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# Constituent Assembly: Chile's Salvation?

**The problem of the Constituent Assembly in Chile is that it lies on a false premise: the alleged "institutional crisis". Evidence shows that this process is far from being neutral or pacific, it is rather a mechanism marked by the power games of political groups. The latter does not exclude the possibility of improving the prevailing institutional framework; however it is not necessary to replace the Constitution.**

Lately, some people have raised their voice to claim for a Constituent Assembly (*Asamblea Constituyente*) with the aim of creating a new Constitution for Chile. The reasons, mechanisms and consequences of this proposal are diverse, but the main thesis seems to be that Chile is passing through an alleged "institutional crisis"[i] or, in other words, a "constitutional moment".[ii]

Along these lines, the statements of former President Ricardo Lagos are worth highlighting, since, in spite of declaring himself in favor of making reforms to the current Constitution, he declared in an interview that, if the binominal electoral system is not modified – a mechanism which is applied only in parliamentary elections- steps should be taken towards a Constituent Assembly.[iii] Notwithstanding that the statement's inconsistency is evident –among other reasons because the electoral system is simply not part of the Constitution-, Lagos allows foretelling the problem's undertone: for an important left-wing sector, the existing "political tie" at the Congress – which is actually due to the existence of two stable coalitions with equivalent voting-, should be broken through a complete change of rules by means of a Constituent Assembly.[iv]

Unfortunately, this approach is consistent with a series of compared experience cases regarding new constitution building processes: its use as one more strategy of the political skirmish.

Of course Chile has to continue discussing the improvements to its constitutional and electoral system, but we should do it based on a rational discussion, and the country's long-term interest should prevail above instantaneous political interests. Furthermore, we should redouble the defense of representative democracy before those seeking to install in the country –following the proposals of the student movement- a plebiscitary democracy – so much in fashion among the continent's populists-, which as we know is a concealed form of authoritarianism.[v] Likewise, the debate cannot lose the ultimate sense of a Constitution: to limit the power of the State in order to safeguard individual rights and liberties.

**Constituent Assembly in Chile?**

There are several indicators showing that political institutions –particularly the Congress and political parties- do not rely today on citizenship's admiration. Nevertheless, this does not apply to other public institutions such as the Police (*Carabineros*) or the Armed Forces, which posses a high level of approval.[vi] Likewise, recent indicators of the World Bank concerning governance, place Chile very close to the OECD countries and very far from the Latin American average (Table 1).

Table 1

GOVERNANCE INDICATORS, WORLD BANK

| | Chile | L.A. (Average) | OECD (Average) |
|---|---|---|---|
| Voice and Accountability | 82.0 | 61.5 | 91.1 |
| Political Stability / Absence of Violence | 67.5 | 53.7 | 78.8 |
| Government Effectiveness | 83.7 | 58.4 | 90.6 |
| Regulatory Quality | 91.4 | 57 | 90.3 |
| Rule of Law | 87.7 | 52.6 | 90.5 |
| Control of Corruption | 90.9 | 58.8 | 89.6 |

Source: World Bank (2010).

In this context, is a new Constitution necessary? Together with the self-denominated "collapse theory", several arguments have been raised to question the Political Constitution, based on the "illegitimacy of origin", the existence of "authoritarian enclaves" and the "subsidiary and neoliberal" view of the Political Constitution. These criticisms, insurmountable according to its proposers, must be necessarily and solely be resolved through a Constituent Assembly.[vii] These statements are also complemented with certain myths

regarding the Chilean constitutional past: people tend to forget, for example, that those which were not approved by the female vote (Constitution of 1925[viii]) were approved through a censitary suffrage (Constitution of 1833[ix]) or were straightly unconsulted to the people (Constitution of 1828, 1823, etc.[x]).

The legitimacy of origin of the Constitution will always be a controversial issue; a question which can also be applied to the first written Constitution, the North American one. Therefore, the legitimacy of exercise is equally important, through the process of constitutional reforms –which have been significant in Chile- or the Constitutional Court's interpretation of its norms.

As Yale University Professor Akhil Reed Amar has pointed out, constitutional reforms are not only words, but collective commitments of today's generations to redeem the original errors of the past generation.[xi] And as former President Ricardo Lagos declared when enacting the reform of 2005: "Chile deserved and deserves a democratic Constitution in accordance with current international democracy standards. This is what the Plenum at the Congress approved a few days ago and we have now proceeded to sign: a Constitution for a new Chile, free and prosperous… Chile relies today on a democratic Constitution which deals with the real problems of the people…having a Constitution which reflects us all is essential for all the tasks we Chileans have ahead, since it consolidates the patrimony of the progress we have made in economic, social and also cultural terms".[xii]

In fact, the Constitution has undergone several improvements, all under impeccable democratic formulas, being those of 1989 and 2005 the most relevant, both having a very high level of political consensus. Thus, up to 2010, the Constitution had gone through more than 240 reforms in its original articles.[xiii]

As for the so-called supermajoritarian quorums, two different questions tend to get mixed up: the constitutional reform quorums (2/3 or 3/5 depending on the chapters subject to amendment) and the existence of supermajoritarian laws: the Constitutional Organic Laws (LOC, which require the congregation of 4/7 of the performing parliament members) or the Qualified Majority Laws (LQC, which require the absolute majority of the elected parliament members).

