Chile's Constituent Processes: A Fault Line of Decolonial Constitutionalism?

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Abstract

This Essay examines the concept of "decolonial constitutionalism," as articulated by Professor Richard Albert, focusing on its application to Chile's recent constitution-making processes. Albert defines decolonial constitutionalism as "the use of legal, legitimate, and non-violent means to assert sovereignty, to secure rights, or to achieve recognition for a people, nation, or state." The Essay explores how Chile's attempts to draft a new constitution between 2019 and 2023 reflect both the potential and challenges of decolonial constitutionalism, particularly in relation to the rights and recognition of Indigenous Peoples. The first process (2019–2022) prominently featured Indigenous demands, including the proposal to reconfigure Chile as a plurinational state, but was ultimately rejected by the public. The second process (2023), in contrast, marginalized Indigenous claims and emphasized national unity, leading to another rejection. Despite these failures, the Essay argues that the constitutional recognition of Indigenous Peoples, even in a limited form, represents a significant—albeit incomplete—step toward decolonization. The Essay concludes by suggesting that future efforts to address Indigenous rights may need to shift from constitution-making to judicial enforcement and international legal mechanisms. Through this analysis, the Essay contributes to the broader discourse on how constitutional processes can serve as tools for decolonial emancipation.

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I. INTRODUCTION

In his Article, *Decolonial Constitutionalism*, Professor Richard Albert defines and illustrates the concept of "decolonial constitutionalism."[1] He proposes a typology of instances of decolonial constitutionalism, offers examples from around the world, and opens up a productive avenue for further research on how constitutionalism can serve as a tool for decolonial efforts around the world. This Essay builds on Albert's insightful Article by looking at the recent failures of Chile's constituent processes.

Albert defines "decolonial constitutionalism" as "the use of legal, legitimate, and non-violent means to assert sovereignty, to secure rights, or to achieve recognition for a people, nation, or state."[2] It is "decolonial" because the examples he uses represent different ways by which a new nation and/or people are constituted, thus breaking legacies with former rulers and their subsequent constitutions, thus instantiating their legal systems.[3] It is "constitutional" because both political and constitutional independence is achieved by legal, pacific, and institutional means — probably the most remarkable difference when compared to past decolonial processes.

Breaking the rule, dominance or subordination of foreign actors is a decisive step towards freedom.[4] That process of independence, and thus of decolonialism, Albert contends, seems to be no longer achievable by violent or revolutionary means only. Whereas "the objective of decolonization remains the same," today, "[t]he protagonists are no longer soldiers and generals; they are politicians, lawyers, judges, and civil society."[5] The avenues where these struggles are fought are no longer battlefields, but "parliaments, courts of law, and the public square."[6]

Albert explores three main institutional, legal, and non-violent avenues where these decolonization struggles take place: first, processes of constitution-making, which include constitutional amendments;[7] second, judicial enforcement, which includes the way courts interpret and apply international treaties and

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1 Richard Albert, *Decolonial Constitutionalism*, 25 CHI. J. INT'L L. 341 (2025).

2 *Id.* at 346.

3 *See id.* at 345-46.

4 As Skinner put it when revising the Neo-Roman conception of liberty, a state that is subject to the will of foreign rulers may not necessarily be "governed tyrannically," but "[s]uch a state will nevertheless be counted as living in slavery if its capacity for action is in any way dependent on the will of anyone other than the body of its own citizens." QUENTIN SKINNER, LIBERTY BEFORE LIBERALISM 49 (1998).

5 *Id.*

6 *Id.*

7 *Id.* at 349-379.

constitutional provisions;[8] and finally, the international legal landscape that is beyond the limits of the state, on the one hand, and the provincial, municipal, or city levels—the space "below the state"—on the other.[9]

This response Essay discusses the recent Chilean constituent processes as instances of decolonial constitutionalism. The Essay explains Chile's constitutional-political background and concentrates on what Albert calls "decolonial constitution-making." To this end, the Essay explores these processes in light of the relationship between the Chilean state and Indigenous Peoples. As Albert notes, decolonial constitutionalism deals with processes of independence from foreign powers, but also from "domestic" actors.[10] Such is Chile's case.

First, the Essay summarizes Albert's main arguments. Part I focuses on the first two sections of his typology, that is, the different models of recognition and what Albert calls "the fault lines in constitutional decolonization."[11] Part II offers a general view on the Chilean constitution-making processes and a more detailed discussion of the various initiatives for constitutional recognition of Indigenous Peoples, and shows that Indigenous Peoples in Chile have tried many times and, in many ways, to be constitutionally recognized. Part III reviews the two recent constitution-making processes. The first process, which took place between 2019 and 2022, was promoted and drawn from demands for recognition of Indigenous Peoples. The second process, which took place in 2023, was its opposite: it hid Indigenous demands under a formula overloaded with nationalism. As a result, the first process proposed the reconfiguration of Chile as a plurinational state, while the second one exalted the unique and indivisible character of the Chilean Nation. Efforts to decolonize Chile's constitutional law were part of these processes, although in different and—as the Essay shows—conflicting ways.

