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No Experiments

Chile Rejects New Constitutional Draft in Referendum –
But the Need for Reform Remains

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Elevating a left-wing government programme into the national constitution? Apparently, many members of Chile's 2021 constitutional convention thought that this would be a good idea. Their draft has now been rejected by a large majority in a referendum. Not because there were no reasons to reform the current constitution, but because the now rejected text was no better than the old one, and the Chilean people have recognised this.

It has been three years since protests arose in Santiago, Chile's capital. At the time, it was not least the promise of a new constitution that stopped the shocking violence. Now, the text drafted in a year-long process by 155 delegates selected specifically for this purpose has been rejected by a clear majority. And yet it is becoming apparent that Chile will indeed receive a new constitution in the not too distant future.

The Path to the 2022 Referendum

Starting on 18 October 2019, demonstrations against a small fare increase in public transport rapidly escalated to violent protests against a number of social grievances in just a few days. This resulted in the destruction of metro stations, looting in the capital of Santiago and a number of other Chilean cities, and finally also in excessive violence on the part of security forces.¹ The police lost control of the situation, and President Piñera turned to the military to restore public order. The violence left 15 people dead, including victims of military violence; dozens of civilians were injured, some severely; and more than one hundred policemen were wounded.²

The government's promise of a prompt referendum on constitutional reform contributed greatly to quelling the protests. This referendum was held one year later, on 25 October 2020. Two questions were posed to voters: "Do you want a new constitution?" and "What type of convention should draft the new constitution?"³ In addition to the fundamental question as to whether a new constitution was desired, voters were thus also able to decide how it was to be created.

This second question involved a choice: the first option was a *Convención Mixta* made up of 172 members, half of whom were elected members of Congress and Senate, and the other half being representatives elected specifically for the purpose of drafting the constitutional text; the other option was a *Convención Constitucional* consisting of 155 representatives of the people, to be newly elected⁴ specifically to draft the constitutional text. This decision was later to have critical influence on the fate of the constitutional draft produced. The historic referendum resulted in a clear victory for those approving of a new constitution: 78.27 per cent voted "Apruebo" – a solid majority. But voter turnout was relatively low with just over 50 per cent of the 14 million eligible voters.⁵ In a second vote, on 15 and 16 May 2021, 155 representatives were elected to the so-named *Constituyente* from among 1,369 candidates.⁶ 17 of these spots were reserved for indigenous peoples.

In the meantime, Chile also elected a new head of state in two ballots in November and December 2021. Left-wing Gabriel Boric, just 35 years old, was elected by a margin of more than ten percentage points,⁷ defeating right-wing candidate Kast, and replacing conservative politician Sebastián Piñera as president in March 2022.

In September 2022, the Chilean people once again had a decision to make: either to approve ("Apruebo") or reject ("Rechazo") the constitutional text presented in July 2022 after ten months of work. A veritable election marathon over the previous two years was therefore already behind the Chileans at this moment. A special feature

of the September 2022 referendum was that this time voting was mandatory. An impressive 13 million of the 15 million voters, or about 85 per cent, cast their ballots. This lends extra weight to the rejection of the draft by a two-thirds majority. It is safe to consider this a stern rebuke to the leftward-oriented government and to the 155 representatives who spent almost one year developing the text. It was a landslide victory⁸ for the draft constitution's opponents, especially considering that in 2020, 78 per cent of voters were fundamentally in favour of a new constitution. How can this result be explained?

A frequent accusation against the text of Chile's current constitution is that it is a "Pinochet constitution".

The Current Constitution: Not Perfect, but Better than Its Reputation

To understand this situation, it is first worth taking a look at the Chilean constitution that is still in force, and at a general finding – namely that constitutions are normally not entirely unchangeable texts. This is exemplified by the 27 amendments⁹ to the Constitution of the United States of America, written in 1787. Similarly, the German Basic Law, ratified in 1949, has been changed more than 65 times.¹⁰ This is not fundamentally different in Chile: more than two hundred years have passed since Chile finally achieved independence from Spain in 1818. Apart from the military dictatorship (1973 to 1990), still very present in the national historical consciousness, Chile has been a republic five times in these two centuries.¹¹ The most recent, current republic has existed since 1990. Its constitution was ratified in 1980 but has already been amended several times since the return to democracy.¹²

