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## PLAN

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## TEXTE

1 In this brief essay, I would like to address a few of the many issues raised by the rich constitutional process that took place in Chile, since 2019. For now, I will focus on just two topics directly linked to this transition from the Constitution of the dictatorship to the Constitution of democracy. On the one hand, I will address what is being left behind—the 1980 Constitution—and from there discuss the legal validity of *de facto* norms. On the other hand, I will reflect on the role that referendums were intended to play during the (failed) constituent process.

# I. Dictatorship: *De Facto* Regulations

2 One of the first issues that catches the attention of those of us who observed the Chilean constitutional process from the outside was the treatment of *de facto* regulations. One tended to wonder, then, what explained the weight that continued to be assigned to the legal framework originating during the years of the Pinochet dictatorship, starting obviously with the most important text of all—and the one currently under discussion—namely, the 1980 Constitution. It was striking, in this regard, that this anti-democratic and illegitimate creation—which sought to legitimize itself through a referendum

considered fraudulent by analysts—continued to enjoy the legal weight it possesses and continues to partly define the limits and obstacles facing the process of change. Questions such as the following then arose: Does Chilean democracy have its "hands tied" by that (so-called) "tricky Constitution"? Can it be understood that Pinochet's Constitution continues to constrain the scope of action for new generations? Could it be that the Constitution, as a prison of democracy as envisioned by Jaime Guzmán, continues to limit the room for maneuver of today's democratic actors, who seek to decide how to organize themselves, on their own, 40 years later?[1]

3 In fact, the discussion regarding the weight and value of *de facto* norms resurfaced in Chile, as soon as activists and legal scholars began to talk of the need for profound constitutional change. Thus, for example, when former President Ricardo Lagos spoke of a "new Constitution," alluding to the need to "start with a blank slate," or when constitutional scholar Fernando Atria referred to the importance of "starting from scratch" in constitutional matters (Atria, 2013). In principle, they spoke of this "new beginning" (from "zero" or from a "blank slate") to distinguish the coming initiatives from previous constitutional changes (i.e., the 2005 reform), and to assert —as Atria explicitly stated—that what was required was a "new constitution" and not merely a "constitutional reform".

4 However, the unquestioned centrality that the Constitution has had and continued to have was a cause for concern, as that was a document that, in principle, *lacked*—as I shall maintain—*a presumption of validity*. In practice, that constitutional text remained the anchor—the foundation upon which the Chilean legal system will continue to rest—to the extent that a new constitutional pact cannot be agreed upon. The 1980 Constitution—according to some—would continue to be the "common home" where the Chilean legal community would continue to reside, if a new text was not approved with the high quorum requirements that (in a manner difficult to explain, incidentally) were defined to deem the changes currently being promoted as approved.

5 The discussion at hand, regarding *de facto* norms, is linked to a long philosophical debate about what gives "validity" to the law—what provides, *prima facie*, reasons to obey the law. The starting

point on this matter could be the following: the concept of *validity* does not overlap with that of *forcefulness*, and yet it is all too common for certain decisions to be considered valid simply *because* they emerge from the one who wields force, regardless of their origin and content. One of the most legally interesting controversies in this regard was the one between the analytical philosopher Herbert Hart and Judge Lord Devlin in England, concerning the *Wolfenden Report*, which in 1957 suggested decriminalizing homosexuality, contrary to what was customary practice in the country. Judge Devlin then justified the need to set aside the report's suggestions, citing in support of his position a variety of arguments related to the value of existing law, which he considered grounded in prevailing social morality. Hart then challenged these criteria, and the main line of reasoning on which he relied concerned the distinction between prevailing morality and critical morality; or existing morality and valid morality. Basically, what Hart argued is that, at best, Devlin was defending prevailing morality, but that this offered no reason to believe that it was a morality the state had grounds to adopt as its own and reinforce through the use of the state apparatus: prevailing morality and valid morality were different things that should not be treated as if they were synonyms.

6 The distinction proposed by Hart proved very fruitful, and has since become commonplace in discussions of law. It was not confined to issues related exclusively to the realm of private morality and its limits. In any case, his proposition helped recognize that the concept of validity, when used in a justificatory judgment, cannot be taken as a merely descriptive concept—for example, regarding the dominant values in a society, or regarding the fact that certain norms are obeyed, regardless of the reasons that may generate such obedience, i.e., fear or resignation. When we speak of validity in legal matters, we refer to a normative concept, which tells us that a norm has binding force because we have reasons to believe that it *ought to be* obeyed. Contrary to what some might argue (from positions we can associate with "ideological positivism"), this "ought to be" cannot be derived from the "fact" that the law is written or in force; nor from the mere "fact" that other superior norms determine its binding nature; nor from the "fact" that many people obey it.

