

**PARENTS V. GOVERNMENT: THE CONSTITUTIONAL  
CHALLENGE BETWEEN THE PRINCIPLE OF  
PROGRESSIVE AUTONOMY OF CHILDREN AND  
PARENTS' EDUCATIONAL RIGHTS IN CHILE**

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ABSTRACT

*This article analyzes the complex balancing exercise between parents' rights and the progressive autonomy of children in the Chilean Constitution and how, in the end, there is a conflict between parents and the Government, and not parents and their children.*

*The Chilean Constitution establishes that "Parents have the preferential right and duty to educate their children. [and that] it shall be the responsibility of the Government to grant special protection to exercise this right." However, the Bill that created the System of Guarantees and Rights of Children attempted to allow the Government's intervention in the face of discrepancies between parents and children regarding the limitations by parents on the requirements of a child for less direction and guidance, or directly, to act alone to participate in assemblies or peaceful protests, as well as to convene them, without the consent of their parents. To fulfill this purpose, the Bill established that conflicts that arose should be settled by applying the principle of progressive autonomy and all the other fundamental rights—including the preferential right and duty of parents to educate their children— should always be interpreted restrictively, in favor of the autonomy of the child.*

*Filed a claim, the Constitutional Tribunal ruled that the "preference" enjoyed by the right of parents to educate their children is part of the minimum core of parental rights and that Bill, in practice, was reversing that preference materially in favor of the Government, which at the end, was called upon to resolve a conflict between parents and children.*

INTRODUCTION

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This article seeks to analyze the complex balancing exercise between parents' rights and the progressive autonomy of children in the Chilean Constitution and how, in the end, the Chilean Constitutional Tribunal has addressed the topic as a conflict between parents and the Government and not parents and their children.

The first part will describe how the current preferential right and duty of parents to educate their children contained in the Constitution is a crucial aspect taken from the International Human Rights Law treaties.

Later, the article will show the background of the Bill that created the System of Guarantees and Rights of Children and how it attempted to allow the Chilean government's intervention in the face of discrepancies between parents and children regarding the limitations by parents on the requirements of a child for less direction and guidance, or directly, to act alone to participate in assemblies or peaceful protests, as well as to convene them, without the consent of their parents. To fulfill this purpose, the Bill established that conflicts that arose should be settled by applying the principle of progressive autonomy and all the other fundamental rights –including the preferential right and duty of parents to educate their children– should always be interpreted restrictively, in favor of the autonomy of the child. Moreover, the last part of the Bill incorporated an obligation for all educational institutions, public and private, to guarantee a secular and non-sexist education, attempting against not only the preferential rights of parents but also violating religious liberty provisions contained in the Chilean Constitution.

In this sense, this piece will analyze the claim filed by Chilean Congressmen before the Constitutional Tribunal and the main arguments to defend parental rights, their preference under the Constitution, and religious freedom.

Finally, the article will develop the Chilean Constitutional Tribunal ruling, which declared that the "preference" enjoyed by the right of parents to educate their children is part of the essential elements of parental rights and how that Bill, in practice, was reversing that preference materially in favor of the government, which at the end, was called upon to resolve a conflict between parents and children. In the same way, the piece will develop the reasons stated by the court to declare unconstitutional the obligation for all Chilean schools to provide secular and non-sexist education and how it violated the religious liberty provisions.

## I. THE PREFERENCE RIGHT OF PARENTS TO EDUCATE THEIR CHILDREN UNDER THE CHILEAN CONSTITUTION

The Chilean Constitution contains an explicit preference for parent's rights over the Government's action in article 19 No. 10, third paragraph, which states: "Parents have the preferential right and duty to educate their children. The State shall provide special protection for the exercise of this right."<sup>1</sup>

For sure, it is not a Chilean creation. Parents' rights appeared for the first time at the international level during the Universal Declaration of Human Rights drafting process.<sup>2</sup> Indeed, as Mary Ann Glendon points out, the debate over educational rights was primarily influenced by the National Socialist regime's efforts to turn Germany's renowned educational system into a mechanism for indoctrinating the young with the government's program.<sup>3</sup> In this sense, the Netherlands explained the ways in which German schools had been used to undermine the role of parents,<sup>4</sup> and the drafters decided to add a new paragraph: "Parents have a prior right to choose the kind of education that shall be given to their children."<sup>5</sup>

At a treaty level, the International Covenant on Economic, Social and Cultural Rights (ICESCR) clearly guarantees parental rights and the complementary liberty to establish and direct educational institutions different than public schools:

3. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.

4. No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph I of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.<sup>6</sup>

Although the ICESCR recognizes the parents' "liberty" to choose their children's schools other than those that are public,<sup>7</sup> it is not a "right." However, the American Convention on Human Rights (ACHR)—to which Chile is a State

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1 Constitución Política de la República de Chile, art. 19.

2 See Universal Declaration of Human Rights, art. 26(3), G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948).

3 MARY ANN GLENDON, A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS 181 (2001).

4 *Id.*

5 *Id.*

6 ICESCR, art. 13(3)(4).

7 ICESCR, art. 13(3).

Party—does not contain a specific article that guarantees the right to education, it does recognize the right of parents to have their children educated in accordance with their own religious and moral convictions, which is embedded in the article that consecrates religious freedom. In this sense, Article 12(4) of the ACHR establishes that “[p]arents or guardians, as the case may be, *have the right* to provide for the religious and moral education of their children or wards that is in accord with their own convictions.” Therefore, it is at least theoretically correct that in the Inter-American System, States parties even have a kind of obligation to provide religious instruction.

In fact, General Comment No. 13 of the Committee on Economic, Social and Cultural Rights (CESCR) refers to religious instruction in public schools and the ways to harmonize it with the liberty of parents and guardians. The CESCR does this to ensure the religious and moral education of their children conforms with their own convictions.<sup>8</sup> In this sense, the CESCR sets out that “public education that includes instruction in a particular religion or belief is inconsistent with [A]rticle 13(3) unless provision is made for non-discriminatory exemptions or alternatives that would accommodate the wishes of parents and guardians.”<sup>9</sup> Thus, it is clear that the CESCR’s interpretation allows States parties to include religious education even at public schools through opt-out measures and non-discriminatory exceptions, entitling parents to ultimately decide if the religious and moral instruction that their children will receive accords with their own convictions, even when their children attend public institutions.

Finally, Article 14(2) of the Convention on the Rights of the Child, ratified and in force in Chile, provides that “States Parties shall respect the rights and duties of parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.”

All these provisions have two points in common. First, they emerged as a response to the atrocities committed by the Nazi regime and captured the spirit of parents’ educational rights history to ensure religious freedom. Thus, there is an inseparable relationship between parents’ rights and religious liberty,<sup>10</sup> recognizing that education is not a morally neutral enterprise and that the children’s rights must be interpreted and harmonized with the educational rights of parents. Secondly, all of them are currently law in force in Chile.