A frequent accusation against the text of Chile's current constitution is that it is a "Pinochet constitution". This is only partly true: the 1980 consti-

tution did indeed bear the signature of dictator Augusto Pinochet Ugarte, and this is the basis of the allegation.¹³ At its core, this text was strongly economically liberal and had robust protections against state intervention. It is precisely these principles, criticised as "neoliberal", that much of the criticism of the current constitution is directed against. However, the 1980 constitution also contained democratically questionable provisions, including the autocratic structure of the presidency for which it provides.¹⁴ But it is also true that in the more than thirty years since the military dictator left power, the constitution has been amended dozens of times under a variety of presidents, many of them left-leaning.¹⁵ These changes were often aimed at eliminating real or imagined "authoritarian enclaves" in the "Pinochet constitution". For instance, the president's right to dissolve the Chamber of Deputies has been greatly limited.

At the same time, there are entirely valid arguments for a more moderate and non-partisan reform of the current constitution. For instance, basic rights, and an effective mechanism for protecting them, as well as the creation of an ombudsman institution should be anchored in the constitution. Greater regionalisation of the hitherto strongly centralised state also seems sensible. The same is true for a possible transition from a presidential to at least a semi-presidential or even a parliamentary republic. Furthermore, the explicit mention within the constitution of specific rights for indigenous peoples (including the right to information and codetermination) could be more than just a symbolic step; it would compensate to a degree (although not make up for) historical injustices, and would thus ideally reduce or even eliminate the violence that continues to erupt sporadically in the parts of Chile inhabited by indigenous peoples. None of this has yet been done, but if it were, it would have the potential to create or rather consolidate social peace.

So, there are reasons for a constitutional reform in Chile. In view of this, why did the Chilean people deliver such a resounding "no" to the draft presented to them in September 2022?



The 2021 “Constituyente”: Not Representative

As indicated at the beginning of this article, it is important to consider the process by which this draft was created. Let us first attempt a comparison with the history of the creation of the current German Basic Law – although such a comparison is, as ever, only of limited validity. The parliamentary council tasked with drafting the German Basic Law united a wide range of political currents, and thus largely reflected the political spectrum at that time in the parts of Germany controlled by the three Western Allies. The composition of the Chilean constitutional convention, elected in 2021, was different – it was dominated by left-leaning thinkers.

Of the 155 seats, 17 were reserved for Chile’s various indigenous groups, the best-known among them the Mapuche and the Aymara. This number (eleven per cent) roughly corresponds to their proportion within the wider population in the most recent census. Of the remaining 138 representatives, 48 were independent (among them many moderate to far-left individuals). The remaining representatives were from centrist and left-wing political parties, which performed better than they had in the previous elections for the Chamber of Deputies and the Senate. The question of why conservative forces were not as well-represented in the constitutional convention as they were in Congress is, thus, a reasonable one. For instance, there



High voter turnout: More than 13 million Chileans, equivalent to 85 per cent of those eligible to vote, flocked to the polls for the constitutional referendum, as seen here in the capital Santiago on 5 September.

Source: © Pablo Sanhueza, Reuters.

constitutional convention. Unlike the political left and independents, they tried too little and too late to engage forcefully in the campaign, and to win seats in the convention.

An examination of the party landscape confirms the impression of a country divided about the constitutional draft.

At the political level, too, the constitutional process that began in 2021 showed how polarised Chile was, and still is, regarding the constitutional draft. Former presidents took a wide variety of positions after the constitutional draft was published in July 2022: socialist Michele Bachelet prominently supported the draft in the media, while others, including conservative Sebastián Piñera, maintained their reserve; still others came out against the draft.¹⁸

were only two representatives from the Christian Democratic Party,¹⁶ while in 2017, in the previous Chamber of Deputies election, the Christian Democrats garnered 8.5 per cent of the vote.¹⁷ The answer has multiple levels: most importantly, conservative parties were on the defensive, having provided the president since 2018, and being blamed by the electorate for many of the current problems. The ruling conservatives had also lost support among some voters because President Piñera had used the military to quell the October 2019 protests – the first domestic use of the military since the end of the military dictatorship. But the main reason is that it took too long for conservatives and right-wing forces to realise the importance of the

