

**THE 2022 DAVID J. STOFFER LECTURE**  
**CONSTITUTIONAL CHANGE FROM AFAR**

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*“You’ve got to trust the dots.”*  
— Anthony Kiedis<sup>1</sup>

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1. RHCP Live Archive , *Red Hot Chili Peppers 2011-09-16 Estadio Monumental, Santiago*, CL [AMT #1], YOUTUBE, at 1:13:02 (Apr. 11, 2018), <https://www.youtube.com/watch?v=sIpCw3TSyeI&t=4376s>.

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## INTRODUCTION

This is both a personal and professional story. It is a story that deals with constitutional change in Chile, an issue that has occupied me throughout my time at Rutgers Law School, and which I hope to share with you in these reflections. Although efforts to change Chile's 1980 Constitution, bequeathed by the military dictatorship of Augusto Pinochet, have been going on for decades, the story I tell here begins in 2013, the year I joined the faculty. This is the same year when the first of three failed processes to change the Constitution was launched. It is a story of constitutional law, human rights, activism, hopes and disappointments. It begins with a brief review of my career, which began some twenty years ago in Chile, and continues from here, in the United States, looking from afar, but thinking closely, about how to move toward a more just and egalitarian society, grounded on a democratically adopted constitution.

### I. BECOMING A LAWYER

On Tuesday, September 11, 1973, Chilean Air Force planes bombed the presidential palace of La Moneda, in downtown Santiago.<sup>2</sup> A bloody coup d'état gave rise to a military dictatorship that lasted seventeen years.<sup>3</sup> Chileans were persecuted, extrajudicially executed, and sent to concentration camps or into exile.<sup>4</sup> In a matter of years, General Augusto Pinochet, the dictator—who would be arrested in London decades later, on the basis of a new and revolutionary doctrine of international law—set out to dictate a constitution, which would allow him not only to ensure

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2. COMISIÓN NACIONAL DE VERDAD Y RECONCILIACIÓN, INFORME DE LA COMISIÓN NACIONAL DE VERDAD Y RECONCILIACIÓN [REPORT OF THE NATIONAL TRUTH AND RECONCILIATION COMMISSION] 155, 155 (1996); See Associated Press, *AP Photos: 50 Years Ago, Chile's Army Ousted a President and Everything Changed*, NBC NEWS (Sept. 6, 2023, 10:03 AM), <https://www.nbcnews.com/news/latino/ap-photos-50-years-ago-chiles-army-ousted-president-everything-changed-rcna103395>.

3. Associated Press, *supra* note 2.

4. COMISIÓN NACIONAL DE VERDAD Y RECONCILIACIÓN, *supra* note 2, at 156–75; *The Pinochet Regime Declassified DINA: "A Gestapo-Type Police Force" in Chile*, NAT'L SEC. ARCHIVE (June 18, 2024), <https://nsarchive.gwu.edu/briefing-book/chile/2024-06-18/pinochet-regime-declassified-dina-gestapo-type-police-force-chile>.

his impunity, but more importantly, that the country would live under his rules for much longer than he would be alive.<sup>5</sup>

This is exactly what has happened. Pinochet adopted a constitution in 1980, ruled the country for almost two decades as “president,” stepped down to become a senator for life, died without ever facing a trial, and left a legal system that the Chilean people have had the chance to bury, not once, but twice—and twice they have rejected the replacement proposals.<sup>6</sup>

I was born and raised under Pinochet’s military rule. In middle school, I became intrigued by the many new classmates arriving from Europe to my French high school. They spoke perfect French, and although they looked like me and had Chilean names, their Spanish had a funny accent. Who were these Chileans who spoke and acted like the French? That was my first encounter with the reality of exile.

The realization had a big impact on me. The country was starting to transition to democracy, and little by little, more information on the horrors of the dictatorship started to surface. I read everything I came across. I looked for books or magazines that were not readily available and began to put together a jigsaw puzzle of mass atrocity, understanding on my own what had not been explained to me by my family. One of the kids who arrived from France became my best friend and I was soon hearing stories from exiles in Europe and elsewhere. In 1989, Chile elected its first president after the military regime, and soon, a truth commission issued a report documenting some of the most serious human rights violations committed by the regime.<sup>7</sup> It was all public information now. A few years later, as I graduated from high school, I decided to go to law school. I did not know that I would become a human rights lawyer, but I did know that I wanted to work on matters of social justice and human rights.<sup>8</sup>

In law school, full-time professors were the ones who had the greatest influence on me. In Chile, and in Latin America in general, law teaching has traditionally been in the hands of adjunct professors, outstanding

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5. See Javier Couso, *Trying Democracy in the Shadow of an Authoritarian Legality: Chile’s Transition to Democracy and Pinochet’s Constitution of 1980*, 29 WIS. INT’L L.J. 393, 405–10 (2012).

6. Alexander Villegas & Natalia A. Ramos Miranda, *Chileans Reject Conservative Constitution to Replace Dictatorship-Era Text*, REUTERS (Dec. 18, 2023, 9:43 AM), <https://www.reuters.com/world/americas/chileans-head-polls-again-replace-dictatorship-era-constitution-2023-12-17/>.

7. See generally COMISIÓN NACIONAL DE VERDAD Y RECONCILIACIÓN, *supra* note 2.

8. In Chile, as in all countries in Latin America, law school is attended right after high school. *Education System in Chile*, SCHOLARO DATABASE, <https://www.scholaro.com/db/Countries/Chile/Education-System> (last visited Nov. 15, 2024).

practitioners who devote part of their time to teaching classes, but who do not dedicate themselves full time and, therefore, do not do legal research.<sup>9</sup> The Universidad Diego Portales, however, had a different model. Since its founding, it hired academics who had been expelled from the Universidad de Chile, in control of the military dictatorship.<sup>10</sup> At Diego Portales, they found a space where they could deploy their work, led by a young lawyer who had returned from Yale Law School to turn this private law school into a first-class legal research center.<sup>11</sup>

By the time I entered law school, in the mid-1990s, I had no idea about any of this. But it did not take long to realize it: I saw the type of work my professors did, the topics they wrote about, and the impact that research had on public affairs. Before long, I became captivated by the teaching of law, the power of legal theory, and the work of scholars dedicated to teaching. The idea with which I had entered law school, of becoming a litigator, possibly in criminal matters, soon gave way to the attraction I felt for the theoretical aspect of law. It was in this context that I approached the Diego Portales Human Rights Program. I enrolled in its clinic, which gave me and my peers the opportunity to apply what we had been learning in the classroom, working on public interest law cases both before national courts and international human rights bodies. Shortly after graduating, the director of the Program, Felipe González, offered for me to join the team. I did not hesitate, and my career as a human rights lawyer began to take shape.<sup>12</sup>

## II. BECOMING A LEGAL SCHOLAR

The first course I got to participate in as an assistant to Felipe and Francisco Cox (another human rights lawyer who would soon become a friend and mentor) was one on fundamental rights, the first part of the constitutional law course. In the first class, Francisco asked the students, “why do you comply with the Constitution if no one asked you if you

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9. See Javier Wilenmann et al., “*It Now Exists*”: *The Birth of the Chilean Professional Legal Academia in the Wake of Neoliberalism*, 48 LAW & SOC. INQUIRY 971, 971–72 (2023).

10. See Daniel Palacios Muñoz, *Criminal Procedure Reform in Chile: New Agents and the Restructuring of a Field*, in LAWYERS AND THE RULE OF LAW IN AN ERA OF GLOBALIZATION 115 (Yves Dezalay & Bryant G. Garth eds., 2011).

11. See *id.* at 114–15.

12. Years later, Felipe González became president of the Inter-American Commission on Human Rights, and later, the UN Special Rapporteur on the Rights of Migrants. *Felipe González Morales*, OFF. OF THE HIGH COMM’R FOR HUM. RTS., <https://www.ohchr.org/en/special-procedures/sr-migrants/felipe-gonzalez-morales> (last visited Nov. 17, 2024).

wanted to have *this* Constitution? Have any of you consented to be governed by these rules?”

Of course, the question was directed at our students, but it reflected my intellectual and personal concerns for over a decade: Why do we obey a constitution to which we have not consented? Under that logic, I thought virtually all people everywhere could refuse to comply with *their* constitutions. Except for those who directly participated in the adoption of a constitution, we don't go around asking people to consent to the laws and regulations by which a society conducts itself. However, the question remained and shaped my interests and my research for a long time.

I turned to reading Thomas Paine's *Rights of Man*.<sup>13</sup> I was obsessed with the idea of the tyranny of the past, of how it is that the dead hand of the past can regulate the present, even though each generation should have the right to determine its own rules.<sup>14</sup> Paine wrote in the eighteenth century about the situation in the United States, but his reflection seemed to me completely relevant to Chile at the beginning of the twenty-first century. We lived under the dead hand of the past. Of course, all constitutions tie the hands of the present generation—and that may be the very point of a constitution.<sup>15</sup> But Chile's past was a particularly dark and sinister one that took power by violent means and exercised state terror while seeking to prolong its political order by legal means.

When it was my turn to prepare for the public competition for assistant instructor—until then I was just a teaching assistant—the assigned topic was “conflict between fundamental rights.” As I studied the subject, I realized that I had not learned anything about this in my constitutional law course during law school. On the one hand, I felt enormously frustrated since I had to learn on my own something that seemed of the utmost relevance, and I felt like I had not learned what was really important. On the other hand, I was excited because a field of theoretical and practical knowledge was opening up before me: How should courts handle conflicts between freedom of expression and the right to privacy? What should a judge do when, for example, a doctor asks to force-feed a hunger striker? As I searched for clues in the writings of German legal theorist Robert Alexy<sup>16</sup> and U.S. legal philosopher Ronald Dworkin,<sup>17</sup> I immersed myself in the history of the discussion among the drafters of Chile's 1980 Constitution, jurists appointed by the military

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13. See generally THOMAS PAINE, *RIGHTS OF MAN* (1791).

14. See generally *id.*

15. I owe this point to Owen Fiss.

16. See generally ROBERT ALEXY, *A THEORY OF CONSTITUTIONAL RIGHTS* (Julian Rivers, trans., Oxford Univ. Press 2010) (1985).

17. See generally RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977).

junta led by General Pinochet who designed the constitutional architecture of the dictatorship.

I realized that there was no serious academic reflection on the subject. The dictatorship's "founding fathers" had simply been content with an absurd idea that postulated that there could be no conflict between individual rights because there was a hierarchical order among rights. This order should "naturally" begin with the right to life, because "without life there can be no other right."<sup>18</sup> The rank would then continue simply by the position in which a given right was placed. Thus, if the right to privacy was in paragraph 4 of Article 19 of the Chilean Constitution, then it should be more important than freedom of expression, which was in paragraph 12. It seemed incredible to me that the drafters of the Constitution had espoused such a ludicrous idea, then reproduced by a prominent law professor (who later served on the country's Constitutional Court) and taken up by the courts. Not only was it a conceptually risible idea, but it was also anti-democratic, for it forced a constitutional interpretation anchored in what a previous generation thought was right. It was, I thought, the work of the dead hand of the past—our anti-democratic past.

The preparation for the assistant instructor competition—which I obtained—gave way to what would be my first academic article, published in Chile.<sup>19</sup> I was fortunate to be guided and mentored by excellent academics, who also invited me to publish in specialized journals as a very young scholar. From there, I began teaching as an assistant instructor in constitutional law and legal theory courses, while writing about constitutional change and the interpretation of individual rights, becoming more and more fascinated with the theoretical aspects of law and law teaching.

A few years later, I came to the United States to pursue graduate studies at Yale Law School. After a human rights fellowship at Fordham Law School, I returned to Chile to run the Human Rights Center at Diego Portales Law School, the program that I had originally joined as a young research assistant. I was assigned courses on constitutional law, legal theory, and human rights. The idea that we lived under undemocratic rules—the past's dead hand—had only become more pressing on me. I loved teaching, but I felt the need to do more than teach and write about

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18. JOSÉ LUIS CEA EGAÑA, *EL SISTEMA CONSTITUCIONAL DE CHILE: SÍNTESIS CRÍTICA* 172 (1999) ("The disparity in the hierarchy of essential rights must be recognized, starting with the most basic of all, that is, dignity, and continuing with life and personal integrity.").

19. See generally Jorge Contesse Singh, *Reglas y Principios en Chile: ¿Jerarquía entre los Derechos Constitucionales?*, 20 ANUARIO DE FILOSOFÍA JURÍDICA Y SOCIAL 53 (2002) (Chile).

political consent and individual rights. I also wanted to advocate for those ideas.

### III. BECOMING A CONSTITUTIONAL ACTIVIST

My courses on constitutional law and political theory increasingly revolved around the idea of our lack of consensus on the fundamental text of our political life. Alongside these courses, my work in human rights was mutually feeding my intellectual and practical interests. I often drew my students' attention to Article 1 of the two most important international human rights treaties: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Both treaties, signed in 1966, begin in the same way: "All peoples have the right of self-determination. By virtue of that right, they freely determine their political status and freely pursue their economic, social, and cultural development."<sup>20</sup>

My goal was to show how, under international human rights law, the self-determination of peoples is the norm on which the entire international legal order is based. From this idea—that peoples have the right to freely determine their political, social, and legal development—I began to bring the theory and practice of human rights closer and closer to constitutional law. This is especially so in Latin American countries, where the integration of international human rights law into the domestic law of the countries is the norm;<sup>21</sup> this is unlike what happens, for example, in the United States, where international law requires domestic acts of incorporation to become the "[l]aw of the [l]and."<sup>22</sup> If the founding norm of international human rights law proclaims self-determination as a key principle, and if Chile's constitutional order is one that, despite being legally integrated with international law, does the opposite, forcing Chileans to continue to be governed by the authoritarian rules that Pinochet and his people bequeathed to them—what is the result?

Colleagues from other universities were reflecting on the same questions. Many of them had also gone to study abroad and were now

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20. International Covenant on Civil and Political Rights art. 1, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976); International Covenant on Economic, Social and Cultural Rights art. 1, *opened for signature* Dec. 19, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976).

21. See Kathryn Sikkink, *Latin American Countries as Norm Protagonists of the Idea of International Human Rights*, 20 GLOB. GOVERNANCE 389, 390–91 (2014).

22. U.S. CONST. art. VI ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . .").

employed in different universities. As we talked to each other in conferences and workshops, we realized that we shared not only intellectual interests, but also a political, and at times ethical, motivation to give the country a constitution that was not the product of a bloody dictatorship that tied up the democratic governments that followed, but a true expression of the people's sovereign will. Was that not what we taught and wrote about?

