/cpolitica/constitucion_politica/Actas_comision_ortuzar >.

although he supported the military intervention in 1973.[17] The proceedings and opinions of the State Council meetings held between November 1978 and July 1980 remained confidential until the end of the military government, despite the fact that public consultation about the draft project was required.

The final step in the drafting process was a review undertaken for a month by the Military Junta itself looking at the drafts produced by the "*Committee for the study of the new constitution*" and the State Council. A final version of the new 1980 Constitution was presented to the nation for confirmation.[18] A plebiscite was called for the 11th September 1980, only one month after being announced. There was neither electoral registration nor freedom of speech to discuss the contents of the constitutional draft and political parties were banned. The political opposition did not receive coverage by the media, which favoured the military regime and was under strict censorship. One of the only pressure groups allowed to voice their dissent was the Catholic Church. Through the Conference of Bishops, they argued that minimum conditions were required for a valid vote.[19] Renato Cristi argues that the electoral act to approve or reject the 1980

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[17] Former President Eduardo Frei died in 1982 in strange circumstances after a routine medical operation, circumstances that are being investigated now as a possible crime perpetrated by the military dictatorship

[18] Authors have shown that the main difference between the two proposals was on the period of transition to democracy See especially Sergio Carrasco, *Alessandri su pensamiento constitucional reseña de su vida pública* (Santiago Editorial Juridica de Chile y Editorial Andres Bello, 1987), at 147-202

[19] Unlike other Latin American countries, in Chile the Catholic Church through the *Vicaría de la Solidaridad* was the main institution to fiercely denounce the abuses of human rights. The *Vicaría de la Solidaridad* was founded by Pope Paul VI in January, 1976 under the requisition of the Santiago bishop The aim of the institution was to provide social and legal help to the population being tortured and

Constitution was without legal effect because all advertisements concerning the plebiscite focused upon the image of Augusto Pinochet as political leader, with the text and implications of the constitutional text barely discussed and the consequences of any rejection unknown.[20] The constitutional proposal was ratified with 67 percent of votes. The new constitution partially entered into force six months after its approval on 11th March 1981.

The 1980 Constitution was composed of 120 permanent articles and 34 sections that would only be valid for a limited period of time. The effects of these latter sections were enormous. For example, one section established that the Military Junta would remain in power until 1990 when the new Congress was to be elected. But there were a number of notable characteristics of the 1980 Constitution, some of them unknown in Chilean political history. First, under section 8, a restricted democratic system, called "protected democracy", was imposed that declared individuals or groups "that advocate violence or a concept of society, the state or the juridical order, of a totalitarian character or based on class warfare" to be unconstitutional. The result was that the political parties who had been part of Salvador Allende's Socialist government were forbidden as an

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prosecuted by the military regime The "Vicaría", recognized as "Chile's conscience", was awarded the Simón Bolívar Prize in 1988 for its tireless struggle to defend freedom and respect for human rights Closed in 1992 after the return to a democratic regime, the 85,000 plus documents gathered during the authoritarian regime form part of a public archive.

[20] Ricardo Cristi, "The Metaphysics of Constituent Power, Carl Schmitt and Genesis of Chile's 1980 Constitution" (1999) 21 Cardozo Law Review, 1749, at 1774-75

alleged "threat to democracy"[21] Second, the armed forces were included as the "guarantors of institutionality" following the national security policy This was a previously unknown role that saw the armed forces act as guarantors of the political institutions through an autonomous body called the "National Security Council" This organ had a military majority with the political power to, for example, advise the President on any matter linked to national security or express its opinion regarding any fact, action or matter that was perceived as attacking the foundations of institutionality or national security Third, the Constitution created an extraordinary fortified executive branch with additional legislative competences Finally, a weak National Congress with an upper chamber only partially composed of elected members was installed

The Judiciary under Pinochet

From a judicial perspective, the 1980 Constitution established the same hierarchical and centralized institutional design that had been in place since colonial times The judicial system during the Spanish colonial period (1541-1810) was created as a hierarchical structure with the Spanish king as the highest judicial authority The colonial organization of the judiciary, and in particular the fact that the administration of justice was often

[21] Chile had models of restricted democracy in the past An example is *la ley para la defensa permanente de la democracia* of 1948, created in order to declare illegal the Communist Party and its members It would be invalidated only ten years after through statute 12 927, published in the Official Gazette August 6, 1958

exercised by executive authorities, may be at the root of the difficulty experienced by Latin American courts in achieving independence from government intervention. This could explain why Latin American courts can be extremely deferential to governmental acts. Another characteristic of the judiciary set up during the monarchy was the existence of specialist courts, such as those dealing with aboriginal people or commercial matters, or the courts existing in Spain for military and ecclesiastical topics. These tribunals constituted a parallel system of justice linked only with the King. The existence of specialized courts, especially military courts, was maintained and continues today in Chile.[22]

Generally speaking, a major obstacle to overcoming the legacy of oppressive regimes is the deferential attitude of the judiciary.[23] Chile was not an exception to this rule. During the period of military dictatorship, opponents claimed that the judiciary regularly applied and interpreted the law in a manner that was biased in favour of the authoritarian regime. Lisa Hilbink even compares the highly hierarchical and centralized structure of Chile's judiciary with a military organization underlining the internal culture of discipline, fear of innovation, and the idea that professional judges must remain

[22] During the Pinochet regime the courts were subservient to the views of the military government. Based on decree laws No 3 and 5 that declared a state of "internal war" in Chile, the Supreme Court decided that it lacked competence to supervise and review decisions of "wartime" military tribunals even though, under section 86 of the 1925 Constitution, the Supreme Court was mandated to supervise and review all courts of justice in the country without exception.

[23] See especially Tom Ginsburg & Tamir Moustafa (eds), *Rule by Law The Politics of Courts in Authoritarian Regimes* (Cambridge, Cambridge University Press, 2008)

"apolitical".[24] As a trade-off for the judicial deference towards the Chilean military government, provisions were inserted into the 1980 Constitution that gave the Supreme Court the right to designate representatives at the Senate, the Constitutional Tribunal, the National Electoral Tribunal and the National Security Council.[25]

1.2. THE ROAD MAP TO DEMOCRACY DESIGNED BY THE 1980 CONSTITUTION

Throughout the military dictatorship the Chilean legal system was dramatically transformed. Not only was the 1925 Constitution replaced, but the foundations of the welfare state, the economic system, and the administrative divisions of the country were altered.

The new constitutional text approved in 1980 helped make these changes palatable by establishing a plan to return to democracy. The transition model lasted eight years, with the military ruling between 1981 and 1990 with the Junta holding all constituent, executive and legislative functions. Augusto Pinochet proclaimed himself President of the Republic, the legal norms created by the Junta were called laws and not decree-laws, and the Constitutional Court was restored. However, as the military government had declared in October 1973 that their mission was to "extirpate Marxism

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[24] Lisa Hilbink, *Judges beyond Politics in Democracy and Dictatorship Lessons from Chile*, at 174
[25] 1980 Constitution S 45(b), S.81(a), S 84(a) and S.95 of the original constitutional text.

from Chile"[26], a "foundational" purpose of the 1980 Constitution was to prevent a socialist government, like Allende's, from securing power in Chile again. To ensure this, all political forces that had been part of Allende's "popular unity" coalition were banned. It is still not clear why the military provided for this transition to democracy.[27] Pinochet's overconfidence as to the level of popular support that he maintained among the general population, and the expectation that a victory was still possible through the democratic rules, may have persuaded the regime to follow the road map incorporated into the Constitution. Alternative explanations look to the legalistic culture that required that the Constitution be abided by in order to maintain a degree of credibility, as well as the international pressure for democratization.[28]

The 'Yes' and 'No" question that changed Chile's political life

Although political rights were severely restricted, a rejuvenated political opposition did call for resistance and massive demonstration against the regime from 1983 onwards. They sought to fight against the regime within the institutional framework envisioned by the 1980 Constitution. The first milestone was a plebiscite scheduled for 1988, where Chilean society was required to approve a presidential candidate, presented by the

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[26] Decree law No 77, published in the Official Gazette October 8, 1973.
[27] See especially Genaro Arriagada, *The Politics of Power* (Boulder: Westview Press, 1988)
[28] See. Renato Cristi, *El Pensamiento Político de Jaime Guzmán Autoridad y Libertad* (Santiago LOM Ediciones, 2000).

Military Junta, who would serve for an eight-year term. Unsurprisingly, Augusto Pinochet was the nominated candidate for the "yes" side. In early 1987, a centre-left political coalition created the "Agreement of Parties for No". As the military government had physically destroyed the electoral rolls following a declaration of their invalidity in 1973[29], the first task of the centre-left coalition was to campaign amongst the population for a massive re-registration of voters. The coalition then strongly campaigned for a "no" vote in the plebiscite, which resulted in 54.7 percent of the population rejecting the military government's nomination of Pinochet. As the opposition newspaper "Fortin Mapocho" comically announced, "Pinochet ran alone and came in second place."[30] The plebiscite of 1988 constituted a roadblock to the Chilean transition to a democratic regime. Sociologist Manuel Antonio Garretón observes that the plebiscite achieved two crucial aims: on the one hand it was the end of the pretence that Pinochet maintained political power through public support; on the other hand, it triggered the definitive transition to democracy designed by the 1980 Constitution. The latter forced the military government to admit that it was necessary to achieve an agreement with the political opposition.[31]

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[29] Decree law No 130, published in the Official Gazette November 13, 1973

[30] Fortin Mapocho, 10th October 1988 digital version online. <http://www museodeprensa cl/1988/corri-solo-y-lleg-segundo>.

[31] Manuel Antonio Garretón, "La redemocratización política en Chile: transición, inauguración y evolución", (1991) 42 Estudios Públicos, at 106.

A referendum for the first constitutional amendment

The second milestone was a constitutional amendment passed in a referendum in July 1989, aiming to remove some of the most objectionable "authoritarian features" of the original text of the 1980 Constitution The process of negotiating the referendum was groundbreaking All major political forces sat around the same table for the first time since the democratic breakdown in 1973 This included the centre and left parties in opposition to the government, the right-wing parties that supported the regime, and the military regime itself Following a common pattern in Chilean political history this process of constitutional amendment represented a "closed-door elite" bargaining model similar to the one used to draft the 1980 Constitution A joint commission of ten constitutional experts, chosen by political parties from the opposition and one of the parties that supported Pinochet, worked for two months on a "package of reforms" Montes and Vial estimate that no more than 30 members of the elite participated in the negotiations [32] During these negotiations, the political opposition raised a number of concerns about the Constitution This included the "protected democracy" model established in section eight where individuals or groups "that advocate violence or a concept of society, the state or the juridical order, of a totalitarian character or based on

[37] Esteban Montes & Tomas Vial, "The Constitution-building process in Chile the authoritarian roots of a stable democracy" (2005) case study of Chile as part of International IDEA project 'The Role of Constitution-building processes in Democratization', at 13 Online <http //www idea int/cbp/upload/CBP-Chile pdf>

class warfare" were politically banned. Concerns were also raised concerning the extensive power given to the President of the Republic and the limitation upon the role of the National Congress by the nine appointed senators. Of particular concern was the fact that the commanders-in-chief of the armed forces could only be removed through the National Security Council, an organ with a military majority. This meant that there could be no civilian control of the military. A final contested area was the rigid system for constitutional amendments that, with respect to some parts of the text, required two successive Congresses to endorse the amendment.

The package of amendments agreed to in 1989 between the political opposition and the authoritarian government illustrates the so-called "democracy of agreements" model that will be discussed later. This model received the support of the majority of social and political actors including the Catholic Church and the Central Unica de Trabajadores (the CUT), the main workers union. Both called for the proposed reforms to be accepted. The only political actor that expressed opposition was the Communist Party, as they did not accept the legitimacy of the 1980 Constitution. The plebiscite to approve the constitutional amendments was carried out in July 1989 with 85 percent of voters in favour of the reforms and 8.2 percent against them. The amendment of the Constitution was one of the procedures modified in order to transform the Constitution into a more

flexible instrument.[33]

In the end, the opposition only secured weak reforms from these negotiations in comparison to what they hoped to achieve. Authors have offered a variety of explanations for the opposition's failure to aim for a more profound constitutional reform.[34] One suggestion has been that the opposition hesitated, despite the strong popular support that they enjoyed, because of a fear of potential repression by the regime and apprehension as to the power that Pinochet maintained within the institutional structure. An alternative explanation was the desire for governability. The political parties that took office in 1990 were centre-left political parties. Their world vision was strongly focused upon human rights, social justice, and the desire to hold the dictator accountable for their abuses. This created a very high threshold for the political coalition coming into power in 1990 and therefore, the desire for governability meant keeping the neo-liberal approach and trying to reach social justice at the same time. However, they knew that after taking office in March 1990, the "social debt" that had accumulated as a result of the brutal neo-liberal approach imposed since the 1980s, could provide for a strong backlash against the policies of a government coming into power.

The wave of democratization reached Latin America in the mid-1980s with Peru,

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[33] The amendment procedure of the Constitution was changed through statute 18 825 establishing lower quorums of approval, not requiring the Plenary Congress vote to approve the amendment and the previous agreement of the executive, statute published in the Official Gazette on August 17, 1989

[34] See especially: Carlos Huneeus, *El Regimen de Pinochet* (Santiago Editorial Sudamericana, 2000)

Argentina, Bolivia, Uruguay and Brazil returning to democracy. This political scenario left Chile as the only dictatorship in the region. Most literature has concentrated on the internal or domestic political factors that facilitated the achievement of democracy in Chile in March 1990. While scholars have agreed that domestic opposition to the Pinochet regime ultimately led to his ousting and the reintroduction of democracy, they also accept that this was made possible by international forces and actors.[35] Moreover, as Jeffrey Puryear highlights, one of the goals of the international approach was the creation of a critical mass of people who could act as a significant force in the transition to democracy.[36] International actors worked hard in the 1980s to empower and help reconcile previously antagonistic members of the political opposition in Chile. The political coalition of the "Concertación de Partidos por la Democracia" was in office from 1990 until 2010. It integrated the centre-left political parties that had been previously antagonistic towards each other in the 1960s. This coalition became one of the pillars of the transition to democracy.

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[35] Alejandro Ortega, "International effects on the democratic onset in Chile" (Spring 2010) Vol. XI No 2 Stanford Journal of International Relations, at 36

[36] Jeffrey M Puryear, *Thinking Politics Intellectuals and Democracy in Chile, 1973-1988* (Baltimore: The John Hopkins University Press), at 164-65

First democratic election in 1989 the end of an era?

Following the road map for the transition to democracy, the third milestone in order to restore democracy was a decisive one By December 1989, the Military Junta was required to call for the first democratic election of the president, deputies and senators since 1973 Chilean citizens were required to vote for the third time in 15 months The candidate of the opposition parties won with 55 5 percent of the vote, while the candidate of the right wing coalition and former minister of the treasury, Hernan Buchi, received 30 percent On 11th March 1990 Patricio Aylwin Azocar became the first democratically elected Chilean president to take office since 1970 When taking office, Aylwin was faced with constitutional challenges that would result in 28 constitutional amendments being made after 1989 [37] Political representatives, using majority-rule as decision-making method focused upon institutional amendments that sought to provide civilian oversight of the armed forces Among the most relevant amendments was the required agreement

[37] After the 1989 referendum that count as the first constitutional amendment the 27 statutes that amended the 1980 Constitution are Statute 18 825 Official Gazette August 17, 1989, Statute 19 055 Official Gazette April1, 1991, Statute 19 097 Official Gazette November 12, 1991, Statute 19 295 Official Gazette March 4, 1994, Statute 19 448 Official Gazette February 20, 1996, Statute 19 519 Official Gazette September 16, 1997, Statute 19 526 Official Gazette November 19, 1997, Statute 19 541 Official Gazette December 22, 1997, Statute 19 597 Official Gazette January 14, 1999, Statute 19 611 Official Gazette June 16, 1999, Statute 19 634 Official Gazette October 2, 1999, Statute 19 643 Official Gazette November 5, 1999, Statute 19 671 Official Gazette April 29, 2000, Statute 19 672 Official Gazette April 28, 2000, Statute 19 742 Official Gazette August 25, 2001, Statute 19 876 Official Gazette May 22, 2003, Statute 20 050 Official Gazette August 26, 2005, Statute 20 162 Official Gazette February 16, 2007, Statute 20 193 Official Gazette July 30, 2007, Statute 20 245 Official Gazette January 10, 2008, Statute 20 346 Official Gazette April 4, 2009, Statute 20 352 Official Gazette May 30, 2009, Statute 20 354 Official Gazette June 12, 2009, Statute 20 390 Official Gazette October 28, 2009, Statute 20 414 Official Gazette January 4, 2010, and Statute 20 053 Official Gazette April 27th, 2011

of the National Congress to declare states of emergency and the elimination of designated members of the senate so that all members of the National Congress are democratically elected representatives. In addition, the armed forces were brought under the jurisdiction of the minister of defence, and the executive could request the forced retirement of any commander-in-chief with prior notification to the Senate and the Chamber of Deputies. The National Security Council was transformed into an advisory executive institution with a majority of civilian members. The primary intention of such a focus was to ensure that human rights abuses could not be perpetrated by the armed forces in the same manner as had occurred under the autocratic regime.[38] Additionally, the first democratic government cautiously attempted to decentralise political power through elected regional and local governments.

1.3. CONSTITUTIONAL AMENDMENTS AS AN "ELITE BARGAINING" MODEL

The role of the 1980 Constitution in the transition towards democracy could be approached in at least three ways. The first possibility was to completely reject the Constitution because of its connection to an arbitrary and illegitimate regime. Adopting this position would have required mobilizing popular resistance to overthrow the regime. Although this ultimately happened, this option was disregarded in part because members

[38] Law 20.050 amended section 49 of the 1980 Constitution, Official Gazette August 26, 2005.

of the Christian Democratic Party, who were opposed to the regime by the period of democratisation, participated in the drafting of the 1980 Constitution and so partially trusted its content. A second possibility was the replacement of the 1980 Constitution through the creation of a new constitution or by returning to the 1925 Constitution. The creation of a new constitution was rejected due to the limited time and political conditions available. The final option available was the acceptance of the 1980 Constitution as illegitimate in origin but open to a process of legitimation through its application, amendments and interpretation. It was this option that was adopted by the first democratic regime in 1990. Oscar Godoy presents this as an explicit transaction between the political opposition and the military forces reflecting the significant institutional and political constraints that would have been encountered otherwise.[39]

The trade-offs of the "democracy of agreements" model

This transitional model, called a "democracy of agreements", was essentially a pact amongst political elites. The process involved those centre and left-wing parties who were members of the Concertación de Partidos por la Democracia (as the former opposition to the authoritarian regime) and the right-wing parties that supported the military regime (and would constitute the political opposition after 1990). Joseph

[39] Oscar Godoy, "La transición chilena a la democracia pactada" (Fall 1999) 74 Estudios Públicos, at 79

Colomer labelled the centre and left-wing coalition as "openists", as their goal in the late 1980s was to encourage the softening of the authoritarian regime through moderate reforms.[40] However, faced with the danger of violent confrontation or civil war, the opposition preferred to join the "continuists" of the authoritarian regime represented by right-wing parties.[41] Thus, the preferred option was a strategy of "specific agreements" that sought to achieve a consensus between the political antagonists. Furthermore, because the parties were still working within the parameters set by the 1980 Constitution that require high quorums for legislative approval, in practical terms the democratic government required a political agreement with the opposition, represented by "continuists", to secure the necessary constitutional amendments.

Because of this approach Chile successfully achieved a measure of political stability in the 1990s. Esteban Montes and Tomas Vial emphasize that the most outstanding characteristic of the constitution-building process in Chile is that it demonstrates how "an authoritarian constitution, both in its origin and content, may allow for a transition to a stable democracy".[42] However, this conclusion is dubious. The use of constitutional amendments, as a mechanism to legitimize the content of the Constitution, achieved some important democratic objectives (mainly in civilian oversight over

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[40] Joseph M Colomer, "Transitions by Agreement: Modeling the Spanish Way" (1991) 85:4 American Political Science Review 1283, at 1296

[41] Joseph M Colomer, "Transitions by Agreement. Modeling the Spanish Way", at 1285.

[42] Esteban Montes & Tomas Vial, "The Constitution-building process in Chile. the authoritarian roots of a stable democracy", at 2

military institutions). However, the model of a "democracy of agreements" limited popular participation, failed to initiate debate about the democratic role of courts, avoided a closer examination of justiciable rights, and excluded the possibility of competing interpretations or new approaches to certain rights. This limited democratic openness also failed to encourage an open debate as to whether the military dictatorship could be considered a rule of law regime. This kind of debate would have required a re-foundation of the legal order in areas where the discretion of the political authorities had previously been uninhibited by law or judicial review, particularly in regard to the mass violation of human rights. A related consequence was that elements of continuity with the previous authoritarian regime have remained in place, ensuring that processes of liberalization and democratization have been rather slow.

Political dissent was often dismissed for being contrary to the "consensual spirit of the moment" and popular participation in transforming the 1980 Constitution as a political forum for new social agreements was initially denied. At the same time the system fostered a low level of political involvement by citizens and the political accountability of the ruling elites was limited to elections. Jorge Contesse notes that aversion to political dissent was seen as a positive quality in a country fractured by disagreement. However, in his opinion, this forced constitutional consensus damaged a

real understanding of what a democratic regime entails.[43] In the same vein, Manuel Antonio Garretón criticized the "consensual path" because it did not strengthen the democratic model, forced the government to act tactically, and did not allow for a coherent strategy to be adopted on crucial themes like human rights.[44] This is exactly one of the problems underlined by the literature on political cleavages in divided societies (although not in ethnically divided societies); where divisions are seen as temporary, moderation and consensus are valued at the expense of addressing or even acknowledging the underlying cleavage itself.[45]

In short, the transitional process was mostly undertaken behind closed doors in an "elite bargaining" model without providing real possibilities for citizens to become protagonists of constitutional transformation.[46] Interestingly enough, the 1980 Constitution, at least in its formal text, contains a particular mechanism in which the direct participation of the citizenry could potentially be required in order to accept or reject a constitutional amendment. If a proposal is approved by the majority of the plenary congress but objected to by the president, the president can consult the citizens

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[43] Jorge Contesse, "Las Instituciones Funcionan: Sobre la Ausencia de Diálogo Constitucional en Chile" (2008) Chilean Yearbook of Legal and Social Philosophy 335, at 347

[44] Manuel Antonio Garretón, "La redemocratización política en Chile. transición, inauguración y evolución", at 127

[45] Sujit Choudhry, "After the Rights Revolution: Bills of Rights in the Post-Conflict State" (2010) 6 Annual Review of Law and Social Science 301, 309-10

[46] See Scott Mainwaring and Timothy Scully (eds), *Building Democratic Institutions Party Systems in Latin America* (Stanford, Stanford University Press, 1995).

through a plebiscite where congress continues to demand the proposed amendments. If the citizens approve the proposed text, it will be incorporated as a constitutional amendment to the constitution.[47] Since the restoration of democracy in Chile, however, these provisions have never been used.

Only in the 1990s, especially through the strengthening of civil society, did a slow public debate and contestation start about the actual contents of the constitutional text. At the beginning of the process that brought Chile back to a democratic regime, it appears that a broad appeal for freedom and democracy was enough and that a more profound reform of the Constitution was not considered important by the general population.

The milestone in the transition to a democratic system

The bottom line is that the failure of the authoritarian regime to protect human rights might have provided a legitimate reason for the new political elite to withdraw support for the established constitutional order. However, they decided to maintain the 1980 Constitution. Given the illegitimate origins of the Constitution, some kind of democratic transformation was required in order to secure legitimacy. Although the 1980 Constitution was created to shield the institutional and economic structure created by the authoritarian regime, since the return to a democratic regime the Constitution has been a

[47] 1980 Constitution, Chapter fifteen: Amendment to the Constitution, sections 127–129.

useful tool for the centre-left government. More radical constitutional amendments, especially related to the "social debt" of the neo-liberal reforms, have been constrained by the difficulty of achieving the necessary quorums in the National Congress. Nevertheless, constitutional amendments have allowed a slow transformation of the constitutional text over time.

The amendment considered by most scholars and politicians to be the milestone in the transition to a democratic system in Chile, was law 20.050 of 2005. This constitutional amendment sought to create a definitive democratic threshold for Chile through broad institutional changes: the inclusion of a new right of publicity of information of public interest and the obligation of disclosure for governmental institutions; the recognition of Chilean nationality through the principle of jus sanguinis in order to accommodate Chileans who were forced into exile during Pinochet's regime and were required to raise their families abroad; the recognition of a limitation on freedom of association given to professional bar associations with respect to ethical complaints involving their affiliation; the requirement that declaration of states of emergency have the agreement of the National Congress; the elimination of designated members of the Senate so that all members of the National Congress were democratically elected representatives; the recognition of the Constitutional Court as the main interpreter of the Constitution; the civilian control over the military ; and finally, the transformation

of the National Security Council into an advisory executive institution with a majority of civilian members.[48] Ricardo Lagos, as President of the Republic, explained that the transition to democracy ended with Law 20.050 because the 1980 Constitution had been transformed through amendments into a democratic Constitution, changing the unwanted "authoritarian enclaves" into a constitutional text that met international standards on most matters.[49]

A democracy and the catalogue of rights and freedoms

The Chilean constitution-building process has been a process of constitutional amendments. This does not absolve judges of the responsibility to play a creative role in constitutional interpretation. Moreover, the catalogue of rights and freedoms creates a more robust relationship between democracy and the rule of law. In addition to the role of the democratically elected and accountable branches of government in creating and enforcing legal norms, the meaning of the catalogue of rights and freedoms needs to be elaborated, and their enforcement assured, by judges as impartial arbiters. Rights are not self-defining or self-enforcing. However, the debate surrounding the catalogue of rights and freedoms in Chile so far has been extremely restricted. While a number of laws and

[48] Statute 20 050, published in the Official Gazette August 26, 2005.
[49] Ricardo Lagos, "Una Constitución para el Chile del Bicentenario" in F Zuñiga, ed., *Reforma Constitucional* (Santiago: Lexis Nexis, 2005), 1-18.

amendments have sought to create and enforce the existing list[50], fundamental provisions like the right to life, the physical and psychological integrity of the individual, and the equality clause, have remained unchanged since they were drafted under military rule. The right to personal freedom and individual security is one of the sections that has been changed in order to incorporate limits to the state "police power", with the goal of avoiding the abuses that occurred under the authoritarian regime.[51] In addition, law 20.050 of 2005 created a new right of access to public information and more recently another constitutional amendment forced political representatives to declare their economic interests. Both amendments aim to further the principle of probity and make political representatives accountable to the citizenry.[52]

As a concrete example one set of rights that are in urgent need of reform are aboriginal rights. The traditional approach of the political authorities in Chile has been to avoid a dialogue that could potentially acknowledge the multinational character of Chile. The option of accepting a multinational character is called a "strategy of dislocation" and is used as a tool in post-conflict states.[53] Historically, the conquest and colonization of Chile (1541–1810) annulled any alternative legality to that imposed by the Spanish.

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[50] The pursuit of a neo-liberal economic framework meant that property rights received an enhanced protection while a special framework called "economic public order" was created

[51] Three Constitutional amendments addressed this area statute 19 055 published in the Official Gazette April 1, 1991, statute 19 519 published in the Official Gazette September 16, 1997, and statute 20.050, published in the Official Gazette August 26, 2005.

[52] Statute 20 414, published in the Official Gazette January 1, 2010

[53] Sujit Choudhry, "After the Rights Revolution: Bills of Rights in the Post-Conflict State", at 310.

Indigenous peoples had their own customs, languages, religions and traditions. Although there were peace treaties in the 1600s to preserve them, the treaties were either violated or neglected, initially by the monarchy and later by the governments of the republic. The largest group of indigenous people are the Mapuches, whose name means "people of the land". It is an historical irony that they lost most of their land.[54] As a remarkable step in the transitional democracy of the 1990s, the Chilean government led a special commission on indigenous peoples that produced a report called "Historical Truth and a New Deal" that tried to move beyond the traditional neglect.[55] In 1993, statute 19.253 legally recognised indigenous peoples at a constitutional level and proclaimed their rights to self-identification, to their culture, and to the lands that they had historically occupied and possessed. It also established a special fund for the development of indigenous culture.[56] Although, indigenous customary law is recognised as a source of law, indigenous entities do not have normative competence to create or regulate it. This situation establishes a clear interpretative problem about how constitutional supremacy and the recognition of indigenous rights will be applied in the future.[57]

Despite these historic developments, democratic debate and contestation occurred

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[54] See especially Jose Bengoa, *Historia del Pueblo Mapuche (siglo XIX y XX)*, Colección Estudios Históricos, (Santiago. Ediciones Sur, 1996).

[55] Report available in Spanish online < http://biblioteca.serindigena.org/libros_digitales/cvhynt/>

[56] For an interesting analysis see Wolfram Heise, "Indigenous rights in Chile. Elaboration and Application of the new indigenous law (ley No 19 253) of 1993" in Rene Kuppe & Richard Patz eds., vol 11, *Law and Anthropology International Yearbook for Legal Anthropology* (Martinus Nijhoff Publishers, 2001).

[57] S 54 statute 19 253,published in the Official Gazette October 5, 1993

primarily outside the realm of judicial adjudication –at least during the 1990s Only after the detention of Pinochet in London in 1998 under charges of crimes against humanity did the Chilean government play an active role in redressing the legacy of the human rights violations done by state organs during the authoritarian regime The attempts by a Spanish judge, Baltazar Garzón, to extradite Pinochet to Spain for crimes against humanity had the effect of abruptly awakening the Chilean judiciary The Chilean government exercised pressure to reinforce the idea that Pinochet could be, and would be, tried in Chile However, the judiciary were also "woken-up" by the events and were keen to demonstrate that they were willing and able to hold human rights violators accountable While seeking Pinochet's return to be tried furthered a more effective human rights policy in Chile, at the same time it proved crucial in advancing the judicial interpretation of the amnesty law to avoid impunity for the crimes committed under the regime [58] In addition, it ended Pinochet's role as a political figure, freeing right wing parties enough to allow them to adopt agreements in order to structurally amend the 1980 Constitution and leave behind the category of simple "continuists" of the authoritarian regime

[58] See Rebecca Evans, "Pinochet in London Pinochet in Chile International and Domestic Politics in Human Rights Policy" (2006) 28 1, Human Rights Quarterly, 207-244

CONCLUSION

The Chilean model of constitution-building has involved a painful process towards democratization, mostly achieved at the expense of an open democratic debate. The argument advanced suggests that a closer look at what is normally considered a successful transition to democracy requires that we challenge the lack of debate about how rights are defined and defended. The challenge posed (but not yet fulfilled) has been to achieve rights protection and democracy in a context of legal continuity with an authoritarian regime.

What is lacking is a more inclusive public debate in the public sphere and more effective participatory mechanisms for future amendments to the Constitution. Until now, the transformation of the institutional structure inherited from the authoritarian regime has been the domain of elite negotiation. We might go so far as to paraphrase Habermas saying that "the catalogue of human rights in Chile has been paternalistically foisted on sovereign citizens".[59] If the protection of rights and freedoms ought also to reflect the basic ideas, principles and values of a polity, consultation about constitutional change needs to be much broader. For example, women, indigenous peoples and sexual minorities have traditionally been excluded from constitutional politics in Chile and their inclusion is necessary to ensure attentiveness to the views of all sectors of Chilean

[59] Jürgen Habermas, "On the Internal relation between the Rule of Law and Democracy" in Richard Bellamy (ed), *Constitutionalism and Democracy* (Ashgate Dartmouth Publishing Company, 2006), at 272.

society As Jennifer Nedelsky argues, if we also endorse the idea that rights are "a particular institutional and rhetorical means of expressing, contesting and implementing the values of a certain polity"[60], the case for a broader discussion about the values that Chile upholds as a polity is even stronger The implications of such a claim touch all branches of government This thesis aims to address the role that the Chilean Constitutional Court could potentially have (and of course maybe fail to fulfill) in the implementation of rights protection

[60] Jennifer Nedelsky, "Reconceiving Rights and Constitutionalism ' (2008) 7 Journal of Human Rights 139, at 145

CHAPTER 2.

BARRIERS FOR THE CONSTITUTIONAL COURT IN ITS ROLE IN A DEMOCRACY

One does not have to examine the history of Latin American constitutionalism very closely to find out that the relationship between constitutionalism and democracy has never been an easy one. In fact, contemporary constitutional theory has occupied itself with solving the constitutionalism-democracy dilemma: the idea that constitutionalism and democracy are in tension with each other. How can a government remain democratic (how can it claim to be *self*-government) if the fundamental law was imposed by a generation that no longer exists or was an exercise of authoritarian will as in the Chilean case? When reduced to its most basic formulation, the dilemma presents itself as an unsolvable tension between popular sovereignty and constitutional supremacy.[61]

Democracy, in the most traditional sense, is about self-government. The idea is that the people decide the content of the laws that organize their political association and regulate their conduct. Constitutionalism, on the other hand, is generally understood as

[61] Joel Colón-Ríos, "The end of the Constitutionalism – Democracy debate" (2010) 28 Windsor Review of Legal and Social Issues 25, at 32.

the *containment* of popular sovereignty by way of a constitution designed to limit the content of the laws that can be made, control who can make them, and by what procedures.[62] The most salient of those limits (although not the only one that matters) is exemplified by the regime of rights, which is usually removed from the scope of democratic politics. Constitutionalism is about affirming the "sovereignty of the constitution", about constitutional supremacy. The so-called democratic objection against judicial review takes on a paradoxical form in Chile where, following the restoration of democratic rule, the catalogue of rights and freedoms used to seek justice and redress were derived from the military junta's 1980 Constitution.

Constitutional adjudication in Latin America exhibits a "hybrid" structure partially based on the United States model that concentrates control in the hands of the judiciary and partially in the continental model which involves the creation of separate courts including a separate court for constitutional matters.

2.1. THE CHILEAN CONSTITUTIONAL COURT INSTITUTIONAL [DIS]CONTINUITY

The original Constitutional Court in the '70s

[62] Frank Michelman, *Brennan and Democracy* (Princeton, NJ: Princeton University Press, 1999), at 5-6.

The Constitutional Court was originally incorporated into the pre-1973 Chilean political structure by way of a constitutional amendment in 1970.[63] The creation of a court distinct from the regular judiciary was intended to assist with the institutional and political crisis that had developed between the Supreme Court, the Executive and the National Congress. The Constitutional Court's main role was to conduct constitutional reviews of law and international treaties that were awaiting the legislature's approval, called *a priori* review. In its first epoch (1970-1973), the Constitutional Court was composed of five judges, three appointed by the executive with the agreement of the Senate and two by the Supreme Court among their members. The Court saw only 17 cases and issued a final judgment in only ten cases.[64] At this time, the Court gave legal standing only to political representatives. The Court is generally considered to have been a failure, given that it could not help to prevent the collapse of Chilean democracy in 1973.

After seizing the constituent, legislative and executive functions by force in a coup d'état in September 1973, the Military Junta dissolved the Constitutional Court in November of that year.[65] The reason given was that due to the dissolution of the National Congress, the mediating function of the Court was obsolete. This gave free rein to authoritarian rule.

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[63] Amendment of the 1925 Constitution, statute 17.284, published in the Official Gazette January 23rd, 1970.
[64] See especially: Enrique Silva, *El Tribunal Constitucional de Chile (1971-1973)* (Caracas, Editorial Jurídica Venezolana, 1977).
[65] Decree Law 119, published in the Official Gazette November 10th, 1973.

Judicial empowerment as an attempt to legimitize military rule

The constitutional text approved in 1980 under the authoritarian regime re-established the Constitutional Court as an independent and autonomous state organ outside of the regular judiciary. In the 1980s, adjudication was again presented as a scientific technique in the drafting process of the Constitution; the Constitutional Court was portrayed as a purely technical rather than a judicial or political organ.[66] The appointment process of the seven members of the Constitutional Court in 1980 for a period of eight years saw three members appointed from the Supreme Court, one lawyer appointed by the executive which at that time was exercised by Pinochet, two lawyers elected by the National Security Council with a military majority, and one lawyer elected by the Senate replaced during the transitional period by the Military Junta. So judges were either part of the deferential regular judiciary or they were appointed by military authorities.[67]

The Constitutional Court was one of the few institutions that came into being in March 1981. Its main function was to review the constitutionality of constitutional amendments, international treaties, decrees with force of law, and decrees referred by the

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[66] The Commission of experts *"Comisión de Estudios de la Nueva Constitucion"* discussed the Constitutional Court institutional design during sessions No 344, No 358 –360, No 409-410, and No 415-416 (8 sessions), and, the State Council discussed the drafting of the Constitutional Court during sessions No 86, 87 and 110 (3 sessions)

[67] The original appointment process was criticized even by constitutional scholars that participated in the drafting process of the 1980 Constitution; see Alejandro Silva Bascuñan, *Tratado de Derecho Constitucional*, tomo IX (Santiago. Editorial Juridica de Chile, 2003), at 36

general comptroller.[68] The Court also had competence to decide about the constitutionality of political leaders or organizations, parties and movements following the "protected democracy" model established in section eight of the 1980 Constitution.

There are concrete differences between the Constitutional Court created in 1970 and the version reincarnated in 1980. The first was intended to assist with the institutional crisis that had developed between the branches of government. The second was part of the "transitional period" from the dictatorship to democratization and, it was intended to shield the framework constructed by the drafters of the 1980 Constitution.

The legal background - the institutions in place and the concepts prevalent within the legal community[69] - against which the Constitutional Court was created in 1980 helps to explain the revival of a particularly undemocratic concept of the role of the judge in Chile. In this model, the adjudication of cases was considered a "scientific practice",

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[68] 1980 Constitution in its original text established in s82 "The competences of the Constitutional Court are
1 To exercise control of the constitutionality of the constitutional organic laws prior to their promulgation, and of the laws that interpret some precept of the Constitution,
2 To resolve on questions regarding constitutionality which might arise during the processing of bills or of constitutional amendment and of treaties submitted to the approval of Congress,
3 To resolve on questions which should arise over the constitutionality of a decree having force of law,
4 To resolve on questions which should arise regarding constitutionality on calling a plebiscite, without prejudice to the powers corresponding to the Elections Qualifying Court
5 To resolve on complaints in case the President of the Republic does not promulgate a law when he should, or when he promulgates a text different from that which constitutionally corresponds or when he issues an unconstitutional decree,
6 To decide, when required by the President of the Republic in conformity with Article 88, on the constitutionality of a decree or resolution of the President which the Office of the Comptroller General may have objected to, for deeming it unconstitutional"

[69] Ugo Mattei, "Comparative Law and Critical Legal Studies" in Mathias Reiman & Reinhard Zimmermann (eds) *The Oxford Handbook of Comparative Law* (Oxford, Oxford University Press, 2006), at 829

regardless of the legal issues involved and judges were portrayed as mechanical appliers of the law. Duncan Kennedy's work on globalized forms of legal thought sheds light on how a project called "classical legal thought" from the 1800s was revived by authoritarian political systems in the 1980s as "a system of spheres of autonomy for private and public actors defined by legal reasoning [and] understood as a scientific practice".[70] The Chilean Civil Code of 1855 is an exemplar of the "classical legal thought" period, with private law defining the legal status of individuals and the key normative principle being the "freedom of individual will".[71] Another consequence of the codification process was that law was no longer seen as an art form open to judicial interpretation, but as a science whose content was exclusively determined by the government's positive legislation.

Lisa Hilkink characterises Chilean judges as an example of a non-democratic judiciary, where "the institutional features of the Chilean judiciary promoted a conservative bias among judges, which in turn explains why the judges offered such little resistance to the undemocratic and illiberal regime of General Pinochet".[72] The implications of the partial revival of the "classical legal thought" paradigm during the military dictatorship reinforced the idea that law is detached from politics and, therefore,

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[70] Duncan Kennedy, "Three Globalizations of Law and Legal Thought 1950-2000", at 20-22.
[71] Ramón Domínguez, "La Constitucionalización del Derecho" in Enrique Navarro, ed., *20 años de la Constitución Chilena 1981 – 2001* (Santiago. Editorial Conosur Ltda , 2001, at 39.
[72] Lisa Hilbink, *Judges beyond Politics in Democracy and Dictatorship Lessons from Chile*, at 39-40.

requires courts to act in a "technical or scientific" manner that restrains judges from doing anything to prevent the law from being captured as a tool for oppression.[73] A poignant example of this attitude can be seen in the annual speech of the Chief Justice in March 1974, shortly after the coup d'état overthrowing the democratic regime, when Justice Urrutia stated:

> [I] can emphatically assert that the courts under our supervision have functioned in the normal fashion as established by the law, that the administrative authority governing the country is carrying out our decisions, and that our judges are accorded the respect they deserve.[74]

The circumstances surrounding the political choice to give the Constitutional Court strong powers of judicial review fits Ran Hirschl's rational–strategic theory of judicial empowerment which sees an alignment between the empowerment of courts and the elite's interests.[75] Hirschl argues that judicial review is attractive to political elites who seek to protect their interests in the face of an imminent loss of control in the legislature and in general policy-making arenas.[76] The key idea behind Hirschl's "strategic approach and the hegemonic preservation thesis" is that judicial power is politically constructed. In the Chilean case, where the military government tried to create

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[73] See David Dyzenhaus, *Judging the Judges, Judging Ourselves Truth, Reconciliation and the Apartheid Legal Order* (Oxford, Hart Publishing, 1998)

[74] Chief Justice Enrique Urrutia Manzano, Annual speech 1974, published in Official Gazette March 14th, 1974

[75] See Ran Hirschl, *Towards Juristocracy The origins and consequences of the New Constitutionalism* (Cambridge, Harvard University Press, 2004)

[76] Ran Hirschl, *Towards Juristocracy The origins and consequences of the New Constitutionalism*, at 41

a new constitutional order based on a neo-liberal model, judicial empowerment helped to shield the legal framework from opposing political forces.

Lisa Hilbink, however, proposes a modified version of Hirschl's account, arguing that judicial empowerment does not necessarily "rely on the same set of interests rational-strategic theorists claim or imply" and that "only historical and ideational context" is able to provide an accurate and complete picture.[77] In the Chilean case, Hilbink underlines how the Constitutional Court was a creature of "Chile's long tradition of conducting government affairs in legalistic terms, making judicial empowerment a logical move in the regime's bid for legitimacy; and second, that the leaders of the authoritarian regime viewed adjudication as an 'apolitical' function and judges (hence) as natural allies in the effort to create and protect their new and improved type of democracy".[78]

The puzzling transitional role of the Constitutional Court

The puzzle is the ambivalent role of the Court during the '80s where in some decisions the Court paved the path to return to a democratic regime and on other cases the Court simply decided to act as a guardian of the institutional design of the military regime. If we follow Hirschl's strategic approach it is possible to conclude that the Chilean

[77] Lisa Hilbink, "The Constituted Nature of Constituents' Interests Historical and Ideational Factors in Judicial Empowerment", (2009) 62 4 Political Research Quarterly 781, at 782

[78] Lisa Hilbink, "The Constituted Nature of Constituents' Interests Historical and Ideational Factors in Judicial Empowerment", at 791

Constitutional Court's rulings in the late '80s adopted anti-government decisions in a strategic "move" when it become clear that the days of the authoritarian government were numbered.[79]

On one hand the Constitutional Court did make contributions towards the democratic institutionalization process during the 1980s. The Constitutional Court established basic standards for free and contested political elections, delivering a crucial judgment in 1985 concerning the National Electoral Tribunal as part of the mandatory abstract review of constitutional organic laws.[80] The main problem being reviewed in that case concerned the date when the National Electoral Tribunal was supposed to enter into force. The legislative proposal established a date sixty days before the first election of deputies and senators, which was scheduled for December 1989. This meant that the 1988 plebiscite - where citizens were required to approve a candidate presented by the Military Junta for another eight-year period - would be held without any electoral "guardianship". The Court decided, by four votes to three, that the sections that created the National Electoral Tribunal after the 1988 plebiscite were unconstitutional. The Court reasoned that the idea of an interpretation that considers the Constitution as a whole, an interpretation that demanded harmony amongst the different sections, was necessary.

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[79] Ran Hirschl, "The Question of Case selection in Comparative Constitutional Law" (2005) Vol LIII:1 The American Journal of Comparative Law, 125-156, at 149

[80] Decision No 33 issued by the Constitutional Court on September 24th, 1985

Therefore, it was necessary to have a functioning institution for all electoral processes during the transitional period. The Court also reasoned that the very existence of political parties was dependent upon the existence of a National Electoral Tribunal and that the normalization of political life could not wait until after the 1988 plebiscite. Finally, the Court argued that logic or "common sense" should prevail - an electoral act without the proper institution would not be the correct road map towards democratization.[81]

Another relevant decision of the Constitutional Court during the military dictatorship that paved the return to a democratic regime was the mandatory review of the statute 18.603 of 1987.[82] There the Court considered the scope of protection for freedom of association and the regulation of political parties. The Court declared that some restrictions imposed by the proposed legislation relating to funding from juridical persons and the excessively detailed internal code of practices to be unconstitutional. This judgment also introduced the requirement of "due process" in the constitution of political parties and the necessity of respect for the "core essence" of the constitutional right guaranteeing freedom of association.