## II. PARENTS V. GOVERNMENT: THE PROPOSED CHILEAN SYSTEM OF GUARANTEES OF THE RIGHTS OF THE CHILD

On September 24, 2015, President Michelle Bachelet submitted to the Chilean Congress the Bill that “Establishes a System of Guarantees of the

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<sup>8</sup> International Covenant on Economic, Social and Cultural Rights art. 13(3), adopted Dec. 16, 1966, 993 U.N.T.S. 3.

<sup>9</sup> U.N. Comm. on Econ., Soc. & Cultural Rights, General Comment No. 13: The Right to Educational Freedom (Para. 28), U.N. Doc E/C.12/1999/10 (1999).

<sup>10</sup> This is clear in the American Convention on Human Rights since parental rights are included in Article 12, concerning the freedom of religion.

Rights of the Child,” contained in Bulletin No. 10,315-18, with the purpose of establishing a comprehensive system that guarantees and protects the rights of all children. The Bill was based at this stage on four guiding principles: (1) Children as a holder of rights; (2) Comprehensive protection of children; (3) Effective protection of the exercise of rights; and (4) Incorporation of that protection.<sup>11</sup>

Under Article 13 of the Congress Chilean Law,<sup>12</sup> the entry of the Bill was reported in the Chamber of Deputies on September 29, 2015, being dispatched in its first constitutional procedure on May 2, 2017.

On May 3, 2017, the Bill was reported in the Senate, passing to the Special Commission in charge of processing bills related to children and adolescents and to the Finance Commission—regarding matters within its competence. Thus, after a long debate in the said legislative chamber, the discussion began in the Senate's plenary session on December 22, 2020, finally approving the Bill, with modifications, on January 27, 2021.<sup>13</sup>

Subsequently, the Bill returned to the Chambers of Deputies for its third constitutional procedure. Although the Committee on Family and the Elderly ruled favorably on the amendments made by the Senate, a series of provisions were rejected because the constitutionally required quorum was not reached.<sup>14</sup>

In this context, and in accordance with the provisions of article 71, second paragraph of the Chilean Constitution, a mixed commission was formed because certain modifications proposed by the Senate had been rejected.<sup>15</sup>

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11 See Congreso Nacional (Chilean Congress), *Sobre Garantías y Protección Integral De Los Derechos De La Niñez y Adolescencia*, Bill that "Establishes a System of Guarantees of the Rights of the Child", Boletín No. 10,315-18. (Chile) (emphasis added). Boletín

12 Law No. 18.918 art. 13, January 26, 1990, Diario Oficial [D.O.] (Chile) ("Any bill must be reported in a meeting room of the respective Chamber, prior to its study by any body of the Congress.").

13 Then, on September 13, 2017, and already issued the first report by the specialized commission, the Bill entered the Senate Chamber again for general discussion. However, the Chamber itself decided to refer the bill to the specialized commission, in order to draft a new report, for which it authorized it to discuss the Bill in general and in particular in that instance. This report is finally sent to the Senate Chamber on September 10, 2019. On October 2, 2019, the discussion began in the room, remaining pending and ending on October 29. The bill is then referred back to the special committee responsible for processing bills relating to children and adolescents. The discussion in particular and drafting of the second report of this commission lasted more than a year, being dispatched on December 11, 2020, after which it went to the Finance Committee, which did not formulate modifications.

14 The provisions of the Bill that were rejected are as follows: the fourth, fifth, sixth and seventh paragraphs of article 7; the second paragraph of article 41; articles 58 and 59; the fourth paragraphs of paragraph (e) and fifth and final paragraphs of paragraph (f), all contained in the first paragraph of article 68; the second and third paragraphs of article 70; paragraph 11 of article 74 and article 76, all of the text of the Bill sent by the Senate.

15 Article 71 of the Chilean Constitution states

If the additions or amendments were rejected, a mixed commission will be formed, and it will proceed in the same manner indicated in the preceding article. If the mixed commission does not reach an agreement to settle the differences between the Houses, or if any of the Houses reject the proposition of the mixed commission, the President

Accordingly, this mixed commission dispatched its report dated June 14, 2021, pending its approval in the Chamber of Deputies and the Senate.

Once both chambers approved the report of the mixed commission, the Bill was ready to be promulgated and published once it was dispatched on June 25, 2021, with 88 permanent articles and 5 transitory provisions.

Finally, for the reasons put forward in this article, a few provisions of the Bill were challenged before the Chilean Constitutional Tribunal, mostly violating parental educational rights contained in the domestic Constitution.

### III. THE CHALLENGED PROVISIONS CONTAINED IN THE BILL

The constitutional claim was filed against precise parts of the Bill that directly violated the parents' rights. Indeed, limited aspects of only three articles were challenged out of a total of eighty-eight permanent articles and five transitory provisions contained in the entire Bill. In this regard, the claim before the Chilean Constitutional Tribunal specifically challenged the following provisions of the Bill that "Establishes a System of Guarantees of the Rights of the Child," The parts in bold were the challenged phrases.

In article 11, first and second paragraphs:

Article 11.- Progressive autonomy. Every child and adolescent, in accordance with the System of Guarantees and Comprehensive Protection of the Rights of Children and Adolescents, may exercise his or her rights in accordance with the evolution of his or her faculties, taking into account his or her age, maturity and level of development, unless the law limits this exercise in the case of fundamental rights **in which case limitations should always be interpreted restrictively.**

During their growth process, children and adolescents develop new capacities and deepen others **that allow them, progressively, to require less direction and guidance from parents, legal representatives or persons who have them legally in their care,** together with a gradual increase in their capacity for responsibility and decision-making regarding aspects that affect their lives. The development and deepening of capacities that favour the autonomy of children and adolescents is affected, not only by age, but also by

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of the Republic may ask to the House of origin to consider again the bill approved in the second stage by the reviewing House. If the House of origin rejected the additions or amendments by two-thirds of its present members, there will be no law in that part or in its entirety; but, if there is a majority for rejection which is less than two-thirds, the bill shall pass to the reviewing House, and it will be understood to be approved by the vote of two-thirds of the members present in the latter.

Constitución Política de la República de Chile, art. 71.

cultural aspects and by the individual and collective experiences that shape their life trajectory . . .<sup>16</sup>

In article 31, fourth and fifth paragraphs:

Children and adolescents have the right to take part in public meetings and peaceful demonstrations convened in accordance with the law, whether festive, sporting, cultural, artistic, social, religious or of any other nature, in the company of their parents, other responsible adults, **or alone, if their age and the degree of autonomy with which they operate so permit.**

Likewise, they have the right to promote and convene meetings and/or public demonstrations in accordance with the law, in the company of their parents, other responsible adults, **or by themselves, if their age, degree of maturity and autonomy with which they operate so permit.**<sup>17</sup>

In article 41, fourth paragraph:

The State shall guarantee, within the scope of its competences and in accordance with its powers and means, comprehensive sexual and affective education, **of a secular and non-sexist nature**, and shall ensure that schools give due respect to the ethnic, cultural, and religious diversity of children and adolescents, as well as to promote educational environments free of violence, abuse, and bullying.<sup>18</sup>

While there are certain common elements in every one of the challenged provisions throughout the claim, it is necessary to treat each constitutionality question separately to better analyze the challenges and how, in such cases, the Chilean constitutional text was violated.

