

Comment

Chilean Insights for Progressive Constitutionalism

Abstract

This article outlines the global importance of the failed proposal for a new Chilean constitution. It shows the potential of constitutional processes to deescalate heightened social confrontation as well as the need of consensus building. In particular, this article focuses on how the Chilean proposal deals with rights. Its mainstreaming of progressive demands is as important as its implicit rejection of the critique of rights voiced in the Global North. The article concludes with a note on substantive equality in a capitalist world economy.

Chile has embarked on a project of constitutional transformation. The referendum to create a constitutional convention to draft a new, and indeed a transformative, constitution gathered almost 80 % approval. However, 62 % then rejected the proposal of 4 July 2022 (Proposal). While this rejection has created much uncertainty, this editorial argues that, even at this stage, Chile has certainly contributed to global constitutionalism. This conclusion holds for what a constitutional process should avoid, but also for what it might achieve.

Though global media have intensely reported on the process, some events and decisions struck me as particularly relevant. On 1 October 2019, the body responsible for the pricing of public transport decided to raise the cost of transit fares.¹ That decision triggered mass demonstrations. Traffic in the capital city collapsed, several subway stations were vandalised, and many demanded president Piñera to resign. During these days of demonstration, 18 October 2019 became the day of the ‘estallido social’ (social outcry) and ‘despertar social’ (social awakening), now remembered as the day the constitutional process started. Indeed, on 19 October 2019, president Piñera declared a state of emergency.² For the first time since Chile returned to democracy, the military could control the population. That led to the biggest

¹ See <<http://www.paneldeexpertostarifas.cl/documentos/ResN22019.pdf>>.

² See <<https://prensa.presidencia.cl/comunicado.aspx?id=103631>>.

demonstrations yet, with more than one million people taking over the streets in Santiago de Chile. More than a raise of transit fares was at stake.

At that point of escalation, the Chilean political system reacted with a constructive and innovative strategy: on 12 November 2019, it proposed to create a new constitution.³ I vaguely speak of ‘the Chilean political system’ as it is controversial who deserves credit for this strategy and who does not. In any event, only three days later, already on 15 November 2019, the government and most parties represented in Congress concluded the *Acuerdo por la Paz Social y la Nueva Constitución* (Agreement for Social Peace and the New Constitution).⁴ On 23 December 2019, Congress enacted a constitutional amendment that paved the following path: a plebiscite would first be held to mandate a constitutional convention, which would have the task of elaborating a proposal, and then a referendum on that proposal would be called. It reaffirmed Chile’s rule of law tradition that the new constitution should come without a constitutional rupture, which was a point that some leftist forces criticised.

Congress also laid down key rules on the plebiscite and how the Convention should operate. Importantly, while participation in the first referendum was voluntary, it was obligatory in the one on the outcome. Moreover, some topics were off limits: the status of a republic, democracy, international treaties valid and ratified, and the finality of judgments. Importantly, for any norm to be included in the proposal for a new constitution, a two-thirds majority of the Convention members needed to approve it. The law creating the Convention also required parity between men and women among its members, which is a global first, and reserved 11 percent of the seats to representatives of indigenous peoples. Moreover, it gave candidates not affiliated with a political party a true opportunity, with unforeseen results.

Due to COVID 19, the plebiscite only took place on 25 October 2020. As mentioned, it approved the project to enact a new constitution by a margin of 78 %. The election of the Convention members followed on 15 and 16 May 2021. Of the 155 Convention members, only 85 belonged to political parties. 17 came from the *pueblos originarios* and all other members were independents, reflecting a serious legitimacy gap in Chilean organised politics. More than a third of all members had a law degree. The Convention then began work on 4 July 2021. It presented its Proposal one year later, on 4 July 2022,⁵ only to see it rejected on 4 September 2022.

³ See <<https://prensa.presidencia.cl/comunicado.aspx?id=134377>>.

⁴ See <https://obtienearchivo.bcn.cl/obtienearchivo?id=documentos/10221.1/76280/1/Acu_erdo_por_la_Paz.pdf>.