Finally, a third example was the Court's decision regarding "popular votes and

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[81] See Eugenio Valenzuela Somarriva, *Criterios de Hermenéutica Constitucional aplicados por el Tribunal Constitucional Contribucion del Tribunal Constitucional a la institucionalización democratica* (2006) 31 Cuadernos del Tribunal Constitucional, at 76-122

[82] Decision No 43 issued by the Constitutional Court on February 24th, 1987

scrutiny", through law 18,700 published in 1988.[83] In this decision the Constitutional Court first used a strategy of under-enforcement by deliberately avoiding a decision and declining to rule on the issue brought before them. However, at the same time, the Court established that "constitutional dialogue" was required, making it clear that it was necessary to legislate concerning all of these matters. The missing legislation actually proved to be crucial, as the Military Junta had failed to establish the dates when the plebiscite would occur as well as when the first executive and parliamentary elections would take place.

On the other hand in its role as guardian of the military regime, the Constitutional Court endorsed the idea of a "protected democracy" established in section 8 of the original text of the 1980 Constitution.[84] This clause of "ideological constraint" was

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[83] Decision No 53 issued by the Constitutional Court on April 5th, 1988

[84] 1980 Constitution section 8 "Any action by an individual or group intended to propagate beliefs against familiar values, or which advocate violence, or a concept of society, the state or the juridical order, of a totalitarian character or based on class warfare, are illegal and contrary to the Constitution The organizations and political movements or parties, which due to their purposes or the nature of the activities of their members, tend toward such objectives, are unconstitutional The cognizance of violations of the provisions set forth in the preceding paragraphs shall rest with the Constitutional Court
Without prejudice to the other penalties established by the Constitution or by the law, persons who incur or who should have incurred the aforementioned violations shall not, for a period of ten years from the date of the Court's decision, be eligible for public duties or positions, regardless as to whether they should or should not be obtained through popular vote Likewise, they will not become rectors or directors of educational establishments or teach thereat or exploit any medium of mass communication, or become directors or administrators thereof, or hold positions therein, related to the broadcast or dissemination of opinions or information During the aforementioned period, they will not be able either to act as leaders of political organizations or students associations, and in general, organizations related to education, or occupy positions in community professional, entrepreneurial, labor or trade unions
If at the time of the Court's decision, those persons referred to above should be holding a public office or position, whether or not as the result of a popular vote they shall lose it as a matter of law

modeled upon section 21 of the German Fundamental Law of 1949.[85] However, there is a substantial difference in the rationale of such a clause. While the German model was created by a democratic regime in order to avoid the encroachment of fundamental rights as had occurred under the Nazi regime, the Chilean clause was drafted by an authoritarian regime that intended to restrict ideological pluralism.

The first decision of the Constitutional Court based on the "protected democracy" model was issued in January 1985, where thirty individuals (including Jaime Guzmán, the intellectual leader of the 1980 Constitution) petitioned the Constitutional Court to decide on the constitutionality of certain political movements.[86] The claimants - all of them related to right wing organisations –sought to have the left-wing "Democratic Popular Movement", "Communist Party of Chile", "Revolutionary Left Movement" and "Socialist Party of Chile" declared unconstitutional on the grounds that "Marxist–Leninist" doctrine promoted the use of violence as a legitimate political tool.

Persons penalized in accordance with this precept, shall not be eligible for reinstatement during the period indicated in the fourth paragraph
The duration of ineligibility as prescribed in this article shall be doubled in case of recurrence of the offense."

[85] 1949 German Basic Law S 21 [Political parties]
(1) Political parties shall participate in the formation of the political will of the people They may be freely established Their internal organization must conform to democratic principles They must publicly account for their assets and for the sources and use of their funds
(2) Parties that, by reason of their aims or the behavior of their adherents, seek to undermine or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany shall be unconstitutional The Federal Constitutional Court shall rule on the question of unconstitutionality
(3) Details shall be regulated by federal laws

[86] Decision No 21 issued by the Constitutional Court on January 31, 1985

The decision of the Constitutional Court, very deferential to the authoritarian regime, declared these political movements to exist and to be unconstitutional, despite the fact that the same movements had been prohibited, declared as illicit associations, dissolved as political movements and had their legal personality cancelled in 1973 during the military dictatorship.[87] The dissenting opinion by Justices Eyzaguirre, Valenzuela and Chief Justice Philippi declared that the decision of the Court was "inadmissible and moot" due to the previous declaration that "the Democratic Popular Movement", "the Communist Party of Chile" and, "the Socialist Party of Chile" were illicit political associations; the appropriate thing to do, they reasoned, would have been to apply legal sanctions (if the named political organisations in fact existed, a fact which had yet to be proven). As Francisco Zuñiga observes, the wording used by the Court displayed its ideological affinity with the authoritarian regime.[88]

The second decision of the Court supporting the framework set up by the authoritarian regime was the case where the Ministry of Interior, representing the government, asked for a declaration of unconstitutionality of Clodomiro Almeyda as a political leftist leader.[89] The Court underlined its lack of competence to declare the 1980 Constitution to be illegitimate in its origin, content and exercise as requested by the legal

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[87] Decree Law No77, published in the Official Gazette on October 8, 1973

[88] Francisco Zuñiga, "Derechos Humanos y Jurisprudencia del Tribunal Constitucional 1981 – 1989: El Pluralismo Político e Ideológico en Chile" (2003) 9 1 Revista Ius et Praxis, at 268

[89] Decision No 46 issued by the Constitutional Court on December 21st, 1987

defense of Clodomiro Almeyda. It underlined how the "constituent power" understood as the political authority with the power to frame a new constitutional order was in the hands of the Military Junta since September 1973. Renato Cristi argues that the Constitutional Court's argument is formally coherent, even though we might disagree with its substantive content. Moreover, Cristi brings attention to the fact that the decision of the Constitutional Court was written by Justice Enrique Ortúzar who was the former president of the commission of experts that drafted the 1980 Constitution.[90]

The milestones of the process to recover democracy already discussed in Chapter One started only in 1988. After March 1990 the authority with the power to frame the constitutional order was the people through their political representatives and directly through a referendum mechanism. Based on this fundamental change in which sovereignty was recovered by the people, the Court needed to adjust the frame of reference for the constitutional order. But the court did not recognize this transfer of sovereign power from the Military Junta to the people – this much is illustrated by one highly political example. In 1998, the Court was asked to decide on the legality of Augusto Pinochet's status as lifetime senator.[91] A writ presented by 16 deputies asked the Constitutional Court to declare that Pinochet was not able to assume the role of lifetime

[90] Ricardo Cristi, *El pensamiento político de Jaime Guzmán. Autoridad y Libertad*, Colección Sin Norte (Santiago: LOM Editores, 2000), at 144.
[91] Decision No 272 issued by the Constitutional Court on March 18th, 1998.

senator following the rules established in s 45(a) of the Constitution.[92] The argument of the Deputies was that Pinochet never exercised his political authority as President of the Republic because the regime in question was an authoritarian one. The Court decided to link this decision to the decision about the "Almeyda case" of 1987 and declared in paragraph 11 that:

> [T]he 1980 Constitution constitutes a manifestation of the original constituent power because it emerges as a consequence of the 1973 institutional breakdown, disregarding the constitutional amendment rules of the 1925 Constitution.

The Court unanimously declared that it did not have the jurisdiction to determine the legitimacy of the regime created by the 1980 Constitution nor of Augusto Pinochet's status as lifetime senator. This is certainly a mistake because it entails a failure to recognize the democratic status Chile has enjoyed since March 1990.

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[92] S 45 "The Senate shall be composed of members elected by direct ballot by each of the thirteen regions of the country Each region shall elect two Senators, in the manner determined by the respective constitutional organic law
The Senators elected by direct ballot shall remain in office for a period of eight years and they shall be replaced alternately every four years Those representing odd-numbered regions shall be replaced in one period, and those representing even-numbered regions and the metropolitan area shall be replaced in the following period
The Senate shall also be composed of
(a) Former Presidents of the Republic who should have served for six consecutive years in that capacity, except for the occurrence of the situations described in paragraph 3 of No 1 of Article 49 of this Constitution These Senators shall hold their positions in their own right for life, without prejudice that incompatibilities, incapacities and grounds for suspension described in Articles 55, 56 and 57 of this Constitution may be applied"

The Constitutional Court faces a democratic threshold

One of the most important goals on the return to democratic systems in the 1990s was the strengthening of the judiciary. The courts had only nominally been a rights-protecting institution. In reality it had been afraid of exercising its review powers "against" the National Congress and the executive. John Merryman attributes the judicial approach to the strong civilian law tradition, an orthodox view of the judicial function, the effects of a traditional legal education and limited career training for judges.[93]

In theory, constitutions have judicial mechanisms to hold governments accountable to collectively agreed-upon basic values that nevertheless can be disregarded or infringed. Through judicial review, state actions can be held accountable against collective decisions and, therefore, benefit democracy. Courts offer a forum for political debate. They can provide a channel of communication between society and the state. Nonetheless, there is a tension between legislative boundaries and the boundaries of the constitutional court. It is a challenge to determine the extent to which it is appropriate for constitutional rights to be determined by the court and when it is more appropriate for a constitutional amendment to be made by the legislature. Nicholas Tsagourias suggests that courts should solidify constitutional principles or create an awareness of constitutional practices to trigger a political debate in order to change a previous socially

[93] J. H. Merryman and R. Pérez-Perdomo, *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America*, 3rd ed., (Stanford, CA: Stanford University Press, 2007), at 140.

accepted norm.[94] This political debate itself will not be court-driven. The debate is attenuated in the Spanish and Chilean constitutional setting because it is the Constitution itself that establishes the Constitutional Court's power of legislative review. So the discussion has shifted from the legitimacy of the Courts' jurisdiction to the appropriate limits of the constitutional control.

The debate about the democratic legitimacy of judicial review is improved if it is focused on the capacity of judges to articulate decisions and make political choices that promote current social aims like democracy, equality, or autonomy in concrete cases that would help to transform a very abstract principle into a "down to earth" ruling. Such an approach blurs the distinction between the work of judges and legislators in a democratic society. Since a democratic system must be capable of reflecting the aspirations of the citizens, legislators and judges need to understand that current socially accepted norms upheld in the constitution are essentially contested and in need of revision. Courts can be seen as democratic institutions with "a vital and complementary role to play in the continuous process of discussion and reflection about what democracy means and demands".[95] For this to happen judges need to embrace their democratic role, a role that is unavoidably political in nature.

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[94] Nicholas Tsagourias, "The Constitutional Role of General Principles of Law in International and European Jurisprudence", in *Transnational Constitutionalism International and European Perspectives* (Cambridge University Press, 2007), at 95

[95] Allan Hutchinson, "The Rule of Law Revisited Democracy and Courts", in David Dyzenhaus (ed), *The Rule of Law The Limits of Legal Order* (Oxford, Hart Publishing, 1999) 196, at 218

Javier Couso argues, with particular regard to the case of Chile in the 1990s, that introducing the judicial review of legislation in transitional regimes constitutes a premature step that endangers a key element of the rule of law: judicial independence.[96] He argues that the level of political consolidation in a given country is far more important in judicial review than the difference between legal traditions or the distribution of political power. In his opinion, by introducing judicial review before a minimum of political autonomy from partisan politics in emerging democracies has been attained, this fundamental goal is virtually impossible to achieve. Disregarding the political, cultural and historical circumstances could lead to bad results that could endanger democratically weak systems.[97]

Chile is a country where the commitment to rights is tenuous and fragile: an unfortunate but realistic account demonstrated not only by a political regime disrespectful of fundamental rights but also by a poor record of rights adjudication (a position demonstrated later through the case-study). In such a case, Waldron suggests that judicial review may help to educate the population about rights as a response to the perceived failures of democratic institutions.[98] In Chile nowadays, the system is one where a model

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[96] Javier Couso, *The politics of Judicial Review in Latin America Chile in Comparative Perspective* (Ph D. in Jurisprudence and Social Policy, University of California at Berkeley, 2002) [unpublished manuscript in file with the author], at 340

[97] Javier Couso, *The politics of Judicial Review in Latin America Chile in Comparative Perspective*, at 96

[98] Jeremy Waldron, "The Core of the Case Against Judicial Review" (2006) 115 Yale L J , 1346-1406, at 1401

of strong judicial review has been adopted through the specialized Constitutional Court that can strike down legislation if it does not conform to or if it affects individual rights guaranteed in the Constitution. The return to democracy in 1990 meant renewed challenges for the Court in the implementation of the 1980 Constitution and the rights and freedoms enshrined in the text. Due to limitations imposed upon the participation of citizens by the "democracy of agreements" model, the judicial forum and the mechanism of judicial review was, throughout the 1990s, a significant forum for debate concerning individual rights and public freedoms and for contesting "official" interpretations of constitutional provisions. Indeed, some Latin American scholars and activists even urged the courts to emulate the "Warren Court era"[99] in the United States in crucial areas like racial discrimination, freedom of speech, privacy and reproductive rights, amongst others.[100] Non-governmental organisations believed that progressive agendas could be better furthered by "activist courts".[101]

Recently Huneeus, Couso and Sieder argue that there has been a recent process of "judicialization of politics" in Latin America characterized as follows:

[F]irstly, claims for social justice and redistribution are stated in rights terms and

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[99] See. Lucas A Powe, *The Warren Court and American Politics* (Cambridge, Harvard University Press, 2000)

[100] Jorge Contesse, "Las Instituciones Funcionan Sobre la Ausencia de Dialogo Constitucional en Chile", (2008) Chilean Yearbook of Legal and Social Philosophy 335, at 351

[101] One example of the outstanding work done by NGOs in Latin America is *Centro de Estudios Legales y Sociales* (CELS), *Litigio Estratégico y Derechos Humanos La Lucha por el Derecho* (Buenos Aires, Siglo Veintiuno Editores, 2008)

> linked to a legal instrument and the struggle over authoritarian legacies have been definitively judicialized; secondly, [the] toolkit of legal language has expanded through constitutions and international treaties hand in hand with a process of democratization; and finally, an acceleration in the use of legal language, instruments and institutions in politics.[102]

Nevertheless, the general Latin American picture seems to be at odds with the concrete Chilean example. During the first fifteen years of transitional democracy, the Constitutional Court was highly deferential to the legislature, showing restraint in its role as "guardian" of the institutional framework inherited from the authoritarian regime, preferring a very formal or mechanical application of the 1980 Constitution. Javier Couso observes how the Constitutional Court in the first period of democratic transition suffered from "political insignificance" with "relative obscurity in the eye of the public", which was fostered through its "diminished status by its very jurisprudence".[103]

A major restructuring of the system of constitutional adjudication occurred in 2005 through law 20.050.[104] This constitutional amendment, considered by many scholars and politicians to be an important milestone in the transition to a democratic system in Chile, gave the Constitutional Court a central role. The changes addressed the main criticisms of the Court, including the appointment, tenure and role of the judges. One of

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[102] Alexandra Huneeus, Javier Couso & Rachel Sieder (eds), *Cultures of Legality Judicialization and Political Activism in Latin America* (New York, Cambridge University Press, 2010), at 9-11

[103] Javier Couso, "The Judicialization of Chilean Politics. The Rights Revolution That Never Was" in Rachel Sieder, Line Schjolden & Alan Angell (eds), *The Judicialization of Politics in Latin America* (New York, Palgrave MacMillan, 2005) 105, at 115

[104] Law 20 050, published in the Official Gazette August 26, 2005

the few Chilean scholars to previously address the democratic objection and the required amendments to the Constitutional Court was Fernando Atria.[105] His criticism intended to create an institutional framework for the Constitutional Court to better serve democracy. Concrete examples of reforms include the appointment process of the ten judges. Nowadays, the democratically elected and accountable branches of government appoint the majority of judges, with the executive designating three judges and the National Congress designating four judges. The Supreme Court designates three judges that cannot be members of the regular judiciary. The consequence is that these three candidates must be drawn from outside the judiciary and, therefore, will provide broader legal expertise.[106] Tenure was also limited to nine years and, for the first time ever, the role of a constitutional judge was appointed on a full-time basis, addressing the critique associated with part-time judges. For the first time, judges of the regular courts and average citizens could access the Constitutional Court when they required a decision about the constitutionality of statutory law through a writ of innaplicability. Moreover, one

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[105] See Fernando Atria, "El Tribunal Constitucional y la objeción democrática" (1993) 20 Revista Chilena de Derecho, 367-378

[106] Among the current judges, 9 out of 10 hold academic appointments at universities Only Marcelo Venegas is not listed as an academic Two of the judges have PhDs in law, Gonzalo García and Raúl Bertelsen Most of the judges have publications in the area of public law, mainly constitutional law and administrative law One member was a diplomat, Francisco Fernández Four were politicians either as part of the executive cabinet (Gonzalo García and Iván Aróstica) or as deputy and senator in the 1990s (José Antonio Viera-Gallo and Hernan Vodanovic) and two were civil servants, one under the military regime (Marcelo Venegas) and one after the return to a democracy in 1990 (Carlos Carmona) The above information is drawn from the official judges' biographies published at the constitutional court website <http //www tribunalconstitucional cl/index php/integraciones/index> (updated May 2011)

procedural change that greatly helped in the democratisation of the Court was the introduction of signed opinions, including concurrences and dissents, and the disclosure of judicial votes.[107] Abstention is no longer a possibility and judges must give reasons to support their decisions. The new role as the principal interpreter of fundamental law also awakened the interest of constitutional scholars in the court's performance.[108]

2.2. A DEMOCRATIC OBJECTION AGAINST AN "ORIGINALIST" METHOD OF CONSTITUTIONAL INTERPRETATION

The second hindrance to a rights-based constitutionalism is the mechanism of constitutional interpretation adopted. Interpretive methodology in the constitutional realm is generally more demanding than regular statutory interpretation. The question about the link between the political order and the interpretation of fundamental rights is not commonly considered by legal doctrine in Chile. The consideration that is always taken into account to interpret the 1980 Constitution is the original will of those who drafted the text. The notion of "constituent power" refers to the political authority with the power to frame a new constitutional order; the legislature is then understood as the "derivative constituent power", with powers only to amend an already given constitutional order.

[107] S. 39, Law 17 997 Organic Constitutional Law of the Constitutional Court, Official Gazette August 10, 2010

[108] Lautaro Ríos, "El Nuevo Tribunal Constitucional" in Francisco Zuñiga (ed), *Reforma Constitucional* (Santiago, Lexis Nexis, 2005), at 627; and Gaston Gómez, "La Reforma Constitucional a la Jurisdicción Constitucional El Nuevo Tribunal Constitucional Chileno" in the same volume, at 651

After 1973 the "foundational path" led by the authoritarian regime, already discussed in Chapter One, as the will to create a new constitutional legal order meant on one hand to knock down the republican framework in place through the 1925 Constitution and on the other it meant to give political authority to the Military Junta to construct a new neo-liberal and authoritarian constitution. Authors like Renato Cristi are of the opinion that Carl Schmitt's influence on Jaime Guzmán (the intellectual leader of the drafting process) demonstrates the affinity between purely economic liberalism and political authoritarianism.[109]

In contrast, in other jurisdictions the interpretation of the constitutional text needs to include a perspective on the future. As an example the Chief Justice of the Canadian Supreme Court described the interpretative task after the adoption of the *Canadian Charter of Rights and Freedoms*.[110] Justice Dickson underlined that:

> [A] constitution is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a Bill or a Charter of rights, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the Constitution and must, in interpreting its provisions, bear these considerations in mind.[111]

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[109] Ricardo Cristi, *El pensamiento político de Jaime Guzmán. Autoridad y Libertad*, at 97.
[110] *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being scheduled B to the Canada Act 1982 (UK), 1982, c. 11 *[the Charter]*.
[111] *Hunter vs Southam Inc.* [1984] 2 S.C.R. 145, 156.

Based on an understanding that the method of constitutional interpretation needs to be underpinned by democratic legitimacy and must also be able to grow based on new social, political and historical circumstances, there is a strong democratic objection against any method of interpretation that relies on the Military Junta as the relevant "constituent power". This is another consequence of the illegitimate origin of the 1980 Constitution.

One case that could have paved the better direction (but did not) in the Constitutional Court's jurisprudence was a decision issued in early 1990 about the constitutionality of the organic statute of the National Congress.[112] This clearly established a division between the political regime before and after March 10th, 1990 (the day when democracy was restored in Chile). The story is complex. After the "continuist" candidate Hernán Büchi lost the presidential election in December 1989, the authoritarian regime "sped up" the remedial legislative process in areas considered to be strategically important. Patricio Alywin, the elected president, criticized the statutes as "mooring regulation" that aimed to protect the institutional framework of the authoritarian regime. In the case at issue the Constitutional Court needed to review the constitutionality of the organic statute of the National Congress in January 1990 after the election of members of the National Congress occurred in December 1989 and two months before the return to a

[112] Decision No 91 issued by the Constitutional Court on January 18th, 1990.

democratic regime The Court established a deadline on March 10th, 1990 The deadline established that only acts performed after that date could constitute the factual base for an impeachment process [113] The declaration of the Court could be explained in two different ways One way is that the judges realised that a democratic regime requires that the people will be the sovereigns and therefore a different threshold was required Another explanation for the Court's decision is the desire to shield the political regime in place between 1981-1990, not allowing impeachment processes once returned to a democratic regime in March 1990 [114]

Legal scholars, practitioner lawyers and judges (including the Constitutional Court itself) continued to refer to the "Commission for the study of a new Constitution" or the Military Junta as the "constituent power" in their interpretations of the constitutional text Moreover, the reference in most of the cases was to the opinion of one commissioner In fact the continuous doctrinal relevance of the drafting commission of experts is so significant that one of the members of this junta-appointed commission, Raul Bertelsen Repetto, was made a judge of the Constitutional Court for the period 2006-2015 [115]

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[113] In para 28

[114] The organic statute of the National Congress No 18 918 was published in the Official Gazette on February 5th, 1990, a month before the return to a democratic regime

[115] Official judges' biographies published at www tribunalconstitucional cl/index php/integraciones index

One of the effects of recognizing the illegitimate origin of the Chilean Constitution would be to discredit the originalist interpretation and its reliance on references to the commission of experts that drafted the 1980 Constitution. Nevertheless, the Constitutional Court does not seem to share this opinion and frequently quotes the opinions of the members of the commission of jurists entrusted by the Military Junta as the "constituent power". I restrict the examples to the set of cases decided by the Constitutional Court in what is supposed to be the fully "democratic" epoch of the Court. With respect to those cases that are discussed extensively in terms of the use of a proportionality analysis, my comments here are strictly focused on the interpretative problem.

In decision No 541 issued by the Constitutional Court on December 26th, 2006 the constitutionality of section 42 of decree with force of law No 164 of 1991 issued by the Ministry of Public Infrastructure was contested.[116] In that case the Court relied extensively on the commission of experts that drafted the 1980 constitution to interpret the individual private property rights guarantee in s19(24). The discussion about the purpose of the legislation was based on the executive message when the law was

[116] The Constitutional Court presented this as a "matter or doubt of inapplicability" presented by the Court of Appeal of Santiago before deciding the appeal of the decision No 21892-2 of the Judge of local police (transit) of Quilicura that upheld the petition of the Highway administration imposing the amount of the debt and the damages

presented at the National Congress.[117] This is certainly an odd reliance on the executive argument, given that the law was not yet debated and passed at the National Congress and no further information or evidence was offered in support.

A second example is decision No 976 decided by the Constitutional Court on June 26th, 2008, that used as an informal precedent decision No 98 decided by the Constitutional Court on February 15,1990, a few days before Pinochet leaving power and therefore, known as part of the "mooring regulation". The fact that cases decided in 2008 have used cases decided in February 1990 (and, therefore, decided under Pinochet's authoritarian regime) is a concrete example of this mistaken disregard for the influence of the political system in place. What is even more troubling is that in this case the opinion provided by Jorge Ovalle as a member of the commission of experts that drafted the 1980 Constitution is invoked as part of the "constituent power" in the hands of the Military Junta.

Authors like former Israeli Chief Justice Aharon Barak propose a more comprehensive account of constitutional interpretation. He calls it purposive interpretation and in the constitutional realm it is presented as:

> [A] balanced interpretation that strikes between subjective purpose (the goals, interests, values, aims, policies and functions that the drafters of the constitution aimed to achieve) and objective purpose (the goals, interests, values, aims, policies and functions of society in its current understanding). Without negating

[117] In para. 16.

> the applicability of subjective purpose, purposive interpretation favors objective purpose in constitutional interpretation.[118]

In the Chilean case, attention should be focused on the process of democratic amendments begun in 1990. The subjective purpose can be derived from the text as a whole, but also through historical material like the debates of the drafting committees or National Congress debates. The objective purpose of the 1980 Constitution, however, is represented by the goals, interests, values, aims, policies and functions that the constitutional text is designed to actualize *in a democracy*. In interpreting the Constitution, judgments must be able to construct a purposive reading of the material in question. This is clearly a highly complex enterprise in which it will be necessary to consider the creator of the text from a democratic perspective, the values and principles that support that section and how these are anchored in Chilean society at that time, in addition to evolving understandings since the creation of the norm. The understanding of the constitutional text will be framed by judges balancing the values and legal principles relevant to their legal community. The aim of the next chapter is to offer proportionality analysis as a constitutional technique of interpretation that aims to fulfill these requirements.

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[118] Aharon Barak, *Purposive Interpretation in Law* (Princeton University Press, 2005), at 371.

CONCLUSION

Fundamental rights and freedoms in Chile are established in the 1980 Constitution and its scope, amendments and limitations are determined mostly by the legislature in Chile. The approach on constitutional rights in a model of a "democracy of agreements" led in some cases to a weak guarantee and protection of constitutional rights. In other cases, it led to a "denial" of protection during the military dictatorship, a situation that has not been fully amended by the democratic regime. Therefore, proposals debated in Chapter One to be explored and furthered as constitutional amendment, include a most open and inclusive debate about the catalogue of rights and freedoms.[119]

An alternative explored in this Chapter is the democratic role of the Chilean Constitutional Court as the institution charged with protecting constitutional guarantees since the definitive constitutional amendment in 2005. This amendment closed the transition to democracy in most eyes. However, the Court has been hesitant to control laws against the will of National Congress or the executive. The path explored in this Chapter focused on two major barriers to rights-based constitutionalism.

The first barrier was an examination of the institutional history of the Chilean Constitutional Court. This describes the misguided efforts of the Constitutional Court to establish institutional continuity between the Constitutional Court established in 1970

[119] Claudio Nash, "Los Derechos Fundamentales: ¿La Reforma Constitucional pendiente?" (2005) 217-218 Revista de Derecho, Universidad de Concepción, at 146.

under the 1925 Constitution and the court created in 1980 under the authoritarian regime The creation of the Constitutional Court in 1970 aimed to fulfill a political role, to prevent political conflicts between the different branches of government and, in 1980, the legal ideal of the Constitutional Court was of a "technical" institution responsible for protecting the institutional framework created by the regime The desire to maintain institutional continuity meant that the Constitutional Court of Chile officially celebrated 35 years of existence in 2006 [120] The historical-institutional elements show how problematic it is to view the Chilean Constitutional Court as a monolithic institution that has continuously existed since 1970 and just happened to be inoperative between 1973 and 1981 It is also problematic to fail to establish a clear division between the role of the Court under the authoritarian regime (1981-1990) and the role of the Constitutional Court under a democratic regime (1990 to date)

The second barrier explored is the originalist method of constitutional interpretation used by the Constitutional Court This method is presented as problematic because the interpretation of the Constitution needs to evolve to take into account the democratic transition in Chile It has become a common practice for the Court to mistakenly disregard the influence of the political system in place when relying on judgments rendered under Pinochet's authoritarian regime In this sense, the originalist

[120] Jose Luis Cea Egaña, "Influencia del tiempo en Nuestro Tribunal Constitucional", public speech delivered at the ceremony of the 35th anniversary of the Chilean Constitutional Court (1971-2006)

interpretive approach to the 1980 Constitution by the Constitutional Court is inadequate because of the Constitution's authoritarian origins. An alternative approach would combine the objective and subjective elements, stressing that constitutions must be guided by an original positive basis but at the same time they must be able to adapt to social change and new scenarios. A stable democratic regime since 1990 seems to be an adequate threshold to give a restricted weight to previous arguments or understandings of the constitutional text.

CHAPTER 3.

RIGHTS AND RIGHTS ADJUDICATION METHODOLOGIES

The three dimensions of legal doctrine – analytical, empirical and normative – proposed by Alexy is partially adopted in Chile through the work of Eduardo Aldunate.[121] Although Alexy proceeds from a normative perspective in his explanation and critique of legal adjudication, the analysis of validly enacted law and the empirical premises that support it, are addressed through actual or hypothetical cases.[122] These areas of study – analytical, empirical and normative – are not equally relevant in Chile - the analytical method has been the traditional way of doing "serious" legal scholarship and the normative dimension has been traditionally focused on adjudication in private law. The empirical dimension is practically unknown as an area of legal research.[123] In what follows, I argue that Alexy's theory of constitutional rights and proportionality analysis speak to each of

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[121] Eduardo Aldunate, *Derechos Fundamentales* (Santiago Legal Publishing, 2008), at 117 and Eduardo Aldunate, *Jurisprudencia Constitucional 2006-2008 Estudio Selectivo* (Editorial Legal Publishing, 2009)

[122] Robert Alexy, *A Theory of Constitutional Rights*, translated by Julian Rivers (Oxford University Press, 2002), at 7-9

[123] Criminal law may be an exception A after a major reform in the '90s scholars turned to statistics and other social sciences as important tools See Mauricio Duce & Cristian Riego, "La Prisión Preventiva en Chile El Impacto de la Reforma Procesal Penal y sus cambios posteriores" en *Prisión Preventiva y Reforma Procesal Penal en América Latina Evaluacion y Perspectivas* (Santiago Centro de Estudios de Justicia de las Américas, 2009), 151 – 212

these areas and could potentially help to develop a stronger empirical and normative analysis of constitutional rights in Chile.

The examination of the different conceptions of rights and rights adjudication methodologies is presented in this Chapter following the "migration path" followed by the Chilean Constitutional Court. The Court, without acknowledging it explicitly, has taken proportionality as rights adjudication mechanism from Spain. This is nothing new because Spain represents one of the most important reference points for Chile for law. I discuss the relevance of the influence of Spain on proportionality analysis, in Chapter Five. Spain adopted the proportionality framework in the '80s, and named Germany as the main source. Therefore, I have incorporated brief references to the jurisprudence of the German Constitutional Court throughout this chapter.

3.1. THE PROPOSED FRAMEWORK: CONSTITUTIONAL RIGHTS AS RULES AND PRINCIPLES

Ideally, constitutionalism ought to express the fundamental principles and values of a polity. As Nicholas Tsagourias explains, a central feature of constitutional democracies is the use of general principles of law

> [...] which are not neutral but, instead, are full of meaning and potential and their study raises important questions about the nature of constitutional orders and the rationale behind patterns of political and legal organisations.[124]

[124] Nicholas Tsagourias, "The constitutional Role of General Principles of law in international and European jurisprudence", in *Transnational Constitutionalism International and European Perspectives* (Cambridge University Press, 2007), at 75

In real life, people dispute the meaning of values, principles, rights and so procedures are designed by constitutional drafters to hold institutions accountable to fundamental ideals. One of these procedures is judicial review.

The constitutional structure of human rights advocated in this Chapter distinguishes between the right, its scope, its possible limitation and the consequences of an infringement. This framework relies on the distinction between constitutional rights as rules and principles defended in Robert Alexy's[125] seminal work "A Theory of Constitutional Rights'.[126] Alexy's main claim is that the complexity of constitutional rights, as a particular form of legal norms, does not allow them to be considered solely as rules. Alexy's work is arguably the most important and influential work of constitutional theory in rights adjudication on proportionality written in the last 50 years.[127] Alexy proposes a theory of rights and proportionality analysis through a consideration of German Federal Constitutional Court case law. Although he refuses to create a general

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[125] Robert Alexy (born 1945 in Oldenburg, Germany) is a jurist and legal philosopher. Professor at the University Christian-Albrechts in Kiel Alexy studied law and philosophy at the University of Götingen His dissertation "A Theory of Legal Argumentation" written in 1976 became one of his well-known books and his appointment as university professor in 1984 was achieved with his seminal work "A Theory of Constitutional Rights" In 2010 Robert Alexy was awarded the Order of Merit of the Federal Republic of Germany

[126] Alexy's work published in English includes Robert Alexy, *A Theory of Legal Argumentation The Theory of Rational Discourse as Theory of Legal Justification*, (translated by Neil MacCormick) (Clarendon, 1989), Robert Alexy, *A Theory of Constitutional Rights,* (translated by Julian Rivers), (Oxford University Press, 2002), and, Robert Alexy, *The Argument from Injustice A Reply to Legal Positivism,* (translated by Stanley Paulson and Bonnie Litschewski Paulson), (Oxford University Press, 2002)

[127] This contention is based upon the invocation of Alexy's work as the primary source by Matthias Kumm, Aharon Barak, Julian Rivers, Nicholas Tsagourias Alec Stone and, Carlos Bernal Pulido among other scholars

account of constitutional rights, his work provides the basic conceptual vocabulary for scholarship on proportionality analysis worldwide. The main reason to analyse it as a doctrinal framework for this thesis was the Chilean Constitutional Court's partial adoption of its theory of constitutional rights in recent years. Alexy's work is extensively followed and quoted in Latin America constitutional rights scholarship particularly as his work has been extensively translated into Spanish.[128] Eduardo Aldunate argues that Alexy's reception by the legal community in Chile has been superficial and uncritical because Alexy's critics (among them Jürgen Habermas) have not been as widely translated.[129] I agree with Aldunate's observation, but I think that the real problem is that Alexy's theory has been incompletely analysed and applied by scholars and judges in Chile. So the aim is to propose a more consistent application of Alexy's theory of fundamental rights case law in Chile.

One of Alexy's contributions is that principles, values and rights must be distinguished. Although in everyday language "value" and "principle" are used as synonyms, from the perspective of practical reasoning, and here I will rely on Robert

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[128] Alexy's work published in Spanish include Robert Alexy, *Derecho y Razon practica,* (Mexico DF Fontamara, 1993), Robert Alexy, *Teoría de la argumentación jurídica La teoria del discurso racional como teoria de la fundamentación jurídica,* (traducción de Manuel Atienza e Isabel Espejo), (Madrid Centro de Estudios Constitucionales, 1989), Robert Alexy, *Los derechos fundamentales en el Estado Constitucional democrático Neoconstitucionalismo y ponderación judicial,* (Miguel Carbonell, ed), Neoconstitucionalismo(s) (Madrid. Trotta, 2003)

[129] Eduardo Aldunate, "Aproximación conceptual y critica al Neo-constitucionalismo" (2010) 23 1 Revista de Derecho Universidad Austral de Chile, 79, at 85

Alexy's work, there is a distinction. A principle is derived from a deontological perspective based on what ought to be and, therefore, a constitutional right will command, prohibit, permit or allow something. Values are considered from an axiological perspective based on a judgment of whether it is good (e.g. democratic), valuable, effective or consistent with the rule of law. The basic dispute concerns the primacy between the concept of "the ought" and "the good". Therefore, what ought to be a principle from a deontological perspective will be the best value from an axiological perspective. The distinction between values and principles is provided by the stronger connection of principles with the legal realm and what it "ought to be" in that particular legal setting. The distinction between principles and rules, used by Alexy to develop his constitutional theory, is a qualitative one. It is a distinction related to the degree in which these norms can be fulfilled both legally and factually.

"Rule construction" is the approach that considers norms seen as definitive commands: rules "...contain fixed points in the field of the factually and legally possible".[130] In the case of rules, questions connected with the application of constitutional rights are solved by following the traditional canons of interpretation. The grammatical, historical or systematic elements will be used to decide how a particular norm should be applied. Therefore, their *prima facie* character is one that contains a

[130] Robert Alexy, *A Theory of Constitutional Rights*, at 48.

decision about the legal and factual context. Rules are considered definitive reasons for norms.

A conflict between rules can only be solved through a formal exception, implying that one of the rules will not be applied or will be declared invalid. Importantly, legal validity does not accept degrees and so a legal rule is either fulfilled or not. In terms of legal certainty and predictability, to consider the constitution and the norms contained in it as rules is desirable. Problems of rule construction are mainly related to the construction of limits on constitutional rights.

However, for Alexy, "rule construction" fails to provide an adequate response to the norms contained in the constitution in three circumstances.

First, constitutional rights guaranteed without reservation end up being "rules of thumb" because their justification depends on an underlying balance of interests. In Chile this idea of absolute rights has been applied to the fundamental right to life. As argued subsequently this "rule construction" covers a "conservative" move to avoid acknowledging other colliding rules and principles.[131] However, common sense suggests that not everything under the scope of a right is constitutionally protected. The solution in this "pure rules model" is to construct the right in such a way as to narrow the initial

[131] S. 19 (1) The right to life and to the physical and psychological integrity of the individual.

scope of the right. For Alexy, "this only obscures the underlying relations of precedence between the constitutional right and the reasons to limit it".[132]

Second, constitutional rights with simple reservations exist where the statutory reservation does not bind the legislature beyond the essential core of the right. This means that the protection of the right is meaningless outside the core content of the constitutional right.[133] The way to fix this weak protection would be prevented by extending the core to cover every possible limitation of the right, or to create an unwritten norm that limits the competence of the legislature to limit rights. For example, in the case of freedom of movement in Chile - contained in s.19 (7) - the only reference to a limitation is that it needs to be established by law.[134] If we think of the recent past in Chilean politics and the relevance of freedom of movement as a principle, the idea of giving free leeway to the legislature is problematic. For Alexy, it is clear that simple reservations do not provide an adequate response to the practical problems of rights and,

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[132] Robert Alexy, *A Theory of Constitutional Rights*, at 74

[133] As an example German Basic Law art 19(2)

[134] 1980 Chilean Constitution s19 (7) the right to personal freedom and individual security Consequently,
(a) Every person has the right to live and remain in any place in the Republic, move from one location to another, and enter and leave the national territory on condition that the norms established by law are respected and provided that third parties are not impaired
(b) No one may be deprived of his personal freedom nor may such freedom be restricted except for the cases and in the manner determined by the Constitution and the laws

therefore, the way in which he proposes to define the essential core of the right is through proportionality analysis as "an accurate insight to judicial practice".[135]

Third, constitutional rights exist with qualified limitation clauses in a "pure rules" system where the court is required to balance the factual and legal circumstances. In Alexy's opinion here what happens is that the concepts are interpreted in such a way that it "becomes a term for the result of a balancing exercise".[136]

The normative solution created to overcome conflict of rules is that of categorization. Categorization imposes a hierarchy upon rights where one rule will be regarded as superior to the exclusion of another. This technique is criticized for the absence of legal parameters that control the process of categorization although hierarchies can be set out in a statute or by means available to the judiciary.

Alexy also sees constitutional rights as principles: norms, which "require that something be realized to the greatest extent possible given the legal and factual possibilities."[137] Principles are considered *prima facie* reasons for norms and are never definitive reasons. Gregoire Webber summarizes Alexy's main idea saying:

> [T]o claim a constitutional right [as a principle] against a legislative measure is to trigger an assessment as to whether the right has been sufficiently optimized....the right is merely a premise in one's reasoning not the conclusion of the debate.[138]

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[135] Robert Alexy, *A Theory of Constitutional Rights*, at 76-7
[136] Robert Alexy, *A Theory of Constitutional Rights*, at 78
[137] Robert Alexy, *A Theory of Constitutional Rights*, at 47
[138] Gregoire C.N. Webber, "The Cult of Constitutional Rights' Scholarship· Proportionality and Balancing" (2010) 23:1. Canadian Journal of Law and Jurisprudence, 179, at 182.

In the case of principles, constitutional adjudication will need to consider those that can be derived from individual rights but also principles that protect collective interests. In order to have constitutional status, principles need to be derived from provisions of the constitutional text. What happens if the desired principle is not covered by the constitution in any explicit or implicit language? Does judicial "filling" apply to constitutional gaps on these matters? However, interpretation of the implicit or explicit text of the constitution is not a gap-filling activity. Filling constitutional gaps requires a source of legitimacy that is beyond interpretative rules. This is normally found in legal analogy and reference to the basic legal values of the system.[139] For those principles contained in a particular constitutional order, it is necessary to be consistently and coherently recognised as part of the structure of the legal order and of the constitution. The central characteristic of this approach is its reliance upon the operation of underlying principles in legal practice. It hopes to build concepts that adequately fit the entire constitutional system. It is not only useful to have a written norm in the constitution so as to invoke a particular value or principle; it is also necessary to have parameters set by the legal tradition. Nonetheless, major challenges are posed by invoking an unwritten constitutional principle that can strike down legislation. For Aharon Barak, this is part of

[139] Aharon Barak, Purpose Interpretation in Law (Princeton University Press, 2004), at 5.

the "implicit constitutional text" that is written between the lines in an invisible ink and can be derived from the text itself and the constitutional architecture.[140] Alexy acknowledges the interpretative difficulties implicit in the theory of constitutional principles by stating "the moment one steps from the spacious world of the ideal to the narrow world of the definitive, or real, ought, one finds competing principles, or to use other common expressions, tensions, conflicts, and antinomies."[141] In the case of constitutional rules, the scope of interpretation is more restricted than in the case of a principle. In both cases, the role of the judiciary is to establish a framework for the constitutional right.

In Chile, Alexy's theory of constitutional right has never been formally adopted by the Chilean Constitutional Court, but the Court referred to the distinction between rules and principles based on Alexy's "Theory of Constitutional Rights" in decision No 1717 issued on August 6th, 2010.[142] Immediately after, in paragraphs 92-93 the Court established the necessary connection between the distinction of rights as rules and principles and the principle of proportionality as a way to solve collisions. For Chilean authors, like Eduardo Aldunate, the model of constitutional rights as optimization requirements diminishes the normative force of rights. For Aldunate such a conception

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[140] Aharon Barak, Proportionality: Constitutional Rights and their Limitations (Cambridge University Press, forthcoming 2011), at 15.
[141] Robert Alexy, *A Theory of Constitutional Rights*, at 82.
[142] In para 91, this case is extensively discussed in Chapter Six.

gives free leeway to the interpreter to decide the way in which the right will be optimized and so leads to excessive judicial discretion.[143] In my view, Aldunate is simply repeating one of the critiques against the rationality of balancing, namely that "balancing is seen as a formal and empty structure used by the judge in a subjective way."[144] The main critiques of balancing as a methodology for fundamental rights will be addressed in Chapter Four.

3.2. A DEMOCRATIC JUSTIFICATION FOR LIMITS TO CONSTITUTIONAL RIGHTS

Rights are presented throughout this dissertation as ideals that ought to be realized to the greatest extent possible. This concept rejects the scheme that rights are absolute, and sees protected rights and freedoms as subject to limitations. Courts will have the task of interpreting the constitutional right granted but also the limitation applicable. Constitutional rights are formulated in a way that allows disagreement within the scope of protection. For example, we can agree on the right to life but we may disagree about abortion or euthanasia. In this model, rights and freedoms can only be limited by criteria that satisfy substantive grounds. Unfortunately state actions in Latin America have traditionally not been bound by limits or minimal threshold requirements. On the

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[143] Eduardo Aldunate, *Derechos Fundamentales*, at 118.
[144] See especially Stavros Tsakyrakis, "Proportionality: As Assault on Human Rights?", (2009) 7 INT'L J. Const. L., at 468.

contrary, abuses of power have been common, as in the Chilean case. The challenge is how a constitutional democracy will address the disagreements surrounding fundamental rights.

For Alexy constitutional rights limits are norms and the things that are limitable are "constitutionally protected interests (liberties, states of affairs, ordinary legal positions) and *prima facie* positions protected by constitutional rights."[145] Thus, a "limitation of rights" generally establishes a two-stage sequence. First, the right-holder carries the onus of establishing the content of the right and its scope based on the constitution, the facts and their application to the right, and the infringement. In the second stage, the state carries the onus of justifying the limitation of a particular right.[146] If the state is unable to justify the limitation on the constitutional right, the violation is unconstitutional.[147]

General Limitation Clause

Most modern constitutions will contain some form of a written limitation clause. The first form is that of a general limitation clause, as a limitation that will apply to all constitutional rights. Section 1 of the 1982 *Canadian Charter of Rights and Freedoms*, is

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[145] Robert Alexy, *A Theory of Constitutional Rights*, at 181

[146] Lorraine Weinrib, "Canada's Constitutional Revolution From Legislative to Constitutional State" (1999) 33 1, Israel Law Review, at 30

[147] Mattias Kumm, "What do you have in virtue of having a constitutional right? On the Place and Limits of the Proportionality Requirement" in S Paulsen, G. Pavlakos (eds), Law, Rights, Discourse themes of the work of Robert Alexy (Hart 2007), at 5

an example of this form of limitation clause. In Canada, rights and freedoms guarantees are subject only to limitations that are "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".[148] Another approach to a general limitation clause is the adoption of a specific rights adjudication doctrine, like proportionality. This is the approach with section 36 of the 1996 South African Constitution that reads:

> [T]he rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors: (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; (e) less restrictive means to achieve the purpose.
> (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.[149]

In Chile there is no general limitation clause. It is still unclear as to whether the interpretative work of the Constitutional Court or a constitutional amendment by the legislature could establish a general limitation clause in Chile. One option, taking into account the Chilean legal context, would be a limitation clause that would make the principle of democracy the center of the analysis. Although democracy is not the only

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[148] *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being schedule B to the Canada Act 1982 (UK), 1982, c. 11. Hereinafter I will refer to it as *'the Charter'*.
[149] Constitution of the Republic of South Africa, No 108 of 1996 online:
< http://www.info.gov.za/documents/constitution/1996/a108-96.pdf>.

principle relevant to the Chilean political regime and Chilean society, democracy is certainly one principle that has been endangered and one principle that the Chilean Constitutional Court needs to take seriously. This proposal does not need a constitutional amendment because section 4 of the 1980 Constitution declares: "Chile is a democratic republic". This declaration could be used as the justificatory criteria against which limitations on rights must be confronted, helping to underline how the action of public authorities must be highly respectful of rights and so limitations are the exception. It might also foster a conversation between the branches of government but also among the population as to what being a democratic political regime entails.