Regarding the first point –constitutional rigidity-, our Constitution is in the moderate zone at international level between rock-like constitutions and those extremely flexible (Table 2).[xiv]

In order to be strict in the methodology, Chile was incorporated to this category, although many of its provisions can be amended with a 3/5 majority and not 2/3, which makes it even more flexible, thus destroying the alleged unmodifiable character of the Political Constitution.

Concerning the supermajoritarian laws –LOC and LQC- it must be said that although they are a technique which is not globally spread and they are perfectly revisable as it will be shown later on, they do exist in several advanced democracies. As an eminent national constitutionalist has recently demonstrated, there are similar norms in the constitutions of Hungary, Austria, Montenegro, Croatia and Albany, which require even greater quorums than in Chilean, in addition to supermajoritarian laws in France, Spain and the United States.[xv]

Table 2

COMPARED CONSTITUTIONAL REFORM QUORUM

| Quorum | Cases |
|---|---|
| Over 2/3, or 2/3 with special provisions | Australia, Canada, Japan, Switzerland, USA, Germany |
| 2/3 majority or equivalent | Austria, Belgium, Costa Rica, Finland, Portugal, India, Spain, **Chile**, Ecuador and Bolivia |
| Majorities between ordinary and 2/3 | Ireland, France, Italy, Sweden, Denmark, Greece, Uruguay and Brazil |
| Ordinary majorities | Iceland, New Zealand, United Kingdom and Israel |

Source: Lijphart (2000).

Finally, regarding the assumed constitutional exclusivity towards a “neoliberal and subsidiary” model, it does not sustain itself in the light of the historical experience. Chile governed itself under the same Constitution, with no crisis, under center-left regimes for 20 years. Furthermore, the Constitution admitted without traumas or complexes reforms tending to create a true Welfare State, with tax increases, labor reforms and a significant reform to the pension system, and the constitutional design did not suffer thereby nor did it collapse. Moreover, all these matters require only a simple majority at the Congress.

**Building a New Constitution**

In the last decade, as a general rule, the generation of new constitutions has been a phenomenon associated to external or internal post-war situations, or derived from the transition from an authoritarian regime to a democratic one. This is the case in Africa and Asia. On the other side there is Latin America, where the situation of Venezuela, Ecuador and Bolivia shows that the constituent process seeks rather to modify the existing state of things, and reassemble the political scenario in order to favor specific political groups or give them more power than they already have.[xvi]

As systematized by the literature, the process has six axis or stages: (i) beginning of the process; (ii) setting up formal mechanisms; (iii) negotiation and agreements; (iv) wording; (v) enactment; and (vi) implementation.[xvii] It is worth highlighting –as demonstrated by the experience of more than twenty countries which have faced this process in the last decade-, that it involves a process which is not only political –which is evident, since it concerns the social compact-, but it is also marked by the power games of the existing political parties or groups.  This is strengthened in highly polarized societies after a civil war or where the existence of diverse religions and ethnics interfere with the political interests (identity politics). This is why more than half of the processes have failed. This makes sense, since at the end of the day the constituent processes stipulate the rules of power of the political system for the next decades.

Therefore, great deal of this political game is present from the beginning; in the election of the formal mechanism, the institution, which shall be in charge of the constituent process. One of the alternatives is the Constituent Assembly, which can either imply or not the election of delegates with the sole purpose of creating a new Constitution, which for some entails the advantage that the Constitution’s legitimacy lies in the initial election of representatives, which does not require a further approval in a referendum. Another mechanism is to instruct the Parliament to exercise the original constituent power; national conferences; expert committees, mixed commissions; etc. the sole decision of this institutional framework is controversial, as well as the extension of its mandate: partial or complete reform. In South Africa, for example, just making this decision took six years (1990-1996).[xviii]

In this context, and according to the analysis of the hypothesis which trigger constituent processes, it is hard to find arguments which

advise Chile to enter one of these processes; unless, of course, that there is a political sector that sees a change in the rules of the game which may favor its political interests.