⁵ See <<https://www.chileconvencion.cl/wp-content/uploads/2022/07/Texto-Definitivo-CPR-2022-Tapas.pdf>>.

One contribution of this process to constitutionalism is that it confirms the potency of an inclusive constitutional process to deescalate an explosive situation. In October 2019, an intervention by the military seemed possible, recalling dark memories of 1973. The initiation of an inclusive constitutional process overcame that danger and channelled the contestation's thrust into 'an institutional exit that aims at peace and social justice', as the November Agreement says.⁶ Another contribution is that Chile now provides a rare example of the kind of popular energy on which many constitutional theorists base their thought. While most constitutional processes are more or less politics as usual, in Chile, this time, true popular energy was harnessed and channelled into the new constitutional proposal.

It seems almost ironic that the illegitimacy of the current constitution helped a democratic constitutional process to successfully address this dangerous situation. Chile's current constitution originated in 1980 under Pinochet's dictatorship, entrenching his neoliberal remodelling of the Chilean society. Here is an important point: Pinochet's regime was the only Latin American dictatorship post World War Two to constitutionally enshrine its vision of the country. The regime knew that the country would eventually return to democracy and to prepare for that it sought to constitutionally entrench its politics, veto power, and privileges. Notwithstanding the many changes brought by democratic majorities after the return to democracy in 1989/1990, some core points could not be changed for this reason. Thus, that constitution continues to symbolise an unjust society to an extent that (fortunately) few democratic constitutions do.⁷

The constitutional process foreseen in the November Agreement did not usher in a new constitution because the Convention's Proposal failed. The reasons are the subject of much political and academic debate, as I was able to observe at the 51st *Jornadas Chilenas de Derecho Público*, the annual gathering of Chilean public law scholars.⁸ Over the course of three days and more than 85 presentations, scholars affiliated with different political forces debated what went wrong and why. Given the deep divisions in the country, I found the discussions surprisingly friendly and constructive.

⁶ See <https://obtienearchivo.bcn.cl/obtienearchivo?id=documentos/10221.1/76280/1/Acuerdo_por_la_Paz.pdf> (own translation).

⁷ Javier Couso, 'Constructing "privatopia". The Role of Constitutional Law in Chile's Radical Neoliberal Experiment' in: Ben Golder and Daniel McLoughlin (eds), *The Politics of Legality in a Neoliberal Age* (London: Routledge 2017), 85.

⁸ LI Jornadas Chilenas de Derecho Público, La Cuestión Constitucional. Hacia un Nuevo Ordenamiento, 9 to 11 November 2022, organised by the Department of Public Law of the University of Chile, for the program see <https://derecho.uchile.cl/dam/jcr:577dc446-b6c0-4625-87df-d8d7b165daa9/programa_jcdp_2022.pdf>.

How should the project's failure be interpreted? Here, I do not report on public surveys, but present what I learned at the *Jornadas* for the purpose of legal analysis. In doing so, I rely on the first pertinent book steeped in constitutional theory: *El Vuelco Constitucional*.⁹ Its author, Mario Fernández Baeza, is a Heidelberg doctoral student of Dieter Nohlen as well as professor of public law at the University of Chile. Moreover, he has been a judge at the constitutional court, minister of defence under president Lagos, and minister of the interior as well as vice-president under president Bachelet whose project for a new constitution was thwarted by conservative forces. He had deliberately not participated (in a formal way) in the current process of constitutional reform. The book provides a fine framework for what I witnessed.

Fernández explains and justifies the Proposal's failure on the grounds that it falls short of the requirements of a good constitution. He conceptualises a constitution as a political agreement as well as juridical norm. A good constitution needs to respond to both dimensions. As a political agreement, a constitution should enjoy support from as many political forces as possible, so it takes an inclusive and skilful operation of the drafting process. As a body of juridical norms, it must respond to the requirements of precision, consistency and legal operability. I focus on the first dimension because the second would require too much detail.