Such democratic justification of the limitations placed upon constitutional rights is presented by Stephen Gardbaum by inviting us to distinguish the threshold that the legislative power must accomplish in order to be able to limit certain rights from the mode of judicial review implemented and the way in which democratic tensions can be reduced. Conflicts among competing constitutional rights would be the general case where balancing is needed. When collisions occur between a constitutional right and the public interest, Gardbaum advances a normative justification based on a "commitment to democracy". He focuses on balancing as a process. Interestingly, according to Gardbaum, the one court that has properly understood his proposed methodology is the Supreme

Court of Canada.[150] Gardbaum's central argument is:

> [T]hat a conception of constitutional rights that includes balancing and a limited override power transcends... the binary choice of judicial versus legislative supremacy by focusing instead on alternative and intermediate allocations of power between courts and political institutions.[151]

In the same vein, but from a more critical perspective, Grégoire Webber underlines how limitation clauses give:

> [T]he legislature the responsibility to complete the specification of rights left open by the constitution...the legislature can be understood to continue the constitutional negotiations that left the scope and content of rights under determinate".[152]

This idea is of special relevance to a North American audience, where constitutional amendments are rare and courts help to nurture the development of the Constitution using a "living tree" metaphor.[153] However, in the Latin America context,

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[150] To prove this point he quotes a paragraph of the Court's decision in *Irwin Toy Ltd V Quebec* (Att'y Gen.), [1989] 1 S C.R 927, 990·

> [W]here the legislature mediates between the competing claims of different groups in the community, it will inevitably be called upon to draw a line if the legislature has made a reasonable assessment as to where the line is most properly drawn it is not for the court to second guess Democratic institutions are means to let us all share in the responsibility for these difficult choices Thus, as courts review the results of the legislature's deliberations, particularly with respect to the protection of vulnerable groups, they must be mindful of the legislature's representative function If the judiciary is to play a role in limiting constitutional rights, it is extremely important that the court assumes an appropriate methodology

[151] Stephen Gardbaum, "A Democratic Defense of Constitutional Balancing" (2010) 4 1 Law & Ethics of Human Rights, at 106

[152] Grégoire C N Webber, *The Negotiable Constitution On the Limitation of Rights* (Cambridge Cambridge University Press, 2009), at 215.

[153] The principle of dynamic interpretation, commonly referred to as the "living tree principle", means that judges interpret the constitution as a "living" document, liberated from fixed historical understandings In this way, the meaning of constitutional language is constantly evolving through judicial interpretation to

where constitutional amendments are very common, democracies are merely restricted to elections and courts are highly restrained in their role even as interpreters of the constitution. In such cases Webber's proposal seems less attractive.

Specific limitation clauses

A second form is the establishment of specific limitation clauses where the limitation is tailored to a particular constitutional subjective right or is defined as a collective interest. The examples used by Robert Alexy are based on 1949 German Basic Law: one example is section 13(3) of the Basic Law that specifies particular public objectives that, in principle, can override the constitutional right of the inviolability of the home.[154] Others examples used by the German Federal Constitutional Court are collective interests, like the principle of the "social state"[155] or the principle of "democracy".[156]

This is also the case for most rights before the European Convention on Human Rights. For example, under section 9(2), freedom of religion can only be limited "if the

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keep pace with changing values and social conditions The "living tree" principle was first stated by the Privy Council in its opinion in 'the Persons case' (*Edwards v AG Canada*, 1930)

[154] Article 13

(3) Interventions and restrictions may otherwise be undertaken only to avert a common danger or mortal danger to individuals and, on the basis of a law, also to prevent imminent danger to public safety and order, especially for the relief of the housing shortage, combating the danger of epidemics or protecting juveniles exposed to dangers

[155] Decisions issued by the German Federal Constitutional Court referred to the principle of social state BVerfGE 8, 284 (329) and also BverfGE 21, 87 (91).

[156] The Luth case is one example where the principle of democracy was used as a collective interest BverfGE 7, 198 (208, 212)

limitation is prescribed by law and is necessary in a democratic society in the interest of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedom of others."[157]

In Chile, the current 1980 Constitution opted for specific limitation clauses. For example, section 19(6) guarantees freedom of conscience and religion and establishes a limitation clause that curtails the activities of "cults that are opposed to morality, appropriate customs and public order".[158] The initial interpretation of the scope of protection of the constitutional rights of freedom of religion and freedom of conscience are in the hands of the legislature. But faced with a concrete case, the court will need to interpret the limitation clause in order to see if the limitation is justified. Then the optimization of "morality", "customs" and "public order" will be considered. If the limitation norms are meant to be used by the legislature, they are considered "mediate" limitation clauses. In the case of freedom of movement in the Chilean constitutional order, contained in section 19(7), the only reference to a limitation is that it needs to be established by law. In this case the clause should be treated as a statutory reservation

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[157] Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, ETS 5, online <http //www unhcr org/refworld/docid/3ae6b3b04 html>

[158] 1980 Chilean Constitution s19 (6) 'Freedom of conscience, manifestation of all creeds and the free exercise of all cults which are not opposed to morals, appropriate customs or public order,
Religious communities may erect and maintain churches and their facilities in accordance with the conditions of safety and hygiene as established by statute
With respect to assets, the churches and religious communities and institutions representing any cult shall enjoy the rights granted and acknowledged by statutes currently in force Churches and their facilities assigned exclusively for religious activities shall be exempt from all taxes "

creating legislative powers to set limits.[159] 1980 Constitution section 19(11) sets limits upon the right to found educational institutions by limiting freedoms as to "morality, appropriate customs, public order and national security."[160] These are very abstract terms in need of interpretation and in the principles theory's language in need of optimization.

In Chile there are other rights where the limitation is built in, and therefore, it is unclear whether the clause is a limiting norm or part of the right itself and its scope. For example, s.19 (13) establishes the right of assembly without permission being required but only if the participants are "peaceful and unarmed". Both are characteristics of the *prima facie* right to assembly. If it was unclear if members of an assembly are unarmed or if the meeting is peaceful, there would have to be a balancing between the principle of freedom of assembly and the limitation of being peaceful and unarmed.[161] Finally, s.19(14) contains the right to present petitions before the authority only if the petitions are "respectful and presented in a proper way".[162] All these previous examples are

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[159] 1980 Chilean Constitution s19(7) "The right to personal freedom and individual security Consequently, (a) Every person has the right to live and remain in any place in the republic, move from one location to another, and enter and leave the national territory on condition that the norms established by statute are respected and provided that third parties are not impaired
(b) No one may be deprived of his personal freedom nor may such freedom be restricted except for the cases and in the manner determined by the Constitution and laws "

[160] 1980 Chilean Constitution s19(11) "Freedom of teaching includes the right to open, organize and maintain educational establishments
Freedom of education has no other limitations but those imposed by morals, good customs, public order and national security "

[161] 1980 Chilean Constitution s19(13) "The right to assemble peacefully without prior permission and unarmed Meetings at squares, streets and other public places shall be ruled by general police regulations "

[162] 1980 Chilean Constitution s19(14) "The right to submit petitions to the authorities with reference to any

constitutionally defined limits. However, some limits empower some organs to establish a limitation. These are what Alexy calls "reservation clauses".[163]

3.3. CORE ESSENCE OF THE RIGHT AS A LIMIT TO THE LIMITATIONS

The idea that constitutional rights are limited and limitable furthered in this Chapter does not mean that those limitations are not themselves under scrutiny. This technique establishes that the legislator cannot limit the core or essence of a right. Klaus Stern, a German constitutional scholars, stated that the legislature can limit fundamental rights in such a way that they become meaningless being this one of the legal weapons used by the Nazi regime. The creation of an essential legal core was a legal response to that threat.[164] This criterion was originally found in Germany as another limitation upon the legislator to prevent a reoccurrence of the events from the Nazi regime. For Alexy the interpretation of section 19(2) of the German Basic Laws[165] prohibiting action in the core of each right is controversial because it does not provide an answer to "whether the guarantee of an inalienable core relates to subjective positions or an objective state of the constitutional

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matter of public or private interest, with no limitation other than the requirement to submit such petitions in a respectful and appropriate manner "

[163] Robert Alexy, *A Theory of Constitutional Rights*, at 181.

[164] Klaus Stern, "El Sistema de los Derechos Fundamentales en la Republica Federal de Alemania" (1988) No 1 Revista del Centro de Estudios Constitucionales, 261-277, at 275

[165] 1949 German Basic Laws S19 (2) "In no case may the essence of a basic right be affected "

rights law, and secondly, whether the guarantee is absolute or relative".[166] The German Constitutional Court's original choice meant the adoption of a subjective perspective of an essential core where the legislature's competence to limit rights is restricted to a matter of balancing. Here there is assimilation between the proportionality test and the guarantee of an essential core. Subjective theories of the essential core can be absolute or relative. The core of a right in a subjective relative perspective for Alexy is "what is left over after the balancing test has been carried out".[167] Objective theories on the contrary will argue that there is a core essence to each right that cannot be limited under any circumstances. The German Federal Court apparently has been hesitant between both approaches talking in some judgments of "final untouchable areas"[168] or an "outermost limit"[169] and in other of a "conjunction between the guarantee of the essential core and proportionality analysis."[170]

In Spain the concept of the core essence of constitutional rights was adopted by the 1978 Constitution in section 53.1[171] as a limitation upon the legislator, although the

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[166] Robert Alexy, *A Theory of Constitutional Rights*, at 192
[167] Robert Alexy, *A Theory of Constitutional Rights*, at 193
[168] Decision by the German Federal Constitutional Court: BverfGE 32, 373 (379)
[169] Decision by the German Federal Constitutional Court. BverfGE 31, 58 (69)
[170] Decision by the German Federal Constitutional Court: BverfGE 27, 344 (352)
[171] 1978 Spanish Constitution S53 1 "The rights and liberties recognized in Chapter 2 of the present title are binding for all public authorities The exercise of such rights and liberties, which shall be protected in accordance with the provisions of section 161, 1(a) may be regulated only by law which shall, in any case, respect their essential content "

Constitutional Court has claimed in the '90s that it can also be applied to the judges.[172] Authors, like Alfredo Gallego have endorsed its application through an objective state of constitutional rights law that considers guarantees as an institution.[173] Consequently, it is particularly important to identify the core of the given right. A further important decision to be reached is whether the conception of the essence of the right will be absolute or relative. An absolute conception refers to the right as a legal "instituto" regulated based on history, customs and social factors well beyond one concrete case, while a relative conception looks at the subjective right in a particular factual context. Authors do not agree as to whether the Spanish system should adopt an absolute or relative conception, with Antonio Martínez-Pujalte arguing for a mix between the absolute and the relative already described in the German system.[174]

The Spanish Constitutional Court's most significant initial decision about the doctrine of the core essence of the right is a 1981 judgment. In this decision the Spanish Constitutional Court established two possibilities for the concept of core essence of the right, the first being the consideration of the nature of the right and the second being the consideration of the relationship(s) fostered by the right.[175] A preliminary conclusion

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[172] Decision of the Spanish Constitutional Court STC 164/ 1996
[173] Alfredo Gallego Anabitarte, *Derechos Fundamentales y Garantias Institucionales* (Madrid Ediciones de la Universidad Autónoma de Madrid, 1994)
[174] Antonio Martínez-Pujalte, *La garantía del contenido esencial de los derechos fundamentales,* (Madrid Centro de Estudios Constitucionales, 1993)
[175] Decision by the Spanish Constitutional Court STC 11/1981

reached by authors like Joaquin Brage, is that the Constitutional Court judgment adopted a subjective and relative theory. He underlines the importance of knowing the social environment in order to establish the essence of the right.[176] A highly debated decision of the Spanish Constitutional Court in 2000 added to the core essence of the right a complementary criterion of limitation based on human dignity. This in the Court's opinion is mainly structured through international documents and is a different limitation to that of the essence of the right.[177] The model advanced by the judgment can be depicted by concentric circles with the first circle being human dignity, the second broader circle being the essence of a fundamental right and the third one being the normative content of that right in the constitutional order. The consequences of this jurisprudential evolution of the Court have been extensively debated in Spain.[178] The Constitutional Court has also adopted it as a separate criterion from proportionality by deciding "that every state act which limits fundamental rights must be proportional and in every case respect the essence of the right."[179] An initial difference from the principle of proportionality is that the essence of a right can only be a limitation to the legislator if the constitution permits this.

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[176] Joaquin Brage, *Los Límites a los Derechos Fundamentales,* (Madrid: Editora Dykinson), at 402.
[177] Decision by the Spanish Constitutional Court STC 91/2000
[178] Joaquin Brage, *Los Límites a los Derechos Fundamentales,* at 407-9
[179] Decision by the Spanish Constitutional Court STC 137/1990

In Chile the 1980 Constitution adopted the model of a core essence of the right as a limit to limits in section 19(26).[180] Eduardo Aldunate underlines how the interpretation done by judges of the meaning of the core essence of fundamental rights in Chile seemed to be unaware of the doctrinal developments and debates in Germany and Spain.[181] One example of the core essence of the right as an interpretative method in the hands of judges allowing them to choose between an objective or subjective model and in turn between an absolute or relative model. Recently the Chilean Labour Code was amended in order to establish a new category of infringements where the employer could affect the core essence of the employee rights.[182]

The Chilean Constitutional Court refers often to the core essence of rights in a rhetorical way.[183] In decision No 541 issued in December 2006 the Court referred to an "established" doctrine of how the core essence of fundamental rights can be recognized.[184] The requirements that must be accomplished by in order to don't limit the core essence are: (1) be established in the constitutional text; (2) the limitation must be

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[180] 1980 Constitution s19(26) "The assurance that the legal precepts which, by mandate of the Constitution, regulate or complement the guarantees established therein or which should limit them in the cases authorized by the Constitution, may not affect the rights in their essence nor impose conditions, taxes or requirements which may prevent their free exercise "

[181] Eduardo Aldunate, *Derechos Fundamentales*, at 176

[182] Labour Code S495 (3rd para) "Rights and guaranteed referred previously will be considered infringed when the employer by exercising the competences given by law, limits in an arbitrary or disproportionate manner, the rights and guarantees of the employee without respect of its essential core "

[183] In the Court's opinion the doctrine of the core essence of the right was established through Decision 226 issued by the Constitutional Court on January 20th, 1995 and Decision No 280 issued on October 20th, 1998

[184] In para 14

established equally for all the individuals affected; (3) limitation must have a time frame; and (4) the limitation needs to be established based on just and reasonable parameters. Another example of this "rhetorical use" by the Court is decision No 976 issued in 2008 talking about the right to choose a health care system. The use of the core essence of the right by the Court is described as "the situation where a right is deprived of what is consubstantial to it in a way that the right cannot longer be recognized".[185] The major problem are that the Court devoted no effort to sustain a method in order to establish what the core essence of any right would be and secondly, does not make any effort to apply the chosen methodology to this concrete right at stake. So far core essence of rights seems to be empty words for the Chilean Constitutional Court.

3.4. METHODS OF FUNDAMENTAL RIGHTS ADJUDICATION BEFORE THE CHILEAN CONSTITUTIONAL COURT: DOES IT MATTER?

I wish to address a missing debate amongst the Chilean legal community about the appropriate methodology for deciding fundamental constitutional rights cases. One of the few voices that approaches the issue is that of Jorge Contesse whose work on judicial accountability sheds some light on the hindrances affecting rights-based constitutionalism in Chile and, in particular, fundamental rights adjudication now under democratic rule.

[185] Decision No 976 issued by the Chilean Constitutional Court on June 26th, 2008.

Contesse devotes particular attention to the legal reasoning in Chilean cases decided by the regular judiciary when a constitutional rights collision was at stake.[186]

The need for clarity in legal doctrine of constitutional rights and guidance from the Constitutional Court is more evident due to recent statutory changes that opted to refer to fundamental rights at the sub-constitutional level. For example the Chilean civil marriage statute provided competence to judges to decide upon the infringement of the so-called "right to marriage" presented as an essential right of human beings and its correspondent *habeas corpus* writ in case of arbitrary denial or restriction[187]. Another example is the labour code that referred to fundamental constitutional rights as duties of the employer.[188]

Positive law is constructed in a conventional way using directives that are triggered by a phenomenon and a response that involves legal consequences. As Pierre Schlag points out, the difference between categorization as a method of adjudication for rules, and proportionality as a standard for principles, is conventionally understood as the distinction between the trigger and the response. The trigger can be "empirical or evaluative" with the response being "determined or guided". Consequently, categorization for rules will have an empirical trigger and a determinate response. Proportionality as a standard for principles will have an evaluative trigger and a guided

[186] Jorge Contesse, "Responsabilidad por la interpretación constitucional" (2005) 11 Revista de Derecho y Humanidades 281, at 289.
[187] Civil Marriage statute No 19.947 section 2, Official Gazette May 7th, 2004.
[188] Section 477[a] of the Labour Code consider a substantial breach of constitutional rights by the employer as a reason to appeal the definitive judgment.

response.[189] The reasons scholars have given in the choice between rules and standards are associated with the virtues and vices of each. If you give preference to certainty and uniformity you will choose a method of adjudication like categorization, while a standard like proportionality will be chosen when flexibility and individualization is required. However, for Schlag the choice is fundamentally based on the legal context and, therefore, "eliminates the possibility of attributing specific virtues only to standards or only to rules" because, in US constitutional law, a rule needs to be flexible if it is to be certain while a standard needs to be stable in order to be open-ended. In constitutional law, the difference between categorization and proportionality can be presented as part of a broader debate about rules and standards. To prove his point, Schlag points out how the use of balancing as a test in constitutional law seems to be a very flexible standard. However, when balancing is applied by judges, they rely upon external factors, like precedent, that are relatively inflexible.[190] Caution is required when making claims about the dichotomy of rules versus standards, because much of the time it may be only about form and not substance.

Methodologically speaking there are alternative methods of adjudication to proportionality analysis. Some methods reject the very idea of balancing, like the idea of absolute rights, while others adopt a different way to solve a collision among

[189] Pierre Schlag, "Rules and Standards", (1985-1986) 33 UCLA Law Review, 382-83.
[190] Pierre Schlag, "Rules and Standards", at 413.

constitutional rights, like categorization. I examine two alternatives available to proportionality by focusing upon those methodologies that have been traditionally applied in Chile. In the process, I describe the particularities of each methodology in order to help bring a clear distinction among them in what can be considered a knowledge gap in Chile.

I will evaluate judicial performance of the Chilean Constitutional Court with respect to their application of judicial reasoning. As Allan Hutchinson explains, "a judgment will gain acceptance or rejection because the judge is able to persuade others that it is a reasonable interpretation and that it has earned its legitimacy through the persuasive force of its supporting arguments."[191] My aim in what follows is to analyse the conceptions of rights associated with each methodology and the requirements the theoretical framework of constitutional rights as principles and rules design by Robert Alexy would require from the Chilean Constitutional Court.

Absolute constitutional rights as a conservative "move"

A methodological alternative is to reject the idea of limitation clauses based on a conception of constitutional rights as absolute. If we agreed to the existence of absolute rights, they would have no legal limits and as a result, constitutional rights would protect

[191] Allan Hutchinson, "The Rule of Law Revisited: Democracy and Courts", at 214.

a domain equal to their scope.

In Chile, the idea of human rights as absolute has been furthered by authors like Joaquín García-Huidobro in the '90s as part of the paradox of classical constitutionalism where constitutional rights are considered as "pre-constitutional". Human rights for García-Huidobro are considered to be supra-positive entities and therefore their infringement cannot be justified in local traditions, a national identity or the interests of the majority.[192] The foundation is that human rights are conceived as the political and juridical expression of human dignity and therefore their existence does not depend on any extrinsic circumstance but are anchored in virtue of their humanity.[193] Human dignity as a source of constitutional rights is a very complex philosophical concept and its transformation into a legal concept is highly debated. The 1949 German Fundamental Law[194] and the 1978 Spanish Constitution[195] both incorporate human dignity as the positive source of fundamental rights at the constitutional level.

The Chilean Constitutional Court considers human dignity as a source of the catalogue of rights and freedoms but without recognizing its complexity. For example in

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[192] Joaquín García-Huidobro, "Lección I Derecho y Derechos Humanos Introducción a un problema" in Joaquín Garcia-Huidobro, Jose Ignacio Martinez and Manuel Antonio Nuñez, *Lecciones de Derechos Humanos* (Valparaiso EDEVAL, 1997), at 15

[193] Joaquín García-Huidobro, "Leccion I Derecho y Derechos Humanos Introduccion a un problema", at 22

[194] The 1949 German Fundamental Law, s1 "Human dignity shall be inviolable To respect and protect it shall be the duty of all state authority "

[195] 1978 Spanish Constitution, s10 1 "The dignity of the person, the inviolable rights which are inherent, the free development of the personality, the respect for the law and for the rights of others are the foundation of political order and social peace "

decision No 976 issued by the Constitutional Court on June 26th, 2008 the Court established that

> [T]he principles and values of the right to healthcare could be incorporated under s.1 of the Constitution, which establishes the aims of the Chilean State and the principle of human dignity. The Court underlined the commitment to the protection of fundamental rights inherent in the concept of human dignity that all organs of public administration must possess.[196]

Moreover, in a subsequent decision on the right to health care, decision No 1218 issued by the Constitutional Court on July 7th, 2009 the Court referring to the nature of fundamental rights at stake argued that several attributes individuals are born with can be derived from human dignity. Among these attributes the Court considered are the catalogue of public subjective rights that are considered "inalienable, imprescriptible and inviolable in any time, place and circumstance".[197] In the next paragraph the Court went so far to declare that the Chilean constitutional framework is articulated by human dignity. This is a problematic assertion. Authors like Eduardo Aldunate criticized how the frequent reference to human dignity by the Chilean Constitutional Court is not well founded on the text of the 1980 Constitution itself or in the drafting process of the text in which human dignity was treated at the same level as liberty and not as a source of the

[196] In para. 24.
[197] In para. 17.

rest of the catalogue as argued.[198] Of course the role of human dignity as a principle of the constitutional order is something that could change over time but the Court would need to give reasons for such a change following for example a purposive framework of interpretation as described in Chapter Two.

In Chile, Jose Ignacio Martinez has also argued that constitutional rights are absolute. He derives the characteristic of being absolute from the concept of human dignity applicable in his approach only to classic rights and not social, economic and cultural rights given the limited economic resources of the state.[199] This is of course contested and will be discussed later on. For Martinez, the limits of a constitutional right are found in the very nature of those rights. Neither a public interest, nor the individual rights of others, can limit the scope of the protected right or diminish its protected domain. The concrete example given by Martinez is a hypothetical collision between the right to life of the *nasciturus* and the rights and freedoms of the mother in an abortion case. Martinez denied the possibility of a collision judges and legislators are not able to limit the right, based on being the right to life outside the competences of legislators and judges. The reasoning is that life and human dignity are the sources of the rest of the

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[198] Eduardo Aldunate, *Derechos Fundamentales*, at 100

[199] Jose Ignacio Martínez, "Lección XX Carácter absoluto y límites a los derechos fundamentales" in Joaquín Garcia-Huidobro, Jose Ignacio Martinez and Manuel Antonio Nuñez, *Lecciones de Derechos Humanos* (Valparaiso EDEVAL, 1997), at 367

catalogue and therefore, are above it.[200]

Nevertheless, Martinez's proposal seemed to be followed by the Chilean Constitutional Court where the right to life has been presented as absolute in several cases denying the option of a collision. In 2008, the Chilean Constitutional Court was asked to decide upon the constitutionality of a Ministry of Health policy relating to the regulation of fertility through the use of the emergency contraceptive pill (also known as the "morning-after pill" policy).[201] The Court in a 277-page judgment showed awareness of the importance of considering extrinsic medical evidence as well as the relevance of considering the societal interest in the case. Furthermore, the Court allowed three public hearings for *amicus curiae*[202] from institutions and individual claimants as well as from the Deputies that initiated the writ of inapplicability.

Most interveners sought to offer evidence that the encroachment of the right to life through an emergency contraception and the abortive effect of the "morning-after pill" were highly contested in the medical arena and that the debate should consider as well the reproductive rights of women. The Court decided to consider the right to life as

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[200] Jose Ignacio Martínez, "Leccion XX Carácter absoluto y límites a los derechos fundamentales", at 371-2

[201] Decision 740, issued by the Chilean Constitutional Court on April 18, 2008

[202] *Amicus curiae* means "friend of the court", and it is applied to someone that has no right to appear in a suit but who wants to bring attention to a matter of public interest, to prevent injustices or to represent a point of law that may have been overlooked In Chile there are no specific rules and regulations as to when an amicus curiae may be used in the court's proceedings

absolute and offering protection to unborn children from the initial moment of conception by considering them persons entitled to protection and rights.

This decision exposed how judicial methodology hindered the debate about rights and the relevance of judges to admit their essentially contested nature. In a concurrent opinion, judge Marcelo Venegas, although supporting the judgment, argued openly about the alternative represented by the option of accepting the idea of abortion as one of the mechanisms for contraception. The judge made an appeal to the legislature in order to initiate a dialogue about the societal views about contraception and abortion in Chile.[203] Moreover, through a dissenting opinion, Judge Hernan Vodanovic argued against the declaration of unconstitutionality based on the existence of a conflict between the right to life and the reproductive rights of the women involved. Judge Vodanovic also pointed out the absence of a proportionality analysis in this case.[204] In another dissenting opinion, Judges Jorge Correa and Francisco Fernandez placed an emphasis upon the medical extrinsic evidence provided in order to prove that the emergency contraception did not have abortive effects and, therefore, it was not unconstitutional as a public policy.[205]

This judgment constitutes the most controversial judicial decision in the Chilean

[203] Decision 740, issued on April 18, 2008 concurrent opinion Judge Marcelo Venegas, 160-68
[204] Decision 740, issued on April 18, 2008 dissenting opinion Judge Hernan Vodanovic, 193-201
[205] Decision 740, issued on April 18, 2008 dissenting opinion Judges Jorge Correa and Francisco Fernandez, 201-75

Constitutional Court's recent history.[206] Contrary to Martínez' beliefs, local traditions, national identity and democratic claims need to be considered as possible justifications to limit a constitutional right to avoid a view of rights dependent on personal beliefs. García-Huidobro's view of absolute rights sounds strongly continuous with the "Catholic natural rights" tradition. It disregards that human rights practice seeks to realise moral norms of human rights through legal and political institutions. If we follow the Martinez line of thought in the "morning-after pill case", the sexual and reproductive rights of women would be outside the realm of legislators and judges. Moreover, for Martinez this could not even be challenged by the constituent power through a constitutional amendment. I think that this conception overlooks the political functions that are now integral to the concept of human rights. As already demonstrated, the concept of absolute rights as a rights adjudication methodology in Chile has been mostly related to conservative perspectives on rights, in a situation where the objective is to avoid the necessity of balancing the "protected" right against another right or interest.

Categorization or subsumption: as the traditional structure of adjudication

Frederick Schauer argues that the deductive formal structure of subsumption constrains the decision-makers, as this is an empirical inquiry dependent upon the availability of

[206] Claudia Bucciferro, "President Michelle Bachelet and the Chilean Media: A complicated affair" (2009) 2:1 Journal of Global Communication 289, 302.

choices, the level of constraint of the rules at stake, and the formal and linguistic range of choices allowed by that legal rule. He offers a positivist account by claiming that the US system of rights adjudication is closer to the formality of the law than balancing. He describes subsumption as "largely constrained, largely textually interpretative, and largely characterized by the way in which the constraints of a moderate clear text, exclude numerous factors and considerations that would be otherwise relevant."[207] Schauer has argued that standards-like proportionality systems and rule-based systems like categorization will converge towards a rule-like structure as it matures, as is provided by the example of the method of adjudication under the First Amendment in the United States.[208]

The method chosen to solve disagreements about rights in Chile was a rule-based system of adjudication. Judges confronted with such a system must use the traditional canons of interpretation -the grammatical, historical or systematic elements contained in the Civil Code- to solve questions connected with the application of constitutional rights. The objective is to provide greater certainty in the outcome and in terms of legal predictability; it is desirable that the constitution and the norms contained in it are considered to be rules. However, the complexity of constitutional rights, as particular

[207] Frederick Schauer, "Balancing, Subsumption, and the Constraining Role of Legal Text" in Matthias Klatt, ed., Institutional Reason: The Jurisprudence of Robert Alexy (Oxford University Press, forthcoming 2011). Available at SSRN: http://ssrn.com/abstract=1403343, at 15.
[208] Frederick Schauer, "The Convergence of Rules and Standards", (2003) N.Z. L. Rev. 303, at 328.

forms of legal norms, does not allow them to be considered solely as rules. The normative solution created to overcome collisions of rules is that of categorization also called subsumption. A conflict between rules can only be solved through a formal exception, implying that one of the rules will not be applied or will be declared invalid. Categorization imposes a hierarchy upon rights with one rule regarded as superior to the exclusion of another.

Rights adjudication in Chile used to be conducted in this categorical fashion, where a constitutional right connects semantic rules with a particular case and the legal judgment follows in a logical way. According to this deductive formal structure of adjudication, constitutional rights are rules with an empirical trigger and a determinate response based on preferences of a legal system that fosters certainty and uniformity.[209] Subsumption can also be constructed as a formula as John Merryman described it:

> [T]he whole process of judicial decision is made to lift into the formal syllogism of scholastic logic. The major premise is in the statute, the facts of the case furnish the minor premise, and the conclusion inevitably follows.[210]

The problem is that the use of a rule-based system of adjudication in constitutional rights claims in Chile, due to its highly formalistic and positivistic legal culture, combined with the conception of judges as "mechanical applicators of the law"

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[209] Pierre Schlag, "Rules and Standards" (1985-1986) 33 UCLA Law Review 379, at 382-83.
[210] John H. Merryman and Rogelio Pérez-Perdomo, *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America*, at 36.

encouraged a detachment from the social and political process, marginalizing judges and promoted minimal judicial discretion with a failure to account for decisions adopted. Under this method legal certainty and uniformity may be achieved at the expense of openness to competing interpretations or new approaches to rights. Categorization will still need to be used for those constitutional rights that are considered to be rules. However, categorization on its own has provided poorly reasoned decisions, with rare reference or argumentation to the substantive content of the right involved. There was no reference to the scope of the right protected by the Constitution, no discussion regarding the extent of legal protection that the right will have in the legal system and, finally, there was no possibility and standard to limit rights. A second critique is that this form of adjudication does not acknowledge the possibility of interrelations between rights, and the acceptance of collisions and ways to solve them.

CONCLUSION

The aim here was to explore the link between a doctrinal conception of constitutional rights and methodologies of rights adjudication. The proposed framework of limitation clauses and the development of a core essence may provide the right method to address some of the problems in Chile's post-authoritarian constitutionalism.

The first area where proportionality analysis might address the problems in Chile is by recognizing the complexity of constitutional rights, as particular forms of legal norms, within a structure of principles and rules. Recall that in Alexy's account, principles are norms that "require that something be realized to the greatest extent possible given the legal and factual possibilities": principles can be fulfilled to different degrees.[211] Given that there has been a "forced consensus" about constitutional rights in Chile imposed by the ruling elites and that there could be potentially a strong disagreement about the content and scope of rights protection among the population, how should constitutional judges proceed? In Alexy's framework constitutional rights like freedom of expression, right to health care or even the right to life will be considered as principles at first, but following the consideration of the legal and factual circumstances and the competing principles, a principle will be transformed into a rule valid in that particular case through proportionality analysis. When a constitutional court transforms a principle into a rule, it is a judicial attempt to declare what the constitution stipulates in that particular setting. However, the ideal of the principle will remain alive behind the particular rule.[212] The Chilean case resonates well with this proposal. Judges could try to reconcile disagreements about rights with judgments that offer an immediate answer to a

[211] Robert Alexy, *A Theory of Constitutional Rights,* at 47.
[212] Robert Alexy, "The Construction of Constitutional Rights" (2010) 4:1 Law & Ethics of Human Rights 20, at 23.

concrete case where a principle is transformed into a rule with very little in the way of "theory" or of fully theorized rights.[213]

A second area where proportionality analysis might address the problems in Chile's post-authoritarian constitutionalism is by requiring that the limitation of rights meet substantive requirements. As already discussed, state actions have traditionally not been bound by to limits or minimal threshold requirements. In a democratic regime, the state needs to meet certain substantive requirements in order to legitimately encroach upon a fundamental right.[214] Again the situation in Chile is such that the burden carried by the right-holder and the burden carried by the state has not been clearly delimited. While the 1980 Constitution opted for specific limitation clauses, a clear general limitation clause setting the parameters against which the collision of fundamental rights will be evaluated is appealing. This will require the courts to turn away from a legal culture characterized by judicial restraint and embrace its role as a legitimate interpreter of the 1980 Constitution, a role that is unavoidably political in nature.

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[213] See Cass R Sunstein, "Incompletely Theorized Agreements" (1994-1995) 108 Harv L Rev , at 1733

[214] Mattias Kumm, "Political Liberalism and the Structure of Rights. On the Place and Limits of the Proportionality Requirement" in S Paulsen and G. Pavlakos (eds), *Law, Rights, Discourse themes of the work of Robert Alexy* (Oxford, Hart Publishing, 2007)

CHAPTER 4.

PROPORTIONALITY ANALYSIS: AN "ANALYTICAL MATRIX" OR JUST A "CULT" IN CONSTITUTIONAL RIGHTS' SCHOLARSHIP

The entrenchment of constitutional rights enforced through judicial review has been a trend in democratic settings in the last 50 years. In this chapter I would like to examine how proportionality analysis emerged as the dominant rights adjudication doctrine being used at the national, international and supranational levels. Aharon Barak defines proportionality in a broad sense as "the set of rules determining the necessary and sufficient conditions for a limitation of a constitutionally-protected right by law to be constitutionally permissible."[215] For Nicholas Emiliou proportionality analysis is considered a methodological criterion generally understood as requiring that "state power may encroach upon individual freedom only to the extent that it is indispensable for the protection of the public interest".[216] The underlying idea is that measures adopted by authorities should not exceed the limits of what is considered appropriate and necessary in order to pursue constitutionally legitimate aims. Proportionality analysis, as part of the

[215] Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (Cambridge University Press, forthcoming 2012), at 2.
[216] Nicholas Emiliou, *The Principle of Proportionality in European Law: a comparative study* (London: Kluwer Law International Editions, 1996), at 23.

transformation of public law in the second half of the 20th century, entailed the adoption of balancing metaphors as part of the constitutional adjudication process in many countries. It is a test used to evaluate a state action that limits a constitutional right and to assess whether the limit is justified. Proportionality provides a structural path for the use of rational judicial discretion.

4.1. MAIN TENETS: THE "CULT" VERSUS THE "ANALYTICAL MATRIX" APPROACH

This chapter devotes particular attention to two conflicting approaches to proportionality analysis, the "radical pragmatism" advocated by David Beatty and described as a "cult" by Grégoire Webber versus the highly theoretical structure developed by Robert Alexy which is seen as an "analytical matrix" for some of the courts using it.[217]

Although proportionality is a tool that can be used by political representatives in their analysis of limitations upon constitutional rights during the statutory drafting process, this thesis deals mainly with the use of the doctrine by judges. It is interesting to begin by underlining what appears to attract judges to proportionality analysis. For Alec Stone and Jud Mathews, constitutional judges employ proportionality to "manage potentially explosive environments, given the politically sensitive nature of rights review, and to establish and reinforce the salience of constitutional deliberation and adjudication

[217] The 'juicio de amparo en revisión 1659/2006' decided by the Supreme Court of Mexico in 2007 introduced formally the principle of proportionality as an "analytical matrix" as the judges called it.

within the political system."[218] The downside of this approach is underlined by Webber's argument that "the principle of proportionality attempts to depoliticize rights by purporting to turn the moral and political evaluations involved in delimiting a right into technical questions of weight and balance."[219] The aim of this chapter is to provide a broad overview of the main defences and critiques of proportionality analysis.

The "cult" of proportionality analysis approach

David Beatty, a Canadian law professor, undertakes a comparative analysis of several jurisdictions through the lens of proportionality analysis. Beatty praises proportionality as a principled, pragmatic and, therefore, legitimate review process. He sees proportionality as a response to various constitutional problems, arguing that,

> [I]n a shrinking planet, [proportionality] is appropriately multicultural. It structures an integration of the real and the ideal, the local and the universal, by integrating a fundamental principle of distributive justice into how each community understands itself.[220]

Proportionality is presented by Beatty as a formal framework of analysis that helps judges organize and evaluate conflicting claims about the laws they are asked to review. He thinks that facts have the certainty, predictability and a reality that permits a technique

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[218] Alec Stone Sweet & Jud Mathews, "Proportionality Balancing and Global Constitutionalism" (2008-2009) 47 Colum J Transnat'l L , 72, at 82

[219] Gregoire Webber, "The Cult of Constitutional Rights' Scholarship Proportionality and Balancing", at 189

[220] David Beatty, *The Ultimate Rule of Law*, (New York Oxford University Press, 2004), at 168

based on measurements and analysis.[221] According to Beatty, facts are to be evaluated through principles as impartially and objectively as possible. It is based on the efficacy of the means and the significance of its effects.[222] Beatty argues that proportionality is a neutral method and is driven by facts. He goes further and claims that "judges have no say on the worth of what is put on each side of the balance because communities decide their local ideal of justice."[223]

Beatty's account of proportionality analysis has been extensively criticized. Vicki Jackson's critique concentrates on the proposal to transform proportionality into the "critical test" or "the solution" to the paradox of judicial review and democracy. Jackson argues that prior questions about the degree and tradition of legal protection accorded to different individual rights, and the institutional roles of non-judicial decision-makers, have not been acknowledged in Beatty's account.[224] She points out the dark side of David Beatty's model - proportionality may offer less constraint on political branches. Jackson reminds us that constitutions serve a number of purposes. Principles, values and rights are protected with consideration of the particular characteristics of a polity. She goes on to criticise Beatty's assertion that proportionality is neutral and driven by facts concerning the beliefs of the community. She argues instead that it is for a court of

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[221] David Beatty, *The Ultimate Rule of Law*, at 73
[222] David Beatty, *The Ultimate Rule of Law,* at 45
[223] David Beatty, *The Ultimate Rule of Law,* at 167.
[224] Vicki C. Jackson, "Being Proportional about Proportionality" a review of David Beatty, *The Ultimate Rule of Law* (New York: Oxford University Press, 2004), (2004) 21 Const Comment, 803, at 821.

justice to determine what the principles of justice are in their societies, although attentiveness to the concrete factual claims of litigants might improve constitutional adjudication.[225] Ultimately, Jackson sees proportionality as one tool in the toolbox of modern constitutional courts. Her invitation is to combine proportionality with institutional considerations on a state-by-state basis.[226]

The strongest critique of Beatty's account is Richard Posner's review essay.[227] Posner, a pragmatist himself, calls Beatty's approach an "extreme version of legal pragmatism". His main criticism deals with "the questionable legitimacy of a purely fact-driven conception of constitutional adjudication".[228] According to Posner, Beatty's model threatens to open the door to an unlimited expansion of judicial power at the expense of political representatives and the people themselves. This will result in a state of permanent uncertainty because judges will only be constrained by factual accounts on a case by case basis. [229]

Proportionality analysis as an "analytical matrix"

From Robert Alexy's perspective, because principles can be satisfied to varying degrees,

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[225] Vicki Jackson, Being Proportional about Proportionality, at 841.
[226] Vicki Jackson, Being Proportional about Proportionality, at 859.
[227] Richard A. Posner, "Constitutional Law from a Pragmatic Perspective" (2005) 55-2 University of Toronto Law Journal, 299-309, a review of David Beatty, *The Ultimate Rule of Law* (New York: Oxford University Press, 2004).
[228] Richard A Posner, "Constitutional Law from a Pragmatic Perspective", at 302.
[229] Richard A Posner, "Constitutional Law from a Pragmatic Perspective", at 308.

conflicts between two principles can only be resolved through balancing in a specific context. A collision between two principles is solved by establishing a "conditional relation of precedence" between the principles in light of the circumstances of the case. The consequence is that a constitutional right will be considered as a principle at first sight but, following the consideration of the legal and factual circumstances and the competing principles, it will be transformed (through proportionality analysis) into a rule valid in that case. Balancing of principles produces rules. The decision of the court ideally rests on socially accepted legal norms previously achieved. These norms can change overtime and need, as already discussed, remain open to debate and contestation. These norms may be violated through government action, and that is why there is a need for constitutional protection.

Robert Alexy offers a proportionality formula in steps or sub-principles: suitability, necessity and proportionality in a narrower sense ("*stricto senso*"). The last step is the most developed in Alexy's work. He puts forward a structure of balancing at the concrete level where a statute is weighed to define if the limitation to the constitutional right at stake is proportional. Proportionality "*stricto senso*" is composed of "the law of balancing", the "weight formula", and the "burden of argumentation".

As for the "law of balancing", it proposes that "the greater the degree of non-satisfaction of, or detriment to, one principle, the greater must be the importance of

satisfying the other."[230] This can be broken into 3 stages.

The first stage is to measure the degree of non-satisfaction or detriment to the first principle (intensity of interference). Alexy proposes a common scale of degrees of interference and importance using three references: light "l", moderate "m" and serious "s", in order to facilitate the differentiation in intervention using categories well-known for judges and ordinary people. This is one way in which the critiques of incommensurability can be addressed. Each principle at stake will be measured in accordance with its importance, which in the abstract can be equal to or, in special cases, higher than the other. For example, the rights to human dignity, life and equality are already considered higher in abstract terms in many constitutional orders.[231]

The second stage is to measure the importance of satisfying the second principle in a concrete sense (degrees of importance). Here as well the three references (light "l", moderate "m" and serious "s") are used in order to facilitate the differentiation in intervention.

The third step is to relate the two previous to each other. The idea is to ascertain whether the importance of satisfying the one principle justifies the detriment to, or non-satisfaction of, the other principle (the relationship to each other). The challenge is to rationally assess the intensity of interference, the degrees of importance and, finally, to

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[230] Robert Alexy, *A Theory of Constitutional Rights*, at 102.
[231] Robert Alexy, *A Theory of Constitutional Rights*, at 406

relate both principles to each other.

The second law of balancing, called the "epistemic law of balancing", refers to the reliability of the empirical assumptions where, "the more heavily an interference with a constitutional right weighs, the greater must be the certainty of its underlying premises."[232] Here the court can also distinguish different degrees in the intensity of the review. For example, the German Federal Constitutional Court distinguished three epistemic situations that can occur: "intensive review of content", if the epistemic intervention is reliable or certain; a "plausibility review", if the epistemic intervention is maintainable or plausible; and an "evidential review", if the epistemic intervention is not evidently false.[233]

The "weight formula" is a crucial scheme in Alexy's account, which works according to the rules of arithmetic. In Alexy's words "the real premises of the 'weight formula' are not numbers but judgments about degrees of interference, the importance of abstract weights and degrees of reliability."[234] Consideration of the abstract weight of the rights at stake can be considered in a real factual case. The formula proposed by Alexy is the quotient between the intensity of interference of the principles at stake, the concrete weight of the principle whose violation is being examined, and the empirical assumptions

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[232] Robert Alexy, *A Theory of Constitutional Rights*, at 72

[233] Decision issued by the German Federal Constitutional Court BverfGE vol 50, 290 (333)

[234] Robert Alexy, "On Balancing and Subsumption A structural Comparison" (2003) 16 4 Ratio Juris, at 448

involved in the concrete case for the non-realization of one principle and the realization of another.[235] The weight formula assigns values to different types of interference in rights and to situations where rights collide. To attain a result, Alexy proposes the application of the "triadic scale" (light "l", moderate "m" and serious "s") to the "weight formula" and, in this way, determines the "concrete weight of a principle" in a particular contextual situation. What is achieved is a "relative weight" result, also called balancing ad-hoc. It is the consideration of social, cultural and political circumstances that are relevant for the court to assign a certain weight to a principle.

One objection to the structure of the "weight formula" is the existence of rational judgments about degrees of intensity and the importance of competing principles. Carlos Bernal underlines that the importance of the relevant principles depends on factual and normative premises.[236] Normative premises that are to be considered include the legal concept of the person and the legal position in a case, understood as the content of a relevant principle in the particular context. One potential problem here is the limited empirical knowledge that a judge may have. The aim of Alexy's formula is to provide judges with a legal argumentation framework that allows the judgment to be decided in a predictable manner. The judgment is supposed to achieve consistency and coherence. For Alexy, the rule of balancing turns out to be an argumentative form of rational legal

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[235] Robert Alexy, *A Theory of Constitutional Rights*, at 408.
[236] Bernal Pulido, Carlos, *El principio de proporcionalidad y los derechos fundamentales*, at 760.

discourse.

The "weight formula" that applies the law of balancing to a real case, certainly implies that discretion is given to the judge when they measure, in the abstract, the weight of the principles or public interest at stake.