7 None of the *facts* described above—neither fear, nor custom, nor widespread practice, nor the certainty that it is written or existing law—give us, in and of themselves, reasons to believe that that norm *must be* obeyed. Therefore, in principle, *de facto* norms—current norms arising from an act of force—do not enjoy a presumption of validity. The case is different, however, for *de iure norms*, which result from a justified procedure, such as a democratic process, in which we directly, or our representatives on our behalf and with our authorization, enter into an agreement intended to apply to everyone. These norms may ultimately prove to be more or less justified, but they enjoy, in principle, a presumption of validity. If someone then asks about the reasons why a community should obey norms arising from a democratic process, the answer is now different: such norms deserve obedience, in principle, because they result from our will—because they have emerged from an agreement in which we have participated in a meaningful way. Of course, there are many reasons that may subsequently determine the greater or lesser validity of such agreements (i.e., the rule ends up being merely the expression of a group of lobbyists; or it is drafted and approved in contexts of severe social exclusion), but, in principle, in this case, we can say that *norms arising from a democratic process enjoy, in principle, a presumption of validity that norms arising from a* de facto *government lack.*

8 Carlos Nino, who studied this issue in the case of Argentina, examining the value of *de facto* legislation during the democratic transition that followed the end of the last military dictatorship (1976–1983), anticipated this very conclusion. In his work on *The Validity of Law*, and reflecting on how to respond to the "self-amnesty" law enacted in its own favor by the military government before leaving power, he argued that: "The norms enacted by a *de facto* government do not enjoy the presumption that what they prescribe is just, a presumption that benefits norms derived from a democratic process operating within the framework of certain basic rights" (Nino, 1985, 106).

9 In any case, Nino continued, the preservation of *de facto* regulations can be justified on grounds of "social peace and security". For example, following a regime change, a community may decide to keep part of those regulations in force, on the understanding that

unnecessary and undesirable chaos would ensue if all marriages, leases, or contracts signed during the validity of those *de facto* regulations were declared invalid (i.e., if they automatically ceased to be valid or "lapsed" after the end of a *de facto* government). But the fact that the community decides, for prudential reasons, to keep such rules in force says nothing about the intrinsic value of those rules. Their validity depends on the will of the democratic community, which does not wish to be subjected to social chaos or major disorder, but there is no substantive reason to recognize in such rules the intrinsic validity that can be recognized, in principle, to democratic norms. We have *prima facie* reasons to obey democratic norms, but we lack such reasons when it comes to *de facto* norms. We maintain such norms in force only to the extent that we decide to do so, because it suits us to facilitate convenience. It is therefore in no way admissible for the democratic community to consider itself "trapped" or substantively limited by what is defined *by de facto* norms: in principle, these are invalid norms.

10 Hence, the "legal imprisonment" that many seemed to accept or recognize in the 1980 Constitution should not be considered as such: democracy must not feel constrained by the accumulation of legal limitations that a dictatorship sought to impose upon it. In this regard, it is surprising that a significant portion of the Chilean political class and legal community seems to share an agreement to the contrary: the *prima facie* validity of *de facto* norms, and the serious difficulties faced in implementing democratic norms. *Prima facie* validity is an exclusive and inherent property of norms that emerge from a democratic deliberative process, and does not apply to *de facto* norms. Ultimately, the democratic community that regains authority after a period controlled by a *de facto* government has every right and need to think freely about how to define the new norms that will organize communal life, and how to arrive at them—but not from the perspective that this is a labyrinth from which there is no easy escape, and in which democracy appears trapped, as if there were an actual normative value in the dictatorship's legislation.

# II. Democracy: The Use of Plebiscites

11 The recent constitutional process in Chile began on November 15, 2019, with the "Agreement for Peace and a New Constitution" (*Acuerdo por la Paz y la Nueva Constitución*). Keen to ensure that the process (and, ultimately, the new Constitution) was built on solid democratic foundations, Chileans had several options to choose from: methods of constitutional drafting that gave a central role to the public (a *crowdsourcing* process, as in Iceland); a *Citizens' Assembly* in constant dialogue with the public (as in Ireland in 2018); a process of popular assembly-based discussion, such as the one Michele Bachelet herself had promoted toward the end of her term. In any case, the option chosen was different: they opted to organize two *referendums*, one at the beginning and another at the end of the constitutional process. Although alternatives such as those mentioned all have, to some extent, some positive aspects, I would suggest that their final assessment should depend on a more specific factor, namely, the ability of the mechanism in question to bring the constitutional process as close as possible to a "conversation among equals". My question would then be whether the selected mechanism would allow Chileans the draft of a document that they could reasonably consider their own.

