The Chilean Political Crisis and Constitutions as Magic Bullets

How to Replace the Chilean Constitution?

Sergio Verdugo

04.11.2019 doi: 10.17176/20191104-162816-0

Chile is currently experiencing the most severe crisis since the dictatorship. One of the proposals to solve this crisis is to replace the current Constitution. Some are demanding a constituent assembly that should be directly legitimized by the citizens and keep representatives from the ruling elite on the sidelines of the process. While a total replacement to the Chilean Constitution could be useful, proponents of a constitutional replacement should consider two caveats: First, the constitution-making process should not weaken the representative institutions but strengthen them. The political class should seize the opportunity to regain the credibility that it has lost. This is feasible and desirable. Also, the constitution-making process should focus on discussing how the institutions can become more responsive – elsewhere I have offered some thoughts on the sorts of reforms that could be useful – and be clear about what a Constitution can accomplish.

The second caveat is that the promises need to be realistic. Constitutions are not magic bullets capable of instantaneously responding to social demands. Many proponents of the new Constitution are claiming that a constituent assembly will address the social problems that the country is experiencing. That is a risky strategy, as treating this idea as a panacea for Chile's problems could frustrate the population even further. Sure, the text of the Constitution can refer to the social problems and expand rights, but most of the demands need specific well-founded public policies. A constitution-making process should not impair the political agreements that aim to advance the social agenda. Instead, a constitution-making process should help politicians to deepen that agenda.

On the protests and the demands

After the price of the Santiago subway tickets was raised a few weeks ago, massive protests took over the streets. A series of unfortunate remarks by key government officers ended up encouraging more people to join the protests, and some violent groups attacked, burned and sacked metro stations, banks, supermarkets, and stores. President Piñera declared state of emergency, and the military tried to control the streets. Human rights violations existed. President Piñera said that the country was at war and in a leaked WhatsApp message, the First Lady compared the protesters with an "alien invasion". President Piñera changed his strategy and asked the citizens to forgive him for not listening before. He also invited the opposition to negotiate bipartisan agreements to respond to the demands, and offered a set of measures aimed to respond to some of the protesters' demands, such as freezing the price of the subway ticket and increasing the guaranteed retirement pension by 20%. Protesters did not calm. After a few days, the President asked several secretaries of state to resign, canceled the state of emergency, and insisted on a bipartisan social agenda that could respond to the demands. Protests continued.

Of course, the protests were not about the raise of the subway tickets. That raise was only the "straw that broke the camel's back" after an accumulated frustration against a privileged ruling elite that has not been able to redistribute the benefits of sustained economic growth. There are some initial explanations for the demonstrations, but we still need to do more research to understand them fully. The demands are miscella-

neous: from raising retirement pensions to lowering the legislators' salaries, from elevating the minimum wage to improving the healthcare system. As the days pass, more social movements join the protests: from the employees of the state-run copper company to nurses and doctors, from the teacher's unions to students' federations. Many of the protesters do not belong to organized group, each movement has its demand, and there is no single leader representing all of them.

Many politicians are trying to represent the interests of the protesters, but they face at least two problems: First, the social movements are diffuse and the demands are too diverse and inorganic. Second, the credibility of the ruling elite is too low. A recent poll suggests that the President only has 14% of approval, the lowest a Chilean President has ever had since the dictatorship ended. Legislators from the Socialist Party have 11% of approval, from the leftist *Frente Amplio* 16%, from the Progressive Party 13%, from the Communist Party 12%, from the Christian Democrats 12%. Legislators from the President's supporting coalition have 16% of approval. Only institutions like the firefighters (99%) and the police (52%) have higher levels of approval, perhaps due to the perception of insecurity triggered by the violent episodes.

The demand for a new Constitution

The idea of replacing the Constitution was also popular in the past, but it seems that the demand for a new Constitution was not the priority for most Chileans – which may explain why President Piñera, who had opposed a replacement of the Constitution in favour of a moderate set of reforms, was elected by a wide margin less than two years ago. But today, the crisis has installed the idea in the agenda and many frame that idea as a way to respond to all the demands simultaneously – so that each specific social movement can be represented. The idea is popular. After all, the Chilean Constitution still appears connected to the Pinochet dictatorship, and activists and influential public intellectuals from the left have been systematically promoting a complete constitutional replacement systematically for years.

Although the present text of the Constitution is a revised version of the document enacted during the dictatorship, the current constitutional system does not reflect the plan of the authoritarian regime but was changed both in *formal* and *material* ways. From a *formal* point of view, the text is different, the authoritarian enclaves have been removed, and new provisions have been incorporated. From a *material* perspective, the political community is organized in a different way than in the past. An important change, to name one, is the reform of the electoral system in 2015. The new proportional electoral system now allows for small parties to enter Congress without the need to bargain with a major political coalition. Both the far left and the centrist liberals are represented by their own means, and the traditional left coalition is now divided. The two-coalition dynamics of post-authoritarian Chile was replaced by an undisciplined and fragmented multi-party system. Combined with the previous democratization reforms of 1989 and 2005 and the presidential structure of the Chilean system, the 2015 reform also produced a problem: it has made it difficult for the President to build legislative coalitions to respond to social demands, stimulating legislative deadlock.

