

Presentation to the Chilean Constituent Assembly: Monday, August 1, 2023

## States of Emergency

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Chile is confronting its constitutional dilemmas in an extraordinarily thoughtful fashion. In many respects, the draft presented by the Experts deals with a host of problems in an incisive manner. But I will focus on two issues that I believe require further revision before the Constitution is submitted to a vote by the Chilean People.

The first deals with Article 23's treatment of States of Emergency. It rightly imposes significant limits on the unilateral power of the President to declare an emergency. He may only act for one month without the approval of Congress. After that point, Congress must give its affirmative approval of an extension every two weeks. If a majority fails to act, the state of emergency comes to an end.

This provision represents an important response to a very serious problem. After all, there have been at least 132 cases in which "states of emergency" have led to military dictatorships in Latin America over the past 125 years. Unfortunately, however, many of these coups took place in countries with constitutions that contained texts like Article 23. Yet these provisions did not serve as a sufficient safeguard against these repeated assaults on democracy.

There is no magic solution to the dangers posed by the next Pinochet's efforts to seize power in the 2030s or 2040s. Nevertheless, my comparative studies suggest that the risk would be greatly reduced if Article 23 were revised to require a supermajority vote in Congress before a state of emergency could extend for more than two months. At that point, sixty percent of Congress should be required to approve an extension; after two more months, seventy percent should be required; and after two more months, only an eighty percent Yes vote should suffice.

Call this the "super-majoritarian escalator" and it has played an increasingly prominent role in constitutional construction for a straightforward reason. Although, it is relatively easy for a sitting President to gain the support of

Congressional allies, opposition political parties will predictably vote against the demand for emergency powers – except when there is very broad public recognition a compelling need for their use. As COVID suggests, there are indeed real-world emergencies that last for several years, and require extraordinary action to prevent enormous suffering – and the same is true if armed terrorists engaged in an on-going struggle to overthrow the existing regime. It is only in such cases that minority parties will reluctantly vote to continue the emergency, since partisan opposition will alienate many voters at the next election. Otherwise, the President will be obliged to restore the rule of law when he fails to gain the requisite majority.

The super-majoritarian escalator will also constrain the abuse of executive power during the period that it continues to gain Congressional approval. If the armed forces engage in widespread abuse, minority parties will predictably protest in the name of human rights, and gain broad public support when they vote to terminate the emergency. So the supermajority provides the President with a powerful incentive to prevent the military from acting in arbitrary ways that go well beyond the needs of the situation.

I do not suggest that my proposal serves as an absolute guarantee against dictatorship. To the contrary, if the President and his military allies foresee the rapid termination of their emergency powers, they might well attempt an immediate coup d'état before they lose the next Congressional vote. The question before the Constituent Assembly, however, is not whether a revision of Article 23 can entirely eliminate the risk of dictatorship. As I have emphasized, no such magical solution exists. The relevant issue is whether a Constitution containing super-majoritarian requirements will significantly improve Chile's democratic prospects in the twenty-first century. I believe that the answer is Yes.

So much for emergencies. I will now turn to the Experts' proposal, in Article 38, for the sweeping use of popular referenda as a mode of citizen participation in Chilean politics. Under its provisions, a law enacted by parliament can nonetheless be nullified at a special referendum held for this purpose. Although the draft claims that these referenda will enhance "the mechanisms of public participation," I believe that the rules established by Article 38 will have the opposite effect. Unless they are radically revised, these referenda threaten to destroy the very foundations of democracy itself.

To see why, I will provide a mathematical example to clarify Article 38's complex provisions in a way that displays its anti-democratic character. Although 8.5 million Chileans voted in the 2021 elections, it will simply my mathematics if you allow me to suppose that 10 million Chileans did so. Since President Boric and his parliamentary supporters won by a 55-45 margin, it follows that, when they enact reform legislation, they can claim a mandate from 5.5 million voters. Nevertheless, Article 38 authorizes opponents to nullify the new law on the basis of a referendum in which only 4.1 million Chileans turn out to vote and 2.1 million Chileans vote No. I should emphasize, moreover, that the same minority veto will operate when opponents of Convergencia Social and Revolución Democrática defeat the current majority at a national election -- as will almost certainly happen during the coming decades.

