

FROM BIG BANG TO INCREMENTALISM: CHOICES AND CHALLENGES IN CONSTITUTION BUILDING

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Session I Making a New Constitution

Chile

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What events led to calls for a new Constitution?

In the case of Chile, the answer to this question is rather clear. The events leading to calls for a new Constitution were, first, the strong contrast between Chile's long – and proud – republican constitutional tradition with the ominous fact that the existing charter was imposed by the country's most antidemocratic regime in its history (that led by General Augusto Pinochet), which rendered the existing constitution illegitimate to a large portion of the Chilean population.

This symbolic/historical context was then combined with the fact that Pinochet's Constitution was actually designed – and it has worked effectively in doing so – to block any significant changes in the radical socio-economic model that the so-called 'Chicago Boys' introduced in the country in 1975.

At what point was it decided to make a new Constitution rather than amend the existing Constitution? Who made the decision, how was it made, and what factors influenced it?

Although there were a few calls for having a new Constitution since at least the late 1990s, these were rare, since the country's 'pacted' transition to democracy had gone relatively well both in terms of political stability and economic prosperity. Indeed, at the time most politicians and constitutional scholars thought that Pinochet's Constitution had not been such a major obstacle for Chile's successful return to democratic rule.

The sense that there was no need to have a new Constitution in the first fifteen years since the end of the military regime (which took place in 1990), was furthered by the fact that the 'political heirs' of the dictatorship (the right-wing parties 'Renovación Nacional' and 'UDI'), had given their support to gradual reforms that slowly eliminated some of the most obscenely anti-democratic features of the Constitution of 1980 (such as the non-elected senators, in 2005).

Then, in the 2009 election for the first time, an important politician – former President Eduardo Frei Ruiz-Tagle – included a New Constitution in his electoral platform, stating that even with all the

amendments that had been introduced to the authoritarian charter, this continued to be incompatible with Chile's democratic and republican tradition and had a neoliberal ideological bias.

Finally, the social movements that in 2011 took to the streets to protest some of the most outrageous features of Chile's neoliberal model for the first time linked the Constitution of 1980 with the difficulty in changing key socio-economic policies that they were strongly against it.

The importance given by the 2011 social movement to the constitutional issue eventually translated in the inclusion of the proposal for a New Constitution by former President (and again candidate in 2013), Michelle Bachelet. By this time, the number of constitutional scholars that supported the notion that a New Constitution was needed was growing, especially among young constitutionalists. The election of President Bachelet gave the constituent process a momentum which it had never had since the end of the authoritarian regime.

What is the process for making the new constitution? Why was this process adopted?

At the time of writing the answers to this questionnaire, the process is almost dead –for reasons which will be given below. Having said this, the Government (which has only five more months in office) is still going through the motions of following the constituent process.

This consists in amending Chapter XV of the existing Constitution, which requires the support of 2/3 of the existing senators and deputies, in order to allow for the 'opening' of the actual constituent process. This process was adopted due to Chile's long tradition to respect the existing legality, no matter how vicious its origin. Furthermore, and given the fact that Chile's democratic breakdown (in 1973) was in part a consequence of the Socialist government decision to sidestep the Constitution, there is a strong reluctance to try anything that can be seen to be a transgression of the existing legality.

Will there be legal continuity to connect the new constitution with the old Constitution? Why or why not? If not, are there any challenges to the legitimacy of the Constitution and how might they be overcome?

Given what I have just said, if the constituent process is allowed to continue (and that it is an enormous 'if', at the moment) there will be a complete continuity connecting the New Constitution with the old Constitution, since the mechanism allowing for the constituent process to start in earnest will be the – totally constitutional – process of amending the chapter of the 1980 Constitution which regulates the process of constitutional change. The problem, however, is that the Chilean right-wing – which has always control around 40 % of the share of the vote – does not see any advantage in allowing any constituent process to proceed, since it perceives the Constitution of 1980 as their insurance against 'populism'. Thus, it is almost a forgone conclusion that the 2/3 majority of the vote of the members of Parliament needed to start the constituent process will not be available in late 2017, when the vote is expected to take place.

How is the constitution making process being managed? How long will it take? Is constitution making sequenced with other major events (eg elections)?

Given that the expected result will be the failure to actually deliver a new Constitution it is hard not to 'indict' Chile's current constitution-making process as a flawed one. Indeed, there are many

politicians and analysts who claim that Bachelet's government should have started with the vote amending Chapter XV of the existing constitution as soon as she took power (in March 2014), since she then had a very strong mandate (she won the Presidency with almost 63% of the vote) and was hugely popular among Chileans. The fact that she started with other important reforms (such as the first tax reform that increased taxes significantly in a generation and a landmark anti-neoliberal educational reform), had the unintended effect of starting the pre-constituent process when she was already dealing with a corruption scandal involving her son which translated in the loss of 30% of the support of the Chilean electorate, something which no doubt debilitated Chile's constituent process (Bachelet went from 60% of approval rate to less than 30% in six months, and she announced the itinerary of the constituent process when she was already at the latest low level of popular support).

At this point it is rather pointless to comment of the constitution-making itinerary and interplay with other events, since no serious constitutional analyst believes that the votes will be there to start the actual constituent process (even though in 2016 and 2017 there was a remarkable pre-constituent process that involved the formal participation of over 200,000 Chileans).

How much, if any, of the old Constitution is likely to be retained in the new Constitution? Why?

Given my previous answer, it is – yet again – rather pointless to answer this question. So, I may invert the question and ask how much of what was hoped would be included in a New Constitution could be reasonably expected to be included in the old constitution through gradual amendments. I think that a bit more of participatory democracy and de-centralization are inevitable. But another aspiration – more social rights – will not be included. In sum, the discrete amendments that will happen will be too little compared with the grand ambitions that existed when a New Constitution was in sight.

What sources or comparative experiences are constitution makers looking to? Are any other international influences being brought to bear?

The teams that – within Bachelet's administration – led the constituent process had many comparative experiences in consideration. My sense is that the most influential ones were those of Colombia (1991); Spain (1978) and South Africa (2004). The Islandic experience was also relevant as an inspiration. And clearly, the role of International IDEA in the preparatory face of citizen information and participation was crucial (and perhaps the best of what ultimately will be a failed effort to have a New Constitution).

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