IV. THE PREFERENCE GIVEN TO PARENTS TO EDUCATE THEIR CHILDREN, AS WELL AS THEIR DIRECTION AND GUIDANCE REGARDING THE EDUCATION OF CHILDREN, CONSTITUTE ESSENTIAL ELEMENTS OF THE RIGHT CONTAINED IN ARTICLE 19 No. 10, THIRD PARAGRAPH OF THE CHILEAN CONSTITUTION.

As said before, Article 19 No. 10, third paragraph of the Chilean Constitution establishes that “Parents have the *preferential* right and duty to

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16 *Id.* at art. 11 (emphasis added).

17 *Id.* at art. 31 (emphasis added).

18 *Id.* at art. 41 (emphasis added).

educate their children. Shall be the responsibility of the State to grant special protection to the exercise of this right.”<sup>19</sup>

In this sense, the claim said that the contested provision broke essential elements of this fundamental right, specifically, regarding the *preference* established in favor of parents in exercising their educational rights, as well as the limitation made by the Bill concerning the direction and guidance of their children.<sup>20</sup>

Indeed, as noted above, Article 11 of the Bill established when it comes to fundamental rights that limit the exercise of what the law calls “progressive autonomy” of children, such “limitations must always be interpreted restrictively.” In this sense, at least two constitutional conflicts resulted in violations of the text of the Chilean Constitution, particularly of Article 19 No. 10.<sup>21</sup>

First, it is evident that one of the fundamental rights which may limit children's progressive autonomy is the preference granted by the Constitution to parents to educate their children. In that regard, the direct effect of the contested provision on parents' rights is none other than to establish that the preferential right of parents to bring up their children must be interpreted restrictively, favoring the progressive autonomy of the child.<sup>22</sup>

As can be seen then, the contested part reversed the constitutionally guaranteed preference to parents, triggering that the children now exercise educational autonomy, preferring that autonomy over the preference guaranteed to parents in the constitutional text. The claim continued stating that if the Chilean Congress aimed to incorporate a new legal principle into the Chilean legislation, such as children's progressive autonomy, it could only do so consistently in harmony with the rights guaranteed in the Constitution. In this case, the right of parents to educate their children is a right that enjoys preference according to the Constitution itself. Thus, Congress broke this harmonization process since it reversed the preference, giving legal precedence to children's autonomy over the educational parental rights expressly guaranteed in the Constitution.<sup>23</sup>

In turn, the contested norm does not allow the interpreter to grant due and special constitutional protection to parental preference since the challenged part provides that such limitations must be interpreted restrictively, *always*.

Subsequently, the claim states that Congress has done the same concerning the second paragraph of article 11 to establish that “children and adolescents are developing new capacities and deepening others that allow them, progressively, to require less direction and guidance from parents, legal representatives or persons who have them legally in their care.” In this way, the Chilean Constitutional Court expressly stated before that among the essential

19 Constitución Política de la República de Chile, art. 19 (emphasis added).

20 Tribunal Constitucional (T.C.) (Constitutional Court) (highest court on constitutional matters), Diciembre 14, 2021, Rol de la causa: 11.315-2021, para. 14. (Chile).

21 *Id.*

22 *Id.*

23 *Id.*, para.16.



elements of the preferential right of parents to educate their children, the direction and guidance in exercising their rights is a must. Indeed, the Court said:

The right of parents to preferential education, as a right, is a right to act **vis-à-vis Government bodies, institutions, groups and individuals who intend to direct, guide or carry out** the education of their children, which translates into the school choice in which formal education will take place and in the educational actions carried out by the family nucleus in the informal education of children and adolescents.<sup>24</sup>

In this line, the senators argued before the Court that the preference enjoyed by parents, constituting indeed a core element of that fundamental right, and the degree of direction and guidance required by children is something that should be decided gradually by parents. The preceding is evident since there would be no real preference if the exercise of their parental educational rights is subordinate to the decision of their children—or the Government at the end—in the exercise of this new progressive autonomy incorporated by Congress.<sup>25</sup> It is for this reason that the claim stated that it is possible to sustain (i) both the preference given to parents to educate their children, (ii) as well as their direction and guidance regarding the education of children constitute essential elements of the right contained in 19 No. 10 third paragraph of the Constitution.<sup>26</sup>

The reason to argue that parents' rights preference and the direction and guidance are core elements of the fundamental right is that Congress is not constitutionally allowed to establish restrictions or limitations that affect core elements of the fundamental rights according to article 19 No. 26 of the Chilean Constitution.<sup>27</sup>

As the claim pointed out, that nucleus, or core part, not only consists of the parental right to educate them. Still, the preference enjoyed by this right, following the constitutional text, stands as an essential element because, as the senators argued before Court, there would be no real preference as guaranteed by the Constitution if the exercise of such educational parental rights is subordinate to decisions taken by *the State, institutions, groups, and individuals* (including children itself).<sup>28</sup>

Thus, this is precisely what the Congress did by *always* preferring a restrictive interpretation of the exercise of parental rights in favor of the

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24 Tribunal Constitucional (T.C.) (Constitutional Court) (highest court on constitutional matters), Rol de la causa: 740 para. 15. In the same vein, Rol de la causa: 2787 para. 6. (emphasis added).

25 Constitutional Claim Rol n° 11.315-2021, p. 17.

26 *Id.*

27 “The assurance that the legal provisions [passed by Congress] which, by mandate of the Constitution, regulate or complement the constitutional guarantees therein or which should limit them in the cases authorized by the Constitution, shall not affect the rights in their essence, nor impose conditions, taxes or requirements which may prevent their free exercise.” (Emphasis added)

28 Constitutional Claim Rol n° 11.315-2021, p. 18.

progressive autonomy of their children. Congress directly reversed the preference guaranteed by the Constitution, or rightly subordinates the exercise of parental rights to the decision of their children in exercise of this new autonomy incorporated by the Bill is contrary to the Chilean Constitution.<sup>29</sup>

In this sense, it is a constitutionally inadmissible violation of said preference which is part of the essential core of the right enshrined in article 19 No. 10, third paragraph. The affectation of rights, in their essence, is something that is prohibited for the Congress itself, because of article 19 No. 26 of the Chilean Constitution. Thus, and based on this provision, both doctrine and jurisprudence have clearly established that although the limitation of fundamental rights can be carried out by statutory means,<sup>30</sup> this is only possible as long as the rights are not affected in their essence or imposed conditions that make their exercise impossible.