It follows that all members of the Constituent Assembly -- regardless of their political ideology -- should be concerned with the anti-democratic threat posed by Article 38. As a matter of fundamental democratic principle, a government elected by 5.5 million Chileans should not see its reforms vetoed by 2 million No votes. Instead, opponents should be required to wait until the next general election and try to persuade a majority that the government's legislation should be repealed.

To be sure, Article 38 requires opponents to confront a formidable obstacle course before they can call a referendum. First, they must persuade 300,000 registered voters to sign a petition challenging the new statute within 60 days of its enactment. Once they present this petition to the Electoral Service, they may be required to obtain an additional 900,000 signatures to support their initiative within the next 60 days. At that point, Article 38 requires the Electoral Service to organize a special nationwide vote and sets two conditions for the invalidation of the government's reform legislation.

First, it imposes a minimum turnout requirement, based on the number of Chileans who voted in the last regular election. To continue with my mathematical example, Article 38 would require opponents to convince at least 4 million Chileans to turn out at the polls to cast a ballot at the referendum. If only 3.9 million participate, the government's new law remains valid even if a strong majority votes No.

The minimum turn-out provision is no longer applicable, however, if more than 4 million Chileans cast ballots at the referendum. In this case, Article 38

provides that a majority of No votes will indeed invalidate the government's new law. Suppose, then, that only 4.1 million Chileans show up at the polls, and 2.1 million vote No. Article 38 permits these 2.1 million No's to invalidate a reform statute enacted by a government elected by 5.5 million voters.

Indeed, once we move beyond simple arithmetic, the case against Article 38 becomes even stronger. Since Pinochet's downfall in 1990, most Chileans take their citizenship responsibilities seriously enough to focus their attention on the key issues raised in regular elections – and cast their ballot in a relatively informed way.

This won't be true in most of the rapid-fire referenda authorized by Article 38. Instead, only well-organized and well-financed groups will have the real-world capacity to collect huge numbers of signatures within the required six-month period. While these mobilized opposition groups will be well-informed, a majority of their fellow citizens may not be paying much attention, since they will be too busy earning a living and taking care of their families to have time to discuss the issues seriously – even if they would strongly favor the government's reform law if they could afford to spend the time required to understand the issues involved. Worse yet, the mobilized opponents of the government will heavily invest in propaganda campaigns on the internet to convince their ignorant fellow citizens that they should view the legislation with suspicion.

As a consequence, if opponents manage to win a series of referenda on the basis of narrow 2 million vote majorities, the Experts' proposal will predictably generate an escalating constitutional crisis. The President and his parliamentary supporters – who gained 5.5 million Yes votes at the last election – may well refuse to obey the No votes of 2.1 million opponents and insist that the laws enacted by Congress remain valid. As both sides rally their supporters in street demonstrations, their lawyers will turn to the Constitutional Court to resolve the crisis. How will the Justices respond?

Since this scenario may only develop in a decade or two, it is impossible to answer this question at present. Only one thing is clear: the Experts' version of Article 38 creates a new and terrible scenario that can readily generate a constitutional coup d'état – in which the President calls on the military to uphold the will of the People if the Constitutional Court insists that Congress reform legislation is invalid.

I believe that the Constituent Assembly should respond to this danger by revising Article 38 in ways that eliminate it. I would be happy to discuss possible revisions in the conversation that follows this presentation.

For now, it is enough to conclude my talk by emphasizing the common concern that has organized the entire discussion. In the first half of my argument, I urged the Assembly to decrease the risk of a coup d'état by revising Article 23 to require an escalating parliamentary supermajority before a state of emergency can continue on a long-term basis. In the second half, I have urged the Assembly to revise Article 38 to reduce the risk of a military coup that the present text threaten to generate.

In taking these two steps, moreover, the Constituent Assembly will be serving its larger ambition – which is precisely to enable the Chilean People to liberate itself from the tragic constitutional legacy left behind by Augusto Pinochet.

Thank you for giving me an opportunity to share this ambition with you.