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Unconstitutional Constitutional Amendments in Chile: From Inconsequential Theory to Consequential Practice**

Enmiendas constitucionales inconstitucionales en Chile: de la teoría intrascendente a la práctica trascendental

ABSTRACT

This text discusses the theory of unconstitutional constitutional amendments in the Chilean context. The main hypothesis is that this theory evolved from inconsequential to determinant. After briefly review contextual factors (regulations on constitutional amendment and historical background), the article examines the Chilean literature on the limits to constitutional amendments. Then, it analyses the case law of the Constitutional Court. Finally, it shows how the recent constitution-making processes were also influenced by the theory of limitations to the constituent power.

KEYWORDS

Constituent power, constitutional amendment, unamendability, Chilean constitutional law, constitutional case law

RESUMEN

El texto trata sobre la teoría de las reformas constitucionales inconstitucionales, en el contexto chileno. La hipótesis principal es que esta teoría pasó

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de no ser considerada a convertirse en ser determinante. Luego de revisar brevemente factores contextuales (normas sobre reforma constitucional y marco histórico), el artículo examina la literatura chilena sobe los límites a las reformas constitucionales. Luego, analiza la jurisprudencia del Tribunal Constitucional. Finalmente, ilustra cómo los recientes procesos constituyentes también fueron influidos por la teoría de las limitaciones al poder constituyente.

PALABRAS CLAVE

poder constituyente, reforma constitucional, inmodificabilidad, derecho constitucional chileno, jurisprudencia constitucional

SUMMARY

INTRODUCTION

Until 2020, the discussion in Chile about the limitations to the power to amend the constitution was infrequent. Advancing similar reasons as those expounded across jurisdictions, only a small number of scholars adopted a clear stance on these issues. Some of these reasons, however, acquired particular relevance due to contextual factors, such as historical facts and jurisprudential influences.

Notwithstanding the theoretical discussion, in practice the unconstitutional constitutional amendment doctrine evolved from insignificant to determinant. Before 2020, practice (case law) showed little if any support for the existence of limits to the amendment power, particularly substantive restrictions. There might be several reasons for this. First, it is possible that the generous practice of constitutional reform in Chile was not subject to any limitations because such amendments, although numerous, did not touch upon the core of the 1980 Constitution. Second, procedural/formal limits to constitutional reform were scrupulous respected. Third, the scarce and rather insipid case law of the Constitutional Court could have been a consequence of the restricted standing to challenge constitutional amendments.

However, the year 2020 was a turning point. That year: (1) the Constitutional Court decided to endorse and apply substantive limits to constitutional amendments, and (2) even the constitutional-making process was subject to substantive restrictions. These two events not only departed radically from

the traditional Chilean approach towards limits on the constitutional power, but also showed the far-reaching practical consequences of the unamendability doctrine.

This paper, drawing from domestic sources, begins by providing context about the Chilean regulations on constitutional amendments as well as a brief historical background. Then, it analyses the domestic scholars' approach towards the unamendability theory and the Constitutional Court's case law, before and after the 2020 milestone. Lastly, it refers to the attempt to impose substantial limits to constitution-making processes.

1. NATIONAL CONTEXTUAL FACTORS

1.1. Constitutional Regulations About Constitutional Amendments

The 1980 Constitution includes a section (chapter XV) specially devoted to regulating its reform. Since 2019, this chapter also provides regulations for the replacement of the Constitution.

According to chapter XV, the power to amend the Constitution is jointly exerted by the President of the Republic and the National Congress. Until 2022, both Houses should approve the reform by 3/5 or 2/3 of its members, depending on the matter to be amended. The former was the default quorum, whereas the latter applies to reforms touching upon the constitutional sections on Institutional Basis (I), Fundamental Rights (III), Constitutional Court (VIII), Armed Forces (XI), National Security Council (XII) and Constitutional Amendments (XV).

Because of the quorum above, the Constitution was widely regarded as rigid, although less than under its original provisions.[1] Nonetheless, in 2002, the reform quorum was reduced to 4/7 of the members of both Houses (Law nr. 21.481), disregarding the matter to be amended, thus facilitating future reforms.

If there is no agreement between the President of the Republic and the National Congress, there would be no reform, unless the presidential veto is overruled by a qualified supermajority of 2/3 in each House. But even in this event, the President of the Republic may resort to a final recourse, calling for a referendum, thus assigning the final decision to the people. This is the only case of direct popular involvement in the amendment process.

Before its enactment, bills of constitutional reform may be subject to judicial review by the Constitutional Court (article 93 nr. 3). This review could only be triggered by the President of the Republic or ¼ of the members of each House.

1 Nogueira, Humberto. "Los límites al poder constituyente y el control de constitucionalidad de las reformas constitucionales en Chile", *Estudios Constitucionales*, vol. 4, n.° 2, 2006, 435, 452.

Following these rules, the 1980 Constitution has been amended dozens of times. The most important reforms were those enacted in 1989 and 2005. The 1989 amendment was called the "Democratic Transition Reform," whereas the 2005 amendment was presented as the "Transition Closing Reform." These labels stress a central feature of the 1980 Constitution: it was drafted and enacted during a *de facto* regime.