II. DECOLONIAL CONSTITUTION-MAKING: EMANCIPATION THROUGH CONSTITUTIONAL LAW

Decolonial constitutionalism refers to "the use of legal, legitimate, and non-violent means to assert sovereignty, to secure rights, or to achieve recognition for a people, nation, or state that is legally or politically subordinate to domestic or foreign actors."[12]

Constitution-making processes present an invaluable opportunity to pursue the objectives of decolonial constitutionalism. Constitutions serve multiple

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8 *Id.* at 380-396.

9 Albert, *supra* note 1, at 401-428, 398-410.

10 *Id.* at 346.

11 *Id.* Section I.B.

12 *Id.* at 346.

functions, including the somewhat paradoxical roles of both limiting and enabling governmental power.[13] One fundamental purpose of constitutions is to constitute a polity, as constitutions determine "the concrete manner of existence that is given with every political unity."[14] In a democracy, the authors of a constitution should ideally be the collective body of people regarded as citizens or members of that political community, considered in political terms rather than strictly legal ones.[15] Those who are not members of that polity are either aliens (who may well live without the need to be counted as the authors of the foundational compact) or part of social groups whose political agency remains colonized. They are not authors, but subjects.[16] Albert observes this irony: "just as Americans were freeing themselves from the grip of their colonial rulers abroad, the state was enforcing its own policy of subordination at home."[17] He further emphasizes, "We should therefore read with strong skepticism the Constitution's powerfully egalitarian opening words "We, the People."[18]

Frequently, the language of a Constitution obscures the underlying political, social, and cultural dynamics of oppression that lie at its core.[19] This invisibilization is particularly intense in the case of colonial constitutionalism, which is usually organized around the idea of a single nation.[20] When decolonial movements adopt the strategy of constitution-making, they channel their claims

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13 Denis J. Galligan & Mila Versteeg, *Theoretical Perspectives on the Social and Political Foundations of Constitutions*, *in* SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS 3, 6 (Denis J. Galligan & Mila Versteeg eds., 2013).

14 CARL SCHMITT, CONSTITUTIONAL THEORY 59 (Jeffrey Seitzer trans., 2008).

15 *Id.* at 77.

16 For now, the Essay only considers Indigenous Peoples. For simplicity, the Essay thinks about social groups understood as a whole in their specific collective claims, although their members may (or may not) take part as individuals in constitution-making moments. These groups have a legacy of colonialism, and the State has put their existence in danger by extermination or assimilation. There may be other groups as well, what Kymlicka calls "national minorities," that is, "groups who have been settled for centuries on a territory they view as their homeland; groups who typically see themselves as distinct 'nations' or 'peoples,' but who have been incorporated (often involuntarily) into a larger state … like the Catalans in Spain, Scots in Britain, or Québécois in Canada." *See* Will Kymlicka, *Theorizing Indigenous Rights*, 49 U. TORONTO L. J. 281, 282 (1999).

17 Albert, *supra* note 1, at 414.

18 *Id.*

19 *Id.* at 414 ("We should therefore read with strong skepticism the Constitution's powerfully egalitarian opening words 'We the People.' Despite this rousing preambular message of unity and belonging, the reality in America was the opposite: women, persons of color, unpropertied white men, and Indigenous Peoples—all were left out of the collective 'we.'")

20 Claudio Fuentes & Juan E. Fernández, *The four worlds of recognition of indigenous rights*, 48 J. ETHIC & MIGRATION STUD. 3202, 3207 (2019).

for constitutional recognition through sites of constitution-making, thereby revealing the persistent realities of oppression and colonization that underlie these processes. Hence the importance of paying attention to constitution-making strategies—for they reveal a constitutive tension, a new paradox, namely, the paradox of a polity that claims to be its ruler, but that fails to achieve total freedom as it builds its will only by considering the agency of some of its members. Recall Skinner: "a state will nevertheless be counted as living in slavery if its capacity for action is in any way dependent on the will of anyone other than the body of its own citizens."[21] In a sense, a state that perpetuates internal colonialism (when some full members govern over the affairs of non-full members) can be seen as remaining colonized. Its will is thus falsely configured. As a result, the echoes of colonialism persist, manifesting in multiple voices, wills, and challenges that demand recognition and response.

It is true that decolonial challenges arise not only during moments of constitution-making but also in instances where alternative or subaltern narratives express a desire to be understood and recognized within the framework of a constitution.[22] However, our focus is on explicit moments of constitution-making. While alternative narratives attempt to align themselves with the broad principles of the constitution (such as the people, sovereignty, or equality), decolonial efforts during constitution-making processes aim to explicitly include new meanings within the constitution itself. As a result, such efforts pursue a creative approach rather than merely an interpretative one.