12 Since the political and academic discussion that took place in Chile rightly assigned enormous centrality to that issue—the importance of referenda for providing the Constitution with popular legitimacy—in what follows I would like to offer some initial reflections on the subject. I will focus, in any case, only on one type of "constitutional democratization" initiative, namely those related to the use of popular referendums in the context of constitutional change. My intuition is that many of the arguments made regarding this issue imply an inappropriate "fetishization" of citizen referendums, as if they—in any of their forms—had an inherent "democratic cleansing" effect, capable of magically legitimizing, or "cleanse" of their troubling "impurities" of origin, rules that have not been the subject of an inclusive, profound, transparent, and diverse democratic agreement, as they deserve to be. In other words, I would like to

argue that the "democratic objection" that the law deserves—any law that has not emerged from a conversation among equals—is not resolved in just any way, nor is it "remedied" through any mechanism that merely gives citizens a voice. We need to take seriously the demand to democratize the law, rather than simply sidestepping the problem without confronting it.

## On the possibility of using a ratifying plebiscite

13 The use of plebiscitary forms in constitutional creation has some relevant precedent within Chilean constitutionalism. There is already, for example, the important precedent of what occurred regarding the 1925 Constitution (which was replaced, during the Pinochet dictatorship, by the 1980 Constitution). The 1925 Chilean Constitution was created to "remedy" many of the problems inherent in the pioneering and authoritarian Constitution of 1833 (one of the most stable in the history of Latin American constitutionalism, Ruiz Tagle 2016). To achieve its goal, the 1925 Constitution was put to a plebiscite (in August 1925), held just a few weeks after the draft Constitution was completed (in July of that year). This background is interesting for highlighting several points. First, the drafting process for this constitutional document was highly elitist: it was written by commissions always appointed by President Arturo Alessandri (that is, they were not democratically elected commissions). Second, the subsequent plebiscite (and, as is often the case with popular referendums, as we shall see) barely allowed for any nuance regarding the crucial questions presented to the public. [2]

14 As I understand it, we democrats who conceive of democracy as a "conversation among equals" have reason to resist (at least in principle, and given their usual and expected form) these ratification plebiscites, even as we celebrate the gesture or "democratic disposition" that such popular consultations, at their best, offer us. This is because this type of constitutional referendum (as is often the case with referendums on broad and complex texts, such as the Peace Agreement in Colombia or the Brexit referendum in the United Kingdom) tends to subject the population to unacceptable "democratic extortion". I will illustrate what I have in mind with an

example that has become quite typical in the region (an example that oversimplifies a situation that is often much more serious and forced in practice). In 2004, in Bolivia, a 411-article Constitution was put to a popular vote, which included, among many other provisions, a clause favoring presidential reelection, and several provisions related to the social and multicultural rights of the most marginalized groups. An average voter—whether well-informed or not particularly knowledgeable about the Constitution, it makes no difference—might emphatically reject the former (re-election) but eagerly embrace the latter (the new rights). However, the referendum only allowed them to approve the "closed and complete package": all or nothing. Thus, in order to approve what they most desired, that voter was "blackmailed" into accepting what they most rejected. Much worse: after the plebiscite, the reelection that voter would have wanted to reject would be applauded and presented by the authorities in power as a simple product of the clamor of the "sovereignty of the people" (note that here we are conducting this exercise considering only 2 of those hundreds of articles put to a plebiscite as a "closed package"). The point is: plebiscites, on their own, cannot "repair" serious flaws in a constitutional drafting process (flaws related to the levels of inclusion and discussion inherent to the process); and, on the contrary, they may end up negating or exacerbating the legitimacy problems they were intended to remedy.

## The "entry" and "exit" referendums and the "hourglass"

15 As anticipated, according to the "Agreement for Social Peace and the New Constitution," signed on November 15, 2019, the Chilean process for the new Constitution had to be preceded by, and followed by, two separate plebiscites. In the first, citizens will be asked whether they "want or do not want" a Constitution and (at the same time) what type of body should draft it (a Mixed Convention or a Constitutional Convention); and in the second referendum—to be held once the Constitution has been drafted—citizens will be asked, through a mandatory referendum, whether or not they wish to ratify the Constitution.

16 That model of constitutional creation appeared to follow, quite strictly, the recommendations of the specialist in the field Jon Elster (Elster, Gargarella, and *al*, 2018). Elster has illustrated what he considers the ideal form of constitutional design with the image of an "hourglass": broad and inclusive at the bottom (i.e., an initial plebiscite to gauge whether society supports constitutional change); narrow in the middle (i.e., the drafting of the Constitution by a commission of experts); and broad again at the top (i.e., the conclusion of the process through a new ratifying plebiscite). This approach recommended by Elster, which appears to have gained traction in Chile, partly corrects and partly improves the drafting process that culminated in the 1925 Constitution (i.e., through an initial plebiscite, and not just a final one, as is now proposed; or through a more legitimate and democratic drafting commission, that is, no longer—as in 1925—as the exclusive product of presidential will).

