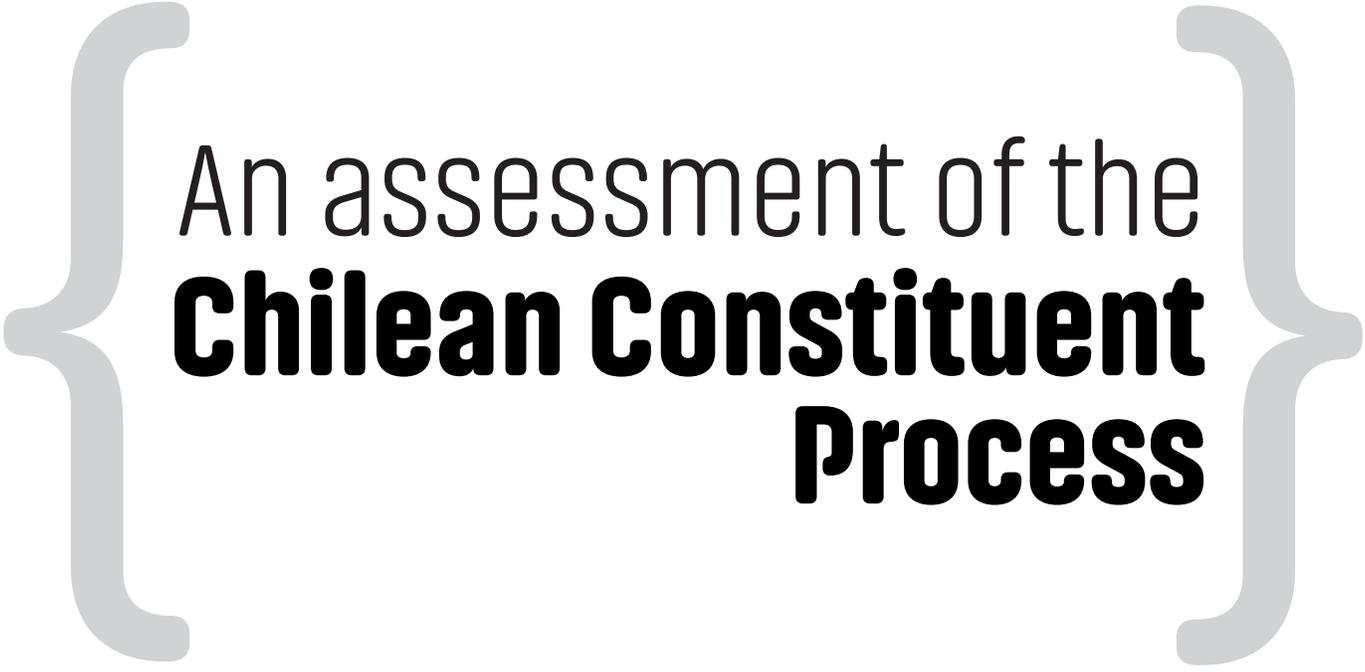




An assessment of the
**Chilean Constituent
Process**



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{Summary}

The *Observatory of the Chilean Constituent Process* is project of the *RED Foundation: Network of Studies for the Deepening of Democracy*, with support from the Ford Foundation, which has been dedicated to monitor and assess the constituent process that has been taking place in Chile since at least 2011, and more clearly with the election of Michelle Bachelet's to a second presidential term (2014-2018). The process, pushed forward by the civil society and later by the government, aims at replacing the 1980 Constitution, drafted and enacted under the Pinochet dictatorship and which, despite numerous amendments, has been unable to gain full legitimacy in the eyes of the citizenry and part of the political establishment. Through different reports made by experts in the area, the *Observatory* provides to different audiences a critical assessment of the constituent process, taking into consideration the multifarious ideals of participatory democracy and values such as transparency, inclusion and deliberation, and examines the social, political, institutional, and legal conditions which favor or hinder its progress along those lines.

The first report, titled **"Political participation and constitution-making: The case of Chile"**, analyzes and evaluates the participatory dimension of the "pre-constituent consultation and deliberation process" developed in Chile in 2015-2016, situating this experience in the context of Chile's constitutional history and in relation to recent scholarly debates about political participation. After addressing an integral concept of participation and its relevance for constitution-making processes, this report analyses political participation in Chile's history and the problems presented by the dictatorship-enacted 1980 Constitution. The core of this report analyzes critically the standards of participation in the pre-constituent process implemented by the former government.

The second report provides an overview of the **"Chilean Constituent Process under the Bachelet Presidency"**, describing the popular origins and current institutional articulations of the demand for a new constitution. This report is rich in details, explaining to a general audience the itinerary of the constituent process, focusing specially on the initiatives triggered by the former government. Within a critical background, this report evaluates both formal and informal political public spheres and the different obstacles that the advocates for a new Constitution had to face. It discusses both procedural requirements included in the current constitutional arrangement, which inhibits a reasonably democratic deliberation, and the different standards of participation and transparency that characterized a much celebrated participatory and popular stage, and the contrast with an opaque "institutional" process of drafting a bill that is, nowadays, stalled in Congress.

Finally, a report on the **"Indigenous Constituent Process"** that was implemented in parallel by the government, analyses its organization and evaluates its implementation under the standards of political participation that Chile has freely and democratically committed to observe before the national and international community. This final report provides a synthesis of the participatory process and indigenous consultation within the framework of the general constituent process, establishing a descriptive summary of the information available, covering the period from May 2016 to October 2017. Moreover, and after describing the normative framework in which the rights of indigenous peoples are granted (standards on political participation and prior consultation at international and domestic levels), the report offers a critical analysis about what has been done in the "constituent consultation processes".

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Political participation and constitution-making: the case of Chile

Claudia Heiss*

{Introduction}

Democracy has reached the greatest normative legitimacy in the history of this political regime. Paradoxically, it also faces the deepest crisis of its working and institutions. The real possibility of the governed to participate in decision-making and the role of economic interests in politics lead to questioning political representation as an effective mechanism for self-government. Citizen apathy and decreasing support for political parties and labor unions are, for some, a sure sign of the inevitable decay of democracy. Phenomena like Brexit and leaders like Vladimir Putin, Recep Tayyip Erdogan, Viktor Orban or Donald Trump embody the populist and authoritarian trends of the third counter-wave of democracy announced in 1991 by Samuel Huntington. While worrisome, this crisis of political representation also opens an unprecedented opportunity to reform and deepen democracy. New legitimating mechanisms include higher levels of transparency and participation in political decision-making. In constitutional debates, issues formerly restricted to experts and representatives are becoming increasingly open. Participation and inclusiveness seem to be requisites for a Constitution to be legitimate and to produce adherence. Colombia 1991, Iceland 2010, Ireland 2012-2014, and Tunisia 2011 are examples of participative processes intended (not always successfully) to create new constitutions. Following this tendency, Chile developed in 2015-2016 a pre-constituent process meant to open constitutional deliberation to citizens.

After the military coup of 1973, the dictatorship-made 1980 Constitution dramatically reversed the increasing levels of social inclusion and participation the country had reached under the 1925 Constitution. The government of Michelle Bachelet sought to address the illegitimacy of the Constitution through a constitution-making process that included a participatory phase of public deliberation and an institutional phase for decision-making. The deliberative stage appeared as a "citizen" inclusive exercise, separated from the traditionally divisive political debate.

The goal of this report is to analyze and evaluate the participatory dimension of the pre-constituent consultation and deliberation process developed in Chile in 2015-2016, as well as to situate this experience in the context of Chile's constitutional history and in relation to recent scholarly debates about political participation. The first section discusses the concept of

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participation and its relevance for constitution-making processes. The second section addresses political participation in Chile's history and the problems presented by the dictatorship-enacted 1980 Constitution. The third section analyzes participation in the pre-constituent process implemented by President Michelle Bachelet in 2015-2016.

{Participation in Constitution-making}

The democratic ideal promises a regime of political equality and individual autonomy where collective decision-making is an expression of self-government. Its main legitimating principle is popular sovereignty. This ideal has no rival in the contemporary political world. Dissatisfaction with existing democracies is, however, "the great political problem of our time" (Rosanvallon 2007: 21). Electoral absenteeism, individualism, elites distanced from the people, are widespread problems of contemporary representative democracies that seem to call for a higher capacity of citizen oversight over the political system. The perception of a crisis of representation has led some theorists and politicians to search the remedy in direct democracy and selection by lottery. Countries have adopted mechanisms of direct and participatory democracy at the national and local level (Soto and Welp 2017: 33). Directly asking citizens their opinion and opening channels to express demands through mechanisms like referendums or bills of popular initiative may, under certain circumstances, reduce the pressure over the political system and increase the legitimacy of political decision-making. Direct democracy, however, tends to follow Rousseau's concept of the General Will in assuming that preferences exist independent and prior to their expression. Advocates of deliberative democracy, on the other hand, argue that debate in representative bodies and a reflexive public sphere are necessary for opinion and preference formation.

Contemporary democratic theory has tended to develop a sort of division of labor: some authors study participatory and deliberative forms, considered **stronger**; others discuss **weaker** electoral versions of a neo-Schumpeterian conception that considers democracy as a means to select and organize political elites (Urbinati and Warren 2008: 388). Against this dichotomic vision of representative and participatory democracy, other political theorists argue that these are two faces of contemporary democracy needing and reinforcing each other (Plotke 1997, Urbinati 2006). Following this line of thought, Peruzzotti 2008 argues that representative democracy cannot be reduced to its electoral component and that elections are not even its main characteristic. Instead, Peruzzotti claims that representative democracy's distinctive feature is an institutional setting allowing for what he calls "mediated politics": a constant, multiple and fluid exchange of communication between representatives and represented.

Peruzzotti stresses the associative dimension of participation, which allows for the formation and expression of informed and elaborated preferences. Mediated politics "breaks with the individualistic vision of representation as a link built between a principal (the individual voter) and an agent (the representative)" (Peruzzotti 2008: 25). From this perspective, the role performed by diverse groups is at least as important, if not more, to the political process, than the specific electoral moment of aggregating individual preferences. Peruzzotti identifies three theoretical approaches to political participation, which he summarizes under the titles of **social capital**, **public sphere** and **interest groups**. Each of these gives importance to different actors and dynamics of participation, making its own contribution to the description of participation.

The main actor in the **civic culture** and **social capital** literatures are dense associative forms born from face-to-face interactions in social spaces such as the family, school, work, and voluntary associations. These spaces, which are not politically motivated, have a pedagogic function in teaching participation and building the basic features of a democratic personality. At the social level, it is implied that this kind of socialization will create a democratic culture.

A correlation is established between psychological features, civic culture and the working of democracy. It is not sufficiently clear, however, how local sociability translates into the functioning of political institutions and political representation. Classic authors in this tradition include Gabriel Almond, Sydney Verba, Robert Putnam and Carole Pateman.

The **public sphere** theories, in turn, underscore the role of informal associations which are politically oriented: social movements, protest groups, NGOs, democratic publics, etc. These groups occupy an intermediate space between the intimate and the properly political: the “public” space. As intermediaries, these actors become a sort of bridge between the private and the political. Participation, from this perspective, is not only pedagogical, but also vocal: its role is to channel demands and concerns ignored or misrepresented in formal politics. Their goal is to have direct incidence in political decision-making. Authors in this tradition include Jürgen Habermas, Jean Cohen and Andrew Arato, and arguably Peruzzotti himself.

The **interest groups** theory identifies as the main participatory actor those formal organizations oriented to exercise direct influence in political decision-making. These organizations represent private or public interests, and compete among themselves for influence. They are clearly part of the political sphere. Unlike the other two theories, this paradigm leaves no room for a pedagogic dimension of participation. Its role is rather to represent a plurality of interests in political decision-making. It has been observed that this approach may lead to antidemocratic results of participation given the difference in access to decision-making of different interest groups. Peruzzotti classifies as members of this perspective the pluralist, neo-pluralist and neo-corporatist approaches to interest groups (Offe, Pizzorno, Schmitter) as well as the resource mobilization theory of social movements (McCarthy, Zald, Tarrow).

Within public sphere theory, Nancy Fraser’s distinction between “weak” and “strong” publics is useful to untangle opposite conceptions of the relation between citizens and political decision-making. “Weak publics” derive from a liberal, bourgeois notion of public sphere that promotes a sharp separation between civil society and the state. It advocates a type of deliberation that “consists exclusively in opinion-formation and does not also encompass decision-making” (Fraser 1990: 75). “Strong publics” on the other hand imply both opinion-formation and decision-making. Parliament is the paradigmatic case of a strong public, where public deliberation ends in legally binding decisions: laws. Fraser concludes that understanding the public sphere only as “weak publics” damages the possibility of a democratic conception of civil society. Mere autonomous opinion formation is not enough when removed from decision-making (Fraser 1990: 77).

The use of different concepts of participation has led to misunderstandings in the study of its role in constitution-making. Many authors, particularly those of earlier historical periods, considered participation to mean ratification via plebiscite. This definition has become too narrow for contemporary demands of political participation. Relevant questions to assess the quality of participatory mechanisms include: 1) whether they allow for a deliberative process or merely yes or no questions, such as in a plebiscite. 2) The participant, which may vary from interest groups representatives, regional or ethnic groups, to expert communities. 3) The participatory mechanism may take place at different moments in the constitution-making process, thus addressing different kinds of questions (Soto and Welp 2017).

Eisenstadt, LeVan and Maboudi (2017) argue that participation in constitution-making processes positively affects the level of the ensuing democracy. The degree of citizen participation at the convening stage of a constituent process, they claim, has a strong impact on the future democracy. This analysis seeks to defy a focus on the contents of constitutions, and relies instead on the deliberative element. They reach this conclusion by comparing imposed constitution-making processes –Chile, Nigeria, Gambia, and Venezuela—with Colombia, Ecuador, Egypt, and Tunisia as cases of participatory constitution-making. According to this analysis, the mechanism is indeed more important than its institutional product in building the necessary legitimacy of a fundamental agreement on the rules of the political game. Soto and Welp (2017: 36) consider a “sign of the times”

the fact that contemporary constitution-making requires significant citizen participation. The process that led to celebrated Constitutions a few decades ago, like the Spanish Constitution of 1978, is unconceivable today, no matter how erudite, wise and just a group of people is gathered to write it. H el ene Landemore, an expert on the Icelandic experiment of constitutional crowdsourcing, also stresses the role of participation in constitution-making and rejects the use of a final referendum as the sole participatory mechanism. "It is not enough to have the final say (...) The French and the Dutch rejected the European Constitution in 2005 for that reason (...) The question then is how to increase participation so that it is more meaningful and takes place throughout: at the beginning, in the middle and at the end of the process" (Interview for the Observatory).

Two relevant questions for participatory constitution-making are who participates and when. Andrew Arato's idea of "multi-track" constitutionalism emerges from an understanding of participation akin to Peruzzotti's notion of "public sphere". Arato argues that his proposal belongs to a post-sovereign paradigm where no political organ can claim to embody the constituent power in full. He derives this model from the experiences of Spain in 1978, Central Europe in 1989 and after, and South Africa in 1996. Multi-track constitutionalism, he argues, "leads to a new and different theory of constituent authority, based on the pluralistic, multi-stage generation of democratic legitimacy capable of taking questions of power into full account" (Arato 2011). Arato's proposal entails multiple legitimating phases along the constitution-making process. His focus is more on when than on who to consult, and particularly on the legitimating impact of this multiple participatory stages.

For Landemore, involving participatory mechanisms all along the process is equally important. "People should have a say in setting the agenda of the debate and in discussing the model for constitution-making", she argues. Crowdsourcing and local citizen meetings could help to get "as many groups of citizens as possible to talk about the constitution". This is important to guarantee legitimacy in terms of popular support as well as the quality of the product, by including different perspectives (Interview for the Observatory).

Instead of an understanding of participation as direct democracy, Landemore advocates the concept of openness: "You don't have to be involved directly in the decision-making process but you have an opportunity to be involved if you want to. If a process is open, it means there is equal opportunity to participate. An open process may not necessarily involve mass participation, but it is accessible to ordinary citizens, via mini-publics like the (Icelandic) National Forum, but also via deliberative and crowdsourcing platforms and the transparency of the whole procedure. Based on what people see and understand of the process they can choose to participate or not in the deliberative phase" (Interview for the Observatory). When a process is opaque, it is impossible for the public to evaluate their need to participate. Information is necessary to make that decision. However difficult it is to measure participation in constitution-making processes and its impact in the constitutional outcome, Landemore argues that the theory predicts a better text, greater legitimacy and a more stable democracy should result from higher levels of participation.

Participation, however, may be a double-edged sword. Given its legitimating role, constitution-makers may seek to manipulate mechanisms in order to give the appearance of participation without real incidence of the public in constitutional decision-making. And this, in turn, may backfire and make the public angry at being convoked to a mockery of participation. "Very often "participation" is just a way for power to buy legitimacy on the cheap. That happened in South Africa. Two million submissions (from signatures to letters) were left unread because political parties had already set the terms of the agreement. Government gave people the illusion that their voice mattered but in the end they did not listen. This kind of participation may be better than nothing in terms of symbolic value and in terms of the democratic expectations it creates in the population, but it is also dangerous. The danger is that if you do this too often –create expectations and then disappoint them– you breed cynicism and disengagement among citizens. If you are going to ask for citizens' participation, you should think hard about your institutional design and how you are going to make the most out of people's time and contributions. You should take citizens seriously." (H el ene Landemore: Interview for the Observatory).

{Political participation in Chile}

Chile's constitutional history shows an early institutionalization of the state, particularly as compared with the Latin American context. An oligarchic democracy developed under the conservative 1833 Constitution, which established a presidential and centralized political system. Constitutional reforms in 1871 and 1874 strengthened civil liberties. In a deeply unequal country, with a property structure inherited from the colonial period, social inclusion experienced a relevant impulse under the 1925 Constitution. Its approval took place under tense political circumstances in a time of deep changes in Chilean society. Migration from the countryside to urban centers and the rise of the middle class created new political struggles. A reform granted women the right to vote in 1934 for municipal elections and in 1949 for presidential and parliamentary election (women voted for President and Congress for the first time in 1952). Workers became increasingly organized and a strong labor movement emerged (Sagredo 2014: 235-236).

Ruiz-Tagle (2016: 126) calls the period of the 1925 Constitution a "social constitutionalism" marked by the extension of rights. The text innovated with respect to its 1833 predecessor by imitating certain features of the Weimar Constitution of 1919, granting the possibility to impose by law certain limitations on the right to property, in order to guarantee social progress (Ruiz-Tagle 2016: 134). This definition was crucial to give the state the capacity to promote industrialization, urbanization and public works.