#### V. PARENTAL AUTHORIZATION IS ESSENTIAL IN HARMONIZING CHILDREN'S PROGRESSIVE AUTONOMY AND PARENTS' RIGHTS.

The second part of the Senators' claim was related to the right of association and assembly regulated in the Bill. The Chilean Congress proposed the following:

Children and adolescents have the right to take part in public meetings and peaceful demonstrations convened in accordance with the law, whether festive, sporting, cultural, artistic, social, religious or of any other nature, in the company of their parents, other responsible adults, **or alone, if their age and the degree of autonomy with which they operate so permit.**

Likewise, they have the right to promote and convene meetings and/or public demonstrations in accordance with the law, in the company of their parents, other responsible adults, **or by themselves, if their age, degree of maturity and autonomy with which they operate so permit.**<sup>31</sup>

In this case, Congress granted children the right to exercise by *themselves* and *without* the company of their parents to take part in public meetings and

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<sup>29</sup> *Id.* at 18.

<sup>30</sup> Tribunal Constitucional (T.C.) (Constitutional Court) (highest court on constitutional matters), 15 de Noviembre de 2016, Rol de la causa: 3028-16, , states that: "the 'statutory reservation' in the regulation of the exercise of fundamental rights is a general and basic principle of Chilean constitutional law. Thus, it is up to the legislator and only to him, to lay down rules in this regard, with no exception other than that relating to the right of assembly in places of public use."

<sup>31</sup> Congreso Nacional (Chilean Congress), Sobre Garantías y Protección Integral De Los Derechos De La Niñez y Adolescencia, art. 31, Bill that "Establishes a System of Guarantees of the Rights of the Child", Boletín No. 10,315-18. (Chile) (emphasis added).

peaceful demonstrations, as well as their right to promote and convene them in accordance with the law.

At first glance it seems that there would be no problem with children, taking into account their age, degree of maturity, and autonomy to function in attending or convening public meetings without the company of responsible adults. However, Congress wrongly granted that they could do it rightly, by themselves, excluding the due authorization of their parents, who are those who have the right to direct and guide their children under the provisions of article 19 No. 10 of the Chilean Constitution in relation to article 19 No. 26. These provisions protect the essential core of the rights from the limitations or restrictions imposed by the legislator itself.<sup>32</sup> Thus, the Senators argued before Court that the Bill established that (i) either the child attends or convenes in the company of his parents or, on the contrary, (ii) has a right—enforceable by the way to his own parents—to attend, convene and promote public meetings and peaceful demonstrations, by himself, without any prior authorization from those who have the fundamental and preferential right to direct and guide the child in the exercise of his rights, and even against the express opposition of parents or guardians.<sup>33</sup>

In this vein, and given that the first paragraph of the challenged article 11 of the Bill *always* subjected the exercise of the preferential right of parents to a restrictive interpretation, it was clear that both contested paragraphs of article 31 of the Bill constitute the same manifestation of this curtailment of parental authority, direction, and guidance, which not only exists as an explicit right in our Constitution but also enjoys preference as an essential element of the same right.<sup>34</sup>

In this line, it is logical that the guarantee by statutory means—without amending the Constitution—of a preference that allows children to exercise by *themselves* without the company or *authorization* of their parents, the right both to take part in public meetings and peaceful demonstrations, as well as their right to promote and convene them in accordance with the law, is in itself incompatible with articles 19 No. 10 and 19 No. 26 of our Constitution, since the contested parts of article 31 of the Bill grant a preference for its exercise, over that constitutionally held by parents.<sup>35</sup>

Finally, the claim clarifies that Senators did not deny that children are holders of fundamental rights according to the Chilean Constitution since the heading of Article 19 establishes that "The Constitution guarantees *all persons*."<sup>36</sup> But at the same time, children are subject to protection, direction, and guidance under the Constitution itself, as well as the international treaties ratified by Chile and currently in force,<sup>37</sup> which recognize the principle of the

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32 Constitutional Claim Rol No. 11.315-2021, p. 20.

33 *Id.*

34 *Id.*

35 *Id.* At 21.

36 Constitución Política de la República de Chile, art. 19 (emphasis added).

37 *Id.*, art. 5.

child's best interests, that is, everyone under eighteen years of age.<sup>38</sup> Indeed, that is why the Chilean Constitution recognizes the *preferential right* and the *preferential duty* of parents to educate their children.<sup>39</sup> The first is to ensure that the parents have direction and guidance over their children, and the second emphasizes that the preferred guardians are the parents themselves.<sup>40</sup>

In this sense, the Chilean Constitution has empowered Congress to make distinctions that may limit or rightly deny not only the capacity to enjoy or acquire certain rights for children and but also the capacity to exercise them. For example, it occurs in civil or patrimonial aspects (infants as absolutely incapacitated, adult minors as relatively incapacitated, prohibition of the acquisition of specific products such as tobacco and alcohol), concerning either civil and political rights (impossibility of marrying minors under 18 years of age,<sup>41</sup> denial of the right to vote to minors under 18,<sup>42</sup> and access to public offices where 18 years old is required as a general rule) or economic, social and cultural rights (minimum age of 15 to work where under 18 must have parental authorization,<sup>43</sup> limiting, in turn, the right to work and certainly to unionization). All the above examples show how the holding and exercise of rights are limited by the lack of maturity and inexperience, as established by Congress itself at the statutory level.

Now, it should be noted that in all the examples given above, there are some instances in which children may act personally, previously meeting two requirements of normative density that allow these provisions to be harmonized with parental rights. Indeed, whenever the law has established that a child has the maturity necessary for the acquisition or exercise of a right, it has done so by: (i) setting a certain and determined age for the acquisition or exercise and/or (ii) expressly requiring parental authorization for the exercise of those rights as the child approaches 18 years.

The claim argued that none of those criteria was included in the contested provisions of Article 31, it being precisely the lack of those elements of

38 Constitutional Claim Rol No. 11.315-2021, p. 21. Moreover, it was expressly recognized by the Chilean Constitutional Tribunal, which stated in paragraph 28 of its CCTDC 1682-10-INA ruling: "It also complies with the provisions of the Convention on the Rights of the Child, especially with regard to the prevalence of the 'best interests of the child', meaning '*every human being under eighteen years of age*', unless, under the law applicable to him, he or she has attained the age of majority earlier." Article 1 of the Convention on the Rights of the Child, promulgated by Supreme Decree No. 380 of the Ministry of Foreign Affairs of 14 August 1990 and published in the Official Gazette of 27 September 1990 (emphasis added).