Most participants at the *Jornadas* identified that the main problem of the Convention was that its progressive majority mishandled the process, in particular by not sufficiently reaching out to its conservative members. This is understandable since the progressives were a heterogeneous group, busy with finding compromise among themselves. They could neglect the conservative members because they held a 2/3 majority in the Convention. This was, however, conceptually as well as politically flawed, because all subsequent elections showed that the Convention's progressive majority did not reflect the mood of the country. Nevertheless, the Convention's progressives went ahead and put forward a thoroughly progressive reform proposal. Politically, this may have seemed feasible since the Proposal only needed a simple majority in the referendum to become the new Chilean constitution. Apparently, the temptation to cement a progressive vision of Chilean society was all too strong as to heed the constitutional insight articulated by Fernández.

Throughout the *Jornadas*, most academics identified four issues as the main reasons for failing to achieve sufficiently broad political acceptance.

⁹ Mario Fernández Baeza, *El Vuelco Constitucional* (Santiago de Chile: Thomson Reuters 2022).

The first was the Proposal to enshrine a constitutional right to abortion without any qualifying conditions (Article 61). When this provision became part of the project, many felt that support steeply declined.¹⁰ The second was the planned abolition of the private pension system in favour of a public pension system (Article 45 and Transitional Disposition 27). This would have dismantled a pillar of Pinochet's neoliberal remodelling of Chilean society (in principle a goal with broad public support), but it also raised the fear that the established private pension rights of many citizens could be adversely affected. The third main reason was that the Proposal would have ended the over-representation of conservative forces in the 'engine room of power':¹¹ The Chilean state was to be decentralised and Senate was to become a mere *Cámara de las Regiones* with far fewer powers (e.g. Article 268). Finally, the fourth key point was that the Proposal envisaged transforming Chile into a plurinational state with a wide range of rights for the *pueblos originarios* (e.g. Articles 1, 5, 11, 12, 34, 36, 44, 55, 58, 66, 119, 162, 234, 235, 309, 322, 329).

The rejection of the last issue requires further clarification. The recognition of the *pueblos originarios* enjoys broad support throughout Chilean society of today, as the approval of their special representation in the Constitutional Convention shows. However, many believed that the manner in which this was implemented in the draft constitution was flawed. Emblematic of this problematic implementation, though admittedly more technical, is its meandering between 'the people' of Chile and the 'peoples' of the Mapuche, Aymara, Rapanui, etc. Such terminology (as well as similar conceptual missteps) provided low-hanging fruit for critics. It did not help that, during the Convention's deliberations, some indigenous Chileans engaged in widespread terrorism. Indeed, the new president Gabriel Boric, a vocal supporter of the indigenous groups as well as the constitutional project, was forced to declare the state of emergency and even send the military to resolve the situation.

The controversial provisions mentioned above show a critical lack of consensus-building in the Convention. Many academics at the *Jornadas* also considered that the progressive forces lacked the political experience necessary to achieve common goals. As we know since Max Weber, politics is a

¹⁰ This, however, is disputed, see University Alberto Hurtado, "Chile dice – Una radiografía de la sociedad chilena de cara a un nuevo proceso constitucional" from October 2022, <https://www.uahurtado.cl/wp-images/uploads/2022/10/Informe_ejecutivo_Chile_Dice_2022.pdf>.

¹¹ On this key issue of Latin American constitutionalism see, seminally, Roberto Gargarella, *Latin American Constitutionalism, 1810-2010. The Engine Room of the Constitution* (Oxford: Oxford University Press 2013).

profession that must be learnt. Overall, the failure provides a cautionary tale for progressive constitutionalism trying to seize an opportunity.

However, the legacy of the Chilean Constitutional Convention is far from being entirely negative for projects of progressive constitutionalism. In fact, I believe it offers important insights into progressive constitutionalism and democratic constitutionalism more generally. In this editorial, I cannot report on or evaluate all the innovations of the Proposal, which consists of 388 Articles and 57 Transitional Dispositions spanning 178 pages. Yet, I would like to stress that I do not consider its length or detail to be a deficiency. Since a good constitution requires broad political agreement, then there should be no principled restriction regarding its design and length as long as it manages to unite the required political consensus. This, of course, does not diminish, but rather stresses Fernández' requirements of precision, consistency, and legal operability.