Starting with the Christian Democratic government of Eduardo Frei (1964-1970), processes of nationalization of the mining industry and agrarian reform began. Frei passed a constitutional reform in 1967 on the right to property that was very important to divide the land and increase its productivity. In 1970, still under Frei, a new reform increased the presidential power to control economic planning. The reform also reduced the age required to vote from 21 to 18 years old and gave this right to illiterates, increasing the electoral body.

In 1970, the socialist candidate Salvador Allende was elected president with 36% of the vote. Political parties, labor unions, student federations and peasant groups became increasingly active. An ambitious program of social and economic reform carried out without a substantive electoral majority in a context of Cold War polarization led to deep economic and political crisis. On September 11, 1973 the military bombed the presidential palace and ended the socialist government through a coup d'état. General Augusto Pinochet took up control of the government, closed Congress, and the 1925 Constitution ceased in fact to rule. From then on, the military undertook a transformative project that led to the 1980 Constitution, written by lawyers appointed and supervised by the military, enacted by decree and ratified in a bogus plebiscite.

The 1980 Constitution imposed a "protected democracy", a regime of limited pluralism and granting the military a tutelary role over the political system. The text contained temporary articles designed to rule the transition to democracy. These articles provided for an eight-year presidential term (March 1981–March 1989) for Pinochet, and required the ruling junta to submit a presidential nominee for a new eight-year term to a plebiscite in 1988. Pinochet lost that plebiscite on October 5, 1988, thus allowing for elections in 1989. The outgoing government proposed a set of constitutional changes to allow for the transition to democracy without dismantling the Constitution. Still under military rule, a plebiscite on July 30, 1989 approved 54 reforms. Elections occurred in December 1989, and new civilian authorities took the government in March 1990 (Heiss and Navia 2007: 163-164). Under the rules of the Constitution, Pinochet remained the Commander in Chief of the Army and later a for-life Senator until his detention in London, in 1998. The military retained levels of autonomy and political intervention incompatible with democracy. Political pluralism was limited through electoral rules, appointed Senators and obstacles to unionization, among others. Only in the year 2005 a new set of important constitutional reforms ended the most salient of the dictatorial "enclaves": the appointed Senators, the political role of the armed forces through the National Security Council (COSENA), and the removal of constitutional barriers to change the electoral system.

In spite of numerous reforms, the Constitution continues to protect the transformative project of the dictatorship, making core areas of this project immune to the democratic process. This is achieved mainly through numerous high-quorum provisions and supra-majoritarian mechanisms that guarantee no fundamental change in key areas can be achieved without the acquiescence of the political heirs of the dictatorship (Heiss 2017: 471). A system of supermajorities, including eighteen Constitutional Organic Laws that regulate key issues of political life, the binomial electoral system –reformed in 2015—and the power of the Constitutional Tribunal to veto legislation guarantee the “neutralization” of the transformative potential of democratic politics and the maintenance of the status quo (Atria 2013).

The project of the dictatorship --embodied among others in the Constitution--was to produce a deep transformation in social life. Its ideological stance expressed contempt for politics. Instead of seeing politics as the collective canalization of the conflict between different groups inherent to social life (Valles and Marti Puig 2015: 18), the military and their civilian allies considered politics to be the cause of conflict and sought to keep political activity at a minimum. The Constitution thus imposed a sharp separation between political parties and labor unions, and circumscribed the activity of political parties to certain “ends belonging to them”. By blaming conflict on politics, the dictatorship sought to negate the conflictive character of social differences and inequality in the access to resources and rights (Valles and Marti Puig 2015: 19).

The 1980 Constitution is the guardian of the veto power the ideological right retains over the political system. Moreover, it has created a culture around it where members of the executive, legislative and judiciary power feel excessively limited for political action and interpretation. The consequence is turning the democratic political process irrelevant. Paradoxically, when the 2005 reform eliminated the most flagrantly anti-democratic features of the constitution, debates over the need of a new constitution increased. Instead of an incremental process leading towards full democratization in time, the maintenance of the Constitution has led to the consolidation of a political system with numerous instances of severe undemocratic veto. The political process remained open to a certain degree, but proved superfluous with respect to key features, mainly regarding the relationship between the state and the market, the role of the public sector in the economy, and the conception of citizenship and rights (Heiss 2017: 471)

The nature of Chile’s transition to democracy and the decision to maintain the Constitution throughout has intensified the crisis of political legitimacy. It is true that a decrease in the associativity linked to social capital theory is a worldwide phenomenon of recent decades, together with a crisis of political party identification. To general criticisms to representative democracy, however, Chile adds the particular problems deriving from institutions inherited from authoritarianism. As a result, voting turnout has undergone the sharpest decrease in Latin America, from 84% in 1989 to around 50% in the presidential elections of 2013 and 2017, and as low as 34% in the municipal election of 2016. The 2017 UNDP report on electoral participation in Chile observes that the country has achieved institutional stability and has been able to provide governability in recent decades. “The political system, however, has been less successful in promoting citizen engagement and participation in public life, and in ensuring the adequate representation of all sectors of society in the formal spheres of democracy” (UNDP 2017: 6). An electoral reform in 2012 that made the previously mandatory vote voluntary contributed to the decrease in voter turnout.

Since 2011, Chile faces the paradox of a sharp decay in institutional political participation coupled with high social mobilization. The crisis of representation relates to the constitutional problem. The democratic deficits caused by the 1980 Constitution, which make democratic institutions in some cases irrelevant, has contributed to the disaffection towards politics and politicians. Arana (2017) has shown that the legitimacy of the Chilean political system is at its lowest since the return to democracy, using as indicators presidential approval ratings, electoral absenteeism, distrust in the three branches of government and identification with political parties. All of these numbers reached their lowest point in 2016, and were significantly lower than in other Latin American countries. Luna (2016) provides an institutional explanation for this phenomenon. Using Guillermo O’Donnell’s

categories of vertical and horizontal accountability, he inverts the description of Delegative Democracy: instead of eroding horizontal accountability in the name of popular acclamation, as occurs in the Delegative model, Luna argues that Chile has strong horizontal, institutional accountability coupled with extremely weak vertical accountability. He warns that the perils of this democratic deficit are not smaller than those of the opposite shortage.

Luna and Altman (2011) recently characterized the Chilean political party system as “uprooted but stable”. They thus questioned the level of institutionalization that has traditionally been attributed to it. From being the good student in the neighborhood, with stable programmatic political parties, Chile has developed a party system that looks healthy on the surface but has no connection with civil society and citizenship. The UNDP 2015 report on Human Development dramatically shows the decoupling of opinions between diverse elites (economic, political and social) and citizenship. Garretón et. al. (2016) describe the break between political institutions and social actors as “the great rupture”. Elite decision-making seems to be operating in a void, detached from society.

Disaffection and institutional de-legitimation have not meant low participation. The social movement for free education, which emerged in 2006 and reached a peak in 2011, had important achievements, including changes in the school system, a new law for higher education, and stronger anti-profit norms in education. Environmental, feminist and labor social movements also intensified their mobilization. The 1980 Constitution seems to act as an institutional straitjacket to these social demands for change. The acknowledgment of a link between the Constitution and a crisis of legitimacy of the political system adopts different perspectives across the political spectrum. What these visions have in common, however, is a diagnostic that the Constitution is a problem. While in the 1990s the right argued that institutional reform was a concern of political elites and not of ordinary citizens, nowadays the relevance of the issue is unquestioned.

Among the political right, the Piñera government and right-wing think tanks like **Libertad y Desarrollo** and **Centro de Estudios Públicos** have developed their own proposals for constitutional change within the amendment rules set by the Constitution. Among those in the left and center-left who reject the institutional legacy of the constitution, two different positions emerge, according to the degree of legitimacy they grant to the political authorities in power since the transition to democracy. While for some the current constitution is a dictatorial decree, others consider it legitimized by the negotiations between the country's center-left and center-right political coalitions and by the reforms of 1989, 2005 and others. If transition to democracy is considered as a pact or an agreement between different political forces, the conclusion is that the reforms of the transition amount to a full recovery of democracy and that the current state of affairs in Chile reflect, more or less, the plurality of political forces existing in the country. If, however, the validity of those pacts is under question, the conclusion is completely different. This seems to be the position assumed by Fernando Atria to call the current constitution a trap. In the same line, Felipe Agüero argues that a transitional pact such as the Spanish “pactos de la Moncloa” at the fall of the Franco regime is still pending in Chile. The strategy of demobilization and the lack of openness and participation in years following the recovery of democracy are key to understand these different diagnoses. A constitution-making process open to public scrutiny could be the means to bridge the gap of legitimacy set by the dictatorial institutional legacy of the 1980 Constitution. A plural, participatory, deliberative and representative debate would be a means to address the increasing distance between elites and citizens and the democratic deficit.

As Fraser (1990) argues, an inclusive, egalitarian project designed to deepen democracy cannot exclusively rely on “weak” publics, since a public sphere only constituted by them makes public opinion irrelevant to political decision-making (Fraser 1990: 77) If the problem is lack of legitimacy because the people has not taken part in decision-making about the rules of the political game, open and inclusive but also consequential participation seem to be a requisite for the solution. This opens new questions about the three models of participation

presented before: as voluntary associations, the public sphere and interest groups / social movements. The proposal by the Michelle Bachelet government to develop a deliberative consultation process about values and principles, rights and duties, and institutions for a new constitution adopted a particular perspective on participation that focused on the individual level and as a “weak public”. This perspective may not have been the most appropriate to the problem the government sought to overcome.

{Participation in the pre-constituent process of 2015-2016}

The Political Manifesto of the New Majority center-left coalition –the heir of the **Concertacion** plus the Communist Party–included as a priority the creation of a new constitution through a procedure at the same time “democratic, institutional and participatory”. The proposal was third in the program to educational reform and a tax reform designed to finance it. The goal was to establish a “social and democratic” rule of law (Nueva Mayoría 2013: 33). The subtext of the proposal was the intention to modify a constitutional structure corresponding to the economically neoliberal and culturally catholic-conservative ideology of the framers of the 1980 Constitution, assuming that most of Chilean society does not share these values and would have created a different constitution if asked.

After the electoral victory of December 2013, the political agenda postponed constitutional change until October 2015, when President Michelle Bachelet announced a multi-stage process that would eventually lead to a new Constitution. According to the chronogram, the next Congress, elected in 2017 with new electoral rules, would approve the Constitution. In the meantime, the president organized a consultation process, the “citizen dialogues”, that would be an input to the elaboration of a full proposal of a new Constitution written by the executive power and sent to Congress for its approval. Congress had to decide the constitution-making mechanism.

The announcements were complex and extended in time. They left many aspects of constitutional change open, and gave the impression of inviting the political system to begin a discussion rather than to present a full-fledged Constituent proposal. A key element was, however, the invitation to participate in a broad citizen deliberative exercise. In a time when support for constitutional change had reached unprecedented levels, as shown by the UNDP 2015 report on public opinion and constitutional change, the political discussion was no longer whether constitutional change was appropriate, but rather its kind and depth. Above all, the issue of the mechanism was prevalent. The UNDP Chile (2015) published a comparative report on mechanisms of constitutional change in the world. Opinions included constitutional reform through the amendment procedures established in the text, the idea of calling a plebiscite to let the public decide on the mechanism, and the establishment of a Constituent Assembly. Proponents of the plebiscite and of the Constituent Assembly argued that the idea of an “institutional, democratic and participatory” mechanism advocated by the government was an oxymoron. Given the institutional traps of the constitution, any truly democratic and participatory decision needed to dodge the institutional setting.

The plan announced by the government started with a phase of civic education, followed by public deliberation at the local, intermediate and national level: the “cabildos” or citizen dialogues. In order to guarantee the transparency of the deliberative process, the President appointed a 15-member Council of Observers in December 2015. The result of these deliberations, the President announced, would be a consolidated document, which in turn was going to be the basis for a constitutional proposal, which would also consider the “constitutional tradition” and the “international commitments” of the country.

Aside from the independent indigenous consultation, the general participatory phase had four stages, each asking the opinion on the same categories: constitutional principles and values, rights and duties, and institutions. Participants had to be at least 14 years old, two years younger

than the voting age. Under the slogan “for the Constitution, a conversation” (para la Constitución, una conversación), the government set up a website (www.unaconstitucionparachile.cl) with all the forms, instructions, documents and later the results of the participatory phase. The first level of participation was an online individual questionnaire; the second, local self-convoked encounters (ELAs) of 10 to 30 people, which took place mostly in homes’ living rooms but also in universities, schools, churches and other social spaces. Organizers had to upload reports from these meetings to an online platform. In several countries, Chileans living abroad organized their own ELAs. The third and fourth level, more institutionalized, took place at the provincial and regional capital cities, in local **Cabildos** or town hall meetings. Participation was, in this scheme, the main remedy for illegitimacy. This seems at odds with the fact that Congress was really the power to decide both the mechanism and probably the contents of the text (in the probable case that Congress did not want to call a Constituent Assembly).

The participatory consultation and the text of a new Constitution followed parallel tracks. Their link was the processing of broad volumes of information produced in the participatory phase by a systematization committee. The report of the systematization was supposed to serve as an input for the executive power in writing the proposal of a new constitution. In March 2018, days before leaving power, the President finally submitted the bill for a new Constitution to Congress. In a televised address to the country, Bachelet defended the contents of the text and emphasized its roots in the participatory phase, where 204.000 persons participated in local meetings and 17.000 in a parallel indigenous consultation.

The Chilean Government asked the OECD to carry out an assessment of citizen participation in what the report called “the Constitution-Building Process in Chile”. The names used by different actors to describe the process are meaningful. In its public appearances, the government called it clearly a constitution-making process. “People will for the first time participate in making the constitution”, the President had said when she announced the consultation. The OECD Scan Report used a more cautious terminology, implying that the participatory process was not, properly speaking, constitution-making. The goal of the report, as stated by to OECD, was to identify lessons learned and advise on how further improving citizen engagement in policy-making processes. This entails the following specific objectives: assess the participative consultation process and its methodology in the constitution-building process; analyze current open government and citizen participation practices designed and implemented in the country; identify areas of improvement, based on good practices by OECD members and partner countries; provide examples from other countries on citizen participation in the constitution-building process (OECD 2017).

Members of a OECD delegation visited Chile and interviewed scholars and practitioners involved with the process. The report expresses a positive view of the participatory phase, seen as open and transparent. The main criticisms focus on the difficulty to process this volume of information and the incidence of the participatory phase. While in Chilean political debate the number of participants was consider high by some and unrepresentatively low by others, the OECD report argues that for a country with such high political disaffection, participation was high. It is also among the highest participatory experiences in constitution-making around the world. The OECD report discusses general dimensions of the role of participation in democracy and compares the Chilean experience with citizen participation in constituent processes in Colombia, Iceland, Ireland, Mexico City, and Tunisia. The description of the Chilean case, however, is extremely general. The team preparing the report had a unique access to interview actors from all over the political and scholarly spectrum, and it is regrettable that the document presents such scarce information from such interviews.

In its history, Chile has never had a participatory constitution-making process (Valdivia 2010). The idea of a deliberative process at the local level was, in this sense, important from the perspective of the participatory grounds for legitimacy. The dialogues had important effects at the education and informational level, as well as in an expressive dimension. In a country traumatized by pre-1973 political polarization, the possibility to discuss politics in a non-confrontational way was meaningful. At the same time, it seems inaccurate to call the participatory phase properly

constituent. It is precisely because there was so little at stake that discussion did not become aggressive. The methodology of the dialogues invited to register both agreement and dissent and tried to avoid cutting the discussion by voting.

The translation of this kind of participation into public policy was very difficult to achieve from the start, both for the technical difficulty of processing the debates and due to the separation of the participatory and the institutional phase in the government's design. Landemore argues that participatory instances should be open to the public all along the constitution-making process. "I think there is a big conceptual problem. If you pass all the information gathered in the first stage through the narrow filter of a few people at the top, there will be an enormous loss, no matter how well-intentioned the people doing the filtering are. It is important to infuse participatory principles all throughout the process. (...) The real proof that a government trusts its own people is when you include the people in the writing of the constitution itself" (Landemore: Interview for the Observatory). The drafters of the new Constitution, in contrast, were an obscure number of advisers of the President, working behind closed doors and presumably negotiating with each other for the contents. It is in these opaque meetings when something like constitution-making took place.

The intense participation of over 200.000 people all along the Chilean territory to deliberate about the Constitution is noteworthy, as underscored by the OECD. The self-convoked encounters and **Cabildos** are not, however, instances of associativity as described by the social capital literature, given the fact that these were one-time meetings. They could reflect a certain level of public confidence (reflect rather than produce social capital) and have an important pedagogic and expressive dimension. Unlike **Cabildos**, which had an institutional dimension with some participation of political parties and interest groups, most self-convoked local encounters were organized by private individuals and held them in homes' living rooms rather than in public spaces. The extent to which the process reached the second dimension of participation described by Peruzzotti, the "public sphere", seems relatively small. The first phase of the process, of "civic education", did not reach a great audience. The government published a document called **Constitucionario** with cartoons explaining basic constitutional concepts and there was a modest media campaign. In July 2016, the autonomous National Television Council did not authorize the emission free of charge of 30-second spots to promote the provincial and regional **Cabildos** because its board refused to declare them "of public interest". Think tanks and universities organized seminars and published books, but political parties had a tepid engagement with the issue. Political parties, interest groups and social movements organized to a certain degree their participation in **Cabildos** to lobby for their specific demands. Aside from a few groups like "Marca AC" and "Proyecto Puentes", the constitutional debate was not strong within civil society. Moreover, all of the participatory phase designed to discuss the constitution considered only "weak publics" as described by Fraser (1990).

{Conclusions}

The anti-political ideology of the military dictatorship included the goal to reduce social participation. Its institutional legacy has contributed to maintain the social and the political sphere apart, reducing citizen participation that had reached historical peaks under the 1925 Constitution. The demobilizing strategy adopted since the first years of the transition by political parties further increased the distance between elites and society. The crisis of institutional legitimacy, along with the adoption of the voluntary vote, led to a sharp decrease in electoral turnout. As political participation plummeted, however, new social movements emerged with unexpected strength in recent years.

The New Majority government sought to address the institutional problem with the proposal of a complex process to create a new constitution. The proposal included as an important legitimating aspect a participatory pre-constituent consultation, the "participatory" phase. More than 200.000

people were directly involved in intense deliberation on constitutional matters thanks to this process. Its design, however, sharply distinguished between the participatory and the decision-making, “institutional” part of the constitution-making proposal.