39 Constitución Política de la República de Chile, art. 19 No 10.

40 Constitutional Claim Rol No. 11.315-2021, p. 21.

41 Código Civil [Cód. Civ.] [Civil Code], Law No. 19.947 art. 5, Establece Nueva Ley De Matrimonio Civil, May 7, 2004. Article 2 of the Act also states that "Article 2: The power to marry is an essential right inherent in the human person, if you are old enough to do so. The provisions of this law establish the requirements to ensure the free and full consent of the contracting parties." Id. at art. 2 (emphasis added).

42 Constitución Política de la República de Chile, art. 13 (emphasis added).

43 Law No. 21.271, Octubre 6, 2020, DIARIO OFICIAL [D.O.] (Chile), expressly prohibits people under 15 from working.

harmonization between the statutory and constitutional provisions which renders those articles contrary to the Constitution.<sup>44</sup> Thus, in the first place, the contested provision granted that children may themselves exercise the rights to participate in public demonstrations as well as to convene them, denying any space to parental rights and even giving their character as a “right.” This makes the autonomy of the child opposable over the preferential right of their parents since it does not require any parental authorization.<sup>45</sup> And secondly, the content of both paragraphs is highly vague, which lends itself to arbitrary application, since it is determined that children may exercise the rights enshrined therein if their age, maturity, and degree of autonomy with which they operate so permit.

At this point, the real question is who, other than parents that enjoy a constitutionally guaranteed preferential right, are called upon to determine when the age or degree of autonomy allows a child to exercise certain rights? There are only two options: either the child decides, or in case of conflict between parents and children, some government agency, whether jurisdictional or part of the Administration. As can be seen, both cases face a curtailment of constitutionally guaranteed preference, which is an essential or core element of the right of parents to educate their children.

VI. THE CHILEAN CONSTITUTION DOES NOT RECOGNIZE PROGRESSIVE AUTONOMY AS A RIGHT THAT CAN BE OPPOSED TO THE PREFERENTIAL RIGHT OF PARENTS TO EDUCATE THEIR CHILDREN, AND CONGRESS RECENTLY REJECTED A CONSTITUTIONAL AMENDMENT IN THIS WAY.

Based on the Chilean constitutional provisions in force, it is impossible to restrict or limit the essential core of parental rights—including preference—by recognizing a principle with simply statutory normative hierarchy.

Still in Chile, it was a fact known to the derivative constituent himself, who had already tried unsuccessfully to incorporate progressive autonomy as a right of children in the Chilean Constitution through a constitutional amendment initiated in motion in matters of guarantees and rights of the child.<sup>46</sup>

That proposal was rejected in October 2019, obtaining only 65 votes out of the more than 103 votes constitutionally required for its approval in the Chamber of Deputies. The draft reform incorporated a final paragraph to article 1 of the Chilean Constitution as follows: “It is also the duty of the State to ensure especially the protection of children and adolescents, recognizing them as subjects of law, safeguarding their best interests and progressive autonomy.”<sup>47</sup>

In the absence of any constitutional provision allowing the Congress to restrict or limit the essential core of parents' right to bring up their children, within which we find the guarantee of preference itself, it must be held that the

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44 Constitutional Claim Rol No. 11.315-2021, p. 22.

45 *Id.* At 23.

46 See Congreso Nacional (Congress), Reforma Constitucional, en materia de garantías y derechos de los niños, Marzo 5, 2012, Boletín No. 8167-07. (Chile)

47 *Id.*

contested provisions of articles 11 and 31 of the Bill are contrary to the Chilean Constitution.

VII. THE BILL VIOLATED THE PURPOSE OF THE STATE TO PROMOTE THE COMMON GOOD CONTAINED IN ARTICLE 1, PARAGRAPH FOUR OF THE CONSTITUTION, AND THE FUNDAMENTAL RIGHT TO MANIFEST ALL BELIEFS BY EXCLUDING THE RELIGIOUS DIMENSION OF COMPREHENSIVE SEXUAL AND AFFECTIVE EDUCATION.

Article 41 of the challenged Bill stated that:

The State shall guarantee, within the scope of its competences and in accordance with its powers and means, comprehensive sexual and affective education, **of a secular and non-sexist nature**, and shall ensure that schools give due respect to the ethnic, cultural, and religious diversity of children and adolescents, as well as to promote educational environments free of violence, abuse, and bullying.<sup>48</sup>

The expression “secular and non-sexist” comes to specify and qualify the type of comprehensive sexual and affective education that the State must guarantee, rightly limiting said integrality and excluding those non-secular expressions, that is, moral or religious.

The expression “secular and non-sexist” comprises two notions that must be understood together as a single concept. Thus, the fact that sex education must be “secular and non-sexist,” as a whole, constitutes an exclusion from the religious dimension, also prohibiting any difference based on sex, even if it is not arbitrary and is legitimately based on convictions or beliefs.

The Constitution of 1925 separated the State from the Catholic Church, and from that moment, Chile ceased to be a confessional State since it no longer had an official religion. However, it does not necessarily follow from the preceding that the State must adopt (or has adopted) an attitude of contempt, neutrality, exclusion, or indifference to religion. On the contrary, the Chilean Constitution considers, on several provisions, the religious dimension as a constitutive and fundamental element in the development and fulfillment of the person, duly recognized and guaranteed.

There are two normative manifestations concerning religion that the Constitution contemplates and that we are interested in considering to argue the unconstitutionality of the challenged articles: (i) the spiritual realization of the person as an essential element of the common good, and (ii) the freedom to manifest all religious beliefs as a fundamental right.

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48 Congreso Nacional (Congress), *Sobre Garantías y Protección Integral De Los Derechos De La Niñez y Adolescencia*, art. 41, Bill that “Establishes a System of Guarantees of the Rights of the Child,” Boletín No. 10,315-18. (Chile) (emphasis added).

A. *The spiritual realization of the person as an essential element of the common good*

Under the fourth paragraph of article 1 of the Chilean Constitution, the common good, whose promotion is one of the purposes of the Government, is aimed at enabling the members of the national community “to achieve the greatest possible spiritual and material fulfillment.”<sup>49</sup> Therefore, both human dimensions—spiritual and material—are considered nuclear elements of the Government's constitutional purpose and must be equally considered.

It follows that excluding one of these dimensions is not constitutionally permissible. Even more so when this exclusion or indifference is made in an area particularly sensitive to the spiritual and religious dimension, such as the education of children, whose preferential right and duty, as we have already seen, corresponds to parents.

However, the Bill intended that the comprehensive sexual and affective education that the Government undertakes to guarantee must be exclusively of a “secular and non-sexist nature.”

