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**A review on cases on independence and impartiality**

**REPORT BY**

**Manuel PUCCIO WULKAU**  
**Study Director Lawyer, Constitutional Court, Chile**

I will give an account of some cases reviewed before the Constitutional Court that allow us to observe how the concept of judicial independence and its correlated principle of impartiality has been constructed in its jurisprudence.

For this, it is important first to briefly review the norms that serve to build the constitutional guarantee of judicial independence and what the scope of said guarantee is.

There is no provision in the constitutional text that expressly recognises the guarantee of judicial independence. This guarantee is rather a constitutional norm that can be constructed through various provisions of the Constitution.

The Constitutional Court has recognised judicial independence as an essential element of due process. The Chilean Constitution establishes due process as the mandate of the legislator to always establish the guarantees of a fair and rational procedure, as indicated in Article 19 No. 3, sixth paragraph, of the Constitution. From this constitutional clause, the Constitutional Court has recognised the consecration of a right to due process.

However, it should be pointed out that number 3 of Article 19 of the Constitution establishes various guarantees that establish the minimum elements that a due process must contain, thus recognising the right to defense, not being judged by special commissions, the guarantee of being judged by means of a prior procedure legally processed.

Thus, in its jurisprudence, the Court has indicated what the minimum elements of due process are based on this constitutional provision. It has declared that due process must contain elements such as timely knowledge of the action and due location, bilaterality of the hearing (adversarial), provision of relevant evidence and the right to challenge the decision of a court, impartial and appropriate and established previously by the legislator.

It is from this general clause that the guarantee of fair and rational trial or due process is established, which has allowed the Court to evaluate when a certain legal procedure complies with due process guarantees, but also to establish whether sufficient guarantees are given so that this procedure is processed before an independent court.

In the following, I will refer to some cases that may explain how the Court has understood judicial independence and its correlated principle of an impartial judge.

It is worth remembering that the primary function of the Chilean Constitutional Court is regulatory control, so it is not up to the Court to review whether judicial independence is materially fulfilled, that is, if the judge in a given case has acted impartially or independently. This corresponds more to the hierarchical superiors, that is to say, in the pyramid structure that characterises the Chilean Judicial power, each higher degree in a process will correspond to an evaluation of how the lower instance has failed.

Thus, the Court's task is rather to evaluate in the abstract, when appropriate, whether the institutional design established by the norms sufficiently guarantees the independent judge. Also in the concrete analysis of rules, the Court will be responsible for evaluating whether a certain legal provision in its application to the specific case will provide sufficient guarantees of an independent judge.

## 1. THE CASE OF MILITARY JUSTICE AND CRIMINAL CASES INVOLVING CIVILIANS

The cases reviewed in the place of inapplicability due to unconstitutionality are related to the competence of the military courts of justice regarding military crimes committed by civilians. According to the Code of Military Justice, Article 5 of the military jurisdiction is responsible for the knowledge of military crimes, except express jurisdiction over some crimes committed by civilians, but does not clearly state whether the jurisdiction also covers crimes committed by military agents regarding civilians. Thus, in some cases in which civilians were victims of crimes committed by the military, civilians, in order to see the damage caused repaired, must necessarily go to military justice.

There is a series of cases in which the Constitutional Court has declared the inapplicability due to unconstitutionality of the provision that would allow the Military Justice to have knowledge of crimes committed by the military with respect to civilians.

Specifically, in case STC 2493, but also 292 and 2902, the Court declared the inapplicability of this rule of military procedural law, declaring, among other reasons, that the military jurisdiction affects the due and necessary independence and impartiality of the Court.

Thus, in case STC 2902, the Constitutional Court examined the situation of police mistreatment (in Chile the *Carabineros* are subject to military jurisdiction) of a civilian. By application of the rule, the complaint of unfair humiliation committed by *Carabineros* against the civilian citizen was referred to the Military Prosecutor's Office. However, the citizen filed an action of inapplicability for unconstitutionality before the Constitutional Court, arguing that the application of this rule violates the guarantee of due process, in particular, being judged by an impartial tribunal.

The Constitutional Court declared that this provision, by allowing a civilian to be subject to military jurisdiction, effectively violates due process.

Thus, the Court reasoned that when civilians are submitted to military jurisdiction, the necessary independence and impartiality of the Court is affected. It pointed out that the institutional structure of the military jurisdiction does not provide sufficient guarantees of independence. In this regard, it should be noted that the process in the military jurisdiction leads to an investigating prosecutor, who depends on the military forces. Then this investigating prosecutor must report to a judge, who also belongs to the armed forces and order. This structure, the Court estimated, which translates into judges in the military process having a hierarchical link with the military high command, do not provide sufficient guarantees of independence of the judges. As a result, the rule that allows judging civilians in the military jurisdiction was declared inapplicable.

What is remarkable about this case and others, is that it recognises the application of the American Convention on Human Rights internally, in particular Article 8 that guarantees all persons to be heard by a judge or a competent court, to a public trial and to be judged by an independent and impartial tribunal.

