"We, the people" and the International Community.[1] Cosmopolitan Guidelines for the Chilean Constitutional Process

"Nosotros, el pueblo" y la comunidad internacional. Lineamientos cosmopolitas para el proceso constituyente chileno

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Abstract

The article analyzes the concept of cosmopolitan constitutionalism and how this concept suggests a cosmopolitan turn of constitutional legitimacy, which may inspire the Chilean constituent process. Several strategies for including a cosmopolitan dimension in the new Chilean Constitution are proposed, incorporating provisions on the constitutional opening to International Human Rights Law, principles of foreign policy, international law principles, to reconceptualize the link between nationality and citizenship, an international consultation provision to democratize the procedure for adopting international treaties.

Keywords: *Cosmopolitanism; constitutional process; international community; international human rights law.*

Resumen

El artículo analiza el concepto de constitucionalismo cosmopolita y desarrolla la forma en que el giro cosmopolita de la legitimidad constitucional que este propone, puede inspirar el proceso constituyente chileno. Se proponen diversas estrategias para la inclusión de una dimensión cosmopolita en la nueva Constitución chilena, incorporando previsiones vinculadas a la apertura constitucional al Derecho Internacional de los Derechos Humanos, principios de política exterior, principios de derecho internacional, reconceptualizar el vínculo de nacionalidad con ciudadanía, la previsión de una cláusula de consulta internacional y la democratización del procedimiento de adopción de tratados internacionales.

Palabras clave: *Cosmopolitismo; proceso constituyente; comunidad internacional; derecho internacional de los derechos humanos.*

[1] Title inspired in the idea of KUMM (2016).

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INTRODUCTION

Chile begins the process of drafting a new Constitution to replace the 1980 Constitution. The Constitutional Convention – composed of 155 members – must draft a new Constitution with inspiration of various currents and notions of constitutionalism, reflecting there the recognition of principles, rights and the design of institutions. In this article I will explain why the Constitutional Convention must include the guidelines provided by cosmopolitan constitutionalism. The cosmopolitan perspective is unavoidable if the idea is to strengthen the legitimacy of the new Constitution and to draft it in accordance with democratic principles.

In the new Constitution the cosmopolitan perspective provides for a new standard of legitimacy to national constitutional decisions, allowing the Chilean Constitution – and ultimately the State of Chile – to contribute to an agenda based on the principles of cosmopolitanism, that is, that all of us fulfill the duties and responsibilities we have towards every human being and with humanity as a whole, no matter the ethnicity, race, gender, place of birth, etc.[2] This differentiates the subject matter of this study from others incorporating the link between the Constitution and the international community. For example, some studies address the transnational character of the Constitution either because of the influence of comparative law in its development process, or the participation of foreign agents in its drafting,[3] or because some studies analyze the external dimensions of the Constitution focusing on issues of territoriality and limits.[4] The cosmopolitan dimension of the Constitution points to the importance of recognizing humanity as a standard for constitutional justification. This is not a descriptive issue of constitutionalism but purely normative, which answers the question of how the Constitution contributes to strengthen an international system aiming at guaranteeing peace, human rights and the protection of humanity's common goods.

This perspective is relatively new in cosmopolitanism studies. Traditionally, cosmopolitanism has viewed states – suspiciously – as an obstacle to build up a cosmopolitan agenda. In this regard, most studies have analyzed and developed structures at the international level, while neglecting how the States themselves may strengthen cosmopolitanism, in a "bottom–up" strategy of cosmopolitanism,[5] where States should be considered active agents of cosmopolitanism through their Constitutions, legal structures and governmental strategies, and not an obstacle. Indeed, this perspective attempts to recover the Kantian ideal, where "cosmopolitan republic" is one of the cornerstones of the pacifist project.[6] This path begins to open through the development of the concept of "Cosmopolitan Constitutionalism", bridging the gap between cosmopolitan theory and state

[2] BROWN & HELD (2010).

[3] About the Constitution as a transnational norm, see: SHAFFER, GINSBURG & HALLIDAY (2019). Regarding participation of international agents in transitional justice processes that have concluded in new Constitutions, see: CHESTERMAN (2004).

[4] BENVENISTI AND VERSTEEG (2018)

[5] Critically highlighted, BROWN (2011). Exceptions to this trend in the study of cosmopolitanism may be mentioned YPI (2008) and the recent book coordinated by BEARDSWORTH, WALLACE BROWN, AND SHAPCOTT (2019b). It is also worth mentioning the characterization made by Somek about "Cosmopolitan Constitutions" inspired in the European integration process in: SOMEK (2014).

[6] KANT (2005).

practice,[7] since cosmopolitan constitutionalism tries to find a new way to understand constitutionalism linking the local, international and transnational dimensions.

In this article I will describe some guidelines to explain how the cosmopolitan ideal can be reflected in the provisions of the constitutional text. This is particularly important when developing this concept, both because of the global context where it is inserted, and the dialogical context allowing it. Regarding to the global context, there is not only a widespread crisis of values of constitutionalism (rule of law, democracy and human rights), but we see that nationalist and populist discourses get stronger every day. There is a crusade accusing cosmopolitanism principles of being "imperialist" or an "elitist" project.[8] The following proposal attempts to show that this supposed dichotomy between universalist and particularist ontologies can be overcome if there is a dialogue between what is universal and what is particular, and this is included into the very mechanism of constitution–making, and if the people themselves – when exercising the constituent power,[9] embrace a cosmopolitan perspective. Indeed, a constituent process is a propitious moment to develop the contents of a universalist ontology, in relation to the discourse context. As Ackerman points out, in constituent moments people transcend personal interests and create instances for deliberation that favor collective welfare.[10] The cosmopolitan perspective aims at including humanity as a whole in that collective welfare.

The feasibility of developing this agenda is also based on the very grammar that gave rise to the process. One of the most significant slogans of the social movement has been linked to the idea of dignity ("until dignity becomes customary"). Although dignity is an abstract concept with a lot of discussion about its meaning and scope, it is unavoidably linked to fundamental rights and its expansive nature.[11] There is a shared diagnosis that "abuse", "inequality", and "humiliation" are the characteristics defining the treatment received by citizens, unveiling imbalances in power relationships, favoring domination of some over others, and in short, violating the idea of equal beings.[12] Citizen demands show that is not enough to recognize dignity in the Constitution, in abstract, but is necessary to develop social, legal and political systems that place fundamental rights and their guarantee (the concrete expression of dignity) as a core element of a new social pact among the citizens of Chile as well.

[7] BROWN (2011), p. 55.

[8] This is done by confusing or identifying cosmopolitanism as a political theory with the excesses of neoliberal globalization, HAVERCROFT *et al.* (2018).

[9] Both the concepts of people and constituent power are highly controversial. In this particular section, these concepts are stated only for the purpose of describing the functioning of the Constitutional Convention.