The truth is that with the expression “secular and not-sexist,” Congress tried to impose a duty of omission, exclusion, or indifference concerning the spiritual and, fundamentally, the religious or confessional intents. In other words, the sex education that the Government must guarantee, including that provided in all schools, public or private, whether or not they have official recognition,<sup>50</sup> and whether or not they receive public funds, under the provision the Senators constitutionality challenged, leaves out any possibility of sexual and affective education that includes the religious and spiritual vision. Indeed, religious expression in matters of sexual and affective education was rightly denied by Congress, imposing a neutral-secular vision without nuances. Of course, in this scenario, it is logical that not all sex education should necessarily be religious; otherwise, it would violate other constitutional rights and guarantees. Still, the Government cannot deliberately exclude religious sexual education. On the contrary, the Government must consider the spiritual vision—which includes the religious one—following the obligation concerning the common good contained in Article 1, fourth paragraph of the Chilean Constitution, which consists of a clear and direct mandate: to ensure the greatest possible spiritual fulfillment.<sup>51</sup>

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49 Constitución Política de la República de Chile, art. 1, para. 4 (“The State is at the service of the human person and its goal is to promote the common good, for which it must contribute to create the social conditions which may allow each and every one of the members of the national community to achieve their greatest possible spiritual and material fulfillment, with full respect for the rights and guaranties established by this Constitutions.”).

50 Official recognition is an Administrative Permit to open a recognized school, which is entitled to grade students and give them a diploma autonomously. Other schools can operate without official recognition, but they cannot grade students nor grant them a diploma.

51 Article 1, paragraph 4 of the Chilean Constitution states “The State is at the service of the human person and its goal is to promote the common good, for which it must contribute to create the social conditions which may allow each and every one of the members of the national community to achieve their greatest possible spiritual and material fulfillment, with full respect for

Moreover, it is paradoxical that the contested provision, while contemplating the adjective “integral” or “comprehensive” to mean the sexual and affective education that the Government must guarantee, expressly limits its scope with the expression “secular and sexist.” The preceding excludes the possibility of legitimately giving children an integral education, in accordance with their religious or moral convictions and those of their parents, by neglecting, *inter alia*, the religious dimension of education.

Thus, it is clear that Congress must discipline its own decisions within the framework of the mandate contemplated in the fourth paragraph of article 1 of the Constitution, not being constitutionally permissible to reduce the scope of the Government’s obligation.

*B. Freedom to manifest all religious beliefs is a fundamental right under the Chilean Constitution*

Article 19, No. 6 of the Constitution ensures “freedom of conscience, the manifestation of all beliefs and the free exercise of all cults.”<sup>52</sup>

In this sense, the Constitution is not neutral or indifferent to the religious or confessional dimension but also recognizes and guarantees that dimension as a fundamental right. This recognition and protection are not trivial: because it is precisely this freedom that is significantly violated by the Government’s duty to guarantee a comprehensive sexual and affective education of a “secular and non-sexist” character.

It is impossible to reconcile this religious freedom that the Constitution “ensures” with a simple statutory mandate that rightly excludes it, especially in a particularly sensitive area (and protected as a fundamental right) like education.

Indeed, every time the Congress has incorporated the expression “secular” in educational matters, it has immediately had to specify that it is understood in the sense that it must be “respectful of all religious expression.” For example, Article 1 of Law No. 20,845 on school inclusion modified Article 3 (f) of the General Education Law,<sup>53</sup> Article 3 of Law No. 21,040 creates the public education system,<sup>54</sup> and Article 5 of Law No. 21,094 creates state universities, among many others.<sup>55</sup>

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the rights and guaranties established by this Constitutions.” Constitución Política de la República de Chile, art. 1, para. 4.

52 Constitución Política de la República de Chile, art. 19.

53 “In educational establishments owned or administered by the State Secular formation will be promoted, that is, respectful of all religious expression, and the citizenship training of students, in order to encourage their participation in society.”

54 “Article 3.- Purpose of the Public Education System. The purpose of the System is for the State to provide, through the educational establishments owned and administered by it, which are part of the Local Public Education Services that are created in this law, a public, free and quality education, secular, that is, respectful of all religious expression, and pluralistic (...)”

55 Article 5.- Principles. The principles that guide the work of the State universities and that underpin the fulfillment of their mission and their functions are pluralism, secularism, that is, respect for all religious expression, (...)”



Thus, Congress has been clear that even public education, both K-12 and Higher Education institutions, must promote respect for all religious expressions in the educational context, and the imposition by the Government of purely secular instruction has been inadmissible.

In this sense, Congress has used the term *secular* with the due normative density that guarantees respect for religious expressions, and on all occasions in the past. However, in the case of the challenged article, Congress has imposed the word *secular* without that specificity and scope that in the past made it compatible and harmonizable with the constitutional text, mandating that all comprehensive sexual and affective education must be secular and not sexist without more, that is, absent from all religious expressions.

*1. Finally, the Bill violated the preferential right of parents to educate their children in accordance with their religious and moral convictions by imposing on the Government the duty to guarantee the child comprehensive sexual and affective education of a secular and non-sexist nature.*

The Constitution states that education is aimed at “the full development of the individual at the various stages of his life.”<sup>56</sup> This provision must be read harmoniously with the integral notion of the common good and freedom of conscience as a fundamental right. In other words, the development of every person who did not consider their spiritual and proper religious dimension recognized in article 19 No. 6 of the Chilean Constitution would not be full.

In addition, as this article pointed out in the previous paragraphs, parents have the preferential right to educate their children. This preferential right, whose relevance is such that the Government must protect it in a “special” way, certainly involves spiritual and religious dimensions.

Indeed, there is no doubt that parents educate in this area from various beliefs and spiritualities (including religious neutrality or non-religious as options). Hence, as anticipated, it is necessary to appreciate the close link between this preferential right of parents and religious freedom.

This close link is what inspires international human rights standards in education, which have been recognized as *essential rights* under article 5, second paragraph of the Chilean Constitution, which states:

The exercise of sovereignty recognized the respect towards the **essential rights** that emanate from human nature as a limit. It is the duty of the State's bodies to respect and promote those rights, guaranteed by this Constitution, as well as by international treaties which have been ratified by Chile and that are in force.<sup>57</sup>

Thus, for example, the Convention on the Rights of the Child, ratified and in force in Chile, provides that “States parties shall respect the right of the child

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56 Constitución Política de la República de Chile, art.19 No. 10, para. 2.

57 Constitución Política de la República de Chile, art. 5, para. 2. (emphasis added).

to freedom of thought, conscience and choice.”<sup>58</sup> Later, the Convention adds that “States Parties shall respect the rights and duties of parents and, where appropriate, legal representatives, to guide the child in the exercise of his or her right in a manner consistent with the evolving capacities of his or her rights.”<sup>59</sup>

Something similar occurs with the American Convention on Human Rights, considering that Article 12, which deals with the fundamental right to “freedom of conscience and religion,” provides in paragraph 4 that “parents and guardians where appropriate, have the right to have their children or wards receive religious and moral education in accordance with their own convictions.”<sup>60</sup>

These cited International Human Rights rules are sufficiently explicit concerning the link between the right to education and religious freedom that there is no hint of doubt. It can be argued that the preferential right of parents to educate their children is intimately linked to freedom of religion, conscience, and the manifestation of all beliefs, because the only way to deal harmoniously with the provisions of Article 19 No. 10 of the Chilean Constitution, with the provisions of Article 14.1 and 14.2 of the Convention on the Rights of the Child, as well as Article 12.4 of the American Convention on Human Rights, is to understand that parents have a preferential right that allows them to educate their children according to their own convictions, moral and/or religious.