1.2. Historical Background

In 1973, after years of acute political and social turmoil, the Armed Forces deposed President Allende. Th6e heads of the Army, Navy, Air Force and Police assumed, together as a "Junta," the "supreme authority of the Nation," which included the constituent power.[2] The 1925 Constitution remained formally in force, but the Junta immediately set down a committee – summoning mostly constitutional experts – to draft a new constitution.[3] After the review of The Council of State, and the final revision by the Junta, the draft was subject to a referendum and approved in 1980.

Since then, the 1980 Constitution has carried upon this "original sin": it was drafted and enacted by a non-democratic government, and approved by a controversial referendum that did not comply with well-established democratic standards (*e. g.*, there was no electoral registries, no electoral court, no free exercise of civil rights such as freedom of assembly and expression).

The 1989 reform was the result of a pact between the non-democratic Government and several political parties, mostly from the opposition. The constitutional text was thoughtfully amended. In exchange, the opposition dropped its demand for constitutional replacement, accepting the 1980 Constitution.[4]

In 2005, after several amendments, during the third democratic Government, an ambitious package of constitutional reforms was agreed with the opposition, attempting to give formal closure to the transitional period to a full democracy.[5] The President of the Republic went so far as to declare that "At last, we have a democratic Constitution, akin to the Chilean spirit and its permanent soul [...]. This new Constitution is one of the most important legacies for the Bicentennial Chile, for the new generations that shall lead our polity to a more democratic, fairer, freer and more egalitarian Chile […]."[6]

2 Decree-Law nr. 527, Ministry of Interior, 26 June 1974.

3 Decrete nr. 1.064, Ministry of Justice, 12 November 1973.

4 About the 1989 reform, see Andrade, Carlos. *Reforma de la Constitución Política de la República de Chile de 1980*, Santiago, Editorial Jurídica de Chile, 1991.

5 About the 2005 reform, see Pfeffer, Emilio. *Reformas Constitucionales 2005: antecedentes, debates, informes*, Santiago, Editorial Jurídica de Chile, 2005; Zúñiga, Francisco. *Reforma Constitucional*, Santiago, Librotecnia, 2005.

6 Presidential speech, 17 September 2005. Available at <https://www.elclarin.cl/2021/01/31/documentos-ocultos-de-la-historia-de-chile-entusiasta-discurso-de-ricardo-lagos-al-suscribir-la-actual-constitucion-en-2005/> accessed 5 April 2022.

However, in 2019, serious political and social unrest lead the political leaders to launch a constituent process. Thus, new provisions were added to the 1980 Constitution regulating its replacement (Law nr. 21.200). This process failed, and a new one was launched in 2023 (Law nr.21.533), which also failed.

2. THE THEORY OF CONSTITUTIONAL UNAMENDABILITY IN CHILE

There are only a handful of scholars that have analyzed the issue of constitutional unamendability, and there is no consensus among them about its scope or the limits applicable to constitutional reforms.

The starting point is Article 93 nr. 3 of the 1980 Constitution, which provides that the Constitutional Court could be called upon to "decide issues of constitutionality emerging during the parliamentary discussion of [regular] bills or constitutional reform bills."

The scope of the constitutional review entrusted to the Court is controversial. There is widespread consensus that Article 93 nr. 3 authorizes the Court to engage in a formal/procedural review, but such consensus evaporates when the power of the Court to engage in a substantive review is proposed.

The formal/procedural review is firmly based on the following considerations:

(1) Article 93 nr. 3 expressly provides for the review of constitutional reform bills, therefore it should *at least* comprehend formal/procedural review, as the minimum possible threshold.

(2) The drafting committee of the 1980 Constitution would have given due consideration to the sentence of the Constitutional Court (case nr. 15-73, 1973),[7] which considered the hypothetical power to engage in the formal/procedural review of constitutional amendments. We will return to this sentence later.

(3) The Constitution sets down precise and specific procedural/formal rules for its amendments in chapter XV. This would show the clear will of the constituent power (original) to bind the amendment power (derivative) to certain rules. Moreover, the Court is provided with readily applicable standards to engage in such review.

(4) The Chilean legal culture has been routinely labelled as "legalistic," where legality and legitimacy are closely related. This would entail, *inter alia*, an intense commitment with legal formalities. As one scholar states: "the validity of

7 See García, Ana María. "El artículo 82 num. 2 de la Constitución de 1980, como límite del poder constituyente derivado", *Revista Chilena de Derecho*, 1998 (*special number*), 169, 170; Zúñiga, Francisco. "Control de constitucionalidad de la reforma constitucional", *Estudios Constitucionales*, vol. 4, n.° 2, 2006, 415, 418-419.

> the amendment depends on its adequacy to the rules about reform."[8] Therefore, imposing to constitutional reform bills the strict observance of the procedural and formal regulations provided in chapter XV of the Constitution, fits comfortably with the Chilean legal culture.

Turning now to the Court's substantial review of constitutional amendments, we found conflicting stances. Many of the arguments are similar to those exposed abroad, although there are certain considerations built upon the text of the 1980 Constitution.