Still, enacting a new Constitution can be useful, as it can provide an opportunity to make political institutions more responsive and legitimize them. It may also help to stop having a Constitution that symbolically divides the Chilean population. Bruce Ackerman has recently claimed that popular leaders can use their charisma to legitimize and to build long-lasting political institutions, such as Charles de Gaulle and the French Fifth Republic. But, in Chile, many see former dictator General Pinochet as the founding father of the Constitution. Even if that view is too simplistic, the Constitution continues to be an instrument most Chileans do not feel attached to. Former President Lagos tried to remove the legitimacy problem of the Constitution by presenting the 2005 reform as "a new Constitution", even symbolically replacing Pinochet's signature. But that was not enough. Later, former President Bachelet tried to replace the Constitution in her second administration (2014-2018), but her constitu-

tion-making process did not gather enough political support.

The path towards a total constitutional replacement

Chilean politicians can seize the momentum and replace the Constitution. Politicians from the left are more committed to the idea and many promote a constituent assembly. They have the following options: First, the path from the *inside* which would require an amendment of the current Constitution to allow the possibility of calling for such an assembly – Congress is already discussing this possibility. Second, the path from the *outside* where the left could ignore the pre-established channels of constitutional reform and invoke some version of the original constituent power theory. Third, the proponents of a new Constitution could compromise with the rightwing coalition, abandoning the idea of calling for a constituting assembly, and using the amending procedure to replace the Constitution.

The government will probably reject the first option. The right in Chile is just too scared that a possible Chilean constituent assembly can follow the paths of the Venezuelan Constitution (1999), the Ecuadorian Constitution (2008), or the Bolivian Constitution (2009). It seems unlikely that the left will be able to convince the right that a Chilean version of the constituent assembly does not need to face the problems of those constituent assemblies, unless perhaps, the decision-making rules are negotiated *ex-ante*.

The second option – a constituent assembly from the *outside* – is possibly feasible, but Chileans should avoid it. Parties from the right and perhaps from the center-left will resist it, and the legitimacy of the new Constitution will be put into question. Also, such a process might eventually harm Chile's competitive constitutional democracy and its representative institutions. The political parties from opposing sides need to be part of the process, in order to regain their credibility by exercising their primary function: representing the constituency. For that reason, the process needs to give them sufficient guarantees that their interests will be represented.

The third option – using the pre-established channels for reform to enact a new Constitution – is probably the most feasible one, though it needs bipartisan agreements from the ruling elite. The advantage is that the process gives sufficient guarantees to represent the interests of the parties from all sides, although parties from the far left will probably reject this possibility. Another problem is that this procedure might lack legitimacy, as many will see it as a closed-doors elite-driven bargain among parties that have lost credibility. Currently, there are no popular leaders that can perform the function described by Ackerman.

How to push for a new Constitution without harming the representative institutions?

Chile is currently facing a paradox: while Chileans urgently need to strengthen their representative institutions, the lack of credibility of the ruling elite may harm the political and social changes that are necessary to solve the country's many problems. Replacing the Constitution can partly solve this puzzle, but it can also harm Chile's democracy. In this scenario, how to push for a total constitutional replacement?

An answer to that question needs two elements: First, popular participation capable of providing the legitimacy that the ruling elite can hardly offer. Second, involving the main political parties from all sides, including rules coming from bipartisan agreements.

An option which includes those two elements could be for politicians to reactivate the process initiated by former President Bachelet, which contained many forms of popular participation. They can channel that process through the constitutionally established reform procedures, start a discussion in Congress, invite social actors to participate in the parliamentary dialogues, amend the Constitution to allow for a plebiscite confirming the process, bargain with President Piñera and perhaps organize other kinds of participatory processes following modified strategies from the examples of other countries such as Ireland. In any case, there should be ways to include political parties as much as possible. If Chileans want to strengthen the representative institutions and make

sure that a new Constitution becomes a feasible idea, they should not allow politicians to abandon their duty to represent the citizens.

But politicians should always remember that constitutions are not magic bullets. They should address realistic goals and manage the expectations that a constitution-making process can create in the population. Also, they need to make sure that the constitution-making process does not prevent bipartisan agreements to advance the social agenda to respond to most of the demands. Otherwise, politicians may be postponing the problems that triggered the crisis, and the crisis may detonate again in the future.

ABOUT THE AUTHOR

Sergio Verdugo

Sergio Verdugo is an Associate Professor of Law at IE University, Spain and the Co-President of the International Society of Public Law (ICON-S).

SUGGESTED CITATION

Verdugo, Sergio: The Chilean Political Crisis and Constitutions as Magic Bullets: How to Replace the Chilean Constitution?, Verfassungsblog, 04.11.2019, doi: 10.17176/20191104-162816-0.

Licensed under CC BY-SA 4.0.

Langzeitarchiviert bei IntRechtDok unter: doi.org/10.17176/20191104-162816-0.