It is worth remembering that the Chilean State was condemned by the Inter-American Court of Human Rights precisely because of the submission of civilians to military jurisdiction. This was the case in *Palamara Iribarne vs. Chile*. The reasoning of the Inter-American Court was accepted in the judgment of this case. Thus, the Constitutional Court declared that the interpretation given regarding the inapplicability of the challenged provision has its interpretative support in the decision of the Court.

The reasoning of this case by the Constitutional Court has been highlighted as an expression of the doctrine of review of Convention compliance that has been developed in Latin America, having an impact on several of the reasonings of the constitutional courts of the region.

That there is not enough relational distance between the investigating prosecutor and the judge regarding the parties or intervening parties, as well as between the latter and the highest military authority of the place, for whom the membership in the same institution joins them and for which there is a linked hierarchy and chain of command.

## **2. HUMAN RIGHTS CASES. APPLICATION OF THE OLD CRIMINAL PROCEDURE. KNOWLEDGE OF CAUSES BY MINISTERS VISITING. 5189 (CASE FREI)**

In this case we are no longer dealing directly with judicial independence, but rather with impartiality. Impartiality and independence should be considered as connected situations, but with different substantivities. Thus, while independence is related to an organic aspect, in terms of the structure to which it is attached in the judicial system, impartiality rather refers to relations that the judge may have with the parties or the litigious issue. In short, independence is related to the separation of powers, while impartiality is precisely related to the relationship of the judge with the parties or the purpose of the trial. However, in order to guarantee impartial justice, it is necessary that conditions or guarantees of independence be given.

In the *Frei* case, STC 5189, the Court dealt precisely with the issue of impartiality.

The case focuses on the action brought against the perpetrators of the assassination of former President Frei Montalva, who ruled the country during the 1960s and subsequently died under suspicious circumstances in a private clinic, in the middle of the dictatorial period. The former president had become a problem for the regime as he began to line up in his favour the opposing forces to the military regime.

From the procedural point of view, the evolution of criminal procedure systems in Chile should be taken into account as a context.

Until 2005, an old criminal procedure was in force in Chile, which had the characteristics of an inquisitive one, in which an investigating judge investigates, reviews the evidence, and finally resolves the criminal case by providing the sentence. This regime was subsequently reformed by an accusatory procedural system, in which, among other things, the separation of the criminal investigation, now from the Public Prosecutor's Office and the resolution of the case, at the hands of an oral criminal court prevails.

However, by constitutional provision and the rules of the same new procedural code, for those events that occurred prior to 2005, the rules of the old criminal procedure apply. This applies to the case under review.

In effect, the investigating judge of the case, which was responsible for the investigation, took evidence, testimony of witnesses, had to rule on the criminal responsibility of those accused of being part of the assassination of the former president of the Republic. The investigating judge conducted the investigation for almost 15 years.

One of the defendants of the crime presented a request of inapplicability before the Constitutional Court, challenging the rules that allow the appointment of a judge exclusively dedicated to investigating causes that are of high public interest. For the defendant of the criminal process, being judged by someone who has carried out the investigation for more than 15 years does not provide sufficient guarantees of impartiality and therefore, the rules that allow his performance as a judge should be declared unconstitutional as regards its application to the concrete case.

The Court rejected these allegations declaring that, in this case, there is not sufficient evidence to conclude that the judge has a partial approach to the case.

Firstly, the Court distinguished between subjective and objective impartiality. Objective impartiality implies external conditions that might compromise the judge's objectivity. It concerns issues such as the structure where he acts. Subjective impartiality implies a more psychological view of how a judge approaches the case.

For the Court in a inapplicability of unconstitutionality, as a concrete evaluation of the application of a rule in a concrete case, the question on whether the structure of the old criminal procedure is adequate to guarantee impartiality, is not admissible. This evaluation – so states the Court - can only be made in an abstract evaluation of the law, and this is not allowed, since the Constitution declares that the old procedure is applicable for to all cases before 2005. Thus, it is not possible to evaluate the conformity of the old criminal procedure to the Constitution, since the Constitution itself recognised this procedure as valid system.

Impartiality, now understood as subjective, is a question that the Court cannot respond to, since the plaintiff in the case had provided no evidence that the judge in this case would lead his investigation and later resolution of the case in a way that does not sufficiently guarantee his impartiality. Therefore, concludes the Court, there is a breach of the Constitution by the application of the old criminal procedure.

## **CONCLUSIONS**

I have reviewed two cases that can enlighten us about the content of the due process clause in the Chilean Constitution and how an essential element – the independence and impartiality of judges – has been understood by the Court and has been declared in its jurisprudence.

As you have may have noticed, both cases have a common ground: they deal with criminal procedure and both have inquisitive elements, since the judge leads the investigation and then provides a sentence. This system has been overtaken by the new accusatory criminal process. However, these old procedures remain in force for some of the criminal cases and some defendants want to have a sufficient guarantee of an independent judge.

For the Court this guarantee is not sufficiently granted in a military court, but in civilian justice, there are enough elements to declare the conformity of the procedure and the actions of the judge in accordance with the Constitution's mandate.