First, we have those that reject any kind of substantive review by the Constitutional Court based on the following considerations:

> (1) The 1980 Constitution does not contain any unamendable clause.[9] There is nothing like the German "eternity clause" or the French and Italian "republican clause." This is remarkable given the increasing trend, particularly in Latin America, to include such clauses in the constitutional texts.[10] Chile, however, in an exception to this trend, not only because of its current Constitution, but also because of its predecessors (1925 and 1833 Constitutions),[11] none of which included unamendable clauses.
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> (2) Implicit limits to constitutional reforms are uncertain and provide excessive power to the interpreter of the Constitution.[12]
>
> (3) The 1980 Constitution expressly provides in chapter XV for the reform of any part of its text, including chapter XV itself (amendment rules).[13] This would prove that there is no "essential part" of the Constitution beyond the reach of the amendments.

8 Henríquez, Miriam. "El 'control de constitucionalidad' de la reforma constitucional, en el ordenamiento constitucional chileno", *Anuario de Derecho Público UDP*, 2011, 461, 466.

9 Cf. Henríquez. "El 'control de constitucionalidad' de la reforma constitucional, en el ordenamiento constitucional chileno", 464.

10 Roznai, Yaniv. "Constitutional Unamendability in Latin America Gone Wrong?", in Albert, Richard *et al*. *Constitutional Change and Transformation in Latin America*, London, Bloomsbury Publishing, 2019.

11 It is arguable that the 1828 Constitution forbade amendments before 1836, but this provision was ignored.

12 Henríquez, Miriam. "¿Inconstitucionalidad de fondo del proyecto de reforma constitucional que autoriza el segundo retiro del 10% de los fondos previsionales?", *Anuario de Derecho Público UDP*, 2021, 289, 299-302; Soto, Víctor. "Un encuentro con fantasmas: análisis de las sentencias del Tribunal Constitucional sobre el segundo y tercer retiro del 10% de las AFP", *Revista Chilena de Derecho Parlamentario*, 2021, 38, 51; Cf. Verdugo, Sergio. "La objeción democrática a los límites materiales de la reforma constitucional", *Actualidad Jurídica*, n.° 28, 2013, 299, 300-304.

13 Henríquez. "El 'control de constitucionalidad' de la reforma constitucional, en el ordenamiento constitucional chileno", 461, 465.

(4) The Constitutional Court would be usurping the Constituent Power (original). As one scholar states, the Constitutional Court "is the guardian of the Constitution, i.e., the maximum expression of the community's political auto-determination, but it cannot replace such community in their exercise of the original and derivative constituent power."[14]

(5) There would be a lack of standards for the Constitutional Court to engage in a substantive review of constitutional amendments.[15] Even de most relevant provisions of the Constitution, contained in chapter I (Institutional Basis) would be un-enforceable as normative limits to the political decision.[16]

(6) Given the non-democratic origins of the 1980 Constitution, many constitutional amendments, democratically enacted, would be incompatible per se with the "fundamental decisions of the authoritarian constituent power"[17] reflected in the 1980 Constitution.

(7) Substantive review of constitutional amendments would be "incompatible" with constitutional democracy, because of the limitations it would impose over the free will of the people expressed through their elected representatives, and the correlative power granted to unelected judges.[18]

On the contrary, there are scholars – like me – that support the substantive judicial review of constitutional amendments by the Constitutional Court, also resorting to similar arguments to those discussed abroad. Some of their reasons are entangled with the limits they propose to the amendment power. The most relevant arguments/limits are the following:

(1) Article 93 nr. 3 of the Constitution, when entrusting the judicial review of constitutional amendments to the Constitutional Court, does not distinguish between substantial and formal judicial review.[19] Thus, it would be improper for the interpreter to create a difference – restricting judicial review – where the constituent power has created none.

14 Zúñiga (n. 7), 433.

15 Cf. Soto (n. 12), 51.

16 Cf. Zúñiga (n. 7), 432.

17 Zúñiga (n. 7), 432; Cfr. Verdugo, Sergio. "The Role of the Chilean Constitutional Court in Times of Change", in Albert, Richard *et al*. *Constitutional Change and Transformation in Latin America*, London, Bloomsbury Publishing, 2019, 216-218.

18 Cf. Verdugo. "La objeción democrática a los límites materiales de la reforma constitucional" (n. 12); Poehls, Marianne and Verdugo, Sergio. "Auge y caída de la doctrina de las reformas constitucionales inconstitucionales en Chile. Comentario a las sentencias del Tribunal Constitucional roles 9797-2020 y 10.774-2021", Santiago, *Anuario de Derecho Público* UDD, 2021, 263.

19 See García (n. 7), 170 referring to former article 82. Cfr. soto (n. 12), 51.

(2) Substantial judicial review would be a better fit for cherished principles of the 1980 Constitution, such as constitutional supremacy (article 6)[20], rule of law (article 7), accountability (article 6 and 7) and separation of powers (article 4).