The fact that these debates did not have direct impact in decision-making contributed to a limited political effect of the exercise. The self-convoked encounters or ELAs and the **Cabildos** amounted to what Fraser calls “weak publics”, since citizen opinion did not clearly translate into political decision. Participation in these instances cannot easily be classified in any of the understandings of participation described by Peruzzotti. Social capital, public sphere and interest groups were not clearly affected by the constitutional consultation. There was, however, a certain level of social and political debate that may have an effect on the general consciousness about the constitutional problem. The feeble involvement of political parties in constitutional debate, not even when a municipal election coincided in 2016 with the participatory phase, further contributed to separate the expressive, private dimension of the participatory phase from the overall political process.

As shown by Landemore, it is impossible to “filter” a complex participatory exercise through the narrow writing of a text by a few actors behind closed doors. This was precisely what the government tried to do in translating social demands through the systematization stage and into a Constitution written without public participation. This unavoidably damages the legitimating efforts of the participatory phase. The Constitution proposed by the government reflected some of the ideas that emerged in the **Cabildos** but not others. The proposal also retained aspects of the 1980 Constitution, suggesting that the Constitution in place was the default rule used by the drafters. The drafting itself was not open, participatory or transparent. The process did not lead to a national debate capable of including all voices in constitution-making.

It seems relevant to learn from this experience. While Bachelet’s constitutional proposal may have come to an end with the electoral victory of a right-wing coalition in the 2017 presidential election, the constitutional problem remains. Building a strong civil society to participate in its solution is key to overcome the crisis of legitimacy affecting Chilean political institutions. The Observatory of the Constitution-Making Process in Chile has been one such instance, and others like it should contribute to strengthen the link between politics and society regarding the basic political rules that are expressed in the Constitution.

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The Chilean Constituent Process under the Bachelet Presidency

*Ernesto Riffo Elgueta

{Context}

From the 1980 constitution to the 2005 amendments

The current Chilean constitution –the “1980 Constitution”– has been in force since 1981, after being imposed by the Pinochet dictatorship through a “sham” referendum held in 1980, which did not meet basic democratic requirements, such as the existence of a public registry of voters, an independent supervising electoral authority, or the authorization of competitive political campaigning by the opposition to the de facto government. Its content was drafted mainly by a committee of lawyers appointed by the military junta –known as the “Ortúzar Commission”, after Enrique Ortúzar, who presided over it, although its most influential member was Jaime Guzmán, often considered the main ideologue of the Pinochet regime–, and was designed to protect the economic and political institutions favored by and implemented by the military dictatorship and the right-wing political groups that supported it. Siavelis (Siavelis, 2016) summarizes the main elements of this constitutional design: “The 1980 Constitution provided for exaggeratedly strong presidential systems; effective veto power for the armed forces; the establishment of a strong and military-dominated National Security Council; a military insulated from civilian control with respect to hiring, firing and promotions; a Constitutional Tribunal with the ability to derail legislation at any point in the legislative process; and a provision that nine of 39 senators would be appointed by the military or other forces sympathetic to the right for much of the transitional period”. Those institutions were complemented by a “binomial” electoral system which incentivized the formation of two coalitions but which “distorted representation” and “put power of candidate selection completely in the hands of elites, and made it virtually impossible to remove incumbents” (Siavelis, 2016, 85).

Despite having been amended more than 30 times, the constitution remains contentious and has never gained enough legitimacy before the citizenry (Heiss, 2017). The most significant reforms passed are those of 1989 and 2005 (Fuentes, 2012). The first of these softened the authoritarian character of the constitution by removing the ban on Marxist parties and organizations --thus allowing for a broader but still limited political pluralism--, strengthening protections for human rights, and modifying the constitutional amendment procedure. The 1989

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1. "Constitución de la República ya no lleva la firma de Pinochet" ["The Constitution no longer carries Pinochet's signature"], 2005.

amendments were the result of negotiations between the parties that supported and collaborated with the junta, on the one hand, and the opposing coalition, the "Concertación", which would later lead four consecutive governments after the end of the dictatorship, a streak that ended with the election of Sebastián Piñera in 2010, a billionaire right-wing politician who, unlike the better part of his political coalition, did not openly support the military government, despite supporting the political and economic model inherited from it.

The 1989 amendments were approved in a constitutional referendum held under more favorable conditions from a democratic point of view --a registry of voters was implemented, some political campaigning was allowed, and the end of the Pinochet rule had been approved in a referendum the previous year--. They were, nonetheless, the result of closed-door negotiations, and still under military rule. The 2005 amendments to the constitution --arguably even more significant than the 1989 ones-- were passed by Congress 15 years after the return to democracy, but were also the result of negotiations between the two political coalitions (Fuentes, 2012). Arguably, the most important of the reforms introduced were the elimination of non-elected members of the Senate, and the reduction of the powers of the military in order to increase civilian control over it.

The text resulting from the 2005 amendments was presented by then-President Ricardo Lagos as a new Constitution, claiming that "Chile has from now on a Constitution that no longer divides us, but is a shared institutional ground from which we can move forward walking the path of the improvement of our democracy".¹ It became clear in the following years, however, that Lagos' hope for the reformed Constitution was frustrated. The 2006 and 2011 students' protests --considered the largest the country had seen since the return to democracy-- were at first directed at issues like transit passes, the quality of public schools, and the state-implemented admissions test for higher education quickly pointed to the dictatorship-era law that regulated the education system. The students demanded that the law be repealed, and consequently were forced to face several institutional devices contained within the Constitution that were designed to make the sort of change the students demanded practically impossible. As legal scholar, and socialist political activist, Fernando Atria put it, the 1980 Constitution was rigged --"tramposa" as the title of his most influential popular book, put it (Atria, 2013)--.

The "rigged" constitution and the crisis of representation

The 1980 Constitution, as mentioned above, contains many elements that serve the purpose of protecting the social, political, and economic "model" imposed by the dictatorship. Nonetheless, it has been reformed numerous times. These facts might seem contradictory. However, as Fuentes (2011) has argued, veto players --the political Right-- has often been willing to "accept reforms because they expect future political gains as a result of the bargaining process. The expectation of future reputational returns is a strong driving force for the promotion of change" (Fuentes, 2011, 1751). Thus, the Constitution has been reformed many times, but always as a result of negotiations between the two political coalitions, without public participation, and subject to the acquiescence of the Right.

Fernando Atria (2013) has popularized the idea that the 1980 Constitution, despite its many amendments, contains different mechanisms ("cerrojos", i.e. "locks") that ensure that any change passed will not modify the elements that protect the core of the social, political, and economic arrangements inherited from the dictatorship. Those "locks" are: (1) the "binomial" (or "binominal") electoral system; (2) the existence of "constitutional organic laws" ("leyes orgánicas constitucionales"); (3) the Constitutional Court's powers of review of legislation, which extends to bills while they still are being discussed in Congress; and (4) the quorums required for amending the Constitution.

The electoral system, which guaranteed in each constituency one of two seats to the party or coalition with 33% of the vote, benefited the Right, and the persistence of the status quo in general, by forcing "political accommodation, at the same time as pushing negotiations into the hands of elites, with minimal citizen input" (Siavelis, 2016, 84). This system was finally replaced in 2015, being implemented for the first time in the 2017 elections, resulting in a more proportional

representation which increased political diversity within Congress, most notably by allowing the newly formed leftist coalition “Broad Front” [Frente Amplio] to elect 20 representatives (out of 155) in the Chamber of Deputies and one Senator (out of 43). Nonetheless, the contribution of the binomial system to the delegitimization of the Chilean political system can still be felt. According to polls, confidence in Congress has steadily declined in the last decade, from 13,4% in 2008 to 4,2% in 2015 (ICSO UDP, 2015). In line with this diagnosis, the governmental National Council on Citizen Participation and Strengthening of Civil Society has concluded that “[a] feature that has been increasing in the country is the increase in distrust toward institutions, with a special emphasis on representative democratic institutions like Congress and political parties” (Consejo Nacional de Participación Ciudadana y Fortalecimiento de la Sociedad Civil, 2017, 24). The existence of the category of laws known as “organic constitutional laws” (LOC, by their initials in Spanish) is another institutional device which protects the status quo. They do so by requiring a supramajoritarian quorum for approval of 4/7 of votes in each chamber of Congress. This has given veto power to the Right on the subjects regulated by those laws, which include the military, the education system, the Constitutional Court, political parties, the electoral system, mining rights, and the Central Bank, among others. As mentioned above, the repeal of the Education LOC was one of the central demands of the 2006 students’ protests. This resulted in drawing attention to the fact that repealing or reforming LOCs required meeting a quorum that would be impossible without the acquiescence of the political Right. Because the quorum for LOCs is established by the Constitution, the latter became the main target of social criticism, and the demands for its replacement commonplace.

The Constitutional Court is, by definition, another institution whose purpose is to protect the constitutional arrangement. Although institutions with powers of legislative review are common in contemporary constitutional democracies, the Chilean Court has characteristics which make it particularly controversial and problematic from a democratic perspective. Criticisms are directed in particular to its power to review bills being discussed in Congress and to strike out the provisions it rules unconstitutional. The exercise of this power of pre-emptive review is mandatory in the case of LOCs, but can be requested with regard to other bills by a quarter of the members of either chamber of Congress. This possibility is seen as a last resort for those defeated in Congress, making it a de facto “third Chamber”. One right-wing member of the Chamber of Deputies is reported to have commented after losing a vote on certain provisions of a bill on the education system: “It doesn’t matter. Let’s go to the [Constitutional Court]. We’re 6/4 over there” (Azócar, 2015), referring to the fact the out of the 10 members of the Court 6 were at the time right-leaning. Among the elements that make the Chilean Constitutional Court a particularly politicized body is the fact that four of its members are appointed by Congress by a two-thirds majority. This requires negotiations and accommodation between the two political coalitions, which has resulted in an agreement by which the coalitions get each half of the appointments. The rest of the designations are made by the President (3) and by the Supreme Court (3).

Finally, amending the Constitution requires quorums of 3/5 or 2/3 of the members of each chamber of Congress. The lower of these quorums is the general rule according to article 127, while the quorum of 2/3 is required for amending some parts of it, namely the chapters on: basic principles of Chilean institutions (ch. I); fundamental rights (ch. III); the Constitutional Court (ch. VIII), the Armed Forces (ch. XI); the National Security Council (ch. XII); and the process of amending the Constitution (ch. XV). The veto power that these quorums grant to those comfortable with the status quo is evident.

{The demand for a new constitution and the 2013 election}

During her first administration (2006-2010) Michelle Bachelet faced the students protests known as the “Penguins Revolution” –so named because of the uniforms worn by middle- and high-school students— and managed to control them by passing legal reforms that claimed to address the students demands. Those reforms were “so watered down that it left intact the basic structure of the privatized education system”, which caused them to be “[w]idely interpreted as a betrayal of the student movement”

(Roberts, 2016, 142). That frustration “set the stage” for the students’ protests of 2011 –led this time by college students–, under the first administration of Sebastián Piñera. Besides those demands for education reform, there were protests on environmental issues, and in general demands for changes to the socio-economic model and a better protection of socio-economic rights. The demand for a new Constitution rose as one that could contain all others, and towards the end of Piñera’s term the issue had become a recurring theme in discussions within the political establishment as well. In 2012 a group of left-of-center Senators introduced a bill (N.º 8562-07) calling for a referendum to convene a Constituent Assembly together with the Presidential election of 2013. The bill proposed that the Assembly would be “independent in its deliberations from all other legal or constitutional bodies”; it would have no legislative powers, nor powers to remove authorities or take over their functions. It would only have the power to draft a new Constitution that would be itself be submitted to the people via referendum. The bill was not discussed in Congress, but there were reactions to the proposals, with several politicians from the same coalition rejecting it emphatically (Varas, 2013, 269-272).

However, the demand for a Constituent Assembly came from civil society and it was actively promoted by different organizations, most prominently by the “Mark your ballot” [“Marca tu voto”] campaign. The campaign invited voters for the 2013 presidential election to write on their ballots the initials “AC” –for “Asamblea Constituyente”-- . According to electoral law, if correctly placed on the paper ballot, the mark should not invalidate the vote. The voter’s preference would be duly registered by election officials, and because the counting of votes is a public procedure, it would be possible to count the number of voters who had marked their ballots demanding a Constituent Assembly (Coddou & Contreras, 2014). There was some public discussion on the legality of the strategy, with some critics arguing that the campaign put the secrecy of voting in jeopardy and opened the possibility of vote-buying, while some defenders even argued that electoral authorities were required to keep tally of the marked ballots. In the end, the campaign deployed volunteers to observe the counting process at polling stations across the country and reported that 8% of the ballots were marked “AC” in the first round, and 10% in the ballotage (“‘Marca tu Voto AC’ hace positivo balance de la campaña,” 2013).

The presidential candidates who competed on the election had differing positions on the issue of constitutional change. The right-wing candidate Evelyn Matthei opposed the idea a new Constitution, and a Constituent Assembly in particular. Left-of-center candidates who were not part of the coalition behind Michelle Bachelet openly supported the idea of constitutional replacement via Assembly, while Bachelet included in her platform constitutional replacement, but did not specify what “mechanism” she preferred for the task. She specified only that the process should be “democratic, institutional and participatory” (“Programa de Gobierno Michelle Bachelet 2014-2018,” 2013).

Those three adjectives were carefully chosen and given precise meaning. “Democratic” meant that the new Constitution should be created in a “context in which all points of view are heard, all legitimate interests are put forward, and the rights of all groups are protected”. “Institutional” meant that all constitutional authorities should be involved: “The Presidency of the Republic and the National Congress will have to agree on criteria that would give constitutional and legal course to the process of change”. Finally, the process was to be “participatory” in the sense that “the citizenry must take part actively in the discussion and approval of a new Constitution. To that effect, the constituent process presupposes, from the start, the approval by Congress of those reforms that would allow” such forms of participation (“Programa de Gobierno Michelle Bachelet 2014-2018,” 2013, 35).

{The second Bachelet government and the constituent “itinerary”}

The adjectives chosen by Bachelet for the constituent process she intended to carry forward seemed to have specific political purposes. The democratic aspect of the process can be understood as a way to address fears that the constituent process would be merely a façade to impose a new Constitution that would enshrine on the fundamental law a one-sided conception

of society, politics and the economy, thus making it impossible for potential future right-wing administrations to govern. The constituent process that the government would later implement, then, had to guarantee that “all points of view would be heard”, and thus avoid any biases in its design and execution.

That the process had to be “institutional” meant that it should be respectful of the rule of law. The need to stress this point was due to the fact that the high quorums required to amend the current Constitution sparked different proposals, by political actors and scholars, of legal routes that would make it possible to create a new Constitution by procedures other than the ordinary legislative process, thus avoiding the insurmountable quorum of 2/3.

The most famous and controversial of these proposals was Fernando Atria’s idea of calling, via presidential decree, for a referendum on the question of whether to convene a Constituent Assembly (Atria, 2013). The obvious objection this proposal faces is that article 15 of the Constitution states that “[a] popular vote may only be convoked for the elections and plebiscites expressly established in this Constitution”, and no such plebiscite is so established. Moreover, if the President were to issue such a decree, the Constitutional Court could review it, in virtue of article 93 No. 5,² and it would, in all likelihood, rule it unconstitutional.

In a nearly 60-page long, densely argued, annex to his popular book *La Constitución Tramposa* (Atria, 2013) Atria responds to those and many other potential legal obstacles to his proposal. The argument is a sophisticated, earnest, tour de force of legal argumentation, but from the point of view of political discourse it was ineffectual. One of the most controversial aspects of the proposal was that it presented a strategy that, while adhering to the constitutional rules, would avoid the intervention of the Constitutional Court. Although the argument showed that such strategy has been part of constitutional practice in the past, the idea of a strategy to avoid constitutional review was enough to make it politically questionable. The proposal was variously labelled as a “fraud”, “a use in bad faith of the law”, “a weird shortcut”, and a “legal loophole”.³

Other proposals presented alternatives seeking to make it possible to call for a referendum on the question of a new Constitution and/or a Constituent Assembly in particular. Some argued that an ordinary law –i.e., one passed by simple majority-- would be a permissible way, based on article 63 which states –in rather vague language-- that laws can establish “[a]ny other general and mandatory regulation that establishes the essential foundations of a legal system”.

One proposal that received support from the political establishment was the idea of amending article 15 of the Constitution so it would be possible to call for referenda on any issue, as determined by a law or by the President with agreement from both chambers of Congress. This amendment was devised by a group of left-leaning legal scholars (“Chile necesita una Constitución originada en Democracia,” 2015), and presented to the “Caucus for the Constituent Assembly” [“Bancada por la AC”], a group of congresspersons which included members of the government coalition, left-wing independents, and one former-member of the right-wing party “National Renewal” [“Renovación Nacional”]. The Caucus sponsored the bill (No. 10014-07), but it did not move forward in the legislative process.

Despite the variety of alternatives proposed to prepare the ground for a Constituent Assembly, all the proposals described share a weakness: The results of the referenda they propose would be non-binding. In other words, even if the alternative in favor of a Constituent Assembly won in the consultation, no further effects would be produced. Pending further regulation, the situation after such referenda would be similar to that faced by the UK after the “Brexit” vote: uncertainty as to what would follow. Moreover, in the case the constitutional referenda proposed, the implementation of a decision such as the convening of a Constituent Assembly would require several complex further regulatory steps: detailed regulation of the Assembly would be necessary either by further decrees, laws, or even constitutional amendments, depending on the alternative chosen from those described.

2. “Article 93. The powers of the Constitutional Court are: [...] To resolve questions that appear regarding the constitutionality a call for a plebiscite, without prejudice of the powers that correspond to the Electoral Court”.

3. The Spanish expression used in this context for “loophole” is “resquicio legal”, an expression associated with the ingenious ways in which Salvador Allende’s government made use of different legal provisions in order to implement its political goals. The term is often used as a pejorative, although it was embraced by Eduardo Novoa Monreal, Allende’s main legal advisor. See Novoa Monreal (1992).

4. use the term loosely. The process was open to all residents, Chilean or foreign, above 14 years of age.

Finally, the adjective “participatory” served the purpose of informing those demanding a new Constitution that it would not be the result of negotiations behind closed doors between representatives of the political establishment, unlike the 2005 amendments or the educational reform passed during the first Bachelet administration.

The October 13th announcement

On October 13th of 2015 President Bachelet presented to the country in a televised message a complex itinerary that would lead to a new Constitution “born under democracy” (“Discurso de la Presidenta de la República al anunciar el proceso constituyente,” 2015). The process involved three main stages: one of civic education, one of face-to-face deliberation between citizens, and one involving several pieces of legislation that would make it legally possible to arrive at a new Constitution.