[10] ACKERMAN (2014). Althoug, as Elster highlights, this "mood" contrasts with the paradox of constitutional processes, where the ideal material conditions for rational and impartial deliberation are not present: ELSTER (1995), p.394. This - which is unavoidable - must be considered when designing the rules of procedure of the Constitutional Convention. The procedural rules are fundamental to channel the tensions inherent in a constituent process.

[11] HABERMAS (2010).

[12] This way of understanding dignity or, in this case, the lack thereof, agrees with the explanation developed on this idea by Rainer Forst: "claim to be respected as an autonomous being who has the right not to be subjected to certain actions or institutions that cannot be adequately justified", see: FORST (2010).

Given this, we can connect Chilean context with the transnational mobilizations we have witnessed in recent years. The idea of economic and political systems based on domination of some over others is a cross-cutting theme in transnational social movements. The global aspect of the problems we face is shown in a common system of oppression that allows for domination by means of a mechanism that combines economic (neoliberal globalization), gender (patriarchy), racial (neocolonialism) and ecological domination. In this sense, transnational social movements[13] are necessarily marked by the universal claim for dignity, and the demand for non-domination, which placed "Chilean October" in the world's spotlight.

Thus, there is a common awareness of shared vulnerability, so Chile's struggles are the struggles of all. This interdependence and vulnerability imply a challenge for the Chilean constituent and for the international community, as long as the struggles require us to promote discourses where States and the international community seek solutions outside the traditional frameworks of constitutionalism. They demand a dialogue between the local and the global spheres, with a transformative view of future, overcoming global structures of injustice. Therefore, the legitimacy of a Constitution is not only given by the deliberative process -from which the new Constitution emerges - but also by its capacity to be part of the big global legal sphere.

First, I will refer to the concept of cosmopolitan constitutionalism and how it provides a new standard of constitutional legitimacy. Second, I will explain strategies for including a cosmopolitan perspective into the new constitution-making process, proposing some constitutional clauses for developing a cosmopolitan agenda.[14] Finally, I will show how all these elements will contribute to strengthen a new Constitution's legitimacy and which democratic perspectives are useful to give raise to a fruitful dialogue between Chile and the international community.

I. COSMOPOLITAN CONSTITUTIONALISM

1.1 Concept[15]

In recent decades, Constitutional language has been used equally to face challenges of globalization and fragmentation of International Law, to explain the phenomena of supranational integration, or the characteristics of human rights protection organizations. In this scenario, is complicated to clearly define the limits of the different debates arising

[13] The transnational character of contemporary social movements and the emergence of a grammar of solidarity around them has been developed by GOULD (2007).

[14] During the very process of drafting the Constitution, strategies can also be developed to incorporate a cosmopolitan perspective by including provisions in the rules of procedure of the Constitutional Convention. For reasons of length, this perspective is not developed in the text, but I emphasize that it would be relevant to include mechanisms for dialogue, discussion forums or public hearings between the Constitutional Convention and bodies such as the Inter-American Commission on Human Rights or the United Nations High Commissioner for Human Rights. For their part, the proposals for constitutional clauses are only examples of some relevant examples and by no means exhaust the possibilities of cosmopolitan elements in a Constitution. As will be seen throughout the article, the examples of comparative law are scarce given the recentness of the perspective analyzed in the studies of constitutionalism.

[15] An extended version of the concept of cosmopolitan constitutionalism as enunciated here can be found in NÚÑEZ (2020).

when the word "constitutionalism" is applied in the international debate and, therefore, there are often concept confusions.

Indeed, in academic studies expressions such as "global constitutionalism",[16] "transnational constitutionalism",[17] "world constitutionalism",[18] "multilevel constitutionalism",[19] "metaconstitutionalism"[20] are used, and in this case "cosmopolitan constitutionalism", is used in this study.

Before understanding cosmopolitan constitutionalism in this great conceptual range, we must consider that the term "constitutionalism" is sometimes used for descriptive purposes, that is, to argue that the global society has a Constitution,[21] or to indicate the constitutionalization process in International Law that sometimes takes place.[22] But this term is used for normative purposes as well, when using theoretical tools of constitutionalism to face the challenges of globalization through the proposal of new concepts and institutions. Cosmopolitan constitutionalism falls within this second group of approaches. Thus, we consider cosmopolitan constitutionalism as an essentially normative project.

In this context, cosmopolitan constitutionalism may be defined as an ambitious normative project aiming at setting conditions for the enjoyment and effective exercise of human rights, and to establish limits to power and conditions for its exercise, considering the particularities of the post–national scenario. In short, it seeks to redefine the conditions for exercising legitimate authority within the context of neoliberal globalization, considering humanity as a whole as the standard of constitutional legitimacy. Although this is not a unified project and there are multiple approaches in different authors such as Ferrajoli,[23]

[16] This is the most commonly used meaning and is defined by Peters as "an academic and political agenda that identifies and advocates for the application of constitutionalist principles in the international legal sphere in order to improve the effectiveness and the fairness of the international legal order" Peters (2019a), p.397. This expression encompasses, in general, the different approaches to this issue that are being developed in the international arena, positioning itself as an interdisciplinary field of study. In this regard, see the explanatory memorandum of the creation of the journal "Global Constitutionalism". WIENER *et al.* (2012). This expression is used in SCHWÖBEL-PATEL (2011) as well.

[17] NEVES (2013).

[18] MACDONALD & JOHNSTON (2005).

[19] PERNICE (2014).

[20] WALKER (2002).

[21] See, by all, the position of FASSBENDER (1998).

[22] In the classification provided by DIGGELMANN & ALTWICKER (2008), the perspective of constitucionalization corresponds to the strategy of "correspondence", while seeking constitutional functions and elements in the international sphere.

[23] The cosmopolitan dimension has been developed in various works by Ferrajoli, but a synthetic systematization of his proposals in this area can be read in FERRAJOLI (2018).

Habermas,[24] Kumm,[25] Peters,[26] Bohman,[27] Martí,[28] etc., there is a common core in all of the proposals, allowing us to speak of cosmopolitan constitutionalism as a new way of understanding constitutionalism in general. This common core shares (1) a diagnosis of the state of constitutionalism in the post-national context,[29] (2) it is proposed as a transformative and critical project in the face of this scenario,[30] and (3) it proposes a cosmopolitan twist to the concept of constitutional legitimacy.

In view of the debate at hand, I will focus exclusively on developing the dimension of constitutional legitimacy provided by the concept of cosmopolitan constitutionalism, and showing its impacts on the Chilean constitutional debate.