In 2012, my colleagues and I decided to venture out of the classroom and try to influence the public sphere, calling for the adoption of a new constitution through the establishment of a constituent assembly. Our shared diagnosis was that the 1980 Constitution, dictated under a military dictatorship, could not solve the political and social crises that, from time to time, surfaced. We were moved by the idea of the self-determination of peoples, the inadmissible rule of the past's dead hand, the rights of those who were excluded from the country's polity—like women and indigenous peoples—and the desire for liberty and justice for all. Before the era of Zoom meetings, we organized virtual meetings to allow those who were pursuing graduate studies abroad to participate. We formed a cadre of constitutional lawyers, determined to use our knowledge in the service of social movements that had been unsuccessfully pushing for a constituent assembly for a long time.

The following year, I joined Rutgers Law. That same year, civil society organizations launched a campaign inspired by the Colombian citizen campaign known as “the Seventh Ballot,” a campaign that emerged as an initiative by young students, which proposed to take advantage of the official elections of March 1990 in Colombia.<sup>23</sup> In those elections, there were six ballots, “that of senators, representatives to the House, mayors, deputies, governors and councilors[;] the citizens sought to express with an additional vote, the seventh ballot, the demand to form a National Constituent Assembly to modify the Constitution of Colombia.”<sup>24</sup> They did—and they succeeded.<sup>25</sup>

Back in Chile, civil society organizations launched a campaign that called for the marking of votes with the acronym “AC” for “Asamblea Constituyente” (“constituent assembly” in Spanish).<sup>26</sup> The idea was to convey, through marks on the ballots, that the demand for a constituent

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23. See *Séptima Papeleta*, LATINNO, <https://www.latinno.net/en/case/5180/> (last visited Nov. 17, 2024).

24. *Id.*

25. *Id.*

26. See Pablo Marshall & Beth Pearson, “*Marca tu voto*” for a Constitutional Assembly: Direct Democracy in Chile’s 2013 Presidential Election, OPENDEMOCRACY (Dec. 4, 2013), <https://www.opendemocracy.net/en/marca-tu-voto-for-constitutional-assembly-direct-democracy-in-chiles-20/>.



convention was real and needed to be addressed because it was key to carrying out the desired changes.<sup>27</sup> The campaign faced accusations of fraud and the nullification of votes, but it also sparked a sort of constituent energy among the people.<sup>28</sup>

Our group of constitutional lawyers who started working in 2012 organized ourselves to deploy the message in all possible spaces. The goal was to persuade citizens not only that a constitution enacted through democratic means was a political imperative that should mobilize citizens, but that it was possible to do so using the resource of marked ballots, given the complete closure of the political system to such a demand. We enlisted the services of political communication experts and connected with community organizers, artists, intellectuals and ordinary people who shared the same desire.<sup>29</sup> The campaign to mark the votes became a phenomenon impossible to ignore, gathering social energy and legal expertise, taking advantage of Michelle Bachelet's election as President in December 2013.<sup>30</sup> Bachelet's platform was based on three fundamental ideas: an educational reform, a tax reform, and the adoption of a new constitution.<sup>31</sup> These reforms were seen as the key to changing Chile's social and economic model from the 1970s' neoliberal model to a twenty-first century rights-based model of social cohesion.<sup>32</sup>

#### IV. THREE STRIKES AND OUT? FAILED EFFORTS TO REPLACE CHILE'S 1980 CONSTITUTION

With the election of Michelle Bachelet, Chile began its decade of attempts at constitutional change. In total, there have been three efforts

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27. See Alisa Solomon, *Purging the Legacy of Dictatorship from Chile's Constitution*, NATION (Jan. 21, 2014), <https://www.thenation.com/article/archive/purging-legacy-dictatorship-chiles-constitution/>.

28. See *id.*; Jorge Contesse, *WEBINAR 3: AMERICAS - COVID-19 Constitution-Making in Chile*, ROUNDTABLE (Nov. 16, 2020), <https://www.iacl-democracy-2020.org/blog/2016/3/23/blog-post-sample-9wntn-6ye75-hwawc-pce7h>.

29. Tarun Khaitan has criticized the activist work of legal academics—labeled “scholactivism”—generating an interesting debate on which I do not comment here, but which is worth referencing. See Tarunabh Khaitan, *On Scholactivism in Constitutional Studies: Skeptical Thoughts*, 20 INT'L J. CONST. L. 547, 548 (2022). But see Adrienne Stone, *A Defence of Scholactivism*, VERFASSUNGSBLOG (Aug. 22, 2022), <https://verfassungsblog.de/a-defence-of-scholactivism/>; Cynthia Farid & Sergio Latorre, *Scholactivism and the Global South*, VERFASSUNGSBLOG (Aug. 24, 2022), <https://verfassungsblog.de/scholactivism-and-the-global-south/>; Vicki C. Jackson, *Integrity and Independence*, VERFASSUNGSBLOG (Aug. 23, 2022), <https://verfassungsblog.de/integrity-and-independence/>.

30. See Solomon, *supra* note 27.

31. See *id.*

32. See *id.*

to repel the 1980 Constitution. All three processes, for different reasons that I now analyze, have failed. Despite attempts to regulate procedures that would result in a new constitution, as I show below, an unwillingness to deliberate and include political opponents has taken its toll. After more than a decade since the first effort to change the Constitution, the country still essentially lives under the dictator's rules. There have been changes, and some are undoubtedly relevant to changing the face of the organization of power and the rights of citizens. Nevertheless, the 1980 Constitution's core remains in force.

This Part discusses the three attempts to change the Constitution: under the Bachelet government, with a unique deliberative process that did not have the support of the parties and ended up failing; and the two constituent assemblies, in 2021-22 and 2023, which generated two very different drafts, both of which were rejected.

#### A. *The 2015-16 Process*

The government of Michelle Bachelet took up the demands and initiated a constituent process that mobilized hundreds of thousands of people. Bachelet created an unprecedented mechanism consisting of rounds of deliberation that citizens could freely organize with friends, family, or colleagues. Through citizen meetings known as "Local Self-Convened Meetings," the government enabled an online platform that provided materials to guide the constituent discussion.<sup>33</sup> Citizens had the possibility of deliberating for a day in a home or private place, having to upload the results of the deliberation they had carried out to the web.<sup>34</sup> Some viewed this mechanism with skepticism, as it was not a constituent assembly, that is, a body of citizens elected for the purpose of drafting a constitution.<sup>35</sup> But it was a genuine effort to give citizens a say in the drafting of a new constitution. Never before in the country's history had citizens been given the possibility to directly discuss constitutional issues.

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33. See TOMÁS JORDÁN ET AL., MINISTERIO SECRETARÍA GENERAL DE LA PRESIDENCIA, PROCESO CONSTITUYENTE ABIERTO A LA CIUDADANÍA: GUÍA METODOLÓGICA PARA LA ETAPA PARTICIPATIVA TERRITORIAL 27 (2016), [https://www.bcn.cl/procesoconstituyente/cabildos2016/pdf/guia\\_metodologica\\_proceso\\_constituyente\\_abierto\\_a\\_la\\_ciudadania.pdf](https://www.bcn.cl/procesoconstituyente/cabildos2016/pdf/guia_metodologica_proceso_constituyente_abierto_a_la_ciudadania.pdf).

34. See *id.*

35. Matías Sagredo Zaldívar, *Presidenta no Puede Mal Usar el Nombre de Camilo Henríquez*, DIARIO UCHILE (May 21, 2015, 6:30 PM), <https://radio.uchile.cl/2015/05/21/presidenta-no-puede-mal-usar-el-nombre-de-camilo-henriquez/>.

Notably, Bachelet announced the establishment of the process in her annual address to the Full Congress in May 2015.<sup>36</sup> In one of the key passages of her address, President Bachelet quoted Camilo Henríquez, “a priest who joined the movement for Chilean independence and contributed to its eventual triumph.”<sup>37</sup> In the early nineteenth century, Fray Henríquez propagated ideas about self-determination<sup>38</sup> as few in Latin America, in general, and in Chile, in particular, had done. In President Bachelet’s words:

Camilo Henríquez said, already in 1813, in his famous *Catechism of the Patriots*, that “the people always have the right to review and reform their constitution,” and that “one generation cannot irrevocably subject future generations to its laws.” Chile, for the first time in its history, has the opportunity to build a genuinely republican and sovereign Constitution, which is politically and socially agreed, reflecting the country we are today, mature and democratic.<sup>39</sup>

On the day of the presidential address, I was in London, participating with other Chilean residents in an event on constitution-making at University College London. I was impressed and excited with Bachelet’s words. She had quoted Camilo Henríquez,<sup>40</sup> in a reference directly inspired by Thomas Paine’s writings, which, as noted, I had used in my constitutional law classes, in my first law review article in 2002, and in the numerous meetings in which I had participated, promoting the idea of a constituent assembly: “Every age and generation must be as free to act for itself in all cases as the ages and generations which preceded it. The vanity of governing beyond the grave is the most ridiculous and insolent of all tyrannies.”<sup>41</sup>

The Bachelet process gathered more than 200,000 people, both in Chile and abroad.<sup>42</sup> In my case, I reached out to my friend Francisca Benítez, a New York City-based artist. We joined forces to gather more

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36. Michelle Bachelet, Mensaje Presidencial 10 (May 21, 2015), <https://obtienearchivo.bcn.cl/obtienearchivo?id=recursoslegales/10221.3/45293/4/20150521.pdf>.

37. Terence S. Tarr, *Escritos Políticos de Camilo Henríquez*, 42 HISP. AM. HIST. REV. 287, 287 (1962).

38. See, e.g., Quirino Lemáchez, *Proclama de Quirino Lemachez* (1812); Camilo Henríquez, *Catecismo de los Patriotas* (1813).

39. See Bachelet, *supra* note 36.

40. See *id.*

41. PAINE, *supra* note 13, at 11.

42. Javier Couso, *Managing the Risks of Inclusion and Participation: Chile as a Case Study*, MELB. F. ON CONST.-BUILDING (2019).

than a dozen fellow Chileans; from intellectuals, to university professors, trade unionists, artists, graduate students, journalists, and an indigenous man. We all met during a steamy Saturday in May 2016 in Francisca's Chinatown apartment. With computers, a giant screen, bagels, and equipped with notepads and pencils, we discussed individual and social rights, the principles of government, the role of the Congress, the Executive, the courts and other government organs. At the end of that day, we realized that, despite being physically far from Chile, we were part of a common project that was being drawn. Like us, hundreds of thousands of people in the country and abroad did the same.

The Bachelet administration's popularity declined, and the process waned until it eventually receded into invisibility. In March 2018, days before stepping down, President Bachelet surprisingly sent to Congress a proposal for a new Constitution.<sup>43</sup> In her televised speech, she talked about "a new Constitution [that] was born from the people, as never before in the history of our country . . . the result of a participatory process inaugurated in October 2015, unprecedented in Chile and internationally praised."<sup>44</sup> Although this time there were no mentions of Fray Camilo Henríquez and the right of every generation to adopt its own rules, the proposal was in fact based on the unprecedented participatory effort.<sup>45</sup> However, the constitutional proposal was essentially the work of the administration's high-ranking officials. The reaction to Bachelet's

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43. Javier Sáez Leal, *Bachelet Presenta una Propuesta de Nueva Constitución a Seis Días del Fin de su Gobierno*, EL PAÍS (Mar. 6, 2018, 5:32 PM), [https://elpais.com/internacional/2018/03/06/actualidad/1520356224\\_601806.html](https://elpais.com/internacional/2018/03/06/actualidad/1520356224_601806.html).

44. Michelle Bachelet, Televised Address (May 6, 2018), <http://colegioabogados.cl/wp-content/uploads/2018/03/Mensaje.pdf>.

45. See Sergio Verdugo & Jorge Contesse, *The Rise and Fall of a Constitutional Moment: Lessons from the Chilean Experiment and the Failure of Bachelet's Project*, INT'L J. CONST. L. BLOG (Mar. 13, 2018), <http://www.iconnectblog.com/2018/03/the-rise-and-fall-of-a-constitutional-moment-lessons-from-the-chilean-experiment-and-the-failure-of-bachelets-project/>.

proposal among politicians and constitutional lawyers was largely negative.<sup>46</sup> The constitutional moment seemed gone.<sup>47</sup>

### B. *The 2019 Social Earthquake*

Days later, the conservative government of billionaire Sebastián Piñera stepped in. In an address to the country's most powerful businessmen, on March 15, 2018, that is, only ten days after Bachelet's announcement, Piñera's Secretary of Interior sent a clear message: "We do not want the proposal for a new Constitution to move forward. This is not a game."<sup>48</sup> The demand for a new Constitution was put to sleep, and many pundits quickly concluded that, in fact, the Chilean people were no longer interested in constitutional change.<sup>49</sup>

Then, October 2019 came, and constitutional change became impossible to ignore.

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46. The president of the Council of Observers of the Constituent Process, a presidential commission appointed by Bachelet, welcomed Bachelet's fulfillment of her commitment. See Felipe Vargas, *Abogado Constitucionalista DC: "Hubiera Sido Interesante Hacerlo de un Modo Más Participativo y Transparente,"* EMOL (Mar. 7, 2018, 6:03 AM), <https://www.emol.com/noticias/Nacional/2018/03/07/897673/Abogado-constitucionalista-DC-Hubiera-sido-interesante-hacerlo-de-un-modo-mas-participativo-y-transparente.html>. However, he politely criticized that, on the one hand, he did not participate in the drafting of the bill sent to Congress and, on the other hand, that "it would have been interesting to do it in a more participatory and transparent way." See *id.* For a compilation of reactions among constitutional lawyers, see Pablo Contreras Vásquez, *Debate Constituyente: El Proyecto Constitucional de M. Bachelet,* APUNTES DE DERECHO (Mar. 12, 2018), <https://www.pcontreras.net/blog/debate-constituyente-el-proyecto-constitucional-de-m-bachelet>.

47. Denise Vásquez, *Chadwick Pone Freno a Proyecto de Nueva Constitución: "No Queremos que Avance, Esto No Es un Juego,"* DIARIO FINANCIERO (Mar. 15, 2018, 9:58 AM), <https://www.df.cl/economia-y-politica/actualidad/chadwick-pone-freno-a-proyecto-de-nueva-constitucion-no-queremos-que>.