The need for a new Constitution was justified by the President in her announcement by pointing out the lack of legitimacy of the current one due to its origin: “It was imposed by a few on the majority. Because of that it was born without legitimacy and has been unable to be accepted as their own by the citizenry”. She acknowledged the relevant amendments it has gone through, while recognizing as well that it still contains elements that hinder democracy. “Chile needs a new and better Constitution, one born under democracy and that expresses the popular will”, she proclaimed.

Before describing the itinerary of the process, she stated that such a process requires a “Republican character”, “real spaces of participation and dialogue between all citizens”, and that it should be conducted “within the channels of our institutions”.

In an attempt to appease concerns that the process might yield revolutionary results, she stated that in the process “[w]e must rely on the strengths of our legal traditions and, at the same time, give course to our capacity to move forward toward a more open and democratic society”.

The itinerary

As mentioned, the first stage of the process announced by Bachelet was one of “civic and constitutional education”. This stage of the process consisted in a public campaign designed to provide a common conceptual ground for the public “face-to-face” deliberation that would follow. The central element of the educational stage was a booklet –the “Constitutionary” [*Constitucionario*]– which explained with colorful cartoons concepts such as “agreement” (“one of the ways we have to decide what to do when we don’t all think the same about something”), “common good” (“what serves and does good to us all, even when we don’t realize it”), “Congress” and separation of powers (“Because it’s so big, the State was divided in three parts in order to work better”), “Constitution” (“The mother of all laws in a State, and we know that mothers are VERY important”), “family”, “identity”, “justice”, “liberty”, “majority”, “nation”, “quorum”, “human rights treaties”, and “xenophobia”, to name some of them. Videos were produced as well, explaining some of those same concepts, as well as infographics and online videos explaining the stages of the constituent itinerary. The exhibition of one of those 30-second videos was allowed by the regulatory body –the National Television Council– to be mandatory, while subsequent ones were rejected, controversially, for not being of public interest, as defined by law (“CNTV rechaza difundir nuevo spot del proceso constituyente por ‘no ser de interés público,’” 2016).

The next step in the process was the participatory stage, which consisted in a process of face-to-face deliberation between citizens on constitutional matters, following an *ad hoc* methodology developed by the government. This stage of collective deliberation took place in three successive types of meetings. First, citizens⁴ would meet in “self-convened local meetings” (“*encuentros locales autoconvocados*” or “ELAs”). These were meetings organized by individuals in homes, schools, or similar places, during which groups of between 10 and 30 people would discuss the meaning and importance of concepts organized in four categories: Values and principles, Rights, Duties and Responsibilities, and Institutions. The meetings –usually several hours long– would consist of discussions on a list of concepts included in the guides prepared by the government. The concepts were then ranked from most to least important within each category, and the results

registered in a form that all participants were required to sign. The forms were then uploaded to the website www.unaconstitucionparachile.cl, where it was also possible to answer a similar but individual questionnaire. More than 100 thousand people participated in the ELA (Soto & Welp, 2017).

The ELA were privately organized, so participants were usually previously acquainted with each other. In the later stages of the participatory process, however, collective deliberation took place in public locations, such as schools, which provided the opportunity to meet and discuss with strangers. These “*cabildos*” were organized by local authorities, and open to all residents as well. There was one cabildo organized per province (71 in total), and later one per region (15 in total). In each cabildo the discussions began with the concepts that, after collecting and the results, had been the most highly ranked in the previous stages.

In order to guarantee that the participatory stage of the process would be “free, transparent, without distortions or pressures of any kind” President Bachelet announced that she would appoint a Citizens’ Council of Observers [“*Consejo Ciudadano de Observadores*”] that would oversee the process. “It will be a group of citizens [*ciudadanos y ciudadanas*] of renowned standing, that will attest to the quality of the process”. On the first week of December the members of the Council were announced. The most notable facts about its members was that half of them were male lawyers or law professors (one of them a member of the Mapuche people), only three were women (a musician, a journalist, and a domestic workers union leader), while the rest were representatives of different areas of civil society. The Council was presided by Patricio Zapata, a well-known constitutional lawyer, law professor, and close advisor to Christian-Democratic politicians.

The ELA and cabildos took place between April and August of 2016, after which began the process of “systematization” of the results of the participatory stage. In her announcement, President Bachelet explained that the results of the participatory stage would be collected in a document called the “Citizens’ Bases for the New Constitution” [“*Bases ciudadanas para la Nueva Constitución*”] which be used to draft a proposed new Constitution, which she would introduce to Congress according to the ordinary legislative process applicable to constitutional amendments.

However, the draft new Constitution prepared by the Bachelet administration from the results contained in the Citizens’ Bases was not meant to be *the* new Constitution, but only one proposal, that of the President’s. It was not clear after the October 13th announcement what body or procedure would be in charge of drafting the actual new Constitution. President Bachelet kept different alternatives open.

She stated in her address that “it is not enough to have a participatory process and a draft for the new Constitution to become reality, because the current Constitution does not include a mechanism for making a new Fundamental Charter”. Thus, it was necessary, according to the government’s plan, to amend the Constitution in order to “establish the procedures that would make it possible” to create a new Constitution. This amendment bill would include three alternatives of constituent bodies: A bicameral commission of Senators and Deputies; a mixed Convention of congresspersons and ordinary citizens; and a Constituent Assembly. The choice between those alternatives would be made the Congress to be elected in 2017 –the first one after the binomial electoral system was replaced–. That Congress, however, could also choose to let the people make the choice by calling for a referendum on the issue.

It was frequent for politicians and the press in the months leading to the presidential announcement to pronounce the possibility of a Constituent Assembly dead (“No se hará de esa forma,” 2014). Faced with many noncommittal answers by Bachelet --during her campaign as well as the first half of her administration-- on the question of whether the new Constitution might be drafted by a Constituent Assembly, any ambiguous statement on the matter could be read favorably or negatively. The October announcement, however, explicitly included it as a possibility. Nonetheless, there was a fundamental aspect of the announcement that made such possibility improbable. Although there was strictly no need to do so, Bachelet’s speech stated that the amendment to include the different alternatives would have to be approved in Congress by a 2/3 majority. This was unnecessary, and contrary to

5. The issue is controversial. For arguments in favor of the possibility of incorporating a new chapter on constitutional replacement with a 3/5 quorum, see Lovera, Contreras & Riffó (2015), and Soto & Welp (2017, 110).

6. See, for example, the chapters by Jorge Sandrock and Máximo Pavez in (García, 2014b), a collective volume by right-leaning constitutional scholars, political advisers, and think-tank researchers who deem themselves the “Group of the 25”, in ‘respectful remembrance’ (García, 2014b) –they claim– of the “Group of the 24”, a group of 24 scholars and political figures formed in 1978, who opposed the Pinochet regime and which drafted a constitutional text in opposition to that prepared by the Ortúzar Commission. The “group of the 25” includes Luz Bulnes, a member of the Ortúzar Commission, which she joined after Christian-Democratic scholar Alejandro Silva Bascuñán quit. The latter later joined the “Group of 24”.

habitual legislative procedures. What quorum a bill must meet in order to be approved is determined by Congress itself by applying the rules found in articles 66 (for laws) and 127 (for constitutional amendments), although the Constitutional Court might intervene to make corrections. Although she did not say it explicitly, the claim that a 2/3 quorum would be necessary would be warranted only if the amendment to allow the choice of constituent body were to be included in chapter XV, which regulates the amendment procedure. However, this can be seen as contradictory with the President’s own claim that the Constitution does not contain rules on how to replace it. If amending and replacing are different kinds of constitutional change, then it could plausibly be argued that rather than including the proposed amendment in chapter XV, a new chapter could be added, which would require a lower 3/5 quorum.⁵

{Fears toward a new Constitution}

Opposition towards the demand for a new Constitution has resorted to a number of different strategies. Some critics propose continuing the path of amendments to the current text by the currently existing procedures, namely the regular legislative process, involving Congress and the Presidency. Others grant that a new Constitution may necessary as a means to address the crisis of representation. The most conservative critics dismiss the need for constitutional change, or make use of the rhetoric of reaction famously described by Hirschman, by portraying the possibility of a new Constitution, in particular one drafted by a Constituent Assembly, as a dangerous or futile endeavor.

The criticisms listed are spread across the political spectrum. In 2012 Socialist politician and then-Senator Camilo Escalona famously dismissed the idea of a new Constitution, proposing instead the pursuit of partial amendments, and referred to calls for a Constituent Assembly as “smoking opium”, delusional for demanding an institutional change that he saw as clearly unfeasible (“Escalona y la Constituyente,” 2012).

More moderate in his rhetoric, Christian-Democratic politician and then-Senator Ignacio Walker argued at first that some amendments to the Constitution would yield what might rightly be considered a new Constitution. Those amendments coincided with three of the “locks” identified by Atria: Replacing the binomial electoral system, eliminating the category of LOCs, and repealing the power of the Constitutional Court to pre-emptively review legislation. However, he considered that the quorums of 3/5 and 2/3 for amending the Constitution should not be modified (Walker, 2013). However, like Escalona, Walker emphasized the need to reach wide agreements within the political elite in order to ensure institutional stability.

Other criticisms pointed to the alleged risks involved in constitutional change. The fear of turning a regime considered stable and prosperous like Chile’s into a populist and unstable one was often stoked by pointing to the case of Venezuela and its political crisis. Calls for a new Constitution, as well as President Bachelet’s constituent itinerary, were deemed reminiscent of “*Chavismo*” (“Diputado Coloma,” 2015), and Constituent Assemblies were portrayed as incompatible with the rule of law and representative democracy, and only adequate when countries faced deep institutional crises.⁶

Some of the warnings against any constitutional change came pointed to the potential economic consequences of such processes. In this vein, former Minister of Finance under Sebastián Piñera’s first administration Felipe Larrain argued that “[t]he possibility that a new Constitution might revise the scope of right to property and economic institutions like the Central Bank, budgetary procedures and the institutions that control public spending, like the Executive’s exclusivity of legislative initiative, would cause harm and uncertainty in the economy. It is because of this that the expectations of agents and investors are affected from *the very announcement* of a constitutional change as uncertain as this one” (Larrain & Moreno, 2017, 19, my emphasis). Beyond

the very idea of a constitutional change, it was often argued that the content of a new Constitution would likely have negative fiscal effects. This criticism pointed to the potential recognition of socio-economic rights in a new Constitution and, in particular, the possibility that such rights might be judicially enforceable.

The warnings against a possible strong recognition of social rights⁷ pointed not only the risks for public finance but also to its alleged futility. In this regard, Larrain also argued that the recognition of more rights does not correlate with higher well-being, at least as measured by per capita GDP, and based on the analysis of the 10 countries with the highest number of constitutionally recognized rights (Larrain & Moreno, 2017).

Arguments from futility also pointed to the possibility that a new Constitution might effectively address the crisis of the political system. Lucas Sierra, researcher of the right-wing think tank “Centro de Estudios Públicos” [*Center of Public Studies*] and member of the Citizens’ Council of Observers, warned against thinking that a new Constitution would solve the political crisis: “[W]e need constitutional improvements, but not to tell the tale [*cuento*] that a new Constitution is going to fix Chilean political life, which isn’t in a terminal stage either” (Chávez, 2017). In his opinion such improvements should be pursued via legislation, rather than constitutional change.

Sierra’s opinion epitomizes several aspects of the moderate Right’s concerns with the possibility of a new Constitution. First, it expresses the rejection of so-called “maximalism”. This ambiguous term refers in this context to ideas such as: (1) that a new Constitution should embody a partisan conception of economic, social, and political arrangements –that of those who call for a new Constitution, rather than that which may result from an inclusive constitution-making process, whatever the outcome--; (2) that a new Constitution should eschew tradition, without regard to Chilean political and constitutional history; (3) that a new Constitution requires a wholly new constitutional text, that is, that its drafting should start from scratch; and (4) that the new Constitution should regulate subjects beyond the most basic institutions and a limited bill of rights, and include a strong bill of enforceable rights, including socio-economic rights.⁸

Against “maximalism” critics on the Right and the Center (in particular part of the Christian Democratic Party) argue that although some adjustments to the Constitution may be necessary, a wholly new Constitution is not. They propose instead changes to the political regime in order to move away from the current “Hyper-Presidentialism” by giving Congress more control over the legislative agenda, as well as removing some the “locks” mentioned above. As Sierra, they hold that the political system is not in a deep crisis yet, but recognize that measures should be taken to avoid reaching that point.

However, it should be noted that although the demand for a new Constitution has been associated with left-wing parties and social movements, there is considerable division within centrist and –up to a point-- right-wing parties and movements on the matter. Within the Christian Democratic Party, for example, politicians such as former Minister of the General Secretariat of Government Ximena Rincón were supportive of a new Constitution drafted via Constituent Assembly (“Los cinco ministros de Bachelet que apoyan la Asamblea Constituyente,” 2014). Rincón’s Ministry was in charge of studying comparative experiences of constitution-making and designing of the participatory stage of Bachelet’s itinerary.⁹

On the more liberal end of the Right politician Felipe Kast – founder in 2012 of the political party Evópoli, former member of the Chamber of Deputies, and currently Senator–included in his platform for the right-wing coalition’s 2017 presidential primary a proposal for a new Constitution, although a “minimal” one drafted by Congress through the current legislative process, complemented by participatory mechanisms and a final referendum (Observatorio del Proceso Constituyente en Chile, 2017). The idea of a “minimalist” Constitution was also embraced by public intellectual Cristóbal Belloio (2015), but defending the idea of a Constituent Assembly. He echoes several of the Right’s

7. Under the 1980 Constitution rights such as those to education or health are recognized as liberties and receive judicial protection only as they relate to the freedoms to choose providers or to open institutions to provide such services. See article 19, Nos. 9, 10, 11, and article 20.

8. See García (2014a) for an attempt to describe some of these aspects of “maximalism” more precisely.

9. In mid-2015 she was replaced by Nicolás Eyzaguirre, who led the implementation of the process.

10. See Zapata's chapter in Fuentes & Joignant (2016), and Arriagada, Burgos, & Walker (2017).

concerns: he recognizes a need to "lower the expectations regarding what a constitution is capable of achieving by itself", and rejects the "recurring argument" from the Left that "we need a new constitution to extirpate the neoliberalism embedded in our institutions" (14-15). He argues in favor of a Constituent Assembly from the point of view of its procedural legitimacy, which requires that no results be predetermined. Thus, he proposes a "democratically maximalist constituent process", which he hopes would yield a minimalist constitution. He argues as well that a constituent process might serve the purpose of validating a market economy, and rejects the fears about the possible negative economy effects of constitutional change by pointing to the non-conclusive evidence for those claims and the risk that they become self-fulfilling prophecies.

{The constitutional amendment bills}

The last part of the constituent itinerary involved two constitutional amendment bills. The first one would amend the Constitution in order to include a *replacement* procedure. The second one would be President's Bachelet proposal for a new Constitution.

Amendment to Chapter XV

The October announcement was clear about what the bill that would make it possible to replace it the Constitution (rather than amend it) would consist in. In her televised speech President Bachelet stated that the bill would give Congress a choice between three different "mechanisms" to draft a new Constitution: a bicameral commission, a mixed convention of citizens and congresspersons, and a constituent assembly. It would also give it the possibility of letting the people choose the mechanism via referendum.

The bill (No. 11173-07) introduced to Congress on April 2017 as an amendment to chapter XV (rather than as a new chapter), however, differed significantly from what was announced, and no explanation was given for the changes. Rather than include three alternatives, the bill used a placeholder term to refer to the body that would draft the new Constitution: a "Constitutional Convention". No details were given on whether it was supposed to be similar to the mixed convention mentioned, or to an assembly of elected members only. Some subtleties in the bill's language, however, made it clear that it was meant to be compatible with both. The bill states, for example, that a law would regulate the "system of *appointment* and *election*" of the members of the Convention. As proposed by Christian-Democratic politician Ignacio Walker and constitutional lawyer Patricio Zapata (before serving as President of the Citizens' Council of Observers), the idea of a mixed Constituent Convention refers to a body of 30 congresspersons and 30 citizens selected by Congress itself.¹⁰ A Constituent Assembly, on the other hand, is understood in this context to be composed solely of elected members (Coddou & Contreras, 2014).

More significantly, however, the bill did not include the possibility for Congress to let the people decide on the mechanism via referendum. Moreover, the October announcement stated that in order to choose the mechanism Congress would have to meet a 3/5 quorum. The bill, however, raised that quorum to 2/3. No explanation was given for this change. Other quorums involved were set higher than seemed justified. For example, the bill requires that a LOC regulate the Convention, but it raises the quorum for passing that LOC from the usual 3/5 to 4/7 for the case of those provisions that refer to the system of appointing or electing the members of the Convention.

This unusual quorum for the LOC that would regulate the Convention mirrors a similar exception which exists in the case the LOC on the electoral system (Law 18.700): after the 2005 constitutional amendments, some of the rules regulating the binomial electoral system were taken out of the Constitution, and left to be decided by the legislature by reforming the LOC. However, the quorum for those provisions in the law were raised from the usual 4/7 to 3/5, which is the same quorum such rules required in order to be reformed when they were part of the Constitution.

Moreover, the proposed amendment to chapter XV also sets the quorums that the Convention would have to meet in order to pass the different parts of the new Constitution. In this regard, it makes applicable to the deliberations within the Convention the same quorums (3/5 or 2/3 depending on the chapter) that Congress is obliged to meet when amending the current Constitution. For all subject matter that the Convention may want to include in the new Constitution which are not included in the current Constitution, the higher quorum of 2/3 would apply.

The bill was debated in the Committee on constitutional matters of the Chamber of Deputies, but was not well received. Members of the Christian-Democratic party, including the Chair of the Committee, complained about the lack of details on the nature of the Convention –whether it would be a Consistent Assembly, a mixed body, or something different-- . Because of this uncertainty, those members of the Committee, although part of the government coalition, abstained from voting favorably on the key provision of the bill. The bill, thus, was passed in the first vote in the committee, but without its most important provision. With only three months left in its administration, that vote meant that the President’s proposed amendment would not move forward further.

The President’s draft new Constitution

With less than a week left of its administration, the President finally presented her proposal for new Constitution. A complete draft of a new Constitution, but which follows closely the structure and contents of the current Constitution. Among its most significant changes in relation to the current one is that it proposes to abandon a conception of the State as guided by the principle of subsidiarity, and puts in its place a social and democratic State; it recognizes the indigenous peoples that inhabit the country; it includes new fundamental rights –such as those of children-- and stronger recognition of rights such as education –by including the right to tuition-free education in state institutions-- , among other changes.