1.2 The Cosmopolitan Turn of Constitutional Legitimacy: An Additional Requirement for the Chilean Constitutional Process

Cosmopolitan constitutionalism asserts that the legitimacy of "traditional" constitutionalism (understood as state constitutionalism) has taken a cosmopolitan turn, since national constitutional legitimacy now depends, in part, on how state constitutionalism is integrated and relates to the larger global legal-political sphere.[31] This integration is part of the constitutional legitimacy, as a way of embodying the promise of constitutionalism in a post-national setting (in contemporary setting the promises of constitutionalism cannot be a reality because individuals are embedded in anonymous networks with no control, where domination has become the rule). According to this, the standards of constitutional legitimacy arise from an integrative conception of public law, which transcends the national-international division, and acquires a cosmopolitan character.[32]

This assertion is based in the constitutional legitimacy model. If we consider that the starting point in the "standard view" of constitutional legitimacy is to establish fair relations between people who are considered free and equal, and that, a model of legitimate authority is required – considering the motivational and epistemic problem underlying reasonable disagreements in matters of justice, which allows to arrive to fair decisions by

[24] See, specially: HABERMAS (2013); HABERMAS (2000); HABERMAS (2008).

[25] KUMM (2009); KUMM (2013), KUMM, (2018).

[26] PETERS (2009A); PETERS (2009B); PETERS (2006).

[27] BOHMAN (2007).

[28] MARTÍ (2010).

[29] It is an apocalyptic-optimistic diagnosis (RUIZ MIGUEL (2008)), which shows the urgency of developing a constitutional paradigm that takes charge of the dialogue of the multiple spheres of power (national, international, public, private) and, on the other hand, is optimistic in relation to the existing structures that make the development of this paradigm possible.

[30] It is transformative because it proposes new ways of thinking about the classic concepts of constitutionalism (demos, citizenship, sovereignty, etc.) and is critical of international structures that are based on domination and impede the development of a constitutionalist paradigm.

[31] KUMM (2013), p. 612.

[32] This paper assumes the premises of cosmopolitan constitutionalism in the way it has been described, without ignoring the existence of critical perspectives on this concept. In relation to its eminently normative character (and the lack of assumption of a sociological perspective in the concept of constituent power), see for example: WALKER (2016) and SOMEK (2014). A defense of its normative premises in relation to critical perspectives is developed in NÚÑEZ (2018a).

impartial and participatory procedures – there is no valid reason to understand that this type of reasoning is only valid for certain types of externalities, unless we understand freedom and equality not as the basis of the model of constitutional legitimacy.[33]

The underlying argument is that there are decisions that need a justification, because they may have negative externalities for others, although these decisions may be justified according to the traditional model of legitimacy[34]. Indeed, citizens of the world may have aspirations that may fairly be considered as part of decisions affecting them.[35]

Unless we accept a model of domination relationships (i.e., legitimacy functions as domination),[36] these negative externalities must be included, and, therefore, constitutional legitimacy must take a cosmopolitan turn. Indeed, the international system has also been built on the principle of sovereign equality (based on the self-determination of peoples), which demands egalitarian relations, guaranteed by a commitment to non-domination.[37] From this perspective, no legitimate constitutional authority can be demanded in a constitutional system (no matter how democratic is internally) if its decisions affect people that were not part of the decision-making process.[38] Humanity becomes a standard of justification for constitutional decisions. In practice, this transform constitutional democracy in a community that "includes humanity when acting as a political community open to reinterpretation and revision of its principles in order to do justice to humanity".[39]

For Benhabib, the cosmopolitan turn implies a change when understanding sovereignty: to move from a self-referential sovereignty to a relational sovereignty, which considers the interaction between States and individuals in the context of the world community, and demands fluid and negotiable democratic iterations, which ultimately allow distinctions, for example, between "citizens" and "foreigners", "us" and the "other". This permanent negotiation makes it possible to change into a society where all human beings –only because of being so – are protected by universal rights, gradually reducing the exclusionary privileges of the membership.[40] This is not to deny the state sovereignty, but

[33] KUMM (2013), p. 615.

[34] Evidently underlying this argument is a cosmopolitan view of the moral relevance of the other and the obligation to justify actions with reasons, BENHABIB (2005), p. 15. In this sense, this perspective highlights the connection between constitutionalism and cosmopolitanism from its foundations.

[35] Martí presents as an example: "European citizens from different countries have a legitimate claim on how Russia administers its nuclear arsenal and how it protects its nuclear reactors. All human beings had a legitimate claim on how Mexico dealt with the 'swine flu' at the very beginning of the pandemic. All of us have a claim on how certain countries are reacting towards international terrorism", MARTÍ (2010), p.39. In the same vein, KUMM (2016), p. 704, lists the type of negative externalities in which humanity has a legitimate interest.

[36] Kumm points out, "Claiming authority to resolve questions of justice concerning outsiders, who per definition have no equal standing in the domestic policy formation process, is an act of domination", KUMM (2013), p. 617. The concept of non-domination as the foundation of the need for cosmopolitan constitutionalism is the central motif of republican cosmopolitans such as Martí or Bohman.

[37] KUMM (2018), p. 177; MARTÍ (2010), p. 35.

[38] KUMM (2016), p. 708.

[39] BOHMAN (2007), p.116-117.

[40] BENHABIB (2005), p. 26.

to assume that it is relational and requires negotiation.[41]

The cosmopolitan turn of constitutional legitimacy implies, to consider that each State is under the obligation to be subject to, supports and helps to develop a constitutional system of international law that is prepared to solve justice issues from the perspective of the discourse of legitimate authority.[42] Legitimacy with a cosmopolitan turn implies a joint view of "We the people" that incorporates the international community.[43] Dworkin pointed this out (although not using constitutional language), in his last writings:

> It follows that the general obligation of each state to improve its political legitimacy includes an obligation to try to improve the overall international system. If a state can help to facilitate an international order in a way that would improve the legitimacy of its own coercive government, then it has a political obligation to do what it can in that direction [...] But it does require a state to accept feasible and shared constraints on its own power. That requirement sets out, in my view, the true moral basis of international law.[44]

From a normative perspective, the crystallization of this duty arises from Article 28 of the Universal Declaration of Human Rights, which would legally bind to move towards a cosmopolitan constitutionalism. This provision states "everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized." Although this article has not been extensively studied and has had few remarks,[45] it is possible to argue that it enshrines those preconditions necessary for the rights and freedoms contained in the declaration to become effective.[46] From this perspective, Ferrajoli pointed out that according to this article "there is a legal obligation to fill the current gaps in guarantees, as well as those of the relevant functions and institutions, which today vitiate international order".[47] Therefore, the States must develop structures which contribute to crystallize this provision in their internal constitutional order.

When applying these elements in the debate at hand, we see that a national constituent power – carrying out a constituent process – must consider the dimension of humanity as a standard of constitutional justification. This implies asking ourselves how this can contribute to creating the conditions for a legitimate international system that guarantees peace, human rights and the common goods of humanity. This does not imply, therefore, to uncritically assume international structures based on domination, on the contrary, we shall ask ourselves how we can contribute to constitutional principles transformation, by means of democratization and transnational dialogue inspired by the principles of cosmopolitanism. The clauses and procedures that will be proposed here – and contrary to the skepticism of national academics to include the international dimension

[41] The author uses the concept of "democratic iteration" to understand these negotiation contexts. Democratic iterations are "complex processes of public argument, deliberation and exchange through which universalist rights claims are contested and contextualized, invoked and revoked, posited and repositioned, throughout legal and political institutions, as well as in the associations of civil society" BENHABIB (20212), p. 179.