48. *Id.*

49. "Será un país distinto": 5 Claves Para Entender Los Inéditos Resultados, BBC MUNDO (May 17, 2021), <https://www.bbc.com/mundo/noticias-america-latina-57140964>. In the November 2017 first round of the presidential election, candidates who ran on platforms that expressly included constitutional replacement obtained a total fifty-six percent of the general vote. See *Number of Valid Votes Cast in the 2017 Presidential Election Primaries in Chile, by Candidate*, STATISTA (July 5, 2024), <https://www.statista.com/statistics/786957/number-votes-cast-presidential-election-primaries-candidate-chile/>. Piñera, who rejected constitutional replacement, obtained 36.6%. See *id.* The following month, Piñera defeated a weak candidate in the ballotage (in an election where less than forty-nine percent of the people voted). See "Será un país distinto": 5 Claves para Entender los Inéditos Resultados, *supra* note 49. Pundits believed that Chileans' demand for a new Constitution suddenly became unimportant, and as seen in the remarks made by President Piñera's Secretary of Interior, the administration also governed under that assumption. See Javier Couso, *Chile's 'Procedurally Regulated' Constitution-Making Process*, 13 HAGUE J. ON R. L. 235, 242 (2021).

Despite being used to natural disasters, Chileans can always answer the question of where they were when a major earthquake hits the country. On the day I delivered this Lecture, March 3, 2022, but almost four decades ago, I was playing cards with my family and friends when a major earthquake struck the central coast of my country. My mother, carrying my two-year-old little brother, ran back to the house with the earth literally opening up in front of her, while my father drove back to pick us up. When we arrived back in Santiago, after many hours of driving in a country with collapsed buildings and houses, I walked into my room and realized that after five or six hours on the road—for a trip that normally takes no more than two hours—I was still holding the cards in my hand. A memory I will never forget.

In 2010, I was flying back to Santiago from a conference in Bogota, Colombia. Soon after we took off, I noticed that the airplane made a U-turn. Then the captain informed us that a major earthquake had just hit Chile, and we had lost all communication with the airport in Santiago. We landed in Lima and had to stay there for a couple of days until the country reopened its borders. In both events, I knew exactly where I was and what I was doing when these major natural disasters occurred.

Something similar happened with the social earthquake of October 2019. One can ask any Chilean, and they will surely know where they were when the news broke; subway stations were set on fire, and hundreds—perhaps thousands—of people wandered the streets of Santiago. I was in Columbia, Missouri, attending the Annual Meeting of the American Society of Comparative Law. When I returned to the hotel after a dinner with colleagues, I checked my phone. The messages were nonstop: The military was in the streets, President Piñera had decreed a state of exception, and nobody seemed to know why or who was setting fire to buildings and subway stations. It was a social revolt.

For days, Chilean students had been protesting against a subway fare hike.<sup>50</sup> The government and political authorities dismissed the protests as some juvenile expression of boredom. A member of the Cabinet infamously said, that instead of protesting, people—who commute for hours to go to work every day—should get up earlier to avoid the increased fare.<sup>51</sup> That day, October 18, 2019, something different

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50. See Eva Vergara, *Students Keep Driving Protests Demanding Change in Chile*, ASSOCIATED PRESS (Dec. 8, 2019, 12:00 AM), <https://apnews.com/article/student-loans-santiago-chile-business-social-services-819108269b65dc2dd4dffcd7712d53a>.

51. Mark Johanson, *How a \$0.04 Metro Fare Price Hike Sparked Massive Unrest in Chile*, VOX (Oct. 29, 2019, 4:20 PM), <https://www.vox.com/world/2019/10/29/20938402/santiago-chile-protests-2019-riots-metro-fare-pinera>; Juan Ignacio Chacón, *The 2019–2020 Chilean Protests*, PRAXIS (Feb. 6, 2020), <https://sites.tufts.edu/praxis/2020/02/06/the-2019-2020-chilean-protests/>.

happened. Like a pressure cooker boiling for too long, the country seemed to explode. Almost simultaneously, more than twenty-five Metro stations were set on fire.<sup>52</sup> To this day it is not known exactly who burned the Santiago Metro, a symbol of integration in an increasingly segregated city.<sup>53</sup> But the fires, plus the spontaneous protest, generated a climate of uncertainty and weariness that Chileans had not experienced since the return to democracy.

Santiago was paralyzed. Thousands of people had to return to their homes walking long blocks with a feeling of uncertainty that many had never experienced, and that reminded many others of the darkest days of Augusto Pinochet's dictatorship.<sup>54</sup> In the following days, massive demonstrations continued.<sup>55</sup> The government, unable to restore order, decreed a curfew and ordered the military to take to the streets.<sup>56</sup> For a nation that four decades ago experienced a coup followed by a seventeen-year military dictatorship, the sight of tanks patrolling the streets, police shooting at demonstrators, looting, barricades, and a president convening the National Security Council to address a situation of civil unrest were deeply concerning.<sup>57</sup>

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52. See *Metro Stations Burned, Buses Set on Fire in Chile's Worst Riots in Years*, NDTV WORLD (Oct. 21, 2019, 1:01 AM), <https://www.ndtv.com/world-news/metro-stations-burned-buses-set-on-fire-in-chile-s-worst-riots-in-years-2119671>.

53. Guillermo Wormald et al., *Cohesive Culture and Integration in Chilean Cities*, 27 REVISTA INVI 117, 124 (2012).

54. See Chacón, *supra* note 51.

55. See Juan Garnham & Nicolás Alonso, *Why Chile's Massive Protests Started with a Subway Fare Hike*, BLOOMBERG (Oct. 26, 2019, 4:49 PM), <https://www.bloomberg.com/news/articles/2019-10-26/why-chile-s-protests-started-with-the-metro>.

56. See Helen Regan & Christopher Ulloa, *Chile Extends Curfew Again as Violent Unrest Paralyzes One of Latin America's Biggest Cities*, CNN, <https://www.cnn.com/2019/10/22/americas/chile-protests-inequality-curfew-intl-hnk/index.html> (Oct. 22, 2019, 11:06 AM).

57. See *Chile: Los Ciegos Que Dejó la Represión*, EL DESCONCIERTO (Oct. 31, 2019), <https://eldesconcierto.cl/2019/10/31/chile-los-ciegos-que-dejo-la-represion/>. The October revolt resulted in unprecedented human rights violations committed by law enforcement officials in democracy: By mid-November, the number of individuals with ocular injuries due to armed forces shooting to repress peaceful protests was higher than in any other part of the world, including war zones. See U.N. OFF. OF THE HIGH COMM'R FOR HUM. RTS., REPORT OF THE MISSION TO CHILE FROM 30 OCTOBER TO 22 NOVEMBER 2019 (2019), [https://www.ohchr.org/sites/default/files/Documents/Countries/CL/Report\\_Chile\\_2019\\_EN.pdf](https://www.ohchr.org/sites/default/files/Documents/Countries/CL/Report_Chile_2019_EN.pdf); *Chile: Police Reforms Needed in the Wake of Protests*, HUM. RTS. WATCH (Nov. 26, 2019, 9:00 AM), <https://www.hrw.org/news/2019/11/26/chile-police-reforms-needed-wake-protests>; *IACHR Condemns the Excessive Use of Force During Social Protests in Chile, Expresses Its Grave Concern at the High Number of Reported Human Rights Violations, and Rejects All Forms of Violence*, ORG. AM. STATES (Dec. 6, 2019), [https://www.oas.org/en/iachr/media\\_center/PReleases/2019/317.asp](https://www.oas.org/en/iachr/media_center/PReleases/2019/317.asp).

Despite several reforms in Congress and Bachelet's constituent process, the 1980 Constitution was still "Pinochet's Constitution."<sup>58</sup> For more than *three decades*, Chile had lived under the political and constitutional architecture that Pinochet's military regime had set up. The protests were not a simple reaction to a recent unresponsive and gridlocked political process—nor were they a response to the thirty pesos (less than 0.5 U.S. dollars) fare increase of the Metro fare.<sup>59</sup> As protestors famously claimed, the revolt was "not about 30 pesos[, but] 30 years" of Pinochet's rule.<sup>60</sup>

The 1980 Constitution crystallized a neoliberal model that Pinochet and his so-called Chicago Boys implemented in the 1970s, taking advantage of the dictatorial regime in place.<sup>61</sup> In a 1982 letter addressed to the economist Friedrich von Hayek—often credited as the father of neoliberalism<sup>62</sup>—former British Prime Minister Margaret Thatcher acknowledged that the measures adopted by Pinochet would have been "quite unacceptable" in a country with democratic institutions.<sup>63</sup> Such measures were possible to implement, Prime Minister Thatcher candidly suggested, in a country ruled by a military junta, where Congress did not exist and courts were not independent.<sup>64</sup> The privatization of health and social security, the defunding of public education, and the privatization of water were some of the measures that Pinochet implemented while carrying out massive and systematic human rights violations.<sup>65</sup>

Many Chileans, especially in urban areas, had grown tired of their economic and social conditions.<sup>66</sup> Despite working very hard, many

58. Verdugo & Contesse, *supra* note 45.

59. See Garnham & Alonso, *supra* note 55.

60. Stacy Torres, *The Protests in Chile Aren't About 30 Pesos. They're About 30 Years of Failure*, WASH. POST (Oct. 23, 2019, 7:51 PM), <https://www.washingtonpost.com/opinions/2019/10/23/protests-chile-arent-about-pesos-theyre-about-years-failure/>.

61. See Solomon, *supra* note 27.

62. Thomas Hoerber, *The Roots of Neoliberalism in Friedrich von Hayek*, in *ECONOMIC THEORY AND GLOBALIZATION* 169, 170 (Thomas Hoerber & Alain Anquetil eds., 2019).

63. Letter from Prime Minister Margaret Thatcher to Professor Friedrich von Hayek (Feb. 17, 1982) (on file with the Margaret Thatcher Foundation).

64. See 21 Parl Deb HC (6th ser.) (1982) col. 1147 (UK).

65. See Fred J. Solowey, *Social Security Privatization is a Disaster in Chile; Anti-union Politicians and Wall St. Still Want It Here*, INT'L LONGSHORE & WAREHOUSE UNION (Aug. 16, 2018), <https://www.ilwu.org/social-security-privatization-is-a-disaster-in-chile-anti-union-politicians-and-wall-st-still-want-it-here/>; 'Chile Has Entirely Privatised Water, Which Means That Theft is Institutionalized', CIVICUS (Feb. 12, 2020), <https://www.civicus.org/index.php/media-resources/news/interviews/4271-chile-has-entirely-privatised-water-which-means-that-theft-is-institutionalised>.

66. *Desiguales. Orígenes, Cambios y Desafíos de la Brecha Social en Chile*, UNDP (May, 9, 2018), <https://www.undp.org/es/chile/publicaciones/desiguales-origenes-cambios-y-desafios-de-la-brecha-social-en-chile>.



experienced a deep sense of injustice, having to pay for health, education and social security, without obtaining decent health, education or pensions.<sup>67</sup> The sense of frustration, or “detachment,” as sociologist Kathya Araujo notes, grew silently but steadily while the political, intellectual, and economic elites patted their backs with the story of a country on the verge of development.<sup>68</sup> Those seemed to be the challenges that surfaced in October 2019—a challenge to the constitutional architecture of an authoritarian regime.<sup>69</sup> It was time to truly bring about constitutional change.

### C. *A Constitutional Itinerary*

After four weeks of sustained mobilizations and increasingly violent clashes between demonstrators and the police, in a dramatic negotiation, political parties struck a deal to address the social crisis, known as the “Agreement for Social Peace and a New Constitution” (“*Acuerdo por la Paz Social y la Nueva Constitución*”).<sup>70</sup> Congress agreed to set up an actual constituent process that would lead to the adoption of a new constitution.<sup>71</sup> There would be a referendum and the people would be asked two questions: first, whether they wanted to enact a new constitution; and second, if the people decided for a new constitution, whether it should be drafted by a fully elected assembly or a mixed body of members of Congress and citizens elected in a general election. The answers to both questions were unequivocal: roughly eighty percent of the people voted for the adoption of a new constitution enacted by a fully

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67. See Solowey, *supra* note 65.

68. See KATHYA ARAUJO, *THE CIRCUIT OF DETACHMENT IN CHILE: UNDERSTANDING THE FATE OF A NEOLIBERAL LABORATORY* 3–4 (2022).

69. See *id.* at 5.

70. *Acuerdo por la Paz Social y la Nueva Constitución*, BCN (Nov. 15, 2019) [https://www.bcn.cl/procesoconstituyente/detalle\\_cronograma?id=f\\_cronograma-1](https://www.bcn.cl/procesoconstituyente/detalle_cronograma?id=f_cronograma-1).

President Piñera’s former Secretary of Interior, Gonzalo Blumel, acknowledged that Piñera was being pressured to send troops to contain the violence in the streets, a decision that “would have caused great damage to democracy . . . the country’s institutional framework would have collapsed.” See Leonardo Vallejos, *Blumel: Piñera Tuvo “Muchas Presiones” de “Sectores Más Duros de la Derecha” para Sacar Militares a la Calle el 12 de Noviembre del 2019*, EMOL (Jan. 16, 2021, 8:10 AM), <https://www.emol.com/noticias/Nacional/2021/01/16/1009565/Blumel-presiones-militares-calle-2019.html>.

71. See generally Jorge Contesse, *Chile’s Kaleidoscopic Constituent Assembly*, VERFASSUNGSBLOG (June 22, 2021), <https://verfassungsblog.de/chiles-const/>.

elected assembly.<sup>72</sup> At long last, the idea of a constituent assembly in Chile was no longer an idea.<sup>73</sup> It would now be a reality.<sup>74</sup>

### 1. The 2021 Assembly

In May 2021, Chileans elected the delegates to the constituent assembly.<sup>75</sup> The assembly was like no other elected body the country had ever seen.<sup>76</sup> Individuals with backgrounds as diverse as the country itself, a roster that no one, no pundit, no scholar, no citizen, no news outlet, expected.<sup>77</sup> The assembly resembled the country in ways that no political arrangement had so far allowed.<sup>78</sup> Not in its early years as an independent nation, nor in the most recent decades.<sup>79</sup>

The rules of the 1980 Constitution had created both a legal and cultural system where only certain matters were possible to be discussed, where some discourses simply had no room at the table, and where a political minority—the conservative right—had an effective veto power over public affairs.<sup>80</sup> The historic May election changed the terms of what was possible, filling many Chileans with hope, as they struggled with one of the worst moments of the COVID-19 pandemic.<sup>81</sup>

The vote for constituent delegates shook the ground. Pundits and the mainstream media had consistently anticipated a result where the right-wing—which gathered a single list of candidates, many of whom were outspoken defenders of Pinochet’s Constitution—would get a large number of delegates.<sup>82</sup> The left, pundits proclaimed, without a unitary list of candidates, would get a lower number of delegates; independent candidates would be able to secure very few, if any, spots, as political parties had made it virtually impossible for them to compete on equal footing with candidates running under existing political parties’ lists.<sup>83</sup> They were all wrong.

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72. *See generally id.*

73. *See generally id.*

74. *See generally id.*

75. *See generally id.*

76. *See generally id.*

77. *See generally id.*

78. *See generally id.*

79. *See generally id.*

80. *See generally* FERNANDO ATRIA, *LA CONSTITUCIÓN TRAMPOSA* (2013).