However, the President’s proposal should not be assessed so much from the point of its contents, but in relation to the process of which it claims to be a result, namely the participatory stage. In this regard, it is difficult if not impossible to provide a satisfactory analysis. While the results of the participatory stage were systematized and are available to be examined in detail (www.sistematizacionconstitucional.cl) the process of drafting the proposed new Constitution was done in secrecy within the government. All the transparency that characterized the participatory stage of the process was lost in the final steps. Although the Government Spokesperson had announced that the names of the people in charge of drafting would be known “in due time” that did not occur (“Fuera de plazo,” 2017). However, even if the names of those persons were to be revealed –most likely advisors to the Ministry of the Interior and the Ministry General Secretariat of Government-- that would satisfy the demands that the very nature of the process put onto it. As the OECD Public Governance Review on citizen participation in the constituent process put it, one of the challenges of the process was to include “the input from the consultation in the draft proposal for a new constitution” (OECD, 2017, 17). The report noted that “[t]he technical and legal nature of constitutional frameworks makes it difficult to untangle what citizens mean when agreeing on a given concept, such as democracy, respect, gender equity or solidarity. As a result, citizens may feel their inputs were not taken into consideration, especially given that the consultation results are not binding, no active feedback has been provided, and no possibility of co-production and public engagement has been implemented”. Although the government was pleased with the generally favorable review issued by the OECD, it did not in the heed the recommendations contained in it.

{Conclusion}

The most valuable aspect of the process implemented by the Bachelet administration was its recognition that the loss of legitimacy of current political institutions in Chile could at least in part be addressed by moving political practices toward the ideal of a participatory democracy. In this respect, the government correctly identified a demand for participation that traditional representative institutions have been unable to meet. This move toward more direct citizen

participation in collective decision-making with regard to constitutional issues signifies a leap forward in the understanding of the importance of public deliberation. It brought participation to bear with the most fundamental of political issues, as opposed to the many smaller examples of participation in specific domains, such as environmental conflicts, or in the context of discussing specific legislation.

However, the spirit of transparency and participation was betrayed in the end by a poor execution of what the government referred to as the “institutional” stage. When the time came to draft the legislation that would enable the results of the participatory stage to directly influence the result of a constituent process, the government was unable to gather support within its own coalition, in part due its intrinsic internal differences, in part due to the inability to move forward the legislative process to fruition in this regard. Finally, some of the same “locks” that have been an obstacle to a deepening of democracy in Chile were included by the government itself in the bill that would enable Congress (or the citizenry) to convene a body that would carry out the task of drafting a new Constitution.

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Indigenous Peoples and Constituent Process

*Jorge Contesse and *Cristián Sanhueza

{Constituent situation in Chile}

A “New Constitution” for Chile has been considered from the moment it was adopted in 1980. Since the return to democracy, several attempts have been made to remove the dictatorial traces of the current text. Through constitutional reforms, certain elements that prevent a configuration according to the historical momentum of the country have been modified.

This has also found its correlate with the indigenous organizations in the context of the presidential elections that followed the plebiscite of the “Si” or “No” in 1988, between the continuity of the dictator Pinochet and the democratic opening with Patricio Aylwin. At the agreement of Nueva Imperial in 1989, the indigenous claim for obtaining constitutional recognition was articulated and submitted to the authorities then.¹¹ Although these claims have translated into some parliamentary motions for constitutional recognition, different peoples –including those who group non-indigenous– continue to wait for a text that gathers a harmonious representation of the existing diversity in Chile. This is relevant because even when the constituent demands of the indigenous peoples are similar to those upheld by non-indigenous peoples –as we will develop later on this report– the participation standards that bounds Chile require a differentiated treatment for constitutional reforms that affect directly to indigenous people. Understanding this phenomenon is, as will be see, key to articulate a constituent process genuinely inclusive and, at the same time, in full compliance of international standards on consultation and participation.

What we will explain later is not about the mere analysis of formal processes in the compliance of the rights of indigenous peoples. As it is stated, the exercise of the right to consultation as a mechanism for participation constitutes a space for political discussion, within the framework of a genuine dialogue. Its implementation, therefore, requires the necessary thoroughness of any democratic process, which has both formal and substantive aspects at the time of adopting the consensus on the measures submitted for consultation. In the case of the indigenous constituent process, it is sought to determine whether compliance with international standards contributed to the effective participation of indigenous peoples, represented in the concretion of agreements, and expressed in the final decision adopted by the State, once it has complied with its international and national obligations.

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11. The agreement of Nueva Imperial constitutes an electoral agreement between the then future president after the dictatorship, Patricio Aylwin, and representative of different indigenous peoples, who signed this agreement as a commitment of the future government. Because of this agreement, the first government of the democratic period (1990-1994) triggered a legislative agenda, including the enactment of the Law N 19.253 and the bill with the signature of the ILO Convention 169, which would be ratified in 2008, once it achieved enough political support.

12. Jorge Contesse y Gonzalo Delamaza, *Pobreza y derechos humanos en Chile: Análisis de dos programas sociales*, Documento de Trabajo N° 15, Programa Ciudadanía y Gestión Pública. Santiago: Universidad de Los Lagos, 2005.

13. Michelle Bachelet, *Discurso de anuncio Proceso Constituyente*, 13 of October, 2015, available in hyperlink [1].

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16. La Tercera, *Presidenta firma el lunes proyecto de reforma al capítulo XV de la Constitución*, 1st of April, 2017, available in hyperlink [3].

17. Mensaje Presidencial, Boletín Nro. 11:173-07, 4 of April, 2017.

18. Gobierno de Chile, *Guía Metodológica para la Etapa Participativa Territorial*, April, 2016, p. 4. Available in hyperlink [4].

19. Gobierno de Chile, *Síntesis de resultados cuantitativos de la etapa de participativa del Proceso Constituyente Abierto a la Ciudadanía*. Available in hyperlink [5].

In this context, it is worth noting the particularity that the ministry in charge of indigenous affairs has traditionally been that of Planning (today, Social Development). Settling indigenous affairs in a ministry in charge of administering social programs aiming to “defeat” poverty is symptomatic of the lack of political understanding that this matter has. Indigenous issues have always been treated as essentially an issue of poverty, despite the specific efforts that governments have made, which in the framework of the constituent process has its own manifestations, as we will see below.¹²

Being one of Michelle Bachelet’s campaign promises in 2013, the idea of a new constitution remained a matter of public interest. Once in office and by the second half of 2015, the President announced a *Constituent Process Open to the Citizenry*, stating that “Chile needs a new and better Constitution, born in democracy and that expresses the popular will.”¹³ With the objective of presenting a bill for a new constitution during the second semester of 2017, the announced path included a first stage of *Civic Education* for the population, raising awareness about the concepts surrounding a constitutional discussion; followed by *Citizen Dialogues* that would serve as a substrate for the elaboration of the *Citizens’ Bases for the New Constitution* that would finally guide the drafting of the *constitutional reform bill*.¹⁴

This methodology proposed by the government created a *Citizens’ Council of Observers* that, coming from civil society and appointed by the President, would ensure that the dialogues were developed freely, transparently and without pressure.¹⁵ In parallel a *reform of chapter XV of the Constitution* would be introduced, allowing a mechanism to replace it, initially proposing the options of a *Bicameral Congress Commission*, a *Mixed Constituent Convention*, composed of members of the parliament and of civil society, or a *Constituent Assembly* that drafted a new constitution, allowing the Congress in case of disagreement on these options to opt for a *Citizen Plebiscite* that ditches the mechanism to use.

This constitutional reform bill, necessary to set in motion a change in the Constitution, was initially contemplated for the second semester of 2016, although it was finally presented in April of 2017, due to the time it took to systematize the process.¹⁶ What was dispatched to the Congress would be a change that would add a new article to the current Constitution –an eventual Article 130– thus creating a *Constitutional Convention* that would be adopted with the vote of two thirds of the deputies and senators in office. This new constitutional norm would delegate, in turn, the mechanism of conformation of this convention into an constitutional organic law, restoring compulsory for the Citizen Plebiscite that would have to approve or reject the New Constitution bill previously approved by Congress –according to any of the aforementioned mechanisms– and sent to the President of the Republic, who convoke citizens to make this decision.¹⁷

The constituent process was defined as “open to citizenship”– with the goal that citizens could participate and “influence” the constitutional discussion, through the mechanisms contemplated for it. It was a process described with a methodology that involved three moments: the *Encounter*, *Deliberation and Sovereignty*.¹⁸ The first of these, which includes public participation of people, would be the task of Bachelet’s government; while the deliberation, understood as the discussion of the contents at the constituent mechanism agreed upon in the Congress –after the reform of Chapter XV–, as well as the sovereignty, consisting of the plebiscite previously mentioned, would imply stages whose impulse would be the responsibility of the Executive and the Legislative from March 2018.

1. Results of the Participatory Stage

The participatory stage was held between April 23 and August 6, 2016. This consisted of a total of 218,689 people who attended the process, who had the opportunity to participate both individually (48.7%), in *Local self-convended meeting* or “ELA” by its initials in Spanish (41.5%), as well as in Provincial Meetings (5.9%) and then in Regional Meetings (3.9%), dialoguing and prioritizing the topics that a new constitution should include.¹⁹ These topics were divided into four fields that guided the dialogue according to the proposed methodology: (i) Values and principles, (ii) Rights, (iii) Duties and Responsibilities, and (iv) State Institutions.

These four fields, in turn, had a wide range of concepts (such as democracy, gender equality, entailment with the Constitution, Armed Forces, and so on), among which the citizens had to express their agreement, partial agreement or disagreement, thus generating the information for the *Citizens' Bases for the New Constitution*. This participatory stage attempted to stimulate a constitutional discussion among citizens, having previously implemented the stage of civic education.

According to the data processed by the *Systematization Committee*, the discussion in all the levels of participation showed that the six most prioritized *values and principles* were "Democracy", "Decentralization", "Respect/conservation of nature or the environment", "Common good/community", "Justice and Equality".²⁰ In the case of *rights*, "Education", "Health", "Equality before the law" and "Respect for nature/environment" were the five that had greater consensus.²¹ While in the field of *duties and responsibilities* were six those who consigned greater assent and these were the "Protection and conservation of nature", the "Protection and conservation of historical and cultural heritage", the "Respect for the rights of others", "Compliance with laws and regulations", as well as "Protection, promotion and respect of Human Rights" and "Legitimate and non-abusive exercise of rights".²² Finally, in the topic of *State Institutions*, the contents with the highest preferences were "Plebiscite", "Referendums and consultations", "Congress or Parliament (structure and functions)", "Ombudsman", "Judicial Power (structure and functions)", "Regional Government".²³

Certainly the ELA, which involved a total of 105,161 people, represent a common and diverse space, "face to face", by requiring a coordination between 10 to 30 people to subsequently validate their participation through a web platform where the meeting was recorded.²⁴ In this context, individuals belonging to indigenous peoples could participate on equal terms. In fact, of the 7,964 meetings systematized by the Committee, 137 were convened by indigenous communities or organizations, bringing together 1,915 people.²⁵

Comparing the ELAs of individuals who do not belong to indigenous organizations, the available information shows that there is a correlation between the prioritizations. Indeed, according to the *Systematization Committee*, the *values and principles* most mentioned in the meetings convened by indigenous organizations were the "Respect/conservation of nature or environment", "Decentralization", "Cultural identity", "Justice", "Democracy", "Equality" and "Respect".²⁶ In terms of *rights*, those most mentioned are "Education", "Health", the "Right of Indigenous Peoples", "Respect for nature/environment", the right to "Dignified housing", to "Equality before the law" and the right to "Non-discrimination".²⁷

In the case of *duties and responsibilities*, indigenous communities and organizations prioritized the "Protection and conservation of nature", "Protection, promotion and respect of human rights", "Protection and conservation of historical and cultural heritage", "Respect for the Constitution", "Respect for the rights of others", "Compliance with laws and regulations" and "Compliance with treaties and international obligations".²⁸ Finally, regarding *State Institutions*, those who consigned greater assent were "Plebiscite, referendum and consultations", "Congress or Parliament", "Regional Government", "Local/Municipal Government", "Ombudsman", "National Government" and "Change or constitutional reform".²⁹

A mere comparison of these data allows us to identify that of the prioritized concepts that are highlighted by the Committee, there is a 75% compatibility –at least at the scope of the concept– between the ELAs convened by indigenous organizations and those that do not. It could be said as a conclusion that indigenous participation had a concordant expression with the general population. However, it is not about isolating data, but precisely about opening differentiated spaces of participation, indistinctly of the concordant appearances of the results. As Boaventura de Sousa Santos argues, "the peoples are political entities and not idealized abstractions".³⁰ Thus, their diversity must be expressed in a participatory democracy through spaces of participation that legitimize decisions, an area that, in the case of indigenous peoples, implies specific rights in the area of participation.

20. Comité de Sistematización, *Informe Ejecutivo*, January, 2017, p. 12. Available in hyperlink [6].

21. *Ibid.*, p. 19.

22. *Ibid.*, p. 25.

23. *Ibid.*, p. 32.

24. Indeed, according to Agreement N. 4 of the Committee of Observers, it was considered 15 persons as the minimum quorums, which for indigenous organizations was considered as not necessary. Cfr. Gobierno de Chile, *Guía Metodológica para la Etapa Participativa Territorial*, April, 2016, p. 26. Available in hyperlink [7].

25. Comité de Sistematización, *Encuentro Locales Autoconvocados: Resultados Cuantitativos comunidades u organizaciones indígenas*, p. 5. Available in hyperlink [8].

26. *Ibid.*, p. 9.

27. *Ibid.*, p. 12.

28. *Ibid.*, p. 17.

29. *Ibid.*, p. 23.

30. Boaventura de Sousa Santos, *Descolonizar el saber, reinventar el poder*, Ed. LOM, Santiago, p. 96.

31. Ministerio de Desarrollo Social, *Resolución Exenta Nro. 329 que dispone la realización del proceso participativo constituyente indígena que indica e inicia procedimiento administrativo*, 6 de mayo de 2016.

32. El Pulso, Marcos Barraza: “*El Consejo Ciudadano no va a observar el proceso constituyente indígena*”, 22 of May, 2016. Available in hyperlink [9].

33. Ministerio de Desarrollo Social, *supra* note 21.

34. Committee conformed through invitation of the Social Development Ministry to representatives of the Ministry of Secretary of the Presidency, Ministry of the Interior and Public Security, Ministry of the Secretary of Government, Ministry of Environmental Affairs, Ministry of Labour and Social Prevision, Ministry of Energy, and the National Council for Arts and Cultures and the National Corporation of Indigenous Development.

35. Committee conformed through invitation of the Social Development Ministry to representatives of the National Corporation of Indigenous Development (CONADI), the National Fund for Solidarity and Social Investment (FOSIS) and other decentralized public services with regional presence.

36. Council formed through invitation of the Social Development Ministry to representatives of the OHCHR, UNICEF, UNDP, ILO, and councillors from the National Corporation of Indigenous Development.

2. The indigenous constituent process: participation and consultation

Within weeks before the beginning of the ELA in May 2016, the Ministry of Social Development, which, as we have explained, has historically had the indigenous policy under its jurisdiction, decided the realization of a *Participatory Indigenous Constituent Process*.³¹ This would gather the observations, proposals and expositions made by the indigenous peoples to be delivered to the President of the Republic in the preparation of a New Constitution project. The first thing that draws attention is that this process was started after the general constituent process has begun, not before.

As the government stated, it was sought to ensure the participation of indigenous peoples in the constituent process, in accordance with the provisions of Convention No. 169 of the International Labor Organization. As explained by the Minister of Social Development, Marcos Barraza, “a participatory process has been designed where the collective rights of indigenous peoples are addressed. It is a different and differentiated process”.³² Although some of the concepts used in the discussions in the ELA were directly related to indigenous peoples (plurinationalism, multiculturalism, rights to cultural identity, among others), and therefore it would be understood that they already had an instance in which all they could participate by prioritizing these or other concepts, it was clarified that the process was not intended to exclude the one already initiated and open to general citizens, but to canalize participation of individuals belonging to one of the nine indigenous peoples. Then, only those with the quality of indigenous people could participate in this specific process.

In 16 months the government would establish the conditions in which the participation of indigenous peoples would be manifested in the context of a new constitution. This institutional space for dialogue would give form to a *participatory process* that would set the aspirations of indigenous peoples as a prelude to an *indigenous consultation* on the constitutional reform that would directly affect them.

a. Indigenous constituent participative process

Between August 2016 and January 2017, the Ministry considered a design based on the principles established in Article 7 of Convention No. 169, assuming “the historical and unpostponable challenges” in different areas of the rights that indigenous peoples have claimed.³³ Taking as reference what was expressed in the Commission of Historical Truth and New Deal as well as international instruments, this process was engaged independently of the one initiated several months earlier open to all citizens, regardless of their ethnic origin.

Without major methodological innovations, which in principle is problematic given the State’s obligation to adapt mechanisms for participation and consultation regarding indigenous peoples, the government initiated a process of indigenous participation through individual mechanisms through a web platform; meetings convened and organized by the government, intended for the participation of indigenous communities and associations identified by the State; and self-convened meetings by communities and associations that, in coordination with public institutions, administered the resources contributed by the government so that these were organized in an autonomous way.

The Ministry of Social Development convened to participate in this process members of indigenous peoples over fourteen years old, being participatory meetings the main modality, whose organization and implementation was in charge of certain Public Universities, in coordination with the government. In fact, Exempt Resolution No. 329 –which would be the formal support of the process– considered the creation of three *ad hoc* structures for the process’s development: an *Interministerial Committee*, responsible for defining and delivering the guidelines for the design of the Process;³⁴ a *National and Regional Coordinating and Executing Committee*, responsible for the coordination and execution of the process in the territory of the country;³⁵ and, a *Consultative and Monitoring Council* that autonomously from the government would ensure compliance with international standards, as well as guarantee its transparency and impartiality.³⁶

The government-proposed methodology convened 255 encounters in which 5,354 people participated; while 350 self-convened meetings that counted with 11,124 participants took place; and 538 participations via online questionnaire, which totaled *17,016 people in six months*.³⁷ This number of participants exceeded about eight times the number of participants who attended the local meetings convened by indigenous organizations in the process open to the general population.