[42] KUMM (2013), p.617; AMHLAIGH (2016), p. 203.

[43] KUMM (2016), p. 709.

[44] DWORKIN (2013), p.17.

[45] HIERRO (2014), p.83.

[46] BOHMAN (2007), p.46.

[47] FERRAJOLI (2011), p. 538.

in the Constitutions[48] – contribute to provide national constitutionalism with critical tools to distinguish processes inspired by cosmopolitanism from those of inspired by "inauthentic" cosmopolitanism,[49] as well as to contribute to transform international structures, being inspired by constitutional principles (democracy, rule of law and human rights). Likewise, the fulfillment of many of our constitutional aspirations depends on the global scenario, therefore, to take over our structures – to the extent of our possibilities – contributes to crystallize these aspirations.

All of the above does not imply ignoring the epistemic difficulties when identifying global wills or interests.[50] This is obviously a complex challenge. As indicated in the introduction, the Chilean case is interesting because International Law, and particularly, International Human Rights Law (IHRL) has been a tool of emancipation for excluded groups in the country[51] - who have a leading role in this constitutional moment - in the discursive, normative and symbolic sphere. In this sense, these processes have become part of a shared "constitutional common sense", i.e. an unavoidable part of the constitutional debate. In the face of epistemic difficulties, to be open to IHRL is an opportunity to channel fruitful dialogue between the national and international dimensions of the Constitution, it is then a learning historical milestone for comparative constitutionalism.

II. NEW CONSTITUTION AND GUIDELINES TO THE CONSTITUENT POWER FROM A COSMOPOLITAN PERSPECTIVE

2.1 How Open We are to International Human Rights Law[52]

The way in which our national constitution interacts with IHRL, i.e. how "open" is the constitutional field to IHRL developments, is not well resolved in the 1980 Constitution. The inaccuracy of Article 5, paragraph 2 of the Chilean Constitution, caused that such interaction has been resolved in a contradictory manner at case-law level. in contradictory terms (human rights provisions of international treaties are considered to have constitutional or even supra-constitutional hierarchy according to the Supreme Court's case-law, but that they have supra-legal and infra-constitutional hierarchy in accordance with the Constitutional Court's case-law).[53] Such inaccuracy has not hindered the acceptance and application of IHRL in the domestic sphere, but has created discrepancies in criteria, difficulties when enforcing international judgments, and a slow progress in case-law feedback compared to other countries in the region.[54]

[48] See, for example, FUENTES (2015) inspired by a state-methodological conception of constitutionalism when dealing with the concept of constitutionalism and its link with the international dimension.

[49] BECK (2004), p. 44.

[50] WALKER (2016).

[51] From a jurisdictional perspective, see the impact of the IHRL on the protection of groups in situations of discrimination in Chile.: NASH & NÚÑEZ (2020).

[52] An extended version of these arguments in: NÚÑEZ (2018b).

[53] HENRÍQUEZ (2008); LÜBBERT & VIERA-GALLO (2012); NOGUEIRA (2014).

[54] See the studies in: NASH & NÚÑEZ (2020).

In addition to the interaction issues between systems, the Constitution fails to address areas that generate tensions in the constitutional system, such as the value of case-law and recommendations of treaties, which sources should be considered when establishing the standard of interaction, and whether it is desirable to include specific IHRL interpretative principles.

In this sense, any Constitution aiming at adequately set a link to the standards developed in the IHRL must enshrine provisions addressing these problems. Although not every aspect should be considered at the constitutional level and some may be left to the law (i.e., provisions for enforcing international judgments),[55] the provisions about which norms and principles of the IHRL shall be applied and how the Constitution is linked to the IHRL.

In order to make an appropriate decision in this matter, the global context, the national reality and the benefits of the chosen constitutional technique must be considered. Although international law neither state how to carry out this incorporation, nor the hierarchy to incorporate international instruments, States must make institutional decisions in line with bona fide compliance with these provisions, achieving effective compliance with the obligations.[56]

In relation to the global context, we must bear in mind that the contemporary system of protection of IHRL is characterized by its interdependence. Thus, human rights are embedded in a multilevel protection system, where local, national and international dimensions interact, feeding each other and creating comprehensive protection standards.[57] In this context, traditional responses of acceptance of IHRL have had to be rethought or adapted to provide adequate responses to the phenomenon of interaction.

The national context, for its part, shows the difficulties of incorporating IHRL standards; however, the progress in terms of substantive incorporation are thanks to the national courts effort to find interpretations of domestic that are suitable for complying with international human rights obligations. In this way, the give IHRL diverse uses such like crystallizing principles, filling gaps, providing content to rights, creating new rights through normative reintegration, giving new content to existing rights, helping to set limits to fundamental rights, etc.[58]

This context reflects that it is not enough to give constitutional hierarchy of human rights treaties for the adequate constitutionalization of this issue,[59] and it is necessary to

[55] In this sense, the example of countries that have enforcement laws, such as Peru or Colombia, can be followed. This is an appropriate mechanism since it allows or facilitates to adopt inter-institutional measures when appropriate and does not place the procedural burden on the victim to activate the enforcement mechanisms, being a more effective and committed system for fulfilling the obligations of the victim.

[56] Articles 26 and 27 of the Vienna Convention on the Law of Treaties.

[57] This is manifested, for example, in the fact that national courts have incorporated in their legal reasoning the standards developed at the international level as a parameter to assess the adequacy of domestic acts to their human rights obligations and, on the other hand, that international courts have come to include the jurisprudential developments of national courts or other international tribunals in their decisions.

[58] NASH & NÚÑEZ (2017).

[59] In the case of the supra-constitutional hierarchy (for example, Venezuela, Guatemala and Bolivia), such clauses present the problem of resolving *ex ante*, a possible clash between human rights treaties and the

incorporate interpretative provisions forcing public authorities (a broad community of constitutional interpreters) to harmonize domestic provisions with the obligations arising from the IHRL.[60] In this regard, provisions of interpretation in conformity or *pro personae* principle are appropriate in the Chilean context and for the cosmopolitan legitimacy idea of the Constitution.