Professor Albert discusses the strategies of decolonialism, which encompass the struggles of internally colonized groups in their quest to attain the constitutional status of full members of their political community.[23] These moments, which the Essay also addresses, highlight the constitutive tension, and they do so in a clear and explicit manner.

Consider the issue of political representation, which involves the establishment of representation mechanisms for Indigenous Peoples. As Albert aptly observes, representation is "an effective way to help heal a state in recovery from the wounds of colonialism."[24] It provides these groups with a voice and presence in government affairs.[25] Similarly, the constitutionalization of self-governance empowers Indigenous Peoples with the constitutional, legal, and

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21 SKINNER, *supra* note 4, at 49.

22 *See generally* Robert M. Cover, *The Supreme Court 1982 Term. Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983–84).

23 *See* Albert, *supra* note 1, Parts III & IV.

24 *Id.* at 9.

25 NADIA URBINATI, REPRESENTATIVE DEMOCRACY: PRINCIPLES AND GENEALOGY 3 (2006).

institutional authority to manage their internal affairs in relation to the government.[26] In areas where the nation-state previously made decisions *on behalf of* Indigenous Peoples, self-governance grants them equal power, enabling them "to look the state in the eye."[27] Finally, Albert talks about the requirement of consultation.[28] Consultation is a strategy that, at least in South America, overlaps with what he calls the "judicial enforcement" of decolonial constitutionalism.[29] Like self-governance, the duty to consult provides Indigenous Peoples with an institutional tool that allows them to have a voice—though not a decisive one, as Albert notes—in government decisions that affect them.[30] While the colonial model has historically silenced Indigenous Peoples, this approach, Albert argues, "creates a constitutional right to be consulted."[31] It represents a potential pathway to begin addressing the constitutive tensions inherent in these relationships.

The following Sections consider "explicit" processes of constitution-making as a strategy of decolonial constitutionalism.[32] Future work shall address other forms of constitutional change, such as processes of higher law-making[33] or instances of constitutional recognition that take place in the courts—instances that Albert also discusses in his Article.[34] Such choice responds to two reasons. First, as previously discussed, constitution-making processes reveal the internal colonial tensions within a polity. Second, the significance of constitutional Indigenous recognition played a crucial role in Chile's constitution-making processes.

Where do the recent constituent processes that took place in Chile fit within Albert's typology? What triggered these processes and what were the results? The following Section addresses these questions.

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26 Albert, *supra* note 1, at 10.

27 This idea is taken from PHILIP PETTIT, ON THE PEOPLE'S TERMS: A REPUBLICAN THEORY AND MODEL OF DEMOCRACY 47 (2012) ("I take the relevant yardstick to be set by what I call the eyeball test. At the level set by this test, the safeguards should enable people, by local standards, to look one another in the eye without reason for fear or deference.").

28 Albert, *supra* note 1, Part III.

29 *Id.* at 33.

30 *Id.*

31 *Id.* at 352.

32 JEREMY WALDRON, POLITICAL THEORY: ESSAYS ON INSTITUTIONS 149 (2016) (A "principle that holds that when law is made or changed, it should be made or changed explicitly.").

33 *See* BRUCE ACKERMAN, THE PEOPLE THEMSELVES: FOUNDATIONS I (1991).

34 Albert, *supra* note 1, Part II.B.

III. CHILE'S CONSTITUTION-MAKING PROCESSES

A. General Overview: What Drove Chile to the Process?

Chile does not have a real constitution—if by constitution one understands it as the wishes of a sovereign people to shape a polity. To be sure, Chile has a constitution, but such constitution is not the result of a community's political decision to organize itself. Chile's 1980 Constitution was enacted by a military regime led by General Augusto Pinochet, a regime that overthrew the government of Salvador Allende and imposed a seventeen-year-long dictatorship.[35]

In the early 1980s, some opposition sectors publicly expressed the need for a constitution emanating from the people.[36] After Pinochet's defeat in the 1988 plebiscite, some of the dictatorship's supporters negotiated constitutional reforms with the center-left sector that had won the referendum, by which Pinochet would no longer be president of Chile.[37] Fifty-four reforms toned down some of the most authoritarian features of the civil-military Constitution. However, the core of the 1980 Constitution remained intact. The dictatorship's legal architecture ensured the privatization of social rights and the right-wing veto of any relevant change in the social order—which included the lack of recognition of Indigenous Peoples in the text of the constitution.[38]

Pressure for constitutional change emerged strongly with student protests. First, in 2006, high school students demonstrated to demand free travel passes on public transportation and the waiving of the university admissions test fee, as well as the end to municipalization of subsidized education and other structural reforms. Five years later, higher-education students, environmentalists, consumers, and women also made it to the streets to demonstrate.[39] These

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35 *See, e.g.*, Javier Couso, *Trying Democracy in the Shadow of an Authoritarian Legality: Chile's Transition to Democracy and Pinochet's Constitution of 1980*, 29 WISC. INT'L L.J. 393, 403–13 (2006).