One intriguing takeaway of the Chilean project is that many demands of progressive constitutionalism seem to have become mainstream. I recall that the Convention had sterling democratic legitimacy and that all provisions were supported by a 2/3 majority of Convention members. I could also observe this mainstreaming in the discussions at the *Jornadas*. This seems all the more relevant as Chile has a long, consolidated, sober, and conservative constitutional culture.¹² Quite a few Chileans refer to themselves (proudly!) as the Prussians of Latin America. That adds to the global significance of these progressive developments in Chile.

The very first provision of the Proposal defines Chile as a social state. This reflects the broad rejection of Pinochet's (and US-American, more precisely Chicago) neoliberalism. But there is more: it is also built on the conviction that deep inequality is one, perhaps even the main, cause for many Latin American ills.¹³ This conviction is categorically manifest in the Proposal. It places great emphasis on substantive equality, in Article 1 and many other provisions. Moreover, it requires parity between men and women as a general principle as well as for the staffing of many institutions (e. g. Articles 6, 161, 163, 254, 297, 299, 312, 342, 344, 350), a gender focus for all public functions (e. g., Articles 296, 297, 299) including judicial interpretation (Article 312), and constitutionalises many social rights as well as Lesbian Gay Bisexual Transgender Queer+ (LGBTBQ+)-requests (see Articles 6, 21, 25, 27, 40, 61, 64, 89, 161, 312). I was surprised that, at least at the

¹² In detail, Pablo Ruiz-Tagle, *Five Republics and One Tradition. A History of Constitutionalism in Chile 1810-2020* (Cambridge: Cambridge University Press 2021).

¹³ For an elaborate argument, Juliano Zaiden Benvindo, *The Rule of Law in Brazil. The Legal Construction of Inequality* (Oxford: Hart 2022).

Jornadas, few considered all these progressive rights as pivotal to the Proposal's defeat.

The Proposal's strong emphasis on rights deserves much attention. Chapter II on fundamental rights comprises 114 Articles and 35 pages (the German Basic Law has 17 Articles and 7 pages on fundamental rights, the EU-Charter of Fundamental Rights 50 Articles over 8 pages). Moreover, this chapter is not exhaustive as other provisions also provide rights. In fact, the Convention uses rights to advance Chile's ecological transition. It grants rights to nature (Article 127) and declares animals to be legal subjects with a right to life without abuse (Article 131).

What can we take away from all this? One insight is that the Proposal's focus on rights signals that the Rights Revolution is alive and kicking.¹⁴ The Chilean progressive forces' reliance on rights seems all the more relevant given that a prominent legal theorist and companion of Salvador Allende famously described the law as an obstacle to social change,¹⁵ rather than a tool. What Eduardo Novoa Monreal did not foresee is that after Pinochet's coup, the Chilean opposition relied heavily on international human rights and institutions to fight his repression.¹⁶ Article 15 draws on this historical experience by granting the rights established by international human rights treaties the same rank as the Constitution and constitutionalising the Inter-American Court of Human Rights' transformative doctrines on reparation: the state must prevent, investigate, sanction, and repair (repair integrally)¹⁷ any violation. Thus, the Proposal aimed to align Chile with the Latin American transformative constitutionalism, which understands rights certainly not as the silver bullet to all problems, but certainly as critical tool for addressing them.¹⁸

¹⁴ On the concept and the phenomenon Charles R. Epp, *The Rights Revolution. Lawyers, Activists, and Supreme Courts in Comparative Perspective* (Chicago; London: University of Chicago Press 1998); Mitchel de S.-O.-l'E. Lasser, *Judicial Transformations. The Rights Revolution in the Courts of Europe* (New York: Oxford University Press 2009).

¹⁵ Eduardo Novoa Monreal, *El Derecho como Obstáculo al Cambio Social* (Mexico: Siglo xxi Editores 1975).

¹⁶ Kathryn Sikkink and Margaret Keck, *Activists Beyond Borders. Advocacy Networks in International Politics* (Ithaca: Cornell University Press 1998).