(3) This stance would better reflect the vision of the expert committee that drafted the 1980 Constitution.[21] This committee voiced its desire to give protection to the essential principles and values of the Constitution, and referred on several occasions to the French Constitution's prohibition of amendments that may affect the territory or the republican type of government.[22]

(4) Constitutions are systems, demanding coherence between its many parts. Consequently, there is no absolute freedom to change a constitutional text; reforms must preserve the coherence of the Constitution.[23]

(5) Constitutions may have a "soul" or "essence" that should be unamendable.[24]

(6) The derivate constituent power is also a creation of the Constitution (and of the original constituent power) therefore, it is bound by the limits imposed by the Constitution to its reform. Otherwise, the derivative constituent power would usurp the original constituent power, which belongs to the people only.[25]

(7) The 1980 Constitution would have imposed, although indirectly, an express limit to the derivative constituent power in article 5 paragraph 2.[26] This provision states that: "the exercise of the sovereign power acknowledges as a limitation the respect for the essential rights emanating from human nature." Constituent power

20 Íñiguez, Andrea. "Las disposiciones transitorias como mecanismo de reforma a la Constitución de Chile: un análisis a luz de la sentencia dictada por el Tribunal Constitucional, causa rol 9797-29", *Revista Jurídica Digital Uandes*, vol. 4, n.° 2, 2020 <http://rjd.uandes.cl/index.php/rjduandes/article/view/102/112> accessed 8 April 2022, 18; Cfr. Henríquez, Miriam. "El 'control de constitucionalidad' de la reforma constitucional, en el ordenamiento constitucional chileno", 471-472.

21 See Session nr. 359 (26 April 1978), Official Recordings, available at < https://obtienearchivo.bcn.cl/obtienearchivo?id=recursoslegales/10221.3/3766/2/Tomo_X_Comision_Ortuzar.pdf> accessed 6 April 2022.

22 García (n. 7), 170.

23 Díaz de Valdés, José Manuel. "Algunas preguntas pendientes acerca del control de constitucionalidad de los proyectos de reforma constitucional", in *Sentencias Destacadas 2006*, Santiago, Libertad y Desarrollo, 2007, 169.

24 García (n. 7), 172; Díaz de Valdés (n. 23), 169.

25 Nogueira, Humberto. "Consideraciones sobre poder constituyente y reforma de la Constitución en la teoría y la práctica constitucional", *Revista Ius et Praxis*, vol. 15, n.° 1, 2009, 229, 238-241.

26 Silva Bascuñán, Alejandro. *Tratado de Derecho Constitucional*, tomo x, Santiago, Editorial Jurídica de Chile, 2004, 264; Nogueira. "Los límites al poder constituyente y el control de constitucionalidad de las reformas constitucionales en Chile", 443-444; Zúñiga (n. 7), 417; García (n. 7), 172-173.

is the exercise of sovereign power *per excellence*. Therefore, it would be subject to this limitation – respect for fundamental rights[27] – and its "irreversibility."[28]

(8) International Law has also been singled out by some scholars as a limit to constitutional amendments,[29] with some textual support in article 54 of the 1980 Constitution. It declares that: "the provision of a treaty could only be repealed, modified or suspended as provided in the treaty or according to the general norms of international law." Thus, the argument goes, the Constitution would have acknowledged International Law as superior and binding. This recognition would have been "irreversible" and therefore, would apply as a limit to the constituent power.

(9) Other implicit limits to constitutional amendments would be: (1) total reformulation, not only as a quantitative criterion, but as a qualitative one (the amendment affects "essential or supreme principles of the constitutional order, altering its nature, taking away its identity, transforming it in a novel constitutional order, i.e., granting the State a new legal identity"),[30] (2) dignity,[31] and (3) core principles of the current constitution,[32] such as the Common Good; serviciality (the State is at the service of the human being), the republican and democratic nature of the political system, constitutional supremacy, rule of law, separation of powers, and the principle of self-determination.[33]

There is also a scholarly stance advancing the existence of substantive control of constitutional amendments,[34] but exerted only by the National Congress and not by the Constitutional Court. This claim finds some support in the statutory and internal regulations of the National Congress that establish a

27 Cfr. Díaz de Valdés (n. 23), 155-157; Molina, Hernán. "Limitaciones del Poder Soberano", *Revista Chilena de Derecho*, vol. 20, 1993, 311; García (n. 7), 172-173.

28 Nogueira. "Los límites al poder constituyente y el control de constitucionalidad de las reformas constitucionales en Chile", 444.

29 Silva Bascuñán (n. 26), 264; Molina (n. 27), 311; Nogueira. "Los límites al poder constituyente y el control de constitucionalidad de las reformas constitucionales en Chile", 446-447; Nogueira. "Consideraciones sobre poder constituyente y reforma de la Constitución en la teoría y la práctica constitucional", 245, 251-253.

30 Nogueira. "Los límites al poder constituyente y el control de constitucionalidad de las reformas constitucionales en Chile", 452-453. Cfr. García (n. 7), 172.

31 Nogueira. "Los límites al poder constituyente y el control de constitucionalidad de las reformas constitucionales en Chile", 444.