81. *See* Contesse, *supra* note 71.

82. Fernanda Rojas, “Era Imposible Proyectar”: *El Mea Culpa de Los Encuestadores Tras el Fail de Los Sondeos Previos a la Elección*, *LA TERCERA PM* (May 24, 2021, 1:55 PM), <https://www.latercera.com/la-tercera-pm/noticia/era-imposible-proyectar-el-mea-culpa-de-los-encuestadores-tras-el-fail-de-los-sondeos-previos-a-la-eleccion/USQITALFE5DVNE7XQTQ4Q7A34U/>.

83. *Id.*

Chile's 2021 assembly looked like a kaleidoscope.<sup>84</sup> It was the first assembly in the world with gender parity: Seventy-seven women and seventy-eight men were elected to draft the new constitutional text.<sup>85</sup> The first vote that was read out loud on live television went to a Mapuche indigenous woman.<sup>86</sup> This was significant because one of the most dramatic discussions that followed the adoption of the constitutional itinerary concerned both gender parity and reserved seats for indigenous peoples—two of Chile's most saliently disadvantaged groups.<sup>87</sup> There were at least six LGBTIQ individuals elected to the assembly.<sup>88</sup> In a country that has historically been considered among the most conservative in an already conservative region, the vote in support of candidates who actively advocate for the rights of LGBTIQ individuals was a strong indication of the underlying social change that had taken place.<sup>89</sup> The conservative-right-wing candidates concentrated sixty-three percent of campaign contributions, yet they only obtained twenty-four percent of the seats.<sup>90</sup> The Convention's representation, however, "did not correspond to [representatives'] weight in terms of population,"<sup>91</sup> an issue that would create serious problems as the Convention's work progressed.

## 2. The 2021-22 Process

On the opening day of the assembly—July 4, 2021—the expectation was enormous.<sup>92</sup> However, the ceremony did not go smoothly, almost as if foreshadowing what would happen during the process of drafting the constitutional text.<sup>93</sup> When a children's choir prepared to sing the national anthem, some delegates interrupted them, claiming loudly for the people imprisoned during the social outbreak.<sup>94</sup> For many, the contrast was eloquent. The rights of imprisoned people, who many saw

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84. See generally Contesse, *supra* note 71.

85. *Id.*

86. *Id.*

87. *Id.* In fact, a spiritual indigenous leader, who faced terrorism-related charges and was in prison, won a seat at the Convention. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*; see Reuters, *Chile's Government Fails to Secure Critical Number of Seats Drafting New Constitution*, NBC NEWS (May 17, 2021, 4:29 PM), <https://www.nbcnews.com/news/latino/chiles-government-fails-secure-critical-number-seats-drafting-new-cons-rcna946>.

91. See Rodrigo P. Correa G., *The Paradoxical Chilean Constitutional Moment 9* (June 8, 2024) (unpublished manuscript) (on file with the *Rutgers University Law Review*).

92. See Contesse, *supra* note 71.

93. T13, *Convención Constitucional: Himno Nacional Interrumpido por Proclamas de Constituyentes*, YOUTUBE (July 4, 2021), <https://www.youtube.com/watch?v=z0CBZ9Z7zk8>.

94. See *id.*

as mere criminals who had destroyed the city, were being used to silence the choir of children who looked on bewildered by what was happening: The constituent power showed its ugly face.

Then came the election of the assembly's board.<sup>95</sup> After several rounds of ballots, Elisa Loncón, a Mapuche indigenous female and academic, was elected President of the assembly; Jaime Bassa, a professor of constitutional law at the University of Valparaíso, and one of the members of the group of constitutional lawyers who had been working for a decade on constitutional change, was elected Vice-President.<sup>96</sup> The image was striking: In a country used to state organs managed by white men from Santiago wearing suits and ties, the country's first constituent convention would be led by an indigenous woman and a lawyer who became known for not wearing a suit and tie in a congressional committee session.<sup>97</sup>

The assembly did not have rules of procedure, so it had to set its own rules of procedure first.<sup>98</sup> Some of the issues that would color the development of the process surfaced at this stage. In mid-August, the front page of the country's main national newspaper, *El Mercurio*, carried an eloquent headline: "After the elimination of 'Republic of Chile,' rules of procedure include the principle of 'plurinationality.'"<sup>99</sup> The message was clear—the Constitutional Convention had eliminated nothing less than *the Republic of Chile*. Further, the republic was being replaced with "the principle of plurinationality." The fear of plurinationality had arrived.

#### a. *The Plurinational Ghost*

Two days before the September 2022 referendum that rejected the constitutional proposal, the *New York Times* ran a story entitled, "The

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95. See Soledad Quartucci, *Elisa Loncón, Indigenous Mapuche Professor*, LATINA REPUBLIC (July 22, 2021), <https://latinarepublic.com/elisa-loncon-indigenous-mapuche-professor/>.

96. See *id.*; *Chile's Constitutional Convention Appoints Mapuche Woman to Chair It*, MERCOPRESS (July 5, 2021, 7:22 AM), <https://en.mercopress.com/2021/07/05/chile-s-constitutional-convention-appoints-mapuche-woman-to-chair-it>.

97. Catalina Batarce & Pablo Basadre, *Insólita Discusión por Abogado que Llegó sin Corbata a Comisión de Defensa: Diputados Aseguraron que Iba Muy "Suelto de Cuerpo"*, LA TERCERA (July 18, 2018), <https://www.latercera.com/nacional/noticia/insolita-discusion-abogado-llego-sin-corbata-comision-defensa-diputados-aseguraron-iba-suelto-cuerpo/247192/>.

98. *After the Elimination of "Republic of Chile," Rules of Procedure Include the Principle of "Plurinationality,"* EL MERCURIO, Aug. 14, 2021, at 1.

99. *Id.*

Contentious Vote in Chile That Could Transform Indigenous Rights.”<sup>100</sup> The article explained how the proposal drafted by the Constitutional Convention was at the forefront of indigenous peoples’ rights, citing specialists in the field from the United States, Canada and New Zealand.<sup>101</sup> The extremely progressive norms on indigenous rights were, in the words of a prominent Chilean constitutional lawyer, what would possibly define the referendum.<sup>102</sup> The proposal was widely rejected,<sup>103</sup> and as discussed below, the rhetoric that accompanied the inclusion of generous indigenous rights standards was one of the main casualties of the September 2022 rejection.<sup>104</sup>

One of the most overdue demands in Chile is the recognition of the rights of indigenous peoples. Despite the fact that about twelve percent of the population identifies itself as belonging to an indigenous tribe, Chile is one of the two Latin American countries that does not recognize indigenous peoples in the Constitution.<sup>105</sup> As in many other places, the relationship between the government and indigenous peoples has historically been one of dispossession and discrimination.<sup>106</sup> The social outburst had, at least in its representation and aesthetics, a marked emphasis on the need for recognition of indigenous peoples,<sup>107</sup> which was clearly reflected in the number of Mapuche flags flying during the October 2019 protests.<sup>108</sup>

The constituent process was largely seen as an opportunity to repair past injustices, starting with the election of Elisa Loncón as president of the Constitutional Convention.<sup>109</sup> That Chile’s first constituent assembly

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100. Ana Lankes, *The Contentious Vote in Chile That Could Transform Indigenous Rights*, N.Y. TIMES (Sept. 2, 2022), <https://www.nytimes.com/2022/09/02/world/americas/chile-constitution-vote-indigenous.html>.

101. *Id.*

102. Legal scholar, Javier Couso, observed: “When we started this constitutional process, we never imagined that this would be the topic on which the outcome of the plebiscite will probably be defined . . .” *Id.*

103. See *infra* text accompanying notes 109–10.

104. See *infra* text accompanying note 110.

105. See Jorge Contesse, *Indigenous Peoples in Chile: The Quest to Become a Constitutional Entity*, 55 *STUD. L., POL. & SOC.* 19, 20 (2011).

106. See generally *id.*

107. See Patricia Rodríguez, *Chilean Protesters Are Waving the Mapuche flag. What’s the Mapuche Flag, and Who’s Hoisting It?*, WASH. POST (Nov. 11, 2019, 7:00 AM), <https://www.washingtonpost.com/politics/2019/11/11/chilean-protesters-are-waving-mapuche-flag-whats-mapuche-flag-whos-hoisting-it/>.

108. See *id.*

109. See Antonia Rivas, *Indigenous Peoples Have a Lot Riding on Chile’s New Constitution*, WORLD POL. REV. (Sept. 8, 2021), <https://www.worldpoliticsreview.com/indigenous-peoples-see-recognition-under-chile-constitution/?one-time-read-code=539721720368602117926>.

was led not only by a woman, but a *Mapuche* woman was not only unprecedented and unthinkable a short time ago, but a sign that “Chile had changed,” as commentators used to say at the time.<sup>110</sup> The assembly had a very large and even disproportionate participation of indigenous delegates, considering the number of indigenous people in the country.<sup>111</sup> This fact, together with the creeping rhetoric among some of its delegates, was marking the tinge of profound and radical change in this matter, to the point that, a year later, it was derogatorily called an “indigenist” proposal.<sup>112</sup>

Among the proposal’s most salient features was the redefinition in Article 1.1 of the Chilean State as “plurinational.”<sup>113</sup> The principle of plurinationality essentially meant that Chile would be defined as a country inhabited by several nations under the organization of a unitary State.<sup>114</sup> The constitutional proposal explicitly recognized the right of indigenous peoples to be consulted in light of international human rights law, and in one case, it established the duty of government agencies to obtain indigenous peoples’ consent before adopting certain measures.<sup>115</sup> This norm was apparently one of the most resisted among Chilean voters.<sup>116</sup> In addition, by recognizing legal pluralism, i.e., the possibility that indigenous peoples could manage certain social conflicts under their own rules, conservative commentators spread the idea that there would

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110. Paulina Astroza Suárez, *Chile: Constituyente, elecciones, ¿y un próximo giro a la izquierda?*, NUEVA SOCIEDAD (July 2021), <https://nuso.org/articulo/chile-constituyente-elecciones-y-futuro-giro-a-la-izquierda/>. The director of one of the most cited polls in Chile noted, “[t]he symbolic phrase that was installed in the 2019 protests, that it was not 30 pesos but 30 years of injustices, becomes a reality after these elections [of constitutional delegates]. Chile has changed and will probably be a different country after this weekend.” “Será un país distinto”: 5 Claves para Entender los Inéditos Resultados, BBC MUNDO (May 17, 2021), <https://www.bbc.com/mundo/noticias-america-latina-57140964>.

111. “Será un país distinto”: 5 Claves para Entender los Inéditos Resultados, BBC Mundo (May 17, 2021), <https://www.bbc.com/mundo/noticias-america-latina-57140964>.

112. See Jorge Jaraquemada, *Una Constitución Indigenista para Chile*, EL LÍBERO (May 25, 2022), <https://ellibero.cl/libero-constituyente/una-constitucion-indigenista-para-chile/>; see Lankes, *supra* note 100.

113. Draft Article 1.1 states, “Chile is a social and democratic State based on the rule of law. It is plurinational, intercultural, regional and ecological.” CONSTITUCIÓN DE LA REPÚBLICA DE CHILE (Draft July 4, 2022), CONSTITUTE PROJECT, [https://www.constituteproject.org/constitution/Chile\\_2022D](https://www.constituteproject.org/constitution/Chile_2022D).

114. See Nick Burns, *Chile Could Become “Plurinational.” What Does That Mean?*, AMERICAS Q. (Aug. 29, 2022), <https://www.americasquarterly.org/article/chile-could-become-plurinational-what-does-that-mean/>.

115. Jaraquemada, *supra* note 112.

116. Mariela Herrera, *René Tapia Herrera: Pluralismo jurídico radical en la Convención: cada vez más cerca de la plurinacionalidad de Bolivia*, EL LÍBERO (Mar. 17, 2022), <https://ellibero.cl/libero-constituyente/rene-tapia-herrera-pluralismo-juridico-radical-en-la-convencion-cada-vez-mas-cerca-de-la-plurinacionalidad-de-bolivia/>.

be “parallel jurisdictions,” like in Bolivia.<sup>117</sup> With the recognition of territorial autonomy, the idea that the unity of the State would end was cemented, notwithstanding an express provision that gave the Supreme Court the power to set unique jurisprudence on limitations to territorial powers.<sup>118</sup> A fear was installed and disseminated that made it impossible for the rights of indigenous peoples not to be seen as a threat to Chilean sovereignty and territorial integrity.

The behavior of many delegates did not help to allay fears, but rather served to confirm the fears of many. The plurinational ghost was fed, and it was never possible to reverse the idea that the headline in *El Mercurio* installed at the beginning of the process: Plurinationality was a way of “eliminating the republic of Chile.”<sup>119</sup>

#### b. Other Factors

Plurinationality was undoubtedly a key factor, and perhaps the main one, in the resounding failure of the Constitutional Convention proposal. But it was not the only one. The proposal had almost four-hundred articles, making it virtually impossible for an average voter to reasonably understand all that was proposed.<sup>120</sup> “Battles” had to be chosen. The Convention offered a new political regime that sought to give more power to Congress at the expense of the Executive, but this change left no one satisfied.<sup>121</sup> In an early proposal, some delegates sought to abolish the Senate.<sup>122</sup> It was accused of being an aristocratic chamber, distant from the people and close to the interests of the rich.<sup>123</sup> The proposal did not prosper, but the idea had been installed: After two-hundred years of

117. *Id.*

118. *See id.*

119. *After the Elimination of “Republic of Chile,” Rules of Procedure Include the Principle of “Plurinationality,”* EL MERCURIO, Aug. 14, 2021, at 1.

120. CONSTITUCIÓN DE LA REPÚBLICA DE CHILE (Draft July 4, 2022), CONSTITUTE PROJECT, [https://www.constituteproject.org/constitution/Chile\\_2022D](https://www.constituteproject.org/constitution/Chile_2022D).

121. Natalia A. Ramos Miranda et al., *Chileans, Offered Left-Right Turns with Constitution, Choose Neither*, REUTERS (Dec. 19, 2023, 5:03 AM), <https://www.reuters.com/world/americas/chileans-reject-conservative-draft-constitution-too-extreme-2023-12-19/>.

122. *Chile’s Constitutional Assembly Votes to Replace Senate with New Chamber*, REUTERS (Apr. 14, 2022, 12:29 PM), <https://www.reuters.com/world/americas/chiles-constitutional-assembly-votes-replace-senate-with-new-chamber-2022-04-14/>.

