

Editors' Note: The Chilean Constitution-Making Process

We are proud to present this special issue of the *Latin American Legal Studies* journal dedicated to the Chilean constitutional process currently taking place. After the massive civilian movement started in October of 2019 and the historical political crisis that ensued, Chile has experienced a whirling process for the elaboration of a New Constitution. If successful, it shall replace the Constitution of 1980 that is currently in force. This process marks a key moment in Chilean constitutional history due to its unprecedented democratic elements, such as the existence of a popularly elected assembly in charge of drafting the constitutional text, the existence of referenda at the start and end of the process, equality in terms of gender participation and quotas for indigenous peoples. But in addition to all this, the Chilean process will become a model in the context of a region that has witnessed fascinating cases of constitutional experimentation during the past few decades. Thus, considering the national and international importance of this phenomenon, it seems fully justified to focus the attention of the journal in this historical process of political and institutional change.

This issue has contributions that are consistent with the academic and international view of the journal. Indeed, the articles examine different aspects of the process of constitutional change from national and comparative points of view. This special issue does not only include foreign and national authors, but the works also include substantial references to the international context in order to carry out their analyses.

From a philosophical perspective, Antonio Morales examines the following problem: to what extent is the constitutional creative power genuinely free of previous restrictions. He uses the concept of freedom explored by David Hume. Morales argues that the relation between the constitutional creative power and freedom is more complex than what we initially assume. In his view, the constitutional power does not have complete autonomy to set a long-term societal regulatory route. Although the article does not specifically mention the distinction between original and derived constituent power regarding the Chilean Constitutional Convention, its reflections highlight a problem that has been clearly seen in the operation of this institution and that will undoubtedly spark political and intellectual debate again.

The international perspective for taking on the Chilean constitution-making process is adequately illustrated by the contribution of Constanza Núñez. Her work's goal is to provide what she calls "cosmopolitan guidelines" for the Chilean constitutional process. After conceptualizing cosmopolitan constitutionalism, understood as a regulatory project that seeks to lay down certain conditions for the legitimate exercise of public authority within a post-national framework, Núñez examines a series of aspects where the future Chilean New Constitution could make significant progress. The article, amongst other things, analyzes the constitutional openness to International Law and Human Rights, the inclusion of foreign policy principles in the constitutional text and how the link between nationality and citizenship is handled within the context of immigration. All in all, the contribution presents a series of

provocative concrete policies that reflect a cosmopolitan conception of constitutionalism and that shall require careful attention during the drafting of the New Constitution.

Roberto Gargarella examines the issue of the judicial review of legislation. He offers a brief historical reconstruction of the theoretical dispute on this matter, distinguishing five phases: the foundational moment that is identified with *Marbury v. Madison* in 1803; the anti-regulatory era symbolized by the *Lochner* case of 1905; the social activism era, illustrated with the *Brown* case in 1954; the era of the court critics, represented by the Critical Legal Studies movement; and finally, what he calls the deliberative turn that has characterized the constitutional justice debate in the last decades. When closing his article, Gargarella skeptically raises the question of whether the Chilean experience may give way to a sixth phase, one with more dialogue, in this historical development. Gargarella's doubt refers above all to the material factors that may challenge the consolidation of progressive institutional design in Chilean constitutional justice.

Eugenio García-Huidobro and Sebastián Guidi, in an interesting piece on comparative constitutional law, examine the issue of the level of specificity that a constitutional text must include when regulating judicial institutions. They argue that the drafters should prefer regulating this kind of institutions with a high level of detail in order to avoid later hampering from future legislatures. They focus on the Italian, Argentinian, and Chilean experiences. These cases suggest avoiding the strategy of deciding not to decide or using broad delegations to the law. García-Huidobro and Guidi's contribution delves into the technical difficulties of drafting constitutional provisions and, in that sense, provides important inputs that the drafters of the New Constitution, and - in general - those who are observing the Chilean process, should bear in mind.

Finally, Pascual Cortés and Gonzalo García-Campo focus their attention on the police as a subject of constitutional discussion. This issue has been especially debated in Chile before and during the current constitutional crisis due to the constant criticism of police action throughout the country. Their analysis, with constant comparative and historical references, suggest that police institutions have traits that set them apart from the rest of the administrative apparatus, and thus must be subjected to careful institutional design where citizen participation has a key role. Cortés and García-Campo argue that this last element could be one of the key elements to prevent Chile from repeating the multiple failed attempts at reform that have been carried out in Latin America.

As we can see, on this *Latin American Legal Studies* issue we have tried to provide theoretical and comparative lessons as to how to tackle some of the issues of the current Chilean constitution-making process. The articles collected herein offer fascinating perspectives on conceptual refinements, historical trajectories, and intricate institutional design challenges that we hope may enlighten the current Chilean constitutional debate. Finally, we thank the authors for their stimulating contributions to our journal and to the Chilean constitution-making debate, as well as the referees whose critical scrutiny has allowed us to improve the quality of this special issue.

Guest Editors

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