Alexy appeals to the "burden of argumentation" in defending the rationality of proportionality. In this way a stalemate, where identical weight is assigned to the principles at stake, can be solved. Originally, Alexy proposed that values considered fundamental in a liberal state, like liberty and equality, must prevail unless stronger reasons can be put forward in order to limit them.[237] In the "postscript" written for the English version of "Theory of Constitutional Rights", published fifteen years after the first German edition, Alexy defers to the value of "democracy" in the case of a stalemate and, therefore, gives discretion for the parliament to decide which way to go.[238]

4.2. THE ORIGIN AND SPREAD OF PROPORTIONALITY ANALYSIS

Proportionality analysis has become the dominant rights adjudication doctrine in the Western world since the consolidation of so-called "new constitutionalism".[239] The

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[237] Robert Alexy, *A Theory of Constitutional Rights*, at 385

[238] Robert Alexy, *A Theory of Constitutional Rights* , at 410

[239] The main tenets of this model of constitutionalism are that: the constituent power is established in the constitution itself and is empowered to amend the constitution, amendments are possible through mechanisms of direct democracy, government institutions are established in the written text, public authority is only lawful if it conforms with the constitution, and there is a catalogue of rights and freedoms

principle of proportionality has become an increasingly important in the reasoning of constitutional and supreme courts all over the world. It has even become a central principle of supranational organisations like the European Union.[240] Proportionality has also been described as a "political maxim", in reference to it being part of a theory of governance initiated in Germany but later on adopted as a foundational principle of the European Union.[241]

According to Alec Stone and Jud Mathews, every effective system of constitutional adjudication in the world, with the exception of the United States, had embraced the main tenets of proportionality analysis by the end of the 1990s.[242] It is useful here to distinguish the loose understanding of judicial balancing used in the United States from the German mechanism of proportionality. Proportionality analysis establishes a relationship between constitutional principles and rules while balancing individual interests with collective ones. Some authors recognize the similarities between the American balancing and the German doctrine of proportionality at the same time as they underline their different historical origins. In any case, there is a certain difficulty in

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protected by a system of constitutional justice See especially Ran Hirschl, Towards Juristocracy The origins and consequences of the New Constitutionalism (Harvard University Press, 2004), and David Beatty, *The Ultimate Rule of Law*, (New York Oxford University Press, 2004)

[240] Nicholas Emiliou, *The Principle of Proportionality in European Law A comparative Study* (London Kluwer Law International, 1996)

[241] Art 5 Treaty of Rome, plus European Constitution· Article II 109 3 , and Article II 112 1 About proportionality analysis in Europe see E Ellis, *The Principle of Proportionality in the Laws of Europe* (Oxford Hart Publishing, 1999), and Tsagourias, N. (ed.) *Transnational Constitutionalism International and European Perspectives* (Cambridge University Press, 2007)

[242] Alec Stone Sweet & Jud Mathews, "Proportionality Balancing and Global Constitutionalism", at 72

harmonizing these two perspectives.[243] Courts in some jurisdictions, like the South African Constitutional Court, have devoted attention to the distinction between their proportionality methodology and the American "strict scrutiny" formula.[244] They have done so believing the American approach to be too rigid. In a South African case, *Christian Educ. S. Afr. v. Minister of Educ.*, the appellant argued that the state had to show a "compelling state interest" to justify a limitation of his right to religious freedom and religious community practice. The Court admitted that balancing was required, but rejected the "strict scrutiny" test from American jurisprudence. The court chose to adopt a "nuanced and context-sensitive" form of balancing, i.e. proportionality analysis.[245] This example illustrates that at least some courts are concerned about methodological choices and their implications.

German model of proportionality analysis

The modern development of proportionality began in the 18th century. It was originally an unwritten constitutional principle of German administrative law and one of the first legal instruments used to hold the state accountable. The German constitutional model emerged in 1945 from the ashes of a devastated post-war Germany. As such, it was

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[243] Iddo Porat & Eliya Moshe Cohen, "American Balancing and German Proportionality: The historical origins"(2010) 8:2 Int. J. Constitutional Law, 263-86.
[244] See: Richard H. Fallon, Jr., "Strict Judicial Scrutiny" (2007) 54 UCLA Law Review, 1267-1337.
[245] *Christian Educ. S. Afr. V. Minister of Educ.* 2000 (4) SA 757 (CC), paragraphs 29-35, online: <http://www.saflii.org/za/cases/ZACC/2000/11.pdf> .

conceived of as a new way of thinking about political power. German political theory emphasizes the place of the individual as part of a community that shares common values. The German Constitutional Court underlines that this is a feature of the German Basic Law of 1949 the Basic Law's idea of man is not the idea of an isolated sovereign individual: rather, the Basic Law has decided the tension between individual and society in favour of the individual being community related and community bound – while not touching its intrinsic value.'[246] The immediate consequence of this approach of in Germany is that the Constitutional Court is considered to be a government institution that shapes social values and norms in cooperation with other government institutions. The central value of German society, as portrayed in the 1949 Basic Law, is human dignity, called by authors like Iddo Porat and Eliya Moshe "the constitution's Archimedes Point."[247]

For Alec Stone and Jud Mathews, the adoption of proportionality in Germany during the late 1950's was related to the structure of constitutional rights adopted in the 1949 Fundamental Law and the civil law tradition. They argued that core elements of proportionality analysis were "native" to Germany. Public law scholars and judges were familiar with the idea of searching for outcomes that restricted rights in the least possible

[246] Decision issued by the German Feederal Constitutional Court 4 BverfGE 7, 15-16 (1954).
[247] Iddo Porat & Eliya Moshe Cohen, "The hidden foreign law debate in Heller: the proportionality approach in American Constitutional Law" (2009) 46 San Diego L. Rev. 367, at 392.

way, while the German Civil Code called for judges to weigh certain interests against others. Thus, private law judges were also aware of the notion of balancing.[248] Proportionality proved to be an effective tool for balancing individual rights and public interests in a post-war period when there was tension between the commitment to protect fundamental rights at the highest possible level and the demands of reconstruction. According to Stone and Matthews, the strongest argument for proportionality as the main rights adjudication doctrine is based on the rationality of its structure and outcomes.[249]

The Basic Law established that limitations upon a fundamental right must be "suitable and necessary for the achievement of its objective. It may not impose excessive burdens on the individual concerned, and must consequently be reasonable in its effect on him."[250] This understanding is implied in a quasi "natural" derivative of proportionality analysis adopted by the German Federal Constitutional Court in 1954. This was in contrast to a reflective approach adopted in 1965 where the German Constitutional Court anchored the principle of proportionality in the rule of law and considered it to be an unwritten principle of constitutional law.[251] Fifty years after the adoption of proportionality analysis, the appraisal is a positive one for Germany. Proportionality is praised by German scholars as an "objective, systematic, and logical implementation of

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[248] German Civil Code [BGB] Aug 18, 1896, Reichsgesetzblatt [RGBI] sections 138, 343 and 228
[249] Alec Stone Sweet & Jud Mathews, "Proportionality Balancing and Global Constitutionalism", at 96
[250] Decision issued by the German Federal Constitutional Court BVerfGE 48, 402
[251] Dieter Grimm, "Proportionality in Canadian and German Constitutional Jurisprudence" (2007) 57 University of Toronto Law Journal, 383-397

constitutional rights and it has become the central mechanism for enhancing harmony and cooperation between conflicting values in the German society."[252] Of course there are alternative rights adjudication methodologies (as already discussed in Chapter Three) and also there are valid critiques of proportionality analysis that will be analyzed later.

American balancing and the "strict scrutiny formula" in rights adjudication

In the United States legal context, Alexander Aleinikoff has explained how balancing emerged as a method of constitutional interpretation in the late 1930s and early 1940s.[253] Aleinikoff describes balancing in the US context as a "progressive judicial attitude that considers constitutional law as a battleground of competing interests".[254] Balancing as a metaphor was presented as a reaction to formalism, a type of adjudication that solved constitutional matters in a categorical fashion. This categorical type of adjudication was derisively referred to as "mechanical jurisprudence" by Roscoe Pound.[255] These authors appealed to a conception of law as the product of social experience and, therefore, appealed to judges to be responsive to societal concerns in their decisions.

American courts decide cases through a categorical constitutional analysis within

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[252] Jacco Bomhoff, "Luth's 50th Anniversary Some Comparative Observations on the German Foundations of Judicial Balancing" (2008) 9 2 German Law Journal, at 124

[253] Alexander Aleinikoff, "Constitutional Law in the Age of Balancing" (April 1987) 96 5 Yale L J , 943, 973 at 948

[254] Alexander Aleinikoff, "Constitutional Law in the Age of Balancing", at 946

[255] Roscoe Pound, "Mechanical Jurisprudence" 8 Colum L Rev 605, 610 (1908)

the scope of the right. This is based upon different levels of scrutiny according to the right at stake. In a seminal article, Richard Fallon reconstructed the history and practice of strict judicial scrutiny in the United States and explicitly underlines the similarity with the Canadian proportionality analysis.[256] The aim was to study the test applied by the United States Supreme Court under which legislation can be upheld against a constitutional challenge only if the law is "necessary, narrowly drawn or narrowly tailored to promote a compelling governmental interest."[257] It is interesting that Fallon locates the birth of the modern strict scrutiny test in the 1960s and attaches it closely to the United States legal and political context. The interpretation of the strict scrutiny test a a "weighted balancing test" is closer to proportionality analysis, than the other two possible interpretations discussed by Fallon: either strict scrutiny understood as a "nearly categorical prohibition" to shield constitutionally preferred rights or on the other end strict scrutiny as an "illicit motive test to ensure that the government does not purposely targeted a preferred group or burdened a preferred right."[258]

Fallon presented the US strict scrutiny test as a device of judicial self-discipline structured in four steps: (1) the identification of the rights that trigger strict scrutiny; (2) the identification of compelling governmental interests; (3) narrow tailoring understood

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[256] Richard H. Fallon, Jr., "Strict Judicial Scrutiny" (2007) 54 UCLA Law Review, 1267-1337, at 1294.
[257] *Shapiro v. Thompson* 394 U.S. 618 (1969)
[258] Richard H. Fallon, Jr., "Strict Judicial Scrutiny", at 1303-1311.

as the necessity of infringement through the least restrictive alternative here the similarity with the necessity test of the proportionality formula is striking. This element aims to avoid "underinclusiveness"[259] and "overinclusiveness"[260]; and, finally, (4) proportionality as an inquiry about how much underinclusiveness or overinclusiveness is permissible, here again the similarity with the proportionality "stricto senso" is striking (although the courts have been reluctant to use this term).[261] Fallon concluded that balancing formulas established as "tools of judicial self-discipline", like "strict scrutiny" in the United States, are subject to characteristic limitations like varied interpretations and allow "selective stringent or flaccid enforcement" in each individual case which makes the overall doctrine less effective.[262]

In the United States authors have advanced a general theory of proportionality analysis applicable to the domain of public law, civil liberties and the criminal justice system.[263] For example authors like Dieter Grimm refers to the similarities between the proportionality test adopted in Canada in *R. v. Oakes*[264] and the US Supreme Court decision in *Central Hudson Gas Electric Corp v. Public Service Commission of New*

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[259] A paradigmatic example that not every underinclusive statute is unconstitutional is *Roe v Wade* 410 U S 113 (1973)

[260] The example of overinclusiveness that would have been considered by the Court potentially unconstitutional under the modern "strict scrutiny" test is *Korematsu v United States* 323 U S 214 (1944)

[261] Richard H Fallon, Jr , "Strict Judicial Scrutiny", at 1315- 1332

[262] Richard H Fallon, Jr , "Strict Judicial Scrutiny", at 1337

[263] As an example Thomas Sullivan E and Frase S , *Proportionality Principles in American Law Controlling excessive government actions,* (Oxford University Press, 2008)

[264] *R v Oakes* [1986] S C J N° 7, [1986] 1 S C R 103

York.[265] Grimm says that, although the US Supreme Court often uses balancing, it has not developed a three-pronged test like the proportionality formula used in other countries like Canada or Germany.[266] David Beatty is also the opinion that "even the US Supreme Court relies on a test very similar to the metric of proportionality when it subjects state action under the First, Fifth, and Fourteenth Amendments to strict scrutiny".[267] Scholarly debate about commonalities and differences among methods of rights adjudication was also recently re-initiated through the US Supreme Court decision in *District of Columbia v. Heller*[268], where Justice Breyer, in his dissenting opinion, introduced proportionality analysis as a "term of art" in Supreme Court case-law.[269]

Although a more detailed comparison of proportionality analysis and strict judicial scrutiny is very appealing such an inquiry lies beyond the scope of research of this dissertation.

Canadian model of proportionality analysis

Since 1986, proportionality analysis has been used in Canadian constitutional rights

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[265] 447 U S 557 (1980) [Central Hudson]
[266] Dieter Grimm, "Proportionality in Canadian and German Constitutional Jurisprudence", at 384
[267] David Beatty, *The Ultimate Rule of Law*, at 162
[268] 554 US Supreme Court (2008)
[269] Iddo Porat & Eliya Moshe Cohen, "The hidden foreign law debate in Heller the proportionality approach in American Constitutional Law" (2009) 46 San Diego L Rev 367, at 379

adjudication under the form of a three-pronged test.[270] There has been minor controversy among Canadian justices whether the proportionality analysis adopted by Canada is a "test" or just guiding principles of interpretation.[271]

In Canada, due to a broad purposive definition of the enumerated rights and freedoms, the limitation of *Charter* rights occupies center stage in constitutional rights adjudication through section 1 of the *Charter*. Section 1 provides that the rights and freedoms guaranteed are "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." This creates a very substantive general limitation clause in need of interpretation due to the use of open-textured principles like "prescribed by law" and "free and democratic society." The Supreme Court of Canada *in R. v. Oakes* considered the values of a free and democratic society:

> [T]he Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.[272]

With respect to the formal requirement of being "prescribed by law", the Supreme

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[270] *R. v. Oakes* [1986] S.C.J. N° 7; [1986] 1 S.C.R. 103 see: Choudhry, S., "So what is the real legacy of *Oakes*? Two decades of proportionality analysis under the Canadian *Charters*'s Section 1" (2006), 34 S.C.L.R. (2nd), p. 501 – 535.
[271] La Forest J. in *RJR-MacDonald v. Canada*, [1995] 127 D.L.R. (4th) 1, at 46 (dissenting judgment).
[272] *R. v. Oakes* [1986] 1 S.C.R. 103, para. 136.

Court has, generally speaking, considered this to require actual positive law: "violative conduct by government officials that is not authorized by statute is not prescribed by law and cannot therefore be justified under section 1."[273] However, the standard applied by the Supreme Court can also allow common law regulation[274] to satisfy the requirement of "prescribed by law".[275]

The interpretation of section 1 led the Court to establish a substantive framework with respect to the justification of limitations on rights and freedoms. The basic framework chosen was proportionality analysis. This was inspired by Germany and also by the United States model of "strict judicial scrutiny" (although both sources were not explicitly acknowledged). The framework adopted was a full three-pronged test, developed first in *R. v. Oakes.*[276]. The steps required to perform the proportionality analysis in Canada are: (1) existence of a sufficiently important objective to justify a rights' limitation; (2) the existence of a rational connection between the limit imposed on the Charter rights or freedoms and the limitation imposed by the legislature; (3) the limitation should impair the right as little as possible; and (4) a proportionality "stricto senso" application of the benefits of the limit and its deleterious effects in the concrete case at stake.

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[273] *Little Sisters Book and Art Emporium v. Canada*, [2000] 2 S.C.R. 1120, 193 D.L.R. (4th) 193 at para. 14.
[274] *R. v. Swain*, [1991] 1 S.C.R. 933.
[275] *R. v. Orbanski* 2005 SCC 37 at para. 52.
[276] *R. v. Oakes* [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200.

In Canada, the first approach in to the step requiring a sufficiently important objective as developed in *Oakes* required that the reason for the limitation upon a constitutional right was to "relate to concerns that are pressing and substantial in a free and democratic society"[277] which means that the legislative act must further the values interpreted to be contained in Section 1 of the Charter It is interesting to add that in *Vriend v Alberta* the Supreme Court stated that it is necessary not only an explanation given by the government to limit a constitutional right, but moreover, the law in order to limit a right must have an objective to be reached and able to be scrutinized [278] Over time the requirement changed to be solely "valid"[279] or "sufficiently important "[280] Courts tend to show deference to legislative objectives and, Canada is not an exception Nevertheless, the way in which the objective of the legislation is drafted can influence the rest of the test For example, if the objective is drafted broadly the connection between means and ends might be less clear

In *Oakes*, with respect of the rational connection requirement, the Canadian Supreme Court explained that the measures "must not be arbitrary, unfair or based on irrational considerations In short, they must be rationally connected to the objective "[281]

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[277] *Oakes*, at 138
[278] *Vriend v Alberta* [1998] 1 S C R 493, 156 D L R (4th) 385
[279] *R v Whyte*, [1988] S C J 63, , [1988] 2 S C R 3
[280] *Reference re ss 193 and 195 1(1)(c) of the Criminal Code (Man)*, [1990] S C J 52, [1990] 1 S C R 1123 [*Prostitution Reference*]
[281] *R v Oakes*, [1986] 1 S C R 103, at 139

The means chosen by the state must be "carefully designed" in order to avoid problems of over-inclusion.[282] The approach to a rational connection has varied. For example, in *Chaoulli v. Quebec (Attorney General)* the Supreme Court questioned "whether an arbitrary provision, which by reason of its arbitrariness cannot further its stated objective, will ever meet the rational connection test under *R. v. Oakes*."[283] Another relevant characteristic is that the rational connection does not require scientific evidence;[284] it can be evaluated through common sense, theoretical knowledge and evidence.

The minimal impairment threshold established in *Oakes* as "least intrusive means" was lowered only a couple of months later in *R. v. Edwards Books & Art Ltd*[285] where the Court established that the state action should impair Charter rights "as little as is reasonably possible" and asking "whether there is some reasonable alternative schema."[286] This suggests that the means chosen do not need to be the least intrusive in absolute terms, but the least intrusive given the legislature's objectives. Over time the Supreme Court of Canada gave more relevance to the factual context in its evaluation. Sujit Choudhry observes that the already diluted requirement of careful legislative design

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[282] Sujit Choudhry, "So what is the real legacy of *Oakes*? Two Decades of Proportionality Analysis under the Canadian *Charter's* Section 1", (2006), 34 S.C.L.R. (2d), at 505.
[283] *Chaoulli v. Quebec (Attorney General)* 2005 SCC 35.
[284] Harper v. Canada (Attorney General), [2004] 1 S.C.R. 827 at para. 104.
[285] [1986] S.C.J. 70, [1986] 2 S.C.R. 713, [*Edwards Books*].
[286] *Edwards Books,* at 772 .

ends up being a claim for "legislative means chosen that simply further the legislative objective."[287]

The relevance of the last step – "proportionality *stricto senso*" - has sometimes been challenged. In its original formulation in *Oakes*, the final required step was: "to be a proportionality between the effects of the measure which are responsible for limiting *the Charter* right or freedom, and the objective which has been identified as of sufficient importance."[288] Scholars in Canada do not agree about its importance and its role in the balancing formula as a whole. Robert Sharpe and Kent Roach argued in 2005 that "until recently, this final balancing test has not been decisive and was thought by many to be redundant".[289] Interestingly, the Supreme Court of Canada in *Canada (Attorney General) v. JTI-Macdonald Corporation* defended the importance of this last step of proportionality analysis by saying:

> [A]lthough cases are most often resolved on the issue of minimal impairment, the final inquiry into proportionality of effects is essential. It is the only place where the attainment of the objective may be weighed against the impact on the right. If rational connection and minimal impairment were to be met, and the analysis was to end there, the result might be to uphold a severe impairment on a right in the face of a less important objective.[290]

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[287] Sujit Choudhry, "So what is the real legacy of *Oakes*?" at 511. The case referred here is *Rocket v. Royal College of Dental Surgeons of Ontario,* [1990] S.C.J. 65, [1990] 2 S.C.R. 232 [*Rocket*].
[288] *R. v. Oakes* [1986] 1 S.C.R. ,at 139.
[289] Robert J. Sharpe & Kent Roach, The Charter of Rights and Freedoms (3rd. Edition) (Toronto: Irwin Law Inc., 2005), at 73.
[290] JTI–Macdonald Corp., 2007 SCC 30, para 46, available at: http://csc.lexum.umontreal.ca/en/2007/2007scc30/2007scc30.html

However, recently the step has been re-structured to consider a balance between the deleterious and the salutary effects of the measure.[291] The tendency to recognize more and more relevance to this step of the analysis is confirmed by a recent case decided in 2009 by the Supreme Court of Canada. In *Alberta v. Hutterian Brethren of Wilson Colony* the Chief Justice underlines that only this step of the test "takes full account of the severity of the deleterious effects of a measure on individuals or groups".[292]

Spanish model of proportionality analysis

In Spain proportionality has been used since the 1950s in administrative law and adopted in the constitutional realm since the 1980s.[293] The first case in the '50s introduced proportionality as an examination of the means undertaken and the results achieved, as a limitation upon the Executive's discretionary power.[294] The use of proportionality analysis was restricted to the administrative domain and seldom used since that first case in 1959. The return to democracy, the adoption of the 1978 Constitution, and the creation of the Constitutional Court in 1980 created a new possibility for the use of proportionality. The Constitutional Court has applied the proportionality principle since the Court's foundation in 1980. According to Javier Barnes, it has become the main way

[291] *Dagenais v Canadian Broadcasting Corporation* [1994] 3 S.C R. 835
[292] *Alberta v Hutterian Brethren of Wilson Colony* 2009 SCC 37, para.76.
[293] García de Enterría, E , "La interdicción de la arbitrariedad en la potestad reglamentaria" (1959) 30 Revista de Administración Publica, at 138.
[294] Decision of the Spanish Administrative Court STC, February 20th, 1959, paragraph 5th.

to implement substantive control of the administration's discretion.[295] The proportionality principle is not expressly stipulated in the Spanish Constitution but the Constitutional Court grounded it in human dignity and, therefore, it was considered inherent to the rule of law[296] and the value of justice[297] as permanent goals of the Spanish state.[298] As a tool for constitutional adjudication, adherence to the proportionality principle is mandatory for the legislature, public administration and the judiciary, in their respective spheres of competence. Therefore, by the 1980s the Constitutional Court already used this adjudication mechanism in the limitation of fundamental rights. The legislature, influenced by the judgments of the Constitutional Court, has also acknowledged the principle (mainly to limit restrictions upon fundamental freedoms by the government).[299]

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[295] Javier Barnes, "Jurisprudencia constitucional sobre el principio de proporcionalidad en el ambito de los derechos y libertades" (1998) 5 Cuadernos de Derecho Público, INAP, at 22

[296] Decisions of the Spanish Constitutional Court STC 85/1992 and STC 111/1993 considered proportionality analysis as inherent to a social and democratic state based on the rule of law

[297] Decisions of the Spanish Constitutional Court SSTC 59/1995 and 173/1995 ground the proportionality principle in the value justice

[298] 1978 Spanish Constitution, s1 Spain is hereby established as a social and democratic State, subject to the rule of law, which advocates freedom, justice, equality and political pluralism as highest values of its legal system

S 9 3 The Constitution guarantees the principle of legality, the hierarchy of legal provisions, the publicity of legal statutes, the non-retroactivity of punitive provisions that are not favorable to or restrictive of individual rights, the certainty that the rule of law shall prevail, the accountability of public authorities, and the prohibition of arbitrary action of public authorities

S 10 1 The dignity of the person, the inviolable rights which are inherent, the free development of the personality, the respect for the law and for the rights of others are the foundation of political order and social peace

[299] Examples Sections 96 1 and 2 of the Statute 30/1992, S 28 Organic Law 3/1986, Organic law 4/1997, Organic Law 13/2003

Joaquin Brage and Carlos Bernal note how the Spanish expansion of proportionality can be directly attributed to the model developed by the German Constitutional Court relaying upon German sources and judgments of the Court. In the process of learning how the proportionality principle works, the Constitutional Court considered Alexy's theory, in particular the "rules of conditional prevalence". This is understood as conditions under which one fundamental right has prevalence above another fundamental right under the form of a principle or a rule.[300] The Constitutional Court did not adopt the German three-step analysis until 1995 when a partial adoption was made. The first judgment to utilize this technique was decision No 66/1995 of the Spanish Constitutional Court, with the second being almost a year later in decision 55/1996 (a more significant decision because it acknowledged the migration of proportionality principle from Germany explicitly).

Joaquin Brage has emphasized the argumentative exercise of juridical logic.[301] The goal is to achieve a better understanding of how the fundamental rights could be limited and, more importantly, protected and guaranteed.

Javier Barnes[302] argues that the proportionality principle has allowed a much higher level of legal certainty. The principle does not provide formal control of the

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[300] Robert Alexy, "Epilogo a la Teoria de los Derechos Fundamentales" (2002) 22 N66 REDC, 13-64 and Spanish Constitutional Court decisions STC 103/2001 and 53/2002

[301] 1978 Spanish Constitution S 117 3. "The exercise of judicial authority in any kind of action, both in ruling and having judgments executed, is vested exclusively in the courts and tribunals laid down by the law, in accordance with the rules of jurisdiction and procedure which may be established therein "

activity of the legislature, administration or judge rather, the substantive aspects of the proportionality principle as a control on the limitations of a constitutional right are based on a factual analysis of particular cases.

Latin American model of proportionality analysis the Chilean case

Proportionality analysis was more recently adopted in Latin America by countries like Colombia[303] in the 1990s, Peru[304] in 2003, Chile[305] in 2006, and México[306] in 2007. Latin American scholars have also been highly influenced by the proportionality principle's main scholars from Germany and Spain. Indeed, in 2009-2010 a group of scholars close to Robert Alexy published similar books regarding proportionality analysis in numerous Latin American countries.[307]

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[302] Javier Barnes, "Jurisprudencia constitucional sobre el principio de proporcionalidad en el ambito de los derechos y libertades", at 44

[303] For a comprehensive study of the use of the proportionality principle in Colombia see Carlos Bernal, *El Derecho de los Derechos* (Bogotá Universidad Externado de Colombia, 2006) 3° edicion

[304] Decision issued by the Constitutional Court of Peru STC 0010-2002-AI/TC

[305] Judgment No 541-2006 adopted a version of proportionality analysis for the first time

[306] The "Juicio de Amparo en Revision 1659/2006" decided by the Supreme Court of Mexico in 2007 introduced formally the principle of proportionality For a analysis of the adoption of the proportionality framework in Mexico see Amaya Alvez, Proportionality Analysis as an 'Analytical Matrix' Adopted by the Supreme Court of Mexico (November 30, 2009) CLPE Research Paper No 46/2009 Available at SSRN http //ssrn com/abstract=1515952

[307] In Chile Miguel Carbonell (ed), *El Principio de Proporcionalidad en la Interpretacion Juridica* (Santiago, UNAM & CECOCH, 2010), in Peru Miguel Carbonell & Pedro Grandez, (eds), *El Principio de Proporcionalidad en el Derecho Contemporaneo* (Lima, Palestra Editores, 2010), in Argentina Laura Clérico, *El Examen de Proporcionalidad en el Derecho Constitucional* (Buenos Aires, Eudeba, 2009), in Mexico Miguel Carbonell (ed), El Principio de Proporcionalidad y proteccion de los derechos fundamentales (Ciudad de México, Comision Nacional de los Derechos Humanos, 2008)

The proportionality methodology has been partially adopted since 2006 by the Chilean Constitutional Court as a rights adjudication mechanism.[308] The Court in Chile did not acknowledge the doctrinal or jurisdictional origin of the migration. The lack of acknowledgement could be traced to a fear of judicial activism in a system that traditionally left less room for judicial power. Perhaps it was a strategic move to render the adoption of the principle of proportionality successful in the Chilean juridical order, partially avoiding the problems associated with the migration of constitutional mechanisms.

Humberto Nogueira, in the only book published so far about proportionality analysis in Chile, has noted that in most cases the court only uses the first steps of a proportionality framework, requiring in a loose and deferential way a legitimate purpose for the statute and the requirement of a relationship between the means and the aims. Rarely has the court considered the question of the least restrictive means that would achieve the same aim.[309] An analysis of the migration of proportionality analysis to Chile through leading cases decided by the Constitutional Court is offered in Chapter Six.

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[308] Decision No 541 issued by the Constitutional Court on December 26th, 2006.

[309] Humberto Nogueira, "El Principio de Proporcionalidad y su aplicación en Sudamérica por la Jurisdicción Constitucional, con especial mención al Tribunal Constitucional Chileno" in Miguel Carbonell, ed., *El Principio de Proporcionalidad en la Interpretación Jurídica* (Santiago, UNAM & CECOCH, 2010).

4.3. THE STRUCTURE OF PROPORTIONALITY ANALYSIS

In the most developed form, proportionality analysis consists of four steps. The first is the preliminary consideration concerning the constitutionally legitimate aim of the government action, and three subsequent sub-tests: suitability, necessity and proportionality in a narrower sense. With regards to whether the content, order and application of the different steps of the proportionality test matters, Dieter Grimm points out that a clear use of each of the four stages would render proportionality analysis more disciplined and rational.[310] Each one of these sub-tests is a different way of approaching the aim of the state action.

The proper purpose of the legislative act

The preliminary issue in proportionality analysis is to examine whether the objective of the state action is capable of justifying a limitation upon human rights. This poses some difficulties in relation to the judicial review of legislative acts. The legislative act should be considered suitable when it appears able to attain the desired result; however, in most cases, a partial realization of the desired result is only ever achieved. Evidently, a legislative measure is unsuitable if that is the case. There is also a difficulty concerning the length of time in which the result pursued by the legislative action must be attained,

[310] Dieter Grimm, "Proportionality in Canadian and German Constitutional Jurisprudence", at 397.

particularly when state policy is proposing long-term solutions. The "margin of appreciation doctrine" was first developed by the European Court of Human Rights to refer to the room given to the political representatives of signatory countries to fulfill their obligations under the European Convention on Human Rights.[311] Over time, this doctrine has been extended to the discretion national courts permit the executive and, primarily, the legislature with regard to the scope of legal protection each constitutional right will enjoy in a given legal order. Critics have argued that this approach could be used by courts deferential towards national political representatives, to avoid the implementation of international standards of human rights.[312] Others, like Aharon Barak, claim that this term ought to apply only to international tribunals; at the local level the appropriate terminology is deference.[313] Barak proposes to distinguish between the hierarchies of the rights at stake: if the right is ranked high then the purpose must "vital" but if the right is ranked lower the purpose could be considered only "important".[314] However, Grimm has argued that some countries, like Germany, have applied this examination as a requirement of a simple legitimate purpose to provide enough room for

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[311] See Brems, E , "The Margin of Appreciation doctrine in the case-law of the European Court of Human Rights" 56 ZaoRV (Heidelberg J Int'L L) at 240

[312] For a critical approach see Benvenisti, E , "Margin of appreciation, consensus and universal standards" JILP , Vol 31, 843 – 854

[313] Aharon Barak, *Proportionality Constitutional Rights and their Limitations* (Cambridge University Press, forthcoming 2012), at 11

[314] Aharon Barak, *Proportionality Constitutional Rights and their Limitations* (Cambridge University Press, forthcoming 2012), at 14

the elected political body to create legislation.[315] In Spain authors like Joaquin Brage underlines that the Constitutional Court understand this requirement as a concrete objective for the statute with constitutional relevance.[316]

So far the Chilean Constitutional Court has been hesitant to challenge a culture of judicial restraint. For example, in the very first case in 2006 where proportionality was articulated, the Court declared "that although the constitutional judge is forbidden to qualify the merit of the legislative decision, it is still possible to examine the constitutionality of the statutory norm and... the requirement of a legitimate aim". More recently the Court has described the requirement as "a reasonable aim". The statute under scrutiny was section 595 of the Organic Code of Courts challenging the institution of mandatory *pro bono* representation by "judicially-appointed lawyers" in civil, criminal, family and labour cases. The Court found that providing legal assistance for those who are unable to obtain legal counsel and defence on their own was a reasonable aim.[317] However, the Constitutional Court unanimously held that section 595 of the Chilean Organic Code of Courts was unconstitutional in respect to the *pro bono* work of the "judicially-appointed-lawyer", due to its mandatory and gratuitous character it was considered to be a disproportionate limitation on the right to equal distribution of public

[315] Dieter Grimm, "Proportionality in Canadian and German Constitutional Jurisprudence", at 388
[316] Joaquin Brage, *Los Limites a los Derechos Fundamentales,* (Madrid Editora Dykinson, 2004), at 373
[317] Decision No 755 issued on March 31, 2008, para 41

duties.[318] In advancing the idea that proportionality can foster a constitutional dialogue, the court held that it is a duty of the state, through the legislature, to provide the adequate institutional and legal mechanisms to allow the fulfillment of the right to legal defence, especially for those unable to obtain legal counsel on their own.

The suitability test

This sub-test is related to the requirement of a rational connection between the means and the goal to be achieved or, as the German Constitutional Court requires, whether the law examined is suitable to its goal.[319]

In Spain Joaquin Brage distinguishes between three aspects of the principle of suitability. The first aspect is the formal or procedural connection, where the limitation upon a fundamental right must be declared by a public authority in a well reasoned decision. The second is the suitability or objective connection that requires the right-limiting measure adopted to be capable of achieving the aim by itself. The third and final aspect is the suitability or subjective connection that requires the persons affected by the

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[318] 1980 Constitution s19 "The Constitution guarantees to all persons
- No 20 Equal distribution of taxes in proportion with individual income or in a progressive manner established by law, and equal distribution of other public charges
In no case may the law establish obviously disproportionate or unjust taxes
The taxes collected, whatever their nature, shall be deposited in the Nation's treasury and cannot be earmarked for specific use
The law may authorize, however, that certain taxes be set aside for national defence needs, or may authorize that taxes levied on activities or assets of a clear local nature be established within the framework of this law, by municipal authorities and that they be allocated to works of community development "

[319] Dieter Grimm, "Proportionality in Canadian and German Constitutional Jurisprudence", at 387

measure to have a direct relationship with the measure adopted; it is possible to conclude that the limitation of the constitutional rights of these people is necessary to achieve the aim.[320]

In 2008, the Chilean Constitutional Court decided a case concerning the legislative design of the new criminal procedure with respect to a particular situation where the right to appeal was denied. The Constitutional Court had to decide whether section 387 of the procedural criminal code was a limitation of the constitutional right to due process and whether such a limitation could be justified. The Court refers to the autonomy of the legislature to decide upon the merits. This shows how the Court has hesitated when it comes to offering substantive opinions about legislative design.[321] Finally, the court described the connection between the means and the goal to be achieved as "the coherence between the legitimate aim (legal certainty) and the means used by the legislature (denial of the possibility of appealing the final judgment of conviction) to achieve the result"[322] rejecting the option of an unconstitutional limitation without further elucidation. By contrast, the dissenting opinion underlines the statute's lack of a clear legitimate aim and the complete absence of coherence with the means chosen. This was justified by arguing that the right to appeal a criminal conviction is part

[320] Joaquin Brage, *Los Limites a los Derechos Fundamentales,* at 374-77.
[321] Decision No 986 issued on January 30, 2008, para. 16.
[322] Decision No 986 issued on January 30, 2008, para. 33.

of the Chilean legal tradition requiring a just and rational criminal procedure. It is also part of international obligations on due process that the state of Chile has agreed to through the ratification of human rights treaties.[323] The constitutional conversation held between the majority and the dissent opinion is an example of how the court can play a more democratic role.

The necessity test

Known as well as the least drastic means element, this step requires that the statute must impair, damage, or harm the right as little as possible. In this case, an examination of the objective of the statute could help to evaluate the concrete situation to ascertain what the most reasonable option would be to limit damage to the right. This would require judges to collect information from third party sources, supporting the view that proportionality analysis is a dialogue between the courts, political representatives and wider society. In cases where an alternative measure would achieve the same goal with less infringement of the right, the initial measure must be declared unconstitutional. Nevertheless, it is important to acknowledge that the legislature has a margin of appreciation to decide between different measures to achieve a goal. The main problems the Court must decide appear when the consequences of the legislation are uncertain, unclear or contingent upon

[323] Dissent opinion in decision No 986 issued by the Chilean Constitutional Court on January 30, 2008, paras. 16-24.

future events.

In the leading case on private property in Germany, the *Co-Determination* case, the challenged act sought to extend the requirement that workers representatives be included on the board of directors to large corporations. The German Federal Constitutional Court ruled that uncertainty about future developments could not justify a ban to legislation but, at the same time, it did not preclude judicial review of the act. The debate concerned the implications of full parity between workers and owners on the board of directors with several constitutional complaints being lodged. The Court decided that the act was constitutional as falling within the power of the legislature to define the scope and limits of private property.[324]

Proportionality, as any other technique, seems to be perfected through practice. In Chile, starting in 2006 the Constitutional Court applied an embryonic version of proportionality analysis. By 2009, decision No 1345 included a more complete proportionality analysis in a case where the claimant was required to pay a fine in order to be able to appeal against the imposition of that same fine. The administrative rule known as "solve et repete" required the prospective appellant to first deposit the total amount of the fine. The Constitutional Court considered whether the limitation of the

[324] BVerf GE 50, 290 at 331 (1979) [Codetermination Case]. Excerpts in English in Donald Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany,* 2nd edition (Durham, Nc, Duke University Press, 1977).

right to due process was justified in order to avoid the so-called "frivolous litigation" that merely sought to avoid the payment of the fine imposed for a period of time. The aim was considered legitimate, but the Court elaborated upon an argument about the lack of a rational connection between the means used (the mandatory payment of the amount of the fine before a claim can be presented before the regular judiciary) and the goal to be achieved (to avoid frivolous litigation). Finally, the Court discussed the existence of less restrictive means (like the admissibility examination or the requirement of paying the expenses of the litigation) in order to obtain the same aim and avoid frivolous litigation. Consequently, without proceeding to the "proportionality stricto senso" step, the Court declared the statutory provision disproportionate and, therefore, unconstitutional.[325]

Proportionality "stricto senso"

This sub-test requires a proper relationship between the means and the goals of the statute. This step is called proportionality in a narrow sense or proportionality *"stricto senso"*. It is focused on balancing the factual limitation of the human right and the attainment of the statute's objective. Rather than being a comparison, it weighs the impact upon the individual if the infringements are effective against the impact upon the social interest if the measure is not adopted.

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[325] Decision No 1345, issued on May 25th, 2009, paras. 13-15

Dieter Grimm, a former judge of the German Constitutional Court, defends the central role of the third sub-test arguing that this gives full effect to fundamental rights and ensures care as to what is allocated to each side of the scale. It is logical to assume that a comparison is required between the advantages and disadvantages of the objectives pursued and the limitations placed upon particular constitutional rights. Grimm describes this step as being a comparison between the losses to the infringed right if the law is upheld and the losses to the value protected by the law if the fundamental right prevails. The analysis is a contextual one and can therefore, provoke accusations that judges are behaving like "policy makers".[326]

In Spain this sub-test is applied in phases.[327] In the first phase, the colliding principles are identified. The second phase sees each principle involved attributed a specific weight, in accordance with the specific factual situation of the case. In this phase it would be necessary to distinguish the degree to which the principle has been protected and how the measure will affect it. It is also possible to weigh the difference between alternative measures and the degree to which they infringe the principle. The third phase focuses upon the resulting decision of the weighing process. This occurs under the premise that the higher the limitation upon the right, the higher the social goal to be

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[326] Dieter Grimm, "Proportionality in Canadian and German Constitutional Jurisprudence", at 393-94

[327] See Rodríguez de Santiago, J M., *La ponderación de bienes e intereses en el Derecho Administrativo,* (Madrid: Marcial Pons Librero Editor, 2000)

pursued should be. The latter is also the way in which the Spanish Constitutional Court has presented the use of the third sub-test.[328]

The Chilean Constitutional Court seems to be unaware of the existence of this step of proportionality analysis, although it would certainly add transparency to their reasoning. Methodologically, as Alexy explains, the rule is constructed as a "law of balancing" and what is finally necessary to apply is the "weight formula".[329]

4.4. LIMITS AND CRITIQUES OF PROPORTIONALITY ANALYSIS

The debate about the rational structure of proportionality analysis

In order to demonstrate the rationality of balancing we first need to address the ambiguity of the terminology. From a theoretical perspective, rationality means that it should be free of all contradiction. At a practical level, theories of legal reasoning do not necessarily agree on the conditions that need to be met for an act to pass the rationality threshold. The consensus appears to be that the act should be justifiable in the law, with the justification conceptually clear and using consistent terms. Another requirement would be that the decision must have normative consistency; this occurs when the court adopts the same decision in cases concerning the same set of facts with any difference in the

[328] Decision issued by the Spanish Constitutional Court STC 76/1995.
[329] Robert Alexy, *A Theory of Constitutional Rights*, at 102.

decision being justified.[330] Coherence is also considered an objective.[331]

Proportionality analysis is based on a theory that regards constitutional rights as principles. Consequently, initial objections address the distinction between principles and rules. A first objection is that the difference between principles and rules is an artificial one, as there are only norms that will simply differ in the way they are used. Alexy's response is that the consideration of all the actual and normative circumstances of a norm is not the same when it is considered to be a principle. The idea of optimization requires that "one must be able to adhere to the norm to a greater or lesser exten"[332] with a principle being neither violated nor partially or totally rendered invalid once it is subjected to a balancing exercise.

Robert Alexy's major claim is that the normative force of proportionality analysis is based upon it being a rational mechanism of balancing. On the flip-side, the rationality (or lack of it) is the main concern of critics like Jürgen Habermas. Rationality is understood by these critics in terms of achieving internal consistency. Jürgen Habermas points out that to fulfill the legitimacy of the law, the court ruling must simultaneously satisfy the conditions of consistent decision-making and rational acceptability.[333] The

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[330] See especially Robert Alexy, *A Theory of Legal Argumentation The Theory of Rational Discourse as Theory of Legal Justification* (Oxford University Press, 1989)
[331] Robert Alexy & Alexander Peczenik, "The Concept of Coherence and its Significance for Discursive Rationality", Ratio Juris 1, 1990, at 115
[332] Robert Alexy, "On the Structure of Legal Principles" (2000) 13 3 Ratio Juris, 294-304, at 299
[333] Jurgen Habermas, *Between Facts and Norms* (Cambridge: MIT Press, 1996), at 198

objection to the principle construction developed by Habermas contests whether balancing is properly seen as rational argumentation (argumentation–theoretic objections) and whether the principle construction counts as a danger to constitutional rights, eliminating as it does their strict validity as rules (doctrinal objections). Habermas is fearful that principles conceptualized as optimization requirements could lead to arbitrary restrictions in favour of the collective good such as "the functional capacity of the armed forces or the judicial system."[334] Bernhard Schlink expresses similar concerns by claiming that balancing in the end boils down to subjective evaluations, although he departs from the dynamics of constitutional adjudication defended by Habermas.[335]

The problem of incommensurability is one of the most common bases for criticism of balancing. Aleinikoff describes this challenge as the difficulty in identifying a common currency that allows balancing between constitutional principles that are qualitatively different.[336] Alexy's response is that the issue at stake in proportionality analysis is not "direct comparability". What is at stake is the existence of elements that allow a comparison, as proportionality assesses each principle in comparison with the ideal for that legal order. Therefore, the relevant question considers the seriousness of and harm caused by the infringement of each principle in respect to the core essence of that

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[334] Jürgen Habermas, *Between Facts and Norms*, at 259.
[335] Bernhard Schlink, Der Grundsatz der Verhälnismässigkeit, in *Festschrift 50 Jahren Bunderverfassungsgericht,* edited by Badura, Peter and Dreier, Horst (Tübingen: Mohr Siebeck, 2001), at 460.
[336] Alexander Aleinikoff, Constitutional Law in the Age of Balancing, at 973.

right in that particular constitutional setting. For Alexy the common point of view to solve the collision between rights is provided by the constitution.[337]

For Bernal Pulido, talking about the Spanish constitutional order there is a way to overcome the incommensurability objection. Pulido observes that one of the critiques against proportionality is that it cannot sustain any constitutional reference point. One way of giving such a reference would be to construct a certain hierarchy of rights and its scope of protection in order to shorten the inquiry about which rights should prevail in the case of a collision. Such a move would be another way in which the strict scrutiny test applied as rights adjudication mechanism in the U.S. would become closer to proportionality analysis.

Another critique refers to a lack of conceptual clarity in proportionality. It is argued that proportionality is only a formal structure and so the judge's subjective preferences will determine what is considered proportional or not. Some authors are reluctant to accept the assumption that a common metric in the weighing process is possible, in Tsakyrakis' opinion this is only possible if we adopt a utilitarian perspective and reject altogether the "myth" of mathematical precision.[338] If we need to compare the respective weights of different rights, what can be done is in opinion of authors like Jeremy Waldrom is call "weak incommensurability" which entails acknowledging the

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[337] Robert Alexy, *A Theory of Constitutional Rights,* at 442.
[338] Stavros Tsakyrakis, Stavros, "Proportionality an assault on human rights?", at 473.

non existence of a common metric for balancing allowing nevertheless bring values into relation with each other.[339]

The lack of predictability in balancing is based upon the idea that proportionality is a case-by-case mechanism. The critique is that the justice of a single case attracts more attention than the generality of the law. The principle of proportionality, by means of limiting a constitutional right based on a comparison between aims and means, is always a prognosis. Therefore, by applying the proportionality principle, a constitutional court must make a decision with the information and particular situations at that time. This can be considered a strength, and not necessarily a weakness, of proportionality as a rights adjudication mechanism.[340]

According to Mattias Kumm, proportionality in its narrow sense (previously discussed as the last sub-test of proportionality analysis) pays insufficient attention to deontological constraints.[341] Alexy's response is that the law of balancing is not valueless; it is based upon degrees of infringement and the importance of those principles at stake. Kumm claims that some features of proportionality analysis do not sit easily with the idea

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[339] See Jeremy Waldron, "Fake incommensurability: A response to Professor Schauer" (1994) Hastings Law Journal, 813

[340] Decision issued by the Spanish Constitutional Court STC 126/2000

[341] Mattias Kumm, "What do you have in virtue of having a constitutional right? On the Place and Limits of the Proportionality Requirement" (2006) NYU Public Law & Legal theory Research Paper Series, Working paper NO. 06-41, at 27.

that reasons justifying infringements of rights must be of a special strength.[342] He calls these "excluded reasons" and explains that they are part of the characteristic of rights from an anti-perfectionist perspective. Within "political liberalism", paternalistic impositions are excluded but, beyond that, there are a set of traditions, conventions and preferences that are not considered plausible and, therefore, are not discussed.[343] The argument is that a consequentialist structure of rights is unable to reflect the deontological nature of, at least, some rights. In Kumm's opinion, the task for the judge is to identify those situations in which there are relevant deontological constraints in comparison to those situations where there are not.