Interpretation in conformity is the hermeneutic technique by which constitutional rights and freedoms are harmonized with the values, principles and provisions of international human rights treaties signed by the States, as well as case-law of supranational courts, in order to achieve greater effectiveness and protection.[61] Unlike other formulas, this clause fails solves the problem in terms of coordination but not in terms of hierarchy.[62] As Caballero points out, this is a more effective solution in the current development of IHRL, since the hierarchy homogenizes the legal system and the sources, but does not allow to set "alternative routes when facing normative collisions".[63]

In simplified terms: this clause implies affirming that, when creating, interpreting and applying law, the fundamental rights enshrined in the Constitution must be understood in harmony with the human rights enshrined in international treaties. Therefore, the interpretation giving effectiveness and coherence to the rights nationally and internationally shall be preferred. We understand "conformity" as "compatibility" and not as identity. Indeed, to the extent that the national standard is different - granting greater protection and guarantee to rights - the interpretation in conformity shall be in no case to the detriment of the State's level of guarantee. On the other hand, "conformity" implies to consider that the IHRL will not be used "only" in case of gaps or when national law is unclear, since they are minimum standards that feedback on each other to shape the content of the law.[64] This is particularly relevant in the Chilean case, where the neutralizing interpretation of the IHRL is usual. This clause forces to consider IHRL in each case, situation, law or public policy (there shall be no discretion when applying it because it is a constitutional obligation). The

Constitution, from a formal and non-integrative perspective, eliminating the possibility of making interpretations at the level of domestic law that are more protective than the development of the IHRL. This possibility restricts the development of an innovative domestic constitutionalism. In relation to the consecration only of the constitutional hierarchy -without interpretative principles-, it can generate the problem of collisions between Constitutional and international norms (there are no answers for complex cases of articulation) and does not consider the express obligation to consider the IHRL in each exercise of application and interpretation of the Law (its invocation is subject to a question of political will in those cases where the express obligation of interpretation of conformity is not consecrated). In short, the mere hierarchy as a constitutional solution offers a static vision of the relations between the systems, not being adequate for the contemporary circumstances of lively interaction, which is what characterizes the multilevel system of protection of rights.

[60] As ACOSTA (2016) points out, clauses with interpretative solutions are those setting "the need to interpret certain constitutional and/or legal norms in the light of international commitments". In addition to the Spanish and Mexican cases taken as a reference in this study, the constitutions of Portugal (1976), Peru (1993) and Colombia (1991) also use this constitutional formula

[61] FERRER MAC-GREGOR (2009), p.22.

[62] See, for example, article 10.2 of the Spanish Constitution.

[63] CABALLERO (2011), p. 109.

[64] SÁIZ (1999), pp. 225-266; QUERALT (2008), pp. 197-201; CABALLERO (2013), p. 10.

obligation of interpretation in conformity is not only incumbent on the courts, but also on every authority.

On the other hand, the pro persona principle is a hermeneutic principle that arises from IHRL. "the broadest provision shall be consulted or the most extensive interpretation must be applied when recognizing protected rights, and conversely, we must consider the most restricted provision or interpretation when establishing permanent restrictions to the exercise of rights or in case of extraordinary suspension".[65] This principle makes it possible to point out the applicable rule in case of antinomies, regardless of the hierarchy, and to avoid developing regressive legislation that limits the protection and enforcement of human rights by the legislator.[66]

A system based on harmonization-interpretation (unlike models based solely on hierarchy) has the following advantages: a) it avoids international liability for interpretations contrary to IHRL; b) it favors evolutionary interpretations through the interaction between IHRL and domestic law; and c) it provides no final answers to complex problems, always offering open answers that have, as a minimum, international human rights protection, allowing an incremental dialogue between the national and the international dimension.

A key issue when incorporating a clause of interpretation in conformity and pro persona principle is to define the scale when applying such principles. The Universal Declaration of Human Rights, the human rights rules enshrined in international treaties ratified by Chile and in force, the principles of international law and the jus cogens rules must be expressly included in order to provide a comprehensive view of the sources of IHRL.

Likewise, according to the Interamerican level, the value of case-law and the recommendations of the treaty supervisory bodies as a standard for the constitutional conformity shall be considered as *res interpretata*. Behind this reasoning the idea is that among the functions of the organs interpreting treaties it is to interpret the content and scope of treaty rights. To clarify this issue -which has always been problematic not only in Chile, but in the IHRL in general- the sentence "under the conditions of its validity" shall be included in the mentioned sources (treaties, principles, norms of *jus cogens*) when incorporating the interpretation in conformity clause, as Argentina has done.[67] In this way, the conformity standard can be set as in International Law provisions, including the case law regarding interpretation. This is an appropriate technique, as it leaves ample room for different forms of interpretation of human rights provisions in the international sphere.

Thirdly, it is desirable interpretative principles specific to IHRL to be incorporated into the constitutional charter as well. These principles function as hermeneutic guides, leading authorities when applying and interpreting norms. They design certain characteristics regarding rights that must be respected and guaranteed at all times and in all

[65] PINTO (1997), p.163.

[66] CASTILLA (2009), p. 71. The Mexican Constitution, is a paradigmatic example of the constitutionalization of this principle, but article 1º included a vein of the *pro personae* principle, the one with the broadest protection, not providing explicitly the criteria of the restricted interpretation of limits.

[67] It is argued that what is desirable is the incorporation of the phrase "under the conditions of its validity" (Article 75, paragraph 22 of the Argentine Constitution), but according to the above reasoning, the constitutionalization of a list of treaties would not be convenient.

places. Among them, we find the universality, interdependence, indivisibility and progressiveness. For example, Article 1 of the Political Constitution of the United Mexican States States: "All authorities, within the scope of their competencies, must promote, respect, protect and guarantee human rights in accordance with the principles of universality, interdependence, indivisibility and progressiveness". Thus, these principles are in line with the basic characteristics of human rights, in accordance with the IHRL and their constitutionalization will allow to adequately integrate their sources and to apply them in accordance with their international validity, limiting in no manner interpretations that are more expansive or protective, in agreement with national constitutionalism.

Finally, the national Constitution should contemplate access to international jurisdiction in accordance with the treaties signed by the State - following a model of multilevel protection of fundamental rights - that is, to constitutionally recognize the right of citizens to resort to international courts or bodies created according to treaties or conventions to which the State is a party in the field of human rights.[68] In this way, there will be no need to make constitutional reforms every time a treaty granting jurisdictional competence to an international instance is signed.[69]

2.2 Foreign Policy Principles

Traditionally, Chilean constitutions have not included foreign policy principles. Although this is not a widespread model, some of them do include them, like Argentina, Mexico, Brazil and Ecuador in Latin America. Foreign policy is understood as something flexible and fluid that must adapt to an ever-changing world. Therefore, the constitutionalization of these principles would not be adequate and this matter should be left to the democratic deliberation of the contingent majorities.

