

CONSTITUTIONAL PARTICIPATION: LIFTING THE VEIL

- Several factors increase the atmosphere of distrust regarding the constitutional process. In different ways, the government is showing that the constitutional debate is an excuse to advance an electoral moment and, thereby, simplistically polarize the opinions within the society.
- The government seeks to impose its own agenda and, by different means, to put pressure on those who have to make an institutional decision on the constitutional issue. Their recent decisions have demonstrated this.
- In the following months, we will face a constitutional debate that can easily degenerate in what has been called “constitutional populism”. The cost of this happening will be paid by the government, but also by politics and, in the midterm, by the institutions.

The citizen participation process in the current constitutional debate will begin in the following weeks and it will be developed in the months ahead. The process has a close precedent in the announcements made by the President of the Republic on October 2015, which were already criticized earlier on.¹ But in the meantime, new information has come to light that justifies a further analysis.

This time, as we will see, several factors are increasing the atmosphere of mistrust regarding the whole process. In different ways, the government has shown that the constitutional debate is an excuse to advance an electoral moment and, thereby, simplistically polarize the positions within the society. Some of them, the “good ones”, are in favor of participation and a new Constitution that reflects all our dreams. Others, “the bad ones”, cling to the past and are afraid of the citizens. Everything indicates that the government has already adopted this true caricature, which unfortunately creates false divisions and further prevents politics to advance once and for all through less confrontational roads that are closer to consensus.

1. LIFTING THE VEIL

This whole process rests on a tense balance. On the one hand, the government claims the need to listen to the citizens in order to make definitions. Who could appose to citizen participation in a democracy? But, on the other hand, the sound mistrust that history has demonstrated to be



necessary when dealing with power, takes us to evaluate a different alternative: the government seeks to impose its own agenda and, by different means, to put pressure on those who have to make an institutional decision on the constitutional issue.

The latter is taking shape, not only because the government has succeeded to keep the discussion about the constitutional change on the table, which, as we know, politically groups the center-left, but also because of different recent decisions.

1.1. Television Campaigns

The most concerning aspect is the imposition of an alleged campaign of public interest related to the constitutional change. Thus, this week, the National Television Council inexplicably authorized the government to force TV channels to broadcast, in prime-time schedule, campaigns calling to participate in this government- led process.

What is questionable, above all, is that it infringes the law. In fact, the Law Nr 18,838 regulating the National Television Council (CNTV) authorizes the broadcasting of campaigns of public interest when the purpose is to “protect the population and disseminate the respect and promotion of individual rights”ⁱⁱ. Can we defend the idea that promoting the participation in open discussions organized by the government has such purposes? Which right does it seek to protect?

While this regulation was being discussed, it was agreed that it made sense when disseminating campaigns related to public health or during disaster situations or imminent emergencies. It was never intended to make it a tool to carry out the government’s agenda. By doing so, it does not only remind us of the abusive use of similar powers by governments like Venezuela or Bolivia; it also leaves the impression that the CNTV is an institution that can be manipulated.

But beyond the legal argument, the decision of the government should generate a political coherency. The President has chosen to carry out a process in which the government does not wish to play a secondary role, but the leading one. In other words, everything indicates that the principal actor will not be the genuine interests of the citizens nor the Council of Observers. It will be the government. And this unbalances the participation playing field, since the critical voices of the government position will be most probably excluded.

1.2. Documentary-style Reality

Another concerning issue is the so-called documentary-style reality. Through a competitive bid for a documentary film, the Minister General Secretariat of Government (SEGPRES) requested the



making of a video of 10 chapters between 5 and 10 minutes each. The objective is to motivate the participation in the upcoming process. Therefore, the idea is to convey the message that “the constituent process has already started” and that “a debated Constitution with citizen participation will ensure for decades the stability of the Chilean democratic system by giving the country a constitutional document that gathers different identities”ⁱⁱⁱ.

The bidding conditions, already awarded, stipulate that the 10 chapters must envisage the “follow-up of citizens who have voluntarily decided to attend the constituent process’ local stage of citizen participation. The series is also required to communicate “confidence, commitment, pride, temperance” and adds that “one of the characters has to represent a feeling of pride regarding this unprecedented and extraordinary process”^{iv}.

The intentionality of the video is undeniable. The bidding conditions themselves allow no doubt, criticism or mistrust. Just “pride and commitment”. Maybe it is counterintuitive to ask a government to admit criticism to their programs in official advertisements. But if the government aspires to convey a message in good faith, which really makes everyone feel reasonably represented, such documentary film is not admissible.

In other words, a good government is that which manages to join forces behind its program through persuasion and deliberation on a level playing field, and not by imposing points of view through the power of an official message, apparently neutral, but which contains an evident political-electoral connotation.

1.3. The Citizen Council of Observers and the Increasing Number of Members

The Citizen Council of Observers (CCO) has been able to survive against all odds. First, there was the institutional precariousness. The President announced it as a true counterweight, but reality and the law soon refuted the President’s announcement. In fact, in the frame of the Rule of Law, if the idea was to create a real Council of Observers, with real powers and capacities to generate a counterweight, it should have been created by law and not through a decree. The government chose the decree alternative, thereby preventing the Council of Observers from having real powers. Thus, at least in formal terms, it is currently a consulting council without binding force, staff nor exclusive powers.

But, despite formalisms, the Council has managed to overcome the situation. In fact, it has been able to put into context some of the government’s decisions regarding the process of citizen participation. It has also expressed some legitimate criticism to the process and its dissemination. The last one of them, regarding the documentary film already referred to.