In consideration of the Canadian approach, Sujit Choudhry observes a general problem concerning the lack of complete knowledge in public policy matters when judges are confronted with constitutional challenges. The Supreme Court of Canada was presented with a dilemma in *R. v. Oakes,* given that many issues represented a factual dispute about the nature of social problems. For Choudhry the question would be "who should bear the risk of empirical uncertainty with respect to government activity that infringes Charter rights?"[344] One option is to require government to bear the risk of empirical uncertainty with another option being that the court should rely on the

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[342] Mattias Kumm, "What do you have in virtue of having a constitutional right? On the Place and Limits of the Proportionality Requirement", at 40

[343] See especially John Rawls, *Political Liberalism Expanded Edition* (New Cork. Columbia University Press, c 2005)

[344] Sujit Choudhry," So What is the Real Legacy of *Oakes*?, at 524.

government's assessment as the risk-bearer. The Supreme Court of Canada struck a compromise. If social science is not conclusive, the requirement is a "reasonable basis" for the government. As Choudhry points out, an absolute lack of evidence is unacceptable.[345] Particular difficulties are presented by those tests that suppose an empirical evaluation of the state act, such as a sub-test of suitability and necessity. For example, the "least restrictive means" prong can be understood from a pareto-optimality perspective. It requires that the aims of the state act are pursued in a way which secures the maximum benefit at the minimum cost. The legislature, in the case of a statute, should choose the "least restrictive means". The concern raised from this perspective is in the maneuverability of the legislature.

Another objection against proportionality analysis is that the case-by-case focus ends up creating an ad-hoc jurisprudence that places too much emphasis on the concrete case and sacrifices the certainty, coherence and generality of the law. This concern can be addressed through the citation of procedural rules that allow an "objective reference" to be established for judges. The objective reference refers to the predictable outcome if the factual circumstances are alike and the proportionality framework is the same the outcome should be foreseeable. Unless there is a new understanding of the socially

[345] Sujit Choudhry," So What is the Real Legacy of *Oakes*?, at 525.

accepted norm under the form of constitutional right under examination and therefore the outcome changes.

Critical approaches to the adoption of proportionality analysis in Spain

According to the Spanish scholar Jimenez Campo,[346] the limitation of fundamental rights by the legislature must respect the core content of each fundamental right but it need not be subject to the proportionality principle. The use of this principle in the penal field has attracted notable criticism. It is argued that the proportionality principle cannot modify the traditional separation between the branches of government. Although a potential danger is recognised if the judges of the Constitutional Court were to make their decisions based upon arbitrary or personal parameters, this author believes that this argument is not difficult to maintain as the legal community nor public opinion would be satisfied with the actions of judges arising from unfair or arbitrary powers. The legislature and the people would not allow behaviour with such abusive characteristics.

The Spanish author José María Rodríguez de Santiago[347] repeats some of the most well known critiques of judicial activism as creating inappropriate constraints on the legislative function. However, he recognizes that the most important role rests with the

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[346] Jimenez de Campo, J., *Derechos Fundamentales. Concepto y garantías* (Madrid: Editorial Trotta, 1999)

[347] Rodríguez, J. M., 'El Art.24.1 CE como "norma de conducta" para jueces y tribunales y "norma de control" para el Tribunal Constitucional' (2005) 25 Nº 74; REDC, pp.261-278

constitutional judge, and proportionality is just a tool that could provide more visibility of the argumentation of the constitutional judge if well used. The author based his arguments on s. 24 of the Spanish Constitution that specifies the role expected from judges.[348]

Critical approaches to the adoption of proportionality analysis in Chile

There is a growing scholarship on proportionality analysis in Chile. The first book on proportionality analysis published in 2010 in Chile, contains one chapter written by Humberto Nogueira with a descriptive evolution of the mechanism in Chile.[349] Eduardo Aldunate, however, argues that the use of proportionality analysis so far lacks coherence. For him the problem is the gap between what the principle of proportionality theoretically proposes as a method of rights adjudication, and the restraint shown so far by the Constitutional Court.[350] One of the appealing features of proportionality analysis is that the judges' decision-making process is made more visible so that others can evaluate judicial performance. If the court comes to scrutinize legislative reasons for the limitation

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[348] 1978 Spanish Constitution S 24 1 "All persons have the right to obtain effective protection from the judges and the courts in the exercise of their rights and legitimate interests, and in no case may there be a lack of defense "

[349] Humberto Nogueira, "El Principio de Proporcionalidad y su aplicación en Sudamerica por la Jurisdicción Constitucional, con especial mencion al Tribunal Constitucional Chileno" in Miguel Carbonell, ed , *El Principio de Proporcionalidad en la Interpretación Jurídica* (Santiago, UNAM & CECOCH, 2010)

[350] Eduardo Aldunate, *Derechos Fundamentales*, at 267

upon a constitutional right it will need to abandon the notion that constitutional judges cannot offer opinions with regards to legislative outcomes. To a degree, they have already begun this process. The existence of dissenting opinions in almost every judgment of the Constitutional Court since 2006 demonstrates how the definition, content and scope of the protection of rights are contested and require revision.

CONCLUSION: A PROPORTIONALITY ANALYSIS FRAMEWORK FOR CHILE

The potential for proportionality analysis to open up a conversation about disagreements on rights at the Chilean Constitutional Court is promising. It could be a way to try to improve a culture of "judicial restraint". Grégoire Webber's critique of proportionality seems to imply that the legislature is the best institution to carry on the "rights disagreements" conversation.[351] Although in theory I agree that the legislative role is relevant and I accept the need to be open to contestation, revision and amendments of the catalogue of rights and freedoms, in Chile this has traditionally entailed an "elite bargaining" model. As was discussed in Chapter One, the 1980 Constitutional has been amended 28 times, once through a referendum and 27 times by constitutional amendments approved by the National Congress. All of this occurred without any meaningful debate about constitutional rights and their interpretation and enforcement.

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[351] Grégoire Webber, *The Negotiable Constitution On the Limitation of Rights* (Cambridge: Cambridge University Press, 2009), at 215

Contextual factors represented by a culture of judicial restraint, a highly formalistic and legalistic legal culture, 17 years of authoritarian regime which imposed a new Constitution require the Constitutional Court to adopt a "living tree" principle and to play a more active role in defining and enforcing the catalogue of rights and freedoms.

I chose David Beatty's account as one approach to proportionality analysis to discuss here, based on his relevance showing how several jurisdictions adopted the proportionality principle as the mechanism to solve collisions between constitutional rights and collective interests. Nevertheless, I would like to underline two aspects where I part ways with David Beatty.

Firstly, Beatty's approach to facts as impartial and objective is highly problematic in the Chilean context (as in any other jurisdiction). The main reason is that the Chilean legal system has trouble acknowledging the exercise of judicial discretion (as was explained in Chapter Two). The advantage of proportionality is that judges need to give reasons and in doing so their reasoning is made more transparent. It is important to note, following Kim Lane Scheppele, that the discretion judges enjoy not only involves the interpretation of legal norms, but entails the construction of an interpretation of facts.[352]

Secondly, Beatty advances the idea that "judges have no say on the worth of what is

[352] Kim Lane Scheppele, "Manners of managing the real" (Autumn 1994) 19:4 Law & Society Inquiry, at 995.

put on each side of the balance".[353] I am inclined to the view that judges do adopt a substantive theory of the constitution and that this substantive theory will play a role in the weight given to principles and values. This is part of the discretion given to judges. In the proportionality framework, by examining the principles of public interests at stake the judge will be required to weight them and that necessarily implies the adoption of a substantive theory. I believe that courts, by applying proportionality analysis, are engaged in substantive value choices. Discretion is about making choices; these choices should be guided by the principles that hold currency in a given society. By that I mean that socially accepted norms under the form of constitutional rights need to remain open to new interpretations of even departure from previous understandings. Having always in mind that judges' interpretative function is limited and incorporation of new principles or the decision of considering one principle dated is not court-driven as already discussed. Obviously, this is the great challenge judges are confronted with, but I do not see how an allegedly factual interpretation of proportionality can avoid this.

I think Robert Alexy's theory of constitutional rights as principles and rules, coupled with the structured analysis of a three-pronged test (suitability, necessity and proportionality stricto senso) could discipline rights adjudication in Chile. By this I mean that the existence of a clear step by step methodology that allows one to follow the

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[353] David Beatty, *The Ultimate Rule of Law*, at 45.

judges' reasoning, could potentially help the transparency of judgments. Besides it could train judges and guide them through the rights adjudication process. Being able to evaluate a proportionality formula adequate to the particularities of the Chilean legal context could be a further step for the Court. For now, I think the requirement is to fully apply the proportionality framework in order to allow an evaluation of rights adjudication with this methodology.

This move could also help to acknowledge the migration of proportionality analysis from Spain and thereby allow for a better comparative constitutional law scheme. The ways in which the Chilean Constitutional Court would benefit from a comparative law scheme with Spain will be discussed in Chapter Five. I offer in Chapter Six a case study of leading cases decided between 2006-2010 by the Chilean Constitutional Court through an embryonic proportionality analysis framework.

With respect to the reasons for adopting proportionality as a method of rights adjudication, one major benefit is the potential to structure the discretionary power of political representatives. It may also facilitate better public engagement with judicial arguments and improve judicial independence by rendering the decision more structured, open and transparent. The focus on a case–by-case analysis allows a public conversation about the concept, structure and normative force of fundamental rights and the way in which two or more rights compete and collide.

CHAPTER 5.

PROPORTIONALITY ANALYSIS THROUGH THE LENS OF COMPARATIVE LAW: SPAIN AS THE REFERENCE POINT FOR CHILE

In general terms the inquiry of law, as a theoretical enterprise, is not constrained by geographical boundaries. Law as a complex normative system has universal aspects and other aspects that are particular. When scholars wish to understand legal phenomena they normally examine legal materials beyond their national framework. Comparison is a fundamental tool of scholarly analysis that allows commonalities and differences to come into focus. This dissertation, for example, is based on legal materials and conceptual frameworks mostly written in English for a Northern audience (i.e. Canada, US and Germany), which are used to shed light on the Chilean legal order. However, this does not necessarily mean that any theoretical inquiry into law is or need be a universal inquiry or have its result be applicable everywhere.

When judges are asked to decide a case before them, numerous questions will appear in relation to the levels of abstraction and the legal norms at stake; several questions might also be asked about the relevance and role that foreign law could play. Initially, it is helpful to underline that foreign law is not binding. The force of

comparative law, as a methodology, is based on the persuasive power of the arguments and what can be learned from them. Comparative law includes the use of foreign legislation, doctrine or case law and it is considered part of an interpretative methodology. Aharon Barak refers to his own experience as a judge:

> [F]or me comparative law acts as an experienced friend. It makes me think better, it awakens in me the potential latent in my own system it expands my thinking about possible arguments, legal trends and available decision-making structures. For me, comparative law serves as a mirror.[354]

Courts in various countries have taken different views about the use of foreign law. On one end of the spectrum the United States Supreme Court has rejected the use of foreign precedents and, some say, is even "hostile" to foreign case law.[355] On the other end of the spectrum some courts, like the South African Constitutional Court, are invited by their own constitutional text to solve cases helped by foreign case law.[356] The Chilean Constitutional Court displays an uncomfortable double standard on the matter. The Court

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[354] Aharon Barak, "Comparative Law, Originalism and the Role of a Judge in a Democracy A reply to Justice Scalia", (Keynote address presented at the Fulbright Israel's 50th Convention January 29, 2006), online. < http //www aharonbarak com/c3455-lectures-speeches>

[355] See *Lawrence v Texas*, 539 U S 588 (2003) and, *Roper v Simmons*, 543 U S 551 (2005)

[356] 1986 South African Constitution section 39 Interpretation of Bill of Rights
(1) When interpreting the Bill of Rights, a court, tribunal or forum (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom, (b) must consider international law, and (c) may consider foreign law
(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights
(3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill

does not accept explicitly the influence of foreign case law, nor has it established a method for its use, but implicitly most of the arguments used in solving constitutional cases are based or have features in common with foreign law. Furthermore, this "loose" use of foreign law lives uncomfortably with the interpretative "originalist" methodology that continues to influence the Court.

This chapter aims to reflect on a framework for the use of foreign law in Chile. In previous chapters, I have discussed the use of proportionality analysis in several jurisdictions. I am aware that the adoption of proportionality analysis as an interpretative tool faces challenges posed by the constitutional migration to different social, cultural and poltical contexts. Because proportionality analysis is a methodology that was created and developed in Germany after World War II and migrated to Spain in the '80s, its use in Chile has to be understood in comparative terms. The problem is that the Constitutional Court's comparative analysis has thus far been confined to loose references or to a simplistic "cut and paste" exercise that lacks theoretical grounding. This framework prevents proportionality analysis from becoming a meaningful part of the argumentation of the case. The problem with the way in which judges are exercising the power of comparative inquiry is not that the judges choose to refer to foreign law, but rather the lack of explanations or reasoning behind the court's choices.

5.1. COMPARATIVE CONSTITUTIONAL CASE LAW AS A METHOD

Constitutional law is highly complex because it is composed not only of normative elements but also the historical, political, social, economic and cultural aspects of a certain polity. Nevertheless, even in constitutional law some aspects remain universal and some are specific to the political entity in question. To decide which aspects specific to the country we need to ask about the level of abstraction of the decision at stake.

Proportionality analysis does not prescribe any legitimate means "per se". Its application is always with respect to a particular aim in a real situation. Only then can it be determined whether or not the limitation applied to a particular constitutional right through a statute is proportionate. Proportionality as a balancing mechanism is, in my view, an invitation for judges to discuss fundamental socially accepted norms reflected in the constitution. As previously stated, this allows an understanding of the Constitution as the normative and structural premise of a political order and allows as well a decision on the helpfulness of the use of foreign law to solve the case at stake. Proportionality, as an interpretative technique, provides a mechanism to examine the means used to achieve a certain societal goal. It provides a structural path to the use of rational judicial discretion; it does not withdraw judicial discretion.

The use of foreign law through a comparative methodology has become "trendy" among constitutional courts worldwide looking for ideas to address problems in their

jurisdiction. Anne-Marie Slaughter identified this inter-court borrowing as the establishment of a globalized judicial discourse.[357] This inter-court borrowing can be "positive borrowing" that uses foreign concepts to incorporate the foreign examples to the local constitutional jurisprudence. Or it can be "negative borrowing" were the objective of the comparison is to allows distinction and contrast between constitutional orders in order to justify the option adopted by the court locally.[358]

Hirschl's main point is that comparative constitutional law scholars aren't methodologically rigorous enough in selecting their cases for comparison.[359] He suggests that they learn from political scientists who have a more developed understanding of comparative studies. Although he is not talking about how judges ought or ought not to engage in comparative reasoning I do think that comparative scholarship and judicial reasoning have commonalities that can be helpful in understanding the challenge of using the comparative law methodology. Hirschl criticizes these comparative endeavours in constitutional scholarship for lacking methodological coherence and being:

> [A]n eclectic, at times even scant and superficial, reference to foreign constitutional jurisprudence – typically rights jurisprudence. Case selection is seldom systematic, and it rarely pays due attention to the context and nuances that have give rise to similar or alternative interpretation or practice of constitutional

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[357] See Anne-Marie Slaughter, A Typologie of Transjudicial Communities, (1994) 29 U Rich L Rev , at 99

[358] Kim Lane Scheppele, "Aspirational and Aversive Constitutionalism The Case for Studying Cross-Constitutional Influence through Negative Models" (2003) 1 2 Int'l J Const L (I CON), pp 296-324

[359] Ran Hirschl, "The Question of Case Selection in Comparative Constitutional Law" (2005) Vol LIII 1, The American Journal of Comparative Law, 125 –156

norms.[360]

Although judges are obviously not social scientists the problem associated with case selection by courts worldwide and the Chilean Constitutional Court in particular, can be associated with this lack of explanation as to why those materials are relevant for the actual case being decided.

The link between constitutional interpretation and the use of foreign law

The constitutional interpretative system adopted in a country is normally established by the judges themselves and is not written in the text of the constitution. There are some interpretative systems that are better suited for the use of foreign law than others. As discussed in Chapter Two, the Constitutional Court in Chile tends to interpret the text of the 1980 Constitution according to what they understand as "the intent of the framers". The drafting process of the 1980 Constitution was formally in the hands of the Military Junta, although in reality different experts commissions throughout seven years wrote the text. Consequently, getting to know the "intent of the framers" is a really difficult task in the Chilean case. The 1980 Constitution was drafted under an authoritarian regime, hostile to foreign influence mainly due to protests of the international community against

[360] Ran Hirschl, "The Question of Case Selection in Comparative Constitutional Law" (2005) Vol. LIII:1, The American Journal of Comparative Law, 125, at 128-29.

the massive human rights violations perpetrated by the regime.[361] The law used during the time of the dictatorship, and still influential today, rejects the idea that a text evolves with society - the idea that the constitution is a "living tree". This is relevant because it shows a contradiction in the Court's use of an "originalist" interpretative system today, while referring often to foreign law in its decisions.

The model of interpretation proposed as potentially adequate for the Chilean Constitutional Court in Chapter Two considers objective (values of the legal system) and subjective elements (intent of the text's author which in the Chilean case is based on 28 democratic constitutional amendments since 1990). In this interpretative method, comparative constitutional law could be used to determine the scope of protection of human rights. Section 1 of the Canadian *Charter* explicitly invites a reflection on the practices of other free and democratic societies and Chile could do the same, utilizing section 4 of the 1980 Constitution. The scope of both principles could be interpreted through comparative law as a method and Canada and Chile could search for inspiration from each other. Of course, the decision to do so is subject to methodological concerns

[361] Perhaps the clearest example of the rejection of foreign influence during Pinochet's regime is the referendum promoted in January 1978 one week after the UN General Assembly resolution condemning human rights violations in Chile Chile was under a state of siege, there were no electoral registers and no freedom of expression The question voters needed to answer was drafted in a very prejudicial way "Due to the international aggression against our native land do I support President Pinochet in his defence of Chilean dignity and do I endorse the legitimacy of the government " At the referendum voters had two options to vote "yes" , drawn next to a Chilean flag or "no", drawn next to a black square Not surprisingly, due to the short notice and the political conditions under which the referendum was held, 75% voted in favour and 20% against Pinochet used these results to legitimate his authoritarian regime

that I will develop subsequently.

In an originalist mode of interpretation that rejects foreign law, the role of the judge is a formalistic one. Judges do not create a new understanding of law with their interpretation and therefore it is not relevant to look for inspiration in foreign law. However, judges who see a more vibrant role in understanding the law will see the value of considering law from other jurisdictions.

5.2. Spain as the reference point for Chile: commonalities and differences

This section looks at proportionality analysis in Spain and in Chile to show that the use of Spain as a reference point presents some particular challenges. The commonalities are obvious: Spanish as a common language, a common historical past where Chile was a colony of Spain from 1541 until 1810, a very similar legal system in the origins and authoritarian political regimes during the twentieth century with Franco in Spain and Pinochet and Chile. The Constitutions are very close in time as well: Spain's 1978 Constitution and Chile's 1980 Constitution. Nevertheless, in an analysis of rights adjudication, proportionality technique and the democratic role of the Constitutional Court, the differences between the countries become very relevant. In the next paragraphs, I rely on some information discussed previously but my aim here is to put those developments in comparative perspective.

Judicial empowerment

Here, I would like to show the differences between Chile and Spain with respect to judicial empowerment. My argument draws in particular on Lisa Hilbink who has argued that in Spain the codification of rights and the empowerment of the Constitutional Court contained in the 1978 Constitution responds to "a genuine democratic will, with a strong desire for an European integration and the break with the authoritarian past."[362] On the contrary, for Hilbink, the decision of the elites in power during the military regime in Chile "to go judicial was a logical move in the regime's bid for legitimacy."[363]

The Spanish Constitution of 1978 is the result of the political transition from an autocratic regime, which had governed since 1937, to a fully democratic political system between 1975 and 1978. It demonstrates the potential for a radical transformation to occur through a smooth and peaceful process. The desire expressed in the preamble was to create a Constitution that articulates the values of "justice, liberty and security" by guaranteeing a democratic state based on law that is an expression of popular will. Drafting a Constitution to guarantee these values was part of the eventual transition to democracy in Spain. The transition began under Franco's dictatorship with the redesign of institutions. The new design included the restoration of the monarchy with Juan Carlos de Bourbon being appointed as King of Spain. The seven drafters of the 1978

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[362] Lisa Hilbink, "The Constituted Nature of Constituents Interests", at 787.
[363] Lisa Hilbink, "The Constituted Nature of Constituents Interests", at 791.

Constitution that brought about this redesign consisted of members of the main political parties and a leader of the nationalist movements. The constitution was then passed in the two chambers of Parliament with only 6 of the 350 members voting against it. It was, thereafter, submitted to public referendum in December 1978. A particular feature of the Constitution is that it was both a product of, and an instrument for, this political transition.[364] It has been argued that the way in which the entitlements and constraints of the actors involved in the process were balanced is the basic element by which to understand how this transition was able to occur.[365]

The Constitutional Court, created by the Constitution to defend the Constitution,[366] was established by the King on the 12th July 1980 and began functioning on the 15th July 1980.[367] The Spanish Constitutional Court is considered as the supreme interpreter of the constitution. It is an independent organ outside the judiciary and its activities are ruled by the 1978 Constitution and the Court's own organizational law.[368]

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[364] Geoffrey Brennan and José Casas Pardo, "A reading of the Spanish Constitution (1978)" (1991) 2 1, Constitutional Political Economy, at 53

[365] José Casas Pardo, "The Spanish transition to democracy a public choice approach," paper presented at the Annual Meeting of the European Public Choice Society, Turku University, Finland, 20th – 23 of April, 2006 For Pardo the actors were Franco himself, the government, the army, the National Movement party, the parliament, the Council of the Realm, the Catholic church, the judiciary, the Vertical Trade union, the bureaucracy, the illegal political parties, the Nationalist movements and their political representatives and special interests groups like the entrepreneurs, the mass-media and the foreign powers

[366] PART IX The Constitutional Court S 159 - 165

[367] Constitutional Court website <http //www tribunalconstitucional es/tribunal/constitu html>

[368] Organic law of the constitutional court, law 2/1979, 3rd of October 1979 (BOE 5 10,23186)

This is a very different from the Chilean story of judicial empowerment. As I indicated in Chapter One the 1980 Constitution was accepted as illegitimate in origin but open to a process of legitimation through its application, amendments and interpretation. This is a main difference with the 1978 Spanish Constitution that was adopted under democratic rule. As explained in Chapter Two, the judicial empowerment of the Constitutional Court in Chile responded to an ideal of a "technical" institution responsible for protecting the institutional framework created by the authoritarian regime. The "democratic makeover" of the Chilean Constitutional Court through a constitutional amendment and its role as interpreter of the 1980 Constitution started only in 2005. Nowadays, the situation and role of the Spanish Constitutional Court and the Chilean Constitutional Court could potentially be more similar, but it is relevant to acknowledge the differences in the past. The Chilean Constitutional Court needs to be aware, of this different political-institutional context when comparing decisions adopted by the Spanish Constitutional Court in order to decide cases before the Chilean Constitutional Court.

The justiciable rights and freedoms

Another area of difference relates to justiciable rights. The preamble of the 1978 Spanish Constitution, sets out its objective to "protect all Spaniards and peoples of Spain in the

exercise of human rights".[369] The Constitutional Court has adopted a restrictive interpretation of the constitutional rights and duties under section 1, deciding that only sections 14 to 29 contain the so-called fundamental rights. The Constitutional Court argues that a right is fundamental when it possesses more intensive jurisdictional protection. Other rights, such as social rights, are called constitutional rights as they are not considered justiciable and, therefore, lack normative force. Consequently, social rights are not considered fundamental rights. This has raised numerous critiques. While Joaquin Brage believes that a fundamental right should receive more intensive protection by the jurisdictional system, he considers Spain constitutional order and in particular the jurisprudence of the Constitutional Court as a failure by not including important rights as fundamental rights contrary to the European Convention on Human Rights.[370] He proposes that fundamental rights should be those detailed in articles 14-38 of the Constitution.

The Spanish Constitutional Court has also rejected the argument that the Constitution could not have envisaged, nor incorporated, all emerging fundamental rights.[371] No provisions were established by the Spanish drafters, to allow for the

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[369] Spanish constitution, 27th of December, 1978. Official English version online: <http.//www tribunalconstitucional.es/constitucion/laconstitucion.html>

[370] Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222, entered into force Sept. 3, 1953, as amended by Protocols No 3, 5, 8, and 11 which entered into force on 21 September 1970, 20 December 1971, 1 January 1990, and 1 November 1998 respectively.

[371] Decision issued by the Spanish Constitutional Court STC 184/1990.

incorporation of new rights within the Constitution, particularly as society's needs changed and developed.

Cruz Villalon argues that section 10.1 of the 1978 Constitution could be regarded as a source by which new fundamental rights can be incorporated:

> [T]he dignity of the person, the inviolable rights which are inherent, the free development of the personality, the respect for the law and for the rights of others, are the foundation of political order and social peace.

As its principal characteristic, human dignity is inviolable, inherent and the final objective. Section 10.1 also provides for the free development of the human personality. In Brage's opinion, the Universal Declaration of Human Rights[372] and the international human rights treaties ratified by Spain will guide this development.

In Chile, as it has been already discussed in Chapter Two and Three, the Constitutional Court has vacillated between a construction of a hierarchy of justiciable rights and a view that some rights are absolute and therefore not subject to limitations. The Court has avoided a clear statement of the rights and freedoms considered as principles of the Chilean legal order. There is also a lack of coherence between what the Court claims to be the original will of the framers and the way in which these original principles could be changed over time. One concrete example is the claim advanced by

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[372] Universal Declaration of Human Rights adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948.

the Court that the Chilean constitutional framework is based on human dignity. This is a problematic assertion under the present circumstances. Authors like Eduardo Aldunate criticizes how the frequent reference to human dignity by the Chilean Constitutional Court is not well founded on the text of the 1980 Constitution itself or in the drafting process of the text in which human dignity was treated at the same level as liberty and not as a source of the rest of the catalogue as argued.[373] Of course the role of human dignity as a principle of the constitutional order is something that could change over time, potentially enhancing the protection of constitutional rights in Chile, but the Court would need to give reasons for such a change.

One concrete example of the difference this entails between Chile and Spain is the protection awarded to private property rights. In Chile private property rights are core to the neo-liberal framework created by the 1980 Constitution and a relevant percent of the Court's jurisprudence is concerned with the property guarantee. In Spain the 1978 Constitution considers private property rights in section 33 as a non-fundamental right with less intensive jurisdictional protection.[374]

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[373] Eduardo Aldunate, *Derechos Fundamentales*, at 100.

[374] 1978 Constitution Section 33:

"(1) The right to private property and inheritance is recognized.
(2) The social function of these rights shall determine the limits of their content in accordance with the law.
(3) No one may be deprived of his or her property and rights, except on justified grounds of public utility or social interest and with a proper compensation in accordance with the law."

Influence of international and transnational bodies

Authors like Carlos Bernal provide an in-deep examination of the methods of interpretation used by the Spanish Constitutional Court.[375] The interpretative methods most frequently used have been the textual analysis of written norms, with a comparison between both the 1978 Constitution and the statute being examined, and the teleological method where what is seen is the relation between the factual situation and the aim of the constitutional norm.[376] Bernal emphasizes the increasing importance of international treaties on human rights and the interpretation made by international courts like the European Court of Human Rights.[377] The ECtHR uses proportionality analysis as rights adjudication mechanism.[378] As an example, there are a number of judgments where the Spanish Constitutional Court has relied upon previous interpretation of the ECtHR.[379]

This is a really important difference between Spain and Chile. Spain is part of the EU, a transnational organization with a quasi-constitutional framework and guidelines. Chile, on the other hand, is part of the Inter American System on Human Rights

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[375] See especially Carlos Bernal Pulido, "El principio de proporcionalidad y los derechos fundamentales" (Madrid Centro de Estudios Politicos y Constitucionales, 2007)

[376] Example of the textual analysis in the judgment STC 141/1988 and example of the teleological method in the judgments STC 5/1981 and STC 91/1983

[377] Hereafter referred to as ECtHR

[378] See especially Nicholas Emiliou, *The Principle of Proportionality in European Law A comparative Study* (London Kluwer Law International, 1996)

[379] Examples are the judgments STC 150/1991 and STC 57/1994

(IACHR).[380] It is not yet clear whether the Inter American Human Rights System (the Court and the Commission) will adopt the proportionality analysis or the US style levels of scrutiny approach.[381] This of course can have concrete effects for Chile. As an example in the application before the Inter-American Court of Human Rights in the case of Karen Atala and daughters (Case 12.502) against the state of Chile published on September 17, 2010 the Commission decided to use strict scrutiny test as a methodology and claim sexual orientation as a suspect category.[382] So the Chilean Constitutional Court would need to carefully acknowledge the influence of decisions of international bodies taking into account the methodology of rights adjudication used. As already stated in Chapter Four a further treatment of the differences and implications of proportionality analysis and strict scrutiny test is outside the scope of research of this dissertation.

Migration of proportionality analysis

The Spanish Constitutional Court declared that any limitation to a constitutional right must follow the proper methodology of the proportionality principle in judgments STC 55/1996 and STC 66/1995.[383] Both are cornerstones of the formal adoption of the

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[380] See Claudio Grossman, "The Inter-American System of Human Rights Challenges for the Future" (Fall 2008) 83 Indiana Law Journal, 1267

[381] Héctor Faúndez Ledesma, *The Inter-American System for the protection of Human Rights institutional and procedural aspects* (San José, Costa Rica Inter-American Institute of Human Rights, 2008)

[382] Case Karen Atala and daughetrs online <http://www.cidh.oas.org/demandas/12.502ENG.pdf>, at 23-26

[383] Decision issued by the Spanish Constitutional Court STC 186/2000

proportionality principle with reference to the limitation of fundamental rights through legislative measures. In these decisions, the Court laid out the proposition that proportionality does not evaluate a government's decision to legislate nor the quality of the legislative act. The only possible analysis is of the impact of the legislative act and the means used to achieve it. The legislature must consider all timely political options for the country.[384] By means of the principle of suitability, the analysis of a legitimate constitutional aim is a minimal and formal comparison between the aim of the legislative act and the constitutional order. Only in extreme cases will the measure be declared unconstitutional at this stage. With respect to the principle of necessity, the legislature must be afforded an ample margin of freedom as the legitimate representatives of popular sovereignty. [385] Therefore, the Constitutional Court recognizes only a limited competence to dictate the least drastic means. Finally, related with the principle of proportionality *stricto senso*, the Constitutional Court requires an evident and disproportionate imbalance between the aims of the legislative act and the measures adopted.

The Chilean Constitutional Court only partially incorporated the principle of proportionality as a criterion to resolve conflicts between competing constitutional rights and freedoms in 2006.[386] Humberto Nogueira points out that in most cases the Court only

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[384] Decision issued by the Spanish Constitutional Court STC 55/1996
[385] Decisions issued by the Spanish Constitutional Court TC 11/1981 and STC 332/1994
[386] Decision No 541, issued on December 26, 2006 used proportionality analysis for the first time.

uses the first steps of a proportionality framework requiring a legitimate purpose for the statute and the requirement of a relationship between the means and the aims. Rarely has the Court referred to the possibility of analyzing the existence of the least restrictive means that would achieve the same aim and the Court has not even used the proportionality "stricto senso" step.[387]

The differences between the Spanish Constitutional Court and the Chilean Constitutional Court result from their being at different stages in the development of the adjudication methodology. Spain has been using proportionality as an adjudication methodology under the form of a three-pronged test for 15 years. Chile has not yet used the full three-pronged test to adjudicate a rights-claim, and the Court has only partially used proportionality analysis in the last five years.

There are as well relevant differences in the way the Chilean Constitutional Court and the Spanish Constitutional Court understand and apply the steps of the proportionality analysis. The main differences have been already discussed in Chapter Four. The problems the court will face after accepting the migration of proportionality analysis and accepting Spain as the reference point are the commonalities and differences between both constitutional democracies and Constitutions. This is not a minor

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[387] Humberto Nogueira, "El Principio de Proporcionalidad y su aplicación en Sudamérica por la Jurisdicción Constitucional, con especial mención al Tribunal Constitucional Chileno" in Miguel Carbonell (ed), *El Principio de Proporcionalidad en la Interpretación Jurídica* (Santiago, UNAM & CECOCH, 2010) 353, at 403.

requirement because, depending on the results of a serious engagement in a comparative law exercise, the judge might decide that such a comparison is impossible due to the levels of development of the methodology or irreconcilable differences in the legal context, or just find the exercise of looking at foreign law unhelpful.

My here aim here was to show that any comparative endeavour, even a simple reference to foreign Spanish case, needs to take into account the differences between Spain and Chile.

5.3. THE [MIS] USE OF FOREIGN LAW BY THE CHILEAN CONSTITUTIONAL COURT

As of April 2011, close to a hundred cases decided by the Constitutional Court in Chile invoked proportionality analysis as a rights adjudication mechanism.[388] Although the Chilean Constitutional Court started using proportionality analysis in 2006, the Court has never formally acknowledged the adoption of proportionality analysis as a new rights adjudication mechanism, or proportionality as a principle of fundamental justice. The Court has not recognized proportionality as being taken from some other jurisdiction, which could potentially help to establish a parameter of migration. Neither has the Court recognised proportionality analysis as a methodology anchored in some internal principle like the rule of law.

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[388] Information requested through the automatic search engine of the Chilean Constitutional Court, available at: http://www tribunalconstitucional cl/index php/sentencias/busca_avanzado

Courts are increasingly using the decisions adopted by other courts as an authoritative source through "inter-court borrowing". Latin American Constitutional Courts are no exception. It is necessary to underline that the Chilean Constitutional Court does not explicitly accept the influence of foreign case law and the "originalist" interpretative method used by the Court rejects the use of foreign law. Nevertheless, Chilean judges often make reference to foreign law – jurisprudence of foreign tribunals, legislation of other national, international or transnational entities, and, doctrine of foreign authors– as part of the arguments given to base a decision. By far, the most frequent reference is to Spanish doctrine and the Spanish Constitutional Court judgments. I could praise the Court's openness to foreign law however, the way in which these materials are used is problematic. The Court simply refers to foreign authors without acknowledging the legal context they are writing about or a reference to how these materials are related to the case being decided in Chile. Through this superficial use of comparative law methodology, the Court makes it seem like the world is one enormous jurisdiction and that social, economic, historical and political factors are unimportant. The underlying assumption that law can be used without any reference to its legal context, might be another consequence of the view of "law as a scientific matter" and a revival of the "classical legal thought" period already discussed. I offer some concrete data as examples of the reference to foreign law by the Constitutional Court in Chile.

Table 1. Use of foreign law by the Chilean Constitutional Court (2006-2010)[389]

Decision/ year	Judgments	Legislation/ Treaties	Doctrine/ legal context[390]	Total
1 No 541/ 2006			- E Garcia (Spain)	1
2 No 546/ 2006	- Constitutional Court Italy (1961) - Constitutional Court Spain (1983) twice - Supreme Court Colombia (1987)	-Universal Declaration Human Rights (1948)	- E Garcia (Spain) - T Fernández (Spain) - R Dromi (Argentina)	8
3 No 825/ 2008	- BVerfGE 34, 238 (245) Germany		-H Jescheck (Germany) - H Heller (Germany) - R Alexy (Germany) - M Atienza (Spain) - U Di Favio (Germany) - H Kelsen (Austria) - L Ferrajoli (Italia)	8
4 No 976/ 2008			- F Laposta (Spain) - G Peces-Barba (Spain) - S Muñoz (Spain) - G Bidart (Argentina) - J Bilbao (Spain) - J Cascajo (Spain)	6
5 No 1254/ 2009	- STC 128/1987 (Spain) - STC (Spain) -STC 76/1990 (Spain) -STC 253/2004 (Spain) - Constitutional Court Colombia C-071/95 - Supreme Court Costa Rica Res 06420-98		-O Bachof (Germany) -L Favoreau (France) -T Fernández (Spain) - N Sagues (Argentina) - R Bielsa (Argentina) - M Gandhi (India) - E Couture (Uruguay) - F Carnelutti (Italia)	14
6 No 1345/ 2009	- Constitutional Court Italy (1961) - Constitutional Court Spain (1983)		- E Garcia (Spain) - T Fernandez (Spain)	4
7 No 1710/ 2010	- Federal Constitutional Court Germany - Supreme Court of United States	-UN Pact concerning economic, social and cultural rights	-E Carll Ladd (US) - F Koja (Austria) - L Luiz (Spain) - I Torres (UK)	34

[389] References includes majority decisions, concurrent votes and dissenting opinions

[390] Country references allude to either the nationality of the author or the legal context in which the work is situated In the case of authors of non-Spanish speaking countries, the references in the decisions are always made to translations published in Spain or Latin America

	case Marbury v Madison (1803) - STC 14/ 1991 (Spain) - Constitutional Court Spain - Federal Constitutional Court Germany, decision issued October 29, 1987	(1966) - EU communication c/04/350 (2004) - ILO Convention No 102 (1952)	- R Grote (Germany) - J Perez (Spain) - D Grimm (Germany) - L Ferrajoli (Italia) - R Alexy (Germany) twice - Aristotle (Greece) - C Zoco (Spain) - S Baer (Germany) - J Pemán (Spain) - J Santamaría (Spain) - E Garcia (Spain) twice - T Fernández (Spain) - V Ferreres (Spain) - I de Otto (Spain) - G Zagrebelsky (Italy) -D Kommers (Germany) - T Groppi (Europe) - J M Casal (Spain) - J Schwabe (Germany) - N Bobbio (Italy)	

I would like to give two examples taken from the case studies offered in Chapter Six and briefly refer to a case already presented in Chapter Three.

The first example shows the misuse of foreign law by the Court. The case is decision No 976 issued by the Constitutional Court on June 26, 2008. This is a leading case because it triggered a new understanding of the guarantee of the right to health care and, more specifically, the way in which the "private health care contracts" relate to the fundamental right. The comparative exercise in the Court's opinion is accomplished by a simple exercise of "cutting and pasting" foreign doctrines, without any further legal context. The Court goes as far as to implicitly consider the Chilean regime as a "social

democracy" understood as a model of democracy that rejects capitalism and communism and that requires an active even interventionist state that provides extensive social security assistance to the less privileged.[391] In Chapter Six I comment extensively on the social deficit of the welfare system drafted in the 1980 Constitution and, in particular, the social deficit of the private health care system and the enormous legislative efforts made after the return to a democracy in 1990 to address the inequality of the system. The problem is not that such an evolution is not a good thing or even a socially desired change in private health care, the real problem is that the declaration of Chile as a social democracy by the Court seems to be out of place. The most problematic issue here is that the Court seems to see in the framework of the 1980 Constitution elements, like a "social democratic" value, which could not have existed in 1980. A role of interpreter of the Constitution should not include filling gaps as already discussed in Chapter Three. The furthest the Court can go is to trigger a political debate, debate that is not court-driven.

The second example is case No 546 issued by the Chilean Constitutional Court on November 17, 2006. In this case Jacobo Kravetz claimed the unconstitutional limitation of his right to due process through Decree Law 3.538. In order to avoid frivolous litigation, the law stated that claims before a court of justice for fines imposed by Chilean Securities and Insurance Supervisor (SVS) required deposits of 25% of the total amount

[391] In para. 29.

of the fine. S. 30 of DL 3.538, the statute under constitutional scrutiny, originally drafted under the military regime in 1980, was modified by the National Congress in the year 2000 by statute 19.705 in order to regulate the public offer of stocks to protect minority shareholders. This mechanism used to ensure the seriousness of the claims against administrative fines is known as "solve et repete". I offer the translation of paragraph 11 of the Chilean Constitutional Court's judgment in case No 546 in order to show the concerns with the use of foreign law in this case.

> [O]bjections to the existence of an economic requirement as a condition to commence litigation has been also discussed before courts in Europe and America. The Italian Constitutional Court decided the existence of this objection in a judgment issued on March 1961. In Spain, ordinary courts decided in a similar vein cases in November 1985 and January 1969. Nevertheless, the Spanish Constitutional Court accepted the requirement of a previous consignment in order to be able to litigate in labour disputes using the principle of reasonableness and proportionality in order to protect the workers' rights in 1983. In tax law some legislation admits the rule "solve et repete" in Argentina and the United States. Finally in Colombia, the Supreme Court decided in March 1987 the requirement of a consignment unconstitutional for being an excessive limitation on the right to access a court of justice.

In the same paragraph, the Chilean Court refers to two Constitutional Courts (Italy and Spain), ordinary courts (Spain) and one Supreme Court (Colombia). There is no reference to the type of cases these courts were deciding. For example there is no clarity as to whether these decisions dealt with the same fundamental rights as the one the Chilean court was deciding about. The time frame is another constraint unknown by the

Chilean Court. This is a case decided in 2008 where references are made to an Italian case decided in 1961, Spanish cases decided in 1969 (under Franco!), 1983 and 1985 and a Colombian case decided in 1987 when the Colombian Constitution dates from 1991. There are also references to foreign legislation in Argentina and the United States, but there is no further information that provides minimal details of the mechanism being implemented, the purpose of the statute or the reasoning of these cases.

The third example is a case from 2008, where the Chilean Constitutional Court was asked to decide upon the constitutionality of a Ministry of Health policy relating to the regulation of fertility through the use of the emergency contraceptive pill (also known as the "morning-after pill" policy).[392] The Court, in a 277 pages judgment, showed awareness of the importance of considering extrinsic medical evidence as well as the relevance of considering the societal interest in the case. The court adopted the consideration of some constitutional rights as absolute, as an alternative methodology to proportionality. The Chilean Constitutional Court referred to decisions from other Constitutional Courts in Latin America. These courts have decided cases in a similar vein, establishing the right to life as an absolute right in cases where what was at stake was a public policy of the Ministry of Health related with the control of fertility based on the emergency contraception method known as "morning after pill". The examples

[392]Decision 740, issued on April 18, 2008.

referred to without quotations or analysis of their reasoning were: Argentina March 5th, 2002; Ecuador May 23rd, 2006; Chile April 18th, 2008; and Peru October 16th, 2009. This example raises again the critique against the Chilean Constitutional Court of using comparative law methodology strategically to "shield" rights and just legitimate outcomes, using partially decisions of other courts to avoid a substantive analysis of its own decision.

CONCLUSION

The argument has been made here that constitutional judges, by referring to foreign law in concrete constitutional cases, will need to use discretion to determine whether there are any social or political conditions or historical developments that will differentiate the local and foreign system to a degree as to render impractical any comparative inquiry.

I am persuaded that openly accepting the migration of proportionality as a rights adjudication mechanism would provide the court with the necessary guidance and information to adequately use the mechanism. This use is independent of the adoption of an internal general limitation clause or the adoption of proportionality analysis as such through a constitutional amendment that would certainly address concerns of legal security in a far better way. Spain may or may not be an adequate reference point, but the real relevance is the seriousness and accuracy of the comparative enterprise.

CHAPTER 6.

CASE STUDY OF PROPORTIONALITY ANALYSIS AS RIGHTS ADJUDICATION METHODOLOGY BEFORE THE CONSTITUTIONAL COURT (2006 – 2010)

Judges are central in adjudicating cases where competing constitutional rights are at stake but neither right clearly prevails. In such cases, the court should attempt to give the greatest effect to each of the rights involved. Balancing requires the identification of principles and an examination as to the "weight" of each principle in accordance with their relative social importance at a particular time and situation. The problem associated with the later is that we in society many times don't agree about what the importance of certain principles or values is relative to others. However, we still expect judges to read the values of society in order to solve constitutional disputes. Of course, the process whereby the judge balances different principles in accordance with societal values is not an arbitrary one. The judge possesses limited discretion and, in some countries, "formulas" have been developed to guide judges. The formula presented here is the three-pronged test called proportionality analysis. Balancing between principles is strictly horizontal with the core of both principles ideally being preserved with only the margins

being compromised. The latter means that the Court will need to define what is the core essence of a right and what are the margins of a constitutional right. Restrictions upon a principle must consider the context of the society.

As the answer provided by the judge is not required to be the same in different contexts, a case study like the one offered here is of particular interest. Although the decision of the Constitutional Court refers to a particular situation and individuals, the decision provides guidance to the government and the Court itself for all similar situations. In addition, this type of judgment involves a more general decision about the normative force of a fundamental right. The decision of the Court can sometimes result in a law being declared unconstitutional as part of the strong judicial review model.

The consequence of opening the Constitutional Court to individual citizens has been to create a judicial forum where the political decisions of the authorities can be examined or questioned with respect to their constitutionality. Cases help to show how law is applied and understood as an everyday experience and it allows minority groups or non-governmental institutions to access the Court in order to advance their agendas. The latter has led to a huge increase in the number of cases presented before the Chilean Constitutional Court. With an average number of 20 cases per year in the '90s the

constitutional court received after the "crucial" reform of 2005 debated in Chapter Two, 236 cases in 2006, 320 in 2007, 270 in 2008, 289 in 2009 and, 304 cases in 2010.[393]

As I explained in Chapter Four, I rely on Robert Alexy's theory of constitutional rights as principles and rules, coupled with the structured analysis of a three-pronged test (suitability, necessity and proportionality *stricto senso*), believing that this theoretical framework could help transforming rights adjudication in Chile. I offer in this chapter a case study of leading cases decided between 2006-2010 by the Chilean Constitutional Court through an embryonic proportionality analysis framework. The Court is experiencing a learning curve in the application of a new methodology that challenges the old culture of judicial restraint.