36 *See* INSTITUTO CHILENO DE ESTUDIOS HUMANÍSTICOS, UNA SALIDA POLÍTICA CONSTITUCIONAL PARA CHILE: EXPOSICIONES Y DEBATES DEL SEMINARIO "UN SISTEMA JURÍDICO-POLÍTICO CONSTITUCIONAL PARA CHILE" REALIZADO EL 27 Y 28 DE JULIO DE 1984, SANTIAGO, CHILE (1985), https://perma.cc/A7KY-HXCV.

37 *See* ROBERT BARROS, CONSTITUTIONALISM AND DICTATORSHIP: PINOCHET, THE JUNTA, AND THE 1980 CONSTITUTION 308 (2002).

38 This Essay calls "constitutional recognition" the express mention of Indigenous Peoples in a constitution. In Latin America, many constitutions "recognize" Indigenous Peoples as a way of granting rights and acknowledging countries' commitment to pay special attention to their needs.

39 Domingo Lovera, *Protestas Constituyentes: Octubre del '19 [Constituent Protests: October '19]*, *in* PROCESO CONSTITUYENTE EN CHILE: DESAFÍOS PARA UNA NUEVA CONSTITUCIÓN [CONSTITUENT PROCESS IN CHILE: CHALLENGES FOR A NEW CONSTITUTION] 97 (Jaime Bassa ed., 2020).

protests were no longer about the transportation fare for high school students; the education model linked to the Constitution's policy goals became a constitutional issue. Something similar happened with labor matters and before that, with healthcare.[40] Congress attempted to enact legislation that would better protect these rights, but the Constitutional Court struck down such legislation.[41] The people's discontent was no longer specific to any one issue. It was now general—it was, in other words, "constitutional."

The pervasiveness of the constitutional claim became evident during Michelle Bachelet's 2013 presidential campaign. Bachelet promised to change the Constitution and to do so "through a participatory and inclusive process."[42] The demand for a constitutional convention had been organized into a social movement that, emulating the "Seventh Ballot" effort in Colombia, demanded a constituent assembly.[43]

Bachelet did not call for a constituent convention, but she did design a process that included authorized local meetings. Over 200,000 citizens gathered for almost a year to deliberate on the constitutional model.[44] It was an unprecedented experience that generated enthusiasm, but the Bachelet administration failed to implement it mainly due to the lack of support from political parties.[45] A few days before leaving office, Bachelet sent a bill to Congress containing a new constitution.[46] The bill was drafted by government officials, taking the participatory process's inputs in a way that was utterly different from the "participatory and inclusive" process that President Bachelet had promised. The move was rather symbolic, as the country was preparing (again) for the arrival of Sebastián Piñera. President Piñera expressly stated that there would be no constitutional change.[47]

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40 Raúl Rodríguez, Patricia Peña & Chiara Sáez, *Crisis y cambio social en Chile (2010-2013): el lugar de los medios de los movimientos sociales y de los activistas digitales*, 12 ANAGRAMAS 71 (2014).

41 Karla Varas, *Titularidad sindical y grupos negociadores: un dilema sin resolver*, *in* EL TRIBUNAL CONSTITUCIONAL DE CARA AL PROCESO CONSTITUYENTE. ENSAYOS CRÍTICOS SOBRE SU JURISPRUDENCIA Y SUS PRÁCTICAS 109 (Viviana Ponce de León & Pablo Soto eds., 2021).

42 Jorge Contesse, *Constitutional Change from Afar*, 75 RUTGERS U. L. REV. 1297 (2024).

43 *Séptima Papeleta* [*Seventh Ballot]*, LATINNO, https://perma.cc/64KE-GANP (last visited Feb. 5, 2025).

44 Contesse, *supra* note 42, at 1277.

45 *See* Sergio Verdugo & Jorge Contesse, *The Rise and Fall of a Constitutional Moment: Lessons from the Chilean Experiment and the Failure of Bachelet's Project*, I-CONNECT BLOG (Mar. 13, 2018) https://perma.cc/3QL7-E9Y8.

46 *Id.*

47 Contesse, *supra* note 42, at 1279.

But then came the 'Estallido Social' or 'Social Outbreak' of October 2019, with thousands of people marching in the streets of Chile's main cities. The movement had no clear leaders. The people who took to the streets seemed to demand everything: health care, education, pensions, recognition of women's rights, Indigenous rights, among others.[48] The large and multifaceted array of demands was answered with an equally comprehensive institutional solution: the opening of a constituent process.[49] After a month of massive demonstrations and violent clashes between demonstrators and both the police and the army, the political parties signed the "Agreement for Peace and the New Constitution" in an almost unanimous agreement.[50] The demonstrations had resulted not only in chaos in the streets and destruction of private property, but also in serious human rights violations committed by the armed forces and police.[51] Social discontent had gone too far, and the political parties understood that it was necessary to start again, from scratch—with a new constitution.