32 García (n. 7), 170.

33 Cfr. Silva Bascuñán (n. 26), 262-266; Molina (n. 27), 311; Henríquez. "El 'control de constitucionalidad' de la reforma constitucional, en el ordenamiento constitucional chileno" (n. 9), 465; Nogueira. "Los límites al poder constituyente y el control de constitucionalidad de las reformas constitucionales en Chile", 444; Nogueira, Humberto. "Poder constituyente, reforma de la constitución y control jurisdiccional de constitucionalidad", *Revista Mexicana de Derecho Constitucional*, vol. 36, 2017, 328, 345.

34 Henríquez. "El 'control de constitucionalidad' de la reforma constitucional, en el ordenamiento constitucional chileno", 473-474.

number of firewalls to ensure the constitutionality of bills.[35] Moreover, the exclusion of the Constitutional Court is justified on grounds similar to the political question doctrine.[36]

3. PRACTICE: TESTING THE LIMITS OF CONSTITUTIONAL AMENDABILITY

As we have seen, there is no consensus among Chilean scholars about the limits of constitutional amendability. We turn now to the case-law of the Constitutional Court. Curiously, despite the enactment of dozens of amendments to the 1980 Constitution, only five constitutional reform bills have been challenged before the Court. Although the first three decisions were rather disappointing, the last two were quite consequential.

1. First Stage: Unchecked Constitutional Amendments

(a) The 'Three Economic Zones' Case (1973)

This case pre-exists the current Constitution (case nr. 15-73). In 1973, at the apex of the political, economic and social crisis of Allende's administration, he submitted a petition to the Constitutional Court to settle a sour dispute with the National Congress regarding a constitutional reform bill. The wording of the 1925 Constitution only provided for judicial review by the Constitutional Court of "proyectos de ley." Ley in Spanish has two different meanings: as a statute or as any legal norm. Thus, the discussion focused on whether "proyectos de ley" – "bills of law" – included statute bills only or it also comprehended constitutional reform bills.[37] The Court, under undeniable political pressure,[38] adopted the first stance, rejecting the petition based on its lack of jurisdiction to review constitutional amendments. Moreover, the Court also declared that, should it have been bestowed the power to review constitutional reforms, it would have been only about the formal dimension of the amendment, because a substantial review "would usurp the genuine role of the Constituent Power to reform the Constitution."[39]

35 Arts. 15, 24, 25 National Congress Organic Law, available at <https://www.bcn.cl/leychile/navegar?idNorma=30289> accessed 8 April 2022; Arts. 14, 55, 168, 244, 274 House of Deputies Bylaws, available at <https://www.camara.cl/camara/doc/leyes_normas/reglamento.pdf> accessed 8 April 2022; Arts. 80, 118, 121, 122 y 187 Senate Bylaws, available at <https://www.senado.cl/reglamento-del-senado-actualizado-marzo-2020> accessed 8 April 2022.

36 Zúñiga (n. 7).

37 An explanation of this discussion in García (n. 7), 169-170.

38 Silva Cimma, Enrique. *El Tribunal Constitucional de Chile (1971-1973)*, Cuadernos del Tribunal Constitucional, n.° 38, 2008, 141 ff.; Evans, Enrique. *Chile: hacia una Constitución contemporánea. Tres reformas constitucionales*, Santiago, Editorial Jurídica de Chile, 1973, 78-79.

39 Case nr. 15-73, cons. 20.

As we will see below, when the 1980 Constitution was drafted, this precedent was closely looked at, and consequently, the current constitutional text expressly confers the Constitutional Court the power to review constitutional amendments (article 93 nr. 3).

(b) The 'Judicial Tenure' Case (1997)

The second case (case nr. 269-97) was about judicial tenure. The 1980 Constitution introduced a 75-year forced retirement rule for judges (article 77). It also included a transitory provision excepting acting judges of "superior courts" from this rule (Eighth Transitory Clause). Later, in 1997, a constitutional reform repealed this exception, thus extending the 75-year retirement rule to all judges.

A group of senators challenged this reform as unconstitutional before the Constitutional Court. Interestingly, their claim was about *ultravires* and substantive limits to the power of constitutional amendment. They argued that "the derivative constituent power exceeded its powers" for two reasons. First, because of article 5° of the 1980 Constitution ("the exercise of sovereign power acknowledges as a limitation the respect for the essential rights arising from human nature"). It was argued that the judges were deprived of the right to keep their positions, granted by the original constituent power. They were also deprived of the right to property over their position. Thus, the derivative constituent power had overstepped its competences.

Second, there was a problem of *ultravires* because the reform was not respecting the "institutional basis" set down by the original constituent power in chapter I of the 1980 Constitution, i.e., the separation of powers principle and the inter-organic independence it requires.

Regretfully, the Court resorted to a technicality to declare the constitutional challenge as "inadmissible,"[40] without discussing its merits, thus leaving all these issues unsettled.

