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Bachelet's "New Constitution": Concerning Proposals

Chile should be receptive to the constitutional reform, since it is part of a sound constitutional evolution. However, the ambiguity shown by candidate Michelle Bachelet on this issue does not contributed to it. The tactical use of the parliamentary result as a pressure mechanism and the intentional uncertainty in relation to the real procedure of constitutional change –where the controversial Constituent Assembly has not been discarded- turn her proposal into a matter a concern.

In the government program introduced by Michelle Bachelet -which we have carefully analyzed in previous documents[i]- her constitutional proposal is definitely worth of highlighting. It is important, not only because the Constitution is relevant by itself for the country -it is the fundamental law, the instrument that contains the social pact of our political community, establishing the main rules for the distribution of power, weights and counterweights and constitutional rights-, but also because Bachelet had ambiguously dealt with the subject, being one of the three core ideas of her campaign.

And although in a few pages it is difficult to fully express the multiplicity of rules and rights that should be included in a "New Constitution", it is positive that most of the proposal replicates a good deal of the current Constitution. This led the constitutionalist Arturo Fermandois to maintain that: "If we are talking about creating something completely new, the proposal presents a strong deficit".[ii] Besides, the constitutional innovation, as the comparativist expert Tom Ginsburg has pointed out, is an extremely slow process.[iii] It could not be otherwise, since most of the current rules concerning distribution of power and rights have been part of the evolution of the Chilean constitutional tradition throughout its republican

life.

When comparing this proposal with those of the different nominations –including that of the center-right- there is a series of shared constitutional improvements in such diverse matters as consolidating the constitutional status of decentralization, increasing the citizen participation forums and simplifying the vote of Chileans abroad, rethink the parliamentary electoral system, the balance of powers between the President and the Congress, the role of the supermajoritarian laws or increasing the accountability of different public authorities; however, Bachelet's program contains a series of proposals which seem concerning and have to be analyzed by virtue thereof. We will highlight some of the most relevant in the following lines.

Means Conducing to the Change

Although the program establishes that a new Constitution is intended based on an institutional, democratic and participative process, Bachelet has been ambiguous on this issue. We know what the current rules of constitutional reform are: depending on the chapter it deals with 2/3 and 3/5 quorums of the exercising parliament members, which as we have explained before, are a global standard.[iv] But in this area, her statements –and some of the members of her constitutional team- have not contributed at all, putting too much emphasis on the tactics; the channels chosen for the change will be defined depending on the forces they have in the Congress. What does this mean exactly? What happens if Bachelet does not obtain the necessary parliamentary majority? Will she cast aside the search for agreements in the Congress or will she choose an unconstitutional decree which summons to a plebiscite in order to pronounce ourselves on the Constituent Assembly, which according to their authors would not be controlled by the Constitutional Court?

Here, the program also refers to the need of reforms "from the start" that would allow a participative process. This participation seems to apply both during the process –integrating representatives of the civil society to the parliamentary debate? Designated persons? Elected ones?-, and afterwards –plebiscite of the process. But here again, many questions arise: what happens if there are legitimate differences regarding the reforms "from the start"? Will they be considered a blockage? Will they be a signal to choose extra-institutional channels such as the above mentioned unconstitutional

decree? It is difficult to create a productive negotiation space in a scenario marked by unilateralism.

Social State under the Rule of Law and Solidarity

In a previous document we have sustained that one of Bachelet's main proposals is to constitutionalize the Welfare State, that is, to establish a Social State under the Rule of Law.[v] Beyond constitutionalyzing this phrase –following, for example, the Spanish Constitution which stipulates that Spain "is constituted upon a social and democratic State under the Rule of Law"-, it proposes the following: (i) to guarantee with juridical actions all of the economic, social and cultural rights (ESCR) currently stipulated in the Constitution (but whose development and implementation remain currently in the hands of the legislator); (ii) to add new ESCR, for example, the right to housing, the right to work –which replaces the current rule of freedom to work- or the right to culture; and (iii) to establish the solidarity principle as guiding principle of the relationship between individual, society and State, substituting –as their proposers have declared- the "neoliberal" principle of subsidiarity.