In this way, the Government is forbidden to impose compulsory religious education and provide that education from a single confession or religion—and it does not do so in this respect—for the same reason it is forbidden to impose a conception of human sexuality excluding the religious dimension. Moreover, the imposition of “secular and non-sexist” sex education is entirely illegitimate since it is the right of people to live under their faith, religion, and moral convictions, as well as to transmit them in the context of education and that their children receive it, including, of course, sex education. Therefore, in the same way that the State or Government does not impose compulsory religious education and also seeks to promote alternatives in accordance with parents’ religious convictions, the State cannot impose a secular and mandatory non-sexist education.

Thus, education according to a “secular and non-sexist” conception can undoubtedly be an alternative for parents and students, but in no case can it be the only one as the Bill aims, under penalty of infringement of the right of parents to educate their children, which enjoys a preference as an essential element of the right, in addition to special protection according to the Constitution itself.

From all of the above, it necessarily follows that the legal consecration of duty to the State to guarantee that sex education is necessarily “secular and non-sexist” violates the right to education and, precisely, the preferential right of parents to educate their children in accordance with their own religious and

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58 U.N. Convention on the Rights of the Child, art. 14.1.

59 *Id.* at art. 14.2

60 Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

moral convictions, and at the same time, as a consequence of the preceding, this precept also violates the constitutional mandate that imposes on the State the duty to protect “especially” the exercise of that preferential right. That happened because the contested provision set a mandate that necessarily ends up annulling the practice of the preferential right of parents to educate their children in the field of sexual and affective education under their own moral and religious convictions, which is logically incompatible with the Chilean constitutional text.

### VIII. THE CHILEAN CONSTITUTIONAL TRIBUNAL DECISION

#### *A. The Bill created a conflict between Parents v. Government, not between Parents v. Children.*

The Constitutional Tribunal ruled in favor of the claims due to the excessive regulatory interference of the State in the space of freedom and autonomy of intermediate bodies, particularly the family—the fundamental nucleus of society—and, to a lesser extent, of educational institutions. In substance, the Constitutional Tribunal declared that the contested provisions violate “the preferential right and duty of parents to educate their children” (article 19, paragraph 10, third paragraph of the Constitution) and, in the last of the contested provisions, also the right of parents “to choose the educational institutions for their children” (article 19, paragraph 11, fourth paragraph of the Constitution).

The Tribunal started declaring that the dilemma is not more or less protection for children and adolescents. Nor is the principle—natural, by the way—of progressive autonomy. But, likewise, the heart of the discussion does not relate to the holding or not of fundamental rights of children.<sup>61</sup>

In this sense, and from a global perspective, the Court established that what is really behind the discussion raised is a different vision of the value that the Chilean Constitution assigns to that intimate community space of parents and children, such as the family, in its relationship with the State and Government, and the possibilities of the latter to constrain its spaces of freedom and autonomy in the educational field.<sup>62</sup>

The Tribunal continues declaring that the system of rules within a family differs from that dictated by the State. The design of permits, freedoms, and restrictions present in the relationship of a mother and/or father with their children is built at the domestic level and in an informal way. In a family, domestic social regulation predominates. It is an essentially deregulated area from the legal point of view. Parents must concern themselves for the best interests of their children by seeking their greatest possible spiritual and material fulfillment. Children have the duty to respect and obey their parents

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61 *Id.*, para. 2.

62 *Id.*

not because the law stipulates it but because of the moral obligation proper to the paternal and maternal filial relationship.<sup>63</sup>

Moreover, the Constitutional Tribunal said the challenged provisions reflected a paradigm shift. Indeed, the State legal regulation is enshrined by virtue of which the intervention of the State is favored in the event of discrepancies between parents and children regarding the limitations on the part of the parents to the requirements of a minor child for less direction and guidance or, rightly, to act alone to certain situations.<sup>64</sup> However, the Court is concerned that these conflicts, under the Bill, needed to be settled by applying legal rules in which limitations on exercising the rights attributed to children based on the principle of progressive autonomy must always be interpreted in a restrictive manner, which is rightly unconstitutional.<sup>65</sup>

The Court said that the Bill tried to legalize the relationship of direction and guidance of parents concerning their minor children. In this sense, the Tribunal declared that “A legally enforceable legal right is granted to a child or adolescent to act, in certain situations, without the need for authorization from his or her parents.”<sup>66</sup>

In this sense, paternal or maternal leave and compliance with the rules by children and adolescents are not matters that are legally regulated. However, that is part of domestic social regulation.<sup>67</sup>

In addition, and regarding the secular and non-sexist sexual education rule, the Court says that this educational process carried out within a family, which is complemented by the work of the educational institutions chosen by the parents, is once again interfered with by the State through the consecration of the obligation imposed on these schools to implement *a certain (non-neutral) type of comprehensive sexual and affective education*.<sup>68</sup> And indeed, the State imposes on itself the duty to guarantee that it has a secular and non-sexist character, rules that are contrary to the Chilean Constitution.

Later, the Court stated, “[t]his preferential right of parents to educate their children and lead them progressively on their way to adulthood is seen to be relativized to the point of affecting its essence.”<sup>69</sup> In this sense, the Constitutional Tribunal clearly says that the Bill established the legalization of mother and/or father relations with their children, which was a wrong change of orientation. Indeed, under the Bill, education seems mistakenly conceived from the perspective of legally enforceable rights and benefits. The Court expressly states:

No one disputes that, sometimes, unfortunately, justice must be used to ensure the protection of children. However, under the justification of looking after the best interests of the child, progress is being made

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63 *Id.*, para. 4°.

64 *Id.*, para. 5°.

65 *Id.*

66 *Id.*, para. 21.

67 *Id.*, par. 22.

68 *Id.*, para.5.

69 *Id.*, para.11.

(with subtlety only in appearance) towards the replacement of the guardianship role of parents by that of the State through the granting of rights to minor children susceptible to be invoked as limits to the authority of their mother or father. The beautiful duty of parents to educate their children is being reduced, through the State's judicialization of filial bonding, to a lower duty of respect for a certain interpretation of progressive autonomy dictated by third parties (the State in its different facets). In this way, not only the power of the courts of justice (the State in its judicial face) is increased, but also the increasingly visible hand of the administrative apparatus of the State.<sup>70</sup>

Here the Court is clear that conflicts between progressive autonomy and parental rights are a shadowing conflict between the State and parents, not between parents and their children.