123. *See Fabian Cambero, More Chileans Now Reject New Constitution Than Support it, Polls Say*, REUTERS (Apr. 4, 2022, 11:47 AM), <https://www.reuters.com/world/americas/rejection-chiles-new-constitution-reaches-record-high-survey-2022-04-04/>.

existence, the assembly wanted to eliminate the Senate.<sup>124</sup> The constitutional draft also proposed an overhaul of the Judiciary, starting with the change of name in the Constitution from “Judicial Branch” to “Judicial Systems.”<sup>125</sup> It created a body in charge of administering the appointment of judges, a reform that many experts and judges demanded.<sup>126</sup> However, the idea that was installed was that the Convention’s aim was to weaken judicial independence.<sup>127</sup> The draft Constitution—labeled as “the world’s most progressive constitution”—recognized the sexual and reproductive rights of women as no other constitution in the world does.<sup>128</sup> But opponents of the text went so far as to claim that the Convention’s proposal sought to legalize abortion even up to the ninth month of pregnancy.<sup>129</sup> The draft also included recognition of the right to housing—which does not exist in the 1980

124. See Rocío Montes, *La Convención Constitucional de Chile Sella el Fin del Senado Tras 200 Años de Historia*, EL PAÍS (Apr. 13, 2022, 10:42 PM), <https://elpais.com/internacional/2022-04-14/la-convencion-constitucional-de-chile-sella-el-fin-del-senado-tras-200-anos-de-historia.html>; *Chile: La Convención Constitucional Aprobó Eliminar el Senado y Crear una Nueva Cámara Legislativa*, LA NACION (Apr. 15, 2022), <https://www.lanacion.com.ar/el-mundo/chile-la-convencion-constitucional-aprobo-eliminar-el-senado-y-crear-una-nueva-camara-legislativa-nid15042022/>.

125. CONSTITUCIÓN DE LA REPÚBLICA DE CHILE (Draft July 4, 2022), CONSTITUTE PROJECT, [https://www.constituteproject.org/constitution/Chile\\_2022D](https://www.constituteproject.org/constitution/Chile_2022D). The actual formula is important to consider. In Spanish, “Judicial Branch” is translated as Judicial “Power.” By removing the word “Power,” many accused the Convention of wanting to lessen the courts’ power to adjudicate, and to diminish the courts’ stature as a branch of government. See Nick Burns, *Chile’s Proposed Constitution: 7 Key Points*, AMERICAS Q. (July 7, 2022), <https://www.americasquarterly.org/article/chiles-proposed-constitution-7-key-points/>.

126. See generally, e.g., Mauricio Olave, *Bienvenido el Consejo de la Justicia*, LA TERCERA (Mar. 30, 2022, 8:20 AM), <https://www.latercera.com/opinion/noticia/bienvenido-el-consejo-de-la-justicia/EKCSHT4YRREH7IXCWVQIIQJMVMI/>; Alberto Merino Lefenda, *Un Modelo Ciudadano de Justicia: No Basta Hablar de Independencia Judicial*, 7 REVISTA DE ESTUDIOS JUDICIALES 7 (2022); Eduardo Aldunate Lizana, *Gobierno de la Judicatura. Concepto y Soluciones Comparadas para la Fundamentación de una Propuesta de Reforma*, 7 REVISTA DE ESTUDIOS JUDICIALES 35 (2022).

127. See Burns, *supra* note 125.

128. John Bartlett, *Vote on World’s Most Progressive Constitution Begins in Chile*, GUARDIAN (Sept. 4, 2022, 5:00 AM), <https://www.theguardian.com/world/2022/sep/04/constitution-approve-vote-chile>. See also “*In Chile’s New Constitution, We Are Free*,” PROGRESSIVE INT’L (Aug. 30, 2022), <https://progressive.international/wire/2022-08-30-in-chiles-new-constitution-we-are-free/en> (reciting a statement that was signed by some of the world’s most prominent feminists and female intellectuals, including Judith Butler, Angela Davis, Silvia Federici, Nancy Fraser, Chantal Mouffe, and Aruna Roy).

129. Eduardo Córdova, “*Se puede terminar con la vida incluso a los 9 meses*”: Felipe Kast Reflexionó por Aprobación de Norma Sobre el Aborto en la Convención, LA NACION (Mar. 16, 2022), <https://www.lanacion.cl/se-puede-terminar-con-la-vida-incluso-a-los-nueve-meses-felipe-kast-hizo-particular-reflexion-por-aprobacion-de-norma-sobre-el-aborto-en-la-convencion/>.



Constitution—but detractors claimed that the proposed rules would allow the government to take people’s homes away from them.<sup>130</sup> On social security, one of the central points of political discussion in recent years, opponents of the proposal said that the proposal did not guarantee workers’ ownership of their pension funds, because the Convention had rejected a regulation that sought to expressly state the ownership of these funds, a regulation submitted as a citizens’ initiative with strong popular support.<sup>131</sup>

The Convention seemed to operate under a theory of constituent power that generated a sense of vertigo among Chilean voters. On the day of its inauguration, the Convention’s president called her fellow delegates to “re-found” the country.<sup>132</sup> The refoundation rhetoric accompanied the process, and detractors accused it as a tool to erase the country’s constitutional history, innovating in everything without attending to the wishes of part of the population that did not see itself reflected in the Convention’s progressive views.<sup>133</sup>

At the end of 2021, the Convention was just getting ready to begin deliberation of substantive norms, as the first months had been entirely devoted to elaborating the Convention’s rules of procedure.<sup>134</sup> At that time, an important event took place: the election of Gabriel Boric as President of Chile.<sup>135</sup> Boric, a leftist deputy and a prominent former student leader, embodied the spirit of the October 2019 revolt. He had been a fierce opponent of the government of Sebastián Piñera, had

130. See Antonia Flores & Ariadna Rodríguez, *¿Las Viviendas Serán del Estado si Gana el “Apruebo”?*, VERGARA 240 (July 21, 2022), <https://vergara240.udp.cl/las-viviendas-seran-del-estado-si-gana-el-apruebo-falso/>.

131. See Gabriela Pizarro, *¿Perderé Mi Casa o Mis Fondos de Pensiones Con La Nueva Constitución?*, CIPER (July 26, 2022), <https://www.ciperchile.cl/2022/07/26/perdere-mi-casa-o-mis-fondos-de-pensiones-con-la-nueva-constitucion/>.

132. See Maximiliano Alarcón G., et al., *Con Llamado a Refundar Chile, Convención Constituyente Elige a Mapuche Elisa Loncón para Presidir el Proceso Político Más Importante en 200 Años*, INTERFERENCIA (July 5, 2021, 7:30 AM), <https://interferencia.cl/articulos/con-llamado-refundar-chile-convencion-constituyente-elige-mapuche-elisa-loncon-para>.

133. See María José Errázuriz L., *La Nueva Constitución de Chile, que Propone Refundar el País, Divide a los Chilenos*, ABC INT’L (July 4, 2022, 3:24 PM), [https://www.abc.es/internacional/abci-nueva-constitucion-chile-propone-refundar-pais-divide-chilenos-202207032039\\_noticia.html](https://www.abc.es/internacional/abci-nueva-constitucion-chile-propone-refundar-pais-divide-chilenos-202207032039_noticia.html).

134. See Richard M. Sanders, *Chile’s Constitutional Convention: A Bumpy Start, Much Work Ahead*, WILSON CTR, at 1 (Dec. 2021), [https://www.wilsoncenter.org/sites/default/files/media/uploads/documents/Chile%E2%80%99s%20Constitutional%20Convention\\_A%20Bumpy%20Start%2C%20Much%20Work%20Ahead.pdf](https://www.wilsoncenter.org/sites/default/files/media/uploads/documents/Chile%E2%80%99s%20Constitutional%20Convention_A%20Bumpy%20Start%2C%20Much%20Work%20Ahead.pdf).

135. See Karol Suarez et al., *Leftist Gabriel Boric, 35, Wins Chile’s Presidential Election*, CNN, <https://www.cnn.com/2021/12/19/americas/chile-election-gabriel-boric-intl-nk/index.html> (Dec. 20, 2021, 4:28 AM).

confronted the military patrolling the streets of Santiago, had incessantly denounced the human rights violations committed during that time, and led the constitutional accusation against Piñera's Secretary of the Interior, who a year and a half before had buried Bachelet's constitutional project in a speech to Chile's business leaders.<sup>136</sup>

Boric won the presidency in the second round of the presidential election.<sup>137</sup> In the first round, there was an electoral surprise: José Antonio Kast, the far-right candidate, had obtained the first majority.<sup>138</sup> As months before with the election of the assembly delegates, once again the ground was shaken. But this time, the scales were tipped completely the other way: Kast was not only opposed to the adoption of a new Constitution, he was also one of the few politicians who still openly defended the legacy of Pinochet's dictatorship.<sup>139</sup> Kast questioned the criminal responsibility of military officers convicted of serious human rights violations during the dictatorship,<sup>140</sup> and his anti-immigrant, anti-reproductive rights and, in general, anti-global agenda put him on a par with some of his associates and friends, such as Jair Bolsonaro in Brazil, Viktor Orbán in Hungary or Donald Trump in the United States.<sup>141</sup>

In an interview I gave before the first presidential round, I pointed out that the work of the Convention should not be mixed up with the outcome of the presidential election.<sup>142</sup> I was wrong. A few months after the work of the Convention began, the attitude against it was increasing and, more importantly, one of its main opponents—José Antonio Kast—obtained the first electoral majority.

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136. See James Gerardo Lamb, *Chile: A Social Explosion*, BERKELEY REV. LATIN AM. STUD., Fall 2020, at 23, <https://clacs.berkeley.edu/chile-social-explosion>.

137. See *id.*

138. See John Bartlett, *Chile's Right Rejoices After Pro-Pinochet Candidate Wins Presidential First Round*, GUARDIAN (Nov. 22, 2021, 1:18 PM), <https://www.theguardian.com/world/2021/nov/22/jose-antonio-kast-chile-right-wing-presidential-election>.

139. See Carlos Durán & Gabriel Rojas, *The Chilean Republican Party and the "Social Outburst": Political Discourse, Identity, and Antagonism*, 29 REVISTA TEMAS SOCIOLÓGICOS 223, 234 (2021).

140. See José Antonio Kast: "Conozco a Miguel Krassnoff y viéndolo no creo todas las cosas que se dicen de él," EL MOSTRADOR (Nov. 9, 2017), <https://www.elmostrador.cl/noticias/pais/2017/11/09/jose-antonio-kast-conozco-a-miguel-krassnoff-y-viendolo-no-creo-todas-las-cosas-que-se-dicen-de-el/>.

141. See Natalia A. Ramos Miranda, *Chile's Bolsonaro? Hard-Right Kast Rises with Frank Talk, Crime Focus*, REUTERS (Nov. 16, 2021, 6:07 AM), <https://www.reuters.com/world/americas/chiles-bolsonaro-hard-right-kast-rises-with-frank-talk-crime-focus-2021-11-16/>; *Latin America's New Hard Right: Bukele, Milei, Kast and Bolsonaro*, ECONOMIST (Apr. 1, 2024), <https://www.economist.com/the-americas/2024/04/01/latin-americas-new-hard-right-bukele-milei-kast-and-bolsonaro>.

142. CUNY TV, *The Unreachable Supermajority for Constitutional Reform – Jorge Contesse*, YOUTUBE (May 2, 2021), <https://www.youtube.com/watch?v=oxDFRbKQB7A>.

Ultimately, the Chilean people elected Boric,<sup>143</sup> and somehow it seemed that support for the Convention was renewed. But there was a very important number of voters who did not see with satisfaction the discourse that accompanied the Convention and the political leaderships that supported it.

The substantive debate continued. At the end of March 2022, three months from the end of the Convention's work, polls for the first time showed that support for the constitutional proposal was less than its rejection.<sup>144</sup> During "four critical days,"<sup>145</sup> public trust in the Constitutional Convention fell seven points to forty-four percent; distrust increased seven points to fifty-five percent;<sup>146</sup> the notion that the Convention was "reaching agreements needed to draft the proposal" fell by ten points to forty-two percent;<sup>147</sup> seventy-two percent of the people showed support to define Chile as a "multicultural, not plurinational" society;<sup>148</sup> the perception that "Chile is on the wrong track" increased twelve points, reaching fifty-two percent;<sup>149</sup> and seventy-five percent of the people showed support to recognizing the "freedom to choose" concerning pensions.<sup>150</sup> The Reject option was ahead of the Approve option for the first time—and it never changed.

At that time, another newspaper headline made the news: "Workers will no longer be the owners of their pension savings."<sup>151</sup> The quote was from Bernardo Fontaine, a right-wing economist and delegate close to the business world.<sup>152</sup> In the interview, delegate Fontaine noted that the Convention's constitutional proposal would allow the government to keep

143. *Chile Swears in New President Gabriel Boric in 'historic shift'*, AL JAZEERA (Mar. 11, 2022), <https://www.aljazeera.com/news/2022/3/11/chile-swears-in-new-president-gabriel-boric-historic-shift>.

144. Macarena Segovia & Paulina Toro, *Los Cuatro Días Clave que Llevaron al Rechazo al Tope de las Encuestas y los Cinco Meses de Campaña para Mantener esa Ventaja*, CIPER (Sept. 5, 2022), <https://www.ciperchile.cl/2022/09/05/los-cuatro-dias-clave-que-llevaron-al-rechazo-al-tope-de-las-encuestas-y-los-cinco-meses-de-campana-para-mantener-esa-ventaja/>.

145. *Id.*

146. *Encuesta, Estudio 429 – Quinta Semana de Marzo*, PLAZA PÚBLICA – CADEM 10 (Apr. 1, 2022), <https://cadem.cl/wp-content/uploads/2022/04/Track-PP-429-Marzo-S5-VF.pdf>.

147. *Id.* at 13.

148. *Id.* at 16.

149. *Id.* at 21.

150. *Id.* at 18.

151. Ariel Lara, "Los trabajadores ya no serán más dueños de sus ahorros previsionales," LAS ÚLTIMAS NOTICIAS (Mar. 31, 2022), <https://www.lun.com/Pages/NewsDetail.aspx?dt=2022-03-31&NewsID=488577&BodyID=0&PaginaId=18>.