An examination of the party landscape on this issue confirms the impression of a divided country. While, unsurprisingly, left-leaning parties campaigned for the adoption of the draft, and the majority of conservative forces sought its rejection, some were undecided, and some changed their minds during the drafting process. Examples of this last group include former members of the constitutional convention from the Renovación Nacional party, who began openly campaigning for rejection of the draft only shortly before the referendum.¹⁹ The leadership of the Christian Democratic Party (PDC), together with several other parties, participated in the campaign for the approval (“Apruebo”) of the draft constitution. However, several influential party representatives at that time, most notably Senators Ximena Rincón and Matías Walker,

strongly opposed the proposal, arguing that it still required numerous reforms. Although this indicated some internal differences, it did not lead to a significant change in the party's official position. By mobilising for the "Apruebo", the PDC leadership actively participated in that campaign.

The Failed Constitutional Draft: Off the Mark

Now let us look at the draft itself. The "political constitution for the Republic of Chile"²⁰ of 4 July 2022 was put to the vote in September 2022 and rejected by an astounding eight million Chileans – a comfortable absolute majority.

The draft reads more like a left-green-secular government programme than like a constitution.

In many German-speaking media outlets, including the most important news programmes, the draft was labelled "progressive" – a term intended as a seal of approval by the reporting journalists.²¹ This reporting did not just seem, but *was* in fact, one-sided. Why else would eight million voters have rejected a constitutional draft if it were as desirable as it was portrayed in Germany? These voters are neither supporters of dictatorship, nor are all of them victims of fake news or disinformation,²² as is sometimes suggested. And this large majority of Chileans certainly does not reject "progress". What transpired, however, was that the draft did not turn out to be significantly better than the current constitution. For one thing, it was far too long: its 388 articles and 57 transitional clauses would have likely made this constitutional draft one of the longest texts of its kind in the world. It is not the task of a constitution to regulate everything in as much detail as possible. Rather, a constitution should provide a framework for the legislator and the state, establishing important ground rules and basic principles. Moreover, the text was not the foundation of a new society reflecting the majority of that society's constituents. The overall impression the text leaves is

more reminiscent of a left-green-secular government programme than of a constitution. The following are just a few of the most controversial and unpopular reform proposals.

First, the planned changes to the legal system were alarming. For example, the Constitutional Court was to be renamed while its competences were to be curtailed, amounting to partial abolition. Experts also expressed concerns about the planned creation, and above all the composition, of a so-called Judicial Council, which was to be responsible for the majority of appointments in the judicial sector. Some were concerned that this would lead to the further politicisation of the judiciary.

While the constitutional draft provided for some useful new institutions, the text also directly called for the creation of a number of other new bodies, which would have had to be created and financed, and whose precise duties remained undefined. The draft also suffered opposition from many members of the church, though not limited to them, as it intended to "regulate", at the constitutional level, a number of issues which remain highly disputed in Chilean society – thereby improperly anticipating the outcomes of ongoing discussions. Among these are the absolute right to abortion and aspects of end-of-life treatment.

Furthermore, the draft's frequent use of the terms "gender" or "gender perspective" is also questionable; it was planned to enshrine a parity quota in many places in the constitution. The text also introduced so-called indigenous voter registries and a "Chilean Afro register". These changes were not to be regulated by more specific electoral law, but directly in the constitution. This would have led to a much greater administrative effort, and thus a much more expensive electoral process.

Indigenous peoples, of which eleven different nations are named directly in the draft text, were to receive not only the right to information and the right to be heard in processes affecting them – both of which are certainly important – but also the privilege of having their explicit



consent required in a number of issues, which would amount de facto to a veto right. This was also criticised by conservative camps who do not reject a reform but disagree with preferential treatment of indigenous peoples over other population groups.²³

There is no doubt that the draft also contained a number of positive elements that deserve to be included in a new constitutional draft. Among the many provisions, rules governing basic rights and the creation of an ombudsman office deserve mention. Furthermore, there is no objection to establishing environmental protection as a governmental goal alongside others such as democracy and the rule of law; nor indeed is there anything to be said against the creation of environmental courts. However, the text is ultimately excessive in its inclusion of a number of regulations that are more detailed than necessary and raise doubts as to how the state can implement it all in practice²⁴ (not to mention how it all can be realistically financed).