Given the character of foreign policies – and not giving up their political dimension - some minimum principles shall be constitutionalized and guide the policy, in order to stabilize some elements of the "domestic chessboard" of foreign policy,[70] assuming that we can distinguish between foreign policy preferences (material interests, such as opening markets) and higher principles (values).[71] This does not mean constitutionalizing the "state character of foreign policy" (this would be counterproductive to the democratic dimension), but rather delimiting some fundamental areas to define a social and democratic State governed by the rule of law. It is also a unique opportunity to overcome the view that foreign policy is only the consensus of national elites, giving back to the "people" the possibility of setting the path, as a consequence of the consensus of a democratic and inclusive deliberation.

The relevance of incorporating foreign policy principles in the Chilean Constitution is justified on conceptual-theoretical grounds linked to the cosmopolitan constitutional legitimacy model I have proposed, as well as by contextual circumstances. Regarding context, in the last decade we have witnessed the development of a back-and-forth between

[68] For example, as article 205 of the Peruvian Constitution.

[69] As was the Chilean case when ratifying the Statute of Rome of the International Criminal Court.

[70] Expression used by PUTMAN and applied for this debate by BYWATERS (2021), p. 153.

[71] MERKE (2021), p. 72.

progressive, democratic and anti-neoliberal, neo-sovereigntist perspectives, or perspectives that aim at a *status quo* in relation to foreign policy. In this movement the foreign policy of the last government has taken a neo-sovereigntist turn.[72]

The neo-sovereigntist agenda is characterized by a negative view of the intervention of supranational organizations in States affairs, arguing democratic self-determination reasons and the need for States to once again take control of their own destiny (in this point a broad spectrum of political and philosophical perspectives, which cannot be classified as right/left or liberal/communitarian agree on this point).[73] This is a global phenomenon, but the Chilean case has been paradigmatic because it has revealed the institutional weakness of the commitment to certain foreign policy principles. There were no institutions, legal mechanisms or constitutional principles to stop the neo-sovereigntist turn of the President of the Republic and, the rule of law was left without tools (as we shall see, in addition to the lack of constitutional principles in the matter, this is directly linked to the high degree of structural autonomy enjoyed by the Presidency of the Republic in the conduct of international relations).

In an era characterized by neo-sovereign regressions, the breakdown of civilizational consensus on human rights and abysmal inequality in international relations, to include foreign policy principles in the constitution (linked to a cosmopolitan agenda) is an opportunity to reaffirm Chile's commitment to a transformative agenda, overcoming these regressions and, at the same time, addressing people's causes. At a minimum, a Constitution committed to a transformative agenda should commit to: (1) respect for and promote peace and human rights, (2) international solidarity, (3) protection of regional and global common goods, and (4) regional integration.

Respect, promotion and guarantee of peace and human rights as a foreign policy principle implies assuming that the State of Chile must be active when promoting this agenda. We shall not be mere spectators, but key agents deepening both objectives. From a practical perspective, this can be done in various ways: entering into new treaties, promoting their signing, denouncing violations. Recent setbacks in this area reveal the need for institutional strengthening of this dimension, beginning to enshrine a mandate for public authorities as a principle. This principle reflects what had been a tradition in Chilean foreign policy before the neo-sovereigntist turn of Sebastián Piñera.

International solidarity,[74] as a principle guiding foreign policy, implies to recognize that States jointly contribute to sustaining a global order. An order characterized by asymmetries and inequality, and they should strive for its transformation.[75] If this principle is enshrined every power is forced to develop policies that promote dialogue, cooperation and global solutions.

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[72] FUENTES-JULIO (2020). I had previously referred to this issue in an opinion column published in El Mostrador, https://www.elmostrador.cl/noticias/opinion/cartas/2019/04/26/un-paso-mas-hacia-la-neosoberania/

[73] BENHABIB (2016), p. 111.

[74] Solidarity is preferred to cooperation, as cooperation has a strategic dimension and may not be linked to cosmopolitan values.

[75] POGGE (2002), p. 50.

Respect and protection of global and regional common goods constitutionalized as a principle assumes that humanity as a whole has a legitimate interest preserving goods that are fundamental to sustaining life in the planet and human beings.[76] With this principle, public authorities are guided to develop legislation and policies compatible with an objective beyond selfish interests, placing humanity as a whole as the standard of constitutional justification. It means to recognize that the "satisfaction, protection and guarantee of these global common goods cannot be achieved without the coordinated action of all, or at least many, of the countries of the world".[77]

Finally, *regional integration* as a constitutional principle involves that to overcome many problems affecting humanity requires democratic coordination at different scales: local, regional and global. In a deeply unequal continent that needs to move towards strategic autonomy, and where the autonomy of each country must be understood in a relational manner, the regional dimension cannot be ignored. It is understood as "the capacity and willingness of a country to make decisions in relation to others, by its own free will and to jointly face situations and processes in and outside its boundaries."[78]

2.3 International Law Principles

Just as constitutions enshrine the importance of values such as democracy, the rule of law or fundamental rights, a constitution inspired by cosmopolitan constitutionalism should also explicitly enshrine some principles of international law that are basis for the cosmopolitan legitimacy model. As was the case of foreign policy principles, international law principles enshrined in the constitution force to consider them and government agents to be held accountable for their non-compliance. This implies Constitutions to move from a "constitutional patriotism" as a category to a "globally sensitive patriotism".[79]

The most relevant principles of public international law are contained in the United Nations Charter and the Vienna Convention on the Law of Treaties. However, not all of them are included there and not all are functional to an agenda inspired by the principles of cosmopolitan constitutionalism (e.g. the system of vetoes or the principle of non-intervention).[80] In this sense, it would not be sufficient to crystallize a reference to these instruments in a constitution but rather to make express reference to institutions or principles of international law that are relevant to a model of cosmopolitan constitutional legitimacy. At a minimum, it should enshrine (1) compliance with international obligations, (2) peaceful settlement of disputes, and (3) recognition of the principle of universal jurisdiction.

[76] There are various meanings of the concept of global common goods, but it is generally accepted that they are those that are vital for the survival of the planet and humanity (air, water, environmental integrity, peace, nuclear safety, health security, food security, etc.). As MARTÍ (2012) points out, p. 28, this category of community goods, unlike the liberal notion of primary goods, incorporates the social dimension and emphasizes the need for community life in order to guarantee them.

[77] MARTÍ (2012), p. 30.

[78] RUSSELL AND TOKALTLIAN (2002), p. 176.

[79] NUSSBAUM (2013).

[80] KADELBACH & KLEINLEIN (2007).

In relation to *the fulfillment of international obligations*, although such a provision would not be necessary considering the Vienna Convention on the Rights of Treaties, in a legal culture that tends to downplay the legal value of international law, it is advisable to incorporate such a clause, stipulating that once a treaty has been ratified, it becomes part of the domestic legal system and can only be rendered ineffective in accordance with the rules of international law (this last issue is already included in the current Constitution in Article 54). Alongside and as a way to advance the development of an agenda based on the principles of cosmopolitan constitutionalism, it would be advisable to include an express commitment to deepen the democratic structures of international organizations and equitable participation of States and individuals in them (along similar lines to what is established in numeral 9, article 416 of the Constitution of Ecuador).