¹⁷ For what that might entail, see Pablo Saavedra Alessandri, 'A Broader Look at the Transformative Impact of the Inter-American Court of Human Rights' Decisions' in: Armin von Bogdandy, Flávia Piovesan, Eduardo Ferrer Mac-Gregor and Mariela Morales Antoniazzi (eds), *Transformations on the Ground: The Impact of Inter-American Human Rights System and Ius Constitutionale Commune on Latin America* (Oxford: Oxford University Press 2023 [forthcoming]).

¹⁸ Armin von Bogdandy, Eduardo Ferrer Mac-Gregor, Mariela Morales Antoniazzi, Flávia Piovesan and Ximena Soley (eds), *Transformative Constitutionalism in Latin America. The Emergence of a new Ius Commune* (Oxford: Oxford University Press 2017).

This shows that the Proposal is irresponsive to an important legal as well as political movement, namely the critique of rights.¹⁹ This merits our attention. One cannot assume that the Convention was oblivious to this critique since many of Chile's finest legal minds have passed through elite law schools of the Global North, where this critique originates. Nor was the Convention discouraged by the specific disappointments of the Rights Agenda in Latin America.²⁰ The Convention's bet on rights is all the more surprising given that many of its members were ideologically close to the scholars articulating this critique. For this reason, the dynamics of rights in Latin America are of global interest, and the Proposal provides a succinct way to study these dynamics.

Although I am impressed by the Proposal, I have many questions, theoretical, normative, and practical. I conclude with three, building on Fernández's analysis. One concerns an apparent mismatch between form and substance. Much of what the Proposal enshrines as constitutional rights read more like the political platform of a progressive government. Because of this mismatch, rights and policies become difficult to distinguish. The second, and related, question concerns institutions. The Convention bets on rights, but not on courts. Indeed, the Proposal's terminological shift from *Poder Judicial*, as the third branch has been labelled in Chilean constitutions so far, to *Sistemas de Justicia* can be read as an indicator that the judicial protection of rights might have suffered if the Proposal had been successful. In any event, rather than courts, the Proposal seems to rely on and places its trust in independent agencies, the *Defensoría del Pueblo* (Article 123) and the *Defensoría de la Naturaleza* (Article 148). Though policies and bureaucracies are the key to make rights a social reality, it is hard to imagine a culture of rights flourishing without strong courts. On a more general note, I wonder what substantive equality can mean for a free country with a capitalist market economy. This is all the more true for a small one that depends on world economy in order to pay for a social state with substantive social rights.

The failure of the Proposal is not the end of the constitutional process. On 12 December 2022, most political parties signed the *Acuerdo por Chile*, which lays out a new path towards a new constitution. With its emphasis on judicial

¹⁹ Susan Marks, 'Four Human Rights Myths' in: David Kinley, Wojciech Sadurski and Kevin Walton (eds), *Human Rights* (Cheltenham: Edward Elgar 2013), 217-235; David Kennedy, *The Dark Sides of Virtue. Reassessing International Humanitarianism* (Princeton: Princeton University Press 2004).

²⁰ See, e.g. Roberto Gargarella, *La derrota del derecho en América Latina. Siete tesis* (Buenos Aires: Siglo veintiuno editores 2020).

expertise, it responds to much of Mario Fernández Baeza's criticism.²¹ In April 2023, citizens will elect a Constitutional Council. That Council will have to present a new proposal by 21 October 2023. It will be compared with the Proposal of 4 July 2022, and so will numerous subsequent ones, from numerous countries. Rightly so.

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²¹ See, Rodrigo Kaufmann, *The Chilean Constituent Process: Take 2*, *VerfBlog*, 2023/2/03 <<https://verfassungsblog.de/the-chilean-constituent-process-take-2/>>. For details, Constitución Política de la República Chapter XV, <<https://www.bcn.cl/leychile/navegar?idNorma=242302&idParte=>>>; Reglamento de Funcionamiento de los Órganos del Proceso Constitucional, <<https://www.diariooficial.interior.gob.cl/publicaciones/2023/03/03/43492/01/2280382.pdf>> and Senado de Chile “Proceso Constituyente: se instala Comisión Experta y elige mesa directiva”, <<https://www.senado.cl/proceso-constituyente-este-lunes-se-instala-la-comision-experta>>.

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