Chile's constitutional endeavour goes on

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The Chilean people overwhelmingly rejected the draft constitution in the referendum held on 4 September. How did it come to that? And what will happen now? A few first impressions on a result that seemed impossible a few months ago.

What got us here?

There are different reasons that might explain the rejection of the draft constitution in the referendum.

The initial referendum that started the process in 2020 saw roughly 80% of Chileans voting in favour of initiating a constituent process to produce a draft constitution. The support with which the process started was thus overwhelming. But there is a big, fundamental difference between asking whether a new constitution should be produced in abstract terms, and whether a particular draft with concrete provisions is to become the new constitution. One of the biggest mistakes was to assume that the support of the process would translate, at least to a large extent, into support for the specific draft. Polls started showing as early as April 2022 that such a translation was fundamentally tenuous. Still, little was done since then to react and correct – the Convention responded by claiming that criticisms were "fake news" or merely a communicational problem.

The draft was further clearly a child of its parents. The exceptional rules that governed the election for members of the Convention resulted in a body in which the traditional weighing of the left and right didn't reflect its traditional proportions, with the right parties failing to secure one third of the members of the Convention. This was a turning point, because the procedure foreseen to produce constitutional norms required a majority of two thirds of the members of the Convention. The design of the procedure presupposed, first, that the right-wing parties would secure at least one third of the seats, and second, that all constitutional norms would thus reflect a fundamental agreement between right and left. That entire design became obsolete after the election of members of the Convention, when it became evident that the fundamental agreement required was no longer one between left and right, but between different leftist forces and smaller activist groups. The type of political articulation required was one that no one had foreseen and for which no one was prepared: one that was based not on discussing and negotiating political positions, but on assessing the justice of fundamental claims to a good life. And while the articulation was, in a fundamental way, successful, since the draft was produced within one year and managed to secure a two-thirds majority for each constitutional provision within the Convention, the political negotiation that led to it probably resulted in the inclusion of a lot of particularistic claims for small activist groups, unable to gain majoritarian support outside of the Convention.

External elements also were of little help. Notably, the referendum was held during a rise in violent crimes and an escalation of the conflict with the Mapuche indigenous people in the southern part of the country. Interestingly, while the draft constitution made of the relationship between indigenous people and the state one of its biggest concerns, the rejection rates from areas more densely populated by indigenous people show little to no variation to those from the rest of the country. In fact, as a recent column has shown, none of the four great "pillars" of the new constitution managed to convince their addressees: There are no substantive differences in rejection rates between poorer and richer parts of the country, between the capital and the regions, between more and less densely populated areas by indigenous people and between men and women. And this, even though redistribution of wealth and comfort, decentralization, a new understanding between the state and the indige-

nous people and parity were issues at the very heart of the proposal. The sum of particularities didn't manage to produce the synergy of mass identification.

Just as in large parts of the globe, inflation is becoming a huge problem in Chile. The draft constitution's solutions for those very concrete and palpable problems, if existing at all, were not exploited enough by the 'approve' campaign. Rather, due to the extremely dense draft, the last weeks saw efforts by the drafters and supporters of the new constitution to manage expectations, claiming that the implementation process would likely take years. While the draft contained many fundamental proposals, Chilean people probably didn't see it as immediately improving their lives and most pressing problems. It seemed to have been fundamentally unclear how the draft would generate dignity for all, the key claim in the beginnings of the constituent process.

Where does it go from here?

Legally, the rejection of the draft means that the current constitution, originally enacted under Pinochet's dictatorship, will remain in force, as stated in Art. 142 of the current constitution. Formally, thus, the rejection has effectively ended the constituent process.

Politically, however, things might look a little different. Over the last weeks and months, political parties on both sides have made explicit statements regarding the need to continue with the constituent process. For the supports of the draft, that meant an offer to amend the draft. For those in favour of rejecting the draft, it should mean the end of the current constitution as is – even the President of the right-wing UDI has claimed that the current constitution "is dead".

The very first question, after the rejection became of the draft became clear, was whether the right would act on its compromise to continue with the constituent process, given its historic reluctance to substantially modify the constitutional architecture inherited in the constitution currently in force. A key factor in that regard were the core alliances which emerged from the broad and diverse political forces behind the "reject"-option; they ranged from the right-wing extremists *Republicanos* to parts of the center-left *Concertación*, the political coalition that led the country between 1990 and 2010. One of the key issues was whether the entire spectrum on the right would remain united after the results and act in concert for either the continuity or the end of the constituent process. As of now, it appears as if the majority of the right, including the *Unión Demócrata Independiente, Renovación Nacional,* and *Evópoli*, has chosen to honour its commitment and allow for the process to carry on. After some confusion and contradictory statement on the day, all of these parties joined a meeting convened by President Boric on Tuesday, 5 September, to discuss and agree upon basic conditions for the next stages of the constituent process. *Republicanos* chose not to attend.

The result of the meeting seems to have been a broad agreement that the process will now be continued by Congress, which will now decide on the fundamental elements of the process. It should be noted that a prominent role of the Congress had been explicitly rejected at the beginning of the constituent process. In fact, during the initial referendum, Chilean people not only voted to start the constituent process, but also to have the draft produced by a Constitutional Convention composed to 100% of members especially elected for that purpose, as opposed to a "Mixed Convention", which foresaw half of its members especially elected, and half of its members joining from Congress. While it's possible that, in light of the failure of the Convention, the predominant view has shifted on that specific issue, it remains to be seen how public opinion will react to the fact that a process largely conceived as "social" as opposed to "political" is now dominated by traditional political elites.

Moreover, the most interesting question is what Congress will decide regarding the channels for the next stages of the process. While the left and President Boric seem to favour another especially elected body, similar to the Convention, for the effect of drafting a new text, the right appears to favour a much more significant participation of Congress.

Whatever is decided, it might be critical to embrace the open and explicit politicization of and in

the process from now on. That doesn't mean that the new draft should necessarily be produced in Congress, but an important effort should be made to replicate at least some of the fundamental conditions of the functioning of an openly and explicitly politicized organ – just as Congress. Current representation in the Chilean Congress is broad, ranging from *Republicanos* to the Communist Party, and contains larger coalitions and single parties. But while the picture might at first somewhat resemble societal fragmentation, a huge difference is that the vast majority of serving members of Congress are part of a large political machinery, which fundamentally provides structure. Large-scale fractures within the organ called upon to draft the constitution, just like the dissolution of the Lista del Pueblo in the Constitutional Convention, become less likely in such a setting. Political forces with representation in Congress, or at least the vast majority of them, should play a critical role in the forthcoming process.

Further, the value of negotiation and flexibility as a political asset needs to be clear to the vast majority of the members in charge of producing a new text. The Convention often operated in terms of maximalism and intolerance; internal conflicts and negotiations were often dealt with publicly. If the new draft is to be credibly presented as a broad agreement, every political force needs to be in the position to present it as a success to its base. That requires a certain level of opacity regarding negotiations and conditions under which consensus on specific points was reached: invisible costs are easier to accept that evident ones. Lastly, and perhaps more importantly, the body in charge of drafting the constitution should operate strategically: the text is not a destination, but a departure. Not every relevant political issue needs to be resolved in the constitution; open compromises with enough room for each political force to develop its own political programme within the frame of the constitution should be the key element that allows for broad identification with the new text. A good measure for that should be: Each political party should look at the final version of the text at the same time with pride and fear.

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