COMPARATIVE LAW CHILEAN BLOG

Constitutional comparison as an opportunity for Chile's constituent process

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Chile is currently undergoing a constituent process. This process, formally initiated through a referendum in which the vote for a new constitution won by an overwhelming majority, has created enormous expectations of political and social transformation. However, achieving that goal will depend less on the constitution as such and more on the legal praxis and political process developing under its influence. In that regard, constitutional comparison and a methodological openness towards social sciences could be important resources when analyzing how new constitutions have managed to positively influence institutional practices capable of reconfiguring the conditions of existence of political communities.

How a constitution works… And how it doesn't

The expectations triggered by the constituent process find their justification in the position and function of the constitution in the institutional system. The constitution is formally and materially the founding element of the legal order. By virtue of its superior normative hierarchy, it defines procedures and competences to further generate Law and sets material requirements for all other legal norms within the system. The constitution also establishes the organic structure that determines the functioning of the political system. In a democratic order, it institutes the series of arrangements through which the people, the political community as a whole, decides over the conditions of its own existence.

An understanding of the transformative potential of the constitution based on its hierarchical supremacy within the institutional system is, however, insufficient. Both constitutional functions mentioned above, referred to the realms of Law and politics, don't have, by themselves, a privileged access to the configuration of the material conditions of existence of the political community. On one hand, the superior normative hierarchy does not exempt the constitution from the problem of transition between the normative and the factual dimensions. Moreover, in the case of the constitution, such transition is mediated by Law and politics, which are the primary spheres of influence of the former. Both are partially set up by the constitution, but develop their own existence and dynamic,[1] so that a constitution does not, in fact, directly define the conditions of existence of a political community.

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[1] As GALLIGAN & VERSTEEG (2013) have pointed out.

The mediated efficacy of constitutional guidelines, which operate through the spheres of Law and politics, exists even in the area of fundamental rights, whose direct applicability has been one of the most important developments in constitutional theory and practice during the second half of the 20th century. Indeed, the appearance of constitutional courts and the understanding of constitutional rights as legally enforceable standards governing state action quickly transformed the realm of fundamental rights in the core of the recent understanding of constitutionalism. This "juridification" of the constitution, however, has only been possible due to certain developments in legal theory, which can very well be read as compatibilization mechanisms between the spheres of Law and politics. The appearance of the category of principles broadened the concept of legal norm, introducing flexibility into the normative standard of required, and generated its own, distinct method for reasoning and application: balancing. Both operationalize within the realm of Law the typically political logic of compatibilization of goals or interests: principles and balancing display their definitive normative force in the context of a (legal) conflict between opposed positions. The constitution sets a frame for solving such conflict, but the latter can only become effective after a (political) decision, which (legally) particularizes the constitutional guidelines.

Constitution as a dynamizing element for transformations

The success of a transformative constitutional project seems to depend, after what has been said, on being conscious about what a constitution cannot achieve on itself. Actual transformation will be determined within the spheres of Law and politics. The constitutional influence needs to be assessed from the perspective of channeling, of positively directing the development of said spheres, differentiating and relating them within the institutional praxis.

Awareness of the relationships of differentiation and complementarity between Law and politics (particularly clear in this regard, Grimm[2] and Luhmann[3]) allow for an understanding of the possibilities arising from the different intensities of normative standards mentioned above. There are good reasons to believe that constitutionally stipulating dignity is different than doing so with life, property, environmental protection or health and that the articulation of a constitutional system should reflect that. Such differences have less to do with categorizations such as those of "generations" of rights (whose analytical value is debatable, even more so its use as an "argument" to define hierarchies between generations) or with generic references to implementation costs. Rather, they seem to relate to the institutional and temporal contexts, in which constitutional guidelines are meant to become effective. In other words: Drafting a constitutional text should reflect a conscious decision about the balance between Law and politics with regards to each regulated aspect. In particular, the specific function of the norm needs to be taken into consideration: A constitutional norm about property can, for instance, be conceived as a directly enforceable standard to be applied by courts or set a frame and contain a mandate to set up a property regime at the infraconstitutional level; both alternatives should imply the use of different normative

[2] GRIMM (2016).

[3] LUHMANN (1990).

standards and consequently of distinct drafting techniques. Similarly, the institutional context responsible for the realization of the constitutional program (a mandate to decide can be directed at the entire political community, legislative power, executive power, courts, all or some of them together) should manifest a clear option and a systematical conception of decision structures. Only a system with flexible normative standards, consciously politicizing and depoliticizing specific areas of constitutional regulation, will be able to make the most of the transformative potential of a constitution and to avoid, at the same time, an unnecessary normative minimalism and a moralizing understanding of constitutional normative standards. Constitution-driven transformation is a process that will develop through its own ways (and times) for each particular area and that especially demands a permanent politization and not one that ends when the new constitution comes to legal force (or in the case of Chile, when it is approved in the referendum). Transformation can be stimulated by and channeled through the constitution, but its realization will take place outside of its realm, in the spheres of Law and politics.

Comparison as a resource

Precisely in this sense is that a comparison with other legal order can be an extremely fruitful exercise for reflecting on the new Chilean Constitution. Experiences of countries facing similar challenges, and in particular those within the region, which, as Chile, have tried to constitutionally reconfigure the conditions of common existence, should be studied carefully.

An example may illustrate the main points made here. The Ecuadorian Constitution of 2008 establishes one of the most ambitious regimes of environmental protection worldwide. On the other hand, the expansion of social programs, also part of the Constitution, has been financed to a large extent through a development model based on extractivism.[4] As a consequence, and according to Laastad,[5] it's hard to conceive the environmental praxis (even under President Correa) as a realization of the particularly strict constitutional program. The underlying problem should be evident: a strict, ambitious normative standard renders politization difficult; its function can be conceived rather as a limit to politics. Under those conditions, a decoupling between the norm, as a standard that should influence the conditions of existence, and the factual conditions as such, can lead to a rapid loss of relevance and consequently of legitimacy of the constitution.

To be sure: Which areas should be politicized and which removed from the realm of Politics is a question that also needs to be discussed in the context of the constituent process. Apart from the necessary decision about the contents that should become part of the constitution, a very relevant question ought to be how to incorporate them. Constitutional comparison can be particularly useful when dealing with this latter question. The core idea is that only a theoretical reconstruction of the constitution that considers its political dimension will allow for a conscious use of the array of different possibilities within legal

[4] As pointed out by LALANDER (2014).

[5] LAASTAD (2019).

technique. In that regard, conceptions of the constitution with a methodological openness towards social sciences, like the comparative constitutional studies as understood by Hirschl,[6] which conceive the constitution against a background of cultural, economic and political conditions, or the latest work by Versteeg and Chilton,[7] which analyzes general patterns affecting the relationship between constitutional rights and their realization, seem to show a path especially relevant for the Chilean process. In other words: The success of the Chilean constituent process will depend to some extent on overcoming an understanding of the constitution that identifies it with its institutional position and normative hierarchy. The analysis should include the set of social and political conditions, which will define the efficacy of the constitution. A way of overcoming the institutional and normative reductionism is to consider a comparative perspective, methodologically open towards social sciences, and try to provide an answer to the following question: Under which conditions, how, and to what extent have new constitutions managed to direct the legal and political praxis and, in that sense, reconfigure the conditions of existence within specific political communities?

[6] HIRSCHL (2014).

[7] CHILTON y VERSTEEG (2020).

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