In the case of questionnaires self-applied by individuals belonging to indigenous peoples, the participation mechanism consisted of 21 multiple choice and open questions. As provided in the process open to general citizens, these questions were related to *principles, rights* and *institutional structures* that a new constitution could contain. The significant and different topic was the question related to historical demands of indigenous peoples' rights. According to data provided by the Ministry of Social Development, 61% of those who participated individually were aware of the historical demands, being the most relevant among the participants the demands for land/territory (49%), constitutional recognition (22.3%), self-determination/autonomy/self-government (14.2%), natural resources (8.7%) and political participation (5.8%).³⁸

Regarding the *principles* that a constitution should contain, individual participation yielded 637 responses in general, with constitutional recognition (46.9%), pluriculturalism (23.2%) and plurinationality (22.3%) the most frequently stated among the participants.³⁹ In the case of *rights*, a total of 1,268 responses among eleven options conclude that the priorities were inclined for the right to participation and consultation (13.7%), political participation (13.3%), right to land, territory and natural resources (10.6%), cultural rights (10.5%) and linguistic rights (10.2%), followed by the right to equality and non-discrimination (8.8%), development with identity (8.2%), social and economic rights (8.1%), the customary right of indigenous peoples (8%) and autonomy and self-determination (7.4%), being the option with less responses the one relative to "other rights" (1.2%).⁴⁰ Finally, in the field of *institutions*, the largest mentions correspond to national/regional political representation (24.3%), autonomy and self-determination (20.6%), administration of local services such as health and/or education (19.6%), statute of special territories (17.4%), and adaptation of the legal system (15.8%).⁴¹

In the case of both types of meetings, convened and self-convened, these were developed in the logic of generating spaces for dialogue and reflection of indigenous organizations, under a structure proposed by the same government and formalized in a "Meeting Report" of seven points that systematized the general information of the meeting, the registration of the contents and their synthesis, observations, conclusion, validation of the contents and attendance.⁴² The report offered by the government as a result of these meetings, although it does not account for a systematization that establishes a priority as it was in the case of the methodology used in the process open to general citizens, does have an order of information that identifies what contents were mainly mentioned, which are also grouped by regions.

In general, participants in the meetings advocated a constitutional recognition and a plurinational state, regarding the recognition of cultural diversity and pre-existence of indigenous peoples to the Chilean State; the configuration of their right to autonomy and self-determination, based on Convention No. 169, generating the conditions for legitimizing ancestral knowledge through governance and political representation; the right to land, territory and natural resources, opening the way to the idea of collective ownership of property; and political rights through participation that guarantee a quota of exclusive and permanent seats in the Congress, judges in the Judicial Power, among other public institutions. In this line, another topic highlighted was the strengthening of traditional authorities and access to sacred spaces for the cultures of indigenous peoples to enhance participation according to their own procedures. Likewise, in the area of social, economic and cultural rights, the formalization and institutionalization of indigenous languages at constitutional level, declaring the Chilean State as multilingual, the right to education with universal, free and quality access, as well as the cultural relevance in the health and educational services was transversal in their territorial dialogues.⁴³

37. Ministerio de Desarrollo Social, *Sistematización del proceso participativo constituyente indígena*, May, 2017, pp. 16-17. Available in hyperlink [10].

38. *Ibid.*, pp. 58-59.

39. *Ibid.*, p. 60.

40. *Ibid.*, p. 62.

41. *Ibid.*, p. 63.

42. *Ibid.*, p. 30.

43. Cfr. Ministerio de Desarrollo Social, *Sistematización del proceso participativo constituyente indígena*, May, 2017, pp. 19-28. Available in hyperlink [11].

44. Gobierno de Chile, *Jefa de Estado recibió Informe de Sistematización del Proceso Constituyente Indígena*, 4 of May, 2017. Available in hyperlink [12].

45. Michelle Bachelet, *Discurso Cuenta Pública*, 1st of June, 2017. Available in hyperlink [13].

46. La Tercera, *Bachelet entrega acta de la etapa participativa del proceso constituyente*, 13 of July, 2017. Available in hyperlink [14].

47. See Jorge Contesse Singh (ed.), *El Convenio 169 de la OIT y el derecho chileno: mecanismos y obstáculos para su implementación*, Ed. Universidad Diego Portales, Chile, 2012.

48. Cfr. Cristian Sanhueza et al, *No nos toman en cuenta*, Ed. Universidad Diego Portales, Chile, 2013.

49. Between 2014 and 2017, the Government made consultation processes on legislative issues, such as the bill for the creation of a Ministry of Indigenous Peoples (Boletín 10687-06); the creation of the Council of Indigenous Peoples (Boletín 10526-06); the creation of a Ministry of Cultures (Boletín 8938-24), the creation of a Public Service of Biodiversity and Wild Protected Areas (Boletín Nº 9404-12), and the bill that regulates the exercise of the right to reside, remain a travel to and from the special territory of Easter Island (Boletín Nº 10683-06).

50. Michelle Bachelet, en Cuenta Pública a la Nación, *supra* nota 35.

51. Organización Internacional del Trabajo, *Chile: Representantes de pueblos originarios participan en Diálogo de la Consulta Indígena para una nueva Constitución nacional*, 23 of October, 2017. Available in hyperlink [15].

52. Ministerio de Desarrollo Social, *Librillo Medidas Proceso Consulta*. Available in hyperlink [16].

Ten months after this process was initiated, in May 2017, the participation of indigenous peoples was summarized and presented in a ceremony at the Palacio de La Moneda, an instance in which the Minister of Social Development presented to the President the *“Report on the Systematization of the Indigenous Constituent Process”*. On the occasion, the President stressed that the process had been added to the National Constituent Process, which would bear fruit to the “Citizen Bases” that were complemented and strengthened with the minutes that she received at that time, noting that these would be the *“foundation of the New Constitution bill that we are going to dispatch to Congress in the coming months”*.⁴⁴ Thus, in parallel there were two participatory processes in Chile related to the new Constitution: one open to all citizens and another especially open to indigenous peoples, which results would have a relative impact on the final constitutional proposal. And, in the end, the two processes that ran by separate strings were only grouped when the government was devoted to the task of drafting the text of the new constitution released only days before the end of the Executive term.

A month later the President announced in the 2017 *Public Account* the completion of an indigenous consultation process on the *“constitutional recognition of indigenous peoples and their political participation in the draft of new Constitution that we will dispatch the second semester”*.⁴⁵ In fact, days later in an act of presenting the minutes of the constituent process to the Directorate of National Libraries, Bachelet reiterated the statement in her speech, announcing this time the date on which this process would begin (August 3rd).⁴⁶ The government added more time to its democratic project of constitutional discussion while waiting for the agreements or disagreements that would eventually arise in the indigenous consultation process.

b. Indigenous constituent consultation

When public policies are related to indigenous peoples, the duty to carry out a prior, free and informed consultation is often seen as the way to guarantee their participation in the decisions that directly affect them.⁴⁷ This right of indigenous peoples –as explained later on this report– has marked the application of Convention No. 169 in a large number of the countries that have ratified it. The Chilean case, which begins with the enforcement of this international treaty in 2009, has implied the judicialization of this problematic, which over time has allowed the consolidation of this right of indigenous peoples and its correlative duty of the State.⁴⁸

With the experience of having carried out consultation processes in other legislative and administrative matters,⁴⁹ President Bachelet announced that it would include *“the Constitutional Recognition and Indigenous Political Participation in the draft of the new Constitution (...) prior to an indigenous consultation”*.⁵⁰ This was the result of the previous participatory process, an aspect foreseen in the Exempt Resolution No. 329 and that would serve as a basis for the administrative act that would contain the indigenous consultation process: the Exempt Resolution No. 726, dated June 29, 2017.

For the first time in the country, a legislative bill of constitutional rank that could affect indigenous peoples would be subject to a consultation process under Convention No. 169. As stated by Silvia Rucks, Resident Coordinator of the United Nations System in Chile, what the government initiated was a “historic and unprecedented phenomenon in the world”.⁵¹ The process carried out between the months of August and November urged indigenous peoples to agree on legislative measures in the following areas: (i) *Constitutional Recognition* of indigenous peoples, as pre-existing to the State, founding the right to maintain their culture, practices and customs by the exercise of diversity; (ii) *Territorial Recognition*, through special statutes established in a law that would regulate the matter; (iii) *Linguistic and Cultural Rights*, through their recognition and protection, promoting the expression of these, recognition of emblems, language and educational systems; and (iv) *Participation and Special Representation* of indigenous peoples in instances such as the national Congress, through a law that regulates the matter.⁵²

All these issues have a global reach, in the sense that they are demands that indigenous peoples have been articulating for decades in international forums that have been constituted since at least the decade of 1980. In this articulation, international human rights organizations have played a preponderant role as platforms for indigenous peoples to deploy their demands with international reach; as well as mechanisms to ensure that certain demands are legally and politically validated. When observing the subjects that are submitted to consideration, it is possible to observe that their root, even remote, is the work that activists and advocates of indigenous people's human rights have developed for a long time.

Three days after the consultation process was decreed, the government summoned representatives of indigenous organizations from August 3 to 30, 2017 to participate in 123 planning meetings throughout the country, in order to specify the manner in which this intercultural dialogue would be understood, in accordance with Convention No. 169 and Supreme Decree No. 66 that regulates the consultation process in Chile.⁵³ These *Planning* meetings were followed by those held at the *information* stage, which provided the background for the communities to meet in a stage of *Internal Deliberation*, instances that exceeded 300 locations and whose purpose was to allow indigenous peoples to autonomously discuss the proposed measures, in which approximately 10,000 people participated. Thus, as described in this report, this process would end with an incremental methodology for the development of agreements, which would be verified in the *Dialogue* stage, in which the government opted for a design that included two stages: the first, with regional character, which defined the position of indigenous peoples on the measures consulted in each region and the election of its representatives. The purpose of the election was to define who would participate in the second instance, called "*National Meeting*", held in Santiago from October 6 to 21, 2017 (ending late at night), and in which final agreements and/or disagreements would be established on the measures submitted by the government to indigenous consultation.⁵⁴

The "*Final Report*" prepared by the Ministry of Social Development, although it does not explain what happened in the planning and information stages, does give an account of what happened in the stages of internal deliberation and dialogue, providing information on what was said by indigenous peoples regarding to the measurements adopted. According to the *Systematization Report* carried out by the University of Chile, which is an integral part of the report prepared by the government, between October 1 and 14, 18 regional meetings were held with the participation of 619 people.⁵⁵ In these meetings, in addition to electing their representatives for the National Meeting, the matters subject to consultation –constitutional recognition and political participation– were discussed, which "were overwhelmingly approved in the regions," according to this report.⁵⁶

The report offers a synthesis of the regional dialogues on the measures consulted, which generated a proliferation and deepening of these ideas, diversifying the contents and normative scope that these proposals would imply. Broadly speaking, regarding the constitutional recognition of indigenous peoples, their position relies on declaring Chile as a *plurinational* State, which must guarantee the exercise of traditional practices and customs, seeking to preserve the cultural diversity of the country. This recognition contemplates the idea of special indigenous territories that allow their material disposition, especially in those spaces of cultural significance, such as nguillatún, "conchales", and cemeteries, among others, although in several meetings there was no consensus on this particular measure. However, self-determination should guarantee the linguistic rights of indigenous peoples based on the recognition of the plurilingualism of the country, proposing institutions that strengthens the different languages, which would have official status in the territories where they are spoken.⁵⁷

Regarding the measure related to political participation, the report offers as a result of these meetings the idea that a new constitution should guarantee the presence of indigenous peoples in different state institutions, both nationally and locally, an issue that has been a relevant political demand for the distribution of local power, and that also encompasses other collective singularities that demand a space from the political system. In this sense, the report describes that the recognition of the participation and political representation of

53. Supreme Decree N.º 66, binding since March 2014, regulates different dimensions on the consultation and participation included in ILO Convention 169, replacing the previous Decree 124 of 2009. Several academic and indigenous organization have criticized the elaboration of these regulations because they claim it limits and unduly restricts the ILO Convention 169 standards and have been adopted in processes that have not complied with the genuine participation of indigenous peoples.

54. Ministerio de Desarrollo Social, *Informe Final: Sistematización Proceso de Consulta Constituyente Indígena*, December, 2017, pp. 13-14. Available in hyperlink [17].

55. Facultad de Ciencias Sociales de la Universidad de Chile, *ibid.*, p.16.

56. *Ibid.*, p.19.

57. Cfr. *ibid.*, pp. 19-26.

58. Cfr. *Ibid.*, pp. 26-27.

59. Facultad de Ciencias Sociales de la Universidad de Chile, *supra* note 45, p. 139.

60. See "Acta Resultados del Diálogo Nacional del Proceso de Consulta para el Reconocimiento Constitucional de los Derechos de los Pueblos Indígenas", 21 of October, 2017, *supra* note 45, pp. 520-528. Available in hyperlink [17].

61. *Ibid.*

indigenous peoples should contemplate reserved seats in the National Congress, members in the Constitutional Court, Supreme Court, among others. Likewise, the forms and mechanisms of these rights should be stipulated in the Constitution, and not in a legal rank norm, establishing that decisions that affect indigenous peoples should go through a binding consultation process.⁵⁸

Once the government had identified the regional representatives and the contents of the meetings, the second phase of the dialogue stage called "*National Meeting*", took place from October 16th to 21st, 2017 at the headquarters in Chile of the United Nations Organization for Food and Agriculture. With the participation of 144 regional delegates, the methodology used by the government, which was verified by the team of professionals from the University of Chile, was characterized by work sessions that "progressively shaped the dialogue and negotiation between the government and the indigenous people".⁵⁹ Through the formation of nine groups, constituted by ethnicity and exceptionally by territorial criteria (as is the case in particular with the inhabitants of the Magallanes region), the dynamics established were the presentation of proposals and counterproposals on which representatives of both government and indigenous peoples discussed possible agreements.

Through this methodology, the groups chose a total of 58 representatives that would form the "*round table*" which would adopt the agreements on the four proposals offered by the government in the process. According to the minutes of October 21, 2017, signed between the Minister of Social Development, the indigenous representatives and the Resident Coordinator of the United Nations System in Chile -as a guarantor and facilitator of the process-, the representatives of indigenous peoples and the government reached full agreement on five measures, as indicated below. There are also five measures in which there was partial agreement and one in which there was disagreement, in addition to two additional demands placed by indigenous peoples.⁶⁰

The results of the national dialogue indicate that the agreed measures are (i) recognition of the pre-existence of the Indigenous Peoples that inhabit the territory; (ii) recognition of the right of Indigenous Peoples to conserve, strengthen and develop their own history, identity, culture, languages, institutions and traditions; (iii) the State must preserve the cultural diversity of the country; (iv) the recognition and protection of cultural and linguistic rights, material and immaterial cultural heritage, as well as (v) the principle of equality and non-discrimination.⁶¹

Regarding measures with a partial agreement, those are related to (i) the interpretation of the New Constitution; (ii) representation and political participation, which would materialize in 10% of reserved seats in Congress; (iii) Right to Health and recognition of intercultural health, (iv) elevating the consultation process to constitutional status; (v) self-determination, settling their own local internal affairs.

On the other hand, there was no agreement regarding the Indigenous Territory, measure that proposed the creation of indigenous territories through a law that would regulate the criteria and procedures for determining them, establishing rights such as access to land and natural resources, in harmony with the national legal framework. Finally, and as additional measures required by indigenous peoples, it was agreed between them (i) that the new constitution should establish plurinationality, (ii) and that both Convention No. 169 and the Declaration on the Rights of Indigenous Peoples of the UN had constitutional status.¹

Therefore, and after less than three months of process, the government sealed the agreements and disagreement in the indigenous constituent consultation, finalizing an unprecedented process in the country, both for its constitutional context and application of an obligation contained in an international treaty, involving both budgetary and human efforts.

{Legal framework of indigenous people's participation}

The history of marginalization and violence that states have exercised over indigenous peoples is the backdrop to the normative architecture that is established in the international system of human rights and, gradually, in national legal systems. Currently, indigenous peoples enjoy a specific legal framework regarding their rights, which can be tracked from the first efforts in the ILO Convention No. 107 of 1957, with its markedly assimilationist vision, to reach the current standards on consultation and participation of Convention No. 169, and of free, prior and informed consent, contained in the Universal Declaration of the Rights of Indigenous Peoples and the recently adopted American Declaration on the same topic. Along with the general norms applicable to all people, regardless of their condition, origin, orientation, among other personal attributes, indigenous peoples have advanced in the recognition of their rights, both individual and collective.

Conceptions about the exercise of sovereignty –which, in the words of Byung-Chul Han, is “that subjectivity that praises itself and has decided in favor of itself”⁶² has penetrated deeply into the compositions of modern states, generating a political and legal culture that preferably understands it in a centralized manner. Sovereignty is conceived under the belief that the State, for example with its electoral system –through the exercise of the universal vote– is the formula for the legitimization of power and, with it, the democracy that it is built in.⁶³ In Chile, this is the experience that historians like Mario Góngora have described as the State constituting the nation through its coercive mechanisms.⁶⁴

However, the spaces required for the exercise of the autonomy by the peoples –any people– constitute “a standard of political legitimacy in the contemporary framework of human rights” and whose traditional expression –universal suffrage– does not cover a regime of rights in favor of the indigenous.⁶⁵ That is why the UN has stated that the “current democratic and representative processes are usually not enough to address the particular concerns of indigenous peoples.”⁶⁶

What the UN seems to refer to is that a fundamental axis that allows measuring the legitimacy of the decisions adopted by the State with respect to indigenous peoples is their self-determination, which assumes that they “freely determine their political status and freely pursue their economic, social and cultural development”, as indicated in Article 3 of the Universal Declaration on the Rights of Indigenous Peoples. However, self-determination of indigenous peoples “is especially contradictory to the patterns of empire and conquest, both prospectively and retroactively,” inasmuch as it clashes with the ways in which States have been built and constituted, as in the case of Chile, to the Chilean nation.⁶⁷ Therefore, the legal standards that serve as a framework for consultation and participation processes of indigenous peoples are, in short, a guarantee for their members to participate in a plane of equality and freedom in the creation of political institutions, navigating in a legal framework that allows self-control of their own destinies, as well as ways of interacting with the state apparatus.⁶⁸ This stresses the habitual spaces of participation and, therefore, a constituent process like the one analyzed in this report must be able to, first, assume in order to offer a solution.

The principle of self-determination is a good tool to measure the observance of the norms applicable to a deliberative process involving indigenous peoples, as in this case. In the opinion of S. James Anaya, this principle is related to a series of norms of international law related to indigenous peoples, whose objective is to compensate the situation experienced by these through history, relating mainly to norms on non-discrimination, cultural integrity, land and natural resources, development and social welfare, and self-government, which resonate in different clauses of international treaties on human rights.⁶⁹

Thus, the principles, rights and standards that are involved in processes related to indigenous peoples require a concrete narrative, in order to identify what is at stake in these participatory spaces. A brief overview of the international law in the matter and its correlation with local norms provides an idea of what implies the participation of the indigenous peoples in a consultation.