**Agenda of Political and Constitutional Reforms**

All the above does not mean that our Constitution and political system do not require some improvements. Quite the opposite, there is still much progress to be made. But, as we have said, the idea is to move along a road which has already been traveled. We must not forget that incremental and progressive reforms are accumulative and may reflect a constitutional order which is substantially different from the initial one.[xix]

In fact, it is possible to revise the institution of the LOC, while studying which matters may be subject to laws requiring a smaller quorum (e.g., Public Ministry) or reviewing the specific quorum that shall govern them.[xx] The case of the LQC is somewhat different, not only because of its smaller quorum, but because they are a guarantee against the regulation of fundamental rights, that is, it is above all a defense technique of the individual's basic guarantees in front of the State.

There's also a space for analyzing the sense and efficiency of the mandatory preliminary control of the Constitutional Court, which has been qualified, based on empirical evidence, as a true "recording", that is, a merely administrative and formal question and, therefore, with little real effect regarding the protection of individual liberties and the rights of minorities.

Likewise, it is still possible to advance in the distribution of political power which, as we know, is centralized upon the President. In this perspective, there is much chance to attenuate the hyper-presidentialism, both in relation to the arsenal of legislative instruments which the President has –probably one of the biggest differences with the classic North American presidential model-[xxi], and mainly to the possibility of decentralizing, transferring authorities and competences to the regional and local level.

In terms of political-electoral reforms, we should mention the significant step towards automatic registration and voluntary vote, which opens the voter registration record and enlarges the base, thus giving more legitimacy to the political system, which could be strengthened with the possible approval of a primaries' law. We are

dealing with two initiatives pro competition and citizen participation.[xxii] And there is also the imminent introduction to the National Congress of a reform bill concerning the law of political parties.

Simultaneously, there have been different initiatives to modify the binominal electoral system, which as we know is not part of the Constitution as of the constitutional reform of 2005. The difficulty of this reform lies both in the short-term political interests –the parties concerned are hardly interested in making reforms that will affect their reelection possibilities, especially if a new district distribution has to be made-, and in legitimate, substantial technical differences: the tension –and difficult reconciliation- between the different goals pursued by each one of the replacing electoral systems: governability and clear majorities in a majoritarian formula like the uninominal or the inclusion of more actors under the proportional formulas. Therefore, it seems strange that those seeking to break the deadlock of *status quo* and who are demanding a system allowing electing clear majorities in the Congress, are at the same time the main promoters of proportional systems, when in fact they have not set this matter as their main objective.[xxiii]

**Conclusion**

The idea of a Constituent Assembly is, in the words of José Miguel Insulza, Secretary General of the OAS, and following Huntington[xxiv], to force “a confrontation”.[xxv] For the President of the Senate, socialist (PS) Camilo Escalona, it does not have any sense, but it is also based on an erroneous diagnosis: confounding disaffection with politics with an institutional crisis.[xxvi] Its convoking, formation and development demand a very high level of social consensus, which, in the opinions expressed by Insulza, Jorge Tarud (PPD, Party for Democracy), Jorge Correa Sutil and Genaro Arriagada (DC, Christian Democratic Party), does not even have shared views in the political sector which brought up the idea, so it would badly obtain them at national level.

Likewise, the problem of a Constituent Assembly in Chile is that it lies on a false premise: the alleged “institutional crisis”, which is in no way similar to historical examples that have been mentioned –such as the United States after its independence and post Second World War Germany- which have served to support this watchword.[xxvii]

Recent evidence shows that constituent processes are usually not neutral: it is not only a political mechanism, but it is also marked by

the power games of existing political parties or groups. This is why more than half of the processes have failed, which makes sense: at the end of the day the constituent processes stipulate the rules of power of the political system for the next decades.

The latter does not exclude the possibility of further improving the prevailing institutional framework, as for example in specific constitutional norms and the electoral system. But, as we mentioned, in doing so it is not necessary to replace the Constitution.

**In brief…**

**Constituent Assembly in Chile?**

- Certain left-wing sectors are favoring the need to convoke a Constituent Assembly as the sole alternative to overcome an alleged institutional crisis which, when analyzing the evidence, is not such.
- Recent evidence shows that constituent processes are usually not neutral: it is a mechanism marked by the power games of existing political parties or groups.
- The Constitution has undergone several improvements, being those of 1989 and 2005 the most relevant, both with a very high level of political consensus. Thus, up to 2010, the Constitution had gone through more than 240 reforms in its original articles.
- There is still room to further improve the prevailing institutional framework, as for example in specific constitutional norms and the electoral system. But in doing so, it is not necessary to replace the Constitution.

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[i] Fernández, Mario. "*Asamblea Constituyente*". La Tercera, August 28th, 2012, p.28.

[ii] Besides, it is an adaptation which has been completely taken out of context from the thesis of Yale University Professor Bruce Ackerman, who tries to justify the role of the North American Supreme Court in judicial review matters in certain critical moments according to the author. Review "We the People: Foundations", 1993 and "We the People: Transformations", 1998, both from Harvard University Press.