(c) The 'Chairmen Case' (2006)

The third case dealt with a problem of interpretation of the procedural rules applicable to a constitutional reform (case nr. 464-06). It also related to the question whether the Chairman of the Senate and the Chairman of the Constitutional Committee of the Senate had the power to declare as "inadmissible"

40 The Court noted that some senators lacked standing because they have voted in favour of the challenged constitutional amendment. A brief explanation in Bulnes, Luz. "Jurisprudencia del tribunal constitucional de Chile sobre el control de constitucionalidad de la ley y las cuestiones de constitucionalidad", *Revista de Derecho Público*, n.° 61, 1999, 29, 43-46; Silva Bascuñán (n. 26), 257-258.

a constitutional reform bill for violating the Constitution. Disappointedly, nothing in the sentence of the Court seems to be relevant for this paper's discussion.[41]

2. Second Stage: Effective Constraints on Constitutional Change

(a) Pension Funds Case (I) (2020)

The fourth case is a landmark decision which dealt squarely with the problem of unconstitutional constitutional amendments (case nr. 9797-20).[42] The challenged reform granted workers access to their pension funds in advance. In Chile, there is a compulsory pension savings scheme, where a portion of the monthly salary is automatically transferred to an individual account managed by private pension funds. The money in the account belongs to the worker, but she cannot withdraw it until her retirement. Thus, the proposal provided for a one-time waiver, allowing the early withdrawal of 10% of the pension funds.

Normally, this measure would be authorized by a regular statute. However, according to the 1980 Constitution, only the President of the Republic (not congressmen) could propose "social security legislation" to the National Congress ("Exclusive Presidential Initiative" or "EPI"). The President was against this proposition, and therefore, opposition parties – which controlled the National Congress – resorted to the constitutional amendment path, which were not subject to EPI: both the President and members of Congress may introduce constitutional reform bills.

Moreover, the bill was introduced as a transitory disposition of the Constitution, and not as an amendment of its permanent text, thus allowing a lesser quorum to be applied (3/5 instead of 2/3 of the members of each House).[43]

The opposition had already resorted to this strategy a few months before[44] and was trying to repeat its success. However, this time the President of the

41 An analysis of this decision in Díaz de Valdés (n. 23).

42 Scholary comments of this decision in Aróstica, Iván; Verdugo, Sergio and Enteiche, Nicolas. "Country reports: Chile", in Albert, Richard *et al*., 2020 Global Review of Constitutional Law (ICONnect-Clough Center, 2021), < https://pure.mpg.de/rest/items/item_3359843_2/component/file_3359844/content> accessed 8 April 2022; Íñiguez (n. 20); Soto (n. 12); Poehls and Verdugo (n. 18); Henríquez. "¿Inconstitucionalidad de fondo del proyecto de reforma constitucional que autoriza el segundo retiro del 10% de los fondos previsionales?" (n. 12), 301.

43 Article 127 of the 1980 Constitution used to require different quorums for constitutional reform bills depending on the section of the Constitution to be amended. This has been changed, and now there is only one quorum applicable to all constitutional reforms.

44 Law nr. 21.248, 30 July 2020.

Republic challenged the constitutional reform bill[45] ("Pension Funds Bill") before the Constitutional Court.

The Court, in a divided decision,[46] found the Pension Funds Bill to be unconstitutional. To reach such conclusion – and drawing from decisions and scholarship from other constitutional systems –[47] the Court began by advancing two connected assertions. First, it addressed the most fundamental question about the scope of its judicial review. The Court declared that it was empowered by the 1980 Constitution to exert both formal/procedural and substantive judicial review of constitutional reforms.[48] Second, it affirmed that constitutional reforms were subject to limits. The main limitations would be: (1) the rule of law, (2) separation of powers, and (3) fundamental rights.[49] Other limits would be the "essential contents" of chapter I of the 1980 Constitution (Institutional Basis)[50] and the need to preserve the coherency of the Constitution as a system.[51]

Upon these foundations, the Court declared that the Pension Funds Bill would have breached the limits above, *inter alia*, because:

> (1) The National Congress has encroached upon the separation of powers, claiming powers it did not have. The Pension Funds Bill was a constitutional reform bill only in its name. Beyond the formalities, it was a statute regulating social security matters, which should subject to the EPI rule.[52] Thus, Congress attempted to pass legislation avoiding the applicable constitutional regulations,[53] usurping powers allocated to the President (EPI in social security matters).[54] Moreover, this "hiperconstitucionalisation" (regulating statutory matters in the constitution) was a vice in itself.[55]
>
> (2) The amendment infringed the fundamental right to social security, rendering it hollow.[56] The original destiny of the compulsory saving scheme – established by article 19 nr. 18 of the 1980 Constitution- was to provide for social security

45 "Constitutional amendment bill providing for a pension funds' withdrawal mechanism" (combines bills nr. 13.736-07, 13.749-07 and 13.800-07).

46 The decision was 5 to 5, but according to article 8.g of the Law nr. 17.997, in some tie situations, such as the one at hand, the Chairman of the Court wields a tie-break power.

47 The Court resorted to decisions of the Hungarian and Colombian Constitutional Courts (cons. 11), and foreign scholars such as Otto Bachof (cons. 12); Rosalind Dixon; David Landau and Yaniv Roznai (cons. 10).