62. Byung-Chul Han, *Sobre el poder*, Editorial Herder, Spain, 2016, p. 114.

63. Albert Noguera, *El sujeto constituyente*, Ed. Trotta, Spain, 2017, p. 37.

64. Mario Góngora, *Ensayo Histórico sobre la Noción de Estado en Chile en los Siglos XIX y XX*, Santiago: Editores La Ciudad, 1981.

65. James Anaya, *Los pueblos indígenas en el derecho internacional*, Ed. Trotta, Madrid, 2005, p. 151.

66. Consejo de Derechos Humanos de la ONU, Informe relator especial sobre la situación de los derechos humanos y las libertades fundamentales de los indígenas, 15 of July, 2009, UN. Doc. A/HRC/12/34/párr. 42 (2009).

67. James Anaya, *supra* nota 55, p. 374.

68. *Ibid.*, p. 169.

69. *Ibid.*, p. 175.

70. OIT, *Los derechos de los pueblos indígenas y tribales en la práctica: una guía sobre el Convenio núm. 169 de la OIT*, p. 26 (2009).

71. Articles 2º, 5º, 6º, 7º, 15º, 17º, 22º, 23º, 27º, 28º y 29º.

72. Consejo de Derechos Humanos de la ONU, *supra* nota 56, p. 41.

73. CEACR, Informe de la Comisión de Expertos en Aplicación de Convenios y Recomendaciones, Informe III (Parte 1A), 2009, p. 869

74. CIDH, *Derechos de los pueblos indígenas y tribales sobre sus tierras ancestrales y recursos naturales: Normas y jurisprudencia del Sistema Interamericano de Derechos Humanos*, OEA Doc. OEA/Ser.L/V/II. Doc. 56/09, párr. 318 (30 of December, 2009)

75. Consejo de Derechos Humanos de la ONU, *supra* nota 56, p. 50.

76. *Ibid.*, párr. 49-50 (2009).

77. See case *Pueblo Indígena Kichwa de Sarayaku vs. Ecuador. Fondo y reparaciones*. Corte IDH, Serie C No. 245, párr. 201-202. (junio 27, 2012).

78. Conferencia Internacional del Trabajo, Adopción 2003, Publicación 92.a Reunión 2004, Informe de la Comisión de Expertos en Aplicación de Convenios y Recomendaciones, Convenio Nº 169, 1989, Observación sobre Colombia, párr. 3 (2004).

79. CEACR, *Informe de la Comisión de Expertos en Aplicación de Convenios y Recomendaciones, Observación Perú*, ILC.100/III/1ª, p. 863.

80. OIT, *supra* nota 62, p. 26 (2009).

Paradoxically, international law has concentrated its efforts on regulating the rights of indigenous peoples by resort mechanisms of the International Labor Organization. After Convention No. 107, which as stated before had an assimilationist approach, Convention No. 169 strongly supports a catalog of rights in favor of indigenous peoples, which was articulated during decades of work in the United Nations agencies.

Although this Convention does not directly establish the right to self-determination of indigenous peoples, it does so indirectly through the mechanisms of participation, consultation and self-governance.⁷⁰ This international treaty comprises a total of eleven articles⁷¹ relating to the participation and consultation of indigenous peoples, both rights intimately linked to “self-determination and the related principles of democracy and popular sovereignty”.⁷²

As we know, prior consultation is a specific mechanism for the participation of indigenous peoples, which guarantees their capacity to influence a measure capable of directly affecting them, before it is decided by the corresponding authority. Free, prior and informed consultation is a right of indigenous peoples and an obligation of the state established in Article 6 a) of Convention No. 169, which requires a consultation every time a measure, administrative or legislative, is susceptible to affect them directly, and whose purpose is to reach agreements and, in some cases, the consent of indigenous peoples, with respect to the measure that is intended to be adopted.

Its standards establish that the consultation must be *prior*, this is, carried out in advance for it be effective;⁷³ *free*, as it constitutes a space for genuine dialogue, absent of pressures that distort wills;⁷⁴ *informed*, since the information constitutes an important source of the decisions, assuming the historical asymmetry of the parties;⁷⁵ in *good faith*, because it is intended to generate a true dialogue and negotiation between the State and indigenous peoples;⁷⁶ conducted through *representative institutions* of indigenous peoples, which are the people identified by the communities themselves;⁷⁷ and, by *suitable procedures*, flexible enough to adapt to “their cultural and social models”.⁷⁸ This standards, if kept when carrying out the consultation process, can constitute an “instrument of authentic dialogue, of social cohesion, playing a role in the prevention and resolution of conflicts”.⁷⁹

Convention No. 169 is followed by the United Nations Declaration on the Rights of Indigenous Peoples, both complementary instruments.⁸⁰ The last one, certainly of lesser normative hierarchy as it is a Declaration, establishes the right to self-determination (Article 3), autonomy and self-government (Article 4), the right to determine their priorities and strategies for their own development (Article 23); as well as the use of their territories and other resources (Article 31, No. 1); the determination of their own identity (Article 33º, No. 1) and structures according to their own procedures (Article 33, No. 2), even having the right to impart justice, as is the case of the determining responsibilities of individuals towards their communities (Article 35).

Almost textually, the Declaration reproduces the right to consultation of indigenous peoples before the adoption of administrative or legislative measures that affect them, in order to obtain their free, prior and informed consent (Article 19). Consultations must be carried out when adopting measures directed to eliminate prejudices and discrimination (Article 15, No. 2); measures related with the protection of children against economic exploitation (Article 17, No. 2); measures related to the use of indigenous territories for military activities (Article 30, No. 2), as well as the authorization of projects that affect the territories and/or resources of indigenous peoples (Article 32, No. 2); those related to measures that guarantee the interaction and contact between indigenous peoples divided by international borders (Article 36), as well as measures adopted to achieve the purposes of this Declaration (Article 38).

At the national level, the current Constitution guarantees the participation of indigenous peoples, although as individuals. Nevertheless, the domestic legislation also has rules that refer to participation and consultation, mainly Law No. 19,253 known as the “Indigenous Law” and Supreme Decree No. 66, which regulates administrative actions in consultation processes in Chile.

Although Article 34 of Law No. 19,253, which regulates the participation of indigenous peoples, today has little practical application, it was relevant when it was regulated by Decree No. 124 of 2009, being the first effort to regulate indigenous participation under the framework of Convention No. 169 in Chile.⁸¹ Nevertheless, the Supreme Decree No. 66 currently has the greatest impact on the public administration activity regarding prior consultation.

This decree is in force since 2014 and regulates the implementation of the consultation in the country. In general, it is a norm that reproduces the provisions of Convention No.169 regarding its standards, and consists of three titles and 19 articles, defining the public institutions to which the regulation is applicable (Article 4), the measures susceptible to be consulted (Article 7); a procedure that establishes criteria to determine the applicability of the consultation (Article 13), the technical assistance provided by the National Indigenous Development Corporation (CONADI) (Article 14), how the process is initiated, through a resolution issued to convene representative institutions (Article 15), and the subsequent execution of the consultation procedure itself, which according to this decree contemplates the realization of five stages (Article 16), lasting 20 working days for administrative measures and 25 working days, in case of legislative ones (article 17).⁸²

This brief display of pertinent norms and standards related to participation and consultation contextualize the field in which the rights of native peoples in the indigenous constituent process were exercised. Analyzing its correlation facilitates identifying whether the rights involved were observed or not.

{Analysis of the constituent process from the perspective of indigenous peoples' rights}

Days before the second term of President Michelle Bachelet came to an end, the Executive entered into Congress the bill to reform the Political Constitution of the Republic, fulfilling what was promised in its government program.⁸³ On a presidential televised address on national television, on March 5, 2018, the President announced the presentation of this bill, stating that it would bring "Chile up to date with social and cultural changes at a global and national level," and that in the case of indigenous peoples, it would respond to the historical demand that the country holds regarding diversity of peoples.

The proposed bill consists of 15 chapters, 133 articles and four transitory provisions, and refers on seven occasions to 'indigenous peoples', in five different provisions. Notwithstanding the aforementioned, in other four times the bill uses the noun 'people'; twice as many as those considered in the Constitution of 1980. The project includes indigenous peoples constitutional recognition in Article 5; the idea of sovereignty residing in the nation and indigenous peoples of article 4; the recognition of their own education systems in article 19, No. 14, final section; the cultural and linguistic rights of indigenous peoples, in relation to their intangible heritage in Article 19 No. 32; and respect for their emblems and traditions, in article 22.

Compared with the articles of the constitutional text of 1980, it is undoubtedly an important advancement in terms of normative prose, since indigenous peoples are presented in Bachelet's bill as a collective subject to which different rights are recognized.

The next section offers an analysis of the participatory process and the indigenous consultation, as well as the constitutional bill, in order to evaluate the obligations that Chile has sovereignly acquired regarding indigenous peoples, both in the local and international level. First, a glance at the process from a regulatory perspective; then an approach to the constitutional bill in relation to the norms and agreements and disagreements of the consultation process; and, finally, observations on emerging divergences regarding the process and the proposed norms.

81. Article 34.- "Los servicios de la administración del Estado y las organizaciones de carácter territorial, cuando traten materias que tengan injerencia o relación con cuestiones indígenas, deberán escuchar y considerar la opinión de las organizaciones indígenas que reconoce esta ley. Sin perjuicio de lo anterior, en aquellas regiones y comunas de alta densidad de población indígena, éstos a través de sus organizaciones y cuando así lo permita la legislación vigente, deberán estar representados en las instancias de participación que se reconozca a otros grupos intermedios."

82. The stages established by the Supreme Decree N. 66 are: (i) *planning*, which attempts to provide preliminary information, determine stakeholders, and the methodology, deadlines, register, observers, among other requirements; (ii) *provision of information and dissemination of the consultation process*, which provides information about the measure subject to consultation, in an adequate language; (iii) *internal deliberation of indigenous peoples*, which attempt to define their positions regarding the measure; (iv) *dialogue*, in which the conditions are created for agreements or disagreements, which are to be registered in the expedient; and, lastly (v) *systematization, communication of results and end of the consultation process*, which is achieved through the detailed elaboration of the compliance with each of the previously described stages, to be drafted in a final report (article 19^o).

83. Mensaje Presidencial, Boletín Nro. 11.617-07, de 6 of March, 2018.

1. Formal observations on the participatory process and the indigenous constituent consultation

Chile advances in the practice of the right to consultation, supplying quantifiable experience of the exercise and delimitation of rights, providing intercultural spaces for dialogue publicly offered by the relation between State organisms and indigenous peoples. The public documentation that accounts for these participatory processes allows us to identify the legality of state actions and its compliance with the principles previously reviewed in this report.

In addition to the requirements contained in international instruments, such as Convention No. 169 and the Universal Declaration of Human Rights, the Executive is bound by the compliance of regulatory standards applicable to organisms of the Public Administration in indigenous consultation processes, but in the case analyzed in this report, these standards seem not to be explicit in the information that should necessarily be available.

As indicated in the final paragraph of Article 19 of the Supreme Decree No. 66, any consultation process that has come to term, regardless of its results, should contain in its file the “final report that must account for the completion of the consultation process in its various stages.” However, the “Final Report” published by the Ministry of Social Development lacks the relevant information that accounts for the completion of the planning stage with the same accuracy granted to other stages contained in the report.

The idea contained in the aforementioned norm is directly related to the obligation established in Article 18, third paragraph, of Law No. 19,880, on administrative procedures, which requires that all administrative procedures must have a file in which the acts performed by the Public Administration are recorded. This requirement is fundamental as a guarantee for citizens when the State expresses its will through these administrative procedures. Therefore, administrative files show how sovereignty exercised by the authority through the mechanisms established for this purpose is in accordance with the Constitution (including, of course, international human rights standards) and laws. In the case of indigenous consultation processes, this duty becomes even more relevant, since the information compiled and systematized by administrative bodies is the evidence of the participation of indigenous peoples, constituting the legal ground to base any decision made by the State.

The lack of information that accounts for the planning stage established in article 16, letter a) of the Supreme Decree No. 66 impacts two fundamental areas of the consultation processes: methodology and timing of the process. As a general rule, the planning stage is the instance in which participants agree on how the dialogue will be understood regarding the measure submitted for consultation, which facilitates the adoption of agreements, privileging the existence of an intercultural space over the formalism content in the regulation.

The lack of information at this stage prevents us from observing the agreements reached on how the process would be carried out, what has been colloquially known as ‘the consultation of the consultation’, including, for instance, the timing of the process. The general rule, set on Article 17, letter a) of Supreme Decree No. 66, establishes for legislative measures a period of 25 working days per stage, totalizing 125 working days, that is, approximately six and a half months, unless a different period has been agreed upon at the planning stage, as permitted by the same article in its final paragraph. This flexibility finds its inspiration in the standards contained in Convention No. 169, Article 34.

The lack of information required in the “Final Report” on the planning stage, makes very difficult to determine whether the indigenous organizations agreed on shortening the consultation process by half the time established in the Decree. This, incidentally, affects the participation of indigenous peoples, more if we take into consideration that the “legislative” measures discussed has constitutional rank. Hence, it is possible to understand the words declared by the Minister of Social Development prior to the initiation of the process, Marco Barraza, who stated that: “(We

must) finish the indigenous consultation process in order to have an agreement based on good faith with the indigenous peoples regarding their constitutional recognition and effective political participation”.⁸⁴ Before even beginning the process, the authority already expressed its interest to finalize it, knowing in advance what issues had to reach an agreement, which sheds light on the radically restrictive approach with which the process was carried out.

On the same formal level, the decree regulating consultation in Chile allows the responsible organism, *ex officio*, and the indigenous peoples likely to be affected, to establish the suspension of the process at any stage. According to Article 18 of the Supreme Decree No. 66, whether to approve or reject the request, a report will be issued by the responsible organism. In the “Final Report” of the indigenous constituent consultation, there is no report on the reasons given to continue with the dialogue stage in spite of a request made by a group of representatives in the ‘National Meeting’ phase in November 2017,⁸⁵ regarding the extension of the days initially proposed by the same government and the late hours in which the dialogue took place. The “Final Report” describes this situation as follows:

...during the National Meeting there were various inconveniences regarding the methodology, with interventions from the participants questioning the government’s disposition, the material conditions in which they were and the demand that fell on them about the urgency of reaching agreements; to which *the indigenous peoples, on the last day of the dialogue, demanded the process to remain open*, requesting two additional weeks to transmit the information to their own communities and discuss the points of disagreement; to then resume the dialogue with the government.⁸⁶

These merely formal aspects have repercussions on substantive aspects of a participatory process (as is the case with the constituent process in general, in which the form determines to a large extent the substantive content of the measures to be discussed). The limited deadline with which this process was carried out does not coincide with the importance of the matter submitted for consultation or with the provisions of the pertinent regulation. This jeopardizes the ability to effectively influence the discussed measure, as disposed by international standards, not generating the optimal conditions of an adequate procedure that fosters trust between the parties involved. Also, the absence of documentation that provides certainty to the process, not observed in other processes carried out by Bachelet’s government, means a regulatory breach that dulls the state’s performance and could even make it legally contestable.⁸⁷

2. Analysis of the proposal in light of the agreements

The above explained initial government proposal submitted to consultation is substantially different from the articles finally presented in the constitutional bill.⁸⁸ Independent of the substantial improvements made by the text promoted by the Executive, the final articles are different from those initially proposed. First, the measures consulted were far from the forms observed when typically drafting a legislative piece. They rather adopted the form of conceptual statements in respect to which a specific measure was not identified, but a mere idea. This is not necessarily harmful to the standards of participation, as, in the abstract, a state organism may have an interest in inquiring into the more or less formalized opinion of interested indigenous peoples regarding a measure that is intended to be adopted. The problem is that, specifically, here we are facing a process carried out against time, to the point that the bill itself, which was supposed to be presented during the second semester of 2017, ended up being sent to the Congress just days before Bachelet’s term finished. Then it was left to the fate of what the incoming government would do with it, given their own legislative urgencies. As expected, the new government quickly expressed no interest in the constitutional bill prepared by Michelle Bachelet and, moreover, appointed its own government commission to study limited changes to the Constitution.

In any consultation process it is possible to observe the correspondence between the measure submitted for consultation, the consensus or disagreements arrived at, and, finally, the measure formally adopted after the process. This chain of events allows studying the degree of participation

84. La Nación, *Ministro de Desarrollo Social: “Espero que haya continuidad de nuestro gobierno”*, 27 of July, 2017. Available in hyperlink [18].

85. Press release by the Communal Assemblies of Colchane, Camiña, Huara, Pica, Pozo Almonte and Iquique, Alto Hospicio, and the Quechua people, 3 of November, 2017.

86. Ministerio de Desarrollo Social, *supra* nota 45, p. 41 (emphasis added).

87. See, for example, the final report made by the Ministry of National Goods: *Sistematiza el Proceso de Consulta Indígena al Pueblo Kawésqar por la ampliación y re-clasificación de la Reserva Nacional Alacalufe*, October of 2017, available in hyperlink [19]. See also the final report by the Ministry of Environmental Affairs: *Sistematiza el Proceso de Consulta a los Pueblos Indígenas sobre materias específicas para elaborar indicaciones al Proyecto de Ley que crea el Servicio de Biodiversidad y Áreas Protegidas y el Sistema Nacional de Áreas Protegidas*, April of 2017. Available in hyperlink [20]; also, see the final report by the Under-Secretary of Regional and Administrative Development: *Sistematización de consulta indígena sobre el anteproyecto de ley de Residencia, permanencia, traslado desde y hacia el territorio especial de Isla de Pascua*, 15 of February, 2016. Available in hyperlink [21].

88. *Supra* note 42.

89. OIT, *Los derechos de los pueblos indígenas y tribales en la práctica: una guía sobre el Convenio núm. 169 de la OIT*, *supra* nota 59, p. 58.

90. The expedient of Results of the National Dialogue registers the achievement of partial agreements in a series of issues such as the constitutional level of the consultation process, the right to self-determination, the recognition of intercultural health, the recognition of ancestral authorities, issues on which there is no motive to understand their exclusion from the constitutional text proposed by the government. In contrast, other partial agreements were actually included, such as the political representation of indigenous peoples in Congress, although not with the 10% of reserved seats, as the agreement told.