B. The Struggle for Constitutional Recognition

Prominent among the flags flying at the 2019 protests was the Mapuche flag. The Mapuche people are one of the Indigenous Peoples in Chile—the most numerous and possibly the best known. After Chile's independence in the early twentieth century, the Mapuche people resisted and negotiated with the Spanish colonists and negotiated treaties with the republic.[52]

The history of colonization during the nineteenth and twentieth centuries is, as elsewhere, one of assimilation, discrimination, dispossession, and lack of recognition. As the dictatorship ended, in 1989, Chile's center-left parties obtained the support of the Indigenous Peoples to elect the first president of the transition to democracy in exchange for an agenda of recognition of rights.[53] The agenda

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48 Nicola□ s M. Somma et al., *No water in the oasis: the Chilean Spring of 2019–2020*, 20 SOC. MOVEMENT STUD. 495 (2020).

49 *See generally*, Claudio Fuentes, *The socio-political dynamic of the constituent process, in* SOCIAL REVOLT IN CHILE: TRIGGERING FACTORS AND POSSIBLE OUTCOMES (Carlos Peña & Patricio Silva eds., 2022) (arguing that there were socio-political dynamics that explain why the Constitution became a political issue in Chile).

50 *See Acuerdo Por la Paz Social y la Nueva Constitución*, BIBLIOTECA DEL CONGRESO NACIONAL DE CHILE (Nov. 15, 2019),https://perma.cc/S8XS-GADC.

51 *See, e.g.*, Office of the High Commissioner on Human Rights, Report of the Mission to Chile from 30 October to 22 November 2019 (Nov. 1, 2019), https://perma.cc/3WE9-9KRK; Chile: Police Reforms Needed in the Wake of Protests, HUM. RTS. WATCH (Nov. 26, 2019), https://perma.cc/8FY2-3FB5.

52 *See* JOSÉ BENGOA, HISTORIA DEL PUEBLO MAPUCHE 33 (1985).

53 *See* Jorge Contesse, *The Rebel Democracy: A Look into the Relationship Between the Mapuche People and the Chilean State*, 26 CHICANO-LATINO L. REV. 131, 141–42 (2006).

included the recognition of Indigenous Peoples in the Constitution, special legislation, and the ratification of International Labour Organization Convention 169, a recently adopted international instrument securing Indigenous Peoples' rights.[54]

The return of democracy, however, left the majority of the demands of Indigenous Peoples unrealized. In a period of thirty years, Congress rejected multiple constitutional amendment initiatives.[55] The opposition was largely led by right-wing parties, whose "conservative and nationalist ideology . . . prioritize[d] national unity and . . . protect[ed] significant economic interests."[56] In 1993, Congress enacted the Indigenous Act, but the law was far from what had initially been promised: recognition of rights was weak and land policies insufficient.[57] The ratification of Convention 169 took almost two decades.[58] The development model that Chile promoted rapidly inserted the country into the world; yet the move came at the expense of Indigenous demands. Indigenous groups became politically organized, making claims and protesting against the government.[59] The government's response was harsh, resorting to anti-terrorist legislation to prosecute crimes committed in Indigenous areas that were presumably motivated by land claims.[60] The government's use of criminal laws led to the persecution and imprisonment of Indigenous leaders.[61] In some cases, in the context of police operations, state security forces even killed Mapuche activists.[62]

International human rights organizations increasingly expressed concern about the treatment of Indigenous Peoples by the State. In 2014, the Inter-American Court of Human Rights found Chile in violation of its international human rights obligations for the use of anti-terrorist legislation in the context of land and rights claims.[63] Time and again, Congress failed to fulfill the promise

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54 *Id.* at 142–43.

55 *See, e.g.*, Jorge Contesse, *The Quest to Become a Constitutional Entity*, 55 STUD. L. POL. & SOC'Y 19 (2011).

56 Claudio Fuentes & Maite de Cea, *Reconocimiento débil: derechos de pueblos indígenas en Chile*, 25 PERFILES LATINOAMERICANOS 1, 5–6 (2017).

57 *See* FACULTAD DE DERECHO UNIVERSIDAD DIEGO PORTALES, INFORME ANUAL SOBRE DERECHOS HUMANOS EN CHILE 2003: DERECHOS HUMANOS DE LOS INDÍGENAS, 299–302-300 (2003).

58 Contesse, *supra* note 55, at 37.

59 *See* Contesse, *supra* note 53, at 143.

60 *Id.* at 146.

61 *See* FACULTAD DE DERECHO UNIVERSIDAD DIEGO PORTALES, INFORME ANUAL SOBRE DERECHOS HUMANOS EN CHILE 2008: DERECHOS DE LOS PUEBLOS INDÍGENAS, 374–82 (2008).