The extension of the catalog of Economic, Social and Cultural Rights and the fact that they are cognizable, does not only lead us to the long discussion about the juridical nature of the ESCR –rights, political aspirations or benefits related to the State's capacity to fulfill them- but its cognizable character implies a massive transfer of power from the Congress to the judges –who lack the democratic legitimacy and the technical capacity to make the most difficult decisions in terms of distributive justice, opening a relevant space for judicial activism.[vi]

On the other hand, it is quite curious that constitutionalists with progressive roots, for decades critical of the fact that the current Constitution contained rules and principles such as the subsidiarity one, which were the basis of the "neoliberal model" and consequently, it would distance our Constitution from the classical principles of freedom and equality[vii], are now searching to replace subsidiarity by solidarity. Moreover, **what is the status of the principle of solidarity in the Chilean constitutional tradition?** None. Furthermore, it was under the principle of subsidiarity, whose origin can be found in the social doctrine of the Church and not in the classical liberalism, that the ESCR were significantly recognized for the first time in the jurisprudence of the Constitutional Court on

occasion of the verdict called *Isapre I*, which relates it to the principle of solidarity.

Anyhow, and in the sensible words of the academician Jorge Correa referred to the constitutional debate, especially in principle and ESCR matters, we should take the “eraser”[viii] along. It is an adequate constitutional minimalism.[ix]

New Mechanism of Constitutional Reform

As we have said before, the current reform quorums of 3/5 and 2/3 of the exercising parliament members are quite standard in the compared constitutional law. In this respect, Bachelet’s proposal has several innovations, quite disturbing to be honest.

First, regarding the reform quorum, it goes back to the rule of absolute majority of the Constitution of 1925 (today we would have 61 deputies and 20 senators), discarding the technique of constitutional rigidity, **which aims at protecting minorities and their rights**. Moreover, the proposed quorum would make the Constitution undistinguishable from other laws, at least from the most relevant (although the constitutional organic laws of the 4/7 quorum are eliminated in Bachelet’s proposal, some qualified quorum rules would be maintained, that is, absolute majority in both Chambers).

It is also concerning that the differences between the president and the Congress on its content would be solved by means of constituent referendum. It is a formula which puts too much power in the hands of a president (who already has broad powers), reducing the power of the Congress as counterweight, and creating institutional incentives for populism. In practice, a popular president, who also deals with “urgencies” –that is, he decides on the schedule and priorities of the legislative agenda-, does not need the Congress in order to modify the Constitution. The risk of authoritarianism is evident; we have already seen the use of this technique in the continent.

Finally, it adds that each constitutional reform shall be approved by the people in a referendum. It is both a rather unpractical matter (mere procedural adjustments or will they also concern the terms?) and a substantive matter: it would add an extremely rigid element, which is curious in view of the criticism of members of Bachelet’s team regarding the fact that the 2/3 and 3/5 quorums are today extremely rigid –we do not only know that this is not true from the

compared perspective, but due to the great number of reforms made to the current Constitution.

Constitutional Court

Today, in the judicial review of legislative actions, and following the constitutional reform of 2005 (Law Nº 20,050), the Constitutional Court (CC) relies on preventive and repressive controls, depending if the law is in force or not. The preventive control is mandatory for the bills that interpret the Constitution, the organic-constitutional ones and the organic-constitutional precepts contained in international treaties. It may be contingent or optional when the president, the chambers or a part of them introduce a requirement before this court in view of constitutionality matters related to constitutional reform proposals or bills. On the other hand, as of the reform of 2005 there are two repressive controls: inapplicability for being unconstitutional and declaration of unconstitutionality, which is available for all citizens. During 2012, from the total issues that entered the CC, 82.7% corresponded to inapplicability; 9.3% to mandatory preventive controls; and 3.8% to optional preventive control.[x] There were no requirements for declaration of unconstitutionality, which are anyhow extremely exceptional.

Bachelet's proposal aims at eliminating the preventive controls and keeping the above-mentioned repressive ones. In any case, the CC will have a new consultative jurisdiction in order to analyze, at the request of any of the chambers, the need to adequate the internal law for the parliamentary approval of human rights international treaties.

It is obviously necessary to revise the CC's preventive controls, especially the mandatory one, which in practice has no major impact and has been well defined by professor Sergio Verdugo, based on empirical evidence, as a true administrative proceeding, an "official process recording ("*toma de razón*")"[xi]; however, its complete elimination does not seem sensible from the perspective of compared law –there are various CC with preventive competence in countries with irreproachable democratic traditions- nor from our own constitutional tradition. The so-called "first CC", which appears in our constitutional system in 1971 (and until 1973), had an optional preventive control in pretty similar terms as today. The optional preventive control is a relevant institutional tool in favor of the political minority on duty.