Finally, the Chilean Constitutional Tribunal expressly agreed with the claimant Senators that:

What the challenged rule achieves is to reverse the constitutionally guaranteed preference to parents. Thus, by simply statutory means, what ends up being restricted interpretatively is the preferential right of parents to educate their children, which must yield in favor of the progressive autonomy of the child. The way in which the Congress modulates this last principle distorts article 19 No. 10, third paragraph of the Chilean Constitution.<sup>71</sup>

The exclusion of religious views in the concept of comprehensive sexual and affective education of children is unconstitutional.

Regarding the secular and non-sexist sexual education rule, the Court said that this educational process carried out within a family, which is complemented by the work of the educational institutions chosen by the parents, is once again interfered with by the State through the consecration of the obligation imposed on these schools to implement *a certain (non-neutral) type of comprehensive sexual and affective education*.<sup>72</sup> And indeed, the State imposes on itself the duty to guarantee that it has a secular and non-sexist character, rules that are contrary to the Chilean Constitution.

The Court also agreed that this is another area in which an unconstitutional interference in the field of family and school freedom and autonomy is evident is that referring to value preferences, including religious, in the comprehensive sexual and affective education of children. The Court said that the provision challenged enshrines positive action by the State in favor of providing for a particular type of education. In this sense, the Court states:

That comprehensive sexual and affective education should be -as a whole- 'secular and non-sexist,' means excluding other value dimensions, prohibiting, even, differences based on sex that are not arbitrary. Contrary to what one might think, the contested rule does

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70 *Id.*

71 *Id.*, para.14.

72 *Id.*, para10–11.

not seek the delivery of a plural education, with greater content or diversity on the part of educational institutions.<sup>73</sup>

As the claimants required, the Constitutional Tribunal declared,

"This has an impact, as stated, not only on the preferential right of parents to educate their children and choose the educational institutions for them. Rather, it is also intimately linked to freedom of religion, conscience, and the manifestation of all beliefs guaranteed by Article 19, No. 6, of the Constitution. The right of parents only makes sense to the extent that they can do so according to their own moral and/or religious convictions."<sup>74</sup>

In this sense, the Constitutional Tribunal declared that the term "secular" is incorporated into our legislation. However, its lack of precision has made it explicit that an education of this characteristic should always be understood as *respectful of all religious expression and pluralistic*.<sup>75</sup> Nevertheless, Congress decided to innovate by coining a new concept or characterization as "secular and non-sexist."<sup>76</sup>

For the Court, the plurality and respect of all religious and, in general, value expression was not guaranteed by the Bill. "Non-sexist" is not a neutral content rating, the Tribunal said. Indeed, this concept adds something that was not satisfied with the mere use of the term "secular" or with constitutional and legal principles that guarantee the equality of men and women, as well as the prohibition of arbitrary discrimination.<sup>77</sup> The contested provision mandates the State to ensure a specific form of providing comprehensive sexual and affective education. Not just anyone. It limits or constricts what was previously possible. The educational institutions parents choose for their children according to their

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<sup>73</sup> *Id.*, para12.

<sup>74</sup> *Id.*

<sup>75</sup> For example, Law No. 18.956, which restructures the Ministry of Public Education, states in article 1, paragraph 2, that: "It is the duty of the State that the system composed of the educational establishments of its property provides a free and quality education, based on a secular public educational project, that is, respectful of all religious expression, and pluralistic, that allows access to the entire population and that promotes social inclusion and equity." Law No. 18.956, Reestructura el Ministerio de Educacion Publica, art. 1, Marzo 3, 1990, (Chile). The same is stated in Article 3, letter f), para. 2 of the DFL Number 2, of 2009, which establishes the consolidated, coordinated and systematized text of the Law Number 20.370 with the non-repealed rules of the Decree with Force of Law Number 1, of 2005: In educational establishments owned or administered by the State, secular formation, i.e. respectful of all religious expression, and citizenship of students shall be promoted, in order to encourage their participation in the society. Similarly, article 4, sixth paragraph, of the same law indicates that: Without prejudice to its other duties, it is the duty of the State that the system composed of the educational establishments of its property provides free and quality education, based on a public educational project, secular, that is, respectful of all religious expression, and pluralistic, which allows access to it for the entire population and promotes social inclusion, equity, freedom and tolerance. Law No. 20.370, art. 3, Julio 2, 2010, (Chile).

<sup>76</sup> Constitutional Claim Rol No. 11.315-2021, p. 14, para. 25.

<sup>77</sup> Constitución Política de la República de Chile art. 19, No. 2.

values, and religious worldview must now be shaped towards a less diverse type of education.<sup>78</sup>

Finally, the Chilean Constitutional agreed with the claimants declaring that,

It is not in dispute that the sexual and affective education that is imparted can have this type of orientation ('non-sexist secular'). What is constitutionally reprehensible is the exclusion of other value dimensions on the subject. This affects freedom of education (in particular, article 19, paragraph 11, fourth paragraph) and religious freedom (expressed in article 19, paragraph 6, of the Constitution as 'freedom of conscience,' 'manifestation of all beliefs,' and 'free exercise of all religions').<sup>79</sup>

### CONCLUSION

The United States does not have a Right to Education at the Federal Level. Since *San Antonio Independent School District vs. Rodriguez* in 1973.<sup>80</sup> The binding precedent for the U.S. Supreme Court is that education is not a fundamental interest. At the same time, since 1973, the International Covenant of Economic, Social, and Cultural Rights has been sleeping at Congress and has not been ratified yet.

On the contrary, the vast majority of countries, such as Chile, recognize an enforceable and justiciable right to education in their domestic constitutions and, at the same time, have signed and ratified the International Covenant of Economic, Social, and Cultural Rights, the Covenant on the Rights of the Child, etc. In this sense, Chile needs to balance an enforceable and justiciable right to education with religious freedom provisions. Furthermore, as the article has shown, in the case of parents' rights, the Chilean Constitution recognized parents' priority right and obligation to educate their children in the same provision that recognizes the right to education. Therefore, balancing the provision of the right to education for the primary holder, the children, and the parent's rights is necessary.

The article intended to describe how important it is to recognize not only parental rights but also their preference under any domestic legislation. Indeed, as the piece has shown, preference is a key aspect that exists precisely to prevent the Government can interfere in the family setting, leaving the most crucial decisions to parents or guardians.

In this sense, if the United States is looking for a parental rights provision at the federal level, the Chilean Comparative Law example demonstrates that parental rights won't prevail if the preference over the Government is not guaranteed.

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78 Constitutional Claim Rol No. 11.315-2021, p. 214, para. 27.

79 *Id.*

80 411 U.S. 1 (1973).