48 Case nr. 9797-20 (2020) cons. 1°, 6° and ff.

49 Case nr. 9797-20 (2020), cons. 1°.

50 Case nr. 9797-20 (2020), cons. 32°.

51 Case nr. 9797-20 (2020), cons. 33°.

52 Case nr. 9797-20 (2020), cons. 15° and 16°.

53 Case nr. 9797-20 (2020), con. 16°.

54 Case nr. 9797-20 (2020), cons. 2°, 21° and 23°.

55 Case nr. 9797-20 (2020), cons. 12° and 23°.

56 Case nr. 9797-20 (2020), cons. 2°.

contingences. This could not be changed (even because of a Pandemic)[57] nor the saved funds reduced before retirement.[58]

(3) The resort to a transitory provision was "severely illegitimate," not because the purposes of the bill were beyond the scope of such provisions (as affirmed by the President), but because the aim was to modify the "essence" of permanent constitutional provisions by a lesser quorum.[59] The required quorum (2/3 of the members of both Houses) was not fulfilled.[60]

This sentence inaugurated a new stage in the judicial review of constitutional amendments. Possibly due to the obviousness of the congressional scheme to corner the President, the Court took the decisive step of asserting the substantial review of constitutional reforms and identifying standards for it. On the downside, these standards were principles and fundamental rights, both highly undetermined and subject to controversial interpretations, thus increasing the power of the Court *vis-à-vis* the constituent powers (President and National Congress). Moreover, the decision was not supported by a substantial majority of the Court, but only by 5 out of 10 of its members.[61] This may be particularly problematic in a country that does not apply the *stare decisis* principle. In sum, the doctrine contained in this decision may be unstable and easy to change.

A few months later, the President of the Republic brought a similar case before the Court, against a constitutional reform bill that allowed workers to withdraw a further 10% of their pension funds (case nr. 10.774-21). This time, the Court refused to hear the case (*inadmissible*), which caused surprise considering its decision in Pension Funds (I), rising doubts about the stability of this sentence's doctrine.[62]

(d) Pension Funds Case (II) (2022)

The last relevant decision of the Court is also about pension funds, but the procedural context is different, and it covered six separate cases (nrs. 11.230, 11.350, 11.559, 11.560, 11.633 and 11.683-21).[63] The National Congress passed – again – a constitutional amendment allowing workers to withdraw 10% of their pension funds (before retirement). The President of the Republic did not challenge the bill before the Constitutional Court, and thus it became law. However, private parties (insurance companies) asked the Constitutional

57 Case nr. 9797-20 (2020), cons. 27°.
58 Case nr. 9797-20 (2020), con. 26°.
59 Case nr. 9797-20 (2020), cons. 29°.
60 Case nr. 9797-20 (2020), cons. 30°.
61 See (n. 46).
62 See Poehls and Verdugo (n. 18), 282-284.
63 Later on, a similar case was presented to the Court (nr. 12.143).

Court to declare the constitutional reform as "inapplicable" in the context of their litigation against the governmental agency implementing the reform.

According to article 93 nr. 6 of the 1980 Constitution, any party (or the judge) to a judicial proceeding may file a petition to the constitutional court to declare a *legal* provision as unconstitutional for causing unconstitutional effects in those proceedings. A declaration of inapplicability does not derogate the challenged provision but only prevents its application to a specific case.

Several insurance companies filed inapplicability petitions before the Constitutional Court. Nonetheless, it was doubted whether a constitutional reform – not being a regular statute – could be declared as inapplicable for producing unconstitutional effects (the relevant provision says *legal* and not *constitutional*).

The insurance companies won 6-4 in four cases (nrs. 11.230, 11.559, 11.560, 11.683) and lost 5-5 in the other two (nrs. 11.350, 11.633).[64] The most salient innovation of the former was the Court's assertion that it could declare constitutional reforms as inapplicable, thus expanding its judicial review over constitutional amendments from *ex-ante* to *ex-post*, i.e., even after their enactment (previously it was understood that only the former was possible). This was a bold and rather surprising move, particularly in a time when the very existence of the Constitutional Court was under scrutiny in the constitution-making process.

The rest of the decision on these cases followed closely and explicitly Pension Funds (I). The Court declared that: (1) the National Congress breached the Constitution by ignoring the EPI, thus encroaching on the separation of powers principle;[65] (2) the National Congress knew about the Court's decision on Pension Funds (I) but persevered on its mistakes;[66] (3) in substance, this was a statute and not a constitutional reform, so it could be reviewed by the Court;[67] (4) constitutional reforms had limits and should keep the coherency of the Constitution, aim for the common good and respect constitutional rights.[68] In these cases, the right to property and social security were breached.[69]

Notwithstanding the above, the insurance companies lost a third of these cases. According to the swing vote (Justice Pozo), the key difference between successful and failed claims was that the former presented the Court "verified patrimonial damage."[70]

64 In inapplicability cases, the Chairman of the Court does not have a tie-break power.
65 Case nrs. 11.230, 11.559, 11.683 (2022), cons. 3-11.
66 Case nrs. 11.230, 11.559, 11.683 (2022), cons. 16
67 Case nrs. 11.230, 11.559, 11.683 (2022), cons. 18, 22.
68 Case nrs. 11.230, 11.559, 11.683 (2022), cons. 23-24.
69 Case nrs. 11.230, 11.559, 11.683 (2022), cons. 26-43.
70 Contrast J. Pozo dissenting vote (nr. 47-50) and concurring vote (nr. 48-51) in all six cases.