6.1. LEGAL PROCESS BEFORE THE CHILEAN CONSTITUTIONAL COURT

The mechanism for an individual to challenge the constitutionality of statutory law is the "writ of inapplicability".[394] It was not until 2005 that the jurisdiction to deal with these writs was transferred from the Supreme Court to the Constitutional Court.[395] A judgment in a "writ of inapplicability" is only applicable to the parties in the case, and so if of

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[393] Annual report of the Chilean Constitutional Court available 2005, 2006, 2007, 2008, 2009 and 2010 online <www tribunalconstitucional cl/index php/documentos/memorias_cuentas>

[394] 1980 Constitution s93 'Competences of the Constitutional Court are (6) to decide by a majority of its members in exercise the inapplicability of a legal norm in any pending case before an ordinary or extraordinary tribunal when it is regarded as being contrary to the constitution

[395] See especially Jorge Correa Sutil, *Inaplicabilidad por Inconstitucionalidad en la Jurisprudencia del Tribunal Constitucional* (Santiago Abeledo Perrot – Legal Publishing Chile, 2011)

limited value. However, there is a second type of strong judicial review possible after the declaration of inapplicability, by which the Constitutional Court can promote an "action of unconstitutionality" on its own motion, or through a "public or popular action" open to all citizens.[396] If the Constitutional Court declares the legal norm to be unconstitutional, the legal norm is declared void and of no effect. Because the effects are in this type of judgment have general applicability, the legal norm will be declared null, the judgment needs to be published in the Official Gazette three days later.[397]

Standing

The "writ of inapplicability" is structured so that the parties or the regular judge of a case can invoke the inapplicability of a legal norm when it is determined to be contrary to the Constitution, with the Constitutional Court making a determination following legal argument. The conditions under which regular judges can present a writ are problematic and unclear.[398] Interestingly, the manner in which arguments are constructed against the judge's ability to present a writ based upon a "constitutional doubt", is mainly based upon

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[396] 1980 Constitution s93 'Competences of the Constitutional Court are (7) to decide by a majority of four –fifths of its members in exercise the unconstitutionality of a legal norm already having been declared inapplicable by the Court

[397] All decisions of the court are published in its website and some of the judgments are published at the Official Gazette which constitutes an exception in the Chilean legal system, S 40, Law 17 997 Organic Constitutional Law of the Constitutional Court, Official Gazette August 10, 2010

[398] Eduardo Aldunate Lizana, *Jurisprudencia Constitucional 2006-2008 Estudio Selectivo* (Santiago: Editorial Legal Publishing, 2009), at 44

the lack of complete arguments sustaining the judges' constitutional questions. The exact role of the judge in a writ of inapplicability does require further elucidation in Chilean constitutional doctrine. This lack of clarity meant that in one of the first cases after the 2005 constitutional amendment a judge designated a lawyer to "represent" him before the Court.[399]

After the declaration of inapplicability, the Court can promote an "action of unconstitutionality" by itself or through a "public or popular action" open to all citizens. So in this particular type of writ the public interest standing is a given, it is not necessary to demonstrate a genuine interest in the issue or the lack of another reasonable and effective manner in which the question may be brought to court. The only requirement of an "action of unconstitutionality" is a previous declaration resulting from a writ of inapplicability. Writs of unconstitutionality have been presented only in few occasions: one case in 2006, none in 2007, two cases in 2008, three cases in 2009, and two cases in 2010 representing not more than 0,6% of the court's annual workload.[400]

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[399] Decision 1065, issued by the Constitutional Court on December 18, 2008, at para 11

[400] Annual report of the Chilean Constitutional Court available 2006, 2007, 2008, 2009 and 2010 online. <www tribunalconstitucional cl/index php/documentos/memorias_cuentas>

Admissible evidence

The Court is required to decide upon the concrete application of a legal norm in respect of the Constitution. As part of the formalistic legal culture in Chile, decisions do not offer explanation or detail about the parties involved in the case, their names, what they do for a living or the communities of which they are part. The courts will only refer to an article of the code or section of the Constitution involved without further discussion of the interpretative alternatives of the decision or about the scope of fundamental rights protection in that particular setting. This is criticized by Eduardo Aldunate, who notes that even when the court underlines how relevant the factual circumstances of the case are, this is "merely an announcement of what the Court finally doesn't do".[401] The use of the proportionality framework required the Court to revisit the traditional concept of constitutional review as a comparison between legal norms, where evidence is not required. Empirical evidence or an assessment of the efficacy of the legal norm can provide valuable information to decide about the level of intensity of the rights infringement. As a consequence, the way that the Court is provided with evidentiary records becomes increasingly important. It is also relevant to initiate a debate about the standard of proof in limitation of constitutional rights.

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[401] Eduardo Aldunate Lizana, *Jurisprudencia Constitucional 2006-2008. Estudio Selectivo* (Santiago: Editorial Legal Publishing, 2009), at 14.

To evaluate the legislative outcome, there are often factual issues, which have to be determined by the courts. However, there has been a debate over whether evidence should be admitted regarding the factual circumstances of the cases being examined. In certain cases the Court rejected the claimant's factual circumstances,[402] while in other cases the very reason to decide the case was based upon those factual circumstances.[403]

Only a limited class of notorious acts may be judicially noticed without proof. On the other hand, a statement of facts unilaterally prepared by one party will not normally suffice. Scholarly publications can also add relevant information for judges and some statistics or data in general can be presented as part of a social science brief also known as a "Brandeis brief".[404] However, so far the Chilean Constitutional Court seems to rely upon the information provided by the parties. All of this information is meant to help judges to reach their decision.

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[402] Decision 1046, issued in 2008 the court rejected the idea of assessing the economic circumstances of the claimant, the owner of a local restaurant, to decide if he was prevented from paying the fine and therefore, was unable to appeal the sanction, affecting their right to access to justice [s 19(3)]

[403] Decision 976 issued in 2007 decided that the increase in cost for Silvia Peña's health insurance was considered disproportionate and an unconstitutional limitation of her right to choose a healthcare system, but the personal economic circumstances of the claimant were never debated

[404] Peter W Hogg, "Proof of facts in Constitutional Cases" (1976) 26 University of Toronto Law Journal 386, 395

Accumulative violations

One further aspect of the Court's methodology (or lack thereof) concerns cases where there are violations of a number of different rights and freedoms. The tendency is for the Court to choose what could be considered the "main or most obvious" infringement and disregard the others. This is not a good approach, as in certain circumstances the confluence of various rights infringements can highlight the violations and demand a more careful analysis by the judges.

The analysis of the cases, below will illustrate what I consider to be the flaws in the use of the proportionality test by the Constitutional Court. Although I have selected a single case to exemplify each of the flaws, most of the cases display more than one problem associated with proportionality methodology. My aim in this case study is to reconstruct a proportionality analysis under the form of a three-pronged test following Robert Alexy's theory of constitutional rights. Because the Chilean Constitutional Court is at an embryonic stage in the application of the proportionality method, I go through all of the steps in order to complete the test. I tried to be clear in each case what was part of the judgment and was added by me. In summary, the flaws evident in these cases are the following.

1. A failure to recognize that there is a collision between two rights
2. The deference of the Court to the aims set out in legislation

3. The failure to adequately analyze the existence of a rational connection

4. The uneven application of the least respective means test

5. The absence of the proportionality stricto senso step

I end the review of the cases with some observations on the Court's role in a democratic setting.

6.2. A FAILURE TO RECOGNIZE THAT THERE IS A COLLISION BETWEEN TWO RIGHTS: DECISION NO 541 ISSUED BY THE CONSTITUTIONAL COURT ON DECEMBER 26TH, 2006

In order to facilitate the growth of public infrastructure, the Chilean state has used public private alliances since the 80's. One such example was the "Autopista Central", a 61 km urban toll highway through Chile's capital, Santiago. In the year 2000 the Chilean Government awarded Skanska, a Swedish construction firm a 30 years concession to build, own, and operate what was hailed as "the most modern highway in Latin America".[405] A dispute occurred when the company "Servicio de Mecánica y Mantención Track S.A." was required to pay a fine of $27.644.230 Chilean pesos to "Autopista

[405] Wall Street Journal reported on Wednesday December 29, 2010 that Swedish construction firm Skanska AB (SKA-B.SK) said it is selling its 50% stake in the 'Autopista Central' highway in Chile to Canadian fund manager Alberta Investment Management Corp, online: <http://online.wsj.com/article/BT-CO-20101229-701138.html>.

Central S.A." The amount of the fine was calculated by multiplying the unpaid toll fees of $691.108 Chilean pesos by 40.[406]

The statute being subject to a constitutional challenge is section 42 of decree with force of law No 164 of 1991 issued by the Ministry of Public Infrastructure.[407] The statute established that in case on non-paid tolls, the concessionaire can claim it judicially, using as evidence pictures or videos, being the concessionaire entitle to receive the unpaid fees, plus an amount of money as damages either 40 times the unpaid amount of the toll adjusted by the rise in the cost of living calculated at the moment of the effective payment, or a fixed amount of 2 UTM defined by the judge. The statute being scrutinized established that the beneficiary of the fine was the private company concessionaire of the highway.

The claim made by the user of the highway "Servicios de Mecanica Mantencion Track S.A." is that by imposing this disproportionate fine without requiring effective damages, the law established a "de facto" expropriation allowing the concessionaire to

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[406] The Constitutional Court present this as a "matter or doubt of inapplicability" presented by the Court of Appeal of Santiago before deciding the appeal of the decision No 21892-2 of the Judge of local police (transit) of Quilicura that upheld the petition of the highway administration imposing the amount of the debt and the fine.

[407] Law 19 460 published in the Official Gazette on July 13th, 1996 S 42 DFL No 164, 1999 Concessions statute

'When a user of a concession highway failed to pay the toll, the concessionaire has the right to judicially reclaim them The competent judge will be the local traffic judge of the jurisdiction where the facts occurred In conjunction to order the payment, the judge is forced to impose a compensatory reparation in favor of the concessionaire, for an amount of money equivalent to forty times the unpaid fees adjusted by Consumer Price Index until the effective payment or two UTM, choosing always the higher amount The litigation expenses will be added to the final payment to be paid by the infractor'

obtain an unjust enrichment and limiting its private property rights in a disproportionate hence unconstitutional manner.

Central Highway S.A., relied on the contract signed with "Servicios de Mecanica Mantencion Track S.A." and on the statutory authority for the fine. The company claims that they are not demanding damages but a sanction imposed in the statute. The company rejects the possibility of being a limitation of the user's right of private property because the sanction is originated in a omission of the user, repeated over time in which he did not fulfil its contractual obligation with the highway administration.[408]

Because this was a contractual matter, the Court turns to the Civil Code and relies on juridical notions drawn from private law. For example the Court refers to the option of establishing a civil punishment by contract as something different from demanding a compensation for damages (sections 1535, 1542 and 1543 Civil Code), even though the wording used by the statute was compensation. A recent trend in Chilean scholarship is the publication of comments about relevant cases of the Constitutional Court. Joel González, a private law professor, criticized the argument given by the Constitutional Court (paras.6-8) that private law accepts a punishment disconnected to damages. He is the opinion that the Civil Code always requires a proportion between the damage caused

[408] In this case the interveners were: Association of Public Infrastructure concessionaires COPSA A.G. and Chilean Chamber of Construction Companies.

and the sanctions applied and gives as examples sections 1231, 1544, and 1768 of the Chilean Civil Code.[409]

The Court seems to adhere to the idea of "limits to limits" through the concept of core essence of rights as part of the catalogue of rights and freedoms.[410] However, instead of an argument about what the core essence of the right of private property would have entailed and how it will operates in the particular case at stake, the Court develops a highly abstract description of what the "core essence of a right" clause is. For the Court to limit a constitutional right without affecting its core essence requires: an explicit reference in the Constitution; affecting citizens equally, and in a determinate manner and within parameters that are reasonable and justified.[411]

The decision was unanimous to uphold the statute as constitutional. It was the first case in which the Court attempted to use the proportionality methodology.

The first step in the test is to establish the existence of a collision between two principles or one principle and a general interest. In this case, the Court's reasoning has trouble establishing a collision between the private property rights of the user of the

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[409] Joel Gonzalez Castillo, "El Derecho de Propiedad y la Intangibilidad de los Contratos en la Jurisprudencia de los requerimientos de inaplicabilidad" (2007) 34 2 Revista Chilena de Derecho, 345-360, at 348

[410] S 19 The constitution guarantees to all persons (26) 'that the legal norms, that by mandate of the Constitution regulates the guarantees established therein or which limits them in the cases authorized by the Constitution, may not affect the core essence of the rights nor impose conditions, taxes or requirements which may prevent their free exercise '

[411] The Court construct a so-called "core essence of a right doctrine" defining how in the Court's opinion a limitation on a fundamental right won't affect the core essence of the right (para 14) Decisions No 226 issued on January 30th, 1995 and No 280 October 20th, 1998

highway "Servicios de Mecanica Mantencion Track S.A." and a general interest that was described by the Court as "the adequate functioning of the system of private infrastructure concessions".[412] The Court relies on the aim pursued by the executive when the project of law was proposed was to establish a severe civil punishment in order to deter users of not paying the required fees.[413] The justification is that privatization of highways is the path that allowed Chile to overcome the deficit in public infrastructure in the last 30 years.[414]

This case matters because it shows the difficulty the Court sometimes encountered in framing firstly, what should be considered legitimately a constitutional principle and a general interest in the Chilean legal order and secondly, a collision between constitutional rights or public interests. The Court did not develop an argument about the social relevance of the principles at stake. From a critical perspective one could

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[412] In para 16

[413] In para 5

[414] Constitutional provisions cited. S 19 "The constitution guarantees to all persons
- No 24 the right to private property, in its diverse aspects, over all classes of corporeal and incorporeal objects
Only the law may establish the manner to acquire property and to use, enjoy and dispose of it, and the limitations and obligations derived from its social function Said function includes all the requirements of the Nation's general interests, the national security, public use and health, and the conservation of the environmental patrimony.
In no case may anyone be deprived of his property, of the assets affected or any of the essential faculties or powers of ownership, except by virtue of a general or a special law which authorizes expropriation for the public benefit or the national interest, duly qualified by the legislator
- No7 (d) the right to personal freedom and individual security (g) no penalty of confiscation shall be imposed, without prejudice to any seizure in the circumstances determined by law, however, such penalty will apply with respect to illicit associations.

affirm that the state is using its coercive power in this statute to ensure the "attractiveness" of the system of concessions in economic terms for a private company.

Application of a proportionality analysis framework by the majority:

The first step is about the legislative reason for the limitation upon a constitutional right. The Court declared in this case "that although the constitutional judge may not question the merit of the legislative decision, it is still possible to examine the constitutionality of the statutory norm and... the requirement of a legitimate aim".[415]

The Court's argument lacks a careful analysis of the objective that the limitation on the user's private property rights is designed to serve. In this case, the limitation of private property rights arises from a public policy related to the privatization of highways to develop infrastructure. The purpose of the legislation was established by relying on the explanation provided by the executive when the law was presented at the National Congress in 1991 under democratic rule but subject to the limits imposed by the "democracy of agreements" already discussed in Chapter One. This is certainly odd as an exercise of the courts by relying on the executive argument as unique foundation, before the law was even debated and passed at the National Congress, without any further information or evidence. The Constitutional Court argues using the legislative history of

[415] In para. 15.

the statute that the aim was to establish a civil punishment by law being the purpose to allow the proper functioning of the concessions system. The Court considered the aim as a legitimate one.

The second step in the proportionality analysis is the requirement for a rational connection between the means and the goal to be achieved through the statute. An examination shows that the means used by the statute is a sanction represented by a fine that is 40 times the unpaid amount of highway fees, adjusted by the rise in the cost of living calculated at the moment of the effective payment and expenses of litigation. In the words of the court the aim of the statute is to "avoid user's conducts that put at risk the concessions system, affecting the general interest and efficacy required".[416] Even if this were the case it is not clear how the sanction is rationally connected to the aim.

I would like to problematize the means and aim chosen by the statute: (1) Why should the Chilean State care so much if the fine is established in favor of the private concessionaire? The answer seems to be associated with the "general interest" represented by the privatization of highways however this assertion is highly controversial; (2) Why should the sanction be 40 times the unpaid fees? What would be required is to know the logic behind such a decision? If the aim was to punish impropriate behaviour why not make a distinction between first time and recidivists

[416] In para. 16.

drivers with unpaid toll fees?; (3) What is the concrete public utility of the "Autopista Central S.A." highway? One option would be to make the statute fail for the lack of clarity as to whether the legislative means "a sanction represented by a fine that is 40 times the unpaid amount of highway fees, plus readjustment of the cost of life and expenses of litigation" achieves [or not] the aim (that users don't make use of the highway without paying the toll) in order not to put at risk the concessions system, affecting the general interest and efficacy required". But there is an option that the court upheld that an exemplary sanction would achieve the goal of users always fulfilling their contractual obligations with the highway and the system remain an attractive possibility for investors on one hand and a way in which required public infrastructure could be developed on the other.

If the rational connection step is upheld the Court would need to examine if there is a way in which the right to private property over the user of the highway could be limited less, through some reasonable alternative scheme, achieving the same aim. The obligation of paying the toll is a first obvious duty, but the limitation on the private property rights of the highway user is more related with the amount of the fine. A distinction between those who failed to pay the tolls for a first time or those who don't pay on numerous occasions could be helpful. The Court did nor refer to this step nor did it provide any concrete information in order to decide if the step was considered passed.

The fourth step of the proportionality analysis is to balance the factual limitation on the constitutional right infringed in this case. The examination at this step could have followed Alexy's weight formula. First, an assessment as to the intensity of interference of the statute "to establish a civil punishment by law being the purpose to allow the proper functioning of the concessions system" could be considered minimal or even not rationally connected. On the contrary, the interference with the right to private property of "Servicio de Mecánica y Mantención Track S.A." could be potentially considered serious.[417] So on the one hand it is relevant to analyze the impact upon the company "Servicio de Mecánica y Mantención Track S.A." being condemned to pay a fine of $27.644.230 Chilean pesos, which is the result of multiplying 40 times the actual amount of un-paid toll fees $691.108 Chilean pesos.[418] Depending on the size of the company this can be a large sum and create financial problems to the company. It could have been relevant to know how many times the vehicles of the company have used the highway without paying? For how long did the company fail to pay the toll fees? Did the company give an explanation for their behavior? On the other hand for a proper decision it could have been very helpful to have the annual income of the "Autopista Central S.A." company, the percentage of the total amount of users that do not pay the tolls, the amount of users that are recidivists among other concrete data. If the amount of money raised

[417] In para. 17.
[418] In Canadian currency the debt was $1.411 CAD and the fine imposed $ 56.468 CAD as of April 2011.

through judicial collection proceedings is residual compared to the annual income of "Autopista Central S.A" or it is proved that the existence of the sanction has not had the "prevention effect" aimed for, the court could take a decision comparing the losses on the property of the highway user if the law is upheld with the losses of the value of legal and economic stability for private investors? The examination of the balance between the objective in question and the deleterious effects on constitutionally protected rights in a concrete case is one understanding of this step.

Due to this case a constitutional dialogue started in the public sphere in Chile, addressing the questions exposed by the case. The National Congress passed a new law to regulate public concessions in January 2010 in which a new section was drafted.[419] The new version accept the judicial collection of unpaid fees, plus readjustment and litigation expenses as the primary objective. The new statute allowed a fine (this time called rightly fine and not compensation) that can be up to 5 times the actual debt and in cases where there were more than three infractions in the last three years, the fine could be up to 15 times the amount of un-paid tolls, readjustment and litigation expenses. The maximum in any case is not more than 20 UTM.[420] Another relevant change is the beneficiary of the fine: 50% will go to the Chilean Communal Fund and the other 50% to the city council

[419] Law 20.410, Official Gazette January 20th, 2010.
[420] UTM is an economic unit used by financial institutions readjusted monthly by the Consumer Price Index, as a reference for April 2011 20 UTM would represent $856 CAD.

where the local transit judge is located. The beneficiary will be public institutions and not private investors anymore.

I would like to point out that, had the court used the proportionality analysis correctly in 2006, it would have arrived at the decision that the public bodies arrived through the new statute 20.410 only in 2010. This methodology helped to show the lack of a rational connection between the means and the aims of the statute, the potential existence of least restrictive means and the more weight given to private property rights asking for a more focused reason in order to allow its limitation.

6.3. THE DEFERENCE OF THE COURT TO THE AIMS SET OUT IN LEGISLATION: DECISION NO 825 ISSUED BY THE CONSTITUTIONAL COURT MARCH 5TH, 2008

This is a criminal case, one of many that occur everyday in Chile. The criminal judge in charge of solving it transformed it into a constitutional challenge of a section of the criminal code. The accused (who was not identified once throughout the judgment) was alleged to have intercepted his victim Bernardita Sandoval and forcefully tried to steal her bag on Wednesday January 3rd, 2007. The victim resisted and, due to intervention of drivers passing by, the police were called who detained the accused shortly after. The events were regarded as an attempt to commit robbery. The case was initiated when Judge Mathilde Esquerre, President of the Third Section of the Criminal Oral Tribunal of

the City of Concepción, presented a writ of inapplicability before the Constitutional Court in July 2007.[421]

The Constitutional Court needed to decide this case where what was being scrutinized was the legislative design of a section of the criminal code punishing the offender with the full punishment even in the case where the robbery was only attempted or frustrated. The normal consequence of a crime that is only attempted or frustrated is applying one less degree in the scale of punishments. In the case at stake the punishment is "major imprisonment" in a medium degree to life imprisonment depending if the robbery is committed with an homicide, rape, or the victim is kidnapped for more than a day. The time frame for "major imprisonment" in a medium degree is 10 years and 1 day to 15 years and 1 day. However, in a normal situation one less degree would mean "major imprisonment" in a minimun degree which time frame is 5 years and 1 day to 10 years. The real concern was the lack of proportion between the offence and its punishment.[422]

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[421] The Criminal oral trial before the third section of the tribunal of Concepcion No RUC 0700007912-4, RIT No 159-2007 was the original proceedings, where judges decided to sent a communication to the Constitutional Court No 2009-2207 on July 25th, 2007 in order to ask constitutional questions

[422] Section 450 of the Criminal Code The crimes and offences contained in paragraph 2 and in section 440 paragraph 3 will be punished as consummate from the moment they are attempted or frustrated

- Paragraph 2 of title IX, section 433-439 of the criminal code refers to robbery with violence or intimidation to persons

- Section 7 of the Criminal Code Are punishable not only the consummate crime or offence, but also the frustrated crime or offence or the attempt to commit it

A crime or offence is frustrated when the accused did all the necessary to consummate it but it did not happen for causes external to his/her will

A crime or offence is attempted when the accused started to execute the crime or offence through direct manners but one or more are missing for its completion

The writ of inapplicability before the Court was presented as a "constitutional doubt" to determine whether s.450 of the criminal code was a limitation of the constitutional right to due process under s.19 (3) through three particular aspects: (1) whether the equal protection before the law was infringed based upon the lack of proportion between the offence and its punishment; (2) the prohibition to presume *de iure* criminal liability; (3) the prohibition for laws to establish penalties that have not been expressly described therein.[423]

The Public Prosecutor's Office based its arguments on the legislative history of the criminal code section as a legislative choice in order to discourage certain offences or crimes. Section 450 of the criminal code was amended in 1972 through the applicability of statute 17.727 to robbery. The head of the Public Prosecutor's Office rejected all three questions raised by the Criminal Oral Tribunal of Concepcion declaring that: (1) the

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[423] Section 19 the Constitution guarantees to all persons
(3) Equal protection under the law in the exercise of their rights
All persons have the right to legal defence in the manner indicated by law and no authority nor individual may impede, restrict or perturb the due intervention of an attorney, should it have been sought. As regards the members of the Armed Forces and of Public Order and Security, this right will be governed, in connection with administrative and disciplinary matters, by the relevant norms of their respective statutes
The law shall provide for the means whereby legal counsel and defence may be rendered to those who should have been unable to obtain them on their own
No one can be judged by special commissions, but only by the court specified in the law, and provided such court has been established prior to the occurrence of the facts
Sentences decreed by a court vested with jurisdiction must be based upon previous legally held proceedings It will be responsibility of the legislator to establish, at all times, the guarantees for a rational and just procedure and investigation
The law cannot presume *de iure* criminal liability
No crime shall be subject to penalties other than those prescribed for by a law enacted prior to the perpetration of the crime, except where a new legislation might favour the interested party
No law may establish penalties for crimes that have not been expressly described therein

proportionality of the penalty of robbery if the criminal code does not distinguish between failures to commit it, an attempt to commit it or the actual commission of the robbery is related with the guarantee of equality before the law. In order to reject the claim, the prosecutor used a formal equality argument saying that everyone accused of robbery is treated alike; (2) the prosecutor's argument rejecting the infringement of the guarantee forbidding the presumption of criminal liability is a highly deferential analysis of the legislature. The prosecutor's office refused to accept the possibility that a legislative option adopted as part of a criminal policy could infringe a constitutional guarantee; (3) the prosecutor also regards the possibility of an infringement of the principle of legality (expressed as the principle of typification) as a mistake because what constitutes an attempt to commit an offence or crime and the failure to commit an offence or crime are perfectly described in s.7 of the Criminal Code.

The majority considered the statute to be "not as disproportionate" so as to qualify it as arbitrary or irrational. Therefore, the criminal policy was upheld.[424] The majority[425] established that in the allegations of an infringement of the equal protection before the law through the lack of proportion between the offence and its punishment, the Court rejected the argument that this was discriminatory because it was not based on personal characteristics of the accused but on a voluntarily act to commit an offence.

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[424] In para 22.
[425] Per José Luis Cea C.J., Raúl Bertelsen, Jorge Correa, Marisol Peña, Francisco Fernández.

Application of proportionality analysis framework by the majority:[426]

In terms of the legislative aim as the first step in the use of proportionality analysis, it is relevant to discuss the criminal head of power and how it can affect a person's liberty and security. The majority once again uses the legislative history of s.450 of the penal code as an interpretative tool arguing that the legislative measure adopted in 1972 by statute 17.727 that sought to discourage the perpetration of robbery with violence or intimidation to persons, was taken into consideration conduct with an alarming social impact. The statute of 1972 was a limitation of a much broader section established by statute 5.507 in 1934 that already considered that robbery and theft could be punished as consummate from the moment they are attempted or frustrated, but also limited the imprisonment sanctions considered in the criminal code for these crimes and offences. The Court decided that the legitimate aim was the prevention of illicit conduct.[427] S.450 of the Criminal Code sought to ultimately protect private property that was acquired through violence or intimidation.

The second step in proportionality analysis examines the requirement for a rational connection between the means used and the goal to be achieved. With the case at hand, the legislative approach was to increase the criminal sanction in order to discourage

[426] For a proportionality analysis framework of Decision No 825 of the Chilean Constitutional Court see Jose Angel Fernandez, "El Juicio Constitucional de Proporcionalidad de las Leyes Penales La legitimación democrática como medio para mitigar su inherente irracionalidad?" (2010) 17 1 Revista de Derecho Universidad Catolica del Norte, 51-99, at 90.
[427] In para. 21

robbery with violence or intimidation. The Court's failure to permit debate about the legislature's criminal policy declaring that "the legislature chose a means that needs to be considered suitable"[428], undermines the possibility of constitutional dialogue. Why shouldn't the court scrutinize the legislative aim? The Court rejected the option of giving its opinion, even though the legislation was adopted 36 years ago. The means described by the Court is the legislative option to punish particular crimes and offences against property as consummate from the moment they are attempted or frustrated.[429] Instead of debating whether the limitation of the constitutional right was rational, the Court opted to admit that it was possible to discuss the appropriateness of the means chosen but declared that it was enough that it was not "irrational" and was, therefore, within the margins of the legislature's discretion.[430] This is the one situation where the rational connection could be tested through data that shows if the new criminal figures can provide evidence to show that illicit conduct diminished afterwards. It this was not the case, it would be necessary to revisit the rationale and nature of the chosen sanctions.

The third step, called the least drastic means element, requires that the statute must impair, damage, or harm the right as little as possible. Gloria Lopera argues that this step ought to include consideration of alternatives to the criminal head of power or other type

[428] In para. 20.
[429] In para. 21.
[430] In para 21.

of sanctions available. Once the evidence shows that it is necessary to use the criminal head of power it is necessary to debate if there is an alternative criminal sanction that achieves the same aim with means that infringes the rights less.[431] In the case at hand, the Court established that the right being considered was the right to due process. The rights being infringed are the rights of the accused. In criminal matters, the least restrictive means can sometimes mean the complete liberalization of the punished conduct. The Court admits that it is possible to think of other least restrictive means[432] but immediately rejects the option of debating it by saying that the Court could not substitute the role of the legislature or offer an opinion of the means chosen as long as it appears to be "reasonably suitable" to obtain the legislative aim. Alternative measures like prevention campaigns, better illumination of public spaces, or more police patrolling could be thought to have the same aim without restricting the principle of liberty.

The fourth step in proportionality analysis is focused upon balancing the factual limitation of the human right infringed and the attainment of the statute's objective. In this particular case, the claimants' rights to liberty and security through due process are highly restricted in order to foster a criminal policy to discourage the commission of certain offences against private property. "Proportionality stricto senso" analyses whether

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[431] Gloria Lopera Mesa, "Principio de Proporcionalidad y Control Constitucional de las Leyes Penales" in Miguel Carbonell, ed , El Principio de Proporcionalidad en la Interpretación Jurídica (Santiago UNAM – CECOCH, 2010), at 200-221, at 228

[432] In para 21

the legislative purpose of creating a criminal policy was balanced, justified and proportionate by the degree of interference in the applicant's right to a due process. If the Court had made proper use of the proportionality technique, they could have applied the "weight formula" proposed by Robert Alexy.[433] This would have first involved an assessment as to the intensity of interference of the principles at stake, including the interference with freedom and security of the accused based on the principle of due process and the interference with the public policy in criminal matters related to property rights. Thereafter, the Court would have been required to examine the concrete weight of the potentially-violated principles of due process on one hand and the criminal public policy on the other. Unfortunately, the Court did not consider extrinsic evidence regarding the operation of the legal or public policy to allow a substantial argument about which one of the principles at stake had a higher weight in the Chilean legal order.

The dissenting opinion by justices Hernan Vodanovic and Mario Fernández up-held the writ of inapplicability presented by the Criminal Oral Tribunal declaring that the application of s.450 of the criminal code could be considered unconstitutional for not providing all the necessary elements for a fair and just procedure. In the case at hand, the limitation was founded in criminal policy that was already 36 years old and the judges claimed that an evaluation of its effects was required. By March 2008 this dissenting vote

[433] Robert Alexy, A Theory of Constitutional Rights, at 408.

represented the most serious and clear description of the proportionality analysis as a rights adjudication method. The judges made clear that the proportionality principle is not expressly considered in the text of the 1980 Constitution. The dissenting judges present proportionality as an element of a just and fair procedure as part of the evolution of the guarantees against political authorities. The core question concerns the mission of the Constitutional Court. For these dissenting judges, the basic elements are given by s.6 and s.7 that contains the principle of legality as a foundation of the rule of law. They also consider s.92(5) when the Constitution declares that the Court will decide the cases according to the law. This encompasses a joint consideration of the text of the Constitution but also the principles and values of the constitutional order. The judges tried to establish the ability to use proportionality analysis in criminal matters as a way in which the modern conception of rights can only be subject to limitations based upon substantive criteria that can be applied. Reference is made to authors like Robert Alexy and Luigi Ferrajoli underlying the requirement of being able to measure and compare the penalties applied. There is, however, a lack of clarity as to how proportionality analysis can be modified for the criminal head of power.

Another dissenting opinion by Justice Teodoro Ribera (substitute) upheld the writ of inapplicability presented by the Criminal Oral Tribunal declaring that the application of s.450 of the Criminal Code could be considered unconstitutional by equating an

offence that has been attempted with a consummated offence. Justice Ribera posed an interesting argument (not always rightly considered) about the possibility of limiting rights. If a right could be limited there is reference to the existence of particular limitation clauses and the way in which the Constitutional Court has decided the topic previously.[434] This second dissenting opinion underlines the central role of proportionality analysis as a rights adjudication doctrine referring to some of its elements. But a structure of the steps to follow and a concretization of what is argued in the abstract are still missing.[435] Justice Ribera considers that the Criminal Code does not fulfil the requirement of a rational connection between the means and the aims by equating an offence that has been attempted with a consummated offence. Although interesting, this is only a partial proportionality analysis. The argument goes even further by explaining how the measure could even be challenged by the lack of a legitimate aim. Based on the doctrinal opinion of Enrique Cury, Justice Ribera underlines how the policy not only discourages potential offenders to execute their actions but, on the contrary, will ensure that once started, there is no point for the offender to stop because they will be punished in full even if it was only an attempt or a frustrated action.[436] This constitutional conversation held between the

[434] Decisions No 226 para 47, and, No 280 para 29
[435] Decision No 519 para 19
[436] Enrique Cury, *Tentativa y Delito Frustrado*, (Santiago Editorial Juridica de Chile, 1977), at 202

majority and the dissenting opinions is an example of how the Court could advance its democratic role.

The Court refers to the advantages of a criminal policy by the state and the data that could eventually sustain this option. However, the Court does not use the opportunity to construct an argument with data to the concrete case at hand. Although there is reference to a concrete social context,[437] there is no reference to the Chilean legal context. Reference to possible limitations upon the legislature through its criminal policy is vague and examples given are the most obvious ones: torture, inhuman and degrading sanctions, or inhuman conditions in which the accused serves their punishment. There is also a reference to the possibility of evaluating the efficacy of the measures of criminal policy adopted. Again, this is not something that the Court is willing to do by itself but is merely a doctrinal reference.

This case matters because it illustrates the difficulties the Court encounters to accept the existence of a collision between the right to liberty of the accused under the due process clause and a general interest in security protecting private property based on a culture of highly judicial deference towards the criminal head of state power. In making its judgment, the majority referred to the autonomy of the legislature to decide upon the merit and opportunity to legislate showing a highly deferential threshold with regard to

[437] In para. 8-9.

legislative design.[438] However, the Court should have considered the existence of a collision. The principle of security is fostered through a criminal policy since 1972 that aims to discourage perpetrators from committing robbery by punishing offenders as having accomplished the act although it may have been frustrated or simply attempted. Meanwhile, the principle of liberty regarding the accused is only briefly addressed by the Court as part of the due process clause. Instead, the Court designed a limited proportionality analysis and considered the statute to be constitutional.

6.4. The failure to adequately analyze the existence of a rational connection: Decision No 1254 issued by the Constitutional Court on July 29th, 2009

In this case there is no set of facts to be described first. This case at stake is the product of one of the few "actions of unconstitutionality" decided by the Court through a "public or popular action" presented by the Chilean Bar Association.[439] This action required the existence of a prior declaration of unconstitutionality, in this case decisions No 755, No 1138 and No 1140 issued by the Court through writs of innaplicability under s.93(6).[440]

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[438] In para 13

[439] Lawsuits of unconstitutionality have been presented only on a few occasions one case in 2006, none in 2007, two cases in 2008 and three cases in 2009 representing not more than 0 6% of the court's annual workload.

[440] Decision No 755 issued on March 31, 2008, Decision No 1138 issued on September 8, 2008, and, Decision No 1140 issued on January 14, 2009

What is clear from this case is that previous decisions enabled the competence of the Court to decide upon the action of unconstitutionality.[441] Another requirement was a higher quorum of four out of five members of the Court.

Enrique Barros, as the president of the Chilean Bar Association, argued that the statute infringed the constitutional right to equality under s.19 (2), the right to equal public charges under s.19(20), and the guarantee of the freedom of work under s.19(16).[442] He alleged that the statute established a disproportionate public duty on the designated lawyers and that the mandatory legal defence could potentially infringe upon their freedom of work and the right to receive a "just compensation" for it.

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[441] In para 13

[442] S19 'The Constitution guarantees to all persons
- No 2 Equality before the law In Chile there are no privileged persons or groups In Chile there are no slaves, and those who should set foot on its territory become free Men and women are equals before the law Neither the law nor any authority may establish arbitrary differences '
- No 3 Section 19(3) 1980 Constitution due process guarantee
The Constitution guarantees to all persons Equal protection under the law in the exercise of their rights
All persons have the right to legal defence in the manner indicated by law and no authority nor individual may impede, restrict or perturb the due intervention of an attorney, should it have been sought As regards the members of the Armed Forces and of Public Order and Security, this right will be governed, in connection with administrative and disciplinary matters, by the relevant norms of their respective statutes
The law shall provide for the means whereby legal counsel and defence may be rendered to those who should have been unable to obtain them on their own [ ]
- No 16 Freedom of work and protection of that freedom
Any person has the right to free employment and free selection of his work, with a just compensation [ ]
- No 20 Equal distribution of taxes in proportion with individual income or in a progressive manner established by law, and equal distribution of other public charges
In no case may the law establish obviously disproportionate or unjust taxes
The taxes collected, whatever their nature, shall be deposited in the Nation's treasury and cannot be earmarked for specific use
The law may authorize, however, that certain taxes be set aside for national defence needs, or may authorize that taxes levied on activities or assets of a clear local nature be established within the framework of this law, by municipal authorities and that they be allocated to works of community development '

The petition before the Constitutional Court was to declare as unconstitutional s.595 of the Organic Code of Courts challenging the institution of gratuitous and mandatory legal defence by "judicially-appointed lawyers" among the members of the Chilean Bar Association, as required by the State in civil, criminal, family and labour cases.[443] The consequence of such a declaration of unconstitutionality was that the legislation would be struck down following publication of the judgment in the Official Gazette three days later.[444]

The argument of freedom of work presented before the Constitutional Court assimilated the institution of the gratuitous "judicially-appointed lawyer" to the category of "forced labour". This is relevant because the Chilean Bar Association had already presented a complaint before the International labour Organization (ILO) against the Chilean State for not complying with the C29 "Forced Labour Convention" ratified by Chile on May 31, 1933. The study of the complaint concluded in 2008 that the

[443] S 595 Organic Code of Courts. 'It is the duty of Civil Judges of first instance to designate monthly and in shifts, among those non exempted, one lawyer that provides gratuitous judicial defence in civil cases and one that provides gratuitous judicial defence in labour cases of the people in need of it and who has obtained the 'poverty privilege' Nonetheless, when the number of lawyers made it possible, the Court of Appeal of the jurisdiction could allow the designation of two or more lawyers in every shift and the Court will decide how the cases will be distributed

[ ] If a person has the 'poverty privilege' and cannot be defended by one lawyer designated in the way already described, the judge can nominate special lawyers that take the legal defence

In the locations were there is more than one civil first instance judges the nominations will be made by the older judge, and the special nomination will be made by the judge deciding the case

The general designation of 'judicially-appointed lawyers' will be made by the Court of Appeal within its jurisdictional territory '

[444] All decisions of the court are published in its website and some of the judgments are published at the Official Gazette which constitutes an exception in the Chilean legal system, S 40, Law 17 997 Organic Constitutional Law of the Constitutional Court, Official Gazette August 10, 2010

"judicially-appointed lawyer" is an institution that could effectively be considered under the concept of forced labour and, therefore, was in urgent need of revision by the Chilean government.

The Constitutional Court[445] held in an unanimous judgment that the expression "gratuitously" considered in s.595 of the Organic Code of Courts was a disproportionate limitation of a lawyer's right to equality under s.19 (2), their right to equal public charges under s.19 (20), and the freedom of work under s.19(16). Methodologically speaking the Court should have considered the existence of a collision. The Court considered the legal profession as "a public function" where individuals collaborate with the administration to ensure justice. This is founded in the fact that lawyers receive their qualification and recognition in Chile from the Supreme Court and not from an educational institution as other professions do.[446] But this public function is a constitutional guarantee through "due process" that refers to the state obligation to provide legal counselling and defence: "The law shall provide for the means whereby legal counsel and defence may be rendered to those who should have been unable to obtain them on their own". The Court itself recognizes this as the aim of the statute under consideration.[447]

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[445] Per Juan Colombo C.J.; José Luis Cea; Hernán Vodanovic; Mario Fernandez; Jorge Correa; Marcelo Venegas; Marisol Peña; Enrique Navarro and; Francisco Fernandez.
[446] In para 41.
[447] In para 57.

The Court also sought to make clear argumentation as to the onus of proof under an action of unconstitutionality. Writing on behalf of the unanimous Court, Justice Navarro underlined that the onus of proof rests upon the party seeking to uphold the limitation of a constitutional right.[448] There is some confusion in the doctrinal understanding of what is being considered and decided by the Court. The catalogue of rights and freedoms are mostly contained in s.19 of the 1980 Constitution and some other relevant parts of the Constitution, like Chapter 1 that contains the basic principles of the Chilean constitutional order. Statutes can establish an infringement of one or more of the constitutional rights guaranteed and, methodologically, what the Constitutional Court will examine is the justification for that limitation. Some guarantees have internal limitations clauses and others will require a general one, which I suggest could be constructed through the declaration of Chile as a democratic republic contained in s.4 of the Constitution as it was already discussed.

Application of proportionality analysis framework:

The Court decided unanimously that the statute being examined had a legitimate aim: it is one way in which the legislator decided that those members of the population unable to pay for services could obtain legal counsel and defence. As had occurred in the previous

[448] In para 9.

case, the Constitutional Court did make an effort to anchor the institution of the "judicially-appointed lawyer" in the historical roots of the legal tradition.[449] However, the Court also sought to highlight the historical developments within the legal profession that is a significant factor in how lawyers are perceived in modern Chile. In 1870 there were fifty lawyers for a two million population. When the Organic Code of Courts was published in 1943 one hundred lawyers presented their oath annually before the Supreme Court with a population of over four million people.[450] However, in 1998 the Supreme Court of Chile called to the Bar 2.013 lawyers with Chile having a total population over fifteen million. Certainly, the number of lawyers has changed dramatically in the last thirty years with the educational reform of the 1980s.[451] Another change in circumstances was that the specialization of litigation meant that family matters were taken to specialized courts and made it necessary to create a Public Criminal Defenders Office in 2001.[452]

The Court elaborated upon an argument about the inexistence of a rational connection between the means used (the mandatory legal defence by the "judicially-

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[449] Paras 31- 41

[450] See Bernardino Bravo Lira, "Estudios de Derecho y Cultura de Abogados en Chile 1758-1998" (1998) 20 Revista de Estudios Historico – Juridicos

[451] In Chile, the Post-secondary education has been fully privatized since 1980 There were eight pre-existing "traditional" universities in place – today there are 60 universities most of them offering a law degree considered a 'low-investment' career

[452] Law 19 718 created the Public Criminal Defenders Office, published in the Official Gazette March 10, 2001

appointed lawyers") and the goal to be achieved ("the law shall provide for the means whereby legal counsel and defence may be rendered to those who should have been unable to obtain them on their own").[453] In terms of the analysis of the infringement of the equality clause, the Court developed a slightly more refined test referring to the relevance of establishing the scope of protection of the right[454] which, has previously been one of the common criticisms of the interpretative work of the Court. The judgment alludes to the formal understanding of equality so far as it had already developed, but what is really relevant is that Justice Navarro called this formal conception a "primitive understanding of equality" and argues for a reinterpretation.[455] A first difference is the requirement of a comparative group with the one advanced in the judgment being other liberal professions that also serves values relevant in life or education like doctors, nurses, or teachers. The judgment then advances the concept of discriminatory treatment as contrary to the equality clause[456] although there is no further elucidation of what discrimination means. Methodologically, the next step was for the Court to decide that the statute established a limitation on the right to equality[457] before proceeding to determine through proportionality analysis if the limitation was justified. It is crucial to distinguish between the examination of the scope of protection and the limitation of the constitutional right

[453] In para 43.
[454] In para 45.
[455] In para 47.
[456] In para 48.
[457] In para 66.

from the examination through proportionality analysis of the justification. The Court did not do this. In terms of the concrete application of the guarantee of equality concerning public charge under s.19 (20), the Court formulates an argument using freedom of work under s.19 (16) where the constitution guarantees that any person has the right to free employment and free selection of his work with just compensation. The Court refers to other public charges that only recently had been considered by law as requiring monetary compensation, like the military service or precinct monitors in an election.[458] The conclusion is that s.595 of the Organic Code of Courts establishes an unequal public charge. In relation to their status as collaborators in the administration of justice, this does not change the reality of the sole income of a lawyer being their professional fees.

The third step is the so-called "necessity test" related with the adoption of the least restrictive means in order to obtain the desired aim. The Court considered the means chosen as too heavy a burden due to its mandatory and gratuitous nature.[459] The Court referred the fact that all alternative ways of achieving the goal of providing legal counsel and defence to the population consider the payment of the lawyer's services.[460] Therefore, the burden of legal defence being mandatory and gratuitous is not seen as fulfilling the necessity subtest.[461] Methodologically-speaking, proportionality analysis could have

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[458] Military service established by statute No 20.045 and precint monitors Law 20.092 both of 2005.
[459] In para 61.
[460] In para 54.
[461] In para 61.

ended here due to the existence of less restrictive means to achieve the same aim. This is part of the learning curve the Court is going through. A proper methodology would have decided this case based on the existence of a least restrictive means, it could have been an opportunity to establish the requirements the Court could demand from the legislature.