152. See Karin Fischer, *Atlas Think Tanks: Manufacturing "Rechazo" in Chile*, THINK TANK NETWORKS (Aug. 15, 2022), [http://thinktanknetworkresearch.net/blog\\_ttni\\_en/atlas-think-tanks-manufacturing-rechazo-in-chile/](http://thinktanknetworkresearch.net/blog_ttni_en/atlas-think-tanks-manufacturing-rechazo-in-chile/).

workers' pension funds.<sup>153</sup> Despite the fierce rebuke by several delegates, the idea was widely circulated.<sup>154</sup> The Convention's rejection of the popular initiative for the rule that sought to declare workers' pension funds non-expropriable did nothing to dispel that specter.<sup>155</sup>

After this episode, and that critical week, the Reject option was always ahead. The idea that the right to housing allowed the government to take away people's homes; that indigenous peoples would have privileges that no other Chilean would have, including that their territories could not be entered without a permit; that it a woman may have an abortion at nine months of pregnancy, and a long etcetera, never stopped circulating.<sup>156</sup> This was compounded by the behavior of few, but vociferous delegates, who denigrated the office they held.<sup>157</sup> The Convention was accused of offering a "woke and fiscally irresponsible mess" as a draft.<sup>158</sup> The right charged that it had been completely marginalized from the main agreements adopted.<sup>159</sup> The climate was one of great division, something that made it simply impossible to approve a new Constitution that by definition is called to unite.

153. *See id.*

154. *See* Hernán Claro, *Convencionales Critican a Fontaine Tras Asegurar que Trabajadores No Serán Dueños de Ahorros Previsionales*, EL DÍNAMO (Mar. 31, 2022), <https://www.eldinamo.cl/politica/2022/03/31/convencionales-critican-a-fontaine-tras-asegurar-que-trabajadores-no-seran-duenos-de-ahorros-previsionales/>; Elías Miranda, *Not Check: ¿Los Trabajadores Ya No Serán Dueños de Sus Fondos Previsionales?*, FASTCHECK (Aug. 19, 2022, 5:18 PM), [https://www.fastcheck.cl/2022/08/19/not-check-los-trabajadores-ya-no-seran-duenos-de-sus-fondos-previsionales/#google\\_vignette](https://www.fastcheck.cl/2022/08/19/not-check-los-trabajadores-ya-no-seran-duenos-de-sus-fondos-previsionales/#google_vignette).

155. Cecilia Román, *Comisión de la CC Rechaza en General "Con mi plata no" y Aprueba Propuesta de Coordinadora No+AFP*, EMOL (Mar. 29, 2022, 2:15 PM), <https://www.emol.com/noticias/Economia/2022/03/29/1056390/convencion-pensiones-seguridad-social-afp.html>.

156. *See* Eloise Barry, *Why Chileans Rejected a New, Progressive Constitution*, TIME (Sept. 5, 2022, 6:57 AM), <https://time.com/6210924/chile-rejects-new-constitution-referendum/>.

157. Some infamous scenes included a convention member singing with a guitar in the assembly plenary, "I am a constituent, and I am not a delinquent; I am a constituent, and the delinquent is the president"; the same delegate voting from the shower; a delegate insulting her colleagues; delegates attending in disguise. *See* Noam Titelman & Tomás Leighton, *¿Por qué ganó el rechazo a la nueva Constitución chilena?*, NUEVA SOCIEDAD (Sept.–Oct. 2022), <https://nuso.org/articulo/301-rechazo-constitucion-chilena/>.

158. The Economist (@The Economist), X (July 6, 2022, 7:27 PM) <https://twitter.com/TheEconomist/status/1544825415457509377>; *see also* John Bartlett & Samantha Schmidt, *Chile Writes a Woke Constitution. Are Chileans Ready for It?*, WASH. POST (July 5, 2022, 7:14 PM), <https://www.washingtonpost.com/world/2022/07/05/chile-constitution-draft-boric/>.

159. *See* Guillermo Larraín et al., *How Not to Write a Constitution: Lessons From Chile*, 194 PUB. CHOICE 233, 234 (2023).

## 3. The 2023 Process

After the September 2022 referendum, a period of relative uncertainty followed. On the one hand, constitutional lawyers and commentators sought to answer the fundamental question of why the proposal had failed so miserably.<sup>160</sup> On the other hand, political leaders, aware of the need to seek an institutional solution to the 2019 crisis, made efforts to bring positions closer to generate a new attempt.<sup>161</sup>

After three months of negotiations, finally the political parties announced an agreement to enable a new constituent process.<sup>162</sup> Like a pendulum, this process would be marked by contrasts with the previous process. The main feature of this new constituent moment was the way in which Congress gained control of the process.<sup>163</sup> In the 2021-22 process, Congress understood that its legitimacy was virtually null, and therefore, it was necessary to open space for independent candidacies.<sup>164</sup> This was one of the surprises of the election of delegates in May 2021: As explained, it was expected that, given the composition of the lists of candidates, the right would be well represented, the left—which was divided—would split many of its seats, and the independents would have very few seats, if any.<sup>165</sup> Just the opposite happened. Independents amounted to the largest portion of the seats on the Convention.<sup>166</sup> On the

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160. See David Landau, *Introduction: Symposium on the Chilean Constitutional Referendum*, INT'L J. CONST. L. BLOG (Sept. 23, 2022), <https://www.iconnectblog.com/introduction-symposium-on-the-chilean-constitutional-referendum/>; Roberto Gargarella, *Rejection of the New Chilean Constitution: Some Reflections*, OXFORD HUM. RTS. HUB (Sept. 14, 2022), <https://ohrh.law.ox.ac.uk/rejection-of-the-new-chilean-constitution-some-reflections/>; María Carrasco, *Why We Failed to Approve the New Chilean Constitution: The Need for a Cultural Transformation*, LSE BLOG (Sept. 15, 2022), <https://blogs.lse.ac.uk/latamcaribbean/2022/09/15/why-we-failed-to-approve-the-new-chilean-constitution/>; Rodrigo Kaufmann, *Chile's Constitutional Endeavour Goes On*, VERFASSUNGSBLOG (Sept. 8, 2022), <https://verfassungsblog.de/chile-goes-on/>.

161. See Kaufmann, *supra* note 160.

162. Christopher Ulloa, *Partidos Políticos Logran un Acuerdo para un Nuevo Proceso Constituyente en Chile*, CNN EN ESPAÑOL (Dec. 12, 2022, 11:18 AM), <https://cnnspanol.cnn.com/2022/12/13/partidos-politicos-acuerdo-nuevo-proceso-constituyente-chile-orix/#0>.

163. See AQ Editors, *Reaction: Chile's New Constitutional Roadmap*, AMERICAS Q. (Jan. 11, 2023), <https://www.americasquarterly.org/article/reaction-chiles-new-constitutional-roadmap/>.

164. See *id.*

165. See *id.*

166. As noted by Escudero and Calabrán: "It was the independent lists that surprised with 48 convention delegates, 31% of the Convention. If to this figure are added the independents elected on party lists, the number rises to 98 (63%). Moreover, if we consider that the indigenous representatives do not belong to parties, the independents reach 74% of the Convention (115)." See María Cristina Escudero & Claudio Calabrán, *Una*

one hand, this was a cause for joy, because the process was being built in opposition to the establishment parties that had neglected the demands of Chileans.<sup>167</sup> On the other hand, however, the significant role of independents made it difficult to negotiate broad agreements, since they did not respond to party agreements.<sup>168</sup>

Upon seizing the process, Congress elaborated an itinerary with three characteristics. First, the process would no longer be conducted on a “blank slate,” as had been the characteristic of the previous process.<sup>169</sup> The idea of a blank slate, which was popular even in moderate sectors, was associated with the overflowing exercise of constituent power and the refoundational impetus that had accompanied the Convention.<sup>170</sup> Thus, Congress enacted twelve “bases” or “borders” that would govern the process,<sup>171</sup> reflecting substantive agreements on what the new process must and must not address.<sup>172</sup> Many, if not all, of these bases were adopted in response to the 2022 Draft Constitution.<sup>173</sup> Some of the most salient bases included: ensuring that Chile is a democratic republic, and a social and democratic State based on the rule of law; respecting the patriotic emblems, national coat of arms, and anthem; protecting fundamental rights, such as freedom of conscience and worship, the right to property, to life, freedom of education; the need to enshrine states of

*Convención No Convencional: La Experiencia Chilena*, 21 IDEAS (2023), <https://journals.openedition.org/ideas/15024> (last visited Nov. 17, 2024).

167. Eva Vergara, *Chilenos Eligen Independientes Para Escribir Su Constitución*, ASSOCIATED PRESS (May 17, 2021, 5:26 PM), <https://apnews.com/article/noticias-3917d4dbbae0597293621727e2d74dc6>.

168. See Larraín et al., *supra* note 159 (“In the context of an acute crisis of representation, the rules created for the selection of delegates allowed voting for lists of independents. Instead of overcoming the crisis, these selection rules exacerbated it by facilitating a large proportion of votes for candidates without party leadership and comprehensive reform programs, most of them on the left.”).

169. See Christian Ramírez, *¿Qué Tan Cierto Es que la Elaboración de la Constitución “partirá de cero”? Falso Problema y Divergencias Lingüísticas en el Debate Constitucional*, 133 CUADERNOS DE POLÍTICA EXTERIOR ARGENTINA 103, 103 (2021); El Mercurio (@ElMercurio\_cl), X (Dec. 3, 2019, 7:00 PM) [https://x.com/ElMercurio\\_cl/status/1202014652651016192](https://x.com/ElMercurio_cl/status/1202014652651016192); See generally ANA MARÍA GARCÍA BARZELATTO & ENRIQUE NAVARRO BELTRÁN, *¿HOJA EN BLANCO? HACIA UNA NUEVA CONSTITUCIÓN CHILENA: LO QUE DEBEMOS SABER* (2020); LA HOJA EN BLANCO: CLAVES PARA CONVERSAR SOBRE UNA NUEVA CONSTITUCIÓN (Rocío Lorca et al. eds., 2020).

170. See Claudia Heiss & Julieta Suárez-Cao, *Constitution-Making in the 21st Century: Lessons from the Chilean Process*, 57 POL. SCI. & POL. 282, 283 (2024).

171. Paz Escárte, *Significados y Alcances de las 12 Bases Acordadas para el Inicio de un Nuevo Proceso Constituyente*, UCHILE CONSTITUYENTE

(Dec. 1, 2022), <https://constituyente.uchile.cl/clavesconstituyentes/significados-y-alcances-de-las-12-bases-acordadas-para-el-inicio-de-un-nuevo-proceso-constituyente/>.

172. *Id.*

173. See *id.*

exception in matters of order and security in the constitution; to constitutionally define the existence of the Armed Forces and the Forces of Order and Security with subordination to civilian power, with express mention of the police; and to recognize indigenous peoples “as part of the Chilean nation,” not as nations with self-governing powers.<sup>174</sup>

Second, the process was built on the basis of three bodies. First, Congress appointed a Commission of Experts, with twelve representatives from the right and twelve from the left.<sup>175</sup> Then, a Constitutional Council that would be elected by the citizenry, as was the Convention in the previous process.<sup>176</sup> An important difference was that the Council would be much smaller in size, and its representatives would be elected under the election rules of the Senate, which gave an advantage to the right over the left.<sup>177</sup> The Expert Commission would elaborate a draft to be submitted to the Constitutional Council.<sup>178</sup> The idea of having experts in charge of the process was a response to the previous process, which many criticized as having been left “in the hands of inexperienced people,” which, it was repeated over and over, had resulted in a text of poor technical quality.<sup>179</sup> Finally, there would be an Admissibility Committee charged with overseeing respect at all times of the twelve fundamental bases set up by Congress.<sup>180</sup> This committee was known as the “arbitrators.”<sup>181</sup>

The new process was *very* different from the previous one. While it sought to give the people the possibility of obtaining a new

174. *Id.* The bases were ultimately adopted as a constitutional reform to enable the second constituent process. See Constitución Política de la República de Chile [C.P.] [Constitution] art. 154 Const. (Chile).

175. See Verónica Undurraga, *The Chilean Constitutional Process: A Closed Chapter*, CONSTITUTIONNET (Dec. 22, 2023), <https://constitutionnet.org/news/voices/chilean-constitutional-process-closed-chapter>.

176. *Id.*

177. The 2021-22 Constitutional Convention had 155 delegates. Claudia Heiss, *The New Chilean Constituent Process: Exercising the ‘Muscle’ of Public Participation in an Adverse Context*, CONSTITUTIONNET (Aug. 29, 2023), <https://constitutionnet.org/news/new-chilean-constituent-process-public-participation>. The Constitutional Council had fifty members. Natalia A. Ramos Miranda, *Chile’s Voters Set to Take Big Step in Constitution Redraft 2.0*, REUTERS (May 5, 2023, 9:06 AM), <https://perma.cc/4SJR-L2JE>.

178. See Escárate, *supra* note 171.

179. It is worth noting that there were several constitutional lawyers in the Constitutional Convention. See Jorge Aillapán Quinteros, *La Constitución de los Expertos: Imperfecta, Jamás Vulgar*, CIPER (Dec. 13, 2022), <https://www.ciperchile.cl/2022/12/13/la-constitucion-de-los-expertos/>; José Francisco García, *Nueva Constitución: el Rol de los Expertos*, DIARIO FINANCIERO (Sept. 14, 2022, 4:00 AM), <https://www.df.cl/opinion/columnistas/nueva-constitucion-el-rol-de-los-expertos>.

180. Escárate, *supra* note 171.

181. *Id.*

Constitution,<sup>182</sup> it intended to avoid as much as possible the occurrence of overflows, as had previously happened.<sup>183</sup> The process transitioned from an unbound constituent power, working on a blank slate, to a constrained constituent power, leading scholars to challenge the very idea of the constituent power.<sup>184</sup>

*a. Third Time's a Charm?*

Congress appointed the group of experts with a perfect balance between opposition and government: twelve on one side and twelve on the other.<sup>185</sup> Most experts fit the profile that the parties wanted to give to this new process: constitutional law specialists, with outstanding professional careers and close to the parties, who would minimize the risk of having people who did not respond to Congress' wishes.<sup>186</sup>

The installation day of the Expert Commission, in March 2023, clearly showed the contrast with the inauguration of the Constitutional Convention, in July 2021. Instead of traditional indigenous dresses, there were only suits and ties. The Commission elected its bureau: two prestigious professors of constitutional law, a center-left female and a center-right male.<sup>187</sup> The Commission, with members appointed from across the political spectrum, from the Republican Party (extreme right) to the Communist Party, began its three-month work to deliver a draft to the Constitutional Council, whose members would be elected by popular vote.<sup>188</sup>

The Commission worked diligently, far from all the noise and giddiness that accompanied the work of the 2021 Convention. Within less than a month the Commission agreed on a first document with basic issues—an outline or “skeleton”—which showed the commissioners'

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182. *Id.*

183. *See id.*

184. *See* Sergio Verdugo, *Is It Time to Abandon the Theory of Constituent Power?*, 21 INT'L J. CONST. L. 14 (2023).