(e) Summing Up and the Foreseeable Change

As we have seen, the Constitutional Court has covered a long path, evolving from a very restrictive approach regarding the notion of limits to constitutional reforms towards a rather ambitious stance. Today the Court affirms its authority to review constitutional amendments, not only regarding procedural/formal issues, but also about their substantive compatibility with the current constitution. Moreover, the Court has identified ambiguous standards for conducting such review, expanding its powers *vis-à-vis* the President of the Republic and the National Congress. Additionally, judicial review is not only pre-emptive, but also repressive, i.e., it applies even to constitutional amendments already enacted.

All of the above, however, may be subject to change, particularly considering that: (1) since Pension Funds Case (II), the Constitutional Court has replaced half of its members, and (2) the *stare decisis* doctrine is alien to the Chilean legal system.

4. THE NOVEL STAGE: IMPOSING LIMITS TO THE CONSTITUTION-MAKING PROCESSES?

The notion of limits to the constitutional power reached new heights during Chile's recent constitution-making processes. Both processes were subject to substantive limitations, thus imposing restrictions on the original (as opposed to derivative) constituent power.

The claim for a new constitution emerged intermittently during the last decades in Chile. Among the main reasons for this 'constitutional pulse' were the fact that the 1980 Constitution was enacted by a non-democratic government (Pinochet's Regime), as well as the perception that certain provisions of its text would block social and political change, entrenching the "Pinochet's Model."[71]

On October 18, 2019, a minor hike of the underground fare erupted into serious civil unrest. After weeks of riots, protests and violent clashes with the police and the military, the main political parties reached an agreement on November 15, 2019 (Agreement for the Social Peace and a New Constitution).[72] This was an attempt to provide a political solution to the civil unrest, with the replacement of the 1980 Constitution as its core proposal.

From a legal perspective, the constitution-making process was implemented through a constitutional reform. Law nr. 21.200 (December 24, 2019), added to chapter XV of the 1980 Constitution the regulations required to create a

71 Atria, Fernando. *La Constitución tramposa*, Santiago, LOM Ediciones, 2015.

72 Available at <https://obtienearchivo.bcn.cl/obtienearchivo?id=documentos/10221.1/76280/1/Acuerdo_por_la_Paz.pdf.> accessed 6 April 2022.

new constitution (stages, agents, dates, etc.). These regulations included *material* or *substantive* limitations to the new constitutional text. According to the novel article 135, the replacing text should: (1) preserve the 'republican nature of the Chilean State'; (2) preserve democracy; (3) respect final judicial decisions; (4) respect international treaties ratified and executed in Chile (the scope of this limitation was controversial on whether it comprised all kind of international treaties or only human rights treaties), and (5) respect for elected authorities' terms, unless their offices were abolished or 'substantially modified' by the proposal.

Considering all of the above, it was not clear whether the drafting body (the Convention) was exerting original or derivative constituent power. On the one hand, it was drafting a new constitution, which is, by definition, what the original constituent power does. On the other hand, the process and its results were subject to limitations imposed by the existing constitution. Thus, we experienced a *sui generis* situation. For this assessment, a key issue was the existence of unamendability: not even the new constitution could change certain contents of the existing constitution.

Eventually, the final draft was rejected in a popular referendum on September 4, 2022. A few months later, a novel constitution-making process started, as regulated by Law nr. 21.533 (January 17, 2023). Again, the process was subject to detailed regulations, and again, some matters were kept beyond the reach of the drafters. These were the "12 bases," which included the republican and democratic system, dignity and fundamental rights limiting sovereignty, the acknowledgment of indigenous people as part of the Chilean nation, the separation of powers principle, the protection of fundamental rights such as life, equality, property and religion, the conservation of nature, among others.

However, the limitations on this second constitution-making process were further. Whereas during the first process there was no mechanism to enforce the substantive limits against the will of the Convention, the second process set up an expert committee (*Comité Técnico de Admisibilidad*) to this purpose. Members of the drafting bodies (there were two stages in charge of two different entities) could call upon this committee to resolve whether the '12 bases' had been breached. Although no claim was ever filed, the mere existence of the basis and the chance to demand its enforceability, played as deterrents.

The second proposal was also rejected by popular referendum on December 17, 2023. Therefore, the 1980 Constitution remains in force, and there is little chance of a new constitution-making process starting anytime soon. Nonetheless, both failed processes showed the potency the limitations on the constituent power doctrine had reached.

V. CONCLUSION

The Chilean approach towards the unconstitutional constitutional amendments' doctrine has evolved. From a time were any kind of judicial review of a constitutional reform was unthinkable (under de 1925 Constitution), it transitioned first, to acknowledging procedural/formal limitations (1980 Constitution), and second, to have a Constitutional Court exerting substantive judicial review over constitutional amendments. The final chapter in this story is even more radical: two constitutional-making processes were also subject to substantive limitations.

Thus, the Chilean case is a remarkable example of how a sidelined and rather inconsequential doctrine may suddenly become prevalent, with consequential effects.

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