Likewise, the principle of *peaceful settlement of international disputes* must be recognized. This principle - established in international law and national political practice - must be accompanied by an express commitment of a pacifist nature in the sense of promoting progressive global disarmament. This is the only coherent way help developing this principle. If, on the one hand, we call for the peaceful settlement of disputes, but on the other hand, we contribute to the arms industry, we will not develop effective guarantees for peace.[81] Thus, the examples of the Constitutions of Ecuador (article 416.4) or Cuba (article 16.k) shall be followed in this matter.

Third, if the Constitution assumes a cosmopolitan commitment, it would be desirable that universal jurisdiction be constitutionalized as a manifestation of the commitment of the people of Chile to the prosecution and trial of crimes constituting a threat to the peace, security and welfare of mankind and that must not go unpunished (Preamble to the Rome Statute). States that recognize *universal jurisdiction* act as responsible cosmopolitan States because they take upon themselves the responsibility to enforce legislation that transcends State interests and looks to humanity as a whole.[82] The constitutionalization of the principle would prevent contingent interests from subverting the commitment to the prosecution of these crimes, as has occurred in most countries where this issue has been developed at the legislative level,[83] and contributes to an effective search for justice for all the inhabitants of the planet, avoiding impunity.

All of the above-mentioned elements reveal a new conception of sovereignty from the perspective of the interrelation between Constitutional Law and International Law. Sovereignty is not an end in itself; what implies moving from understanding it as non-intervention to understanding it as a responsibility to protect human rights.[84]

2.4 Migration, Citizenship and Neighborhood

[81] FERRAJOLI (2011), p. 508.

[82] SHAPCOTT (2019).

[83] For example, the setback experienced in this area in Spain in 2014 with the reform of Article 23.4 of the Organic Law of the Judiciary. On the difficulties of implementing universal jurisdiction due to the lack of legal and constitutional provisions on the matter, see the Amnesty International report: "Overcoming obstacles to implementing universal jurisdiction". Available at: https://www.amnesty.org/download/Documents/128000/ior530172001en.pdf

[84] PETERS (2009b).

Another aspect affecting the cosmopolitan character of a Constitution is the way in which the Constitution relates to foreigners who are in its territory. Our current Constitution has not express regulation of the rights of foreigners (migrants or refugees). The wide scope of the fundamental rights rules and the universal dimension in which clauses are drafted[85] allows to recognize – although with limitations - their rights.

However, for these rights to be effectively exercised under conditions of equality three dimensions shall be revised.

First, the link between nationality and citizenship must be reviewed. Full citizenship (including political rights) depends on nationality and a 5-year period of residence according to the Chilean legal system. In the context of the constituent process, the category of citizenship associated with nationality must be revised, complementing it with the concept of neighborhood or residence, in order to allow the effective exercise of political rights.

To link citizenship with nationality is one of the great aporia of contemporary constitutionalism based on universal human rights.[86] As De Lucas points out, the national-state anchoring of citizenship has transformed it into a status of privilege rather than a tool for emancipation.[87] The phenomenon that has expressly unveiled transnational migration, with its evident serious consequences for enjoying and exercising human rights. Protection of boundaries is one of the areas where States continue to have a wide margin of action and discretion, by migration and citizenship policies.

The great challenge of globalization in relation to human rights is to guarantee their universality in all contexts and places. Several authors have addressed this issue, highlighting the tension between particularist practices of nation-states and the demands of universality.[88]

This tension triggers the fact that non-nationals or non-citizens -in practice- lack of rights, since the way the nation-state is configured, the latter ultimately guarantees them, depending on the conditions of membership.

These features of the crisis of the concept of citizenship - anchored to nationality - have a correlate in the discourse of cosmopolitan constitutionalism since it seeks to set itself up as a framework for reconceptualizing citizenship, overcoming the aporias that prevent the universality of human rights. Although there are various theoretical proposals to overcome this aporia (multiple citizenships, universal citizenship based on human rights, cosmopolitan citizenship, etc.), in the context of the Chilean constituent debate I propose to redefine citizenship in relation to the person's neighborhood or residence link. This perspective helps to recognize that people who reside and have deep-rooted ties have legitimate expectations of having influence - by suffrage and other forms of participation – in the decisions that may affect them. However, neighborhood should not be interpreted in strict terms as it has been done in Chile (linking it to the legal status of permanent

[85] Article 1 ("All persons are equal in dignity and rights"), Article 19 ("The Constitution ensures that all persons").

[86] FERRAJOLI (2011), p. 481.

[87] DE LUCAS (2013a).

[88] A study on different perspectives of this problem in: CAMPOY (2006).

residence), but to the effective link with the territory, which could be set in a shorter period, for example, 1 year. This would lead to recognize multiple citizenships, where a first level would be configured by the category of neighborhood that allows to exercise political rights in the localities of residence and access to basic health and education services.[89]

To recognize citizenship linked to rootedness is more effective when guaranteeing rights than to crystallize a cosmopolitan citizenship, as is the case of the Constitution of Ecuador (Article 416.6), since it addresses the specific circumstances when migrants exercise right and establishes a more specific subject of obligations from whom to demand the satisfaction of rights (cities).

Secondly, the Chilean Constitution must avoid the risks of statelessness. Therefore, the reference to "children of transient parents" as exception for acquiring nationality by *ius solis* (creating in practice many situations of statelessness, assimilating this condition to those of children in an irregular administrative situation) should be eliminated, and include a model for acquiring nationality by *jus solis* and *jus sanguinis.* Likewise, it should be expressly stipulated that the loss of nationality cannot occur if the person if left in a situation of statelessness.

Finally, the principle of non-discrimination shall expressly enshrine, guarantee and protect fundamental rights on the basis of migratory status. This avoid interpretative judicial regressions in this area, providing certainty to a basic standard that has been established by the IHRL.[90]

To include this perspective and to satisfy the standards of cosmopolitan constitutional legitimacy, deepens the plural dimension of Chilean democracy and meets the contemporary challenges of the realization of the egalitarian principle.

2.5 Consultation clause and impact on common goods of humanity

As I pointed out in the note about the cosmopolitan turn of constitutional legitimacy, a model inspired by cosmopolitan constitutionalism develops institutional arrangements so that all those potentially affected by constitutional decisions may have ways to be considered in the decision-making process - accordingly to the legitimacy standard that places humanity as the object of constitutional concern, i.e., it develops procedural standards for this inclusion. That implies to consider the interests of humanity and their possible affectation as provided by the cosmopolitan model.

One way to accomplish this using existing institutions is to set constitutional provisions imposing procedural conditions for taking decisions that may cause negative externalities and that the international community could not influence (climate change, global security, health security, etc.). An example is to establish a system to force the

[89] This has been proposed in relation to immigration policies in Europe, for example, DE LUCAS (2013b), p. 45. The recognition of citizenship based on roots would not exclude other dimensions of citizenship, such as, for example, the political rights that Chileans residing abroad can exercise due to their nationality link with the State of Chile. In short, it is a matter of recognizing the multiple affiliations that human beings may have.