The fourth step in proportionality analysis in this particular case, is focused upon balancing the limitation upon the lawyer's rights to equality and the attainment of the statute's objective "mandatory and gratuitous legal defence". The Court considered the limitation high.[462] As in the previous case on this issue, if the decision of the Court would have been a proper use of the proportionality technique, they could have applied the "weight formula" proposed by Robert Alexy.[463] An assessment as to the intensity of the interference in the right to equal public charges of lawyers would be considered high. However, the value of "due process" through legal defence and counselling of those unable to afford it could be considered low due to the availability of numerous alternatives.[464]

This case is interesting from the perspective of civil society and also from the perspective of the branches of government. The Chilean Bar Association assumed a role through the "public open action" representing the interest of all affiliated lawyers. The

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[462] In para 65

[463] Robert Alexy, A Theory of Constitutional Rights, at 408

[464] One of the alternatives is that every law students in order to finish their preparation and be called to the bar need to work gratuitously for the 'Corporation of Judicial Assistance' a type of public legal clinic.

Court decided, being this a public "action of unconstitutionality" to notify the executive and the National Congress. It is relevant that 35 deputies formulated a presentation accusing the Constitutional Court of "legislative attempts" and also claimed that the remedy obtained by striking down the statute could create a constitutional gap and further contradictions. The political representatives asked the Court to disregard the petition of the Chilean Bar Association as they perceived that none of the constitutional guarantees invoked had been infringed.[465]

6.5. UNEVEN APPLICATION OF THE LEAST RESTRICTIVE MEANS TEST :

DECISION NO 546 ISSUED BY THE CONSTITUTIONAL COURT ON NOVEMBER 17TH, 2006

Jacobo Kravetz as CEO of mining company "Schwager" signed an agreement with the National Oil extractive company ENAP to develop an additive for diesel fuel. The release of this piece of information meant that "Schwager" shares rose by 146%. Although Kravetz was prohibited by statute from taking advantage of insider knowledge, he bought shares worth $300 million Chilean pesos, and sold them within days, obtaining $691 million Chilean pesos for the sale of the shares. Only days after this stock-market operation "Schwager" unilaterally ended the agreement to develop the additive "Chiss" for diesel combustible. The Chilean Securities and Insurance Supervisor (SVS) an

[465] The arguments presented by the deputies are referred in page 6-7 of the judgment.

autonomous body affiliated with the Chilean government through the Ministry of Finance applied a fine for the improper use of privileged information. Kravetz filed a complaint against the fine imposed by the SVS before a civil judge[466] and a writ of inapplicability claiming the unconstitutional limitation of his guarantees to access a court of justice s. 19(3); to equality rights s.19(2); and his right to petition before the authority s19(14) before the Constitutional Court.[467]

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[466] Claim ROL 9059-06 before the 8th Civil 'Juzgado de Letras' of Santiago, claim of a 700 000CAD imposed In this particular case Jacobo Kravetz needed to deposit nearly 200 000 CAD in order to be able to claim the fine

[467] S 19 The Constitution guarantees to all persons

- No 2 'equality before the law In Chile there are no privileged persons or groups In Chile there are no slaves, and those who should set foot on its territory become free Men and women are equals before the law Neither the law nor any authority may establish arbitrary differences '
- No 3 'Equal protection under the law in the exercise of their rights

All persons have the right to legal defense in the manner indicated by law and no authority nor individual may impede, restrict or perturb the due intervention of an attorney, should it have been sought As regards the members of the Armed Forces and of Public Order and Security, this right will be governed, in connection with administrative and disciplinary matters, by the relevant norms of their respective statutes

The law shall provide for the means whereby legal counsel and defense may be rendered to those who should have been unable to obtain them on their own

No one can be judged by special commissions, but only by the court specified in the law, and provided such court has been established prior to the occurrence of the facts

Sentences decreed by a court vested with jurisdiction must be based upon previous legally held proceedings It will be responsibility of the legislatoi to establish, at all times, the guarantees for a rational and just procedure and investigation

The law cannot presume de iure criminal liability

No crime shall be subject to penalties other than those prescribed for by a law enacted prior to the perpetration of the crime, except where a new legislation might favor the interested party

No law may establish penalties for crimes that have not been expressly described therein '

- No14 'The right to submit petitions to the authorities with reference to any matter of public or private interest, with no limitation other than the requirement to submit such petitions in a respectful and appropriate manner '

The constitutional challenge was about section 30 of Decree Law 3.538 approved in 2006.[468] This section of Decree Law 3.538 regulated the public offer of stocks to protect minority shareholders. The law stated that in order to be able to claim before a court of justice a fine imposed by Chilean Securities and Insurance Supervisor (SVS) it is necessary to first deposit 25% of the total amount of the fine.[469] This mechanism was established to avoid frivolous litigation.

Methodologically speaking, the Court should have considered first the existence of a collision between rights. On one hand was the desire to protect the securities market and maintain the credibility or "public faith" of the system by instituting sanctions known as "pay first litigate after" in order to avoid frivolous litigation. This is the concrete aim

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[468] Decree law (DL) are statutes adopted during factual regimes Due to the lack of a proper legislature decree-laws are created by the executive power and homologated to a statute

[469] S30 Decree Law 3,538 modified by statute 19 705 in 2006 The amount of the fines established by law will be fixed by the Chilean Securities and Insurance Supervisor (SVS) and paid within ten days since the SVS notification by registered mail

Those affected by the fine can claim before the correspondent civil first instance judge within ten days since the SVS notification by registered mail, however in order to be able to claim before a court of justice a fine imposed by Chilean Securities and Insurance Supervisor (SVS) it is necessary to first deposit 25% of the total amount of the fine The deposit cannot be superior to an amount of 500 UF is the fine is applied to an individual person or the deposit cannot be superior to 1 000 UF, if the fine is applied to juridical person unless there are reiterate fines or those treated in title XXI of the statute N° 18 045 in which case the deposit will raise to 25%

Once the claim is presented the term to pay the fine will be suspended, although an interest rate will be applicable The notification of the claim needs to be send by mail following s44 of the Civil Procedure Code within ten days since its presentation

The claim will be solved through a summary procedure and its judgment can be appealed The first and second instance judgments that condemn the claimant to pay the fine needs to forcefully made the claimant responsible for the expenses of the case

of the section at stake. On the other hand was the right of access a court of justice as part of the scope of protection of the "due process" clause of Jacobo Kravetz.

When the Constitutional Court heard the case it resulted in a stalemate. Five judges were in favor of rejecting the writ of inapplicability because the claimant's rights were not unconstitutionally infringed. The other five judges were of the opinion that the rights were disproportionately limited. Five judges refer to the necessity of a multiple steps examination.[470] First, to establish the scope of the guarantee; secondly, to establish the existence of a limitation by the statute; and thirdly, the resolution if the limitation based on a constitutional analysis is "tolerable". The judges refer to possible limitation clauses and establish that part of the scope of the right includes the access to a court of justice and the judges accept that the statute establishes a limitation to the right to access a court of justice as part of the "due process" clause. The Court decided that the requirement of a deposit of 25% of the fine is part of a "just and rational" process in the Court's opinion.

Justice Enrique Navarro in a dissenting opinion held that the inapplicability writ should be dismissed because the Constitution requires that to declare the inapplicability of a statute it must be considered "relevant" to solve the controversy before the ordinary or special tribunal. In this case Justice Navarro thought that the application of this statute is a previous requirement to avoid "frivolous litigation". Justice Navarro offered doctrinal

[470] Justices Jose Luis Cea, Raúl Bertelsen, Hernan Vodanovic, Jorge Correa y Marisol Peña upheld the writ of inapplicability and refer to the characteristics such a limitation needs to fulfil (in para 6)

opinions against the existence of an economic requirement to litigate and refers as well to comparative law examples, especially courts that accept the existence of limitations based on the principle of proportionality.[471] Finally Justice Navarro drew attention to the entities being audited through DL 3.558 as entities that participate in the securities market and therefore need to be transparent and serious because credibility of the shares market is crucial. He referred to the limit in the amount of the deposit establish by the statute "the deposit cannot exceed 500 UF if the fine is applied to an individual person or the deposit cannot be superior to 1.000 UF, if the fine is applied to a corporation unless there are repeat fines or those treated in title XXI of the statute N° 18.045 in which case the deposit will rise to 25%".[472]

Application of a proportionality analysis framework:

The judges underlined for the first time the relevance of examining the purpose of the statute in order to evaluate the legislative outcome. The statute under a constitutional challenge was s.30 of DL 3.558 that regulates the most powerful economic companies of the country and which aim was to protect minority shareholders. The aim of depositing 25% of the fine in order to be able to claim the fine is to make the market of shares more

[471] In para 11

[472] The amount of the fine in Canadian currency is $21 908 CAD if the fine is applied to an individual person and $ 43 816 is the fine is applied to a corporation as of April 2011

transparent and avoid unfounded claims of fines that only serve to delay the payment. The judges also underlined that the existence of this rule is part of a "public economic order" considered a principle of the constitutional order understood as: "the right to develop any economic activity which is not contrary to morals, public order or national security, abiding by the legal norms which regulate it."[473] The judges underline that is up to the legislature to establish the norms that regulate an economic activity to a degree that does not impede its free exercise. In methodological terms, the jurisprudence is divided with respect to the legitimate aim that should be scrutinized. It is the aim of the statute as a whole or only the particular purpose of the limitation that allegedly infringes the catalogue of rights and freedoms? The judges in a confusing way alluded to both the aim of the entire piece of legislation and the concrete aim of the procedural mechanism of "solve et repete". They unanimously believed that the statute had a legitimate aim; what is less clear is if the judges thought that the limitation of the constitutional guarantee of "due process" was "pressing and substantial".

The second step of proportionality analysis is to identify the presence of a rational connection between the means and the ends of the statute. The end is to avoid frivolous litigation in relation to the securities market. The means were the deposit of 25% of the total amount of the fine. However, the five judges in favor of upholding the writ of

[473] 1980 Constitution s19(21).

inapplicability advanced the argument that even if we considered a much more focused aim of avoiding "frivolous litigation" the imposition of an economic requirement could put a heavy burden on serious and well founded claims.[474] The judges used the expression "it is clear that the limitation is not adequately designed to serve the legitimate aim of the statute".

An examination of the objective of the statute may determine the concrete situation to ascertain the most reasonable option that would least damage the right. In this case there was no reasoning of the Court in terms of least restrictive means alternative to the infringement of the right to access a court of justice requiring to deposit 25% of the total amount of the fine to be able to claim it. The natural consequence of not having the economic resources would be impede to claim it. The judges that were in favor of uphold the writ of inapplicability discussed the existence of least restrictive means to obtain the same aim like establish an admissibility exam, or the possibility of condemn the claimant to pay the costs of litigation or even the possibility to pay ahead the fine and obtain a discount in order to avoid litigation altogether. For these judges it is also challenging that the statute does not recognize discretion to the judge in charge of the case and, consequently, declared the statutory provision disproportionate and, therefore, unconstitutional.

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[474] In para. 18.

In this particular case, the claimant rights were infringement of the right to access a court of justice requiring to deposit 25% of the total amount of the fine $68.036.025 CLP to be able to claim it.[475] However, we need to remember the original factual context provided where the claimant, Jacobo Kravetz, a CEO of mining company "Schwager" bought $300 millions in shares of "Schwager", being by statute impeded of taking advantage of his privileged position, and sold them within days obtaining $691 million for the sale of the shares. The Chilean Securities and Insurance Supervisor (SVS) applied a fine for the improper use of privileged information. "Proportionality *stricto senso*", as the fourth step, analyzed whether the legislative purpose of creating a mandatory deposit to avoid frivolous litigation was balanced, justified and proportionate by the degree of interference in the applicant's right to access a court of justice.

The proportionality analysis advanced in this dissertation requires the use of Alexy's "weight formula" as part of the proportionality *stricto senso* step.[476] An assessment about the intensity of interference of the right of the claimant to access a court of justice by requiring to deposit a 25% of the total amount of the fine could be considered moderate. Authors like Edefesio Carrasco commenting this case and others where the mechanism of "pay first litigate after" has been constitutionally challenged, praised the Court for having fortified the "due process" clause by considering that access

[475] The total amount of the fine corresponds to $138.082 CAD as of April 2011.
[476] Robert Alexy, A Theory of Constitutional Rights, at 408.

a court of justice is part of its scope of protection. This interpretation in Carrasco's opinion meant departing from a stric textualist interpretation of the text of the constitution.[477] The concrete weight of the potentially violated principles of right to access a court of justice on one hand and the right to punish deleterious litigators is balanced in favor of the salutary effects of a securities market that protects minoritarian share holders.

This case meant to open a conversation about the content of the "due process" guarantee in the 1980 Constitution and how proportionality analysis as a methodology to solve a collision between principles could balance the interests at stake and provide an assessment about the means chosen and the possible alternatives. This first case is also relevant due to the stalemate among the judges that could have lead to a concrete definition of the Court of what to do in these cases. The Court wasted a very relevant opportunity to have discussed how to approach a situation where identical weight is given to the principles at stake. Question like: is the Court entitled to decide a stalemate of it is necessary to defer to the legislature? Remained unanswered because the Court opted for a formal exit avoiding a more substantive decision of what to do in the case of a

[477] Edefesio Carrasco, "Acceso a la Justicia, Igualdad ante la Ley y el termino del 'solve et repete' un valioso cambio en la jurisprudencia del Tribunal Constitucional" in Sentencias Destacadas 2008 (Santiago Libertad y Desarrollo, 2009), at 225

stalemate.[478]

DECISION NO 1345 ISSUED BY THE CONSTITUTIONAL COURT ON MAY 25TH, 2009

The Chilean Constitutional Court decided in March 2009 to promote an "action of unconstitutionality" by itself. The latter means that there is no set of facts to discuss. The Chilean Constitutional Court had declared the inapplicability of the first paragraph of section 171 of the Health Code in four previous cases: decisions No 792, 1061, 1046 and, 1253. This rule states that in order to be able to appeal a fine imposed by an administrative body in charge of Public Health matters before a court of justice, it is necessary to first deposit the total amount of the fine.[479] This is part of the strong powers of judicial review of the Court and represents a departure from a culture of judicial restraint. If the Constitutional Court declares the legal norm to be unconstitutional, the only possible remedy is to strike down the piece of legislation publishing the judgment in the Official Gazette three days later and the effect is the legal norm is void.[480] The Court

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[478] Before the constitutional amendment of law 20 050 in 2005 in case of a stalemate the decision corresponds to the Chief Justice of the Court with exception of the 'writ of inapplicability' and the 'action of unconstitutionality' section 8 letter g statute 17 997, published in the Official Gazette August 10th, 2010

[479] S 171 paragraph 1 of the of the Health Code "The sanctions applicable by the National Health Service can be appealed before a ordinary court of justice within five days since the decision is notify, claim that will be solved through a brief and summary procedure In order to be able to claim the fine it is required that the offender first deposits the total amount of it

[480] All decisions of the court are published in its website and some of the judgments are published at the Official Gazette which constitutes an exception in the Chilean legal system, S 40, Law 17 997 Organic Constitutional Law of the Constitutional Court, Official Gazette August 10, 2010

decided to notify the executive and the National Congress, Institute of Public Health and the Office of the Attorney General.

Although the mechanism under constitutional scrutiny in this case is the same "solve et repete" the aim of the statute is different and this meant a different balancing exercise. If we follow Robert Alexy's theory of constitutional rights, principles are *prima facie* rights rather than definitive formulations. The majority decided that the statute being examined had as legitimate aim: the protection of the life and health of the population through the oversight of how medicaments are produced and distributed by an administrative body. The presumption of legality of administrative acts is invoked and one tool used is to establish a mechanism of "pay first and litigate after" as a barrier to avoid "frivolous litigation".[481] The majority decided that the statute under constitutional scrutiny was a disproportionate limitation of the constitutional right to access a court of justice and therefore declared it unconstitutional.[482] The effect of the Court's decision was to strike down paragraph 1 of section 171 of the Health Code.

Application of a proportionality framework by the majority:

[481] In para 12.
[482] Justices Jose Luis Cea, Raúl Bertelsen , Hernán Vodanovic, Mario Fernández , Marcelo Venegas , Jorge Correa and Marisol Peña.

Two methodological claims can be advanced in this step: firstly, the jurisprudence is divided with respect of the legitimate aim that should be scrutinized. It is the aim of the statute as a whole or only the particular purpose of the limitation that allegedly infringes the catalogue of rights and freedoms? The Court, in a confusing way, alludes to both the aim of the entire piece of legislation and the concrete aim of the procedural mechanism of "solve et repete". However, there is no evidence to support what the Court considers to be the general aim of the statute. Secondly, once the majority accepts the existence of a legitimate aim the question is if the limitation of the constitutional guarantee of "due process" was considered pressing and substantial.

The particular aim of paragraph 1 of section 171 of the Health code is to avoid frivolous litigation of fines previously applied by the National Health Institute. The mean used is to pay the total amount of the fine in order to be able to claim it before a court of justice. The Court elaborated an argument about the lack of a rational connection between the means used (the mandatory payment of the total amount of the fine before a claim can be presented) and the goal to be achieved (to avoid frivolous litigation) because by imposing the requirement of a "pay first litigate after" system the serious and the frivolous litigator will be affected.[483] Moreover, the Court was of the opinion that the means used do not rationally connect with the aim and only position better the claimants

[483] In para. 13.

with economic capacity. The majority stated that "under these circumstances it cannot be argued that the mechanism served the aim pursued".[484] Following a proportionality methodology the examination of the constitutionality of the justification might have ended here. The court could have declared the lack of a rational connection and therefore the limitation as disproportionate and therefore unconstitutional.

The Court discussed the existence of less restrictive means in order to obtain the same aim and avoid frivolous litigation giving as concrete examples the existence of admissibility exams before revising claims before the tribunals and the punishment for unmeritorious litigators to pay the expenses of the litigation. Consequently, without proceeding to the "proportionality stricto senso" step, the Court declared the statutory provision disproportionate and, therefore, unconstitutional.[485]

In this particular case, the infringement of the claimant's right to access a court of justice requiring them to deposit the total amount of the fine is considered by the Court as a high limitation.[486] If the decision of the Court would have been a proper use of the proportionality technique they could have apply the "weight formula" proposed by Robert Alexy.[487] Firstly, an assessment as to the intensity of interference of the right of the claimant to access a court of justice by requiring depositing the total amount of the

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[484] In para. 13.
[485] Decision No 1345, issued on May 25th, 2009, paras. 13-15.
[486] In para. 9.
[487] Robert Alexy, *A Theory of Constitutional Rights*, at 408.

fine would be considered high. On the contrary, the interference with the aim of the statute part of the "due process" clause as well, aiming to avoid frivolous litigation due to least restrictive means and the lack of a rational connection between means and ends could be low. Moreover, the Court refers to the marginal augmentation of the efficacy of administrative sanctions as light. Due to the concrete weight of the potentially violated principles of right to access a court of justice on one hand and the right to punish deleterious litigators is balanced in favour of access to litigation.

The dissenting opinion by Justices Juan Colombo C.J. and Francisco Fernández held that the action of unconstitutionality should not be upheld and took their decision through categorization rather than proportionality. In their opinion the right to access a court of justice was not limited in an unjustified manner.

Most of the critiques raised among the legal community concerned the different outcomes in the decisions of the Constitutional Court, both dealing with the "solve et repete" mechanism when what was at stake allegedly was the same. The latter is based on a lack of knowledge of the mechanism of proportionality analysis as a flexible standard, one that allows for diverse outcomes.

This decision of the Constitutional Court advances several steps in the learning curve towards a more accurate proportionality methodology. Firstly, it is relevant that the Court assumed the existence of a collision between constitutional rights; this is a

methodological improvement in the Court's argumentation. On one hand there is the right to access a court of justice as part of the scope of protection of the due process clause. On the other hand the National Institute of Public Health argued that the public interest at stake was the state duty towards public health conditions which, the administrative body connected with the right to live and the physical and psychical integrity.[488] Secondly, the Court accepted the broader aim for the National Institute of Public Health as an institution made an effort to concretely establish the aim of the statute. The statute at stake was justified in order to avoid the so-called "frivolous litigation" that merely sought to avoid the payment of the fine imposed for a period of time.[489] Consequently, procedural concerns are also part of the due process clause and therefore the collision is

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[488] S 19 The Constitution guarantees to all persons
- No 1 'The right to life and to the physical and psychological integrity of the individual.
The law protects the life of those about to be born
The death penalty may only be instituted for a crime considered in a law approved by a qualified quorum.
Use of illegal pressure is prohibited,
- No 3 'Equal protection under the law in the exercise of their rights
All persons have the right to legal defense in the manner indicated by law and no authority nor individual may impede, restrict or perturb the due intervention of an attorney, should it have been sought. As regards the members of the Armed Forces and of Public Order and Security, this right will be governed, in connection with administrative and disciplinary matters, by the relevant norms of their respective statutes
The law shall provide for the means whereby legal counsel and defense may be rendered to those who should have been unable to obtain them on their own.
No one can be judged by special commissions, but only by the court specified in the law, and provided such court has been established prior to the occurrence of the facts
Sentences decreed by a court vested with jurisdiction must be based upon previous legally held proceedings It will be responsibility of the legislator to establish, at all times, the guarantees for a rational and just procedure and investigation
The law cannot presume de iure criminal liability
No crime shall be subject to penalties other than those prescribed for by a law enacted prior to the perpetration of the crime, except where a new legislation might favor the interested party
No law may establish penalties foi crimes that have not been expiessly described therein.'
[489] In paia 12

within the same guarantee. Thirdly, the Court is aware of the existence of a presumption of constitutionality of the legislature and being self-aware of their culture of judicial restraint admits the existence of limits to legislative discretion. The Court paraphrases a three-pronged proportionality test (suitability, necessity, proportionality 'stricto senso') to examine the infringement of the constitutional right.[490]

6.6. THE ABSENCE OF THE PROPORTIONALITY STRICTO SENSO STEP: DECISION NO 976 ISSUED BY THE CONSTITUTIONAL COURT ON JUNE 26TH, 2008

Under a neo-liberal market frame created in the 1980s, the welfare state promoted a highly individualistic conception of pensions and healthcare. Consequently, healthcare coverage in Chile is provided by a dual system: by a public and a private system. The drastic neo-liberal reform in the 1980s served as a model for later World Bank healthcare reform programmes in other Latin American countries like Colombia.[491] In 2007, when the case was first brought before the courts, 70% of the population was covered by the Public National Health Fund (FONASA), 16% of the population was covered by the Private Healthcare System (ISAPRE – Institute of Public Health and Preventive Medicine) and the remaining 14% of the population was covered by other healthcare regimes (understood as the armed forces system, private insurers and non-affiliated

[490] In para. 10.
[491] Worlds Bank's 1993 report 'Investing in Health' made Chile a model for neoliberal reforms to health services.

groups).[492] Despite the dualist approach, public healthcare remains the backbone of the healthcare system. However, all cases being examined by the Constitutional Court are part of the private healthcare system. The two systems respond to opposite rationale. The public system corresponds with a traditional solidarity perspective on social security enforcing a system were members contribute a proportion of their wages and receive healthcare according to their need. By contrast, the private system corresponds with an auto-financed insurance where the price is determined according to personal characteristics like age, gender, health risks and co-payments with the benefits dependent upon the nature of the contract agreed upon. In the private system, every employee is required to make a monthly mandatory contribution of 7% taxable income as a minimum with the health insurance provided by private companies called ISAPRE.

The significantly unequal nature of the private healthcare system in Chile with regards to income, employment status, region, ethnic origin, access and gender is detailed by the scholar Carmelo Mesa-Lago.[493] Health plans provided by the private sector has a discriminatory effect on women because of the greater risk factor associated with them primarily due to child-birth. Mesa-Lago also claims that gender inequality in healthcare could also be attributed to external factors in Chile including a female labour force

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[492] Public statistics 2007 published by the public healthcare system FONASA, available at <www.fonasa.cl> accessed march 25th, 2010

[493] Carmelo Mesa-Lago, "Social protection in Chile Reforms to improve equity" (Dec 2008) International Labour Review 147-4 ABI/INFORM Global, p 377, at 379

participation rate of 39%, a female wage amounting to one-third of the male wage, and the fact that women's healthcare is largely covered through dependence upon an insured man. Age is also an impediment to healthcare where, surprisingly, only 5% of people over sixty years old were affiliated to the private healthcare system in 2006.[494] Another element to consider is that ISAPRE are companies that operate to obtain profits. Private healthcare has been presented as an opportunity for business with the profits made by ISAPRES exceeding 20% in some years.

Since 1990, democratic governments have worked to introduce social solidarity and equity as part of the system. In 1995, the "Health Superintendency" was created with the objective of monitoring the compliance with contractual regulations. In 2002 the President of the Republic, Ricardo Lagos, proposed Bill 19.966 to establish a general system of healthcare guarantees, as a legislative answer that addresses the inequality of the system in Chile.[495] There was concern as to how a neo-liberal scheme would regulate health as a commodity and the law sought to establish a framework for healthcare companies. In 2005 a new institution called the "Intendance of Healthcare Fund and Insurances" was created in order to enforce the obligations imposed by law upon the

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[494] Carmelo Mesa-Lago, "Social protection in Chile Reforms to improve equity", at 382

[495] The only advancement on the egalitarian access to healthcare with independence of the economic capacity of the person has been the plan GES (Plan for explicit health guarantees) implemented since 2005 A total of 40 diseases are guaranteed without discrimination according to gender, age, or ability to pay Both systems, the public and the private, are required to provide their beneficiaries with medical treatment, surgery if necessary, drugs and medical supplies The original idea is to broaden the plan to cover all the illnesses that have the greatest impact on the Chilean population to an amount of 80 by 2010.

ISAPRES. These included the "explicit guarantees" in health, the health contract, as well as the laws and regulations regulating ISAPRES. However, the framework still considered gender, age and the situation of the beneficiary as factors, with the service dependent entirely upon the income of the beneficiary, and the cost being defined unilaterally by the company with no concrete requirement of a maximum cost or necessary proportionality amongst the different contracts. However, the enactment of this legislation is an endorsement of the existence of a hybrid legal system where the private healthcare is in the hands of private companies, with the legal form of contracts under a profit scheme. This option is open to those able to pay for it.

The key issue to be defined by the Constitutional Court was whether s.38 of statute 18.933 (as amended by s. 1(15) of statute 20.015), establishing a table that unilaterally modify the cost of health plans based on parameters such as gender or age, was constitutional.[496] Was such a legislative provision an unconstitutional limitation of

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[496] Section 38 of Law 18.933 establishes since 2005 that in order to define the cost of the health contract the private healthcare company called ISAPRE will need to multiply the basic cost by the factors following the table The 'Health Superintendency', a governmental administrative institution, has the discretion to modify the tables every ten years based on criteria like gender and age of the beneficiary Section 38 establish in how divisions will be set up based on age and gender So tables will be different for male and for female There is a first stretch between the birth and two years of age s 38ter (1), the following stretches need to be at least five years long and will cover beneficiaries from two years of age until 80 years of age s 83ter (2), from 80 years of age onwards the 'Health Superintendency' will establish the stretches s 38ter (3) and finally every 10 years the 'Health Superintendency' will establish the maximum difference between the lowest and highest factor in each table distinguishing by gender s 38ter(4)
- Section 2 of Law 18.933 modified by Law 20 015 in 2005 is relevant because it establishes basic concepts helpful for the legal analysis·
" For the purposes of this law it shall be understood

the guarantees of equality and non discrimination under s.19 (2), the right to private property over the healthcare contract under s.19 (24), and the right to choose a healthcare system under s.19 (9). If unconstitutional, can the section be justified under a substantive threshold?[497]

In the first case at stake here, Silvia Peña, a clear minority in the system as a woman over 60 years old, contracted with the private company ING SALUD for her health

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i) The expression 'captive beneficiary' is used to describe a serious limitation to one individual's will based on age, gender or based on health records of the beneficiary of a member of her family and which effect is to impede or limit substantially or permanently to contract with another healthcare company

k) The term 'contracted healthcare plan' for benefices additional to the ones provided by Plan GES (Plan for explicit health guarantees) in access, quality, financial protection and opportunity for healthcare treatments

m) The expression 'basic cost' for the cost defined by the healthcare company to each plan The same prize will be applied to every person contracting that plan with the healthcare company The final prize to be paid to the company will be obtained multiplying the 'basic cost' for the correspondent factor based on the table of factors

n) The term 'table of factors' refers to the table created by the private healthcare company which factor reflect the differences based on age, gender and situation of the beneficiary following the instructions provided by administrative organ called 'health superintendency ' This table represents a pact to modify the cost of the healthcare plan between the private healthcare company and the beneficiary throughout her life The table of factors is known and accepted by the beneficiary at the moment of sign the contract and it cannot be modified while the person is attach to this plan

[497] S 19 'The Constitution guarantees to all persons

- (2) Equality before the law In Chile there are no privileged persons or groups In Chile there are no slaves, and those who should set foot on its territory become free Men and women are equals before the law Neither the law nor any authority may establish arbitrary differences '

- (9) The right to healthcare The state protects the free and egalitarian access to actions for the promotion, protection and recovery of the health and rehabilitation of the individual The coordination and control of activities related to health shall likewise rest with the state It is the prime duty of the state to guarantee health assistance, whether undertaken by public or private institutions, in accordance with the forms and conditions set forth in the law, which may establish compulsory health quotations Each person shall have the right to choose the healthcare system that he/she wishes to join, either state or private-controlled '

- (24) right to private ownership in its diverse aspects over all classes of corporeal and incorporeal property Only the law may establish the manner to acquire property and to use, enjoy and dispose of it, and the limitations derived from its social function Said function includes all the requirements of the Nation's general interests, the national security, public use and health, and the conservation of the environmental patrimony '

coverage in 1997. Her complaint concerned the augmentation of the cost of her health plan when she turned 60 in 2007, when ING SALUD unilaterally increased the cost by 22%. Silvia Peña alleged that her right to equality violated when the legislator established an arbitrary authorization for private healthcare companies to fix the cost of health plans based on a table with factors such as gender or age.[498]

The "Health Superintendency" issued a response on behalf of the government.[499] While the Chilean government had placed emphasis upon the solidarity deficit of the "private healthcare system" and imposed legislative efforts since 1990 to address the inequality of the system, these attempts were undermined by the response of the "Health Superintendency" who is in charge of the supervision of private companies within the healthcare system. It claimed that s.38 of the statute 18.933 was constitutional and that the difference in the health insurance price, based upon parameters like gender or age, was not discriminatory. The Chilean government underlined the hybrid legal structure of a private system of health coverage that, on one hand, must not discriminate and show solidarity but, on the other hand, was ruled by the law of contracts and pursuit of economic profits. The administrative body did not consider the constitutional rights of Silvia Peña to be limited in an unconstitutional way by the modification in the cost of her

[498] Silvia Peña, the claimant, is a lawyer who originally presented a 'protection writ' against ISAPRE ING Salud S.A. at the Court of Appeal of Santiago, ROL 4972-2007.
[499] Oficio Ordinario SS No 4847, December 14th, 2007.

healthcare contract. The key argument was the autonomy of the will invoked as part of the "contract" signed by both parties.

The response provided by the private healthcare company ING SALUD S.A. reflects the traditional view of he relationship with the claimant as a contractual one. The company claimed that the amendment of the 2005 law does not apply to Silvia Peña's contract signed in 1997. ING SALUD S.A. rejected the idea of discrimination based on gender and age. The company described the way in which private health coverage is structured in Chile as an insurance and argued that it can, therefore, be related to particular characteristics of the claimant. One of the arguments put forward was that the 1980 Constitution does not include an obligation on the part of the legislature to uphold a minimum threshold in the realm of non-discrimination. ING SALUD S.A. saw s.38 of Law 18.933 as representing the best legislative effort to date to regulate institutions of private healthcare in Chile and the modification of private health coverage contracts. They do not perceive there to be a limitation to the right to choose either the private or public healthcare system in this case because the market regulates the system. Therefore, the option will remain open although it will be dependent upon economic and personal factors. The company also rejected the idea of a right of property over the contract because the claimant has not paid the price of the private health contract.

The majority of the Constitutional Court[500] held that the existence of a table that considers criteria such as age and gender cannot be considered discriminatory based on the equality rights contained in s.19(2). However, the increase in cost for Silvia Peña's insurance was considered disproportionate and an unconstitutional limitation of her right to choose a healthcare system under s.19(9). Although the Court decided that the private healthcare contract neither accomplished the societal aim described in the Constitution, nor did it allow her to freely decide on her healthcare system, there was no proof of facts in the judgment that allows the reader to reach such a conclusion. The decision of the Court was limited to establishing that, in this healthcare contract, there had been no proportionality between the parties and their mutual obligations through the unilateral augmentation of the cost based on the gender and age of the claimant.

The majority established that the principles and values of the right to healthcare could be incorporated under s.1 of the Constitution, which establishes the aims of the Chilean State and the principle of human dignity. Once again the tendency to oversimplify complex philosophical terms like human dignity creates the danger of watering down relevant legal concepts like equality. The Court underlined the commitment to the protection of fundamental rights inherent in the concept of human

[500] Per Jose Luis Cea, Hernan Vodanovic, Mario Fernandez, Marcelo Venegas, and, Marisol Peña.

dignity that all organs of public administration must possess.[501] The Court also asserted that the Constitution must always be considered the supreme and superior norm of the Chilean legal order and, therefore, its content is mandatory for every single person in Chilean territory.[502] The Court referred to the mandatory obligation of the state to search for the common good, and to protect and ensure equality among the population. The Court refers to subjective rights like the right to life, the right to physical and psychological integrity and the right to healthcare protection as part of the Chilean constitutional order.

The majority referred to fundamental rights as pre-existing the constitutional order[503], which could be linked to a particular substantive conception of right that runs counter to a positivist approach.[504] It recognises the normative force of the catalogue of rights and freedoms especially for the government but does not refer to the possibility of a collision between fundamental rights. Moreover, the Court presented the Constitution as a coherent and harmonic system of values and principles.[505] The Court also referred to the restrictions this may impose over the legislature, by establishing minimal standards that must be fulfilled by private healthcare companies. Moreover, the Court established that

[501] In para 24.
[502] Judgment 976/07, section 4 paragraphs 12, 13, 14 and 15.
[503] In para.14
[504] In para 15.
[505] In para. 34.

the constitutional guarantee consecrated in s.19(9) should be considered the basis of every healthcare contract.[506]

Methodologically speaking, the judges should have first considered the existence of a collision. From the perspective of the private healthcare company only one paragraph refers in an indirect way to a possible limitation private companies can have upon their freedom to contract.[507] The Court referred to the social function of private property that accepts limitations based on concerns of public health. What kind of concerns would limit private healthcare contracts? Do profits of companies have a limit? Do they need to reinvest part of the profits in research or technology? Do they also provide services to public care beneficiaries? So, on one hand, there was the private property right of the ISAPRE and the possible limitation to the freedom to contract based on the social function of the right understood as concerns regarding public health. On the other hand, it was held that the existence of a table containing criteria such as age and gender in order to define the cost of the private healthcare contract wasn't considered discriminatory based on the equality rights protected in the Constitution under s.19(2). Of course, a country's constitutional maturity in recognising prohibited grounds of discrimination or analogous grounds of discrimination differ, but it is surprising that the Court did not make a revision of the current standpoint in the Chilean healthcare system that, according

[506] In para 22-28.
[507] In para. 37.

to health law scholars like Mesa-Largo, fosters discrimination. A different question would have been to examine whether the limitation was constitutional. However, the increase in the cost of Silvia Peña's health insurance was consider disproportionate and an unconstitutional limitation of her right to choose a healthcare system under s.19(9). The formulation of the scope of protection of this guarantee by the court was confusing, because it did not distinguish between the private and the public system, nor did it distinguish how both systems are based on distinctive values. Here "disproportionate" seems to be constructed as arbitrary, contrary to principles of fundamental justice. It is underlined by the first dissenting opinion that discusses how the decision about the healthcare system is totally dependent on the income of the beneficiary in Chile, with solidarity not being a value fostered by the private healthcare system. The simple fact that the beneficiary did not have the money to pay for the increased cost of her private health plan does not prove the infringement of the constitutional guarantee. The system itself is based on the income of the beneficiaries in a market-type health coverage system.

The scope of protection given to the right to healthcare[508]

The Court's ruling failed to analyze what the scope of the constitutional guarantee of healthcare actually entails. What is the value being protected? A person's health enables

[508] I realise that the explanations regarding the scope of protection of rights is complementary to a proportionality analysis technique it is relevant to address the methodological problems encountered by the Constitutional Court in order to have a clearer picture of the challenges

them to function normally and exercise their full range of opportunities. There are socially controllable factors in maintaining the normal functioning of the population like education, access to employment, and distributing healthcare. The Court failed to mention the legal context that can be ascertained from the 1980 Constitution that originally established a pure market account of healthcare with a financial barrier that implies other forms of discrimination and exclusion under the form of non-financial barriers. The Court then ignored the legislative efforts after 1990 to address the inequalities by establishing universal access to healthcare based upon a constantly growing list of diseases. There has been no discussion about the constitutional guarantee establishing a "decent minimum" of healthcare. Aside from the fact that it only covers 16% of the more wealthy population, private healthcare is based on distinctions like age and gender, which the public healthcare system does not permit. Another missing debate relates to the effects a private system has on a universal public healthcare system. Reasons given for the failure to allow a supplementary insurance for health coverage in countries like Canada are that a private system attracts better quality providers away from the basic tier and can undermine even political support for those who need the healthcare more.[509]

[509] *Chaoulli v. Quebec (Attorney General)* 2005 SCC 35.

If this was a concrete examination of the private healthcare system, I would have expected to see some social science data about the effects that such a system has had on the Chilean population. Are the beneficiaries better protected? Does research on health show an improvement in Chilean health indicators? Are there any reliable studies about the social gradients of health in Chile? How is the scope of the guarantee interpreted when faced with two systems that respond to opposite rationales?

The scope of protection in the equality clause and prohibited grounds of discrimination

The decision of the Chilean Constitutional Court does not recognise age and gender as prohibited grounds of discrimination. Due to its previous statement that private health companies also fulfilled a public duty, a confusing argument emerged where the Court claimed the existence of contractual equivalence between the individual and the healthcare provider. Therefore, discrimination or unreasonable differences are not to be tolerated and constitute an infringement of the equality clause. The scope of protection of the equality clause under s.19(2) was not established by the Court. Nevertheless, in this constitutional provision there are references to personal characteristics that should not be the basis for discriminatory treatment like differences between genders. This would be assimilated with prohibited grounds of discrimination in many other constitutional states.

Chilean superior tribunals have only been considering formal equality perspectives appraised as being "to treat similar things alike" The first dissenting opinion argued that an arbitrary distinction is meant to target social groups with less power or social influence when based upon price [510] On the contrary, distinctions made in healthcare contracts based upon age or gender were made on a scientific basis and argued before the Court The Court acknowledged that the justice of such a legislative decision could be debated but it does not mean that as far as it stands the constitutional provision is now irrational The interpretation of the equality clause is one aspect that was set to be developed throughout the cases decided by the Constitutional Court

Applicability of fundamental rights in private relationships

The majority refers directly to a German doctrine called "Driffwirkung der Grundrechte",[511] that assumes that the contractual relationship between Silvia Peña and the private health insurance company would be infused by the regulations provided by the 1980 Constitution [512] The Court referred to the possibility of limiting private property under s 19(24) by the social function established by law that included "the requirements of the Nation's general interests, the national security, public use and health, and the

[510] Per Justices Colombo, Beitelsen and Correa
[511] In para 56
[512] In para 32

conservation of the environmental patrimony".[513] Does this then imply that public health could be a reason to limit private health contracts? The Court acknowledged that in Chile private healthcare companies fulfill a public duty in protecting the health of individuals and, therefore, it is subject to the catalogue of rights and freedoms. There is no further elucidation as to how the limitation clause should be interpreted. This is problematic because the parties are private companies fulfilling a constitutional guarantee. This is a highly contested matter, although the Court does not seem to realise it.

The pioneering jurisdiction in this issue is the Federal Constitutional Court in Germany through the doctrine initiated in the "Lüth case" in 1958.[514] This doctrine called "Driffwirkung der Grundrechte" became a reference for Civil Law jurisdictions that were required to decide whether basic rights affect private law.[515]

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[513] In para 37

[514] About the path breaking relevance of this case Jacco Bornhoff, "Luth's 50th Anniversary. some comparative observations on the German foundation of judicial balancing" (2008) German Law Journal Vol 09 No 2, 121

[515] The following set of arguments were considered by the German Federal Constitutional Court in 1958 (1) the main purpose of the catalogue of constitutional rights is to protect the individual against encroachments by public power, (2) the Constitution establishes a system of values that applies throughout the whole legal system and that informs legislation, administration and judicial decisions, and (3) the influence of basic rights is clearer in those rules of private law which are mandatory because the public interest applies to private legal relations whether the parties choose it or not

Application of a proportionality analysis frame by the majority of the Court

The first step of proportionality analysis is the study of the legitimate aim of the law.[516] The legislative purpose was to create a normative framework with limitations to determine the cost of a private healthcare contract. Law 18.933 approved in March 1990 just before the end of the military dictatorship, aimed to "enforce the obligations of the ISAPRE, oversee the healthcare contracts imposed by the ISAPRE on their clients, promote solutions to the market's imperfections and guarantee the long-term stability of the system of ISAPRE".[517] In the case at stake, the information provided by private health companies is obviously structured in a manner that benefits the company. The Court did not require further information about the claimant nor did the Court establish a standard of proof. Questions remained unanswered. What was the income of Silvia Peña? Does her plan require her to pay more than 7% of her salary? What are the technical reasons for the private healthcare company to raise the cost of her contract? How can the court assess that the present change in the cost is proportionate? What is the parameter used?

However, the judges' role is to guard the Constitution and to represent the current understanding of the socially accepted norms under the form of democratic rights. At the same time, they must give discretion to the political representatives to debate and reformulate those social agreements. A concrete judicial case before the Constitutional

[516] http://www.supersalud.cl/568/w3-article-6487.html
[517] Superintendency of Health Government of Chile.

Court can then put into question a legislative fact. There is reference to the debate held at the National Congress during the drafting of the section under scrutiny, recognising the existence of discrimination between the active and the passive population and the debate concerning different options that could diminish this discrimination. The key issue to be defined by the Constitutional Court is whether the private system of health coverage in Chile, ruled by the law of contracts and the pursuit of economic profits, can determine the cost of the contract unilaterally based on factors like gender or age following the limitations described by law. Alternatively, it must determine whether such a legislative provision is an unconstitutional limitation of the guarantees of equality and non-discrimination and/or the right to choose the healthcare system. What is the rationale for accepting a public system that does not discriminate based on age, gender, income or health conditions, but that accepts these as legitimate factors for the private system? What is the benefit for the Chilean society of the private healthcare system? Is scientific research being done? Has new technology been implemented? Does the general population benefit from the advances created by private medicine care in Chile? Literature on health policy has proven very critical on the outcomes of the Chilean model. It is argued that the neo-liberal health reform in Chile has created an unfair dual health system with Fonasa and public services for the poor while the affluent have the ISAPRE and private services. The reform increased the incomes of private sector providers and

decreased the efficiency of the health system (through the incentive to over-treat inherent in fee-for-service schemes, through much higher administration and marketing costs, and through the fragmentation of service provision).[518]

The aim of s.38 of Law 18.933 is to uphold a private healthcare system that secures profit under a fixed framework that allows the unilateral modification of the cost of private healthcare plans. This can be connected to a discourse of legal security and stability for private companies, where the aim is linked to a "market-type" healthcare service. The means used to establish a fixed framework for the cost of healthcare contracts are age and gender as factors that, interestingly enough, are not considered a violation of the equality clause but, in this case, is a limitation of the right to choose a healthcare system. The claimant pointed out a lack of a rational connection between the aim pursued and the means adopted by arguing how parameters such as gender and age are involuntary and, therefore, differentiations based on them are discriminatory. She proposed that the cost of the healthcare contracts could consider factors that are voluntarily and that put health at risk like smoking or drinking in excess. If the aim was to "guarantee the long-term stability of the system of ISAPRE" there is no rational connection to define the price based on personal characteristics that are "unavoidable" like gender and age.

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[518] See Unger J-P, De Paepe P., Cantuarias GS, Herrera OA; "Chile's Neoliberal Health Reform: an assessment and a critique" (2008) 5:4 PLOS Med.

In this case, an examination of the objective of the statute may determine the concrete situation to ascertain the most reasonable option that would least damage the right. First, in order to examine this step, it is necessary to admit that a constitutional right has been limited. The identification of a limitation is required to define the previous scope of that right. In the case at stake, the Court established a limitation of the right to choose a healthcare system by the use of age and gender as factors. Paradoxically, the Court did not consider this a limitation to the equality clause. The limitation was upon the right to choose a healthcare system. Nevertheless, there is a lack of treatment of the scope of protection of the right to healthcare in the 1980 Constitution. What does this right entail? What if the system is constructed in such a way that the economic capacity of the individual is crucial to distinguish between the public and the private healthcare systems? Why is it considered disproportionate and, therefore, an unconstitutional limitation of a right when age and gender is used to determine the cost of the private healthcare contracts? Maybe less restrictive alternatives would determine the cost of the private health insurance by the state as a fixed quantity, reducing the possibility of profits by the private sector, or creating an equal legal frame for the public and private healthcare systems. The Court's decision lacks a proper debate on this point.