185. Ana María Sanhueza, *Chile Crea una Comisión de Expertos para Escribir por Segunda Vez una Nueva Constitución*, EL PAÍS (Feb. 3, 2023, 11:13 AM), <https://elpais.com/chile/2023-02-03/chile-crea-una-comision-de-expertos-para-escribir-por-segunda-vez-una-nueva-constitucion.html>.

186. Francisca Toledo, *Miembros de la Comisión Experta: Estos Son los 24 Elegidos*, LUPA CONSTITUCIONAL (Jan. 26, 2023), <https://lupaconstitucional.malaespinacheck.cl/2023/01/26/miembros-de-la-comision-experta-estos-son-los-24-elegidos/>.

187. Rodrigo Verdejo & Nicolás Quiñones, *Proceso Constitucional: Comisión Experta Designa a Verónica Undurraga como Presidenta y a Sebastián Soto como Vicepresidente*, LA TERCERA (Mar. 6, 2023, 12:41 PM), <https://www.latercera.com/nacional/noticia/proceso-constitucional-comision-experta-designa-a-veronica-undurraga-como-presidenta-y-a-sebastian-soto-como-vicepresidente/T7CJS6OMXZCP5LFJ7KF4Z6EJOU/>.

188. Undurraga, *supra* note 175.



willingness to work collaboratively.<sup>189</sup> In time, however, differences began to emerge in areas such as social rights and the definition of the country as “a social State under the rule of law.”<sup>190</sup> For the right-wing commissioners, it was essential that the new Constitution ensured that not only the government but also the private sector would provide health benefits, something that was unacceptable to the left.<sup>191</sup> The right-wing experts’ position meant granting constitutional status to the private insurance system that was—and still is—one of the sources of great inequality among Chileans.<sup>192</sup> The discussion centered on the model of State to be designed: For the right it was key to ensure the “principle of subsidiarity,” and some form of participation of the private sector in the provision of social rights, such as health, education or social security.<sup>193</sup> For the left, granting constitutional rank to principle was incompatible with the agreed definition of the state as a “social State.”<sup>194</sup> There was no agreement, and the matter was left to the future Constitutional Council, as well as other issues on which the experts could not find agreement.<sup>195</sup>

Eventually, the Expert Commission agreed on a proposal supported by all the members of the Commission—an unprecedented political agreement, as it included all the political forces represented in Congress.<sup>196</sup> The work that Congress designed, at least in the first part,

189. *Comisión Experta: Documento Oficial Propuestas de Normas Constitucionales*, PROCESO CONSTITUCIONAL (Mar. 31, 2023), <https://www.procesoconstitucional.cl/comision-experta-documento-oficial-propuestas-de-normas-constitucionales/>.

190. See, e.g., Rodrigo Córdova Parada, *La Pelea que Marcó a la Comisión Experta Tras un Mes con Pacto de Silencio y un Gran Acuerdo*, EL MOSTRADOR (Apr. 1, 2023), <https://www.elmostrador.cl/destacado/2023/04/01/la-pelea-que-marco-a-la-comision-experta-tras-un-mes-con-pacto-de-silencio-y-un-gran-acuerdo/>.

191. See *id.*

192. Oscar Arteaga et al., *Desigualdades en la Provisión de Asistencia Médica en el Sector Público en Chile [Inequalities in Public Health Care Provision in Chile]*, 18 CAD. SAÚDE PÚBLICA 1053, 1055 (2002); David Debrott, *La desigualdad en el gasto público y privado de salud sigue siendo enorme*, EL MOSTRADOR (Nov. 13, 2017), <https://www.elmostrador.cl/noticias/opinion/2017/11/13/la-desigualdad-en-el-gasto-publico-y-privado-de-salud-sigue-siendo-enorme/>.

193. See Claudio Fuentes S. & Pedro Valenzuela, *Nueva Constitución: Prioridades de la Comisión Experta*, CIPER (Apr. 13, 2023), <https://www.ciperchile.cl/2023/04/13/nueva-constitucion-prioridades-de-la-comision-experta/>.

194. See Rodrigo Córdova Parada, *Comisión Experta Dividida por Subsidiariedad antes del Ingreso de Enmiendas a Propuesta de Nueva Constitución*, EL MOSTRADOR (Apr. 12, 2023), <https://www.elmostrador.cl/noticias/2023/04/12/comision-experta-dividida-por-subsidiariedad-antes-del-ingreso-de-enmiendas-a-propuesta-de-nueva-constitucion/>.

195. See *id.*

196. See Ana María Sanhueza, *Los Grandes Acuerdos Marcan el Último Paso del Borrador de la Constitución en Chile*, EL PAÍS (May 24, 2023, 6:15 AM), <https://elpais.com/chile/2023-05-24/los-grandes-acuerdos-marcan-el-ultimo-paso-del-borrador-de-la-constitucion-en-chile.html>.

seemed to be fulfilled. Yet, the climate of concord within the Commission was fragile, as there were points on which there were deep differences.<sup>197</sup> In addition, some surveys showed a negative perception of the expert-controlled constituent process.<sup>198</sup> Even if the climate was very different, the result of the October 2020 referendum, where nearly eighty percent of the population opted for an assembly of elected citizens—not experts—was still valid.<sup>199</sup>

*b. The Pendulum Swings Again*

The agreement reached by the Expert Commission had a key ingredient. Three weeks before concluding the Commission's work, the country elected the delegates to the Constitutional Council, the body ultimately charged with drafting the proposal for a new Constitution based on the experts' draft.<sup>200</sup> The election was another electoral earthquake: With a turnout of around eighty percent, Chileans voted overwhelmingly for the right, and in particular for the far-right Republican Party, the same party that a couple of years earlier had expressed its total rejection of the constituent process.<sup>201</sup> The pendulum had swung again.

Just as in the previous process, the left—and especially the independent candidates—had dominated the electoral preferences, this time it was the turn of the right. The election undoubtedly influenced the way in which the Expert Commission reached agreements during its last weeks of work.<sup>202</sup> In those matters on which the experts had failed to

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197. See, e.g., *id.*

198. According to a survey conducted by Diego Portales University, “when asked about the legitimacy of the current process, 22.1% indicated that the process had high legitimacy, 37.5% indicated that it had medium legitimacy, and 30.8% indicated that its legitimacy was low.” *Encuesta UDP Revela Preocupante Desinformación Sobre Proceso Constituyente*, UNIVERSIDAD DIEGO PORTALES FACULTAD DE CIENCIAS SOCIALES E HISTORIA (Apr. 24, 2023), <https://socialesehistoria.udp.cl/encuesta-udp-revela-preocupante-desinformacion-sobre-proceso-constituyente/>.

199. See *Chile Aprueba por Abrumadora Mayoría Cambiar la Constitución de Pinochet: ¿Qué Pasa Ahora y por qué es un Hito Mundial?*, BBC NEWS MUNDO (Oct. 26, 2020), <https://www.bbc.com/mundo/noticias-america-latina-54686919>.

200. See *Chile: Far-Right Party on Top in Constitution Rewrite Vote*, DEUTSCHE WELLE (May 8, 2023), <https://www.dw.com/en/chile-far-right-party-on-top-in-constitution-rewrite-vote/a-65546486>.

201. See *id.*; Vanessa Buschschlüter, *Chile Constitution: Far-Right Party Biggest in New Assembly*, BBC (May 8, 2023), <https://www.bbc.com/news/world-latin-america-65524068>.

202. See Rodrigo Gómez S., *Presidenta de la Comisión Experta: “Después de un Estudio, de un Trabajo Más Acabado, las Personas Van a Empezar a Valorar el Texto*, LA TERCERA (May 29, 2023, 1:22 AM), <https://www.latercera.com/politica/noticia/presidenta-de-la-comision-experta-despues-de-un-estudio-de-un-trabajo-mas-acabado-las-personas-van-a-empezar-a-valorar-el-texto/WUZUHZJPNRGCZPJ5QRFWEHRTI4/>.

agree on—such as social rights and abortion—given the composition of the future Council, right-wing delegates would be able to make their views prevail.<sup>203</sup> The leaders of the Expert Commission publicly called on the Council to “incorporate all views” in the final text, to not repeat the mistake of the 2021-22 Convention.<sup>204</sup>

This, however, did not happen. Despite the lessons supposedly learned from the failure of the 2021-22 Constitutional Convention, the right-wing-controlled Council pushed the agenda of the right, especially the far-right Republican Party’s agenda, without strings attached. Some of the key and most controversial provisions included an amendment that would allow Chile’s abortion law to be declared unconstitutional,<sup>205</sup> as some of the leaders of the Republican Party recognized;<sup>206</sup> the incorporation of conscientious objection on a general basis, which, given its vague and broad wording, could allow people to be excused from complying with the law in cases other than abortion.<sup>207</sup> In the area of social rights, the proposal ensured that there should be a private health and social security system, bringing insurance companies into the Constitution itself, something that not even the 1980 neo-liberal Constitution does.<sup>208</sup> On education, the proposal mandated the government to finance a system that would guarantee funding “per student in both State and private establishments,”<sup>209</sup> which also meant

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203. *See id.*

204. *Id.*

205. Luis Villavicencio Miranda, *Alertas Constituyentes: Tropezar Dos Veces con la Misma Piedra*, CIPER (Oct. 13, 2023) (emphasis added), <https://www.ciperchile.cl/2023/10/13/alertas-constituyentes/>.

206. *Id.* Draft Article 16.1 stated: “The law protects the life of *who* is unborn[.]” *Id.* Delegate Antonio Barchiesi, from the Republican Party, acknowledged that while the proposed provision did not enshrine “an outright ban on abortion, for us it [was] a mandate to always and everywhere seek the repeal of the abortion law, insofar as it permits the murder of an innocent person.” *Consejo Constitucional: Republicanos Ratificó Su Intención de Derogar el Aborto*, COOPERATIVA (Sept. 20, 2023, 4:08 PM), <https://cooperativa.cl/noticias/pais/politica/constitucion/consejo-constitucional-republicanos-ratifico-su-intencion-de-derogar-el/2023-09-20/155210.html>. In Chile, abortion was completely prohibited until 2017. *See Chile Aprueba la Despenalización del Aborto en Tres Causales en Histórica Decisión*, BBC NEWS MUNDO (Aug. 21, 2017), <https://www.bbc.com/mundo/noticias-america-latina-41006338>. That year, Congress passed a law that decriminalized abortion in only three cases: risk of death of the woman, when the pregnancy is the result of rape, or non-viability of the fetus. *Id.*

207. *See* CONSTITUCIÓN DE LA REPÚBLICA DE CHILE (Draft Oct. 30, 2023), CONSTITUTE PROJECT, [https://www.constituteproject.org/constitution/Chile\\_2023DD](https://www.constituteproject.org/constitution/Chile_2023DD). Draft Article 16.13, which protected “[t]he right to freedom of thought, conscience and religion,” stated that such right “also includes conscientious objection” without any constitutional limitations. *Id.* art. 16.13.

208. Draft Articles 16.22.b and 16.28 cover these topics. *See id.* arts. 16.22.b, 16.28.

209. Draft Article 16.23.e discusses funding of education. *See id.* art. 16.23.e.

ensuring the constitutional status of privatized education, one of the most heartfelt demands of the population since the first constituent debate, under Michelle Bachelet.<sup>210</sup> The proposal also introduced “[t]he right to adequate housing[.]” which was an innovation as the 1980 Constitution does not provide for this right.<sup>211</sup> However, the provision exempted from taxation the “property intended for the owner’s main residence.”<sup>212</sup> The rule, however, favored only twenty-three percent of homes, which are those that pay property taxes.<sup>213</sup> It was a provision that favored the rich only.<sup>214</sup> Ultimately, regulation of social rights was emptied of content in one of the most symbolic clauses of both constituent processes: the redefinition of the state as “social and democratic.”<sup>215</sup>

In response to the demands for public safety, the proposal ordered the expulsion of illegal aliens “in the shortest possible time,”<sup>216</sup> an unprecedented provision in a constitutional text, in line with the anti-immigrant narrative that proliferates in many parts of the world.<sup>217</sup> On the other hand, the proposal introduced a rule that allowed individuals sentenced to a prison sentence to request a change of their sentence to house arrest if they could prove that “he or she is terminally ill and . . . does not represent a present danger to society.”<sup>218</sup> Critics of the proposed provision pointed out that the provision’s real goal was to benefit military officers convicted of serious human rights violations committed during the Pinochet dictatorship, most of whom are over seventy years of age.<sup>219</sup>

210. *See supra* Part IV.A.

211. CONSTITUCIÓN DE LA REPÚBLICA DE CHILE, art. 16.29 (Draft Oct. 30, 2023), CONSTITUTE PROJECT, [https://www.constituteproject.org/constitution/Chile\\_2023DD](https://www.constituteproject.org/constitution/Chile_2023DD).

212. *Id.* art. 16.29.c.

213. *Consejo Aprueba Exención de Contribuciones y Derecho al Acceso al Agua*, PROCESO CONSTITUCIONAL (Sept. 21, 2023), <https://www.procesoconstitucional.cl/consejo-aprueba-exencion-de-contribuciones-y-derecho-al-acceso-al-agua/>.

214. *Id.* (“[A]ctualmente el 77% de los propietarios están eximidos de este impuesto, por lo que la medida solo beneficiaría a los ‘más ricos.’” [“Currently 77% of property owners are exempt from this tax, so the measure would only benefit the ‘richest.’”]).

215. *Id.* art. 1.3.

216. *Id.* art. 16.4.b.

217. *See* Mattias Ekman, *Anti-immigration and Racist Discourse in Social Media*, 34 EUR. J. COMM’N 606, 606–10 (2019); *see generally* William Walters, *Imagined Migration World: The European Union’s Anti-Illegal Immigration Discourse*, in *THE POLITICS OF INTERNATIONAL MIGRATION MANAGEMENT. MIGRATION, MINORITIES AND CITIZENSHIP* 73 (M. Geiger & A. Pécoud eds., 2010).

218. CONSTITUCIÓN DE LA REPÚBLICA DE CHILE, art. 16.4.h (Draft Oct. 30, 2023), CONSTITUTE PROJECT, [https://www.constituteproject.org/constitution/Chile\\_2023DD](https://www.constituteproject.org/constitution/Chile_2023DD).