62 *Id.* at 374–77.

63 *See, e.g.*, *Norín Catrimán et al. v. Chile*, Inter-Am. Ct. H.R. (ser. C) No. 279 (May 29, 2014).

made in 1989 to give Indigenous Peoples recognition in the Constitution.[64] In the decades following the dictatorship, Chile modernized, expanded access to credit for vast sectors of the population, tried to modernize its political regime, and recognized the rights of some disadvantaged groups. However, in the case of Indigenous Peoples, things only seemed to get worse.

There were, however, two significant developments that gave hope. In 2007, Chile adhered to the United Nations Universal Declaration on the Rights of Indigenous Peoples, and in 2008, the country finally ratified ILO Convention 169.[65] This opened the possibility of international law offering avenues of relief to the growing tension at the national level. As Albert points out, the role of international law can be very relevant in opening up decolonizing spaces.[66]

The adoption of international instruments meant that Indigenous Peoples increasingly resorted to *legal* arguments to defend their demands: "self-determination" and the "right to be consulted" became part of the language of the political channels used to advance Indigenous demands.[67] By the time of the social outbreak in 2019, not only had discontent with the permanent lack of recognition grown; the demands had also been translated into a specific language of rights that promoted and sought "self-determination," "consultation," "consent," the right to land, and the "plurinational" character of the State.[68] The law now allowed for decolonial claims lodged against the country's constitutional structure.

IV. RISE AND FALL OF DECOLONIAL CLAIMS: THE CASE OF PLURINATIONALITY

This Section builds on Albert's typology to discuss the contrast between the two constitution-making processes that took place in Chile in recent years. The

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64 Contesse, *supra* note 55, at 143–48.

65 FACULTAD DE DERECHO UNIVERSIDAD DIEGO PORTALES, *supra* note 61, at 363–64, 367.

66 *See* Albert, *supra* note 1, Part IV.A.

67 *See* Jorge Contesse, *El derecho de consulta previa en el Convenio 169 de la OIT: Notas para su implementación en Chile*, *in* EL CONVENIO 169 DE LA OIT Y EL DERECHO CHILENO: MECANISMOS Y OBSTÁCULOS PARA SU IMPLEMENTACIÓN (J. Contesse Singh ed., 2012); *see also* Laura M. Seelau & Ryan Seelau, *Implementación del derecho a la libre determinación indígena en Chile*, *in* EL CONVENIO 169 DE LA OIT Y EL DERECHO CHILENO: MECANISMOS Y OBSTÁCULOS PARA SU IMPLEMENTACIÓN (J. Contesse Singh ed., 2012).

68 *See* Camila Peralta García, *Reconocimiento Plurinacional en el marco de la Revuelta Social: A 30 años del Acuerdo de Nueva Imperial, demandas pendientes*, Instituto de Investigación en Ciencias Sociales, Working Paper No. 51–63 (2020); *see also* Catalina Albert, *Plurinacionalidad y reconocimiento de los pueblos: las demandas indígenas para la nueva Constitución*, CIPER (Nov. 14, 2019), https://perma.cc/6Y64-T39X.

first process (2019–2022) was promoted and drawn from the different demands for the constitutional recognition of Indigenous Peoples. For the first time in Chile's history, Indigenous representatives were given reserved seats in a deliberative body. The Chilean people largely rejected the proposal, and political parties swiftly moved to articulate a second consecutive constituent process. Such process, which took place in 2023, was its complete opposite. Indigenous demands were largely hidden. The language of "self-determination" and "plurinationality" was utterly rejected.

A. The 2021–2022 Process

The language of decolonization was key in the campaign of the delegates of the first process. Except for the right-wing candidates, virtually all delegates embraced with greater or lesser intensity the need to reconfigure the Chilean state. There was a consensus that the state had historically and systematically mistreated the Indigenous Peoples.[69] To repair this injustice, the state needed to "redefine" itself, starting with an assembly with quotas reserved for Indigenous Peoples. This was Congress' understanding, and so it drew up electoral rules that not only gave representation to representatives of Indigenous Peoples—it did so in an enhanced and even disproportionate manner.

Seventeen Indigenous delegates were elected to the Convention, a body that strongly embraced Indigenous demands. Its first president was not only a woman, but a *Mapuche* woman.[70] Dressed in traditional Mapuche costume, Elisa Loncon's election set a stamp that radically broke with the formalism of a ruling class historically dominated by white men dressed in suits. A Mapuche spiritual leader who had been imprisoned on terrorism charges was also elected to the Convention.[71] Like her, Indigenous individuals belonging to the other legally recognized "ethnic groups," who had endured decades of mistreatment and discrimination, became members of the Convention.[72]

The Convention moved on to deliberate on the norms for the proposed text. Increasingly, the left-wing groups that had the majority of delegates marginalized

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69 *See* Aprueba Reglamento General de la Convención arts. 3, 5, 35, 37, 63, octubre 13, 2021, Diario Oficial [D.O.] (Chile); *see also Verónica Figueroa Huencho, Lo conseguimos: una Convención Constituyente Plurinacional e Intercultural*, CIPER (May 20, 2021), https://perma.cc/45T4-A7QP.