91. The case of the bill that created the Ministry of Indigenous Peoples, simultaneously with the legislative proceedings to discuss the creation of the Ministry of Cultures, placed on the agenda general issues (name of the Ministry, the continuity of the previous Indigenous Peoples institutional arrangements and the new arrangements proposed; the creation of an entity of consultation and register of traditional authorities), and some merely symbolic issues, on which there were agreements and partial disagreements that are included in the final report. The bill currently in Congress observes a huge distance between the form and content of the agreements proposed in the stage of National Dialogue. See *supra* nota 45.

and effective incidence of indigenous peoples in the determination of an administrative or legislative measure, which is the fundamental objective of the right to consultation.⁸⁹ In the case presented in this report, measures consulted did not take the form of legal articles, although the final decision is a constitutional bill. On the contrary, only open contents were submitted for consultation, reaching total agreements, partial agreements and non-agreed measures. This construction of agreements went even further, adding contents that were not contemplated in those initially consulted, such as granting indigenous languages an official status in some regions of the country, contents that were not finally integrated into the constitutional bill presented by the government.⁹⁰ Hence, articulating an intercultural dialogue that presents ideas in the abstract, without the corresponding form of the *measure* object of the consultation, opens a separation between the will expressed throughout the process and the final decision – this is the “adopted” measure. This does not represent the discussion effectively performed, thus harming the good faith that must prevail in the exercise of this right for indigenous people and its correlative duty for the State.

The distance between discussing an idea and discussing legislative measures presents a substantial obstacle, the “participation drain”. As has occurred in other consultation processes, once indigenous peoples are warned that the spaces for participation and “incidence” are limited, they tend to leave the process.⁹¹ The lack of harmony between what is generally sought by a particular public organism –or the whole Executive branch, as in the case of the constitutional reform bill– and what is discussed in the consultation process, generates problems in multiple ways: it undermines the legitimacy of the particular process, given that this depends on the active (and numerous) participation of indigenous individuals and organizations. But in addition, it affects the global legitimacy of the constituent process, given that, as proclaimed by the former president Bachelet, the indigenous constituent process would feed the general constituent process. And, finally, it affects the already deteriorated relations between the State and the indigenous peoples, which transcend their constituent demand.

This phenomenon occurred in the analyzed process, which is reflected in the measure finally adopted by the government in light of the agreements reached during the consultation process. The case of constitutional recognition and aspects related to sovereignty offers an example in this regard. Article 4 of the proposed new Constitution establishes the elements of sovereignty and the exercise of it in the following manner:

Article 4. - Sovereignty resides in the Nation and its various indigenous peoples. Its exercise is fulfilled by the citizens through elections and plebiscites that this Constitution and the laws establish, as well as by the public organisms and authorities holding their offices. No sector of the population or any individual can attribute its exercise.

Likewise, article 5 establishes the constitutional recognition of indigenous peoples, generating a relationship between them and the conformation of a single nation in the Republic. In effect, the rule states that:

Article 5. - The State recognizes indigenous peoples that inhabit its territory as part of the Chilean Nation, obliging itself to promote and respect their integrity, as well as their rights and culture. Indigenous peoples will participate as such in the National Congress, through a parliamentary representation, whose number and form of election will be determined by a constitutional organic law...

Both articles are the fundamental core of the constitutional recognition of indigenous peoples. However, the concepts consulted by the government related to the idea of “pre-existence” of the indigenous peoples in the territory they inhabit, as well as guidelines for constitutional interpretation according to the rights of indigenous peoples, both elements that are not identified in bill finally presented to Congress. In the same line, the minutes containing the agreements reached in the phase of ‘National Meeting’ indicate total consensus on the aforementioned elements. Thus, the measure consulted, the agreements reached and the final measure adopted are different from each other.

Likewise, it draws attention to the inclusion of parliamentary representation of indigenous peoples in the Congress established in Article 5, considering that it was a partial agreement reached at the 'National Meeting'. In the same situation are the interpretation agreements of the New Constitution, the right to intercultural health, the constitutional status of the right to consultation, and self-determination; all which are not included in the constitutional bill, without providing indication of the reasons why these claims were not finally covered.

Bachelet's constitutional bill regulates in Chapter III over fundamental rights, guarantees and constitutional duties, establishing three articles related to indigenous peoples. Regarding the right to education, the norm establishes that:

Art. 19, No. 14, final paragraph: The State recognizes the different forms of education of indigenous peoples within the framework of the general education system provided in this article.

It should be noted that this article directly relates to the contents consulted initially by the government, as well as captured in the agreements in the 'National Meeting', which for methodological purposes, are part of one of the five "total agreements" found in the minutes of October 21, 2017.

In the same way, the new Constitution bill ensures the cultural and linguistic rights, as well as the material and immaterial heritage of indigenous peoples. The proposed rule provides that:

Art. 19, No. 32: The cultural and linguistic rights of indigenous peoples and the right to their cultural, material and immaterial heritage in accordance with the law. It is the duty of the State to promote such rights. The preservation and dissemination of the languages of the indigenous peoples will be established in the law.

Both rights and the duty of promotion, preservation and dissemination are elements that are possible to identify with the total agreements reached at the meeting, although not in the extended manner in which they were systematized. However, the last sentence of the abovementioned article expresses a normative reference in which languages will be established in a law, which opens an opportunity to set norms, although not of constitutional rank, as it was agreed.

With regard to the duties of all people in Chile –the so-called "burdens"–, the constitutional draft provides that:

Article 22.- Every inhabitant of the Republic owes respect to Chile, to its national emblems and to the emblems of its indigenous peoples.

The national flag, the coat of arms of the Republic and the national anthem are emblems of the Chilean Nation.

Chileans have a fundamental duty to honor the country, to defend its sovereignty and to contribute to preserving national security and the essential values of the Chilean tradition and its indigenous peoples.

This proposed constitutional text mirrors the agreements reached in the dialogue stage between indigenous peoples and the government, by establishing the duty of respect –which requires recognition– of the emblems, as well as honoring the tradition of the indigenous peoples, a matter that was also agreed upon. In any case, the article lacks a crucial element of the agreement, even highlighted in the minutes, regarding the fact that this recognition and protection is carried out in accordance with the cosmovision of indigenous peoples, an issue not addressed in the bill. Moreover, from the reading of this article in harmony with Articles 4 and 5, it is possible to conclude that indigenous peoples exercise their sovereignty differently from "the Chilean Nation", even though they are part of it. In fact, the norm refers to

92. *Supra* note 40. See section D.

93. James Anaya warns that “along with applicable procedural guarantees, and independently of a potential agreement, consultation processes should lead to the adoption of decisions that are compatible with the substantive rights of indigenous peoples”. See James Anaya, *supra* note 55, pp. 236-237.

94. Noguera, Albert, *El sujeto constituyente*, Ed. Trotta, Spain, 2017, p. 120.

95. Acta Acuerdo con Consejeros Indígenas CONADI, *supra* note 45, p. 95.

96. Ministerio de Desarrollo Social, Oficio Ordinario Nº 3618, 28 of August, 2017, in Ministerio de Desarrollo Social, *supra* note 45, p. 97.

97. Ministerio de Desarrollo Social, Oficio Ordinario Nº 3316, 10 of August, 2017, in Ministerio de Desarrollo Social, *supra* note 45, p. 99.

98. Salvador Millaleo, *Reconocimiento constitucional en Tiempos de Huracán*, in *The Clinic*, 8 of March, 2018. Available in hyperlink [22].

“its indigenous peoples” without recognizing their emblems as part of the Chilean nation, thus the State continues to recognize only one Nation, which seems to subsume other nationalities. There is no clarity about how this norm was drafted, nor is there an explanation of this point in its introductory Message.

The case of Article 19, No. 22, which establishes the exercise of political rights is paradigmatic. It provides that “[political] parties are associations that contribute to the functioning of the democratic system and the formation of the political will of the *people*” (the highlighted is our), in singular, as if the wording of the previous articles that speak of ‘*peoples*’ did not exist, tacitly obliterating the plurality of sovereignties that falls on the *people*, in plural. This appears as the antithesis to the “additional claims of indigenous peoples” made in the ‘National Meeting’ related to the idea of the declaration of the Plurinational State.⁹² Once again, there is no indication of the reasons why this textual form was adopted.

At some extent, the proposed articles reap elements of the agreements reached in the indigenous consultation, however, they restrict the scope that was raised in the dialogue phase. While the proposals go in the line of one national state, in which indigenous peoples are recognized, even with the possibility of parliamentary representation, the truth is that indigenous peoples were discussing -and this is contained in the information provided during the process- about plurinationality, official recognition of languages, among other matters already recognized in international treaties.

The foregoing is relevant if it is observed along with the previously discussed topic on the formal aspects that hinder the exercise of consultation of indigenous peoples. As exposed by a former UN rapporteur on indigenous peoples, the formal aspects of a consultation process, closely related to the standards of the same, suppose a degree of respect that does not impact the result, whether or not there is consensus on the measure consulted, which at the same time cannot affect the rights already established in favor of indigenous peoples.⁹³ The form and the content matter when constructing intercultural spaces where respect and good faith must prevail.

3. Analysis of emerging divergences in the process

Prior consultation is a special participation mechanism that, as said before, is a tool that aims to balance the historical situation of distribution of power between the state and indigenous peoples. To a certain degree, it legally embodies the determination of indigenous peoples own priorities, changing the paradigm in which they passively perceive the construction of the common. Hence, this right seek to protect participation, understanding it as the possibility of bringing intentionality to the decisions that are being adopted.⁹⁴

Expectations regarding the application of this right were questioned by the indigenous leadership. It is remarkable what was publicly declared by the Mapuche Councilors of the CONADI, who on the same day, October 17, during the National Meeting, issued a communiqué stating that there are “evident practices of interventionism and coercion”, as well as a lack of proximity for determine “the dialogue mechanism” that is used in this meeting. This is relevant considering that they are indigenous representatives with whom the government agreed on August 17, 2017, to “overcome the differences in approach, focus and content of the consultation”,⁹⁵ giving support to the request of collaboration as guarantor and observer of the process to the United Nations in Chile,⁹⁶ and as an observer, the National Institute of Human Rights.⁹⁷ These aspects should be addressed during the planning stage as indicated in Article 15, No. 1 of the Supreme Decree No. 66, together with the participating indigenous peoples.

On the other hand, it is important to highlight the opinion of Salvador Millaleo, lawyer and sociologist, who was a member of the Citizens’ Council of Observers of the Constituent Process, for whom the constitutional proposal on indigenous peoples is “incoherent, incomplete and unsatisfactory for its recipients”.⁹⁸ After the announcement and dispatch of the Bachelet bill, the academic shared an

analysis of the rules of the constitutional proposal, noting that in matters of constitutional recognition “reiterates the tradition of subordination and mono-national understanding of relations between indigenous peoples and the State”, adding that the proposal discards the recognition of the right to self-determination, which was one of the main conclusions of the indigenous constituent process.⁹⁹

4. Judicial challenges

The political level was not the only one in which disagreements regarding the process were aired. During the development of the process, at least two constitutional protective actions were filed that aimed to challenge the indigenous constituent consultation process.

One case is a claim filed by representatives of the regions of Biobío and Ñuble, who argued the realization of actions by state agents involved in the process that undermined the rights of indigenous peoples. Particularly, they point out the absence of legal advice, the breach of the planning stage since the methodology was not agreed upon; the information stage, due to not being validly notified or in the requested number of meetings; breaches of the dialogue stage, mainly in the national meeting, when the request to suspend the process due to the conditions of the dialogue at that time was dismissed.¹⁰⁰ However, this claim was declared inadmissible by the Court of Appeals of Santiago,¹⁰¹ a decision confirmed by the Supreme Court.¹⁰²

On the other hand, there is a protective action filed by six indigenous representatives of the Tarapacá region, in which the Court of Appeals of Iquique accepted the claim, providing for nothing less than the repetition of the indigenous consultation process, based on the breach of Article 3 of the Supreme Decree No. 66, which violates Article. 19 No. 2 of the Constitution, that is, the right to equality.

According to the appellants, the necessary conditions to address the process were not generated, due to deficiencies in methodology, information of scarce relevance, lack of necessary resources for advisors and refusal to suspend the process, which harm the principle of good faith and appropriate procedure, both contained in Convention No. 169 and the Supreme Decree No. 66. The judgment of the Court of Iquique states that “the appellants do not question the prior nature of the consultation, but they question the manner in which the procedure was carried out and the good faith of the State organism during the same”.¹⁰³

The Ministry of Social Development requested that the claim be dismissed, since the action was unfounded, indicating that all the necessary information was effectively provided, establishing the conditions for a proper assistance of the participants; arguing as well the lack of active legitimation of the appellants –pointing out that they did not have proper representation of their indigenous communities, even though they were chosen in the same consultation process to represent communities from the north of the country– and, finally, arguing that the action was filed extemporaneously.¹⁰⁴

The Court understood that the deficiency of conditions is responsibility of the Ministry of Social Development, since this is the organism responsible for the measure, an issue that is referred to in the Supreme Decree No. 66, Articles 4 and 7.¹⁰⁵ It also understood that the absence of the necessary resources for technical assistance, noting that no information appears in the process that accounts for a methodology agreed upon with indigenous peoples, as well as not having provided the relevant information during the process, nor offering the right time for its due assimilation, generated –in the opinion of the Court– that the process was not adapted to the particularities of indigenous peoples, lacking a due identification of their representative institutions (section 12).

The Court of Appeals of Iquique ruled that:

... it must be concluded that the employed procedure has not been adequate and that there has been a lack of good faith, both principles that, according to Supreme Decree No. 66, are basic and inspiring and must be respected in the consultation process.¹⁰⁶

99. Salvador Millaleo, *Análisis del Reconocimiento Constitucional de los Pueblos Indígenas en la Propuesta de Bachelet*. Available in hyperlink [23].

100. Writ of Protection claimed by María Olmos, President of the Indigenous Association Rayen Leufu; Marcia Rain, President of the Indigenous Association We Newen Che; Marcelo Huechunpán, President of the Indigenous Association Raeyen Wenu; Ingrid Álvarez, President of the Indigenous Association Tabuchi Mapumu Mongeleiñ; Job Lozano, President of the Indigenous Association Newen Boyen; María Huichamán, President of the Indigenous Association Antu.

101. Court of Appeals of Santiago, Ruling on case N° 9858-2018, 15 of February, 2018.

102. Supreme Court, Ruling on case N° 3434-2018, 5 of March, 2018.

103. Court of Appeals of Iquique, Ruling on case N° 916-2017, 5 of January, 2018, Section [“Considerando”] 11th.

104. *Ibid.*, Section 2nd.

105. *Ibid.*, Section 5th.

106. *Ibid.*, Section 12th.

107. Supreme Court, Ruling on case Nº 1186-2018, 9 of April, 2018.

108. Ibid., Section 5th.

These aspects, also covered by this report in the formal aspects of the process, result in obstacles to the implementation of the consultation with respect to fundamental principles of the same. This led to the decision of the court that accepted the action impetrated by the representatives of the communities. On January 11, 2018, the State Defense Council filed an appeal before the Supreme Court. The Highest Court repealed the decision made by the Court of Iquique, thus the process of indigenous constituent consultation will not be repeated.¹⁰⁷

Without going into the substantive considerations, the Supreme Court rejected in a five-page sentence what was sustained by the Court of Appeals of Iquique, arguing that, since these are facts that have already taken place, namely the dispatch to the National Congress of the bill that modifies the Constitution, the grounds for a protective action were not configured. According to the Court:

... it becomes evident the impertinence, due to lack of opportunity, to develop a new process of indigenous consultation to review the subject and matter of this constitutional protective action, reason why this Court is not currently able to adopt the necessary measures to restore the rule of law and ensure the due protection of those affected [...]¹⁰⁸

In other words, even if the facts that motivate the appeal violated rights affecting the participation of indigenous communities in the process, as ruled by the Court of Appeals, this was no longer possible to repair, since the government already had taken the decision to dispatch the bill, reducing the possibility for courts to exercise their jurisdictional role on the actions of the Executive.

{Final Remarks}

The effort that the government of President Michelle Bachelet deployed to carry out a participatory indigenous constituent process is unprecedented in the Chilean constitutional practice and, possibly, in the compared practice. In a context of structural discrimination and lack of recognition of the collective and individual rights of indigenous peoples, the constituent process appeared as a good opportunity to change the paradigm of relationship between the State and indigenous peoples. However, as this report analyzes, the effort has been hampered by the lack of prolixity in the development of the process.

Specifically, and in consideration of the available data, there is an insufficiency with respect to the composition of the final reports provided by the Ministry of Social Development, which account partially for what happened in the constituent consultation process. In effect, the "Final Report" gives an account of what happened in the internal deliberation and dialogue stage, but it lacks information regarding what happened in the planning stage, perhaps one of the most relevant stages of the consultation process. With this, the terms under which this process could be developed are harmed, which is exposed by the problems outlined at the level of the meetings and, in particular, with the judicial challenges that are still pending at the date of this report (even though it is evident that, since the process has concluded, the actions seem, at least in the immediate objective of suspending it, obsolete).

In the substantive aspect, the normative scope of the constitutional bill regarding indigenous matters is indebted to the international human rights standards, although the State obliged itself to respect. The *ex-ante* limitation of the measures to be consulted, without a clear rationality of how these measures are reached, how others are left out of the discussion, and how they comprise (or not) the final text, give an account of a very precarious understanding of how this process of constituent participation could and should have been carried out.

{Hyperlinks}

- [1] <http://www.gob.cl/2015/10/13/discurso-de-la-presidenta-de-la-republica-al-anunciar-el-proceso-constituyente/>
- [2] <http://www.gob.cl/2015/10/13/8-conceptos-del-proceso-para-la-nueva-constitucion/>
- [3] <http://www.latercera.com/noticia/presidenta-firma-lunes-proyecto-reforma-al-capitulo-xv-la-constitucion/>
- [4] https://www.unaconstitucionparachile.cl/guia_metodologica_proceso_constituyente_abierto_a_la_ciudadania.pdf
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- [16] <http://www.constituyenteindigena.cl/wp-content/uploads/2016/08/Librillo-3-cuadernillos-AJUSTES-FINALES-II.pdf>
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- [22] <http://www.theclinic.cl/2018/03/08/columna-de-salvador-millaleo-reconocimiento-constitucional-indigena-en-tiempos-de-huracan/>
- [23] <https://es.scribd.com/document/373240135/Ana-lisis-del-Reconocimiento-Constitucional-de-os-Pueblos-Indigenas-en-la-propuesta-de-Bachelet-v-1>