Assessment and Outlook

The referendum on Chile's draft constitution attracted great global attention. There were strong emotions in both the "accept" and "reject" camps in the immediate aftermath. Catholic bishops spoke of democracy having "triumphed"²⁵. The chairman of the constitutional convention, herself from the Mapuche people, spoke of "individual and collective mistakes" that led to "defeat", but announced that the "recognition of the indigenous people has only been postponed"²⁶. One of the most striking (and inappropriate) comments from abroad came from the newly elected president of Colombia, Gustavo Petro, who tweeted that "Pinochet is alive in certain political sectors of America"²⁷.

Chile will continue to struggle in the years ahead to create a new constitution. This issue will continue to dominate political debates (and likely elections as well). The only eventuality that can be ruled out at the moment is that there will be no more constitutional reform after the



"Not that way!": Although a majority in Chile still wants constitutional reform in general, the draft presented in mid-2022 by the left-leaning "Constituyente" failed miserably. Source: © Mark Leffingwell, Reuters.

failure of the draft constitution. Shortly after the referendum, President Boric announced a new, comprehensive constitutional reform. It is reassuring to see that his grasp of political reality has improved, prompting him to first consult parliamentary groups in Congress.

Despite the rejection of the one-sided 2022 draft, there appears to be no question that a majority of Chilean people want a new constitution. This is especially true of the left, who wish to finally get rid of the so-called “Pinochet constitution”, and to implement at least part of their agenda. Indigenous peoples also wish to see their rights recognised and their status as nations legally enshrined. Moderate forces are also interested in having a modern constitution and eliminating remaining authoritarian presidential elements.

It would be advisable for a new draft to avoid the temptation – evident in several other Latin American countries – of formulating an excessive number of rights. Several tendencies can be observed at the regional level: in Ecuador (2008) and Bolivia (2009), for instance, the concept of plurinationalism, also envisaged in the failed Chilean draft, has been anchored in new constitutions. This ensures that, for the first time, the indigenous peoples of these countries are recognised not only as cultures, but as nations in their own right.²⁸ In general, the last few decades have seen a significant expansion of the catalogue of rights in Latin American constitutional texts. In addition to the basic rights familiar in Germany, Latin America attaches particular importance to social and economic rights – at least in theory. A right to work or to free medical care often appears unrealistic to outside observers, for despite all the constitutional reforms – and an ever more extensive catalogue of rights that go beyond classical human rights to encompass economic, social, and cultural rights in the constitutions of countries in the region – the overall human rights situation in Latin America remains “deplorable”.²⁹ A significant problem for many constitutions in the region is the lack of effective enforcement mechanisms comparable to the German constitutional

complaint (*Verfassungsbeschwerde*). There are a few exceptions, such as the *tutela* in Colombia, and the *amparo* in Mexico.³⁰

It remains unclear how things will develop in Chile; several options appear possible. In the first days following the referendum, the question of whether another completely independent constitutional convention should be newly elected was discussed, or whether this time there should be a mixed committee of senators, members of the Chamber of Deputies, and newly elected representatives.

It therefore currently appears likely that in early 2023, citizens will once again vote on the composition of a new constitutional convention. President Gabriel Boric has made statements to the press to that effect.

Conclusion

The failure of a flawed constitutional draft that would have cemented the political views of only *one* part of the Chilean people, and had other deficits as well, is something to be welcomed. However, in order to ensure long-term social peace in Chile, a new and more balanced constitution continues to be something to strive for. The hope is that a new attempt at reform will give all parties represented in Congress a chance to be heard, to vote, and also to participate in the reform process. The result must not be a draft that is supposedly “progressive” and reflects only *one* political perspective. A robust constitution must leave room for a variety of political views. On such a basis, a new, balanced social contract for Chile could emerge. Such a contract could then, in a few years, receive the necessary majority and replace the current constitution.

– translated from German –

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