[90] In the Inter-American sphere, see: Cuadernillo de jurisprudencia sobre derechos de las personas migrantes (Jurisprudence booklet on the rights of migrants). https://www.corteidh.or.cr/sitios/libros/todos/docs/cuadernillo2.pdf

creation of a system for international consultation regarding constitutional or legal provisions that may cause this type of externalities (for example, requesting prior decision of the relevant international entity). This type of clause is based on the fact that "We, the people" and the "international community" are co-constitutive parts of a globally integrated system of public law.[91] This is not a right of "veto" of the international community, but as a procedure to include common interests. Evidently, this should be restricted to those cases where there is an interest of humanity as a whole in accordance with the concept of the common goods of mankind we explained. Alongside an agenda of democratization of international institutions (as we pointed out with respect to foreign policy principles) shall be promoted.

This type of clauses allows to impose the burden of proving a justification that is considered valid from a cosmopolitan perspective when designing public policies or jurisdictional decisions.[92] The obligation to consult and justify raises the standard of justification for such decisions, enhancing transnational dialogue on how best to promote common goods.

Comparative constitutionalism has not developed this. Without specifying, for example, Besson points out how important is to develop "special courts where the interests of those affected can be discussed".[93] In this sense, this is the possibility to address a challenge that traditional constitutionalism has not taken up. This type of clauses shall be claimed considering broad legitimacy (Parliament or civil society), establishing a period of hearings with interested parties (transnational civil society and international organizations). Three interesting models to explore are the transnational social dialogue developed by the ILO,[94] the thematic hearings of the Inter-American Commission on Human Rights[95] or participatory structures such as those of the *Aarhus Convention*.[96] One of the consequences of these procedures is that they allow to internalize interests in a preventive manner, so that in the future this becomes part of the common sense of public deliberation.

2.6 Democratic Opening and International Treaties

Finally, a fundamental aspect when designing a constitutional institutional framework linked to the international community is related to the procedures for adopting international treaties. The Chilean model is deficient in this regard. We see it in the reinforced presidential model Chile has, which shows the autonomy, from a structural

[91] The concept of "negative externalities" has generated controversy in the literature regarding its real possibilities of identification, as well as its subjective nature, see for example: WALKER (2016). With the aim of not falling into the risk that everything can be considered a negative externality given the butterfly effect, Gould proposes to link its interpretation with the international obligations that the State has assumed, particularly, in terms of human rights, GOULD (2016).

[92] This would make explicit the "internalization condition" referred to by Cavallero. That is, that the costs of decisions (which would otherwise be external), are internalized through the constitution of coordinated policies that include all those who must bear those costs, see: CAVALLERO (2009), p.58.

[93] BESSON (2009), p.78.

[94] https://www.ilo.org/dyn/normlex/es/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312289

[95] http://www.oas.org/es/cidh/sesiones/default.asp

[96] https://ec.europa.eu/environment/aarhus/

perspective, of the President of the Republic when defining and implementing foreign policies.[97] Regardless of the political regime adopted, it is necessary to provide greater democratic elements to the process of signing international treaties, finding an adequate balance between the efficiency of the management of international relations and its democratic dimension.[98]

In this sense, two aspects are problematic: the lack of participation of civil society and the National Congress when promoting the adoption of new treaties and the exclusive power of the President of the Republic to denounce treaties (Article 54 (1) par. 6.).

In order to solve the first aspect and aiming to start public deliberation on the relationship of civil society and the international community, it is possible to state that the civil society and the Parliament or the Presidency of the Republic have initiative to propose the ratification of new treaties. The debate about the ratification of new treaties should be heard in public hearings; listening to national and transnational civil society. Regarding the preventive control of the constitutionality of international treaties, this will depend on the institutional design of constitutionality control. If some type of preventive control is retained, its sole purpose should be to avoid the State's potential international liability due to the incompatibility of its internal regulations with international provisions, giving the State the opportunity to make the necessary constitutional reforms prior to the ratification of an international instrument.

In relation to denunciation of international treaties, the exclusive power of the Presidency of the Republic to denounce the treaty should be eliminated, and the denunciation process should be the same as for the ratification of the treaty.[99] In the specific case of human rights norms or on common goods of humanity, the same quorum as for constitutional reforms should be contemplated.

Democratization of international politics is an inherent element of cosmopolitan constitutionalism, where multiple scales (local, national, international), interact in a fluid manner, to the extent that it is recognized that the "State is too big for small things and too small for big things".[100] In this sense, the institutional design to be developed in relation to the regions should also incorporate competencies that allow cities and regions to be agents in multilevel policy.[101]

CONCLUSION

Every mentioned element (opening to IHRL, principles of foreign policy, international law principles, provisions on migration, international consultation clause and democratization when entering into treaties) are intended to reinforce legitimacy of the

[97] BYWATERS (2021), p. 149.

[98] The problem of a model based solely on structural autonomy is that no space is given to public deliberation on issues that concern the whole humanity. In the case of Chile, under neo-sovereigntist perspectives, the State of Chile has been prevented from participating in fundamental treaties for the achievement of cosmopolitan principles, such as the Escazu Agreement and the Global Compact on migration.

[99] In the same vein, see: CORTÉS (2021), p. 139.

[100] FERRAJOLI (2011), p. 471.

[101] ASTROZA (2021), p. 171.

Constitution in relation to its cosmopolitan dimension. If these elements are included in a future Constitution, the Chilean Constitution and, ultimately, the State of Chile, can contribute to the development of a global system that fulfills its objectives of guaranteeing peace, human rights and the common goods of humanity. Likewise, to include these provisions will favor, progressively, the standard of constitutional legitimacy based in the consideration humanity as a whole as part of the debate, incorporating and internalizing them in political and legal practices. This undoubtedly contributes to develop - from the internal constitutionalism - a cosmopolitan agenda driven "from the basis", i.e. that it is discussed by the Chilean people in the constituent process. This is relevant in a scenario where the "top-down" character of the approach of the cosmopolitan agenda in the international arena has been usually criticized.

This strategy not only strengthens the inclusive dimension of democracy (the principle of all those affected by decisions), by opening the political community to the demands made by all people based on their human rights (and not their nationality), but it is also an appropriate strategy to confront the tensions faced by the regional and universal systems of human rights protection. The crisis of the international system requires to develop a joint strategy that implies, on the one hand, international democratic deepening and, on the other, changing national practices by incorporating a cosmopolitan dimension. Where the standard of constitutional legitimacy incorporates both dimensions, it is possible to advance towards an effective transforming cosmopolitan constitutionalism, and we have the historic opportunity to make this possible.

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