70 *Quién es Elisa Loncón, la profesora mapuche elegida presidenta de la Convención Constituyente de Chile*, BBC NEWS MUNDO (July 4, 2021), [hereinafter *Quién es Elisa Loncón*] https://perma.cc/NHW5-4G6R.

71 Manuel Carvajal, *Pueblo Mapuche. Machi Francisca Linconao es electa como Convencional Constituyente*,, LA IZQUIERDA DIARIO (May 17, 2021), https://perma.cc/H94V-J3N4.

72 *See id.*; *see also Quién es Elisa Loncón*, *supra* note 70.

the right-wing delegates from the deliberations. This move generated a hostile climate. At the same time, some delegates proposed norms that sought to reconfigure many government bodies as "plurinational," ensuring autonomy for Indigenous Peoples, the duty to consult when investment projects were to be carried out (and in some cases, to obtain consent), and the creation of an Indigenous justice system.[73] The proposals made sectors of the Convention and opinion leaders very uncomfortable. "Plurinationality," a term that only recently was common ground for most delegates, became frightening. Many thought that the country would be literally divided, that Indigenous Peoples would have separate territories from Chile, and that they could even control entry and exit with parallel judicial systems.[74] The proposed reforms included "some of the world's most extensive Indigenous rights . . . but those reforms [became] the focal point of the campaign to reject the new text."[75]

The more the Convention promoted decolonizing norms, the more rejection there seemed to be from sectors of the population. Many of these norms made international law directly applicable, although the courts had been using international law more and more for at least a decade.[76] The Constitutional Convention's redefinition of the state was arguably too much, as the country's elites were still utterly opposed to the recognition of Indigenous rights.[77] The decolonizing constitutional effort went too far. In September 2022, the Reject option won by a landslide.[78]

B. A Colonial Backlash?

If the first process was characterized by the unprecedented inclusion of Indigenous Peoples, the second process took an opposite turn. This section reviews some of the agreed-upon rules for the second process, as political parties framed it in direct response—and opposition—to the first process. It was, in other words, a colonial backlash.

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73 *See* Ana Lankes, *The Contentious Vote in Chile That Could Transform Indigenous Rights*, N.Y. TIMES (Sept. 2, 2022), https://perma.cc/E8TL-YDZ3.

74 *See 5 Puntos Críticos sobre la Plurinacionalidad y los Derechos Garantizados a los Pueblos (Naciones) Indígenas en la Propuesta de Nueva Constitución*, LIBERTAD Y DESARROLLO (July 29, 2022), https://perma.cc/MAB9-HMNW.

75 Lankes, *supra* note 73.

76 *See* SEBASTIÁN DONOSO RODRÍGUEZ & MANUEL NÚÑEZ POBLETE, CONVENIO 169 DE LA OIT SOBRE PUEBLOS INDÍGENAS 163–99 (2021).

77 *See* Kelly Bauer, *Untangling Elite Opposition to Indigenous Rights, Throughout Chile's constitutional process, right-wing rhetoric has rejected indigenous recognitions and representation in defense of the status quo*, 54 NACLA REPORT ON THE AMERICAS 430 (2022).

78 John Bartlett, *Chile votes overwhelmingly to reject new, progressive constitution*, THE GUARDIAN (Sept. 4, 2022), https://perma.cc/U28F-XFS4.

First, and unlike the first process, political negotiations led to the inclusion of a commission of experts. In Congress' view, one reason the Chilean people distrusted the first process was the lack of experts involved in the drafting.[79] The commission was integrated with twenty-four constitutional and political experts appointed by the two chambers of Congress, including one of the authors of this Essay.[80] The appointment of experts maintained the political balances in Congress, as no camp had a majority to approve norms on its own. The commission's task was to produce the first draft of the constitutional proposal. The proposal would then be reviewed by an elected body—the Constitutional Council—which had ample powers. This time, there was no Indigenous representation on the commission of experts.

Second, the Constitutional Council was significantly smaller than the 2021–22 Constitutional Convention. The Council was composed of fifty members. It was elected under the electoral rules of the Senate, which brought an immediate effect on representation: independents—i.e., council members not affiliated with a political party—were dramatically affected. Senatorial districts are significantly larger than those of the Chamber of Deputies, used in the first process. Under the electoral rules of the Senate, the election of independents was virtually impossible. Unsurprisingly, no independents were elected.[81]

Third, Indigenous representation was also severely compromised by the new electoral rules, which were far more restrictive when compared to those of the first process. This time, the inclusion of Indigenous peoples' representatives was not based on reserved seats but tied to their electoral turnout.[82] Votes in favor of Indigenous candidates were to be compared with votes from the remaining sixteen non-Indigenous electoral districts. To obtain a seat in the Council, an Indigenous candidate had to reach at least 1.5 percent of the votes cast in the remaining sixteen districts. To obtain a second seat, Indigenous candidates needed to reach 3.5 percent of the votes, and so on. Voters enrolled in the Indigenous electoral

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79 Claudia Heiss, *El proceso constituyente en Chile: Entre la utopi□ a y una realidad cambiante*, 305 NUEVA SOCIEDAD 126, 127 (2023).