In this particular case, the claimant's rights were restricted in order to privilege the private property of the healthcare company. "Proportionality stricto senso" analyzes

whether the legislative purpose of creating a normative framework with limitations based on age and gender to determine the cost of the healthcare contract was balanced, justified and proportionate by the degree of interference in the applicant's right to choose a healthcare system and her right to equality and non-discrimination based upon prohibited grounds (although not really considered by the Court). The Chilean Constitutional Court considered the law to be disproportionate. If the decision of the Court would have been a proper use of the proportionality technique, they could have applied the "weight formula" proposed by Robert Alexy.[519] Firstly, an assessment as to the intensity of interference of the principles at stake would have determined that the interference upon the freedom of contract based on the social function of private property regarding concerns of public health could be considered minimal. The latter is based upon the freedom enjoyed by the private healthcare company to define the "basic cost" of each health plan which will be multiplied by the factors define in the table. By comparison, the interference with the right to choose a healthcare system could be considered serious if the claim was that the disproportionate augmentation of her healthcare contract forced the claimant to move to the public healthcare system. In my opinion, there was also a serious limitation of her right to equality and non-discrimination based on grounds like age and gender. Secondly, the concrete weight of the potentially-violated principles of freedom of contract on one

[519] Robert Alexy, *A Theory of Constitutional Rights*, at 408.

hand, and the right to choose a healthcare system (or better the right to a non-discriminatory treatment) is not conclusive. Unfortunately, the Court did not consider extrinsic evidence, legal policy or public policy to allow a substantial argument about which one of the principles at stake had a higher weight in the Chilean legal order.

The dissenting opinion by Justices Juan Colombo, Raul Bertelsen, and Jorge Correa has the clear footprint of the neo-liberal approach by claiming that the inapplicability writ should be dismissed because s.38 of Law 18.933 represents a lawful option of unilaterally modifying the price of services being offered through a healthcare contract. The existence of a table based on objective factors like age or gender is not considered discriminatory. On the contrary, it is based upon the idea that private healthcare contracts are equivalent to "individual insurance". The exercise of the right to choose a private or public healthcare system under s.19 (9) is not being affected because it still depends on the income of the person to contract. The dissenting judges underline that the 1980 Constitution does not protect an egalitarian access to private health insurance, with independence of the economic capacity of the person. This is relevant, because it acknowledges a "market type" healthcare system in Chile, dependent upon the economic capacity of the individual. The debate held about the role of constitutional judges and legislators in the design of healthcare rights and protection of the guarantees is interesting. The dissenting judges are of the opinion that constitutional judges cannot give

their view with regards to the way in which the legislature designed the private health insurance contract and the unilateral modification of its price based on characteristics like gender or age. The judges referred to ROL 207 decided in 1995 that referred to principles of the Chilean constitutional order like the rule of law, certainty, and the trust that private companies need to have in the system.[520] If the legislature modified the system after private parties signed a contract, they can feel affected by that modification. ROL 505 decided in 2007 recognised a property right over the price of a contract, but the dissenting judges are of the opinion that in this particular private health insurance contract, the individual does not have the same property rights.

The dissenting opinion by Enrique Navarro held that the inapplicability writ should be dismissed because the Constitution requires the writ of inapplicability to be considered "relevant" to solve the controversy before the ordinary or special tribunal in order to be upheld. In this case, Justice Navarro believes that the application of s.38 is uncertain in solving the controversy at stake based upon technical rules of the private healthcare system.

The decision adopted by the Constitutional Court should have been implemented by the Court of Appeal of Santiago in the case "Silvia Peña vs. ISAPRE ING Salud S.A.", protection writ ROL 4972-2007. However, the Court of Appeal declared the writ

[520] Decision No 207, issued by the Constitutional Court on February 10th, 1995.

inadmissible, as they perceived the petition to be untimely. As a Chilean scholar declared with great irony: "doubtless this is the most important judgment of the Constitutional Court to date if we consider the general arguments made, but at the same time it is maybe the least glamorous decision with respect of its concrete effects".[521]

The novelty in this judgment is the recognition made by the Constitutional Court of social rights as positive rights that require the exercise of precise actions to be adequately guaranteed by the state. The Constitutional Court presented the normative force of social rights in Chile as "non-critical" and "non-controversial". Consequently, the constitutional guarantee is, in my view, in danger of being watered down. The truth is that social rights started to be considered as part of the constitutional order only a short time ago. This is an interesting case where the outcome is the result of a proportionality analysis, but where the technique, if any, is hidden.

6.7. THE CONSTITUTIONAL COURT'S ROLE IN A DEMOCRATIC SETTING: DECISION NO 1710 ISSUED BY THE CONSTITUTIONAL COURT ON AUGUST 6TH, 2010

The Chilean Constitutional Court decided in August 2010 to promote an "action of unconstitutionality" by itself. The latter means that there is no set of facts to discuss. This case was to built upon decisions previously made by the Court including: Decisions No

[521] Eduardo Aldunate Lizana, Jurisprudencia Constitucional 2006 – 2008: Estudio selectivo (Editorial Legal Publishing, 2009), at 94.

976 and No 1218 that declared s.38 to be an unconstitutional limitation of the equality clause under s.19 (2) and the right to healthcare under s.19 (9); and decisions No 1273 and No 1287 that added that the provision was also an unconstitutional limitation to the right to social security under s.19 (18). The Constitutional Court decided this case through a two hundred and fifteen page long judgment and garnered substantial public attention. This was a case whereby the Constitutional Court unilaterally initiated proceedings before inviting the other political branches of Government (the executive and National Congress) to participate as interveners.[522]

The Court established the constitutional questions as being: (1) Whether s.38 of statute 18.933 fulfils the constitutional mandate to treat equally before the law men and women; (2) Whether the same provision fulfils the constitutional mandate to protect the healthcare of individuals that opted for private healthcare; (3) Whether the statute fulfils the duty of the state in reference to the right to healthcare under s19(9) and the right to social security under s19(18); and (4) Whether proportionality analysis is an approved mechanism to use.[523] The latter developed with the Executive proposing (for the first

[522] This case caused a huge public debate and therefore, interveners where numerous The President of the Chilean Republic, eleven Deputes members of the Socialist Party, Private Health Company Consalud S A , Private Health Company Banmedica S A , Private Health Company Vida Tres S A , Association of Private Healthcare Companies, Private Health Company Cruz Blanca S A , Private Health Company Colmena Golden Cross S A , Javier Fuenzalida & Cia , Pedro Barria (Infolex Limitada); Humanas Corporation; Chilean Association of Geriatrics and Gerontology, four professors of Constitutional Law, Altura Management, Private Health Company Masvida S A , and, Chilean Medical Society

[523] In para 143

time) a proportionality analysis framework as the rights adjudication mechanism to follow.

The majority[524] concluded that s.38(1-4) of statute 18.933 were "incompatible" with equality before the law because that principle established a different treatment between men and women, while also finding that there was an incompatibility between the statute and the rights to healthcare and social security guaranteed in the Constitution.[525] The court rejected the argument put forward by all private healthcare companies in the previous cases claiming that the contract between a private healthcare company called ISAPRE and an individual is not a individual health insurance contract guided by the principle of autonomy of will.[526] They based this upon the rationale that the healthcare contract is part of the right to healthcare and the right to social security guaranteed by the Chilean state. Moreover, the Court underlined that the legal framework of public healthcare contracts is part of the public order domain. The Court refers to the adjustment of the healthcare contract where the private healthcare company defines the "basic cost" unilaterally and multiplies it by the factor of the table. Therefore, the augmentation of the cost is exponential and unlimited.[527] The Court held that the law did not establish reasonable parameters or conditions to define the cost of the healthcare

[524] Per Marcelo Venegas C.J., Mario Fernández Baeza, Carlos Carmona Santander, and José Antonio Viera-Gallo.
[525] In para 144.
[526] In para 154.
[527] In para 155.

contract with the private company ISAPRE, allowing the price to grow in such a way as to become equivalent to a confiscation of the beneficiary's income.

Human dignity and its radiation to the constitutional rights affected

The Court again made the argument that the principles and values of the right to healthcare could be incorporated under s.1 of the Constitution, which establishes the aims of the Chilean State and the principle of human dignity. The Court underlined the commitment to the protection of fundamental rights inherent in the concept of human dignity that all organs of public administration must possess.[528] The majority referred to arguments made in previous cases as to the role human dignity plays in the analysis.[529] The majority also asserted that the Constitution must always be considered the supreme and superior norm of the Chilean legal order and, therefore, its content is mandatory for every single person in Chilean territory.

The majority adopted the proportionality analysis as the adjudication technique[530] but, unfortunately, did not accept it as a migration of a constitutional mechanism nor adopted a particular legal order to be followed on these matters. However, the Court referred to Robert Alexy's differentiation between principles and rules and to the equality clause under s.19(2), the right to healthcare under s.19(8), and the right to social security

[528] In paras 85-88.
[529] Decision No 1287 para. 18 and Decision No 1273 paras. 45 and 46 (in paras 87 and 88 of this case).
[530] In para 93.

under s.19(18) as a general reference to the justiciability of social rights and of the right to healthcare in particular.[531] What is missing is a more thorough acknowledgement of the reasons why the justiciability of social, economic and cultural rights has been a highly debated issue.

Equality before the law under s.19(2)

The majority claimed that Decision No 1273 incorporated the equality concepts and debates of the last 10 years in the comparative constitutional arena and argumentation from the main authors on this matter.[532] The main references are adopted from the German public law perspective that distinguishes between "essential equality" and "essential inequalities", but the analysis provided by the Court is very confusing and limited with no specific reference to authors or cases of the German Federal Constitutional Court. The Court simply referred to the fact that in order to do a proper equality analysis, it is necessary to adopt a proportionality framework. What the Court did not realise is that this is a two-step process. Before undertaking the proportionality analysis, the Court needs to analyse whether there has been a violation of the equality provision. This is a very complex issue that has been in constant evolution in the last few

[531] In para 95 reference is done to Rodolfo Figueroa Garcia Huidobio Justiciabilidad de los derechos económicos, sociales y culturales Discusion teórica, en Revista Chilena de Derecho, 36, 3, 2009, pp 587-620

[532] In para 100

years. Only after the Court establishes that there has been a violation of the equality provision can proportionality analysis help to analyse if the limitation is justified. While the Court is trying to articulate a framework of analysis, nevertheless, there are references to personal characteristics in the constitutional provision, such as gender, that should not be the basis for discriminatory treatment. In many other constitutional states, this could have been assimilated with prohibited grounds of discrimination. A more complex examination of the rule through its purpose would allow a determination of the similarities and differences. Scholars like Kent Roach and Robert Sharpe tend to agree that a more meaningful treatment of equality should address the adverse treatment of certain groups on the basis of characteristics like race, ethnic or national origin, sex, age, religion, physical or mental disability, which have led to prejudice, stereotype, and unjust disadvantage.[533] While a comparative examination of these various steps undertaken in other jurisdictions would assist the development of proportionality in Chile, the sole comparative exercise carried out by the Court in this case were weak references made to one Spanish and two German authors, without further explanation of the substantive arguments provided by the authors or the interpretation by the Court.[534]

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[533] Robert J. Sharpe & Kent Roach, The Charter of Rights and Freedoms, 3rd edition (Toronto, Irwin Law Inc, 2005), at 281.
[534] Cristina Zoco (Spanish author), Michael Wrasse and Susan Baer (German authors) in paras. 105 and 106.

While the Court's argumentation is weak, it does refer to certain key facts. This included the constitutional amendment in 1999 that incorporated the phrase 'men and women are equal before the law' into s.19(2) as part of the agreement by which Chile partially joined the United Nation's effort to eliminate all forms of discrimination against women (CEDAW). The Court also advanced one further step in the construction of the scope of protection of the equality clause. By referring to previous decisions No 1273 and 1348, the Court rejected statutory distinctions based upon gender and age by considering these factors inherent to the human condition and, therefore, affecting the free and equitable access of actions that promote healthcare. In a very concrete and direct argument, (something that was scarce in its jurisprudence), the Courts indicated that the actual mechanism to fix the cost of the private healthcare contract discriminated against women, elderly and children under 2 years of age. In the Court's opinion, there was no rational justification for this and, as a result, it was a clear infringement of the 1980 Constitution.[535]

The right to healthcare under s.19(9)

Within its judgment, the Court relied upon a doctrinal analysis of the right to healthcare by Alejandro Silva that states that the right to healthcare

[535] In para. 155.

> [I]s part of the social rights or rights of second generation, rights that go beyond the classic liberal conception of the state, based on principles of equality and solidarity, which entitle human beings to require its fulfilment from society as a whole.[536]

This is paradoxical when Alejandro Silva, a Chilean constitutional scholar who was a formal member of the experts committee that drafted the constitution under the military dictatorship, provided the analysis. While we could certainly agree to such a conception, it is problematic that the Court sought to argue that this is the current understanding of the guarantee when the evidence, data, and even the "originalist interpretation" perspective strongly suggests that this is not the case.

However, the Court did go on to refer to the international treaties in which Chile has ratified and, therefore, are mandatory in their application. Moreover, under s.5 of the 1980 Constitution, international human rights treaties represent a limitation on the internal legal order and, it has been argued, will occupy a higher level than the constitution itself. Special reference is made to the International Covenant on Economic, Social and Cultural Rights.[537]

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[536] In para 100 reference is to Alejandro Silva Bascuñán, Tratado de Derecho Constitucional, Tomo XII (Santiago Editorial Juridica de Chile, 2008), at 130

[537] Signed by Chile on September 16, 1969 and ratified on January 10, 1972 Although the covenant entered into force on January 3, 1976 during the military dictatorship, the way in which the regime avoided the international obligations of Chile especially in human rights matters was using as subterfuge the non publication of the treaty in the Official Gazette and as a consequence the non enter into force of the norm The International Covenant on Economic, Social and Cultural rights entered into force in Chile only after being published in the Official Gazette on April 27th, 1989

The Court sought to interpret the right to health care[538], especially in the section that addresses the state duty as being:

> [T]he coordination and control of activities related to health shall likewise rest with the state. It is the prime duty of the state to guarantee health assistance, whether undertaken by public or private institutions, in accordance with the forms and conditions set forth in the law, which may establish compulsory health quotations.[539]

The positive obligation of the state is something unique for certain rights as a public duty. There is also a reference that in these matters the principle of subsidiarity, key in order areas like the public economic order, operates differently giving the state a central main role in healthcare matters. However, on this issue the Court relied on Chilean authors by merely quoting from books and articles without a substantive argument.

Right to social security under s.19(18)

The Court relied upon previous judgments (like Decision No 1287) where the scope of the right to social security was discussed and the evolution of s.33 of the statute 18.933 constitutionally challenged. Again the Court referred to Alfredo Bowen's work published in 1992, a book that described a system of social security very different from the neo-

[538] 1980 Constitution S19 (9).
[539] In para. 108.

liberal one drafted under the military dictatorship.[540]

Justice Bertelsen in his separate opinion protected the right by clarifying that he concurred with the majoritarian decision as s.38(1-4) of statute 18.933 contained an incomplete and imprecise regulation of the way in which the cost of healthcare contracts should be calculated. The unconstitutional consequence of the lack of a precise and complete regulation has been: (1) arbitrary differences among beneficiaries; and (b) the non-fulfilment of the state's duty to guarantee the execution of health actions in the form and conditions established by statute.

The second concurrent opinion by Justices Vodanovic and Fernández made a broader declaration of unconstitutionality concerning the entire text of s.38 rather than just the first four sub-sections as was declared in the majoritarian decision. The main objective of this concurrent opinion was to clearly establish the difference between a commercial insurance contract and a private healthcare contract that forms part of what is known in doctrine as "social insurance". For Justices Vodanovic and Fernández a certain degree of solidarity requires the redistribution of the costs involved in the system in any social insurance. The judges went so far as to suggest that the private healthcare companies are voluntarily replacing the role of the State on these matters. The way in which the private healthcare companies pursued profits while health was treated as a

[540] In para. 138.

commodity within the neo-liberal framework is complex to in the context of the judges' analysis.

A second argument that is only hinted at by the majority decision and further advanced in this concurrent vote is that the unconstitutionality of the statutory provision is due to the transgression of the "principle of legal reserve". This means that when the Constitution determines that a certain matter can only be regulated through statute, the legislature cannot simply create an administrative body to regulate it or pass other inferior legal norms like simple decrees. As such, the judges claimed that it was not within the competence of an administrative body such as the "health superintendency" to define the table of factors, but that instead it had to be modified by statute as requested by the Constitution.

Application of proportionality analysis framework by the majority of the Court:

The first step within proportionality analysis is supposed to concentrate on discussing the aim of the legislation. However, the Court referred extensively to the potential effects of a declaration of unconstitutionality if the Court strikes down a statutory norm. This is a very uncommon and exceptional situation in Chilean judicial history. The Court shows the self-restrained mindset that blocks judges, even constitutional judges, from openly

debating and contesting legislative outcomes.[541] The Court contradicted itself partially; earlier in the judgment that is exactly what they were doing. The Court argued that

> [T]he Constitutional Court is a organ that decides in conformity with the law and not an organ of political deliberation, that can offer judgments based on merits, like the legislature.

Therefore, the declaration of a statute being void is different in the Court's eyes if the declaration is made by the Constitutional Court than if the declaration is made by the legislature. With the former, the reason needs to be a vice that invalidates the legal norm while the latter can be a political decision.

There is an extensive legislative history of the section of the statute being challenged but there is a lack of substantive argumentation where the Court defines clearly its opinion and gives reasons to justify it. The legislative purpose was to create a normative framework with limitations to define the cost of a private healthcare contract as has already been discussed. Law 18.933 (approved in March 1990 just days before the end of the Military dictatorship) aimed to

> [E]nforce the obligations of the ISAPRE, oversee the healthcare contracts imposed by the ISAPRE on their clients, promote solutions to the market's imperfections and guarantee the long-term stability of the system of ISAPRE.

The second step of proportionality analysis is to identify the presence of a rational

[541] In para 171.

connection between the means and the ends of the statute. The aim of s.38 of Law 18.933 is to uphold a private healthcare system that secures profit under a fixed framework that allows the unilaterally modification of the cost of the private health plans. This can be connected to a discourse of legal security and stability for private companies, with an aim linked to a "market-type" healthcare service. When commenting upon this set of cases, authors like Angela Vivanco have underlined how problematic it is that the Court aimed to change the neo-liberal model of private healthcare by striking down the legislative framework without any alternative plans in place.[542] The means used to establish a fixed framework for the cost of healthcare contracts are age and gender as factors that, interestingly enough, are not considered a violation of the equality clause but, in this case, a limitation of the right to chose a healthcare system.

In this case, an examination of the objective of the statute may determine the concrete situation to ascertain the most reasonable option that would least damage the right. The Court does not offer concrete alternative means bur referred to the lack of prudence of the legislature to allow the achievement of the aim of the statute by establishing an exponential augmentation of the cost of the health care contract over time.[543]

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[542] Angela Vivanco, "Justicia Constitucional, Libre Elección en Materia de Salud y Normativa sobre ISAPREs. un comentario a la reciente jurisprudencia del Tribunal Constitucional" (2010) Revista Chilena de Derecho, 141-162, at 160

[543] In para 155

In this particular "action of unconstitutionality" the comparison needs to be in abstract terms because there is no concrete factual case to be decided. The rights are restricted in order to privilege the private property of the healthcare company. "Proportionality stricto senso", as the fourth step, analyses whether the legislative purpose of creating a normative framework with limitations based on age and gender to define the cost of the healthcare contract (Law 18.933) was balanced, justified and proportionate by the degree of interference in choosing a healthcare system and the right to equality and non-discrimination based upon prohibited grounds (although this was not really considered by the Court). The Chilean Constitutional Court considered the law to be disproportionate. If the decision of the Court would have been a proper use of the proportionality technique they could have applied the "weight formula" proposed by Robert Alexy.[544] An assessment as to the intensity of interference of the principles at stake would first be required. The interference with the freedom of contract based on the social function of private property and based on concerns of public health could be considered minimal. This is based on the freedom the private healthcare company enjoyed to define the "basic cost" of each health plan that will be multiplied by the factors defined in the table. On the contrary, the interference with the right to choose a healthcare could be considered serious if the claim was that the disproportionate

[544] Robert Alexy, A Theory of Constitutional Rights, at 408.

augmentation of the healthcare contract forced the claimant to move to the public healthcare system. In my opinion, there was also a serious limitation of the right to equality and non-discrimination based on grounds such as age and gender. Unfortunately, the Court did not consider extrinsic evidence, legal policy or public policy to allow a substantial argument about which one of the principles at stake had a higher weight in the Chilean legal order.

The dissenting opinion by Justice Marisol Peña suggested that the Court's striking down of part or the whole statute could create a gap that entails normative instability. During the process of constitutional amendment that culminated in Law 20.050 in 2005 that saw the end of the transition to democracy, one parliamentary motion sought to delay the effects of a declaration of unconstitutionality by the Constitutional Court for a period of one year. The objective was presented as an opportunity for the legislature to fill the gap with a constitutional statutory norm. However, the legislative motion was not approved and, as a result, a declaration of unconstitutionality will enter into full effect three days after being published in the Official Gazette. This dissenting opinion opens the conversation about the possible remedies available for the Court. If an infringement of a constitutional right cannot be justified, the Court needs to decide about available remedies. In Chile the options are highly restricted. One option would be to sever the part of the statute considered unconstitutional and declare it's partial invalidity. Another

remedy that was dismissed during the drafting process of the 2005 Constitutional amendment is the possibility of a temporary suspension of invalidity. The immediate nullification of a legal norm can lead to a gap or "lacuna" causing public harm. So the Court will be able to decide the unconstitutionality of a provision but the implementation of the order of invalidity will be delayed to give the legislature the opportunity to fill in the constitutional gap.

In order to construct her argument, Justice Peña relies upon part of the evidence provided by one of the private healthcare companies and the legislative history of Law 18.933. Both elements are dubious as proof in constitutional cases. What is also problematic is that dissenting opinions do not address the majority decision of the case by establishing a dialogue with it. Instead, judges construct an independent decision that does not address the majority decision and, therefore, weakens the general argument. As an example, Justice Peña refers to the private healthcare contract as an insurance contract, which is exactly the opposite of what was argued by Justices Vodanovic and Fernández. However, no attempt is made to engage in a form of dialogue over the contradictory viewpoint. Justice Peña argued against the declaration of unconstitutionality concerning section 38(1-4) of statute 18.933 based on the argument that age and gender are objective factors of distinction, and the justification for differentiation in the definition of the cost of the private healthcare contract is considered rational. Interestingly, concrete date is

offered for the first time in this saga of cases where the right to healthcare has been debated. Justice Peña referred to the proportions of the population who were using the varied forms of healthcare available in Chile[545] although she based her understanding of the public budget upon information provided by the Association of Private Healthcare Companies, whose interpretation of the statistics could be regarded as debatable. This does raise an important question though. If the data was considered publicly available information, why was this dissenting judgment not based upon it? Instead the decision is based upon the understanding that a declaration of unconstitutionality of the framework used to define the cost of the private healthcare contracts could cause major economic difficulties to the economic sector and potentially create major uncertainties for individual users of the private system.

The dissenting opinion by Justice Navarro proposes a set of reasons to reject the action of unconstitutionality based on the lack of continuity between the reasoning of previous decisions decided by the Court and this particular case. Justice Navarro even alludes to the concept of *"ratio decidenci"*, which is very unusual in judicial terms.

This case would have been a great opportunity to foster a conversation about the relevance of the principles at stake. Does private property trump equality? Does the right

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[545] 2 8 millions (16% of the total population) The public system is in charge of 72 7% of the total population of the country, 12 248 257 individuals, based on public statistics by FONASA Meanswhile, 13% of the population are covered by the special healthcare system created for the Armed Forces and Police

to healthcare depend entirely upon the level of income of the individual? Can solidarity be invoked as part of a social security system framed by a neo-liberal market? Commenting on this judgment, authors like Sebastian Soto seem to respond in the affirmative.[546]

As a consequence of these Constitutional Court judgments and the public impact that they had, Presidente Piñera announced the creation of a commission of experts to provide an exhaustive analysis of the healthcare system in Chile in May 2010. The final report of the so-called "Commission Illanes" was released in December 2010. The conclusion asked for the healthcare system to be restructured in order to guarantee universal access to healthcare. The proposal is to eliminate the model of an auto-financed insurance in order to be able to infuse solidarity in the social security model. The public repercussions of this report are still huge in Chile. The Constitutional Court and its decisions should be congratulated for triggering a revision of the private healthcare system in Chile in which all branches of government are participating.[547]

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[546] Sebastián Soto, "Fallo ISAPREs: Una mirada a los Derechos Sociales y al Rol de los Jueces" in Sentencias Destacadas 2008 (Santiago. Libertad y Desarrollo, 2009), 171-213

[547] Informe Comisión Presidencial de Salud, December 2010, complete report in Spanish is available here: www colegiomedico cl/portals/0/files/101207comision.pdf.

CONCLUSION

I have discussed a number of cases that illustrate the use of the proportionality test by the Constitutional Court. One could argue that the proportionality test has been merely adapted to the particularities of the Chilean's circumstances. However, in my view, the Court does not fully appreciate the purpose of the test, nor the discipline required to implement it.

There is still a need for the Court to provide leadership in reflecting on the fundamental values of Chilean society. I am persuaded by Allan Hutchinson's claim that the rule of law in constitutional matters

> [D]emands that positive law embody a particular vision of social justice that gains its constitutional justification on political appeal from the judicial enforcement of individual rights in the institutional exchanges between the state and its [citizens]'.[548]

Perhaps it is a big step forward if we acknowledge that values and principles have evolved since 1980, and that the role of Courts can be evaluated by their capacity to adequately grasp changing social values and not by their capacity to be objective and impartial.

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[548] Allan Hutchinson, "The Rule of Law Revisited: Democracy and Courts", at 199.

CHAPTER 7. CONCLUSION

PROSPECTS FOR THE CHILEAN CONSTITUTIONAL COURT

The evaluation of the quality of a democratic regime has traditionally been tied to the performance of political representatives. As explained in Chapter 1, the return to a democratic regime after the military dictatorship in 1990 was structured through a "democracy of agreements" model that sought to achieve a consensus between the political antagonists. As I have argued, because of this approach, it was possible to amend the 1980 Constitution 28 times to date. Chile has successfully achieved a measure of political stability in the '90s, but at the expense of democratic openness. There are still institutional constraints imposed by the 1980 Constitution on the legislature. Even after 28 amendments, the president can still control the legislative process. Peter Siavelis notes that the Chilean Congress is not an arena for negotiation and interest aggregation.[549]

The approach favoured in this dissertation is the view that legislators and judges are partners in a democratic society and the evaluation of Chilean democracy needs to include both. Since a democratic system must be capable of reflecting the aspirations of

[549] See Peter M. Siavelis, *The President and Congress in Postauthoritarian Chile. Institutional Constraints to Democratic Consolidation*, (University Park PA: The Pennsylvania State University Press, 2000).

its citizens, legislators and judges need to understand that norms included in the 1980 Constitution are essentially contested and in need of revision. It is only recently that scholars have begun to look at the decline of consensus in Chile, twenty years after the return to a democratic regime.[550] This dissertation aims to contribute to the debate about unresolved conflicts embedded within the forced consensus of 1980.

This dissertation has focused on the political function that is now integral to the interpretation and enforcement of constitutional rights by the Constitutional Court. The latter is part of a substantive concept of democracy. Following the metaphor of the constitution as a "living tree", the Constitutional Court would be better positioned to keep pace with changing social, political and economic values and conditions if it adopted a more dynamic style of interpretation. This dissertation has explored the problem of conflicting substantive values of democracy and how the Court's adjudication methodology can manage conflict in a way that takes democracy seriously.

Democracy includes values that go beyond the value of the majority rule. Democratic values include human rights as well as social objectives and interests embedded in the Constitution. The case studies presented in Chapter Six discussed some examples of social objectives like public infrastructure and health care, both part of a public debate in Chile today. It is an open question where the Court will go with respect

[550] See Silvia Borzutzky and Gregory B. Weeks, *The Bachelet Government. Conflict and consensus in Post-Pinochet Chile*, (Gainesville FL: The University Press of Florida, 2010).

to other rights that generate high controversy in Chile like "the right to live in an environment free from contamination".[551]

The research in this dissertation was focused on the "discovery" of a democratic role for the Chilean Constitutional Court. As demonstrated in Chapter Two, Chilean political history shows that this will require the Court to reject the role set for it in 1981, as an institutional shield for the dictatorship. The Court has yet to fully reject its authoritarian past. The explanation I have offered for this is that the traditional approach - either the view that some rights are absolute and therefore limitless, or the concept of rights only as rules to be applied according to a categorical deductive method –have left judges ill-equipped to interpret the 1980 Constitution through a democratic lens. By "democratic lens" I am referring to the capacity of judges to articulate decisions and make political choices that promote the values of substantive democracy in concrete cases, thereby helping to transform an abstract principle into a "down to earth" ruling. A democratic lens in judicial rights methodology will require an admission of the essentially contested nature of rights and the possibility of competing interpretations.

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[551] S19(8) of the 1980 Constitution imposes the Chilean state the duty to watch over the preservation of nature As a concrete example they has been huge criticism of Chilean society protesting a plan to build five hydroelectrical dams in Chile's Patagonia The energy project was approved in May 2011 by local authorities The major problem is that building the dams means to construct a mile power-line corridor northward creating one of the longest clear-cut of the planet destroying forests, rivers, glaciers and wild life

7.1. THE DEMOCRATIC MAKEOVER

While drafting the 1980 Constitution under the authoritarian regime, the commission of experts viewed the Chilean Constitutional Court as a purely technical institution. To them, law was detached from politics and adjudication was a scientific application of rules. This approach promoted an attitude of restraint from the judges. The appointment process of the seven members of the Constitutional Court in 1980 for a period of eight years saw three members appointed from the Supreme Court, one lawyer appointed by the executive (which at that time was exercised by Pinochet), two lawyers elected by the National Security Council (which had a military majority), and one lawyer elected by the Senate replaced during the transitional period by the Military Junta. So judges were either part of the deferential regular judiciary or were appointed by military authorities.[552] The Court was part of the "transitional period" from the dictatorship to democratization and, as already discussed, it was intended to shield the framework constructed by the drafters of the 1980 Constitution.[553]

The Court played an ambivalent role during the '80s. In some decisions, the Court paved the path to return to a democratic regime while in other cases the Court simply decided to act as a guardian of the institutional design of the military regime. For

[552] The original appointment process was criticized even by constitutional scholars that participated in the drafting process of the 1980 Constitution, see Alejandro Silva Bascuñan, *Tratado de Derecho Constitucional*, tomo IX (Santiago Editorial Jurídica de Chile, 2003), at 36

[553] Lisa Hilbink, "The Constituted Nature of Constituents' Interests Historical and Ideational Factors in Judicial Empowerment", at 781

example, the court established basic standards for free and contested political elections (decision No 33/1985), the scope of protection of freedom of association exercised through political parties (decision No 43/1987), and forced the Military Junta to legislate the date when political elections would take place (decision No 53/1988) In the same period, the Court decided two cases supporting the "protected democracy" model contained in section 8 of the Constitution, which intended to restrict ideological pluralism (decisions No 21/1985 and No 46/1987) As Francisco Zuñiga observes, the wording used by the Court displayed its ideological affinity with the authoritarian regime [554]

Pinochet's military dictatorship ended on March 10th, 1990 After that date, the authority with the power to frame the constitutional order was the people through their political representatives and directly through referendum mechanisms Based on this fundamental change in which sovereignty was recovered by the people, the Court needed to adjust the frame of reference for the constitutional order But the Court did not recognize this transfer of sovereign power from the Military Junta to the people – this much is illustrated by one highly political example In 1998, the Court was asked to decide on the legality of Augusto Pinochet's status as lifetime senator [555] The Court unanimously declared that it did not have the competence to determine the legitimacy of

[554] Francisco Zuñiga, "Derechos Humanos y Jurisprudencia del Tribunal Constitucional 1981 – 1989 El Pluralismo Politico e Ideologico en Chile" (2003) 9 1 Revista Ius et Praxis, at 268
[555] Decision No 272 issued by the Constitutional Court on March 18th, 1998

the regime created by the 1980 Constitution nor of Augusto Pinochet's status as lifetime senator.

Javier Couso observes that the Constitutional Court in the '90s suffered from "political insignificance" with "relative obscurity in the eye of the public".[556] It became clear that the Constitutional Court needed an "extreme institutional makeover". The latter occurred in 2005 through constitutional amendment law 20.050.[557]

The consequence of opening the Constitutional Court to individual citizens has been to create a judicial forum where political decisions of the authorities can be examined or questioned with respect to their constitutionality. It also transformed the ability of minority groups or non-governmental institutions to access the Court in order to advance progressive agendas. The latter change meant a huge increase in the number of cases presented before the Constitutional Court.[558]

However, despite these reforms, the judicial methodology used by the Constitutional Court hindered the debate about rights and the relevance of judges to assess its essentially contested nature. The two approaches often used by the Court are problematic.

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[556] Javier Couso, "The Judicialization of Chilean Politics The Rights Revolution That Never Was" in Rachel Sieder, Line Schjolden & Alan Angell (eds), *The Judicialization of Politics in Latin America* (New York, Palgrave MacMillan, 2005) 105, 115.

[557] Law 20 050, published in the Official Gazette August 26, 2005

[558] Annual report of the Chilean Constitutional Court available 2006, 2007, 2008, 2009 and 2010 online www tribunalconstitucional cl/index php/documentos/memorias_cuentas

The first approach relied on the concept of absolute rights as a rights adjudication methodology. In Chile, this approach has been mostly related to conservative perspectives on rights. The objective was to avoid the necessity of balancing the "protected" right against another right or interest. The consequence of a doctrinal approach to rights as absolute is that neither a public interest, nor the individual rights of others, can limit the scope of the protected right or diminish its protected domain. It excludes from the competences of legislators and judges the option of limiting the absolute right.[559]

The second approach was categorization as a method of rights adjudication. In Chile, categorization meant poorly reasoned decisions, with rare reference or argumentation to the substantive content of the right involved. There was no reference to the scope of the right protected by the Constitution, no discussion regarding the extent of legal protection that the right would have in the legal system and, finally, there was no mechanism to limit rights.

These rule-based approaches to adjudication were based on Chile's highly formalistic and positivistic legal culture; the conception of judges as "mechanical applicators of the law" encouraging detachment from the social and political process; and, the

[559] The case discussed in Chapter 3 was Decision No 740, issued on April 18, 2008 deciding upon the constitutionality of a Ministry of Health policy relating to the regulation of fertility through the use of the emergency contraceptive pill (also known as the 'morning-after pill' policy)

marginalizing of judges through promotion of minimal judicial discretion with a failure to account for decisions adopted. Under this method, legal certainty and uniformity may be achieved at the expense of openness to competing interpretations or new approaches to rights.

7.2. METHODOLOGICAL CHALLENGES FOR RIGHTS ADJUDICATION

As of April 2011, close to a hundred cases decided by the Constitutional Court in Chile invoked proportionality analysis as a rights adjudication mechanism.[560]

As we have seen, the Chilean Constitutional Court is having trouble implementing proportionality analysis. The first challenge is to interpret the 1980 Constitution in a way that allows it to grow. Ideally, the Constitution would be interpreted to meet Chilean social, political and historical values from a democratic perspective. While the 1980 Constitution opted for specific limitation clauses, a clear general limitation clause setting the parameter against which the collision of fundamental rights will be evaluated is appealing. It could be achieved through constitutional interpretation of the 1980 Constitution. For example through a purposive interpretation of section 4 that declares that Chile is a democratic republic as already discussed. This will require the courts to turn away from a legal culture characterized by judicial restraint and embrace its role as a

[560] Information requested through the automatic search engine of the Chilean Constitutional Court, available at: http //www tribunalconstitucional cl/index php/sentencias/busca_avanzado

legitimate interpreter of the 1980 Constitution, a role that is unavoidably political in nature. The interpretation of specific limitation clauses that use broad terms like "morality, appropriate customs and public order"[561] or "national security"[562] will help construct a threshold for political representatives wishing to limit constitutional rights.

I am persuaded that openly accepting the migration of proportionality as rights adjudication mechanism from Spain to Chile (as is already factually done through a number of loose references) would provide the Court with the necessary guidance and information to adequately use the mechanism. Furthermore, in order to refer to foreign law in concrete constitutional cases, the Chilean Constitutional Court first needs to take it seriously and, secondly, make decisions using its judicial discretion on whether or not a comparative inquiry is even possible. This decision can be determined based on social or political conditions or historical developments that will differentiate the local and foreign system to take advantage of the comparative inquiry.

Being able to evaluate a proportionality formula adequate to particularities of the Chilean legal context could be a further development in the Court's approach. For now, the Court should start by fully applying the proportionality framework. Robert Alexy's theory of constitutional rights as principles and rules, coupled with the structured analysis of a three-pronged test (suitability, necessity and proportionality 'stricto senso'), could

[561] 1980 Constitution s19(6).
[562] 1980 Constitution s19(11).

discipline rights adjudication in Chile. The existence of a clear step by step methodology that allows us to follow the judges' reasoning could train judges to adjudicate rights more rigorously.

I have discussed a number of cases that illustrate that the Court is still on a learning curve in the application of the proportionality approach. One could argue that the proportionality test has been merely adapted to the particularities of the Chilean's circumstances. However, in my view, the Court does not fully appreciate the purpose of the test, nor the discipline required to implement it. To sum up, the case study of the application of the proportionality principle to concrete cases shows progress in the following areas.

Analysis of the legitimacy of the legislative aim

The proportionality framework challenges the judicial mindset of Chilean judges. They cannot be completely deferential and they will need to have an opinion about the legitimacy of the legislative activity. In decision No 825/2008 the majority referred to the autonomy of the legislature to decide upon the merit and opportunity to legislate, in decision No 1254/2009 the Court ordered in an unanimous judgment the legislature to provide the means to achieve the aim of legal counsel and defence guaranteed in the

Constitution. So from a restraint first attitude of the Court, in the second case the Court decided to start a process where the legislature will need to address the constitutional gap.

The rational connection between the aims and the goal to be achieved through the statute

In 2006, the Court avoided addressing this issue in decision No 541/2006. In that case, the Court did not explain how a fine that is 40 times the unpaid fees is rationally connected to the goal of ensuring the "attractiveness" of a system of concessions in economic terms for private companies. By 2009, the Court had crossed this hurdle and addressed the issue directly in decision No 1345/2009. Here, legislation required a party to pay the total amount of the fine before it could file an appeal. The idea was that through this means, frivolous appeals would be discouraged. Court found that the "pay first litigate after" system affected both the serious and the frivolous litigator. According to the majority of the Court, the means used did not rationally connect with the aim and only served to favour the claimants with economic capacity. The majority stated that "under these circumstances it cannot be argued that the mechanism served the aim pursued."[563]

[563] In para. 13.

The least restrictive means

In decision No 825/2008, the Court did not understand the concept of "least restrictive means" and evaluated the means on the basis of whether or not it was "irrational".[564] Proportionality requires judges to not only argue about the legitimacy of the legislative statute but also to think about alternative means that could limit the rights less but still achieve the same goal. A year later, in decision No 1254/2009 the Court was prepared to developed this sub-test. The Court considered the means chosen by the statute to impose a mandatory pro bono requirement on lawyers as too heavy a burden.[565] The Court referred the fact that there were alternative ways of achieving the goal of providing legal counsel and defence to the population that involved payment for the lawyer's services.[566]

Stricto senso

The Constitutional Court has yet to address this last step, and arguably most important, step of the proportionality framework. It is through the balancing of rights in this step that the Court will help shape the principles and values of Chile as a democratic society. I believe that it is only a matter of time before the Court includes this analysis in its decisions.

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[564] In para. 22.
[565] In para. 61.
[566] In para. 54.

7.3. WHY SHOULD THE CHILEAN CONSTITUTIONAL COURT ADOPT PROPORTIONALITY ?

Proportionality analysis has the potential to open up a conversation about disagreement on rights. Chilean courts could benefit from a "living tree" approach by playing a more active role in defining and enforcing the catalogue of rights and freedoms, taking into account contextual factors at play in Chile. There are two ways that proportionality analysis might address Chile's post-authoritarian constitutionalism problems. One way would be through recognition of the complexity of constitutional rights, as particular forms of legal norms, within a structure of principles and rules. Given that there has been a "forced consensus" about constitutional rights in Chile imposed by the ruling elites, and that there could potentially be strong disagreement about the content and scope of rights protection among the population, how should constitutional judges proceed? Judges could try to reconcile disagreements about rights with judgments that offer an immediate answer to a concrete case where a principle is transformed into a rule with very little in the way of "theory" or of fully theorized rights.[567] A second way is to use proportionality analysis to address the problems in Chile's post-authoritarian constitutionalism. As already discussed, state actions have traditionally not been bound to limits or minimal threshold requirements in the Chilean context. In a democratic regime, the state needs to

[567] See: Cass R. Sunstein, "Incompletely Theorized Agreements" , at 1733.

meet certain substantive requirements in order to legitimately encroach upon a fundamental right.

With respect to the reasons for adopting proportionality, one major benefit is the potential to structure the discretionary power of political representatives. A concrete example extensively discussed in Chapter Six, where proportionality analysis has triggered a broader debate that involves all branches of government, is decision No 1710/2010 about the right to health care in Chile. Because of the public impact of these cases, President Sebastian Piñera announced the creation of a commission of experts to provide an exhaustive analysis of the health care system in Chile. The final report of the so-called 'Comisión Illanes' released in December 2010 challenges the government to design a system that would guarantee universal access to health care. The report proposes to eliminate the model of "self-financed insurance scheme" in favour of a social security model.[568]

Proportionality may also facilitate better public engagement with judicial arguments and improve judicial independence by rendering the decision more structured, open and transparent. Reading cases decided through proportionality analysis allows for a better understanding of what is being decided by the Court. I think it is still early to evaluate the way in which proportionality has (or has not) enhanced judicial independence. The

[568] Informe Comisión Presidencial de Salud, December 2010, report in Spanish online: www.colegiomedico.cl/portals/0/files/101207comision.pdf.

Court's decisions are not yet as structured as they should be.

The focus on a case–by-case analysis allows a public conversation about the concept, structure and normative force of fundamental rights and the way in which two or more rights compete and collide. Proportionality analysis does not prescribe any legitimate means "per se". Its application is always with respect to a particular aim in a real situation. Only then can it be determined whether or not the limitation applied to a particular constitutional right through a statute is proportionate. Proportionality as a balancing mechanism is, in my view, an invitation for judges to discuss fundamental social values as reflected in the Constitution. As previously stated, this allows for an understanding of the Constitution as the normative and structural framework of the political order. Proportionality, as an interpretative technique, provides a mechanism to examine the means used to achieve a certain societal goal. It provides a structural path to the use of rational judicial discretion without withdrawing judicial discretion.

In the long term, a disciplined use of proportionality analysis by the Chilean Constitutional Court may influence the legislature as well. In order to avoid having their legislation struck down, political representatives might think longer and harder about the purpose, means, and aims chosen – and how they are interconnected – when drafting legislation in the first place

7.4. BROADER IMPLICATIONS

I hope that some of the arguments advanced in this dissertation will have more general implications.

An area of future research is a study of the basic legal values of the Chilean constitutional system. The aim would be to construct a list of principles that have been consistently and coherently recognised as part of the structure of the legal order and of the 1980 Constitution, distinguishing between written and unwritten constitutional principles. The central characteristic of this approach would be the reliance upon the operation of underlying principles in legal practice, offering concepts that adequately fit the entire constitutional system. What is at stake is the existence of elements that allow a comparison, as proportionality assesses each principle in comparison with the ideal for that legal order. Such an endeavor would require studying the parameters set by the legal tradition and the current Chilean constitutional architecture.

Another avenue for further research is mapping the migration of proportionality analysis to Latin America. Proportionality analysis was already adopted in countries like Colombia[569] in the 1990s, Peru[570] in 2003, Chile[571] in 2006, and México[572] in 2007

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[569] For a comprehensive study of the use of the proportionality principle in Colombia see: Carlos Bernal, *El Derecho de los Derechos* (Bogotá Universidad Externado de Colombia, 2006) 3° ed

[570] Decision issued by the Constitutional Court of Peru STC 0010-2002-AI/TC

[571] Judgment No 541-2006 adopted a version of proportionality analysis for the first time

[572] The 'juicio de amparo en revisión 1659/2006' decided by the Supreme Court of Mexico in 2007 introduced formally the principle of proportionality. For a analysis of the adoption of the proportionality

however there is no comparative treatment of the migration of the mechanism. It seems appealing to research if the doctrinal problems debated in this dissertation about the migration of proportionality to Chile are also applicable to other Latin American countries. Certainly, it is also interesting to ask about the legal, social and political context that influenced (and those elements that did not influence) Colombia to adopt proportionality analysis in the early '90s and the differences that made Mexico adopt proportionality only in 2007.

A path for further inquiry is the study of commonalities and differences among methods of rights adjudication and more concretely a more detailed comparison of proportionality analysis and strict judicial scrutiny test. Such an inquiry is very appealing especially because of the hesitation showed so far by international bodies like the Inter-American Human Rights system in choosing and method of rights adjudication and the relevant implications such a choice would have for Chile.

It has been two decades since the end of the military dictatorship in Chile. Considerable progress has been made in the recognition of human rights and the Constitutional Court has played a role in some of those advances. At the same time, Chilean society, and the Chilean judiciary, still operate under the 1980 Constitution

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framework in Mexico see: Amaya Alvez, Proportionality Analysis as an 'Analytical Matrix' Adopted by the Supreme Court of Mexico (November 30, 2009). CLPE Research Paper No. 46/2009. Available at SSRN: http://ssrn.com/abstract=1515952.

drafted under General Pinochet. While the Courts cannot change the Constitution, this dissertation has attempted to show how the Constitutional Court could take a more systematic approach to breaking with the past.

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