219. Mauricio Weibel Barahona, *Propuesta Constitucional Podría Abrir la Puerta de la Cárcel a Presos con Enfermedad Terminal, Sin Restricción de Edad o Delito Cometido*, CIPER (Dec. 8, 2023), <https://www.ciperchile.cl/2023/12/08/propuesta-constitucional-podria-abrir-la-puerta-de-la-carcel-a-presos-con-enfermedad-terminal-sin-restriccion-de-edad-o-delito-cometido/>; *see also* *Chile: No House Arrest for Those Convicted of Human Rights*

The Constitution gave recognition to indigenous peoples and stipulated that the Chilean Nation “is one and indivisible,” as the process’ bases ordered.<sup>220</sup> There was no regulation on indigenous justice or reserved seats, as was the case in the 2022 proposal.<sup>221</sup>

In the words of a member of the Expert Commission, the Draft Constitution “radicalize[d] the neoliberal project of [the Constitution of] 1980.”<sup>222</sup> Similarly, the proposal was dubbed as “a moralist Constitution,” which essentially constitutionalized the agenda of the U.S. conservative right.<sup>223</sup> Despite calls within the right wing itself to include the views of the left in order to ensure a favorable vote in the closing referendum, the Republican agenda was stronger.<sup>224</sup> The text retained only twenty–seven percent of the preliminary draft of the Expert Commission, and failed to represent all the political forces that participated in its elaboration.<sup>225</sup> December 2023 came, and Chileans voted again to reject a constitutional proposal offered to them.<sup>226</sup> It was as if the whole decade of attempts at constitutional change had passed in vain.

## V. INCLUSION AND DELIBERATION

In 2019, Chile made news for managing to channel a deep social crisis through a constituent process. Four years later, the news was quite different: Chile became the first country in the world to reject two

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Violations, MERCOPRESS. (July 22, 2023, 10:58 AM), <https://en.mercopress.com/2023/07/22/chile-no-house-arrest-for-those-convicted-of-human-rights-violations>.

220. CONSTITUCIÓN DE LA REPÚBLICA DE CHILE, art. 5.1 (Draft Oct. 30, 2023), CONSTITUTE PROJECT, [https://www.constituteproject.org/constitution/Chile\\_2023DD](https://www.constituteproject.org/constitution/Chile_2023DD).

221. See *supra* Part IV.C.3.

222. Ascanio Cavallo, *Domingo Lovera: “La Propuesta de Nueva Constitución Radicaliza el Proyecto Neoliberal de 1980,”* EL PAÍS (Dec. 15, 2023, 11:30 PM), <https://elpais.com/chile/2023-12-15/domingo-lovera-la-propuesta-de-nueva-constitucion-radicaliza-el-proyecto-neoliberal-de-1980.html>.

223. Francisco Cox, *Una Constitución Moralista*, CLINIC (Nov. 5, 2023), <https://www.theclinic.cl/2023/11/05/columna-de-francisco-cox-una-constitucion-moralista/>.

224. Paula Valenzuela, *H. Larrain Matte: “El Plebiscito Puede Ser Sobre la Constitución de los Expertos, y No la de Boric, Kast o Pinochet. Republicanos Tiene la Palabra,”* T13 (May 18, 2023, 9:00 AM), <https://www.t13.cl/noticia/consejo-constitucional/politica/h-larrain-matte-plebiscito-puede-ser-sobre-constitucion-expertos-no-boric-kast>.

225. Natalie Sofia Rojas, et al., *Chile: Nueva Propuesta Constitucional a Plebiscito*, CELAG (Dec. 15, 2023), <https://www.celag.org/chile-nueva-propuesta-constitucional-a-plebiscito/>.

226. John Bartlett, *Chile Votes to Reject New Conservative Constitution Which Threatened Rights of Women*, GUARDIAN (Dec. 17, 2023, 8:32 PM), <https://www.theguardian.com/world/2023/dec/18/chile-votes-reject-conservative-constitution-referendum-womens-rights>.

consecutive constitutional proposals.<sup>227</sup> The causes are multiple and require a much more detailed study than the general reflections I offer here. However, there are two aspects worth mentioning before closing. Namely, the processes' lack of inclusion and their disregard for deliberation.

These reflections began at the crossroads between constitutional law and human rights, reflected in Article 1 of the two main international human rights covenants.<sup>228</sup> To study the failure of the Chilean constituent processes, we may return to the United Nations. In its *Guidance Note of the Secretary-General: United Nations Assistance to Constitution-making Processes*, the United Nations emphasizes the role of participation, transparency, and inclusion in constitution-making processes.<sup>229</sup> The Bachelet process was one in which thousands of people participated, without any kind of exclusion as everyone was allowed to organize the deliberation meetings.<sup>230</sup> The 2021-22 and 2023 processes allowed participation through mechanisms of citizens' initiatives, which were widely praised.<sup>231</sup> The processes were highly transparent, with access to information in real time.<sup>232</sup> However, their major flaw was arguably their lack of inclusion.

In both cases, part of the assembly felt displaced from the elaboration of the norms. Such perception prevented the final texts from reflecting the diverse views that exist in Chilean society. First, with a text that accommodated the left and that the right saw as alien, and second, with a text that was the result of right-wing forces and that the left rejected for having been left out of its elaboration. The idea of a constitution as a space of diverse views in a single text, a space where the people are constituted, was ultimately alien to the two processes that were believed to be broadly participatory and, therefore, inclusive. Despite the efforts to make the deliberative bodies representative, the rules that Congress designed allowed for pluralism—especially in the case of the first Convention—but failed to act as a genuine mirror of Chilean society, to use Hanna Pitkin's formula.<sup>233</sup>

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227. , *Chile Rejects Second Constitutional Rewrite*, AMERICAS Q. (Dec. 18, 2023), [www.americasquarterly.org/article/reaction-chile-rejects-second-constitutional-rewrite/](http://www.americasquarterly.org/article/reaction-chile-rejects-second-constitutional-rewrite/).

228. See *supra* Part III.

229. See U.N. Secretary-General, *Guidance Note of the Secretary-General: United Nations Assistance to Constitution-Making Processes*, at 2 (Apr. 2009), <https://www.refworld.org/policy/opguidance/unsecgen/2009/en/47535> [hereinafter *Guidance Note of the Secretary-General*]. See generally ZACHARY ELKINS ET AL., *THE ENDURANCE OF NATIONAL CONSTITUTIONS* (2009).

230. See *Guidance Note of the Secretary-General*, *supra* note 229.

231. See *supra* Part IV.C.2–3.

232. See *id.*

233. See HANNA FENICHEL PITKIN, *THE CONCEPT OF REPRESENTATION* 61 (1967).

As Rawls famously observed, fair procedures allow us to obtain results that can be deemed just.<sup>234</sup> In the case of Chile's constituent processes, it was thought that the first process was "highly regulated."<sup>235</sup> As such, the process would ensure that the diverse views would be reflected in the text, which would in turn "promote[] the rule of law,"<sup>236</sup> and make the process fair. After the first failure, specialists in comparative constitutional law observed that the problem lied in the process.<sup>237</sup> Thus, if only the procedure was fixed—through better rules for the election of delegates and the discussion of the draft—the problem too should be fixed. But that did not happen. Apparently, procedure is only one part of this type of endeavor, as it also requires a certain willingness to dialogue, which makes it possible, *along with the existing rules*, to reach an agreement. Such is the space for deliberation.

Toward the end of the twentieth century, democratic theory turned to the notion of deliberation as a regulative ideal. Legal theorists and philosophers advanced ideas about the value of conversation under certain rules to reach impartial decisions affecting everyone.<sup>238</sup> Among the thinkers who burst into this debate was Argentine jurist Carlos Nino, who played a central role in his country's transition to democracy and went on to influence dozens of jurists in his country and beyond like no other in the region.<sup>239</sup>

I bring Nino into this discussion for two reasons. First, it is a way to go back to where I started this Essay: Carlos Nino's *Introducción al Análisis del Derecho* ("Introduction to the Study of Law") was the first book I took out of the library of the Diego Portales Law School, when I was a first-year student.<sup>240</sup> And it was another book by Nino that I turned to after I graduated and was hired as a teaching assistant for a

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234. See JOHN RAWLS, A THEORY OF JUSTICE 73–78 (1971).

235. Javier Couso, *Chile's "Procedurally Regulated" Constitution-Making Process*, 13 HAGUE J. ON RULE L. 235, 235 (2021).

236. *Id.*

237. See Tom Ginsburg & Isabel Álvarez, *It's the Procedures, Stupid: The Success and Failures of Chile's Constitutional Convention*, 13 GLOB. CONSTITUTIONALISM 182, 182 (2024).

238. See generally, e.g., Jürgen Habermas, *Popular Sovereignty as Procedure*, in DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS (James Bohman & William Rehg eds., 1997); AMY GUTMANN & DENNIS THOMPSON, WHY DELIBERATIVE DEMOCRACY? (2004); John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765 (1997).

239. See CARLOS SANTIAGO NINO, THE CONSTITUTION OF DELIBERATIVE DEMOCRACY 107 (1996).

240. See CARLOS SANTIAGO NINO, INTRODUCCIÓN AL ANÁLISIS DEL DERECHO (2d. ed. 1980).

constitutional law class.<sup>241</sup> That is the personal reason. Let me know move to the “professional” one.

Nino clearly synthesizes the need for inclusiveness in the constitution-making debate.<sup>242</sup> As does the United Nations position cited above, Nino understands that deliberation allows for varied viewpoints to be heard and forces participants in public debate—or, in the case of this Essay—delegates to a constituent assembly to publicly justify their decisions.<sup>243</sup> Nino’s conception of deliberative democracy conceives of democracy as a way of arriving at the unveiling of moral truths—what he called an “epistemic” conception of democracy.<sup>244</sup> But even without adhering to the understanding of democracy as a mechanism that allows for fair (*i.e.*, impartial) decisions in the realm of public morality, the notion of deliberation is one that emerges as fundamental to understanding the failure of the Chilean processes. Deliberation combined with inclusiveness imposes duties to bring all participants to the discussion table, to justify decisions to all, and to base the impartiality—that is, the legitimacy—of decisions in this procedure.

The Chilean processes were not only hostile to the participation of some of those involved, but also made the legitimacy of the decisions on the constitutional drafts rest on the exit referenda. Instead of making an effort to justify the decisions adopted as decisions were being adopted, the processes relied first on the support of the initial vote—“we were elected, we can decide”—and later on the voice of the sovereign people, as manifested in the exit referenda. After the failure of the first assembly, Roberto Gargarella warned about the problem of the exit referendum, which asked the citizenry to vote Yes/No to a text with almost four-hundred articles—a text that addressed issues as varied as the political system, fundamental rights (including civil and social rights, the rights of animals, neuro-rights), the creation of government agencies, judicial review, legal pluralism, among many others.<sup>245</sup> This was no different in

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241. See CARLOS SANTIAGO NINO, FUNDAMENTOS DE DERECHO CONSTITUCIONAL (1992).

242. See *id.*

243. See *id.* at 107.

244. *Id.* Nino argues that “democracy is the most reliable procedure for obtaining access to the knowledge of moral principles.” *Id.*

245. Roberto Gargarella, *El “Plebiscito de Salida” Como Error Constituyente*, IACL-AIDC BLOG (Sept. 6, 2022), <https://blog-iacl-aicd.org/new-blog-3/2022/9/6/plebiscito-salida-error-constituyente>. But see Rodrigo Kaufmann, *Plebiscitos Como Democracia: Una Respuesta al Prof. Roberto Gargarella*, IACL-AIDC BLOG (Sept. 15, 2022), <https://blog-iacl-aicd.org/new-blog-3/2022/9/15/plebiscitos-como-democracia-una-respuesta-al-prof-roberto-gargarella>; Joel Colón-Ríos, *Plebiscitos de Salida y Democracia*, IACL-AIDC BLOG (Sept. 20, 2022), <https://blog-iacl-aicd.org/new-blog-3/2022/9/20/plebiscitos-de-salida-y-democracia>; Luis Eugenio García-Huidobro, *En Defensa del Plebiscito de Salida Chileno*,



the second process: Once again, the legitimacy of the constitutional decision was delegated to a binary vote on another text rich in words and topics, which, as explained, divided both legal specialists and members of the assemblies.

The brief lesson that can be drawn—and simply stated here with the view of continuing the exploration of these topics—is that deliberation tied to referendums seems insufficient. The same is true with procedures articulated with fair rules that are supposed to ensure the participation of all. What is apparently required, in addition to the above, is a certain deliberative *attitude*—a certain willingness to dialogue. This attitude was markedly absent in the work of both elected bodies, in 2021-22 and 2023, but was largely (and to some extent forcibly) present in the work of the Expert Commission. In the 2016 process, deliberation was arguably of better quality, inasmuch as there was ample space given for citizens to meet to discuss public affairs. But then, due to circumstances unrelated to the process itself, the process—and its deliberative effort—was diluted.<sup>246</sup>

What remains then as a tentative lesson is that inclusion and deliberation based on rules and procedures, but also on a willingness to dialogue, are perhaps the necessary mix for Chile—and perhaps any country—to achieve a successful constituent process. This is a difficult issue, as it requires a certain political culture that seems alien and increasingly distant from the reality of the country. Like other places in the world, Chile seems to move towards a greater, not lesser, polarization among its political elites.

#### A NON-CONCLUSION

On a cold Tuesday morning in February 2016, I met my friend and colleague Sergio Verdugo at Grand Central Station in New York City. I was in my third year as a faculty member at Rutgers and Sergio was doing his doctorate at New York University. We headed north to New Haven to participate in a workshop on constitutional change in Chile that Owen Fiss at Yale Law School had organized. The event's title was, "*At Long Last? The Efforts to Reform Pinochet's Constitution in Chile.*"<sup>247</sup> On the train ride, Sergio and I discussed the prospect of constitutional

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IACL-AIDC BLOG (Sept. 27, 2022), <https://blog-iacl-aidc.org/new-blog-3/2022/9/27/en-defensa-del-plebiscito-de-salida-chileno>.

246. See *supra* Part IV.A.

247. See generally *Lecture Series on Latin American Law Debuts*, YALE L. SCH. (Jan. 28, 2016), <https://law.yale.edu/yls-today/news/lecture-series-latin-american-law-debuts>.

change, our mostly different views on the process, the challenges that lay ahead, and the Iowa Caucus, which had taken place a few days before.

Upon arrival, I asked Owen about the question mark in the workshop title. “At long last?” I told him it was unnecessary—“We are getting rid of the dictator’s Constitution.” With his characteristically calm tone, he replied: “Let’s see what happens.” We had a fascinating discussion during the panel. Later, over dinner, we kept talking about constitutional change and we also discussed the electoral dispute between Hillary Clinton and Bernie Sanders. Then Sergio and I made our way back to New York City.

It has been almost a decade since that day. Three efforts to reform Pinochet’s Constitution have failed.<sup>248</sup> But the lessons learned are numerous. To name just a couple: the need for deliberation and inclusiveness and the significance of a political attitude to engage in constitution-making processes. If one had to summarize such lessons in one sentence only, perhaps one could note that constitutional change can also occur by practice. The final lesson—Owen was right, and I was wrong: Getting rid of Pinochet’s Constitution was—and still is—an open question.

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248. See *supra* Part IV.



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