All these aspects indicate that, so far, the Council's work has been able to overcome a certain degree of illegitimacy that had been present since the beginning. In other words, it is debatable that a body whose aim is to counterweight the action of another is totally subjected to the latter. This is what happens in the Council of Observers created by the government; the President chose its members without consulting anyone; and the government itself gives all the necessary administrative support so that it can operate. At least in its origin, the efficiency of that body, and thereby its legitimacy, could have been reasonably doubted.

But the Council of Observers has sought to get rid of this questionable origin and has gained a certain force of its own that, still precariously, allows it to become a counterweight. That is why it is so important that, despite the President's will, the Council does not accept pressures and maintains what was agreed in relation to the next process. If it fails, and yields to the pressure of the principal, its legitimacy and efficiency will be questioned with justice.

In the same sense, it is crucial that the Council ends its subordination bonds, which the government pretends to maintain. The best proof thereof is the announced designation of new members. The Council cannot accept it, because neither the President nor the government should play a role whatsoever in the Council's management. It is evident that the designation made by the President seeks, in part, to nuance the current counterweight of the Council. And even if that were not the intention, which is impossible to determine, the sole suspicion that something like that could be true should lead the Council to refuse the incorporation of these new members. Thereby, it would demonstrate its real autonomy.

2. THE UPCOMING PROCESS

According to the government, a participation term will begin in the next days, through local meetings and individual participation in the webpage designed for this purpose. Thus, the idea is to create dialogs to address constitutional issues between April 23rd and June 23rd.

The system is inorganic. That is, a group of people is convoked by a moderator who schedules the meeting in advance, organizes and leads it; then, a minute is drawn up that will establish the agenda of the respective provincial town meetings. The latter will be held simultaneously on July 23rd in the whole country. The dynamics is not yet settled, but it expects to record the agreements and disagreements among participants. Finally, on Saturday August 6th, regional town meetings will be held with the same purpose.

This whole process and part of its content will be expressed in the so-called Citizen Bases for the New Constitution.

The description above is, again, questionable.

2.1. Agreements

The first questionable point is that the participation process is focused on reaching agreements during the different discussions and town meetings. Above all, the facilitator in charge is thus transformed into a sort of promotor or leader that will address the conversation with a much bigger influence. Instead, if the objective were to simply add different opinions, it would not only reflect the variety of interests involved in a better way, but the risk of manipulation would also be reduced.

But there is a deeper aspect concerned. Neither local discussions nor town meetings can claim the right to represent any alleged general will, because they are not representatives elected by the community; it is a self-convoked participation. Therefore, there is no representation whatsoever that allows conferring a general value to agreements that have been only partially concurred with. In this context, promoting agreements turns into generating a sort of reflect of a general opinion through proceedings that lack representation and convokes people that are more motivated by these matters and with less access cost, but which excludes the opinion of the rest. This is not only incorrect but also an improper way of trying to assume sovereignty.

2.2. Citizen Bases for the New Constitution

Given the huge number of inputs that will derive from different local discussions and town meetings, the government has proposed a final stage that will entail the drafting of the Citizen Bases for the New Constitution. As it is evident, the content thereof will have an enormous influence on the following political debate.

As the Citizen Council of Observers (CCO) has indicated, if these Bases are written by the government or by a group of experts chosen by it, the “conditions of transparency, inclusiveness, participation and absence of political bias in the process may be compromised”. Therefore, the Council stated that “the expression of the conclusions of the participation process should be made by a team designated and supervised directly by this CCO”.

As everyone knows, the President disagrees with this alternative and in a meeting with the observers she has requested them to include people she trusts in the drafting process of the Bases. This is unacceptable, since government interference will not allow guaranteeing the slightest reasonable process that reduces the options of illegitimate capture or influence of the political power. As said before, in this respect, the Council must maintain its position.

CONCLUSIONS

In addition to what has been said earlier, there is another series of factors that strengthen the distrust of the process. For example, recently, the election and hiring of facilitators has been controversial because of the type of questions made during the selection process itself, and due to consequent exclusions^{vi}. Likewise, the dynamics of local meetings will require a particularized analysis, with the aim of measuring their level of deliberation or capture degree.

At any rate, in the following months, we will face a constitutional debate that can easily degenerate in what has been called “constitutional populism”. The cost of this happening will be paid by the government, but also by politics and, in the midterm, by the institutions.

It cannot be pretended, as the government seems to do, that the critical discourse regarding the Constitution and the institutional framework is spread among the citizens without causing any harm whatsoever to our future. When those declaring that the Constitution is the solution to all our problems sell unattainable dreams again and again, or when others proclaim that a possible new Constitution will be written by “all men and women”, what they are doing is dangerously close to demagogy. And in any modern society, this should generate distrust and rejection; the same distrust and rejection that the channeling process should produce.

ⁱ The Long and Unforeseeable Constitutional Road. Public Issues Nr 1229, October 23rd, 2015.

ⁱⁱ Article 12, m). Law Nr 18,838.

ⁱⁱⁱ Exempt Resolution 272/264 of March 3rd, 2016. Authorizes call for public tender and approves conditions and annexes for hiring production services for making a documentary-type of reality for the Minister General Secretariat of Government. Page 7.

^{iv} Exempt Resolution 272/264 of March 3rd, 2016. Authorizes call for public tender and approves conditions and annexes for hiring production services for making a documentary-type of reality for the Minister General Secretariat of Government. Page 8.

^v Citizen Council of Observers. About the Citizen Participation and the Citizen Bases for a New Constitution Discussed in Democracy. Agreement Nr 4. Page 9.

^{vi} See El Líbero: Applicants to facilitators of the constituent process accuse biased interrogations in selection interviews. Also in El Líbero: Director of the Civil Service and polemics over excluded facilitators: “The Segpres is in charge of the hiring process”.