17 Once again, however, the reasons we had for resisting constitutional plebiscites are the same reasons we have for sounding the alarm about the "closed" forms of constitutional drafting, which later purport to "open up" (to a yes or no vote) to popular consideration. The objections arise "naturally," whether we start from the idea of democracy as a "conversation among equals" or whether we return to what Nino said regarding the "validity" of law. The fact is: norms must result from an inclusive discussion, not out of a whim but because, in multicultural societies marked (as John Rawls, 1991, would say) by the "fact of pluralism" and (as Jeremy Waldron, 1999, would say) by the "fact of disagreement," we need our most basic institutional arrangements to be informed by the needs, demands, and viewpoints of society as a whole. Any commission—small and/or closed; composed of technicians or experts; of specialists or politicians—tends to fail in its purpose of recognizing the diversity and reasonableness of existing claims, no matter how well-intentioned and lucid its members may be. Ultimately, these kinds of "epistemic" difficulties explain the historical struggles that all-male (even empathetic) parliaments have faced in addressing women's rights; or the struggles of Congresses without representatives from indigenous groups to address the rights needs of such groups (and hence, the wisdom of ILO Convention 169, which requires "prior and direct

consultation" with indigenous groups when discussing regulations that directly affect their interests).

# Conclusion

18 In this brief essay, I wanted to revisit Chile's recent (and, in a sense, failed) constitutional process in order to reflect on two fundamental issues for constitutional theory. The first relates to the value—if any—that should be assigned to regulations enacted by a *de facto* government when democratically reorganizing society, whether through its laws or (as in the Chilean case) its constitution. The second relates to the value of popular consultations or referendums as mechanisms designed to enable or ensure that the creation of laws or (as in the Chilean case) the constitution is genuinely democratic in nature.

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## NOTES

1 Guzmán stated in 1979: “The Constitution must ensure that if adversaries come to power, they are compelled to follow a course of action not so different from the one one would oneself desire, because… the range of alternatives that the playing field imposes on those who play on it is sufficiently narrow to make the opposite course extremely difficult” (Guzmán, 1979).

2 Article 2 of Decree-Law 462, signed by Alessandri, stipulated that each voter would receive three ballots: red, blue, and white. The first read: “I accept the draft Constitution presented by the President of the Republic without modification”; the second, “I accept the draft Constitution, but with a parliamentary system and the consequent power to censure ministries and postpone the discussion and passage of the law on the State budget and resources”; and the third, “I reject the entire draft”.

## RÉSUMÉS

**English**

This essay examines Chile’s constitutional transition from the 1980 Pinochet-era Constitution through the lens of two theoretical problems. First, the author argues that *de facto* norms—laws enacted by dictatorships—lack the presumption of validity enjoyed by democratically produced laws, since validity derives from legitimate deliberative processes rather than mere force or custom. Democracy should therefore not consider itself “trapped” by authoritarian legal frameworks. Second, he critiques the use of

ratifying referendums in constitutional processes, contending that plebiscites on complex texts force voters into "democratic extortion"—accepting or rejecting entire packages without meaningful deliberation on individual provisions. Drawing on Hart, Nino, and Elster, the authors maintains that genuine constitutional legitimacy requires inclusive, deliberative processes approximating a "conversation among equals", which neither *de facto* origins nor ratifying plebiscites can adequately remedy.

**Français**

Cet essai examine la transition constitutionnelle chilienne depuis la Constitution de 1980 sous l'angle de deux problèmes théoriques. L'auteur soutient d'abord que les normes *de facto* – lois édictées par des dictatures – ne bénéficient pas de la présomption de validité propre aux lois démocratiques, car la validité découle de processus délibératifs légitimes et non de la force ou de la coutume. La démocratie ne devrait donc pas se considérer « prisonnière » des cadres juridiques autoritaires. Ensuite, il critique l'usage des référendums de ratification dans les processus constituants, arguant que les plébiscites sur des textes complexes contraignent les électeurs à un « chantage démocratique » – accepter ou rejeter des ensembles complets sans délibération significative. S'appuyant sur Hart, Nino et Elster, l'auteur affirme que la légitimité constitutionnelle exige des processus inclusifs et délibératifs, que ni les origines *de facto* ni les plébiscites ne peuvent véritablement garantir.

## INDEX

**Mots-clés**

légitimité constitutionnelle, normes de facto, validité démocratique, référendums de ratification, démocratie délibérative, Chili, Constitution Pinochet

**Keywords**

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