[iii] El Mercurio, C2, August 28th, 2012.

[iv] The articles of the Political Constitution do not provide for a Constituent Assembly, but there is a Constitutional Reform mechanism, which, depending on the concerned chapter, requires the approval of 2/3 or 3/5 of the performing deputies and senators. If this norm were to be modified, it would be necessary to amend the articles regarding the Constitutional Reform (chapter 15), which requires 2/3 of the performing deputies and senators.

[v] See Plebiscitary Democracy: A Deceptive Proposal. Libertad y Desarrollo. Public Issues Nr 1,026, August 12th, 2011.

[vi] See Encuesta Nacional de Opinión Pública Nr 67 (National Public Opinion Survey), CEP, July-August 2012.

[vii] See, for example, the articles of Francisco Zúñiga and Pablo Ruiz Tagle in the book of Fuentes, Claudio (ed.): "*En nombre del pueblo: debate sobre el cambio constitucional en Chile*", 2010.

[viii] The female vote was not introduced until 1949 in broad terms for the presidential elections.

[ix] Universal suffrage (but excluding women) was not approved until 1874.

[x] The same American Constitution was created "exceeding" the original mandate of the delegates who took part in its signature, insofar as they were convoked to reform the Articles of Confederation, a text prior to the prevailing Constitution of 1787.

[xi] Akhil Reed Amar. "America's Constitution: A Biography", Random House, 2005, p.18.

[xii] Document related to the enactment of the Constitutional Reform of 2005, Law Nr 20,050.

[xiii] Fermandois, Arturo. "*De afectos y razones en el debate constitucional*" in Fuentes, Claudio (ed.): "*En nombre del pueblo: debate sobre el cambio constitucional en Chile*", 2010, UDP, p.287.

[xiv] Based on Lijphart's methodology (2000), rigidity and flexibility levels of a set of constitutions shall be analyzed, in relation to the quorums considered for amending their substantial articles; thus, following Lijphart's model, "the implementation of different rules to different parts of the constitution must rely on the rule related to the most basic articles of the constitution", p.207.

[xv] Recently, the Venice Commission for Democracy (European Union) suggested revising Hungary's so-called "cardinal laws", admitting that, in certain matters, this type of laws are acceptable (it requires 2/3 quorum). Thus, the Commission recommended that they should only concern the regulation of specific questions. Another common example which this author reminds us is that of the United States, where the possibility has been discussed of the Congress generating qualified voting rules, something that has actually occurred. Besides, it concerns a debate different from the rule of legislative obstruction allowed by the North American Senate (filibuster). Verdugo, Sergio. "Leyes orgánicas y democracia", El Mercurio, January 12th, 2012.

[xvi] Plebiscitary Democracy: A Deceptive Proposal. Libertad y Desarrollo. Public Issues Nr 1,026, August 12th, 2011.

[xvii] Institute for Democracy and Electoral Assistance: "A Practical Guide to Constitutional Building: An Introduction", IDEA, 2011.

[xviii] Op. Cit., p.13.

[xix] Op. Cit., p.11.

[xx] An intermediate alternative of having a smaller quorum could be considered, between the LOC and LQC, or clearly transforming the LOC into LQC, thus having only one type of supermajoritarian law. In this framework it could also be considered increasing the

quorum for tax matters, an area which requires long-term stability, going from a simple law to a LQC.

[xxi] Fermandois, Arturo and García, José Francisco. "*El origen del presidencialismo chileno: Reforma constitucional de 1970, ideas matrices e iniciativa legislativa exclusiva presidencia*". Revista Chilena de Derecho, Vol. 36, Nr 22, 2009.

[xxii] Bellolio, Álvaro and Ramírez, Jorge. *Sistema binominal y modernización electoral: evaluación y lineamientos de reforma*. Political Report Series Nr 23, Libertad y Desarrollo, 2011.

[xxiii] Furthermore, as Yale University Professor Bruce Ackerman has sustained, "the most toxic form of separation of powers is the constitutional combination of 1) a popularly elected president together with 2) a Congress elected by a proportional representation system", Bruce Ackerman, The New Separation of Powers, Fondo de Cultura Económica, 2007, p.40.

[xxiv] In fact, the author sustains: "In certain circumstances, reforms may reduce tensions and encourage peaceful rather than violent changes. In other circumstances, however, reform may exacerbate tensions and precipitate violence". Huntington, Samuel P., The Political Order in Changing Societies, Paidós, 1996, p.18.

[xxv] La Segunda, August 29, 2012, p.14.

[xxvi] El Mercurio, C2, September 1st, 2012.

[xxvii] Ibid, footnote 1.