Other Subjects

Finally, there are two additional concerning proposals. First, regarding the freedom of speech and the statute of social communications media, there are sentences with no major details declaring that the law will determine the limits to the concentration of communications media' ownerships and that the intention will exist to guarantee the information pluralism. This type of proposal has ended very badly in our continent, eroding not just the freedom of speech but also democracy. Of course, this does not have to be that way in our country; **however, the constitutional rules are designed to prevent excesses and arbitrary acts, not by assuming the government** of virtue. Independent communications media and a strong freedom of speech system are the cornerstones of a free society, democracy and the criticism to the State's performance and authorities. To weaken them would be a mistake.

Second, the constitutional autonomy of the Central Bank of Chile seems diminished, because although it is recognized, the proposal establishes that the law will set the measure of the autonomy and the configuration of its competences. Some members of Bachelet's constitutional team maintain that the aim is to extend the constitutional accusation against the advisers; for others, it consists in increasing the control and responsibility regime on them. The relevant point is that it is an autonomy that has meant a significant institutional progress which should not be eroded. Furthermore, the proposal is confusing while mixing up the treatment to the Central Bank and its constitutional autonomy with other institutions that have only legal status and autonomy, such as the Council for Transparency and the supervising bodies (for example, the Superintendences).

Conclusion

In the same way as in past decades, Chile should be receptive⁰ to the constitutional reform, since it is part of a sound constitutional evolution. When analyzing the constitutional proposals of the presidential candidates, we find a series of widely shared reforms, which is something positive. Obviously there are legitimate differences regarding the institutional diagnosis and the magnitude and direction of the changes. But Chile relies on a constitutional tradition that should serve as a standard to all sectors to judge the constitutional reform process that is on the way.

All in all, the ambiguity shown by the person who will most probably be the next elected president does not contribute to it. The tactical use of the parliamentary elections' result as a pressure mechanism, the intentional uncertainty in relation to the real procedure of constitutional change –where the controversial Constituent Assembly has not been discarded-, and some specific proposals already discussed, turn her proposal into a matter a concern; and there are reasons to believe it.

In brief…

- Chile relies on a constitutional tradition that should serve as a standard to all sectors to judge the constitutional reform process that is on the way.
- The reform quorums of 3/5 and 2/3 of parliament members are standard in the compared constitutional law. Bachelet's proposal pretends to go back to the rule of absolute majority of the Constitution of 1925, discarding the technique of constitutional rigidity that aims at protecting minorities and their rights.
- The ambiguity shown by Bachelet in constitutional reform matters is not a contributing factor. The tactical use of the parliamentary result as a pressure mechanism and the uncertainty of the change method are concerning.

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[i] See Public Issues N° 1,134 L&D "*Programa de Gobierno de Bachelet: Ambigüedades, Giro a la Izquierda y Exceso de Estatismo*", and Public Issues N° 1,135 L&D "Bachelet's Government Program: Concerning Signals in Other Areas".

[ii] Article in the magazine Revista Qué Pasa "*Debate a la carta*": http://www.quepasa.cl/articulo/politica/2013/11/19-13104-9-debate-a-la-carta.shtml

[iii] Tom Ginsburg (2013): "Innovation in Constitutional Rights". http://www.law.nyu.edu/sites/default/files/upload_documents/November%2019%20Ginsburg%20Melton%20Innovation%20in%20Constitutional%20Rights%20.pdf

[iv] "Constituent Assembly: Chile's Salvation. Libertad & Desarrollo, Public Issues Nº 1,079.

[v] See Public issues Nº 1,134 L&D.

[vi] See José Francisco García and Sergio Verdugo. *Activismo judicial en Chile ¿Hacia el gobierno de los jueces?*, L&D Editions, 2013.

[vii] See, for example, Pablo Ruiz-Tagle. "*Principios constitucionales del Estado empresario*", Revista de Derecho Público, Universidad de Chile N° 62. 2000. http://mazinger.sisib.uchile.cl/repositorio/pa/derecho/r20074201622revistadederechopublicov.62p.4867.pdf

[viii] See Jorge Correa Sutil. "*¿Ha llegado la hora de una nueva Constitución*?", Anuario de Derecho Público 2013, Universidad Diego Portales, 2013.

[ix] See José Francisco García. "*Minimalismo constitucional*", 2013 http://voces.latercera.com/2013/10/21/jose-francisco-garcia/minimalismo-constitucional/

[x] See Public Account of 2012 of the President of the Constitutional Court.

http://www.tribunalconstitucional.cl/wp/documentos/memorias-y-cuentas

[xi] Sergio Verdugo. "*Control preventivo obligatorio: auge y caída de la toma de razón al legislador*", Constitutional Studies, Year 8, N° 1, 2010. http://www.scielo.cl/pdf/estconst/v8n1/art08.pdf