80 Professor Domingo Lovera served as a member of the Commission. *See Comisión Experta*, PROCESO CONSTITUCIONAL (Mar. 6, 2023), https://perma.cc/565S-YQHM.

81 Individuals not legally affiliated with a political party —a type of independent candidate— were elected. However, they ran under the auspices of political parties. In the first process, Congress enacted electoral rules that favored the inclusion of independents, as *lists* of independents could participate. Commentators argue that these one-time changes, coupled with huge dissatisfaction towards political parties during the Chilean social outbreak, explain the massive victory of independents in the first process. *See generally* Guillermo Larraín, Gabriel Negretto & Stefan Voigt, *How not to write a constitution: lessons from Chile*, 194 PUB. CHOICE 233 (2023).

82 Claudia Heiss & Julieta Suárez-Cao, *Constitution-Making in the 21st Century: Lessons from the Chilean Process*, 57 PS: POL. SCI. & POL. 282, 282 (2024).

registry could choose either to vote for Indigenous candidates or for non-Indigenous candidates. Ultimately, only two candidates ran, and only one was elected to the Council.[83] Professor Albert argues that granting political representation is a form of healing the wounds of colonialism.[84] This was the path taken by the first process.[85] The backlash seen in the second process sent the opposite message.

Fourth, and most importantly, to enable the second process, Congress agreed on a constitutional reform that introduced a key provision to the 1980 Constitution. According to the newly enacted article 154 of the Constitution, "[t]he proposal for a new Constitution submitted to a plebiscite must contain at least" a set of—so they were termed—"institutional and fundamental bases."[86] Thus, the Constitution substantively constrained the work of both the Commission and the Council. Their task was "pre-determined, pre-agreed-upon," and in response to "pre-imposed principles."[87] Both bodies had to include and respect a set of twelve substantive principles that Congress had previously agreed upon. Mirroring other experiences,[88] and considering claims according to which the Convention sought to reset and reestablish the Chilean republic, this time political parties decided to impose a set of constitutional principles. The new constituent power was largely bound.

In direct response to the debate over plurinationality that took place during the first process, the constitutional bases that Congress agreed upon reflected a drastic position regarding Indigenous Peoples: they were no longer to be considered as independent peoples, let alone "nations" with special rights. Rather, they would be "part of the Chilean Nation," which would have a duty to "respect and promote" their rights and culture.[89]

Procedurally speaking, the rights of Indigenous Peoples were compromised from the outset. If on top of that, one adds the astonishing performance of far-right candidates belonging to the nationalistic Republican Party, who obtained 23

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83 ADRIANA CHUAQUI, CARMEN LE FOULON & BENJAMÍN OTEÍZA, DESENTRAÑANDO EL 7 DE MAYO: UN ANÁLISIS DE LA ELECCIÓN DEL CONSEJO CONSTITUCIONAL 659 (2023).

84 Albert, *supra* note 1, at 9.

85 Jennifer M. Piscopo & Peter M. Siavelis, *Chile's Constitutional Moment*, 120 CURRENT HIST. 43, 47 (2021).

86 CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [POLITICAL CONSTITUTION OF THE REPUBLIC OF CHILE] art. 154 (2022 draft) (Chile).

87 Yaniv Roznai, *The Boundaries of Constituent Authority*, 52 CONN. L. REV. 1381, 1400 (2021).

88 *Id.*

89 According to Article 154.4, "The Constitution recognizes indigenous peoples as part of the Chilean nation, which is one and indivisible. The State shall respect and promote their rights and cultures". CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE (2022), *supra* note 86,at art. 154.4.

out of 50 seats in the Council, the tepid recognition of Indigenous Peoples in the proposal should not come as a surprise.

Few Articles of the proposal dealt with Indigenous Peoples. Article 5, almost copying the above-transcribed basis, declared Indigenous Peoples "as part of the Chilean Nation, which is one and indivisible."[90] The provision also included the State's duty to "respect and promote their individual and collective rights guaranteed by this Constitution, statutes and international treaties ratified by Chile and in force." The language was taken from the Expert Commission's proposal. Section 2 of Article 5 also included "interculturality"—not "plurinationality"—as a constitutional "value."[91]

Also, Article 51.2 gave Congress the power to regulate a "mechanism to promote the political participation of indigenous peoples in the National Congress."[92] Finally, Article 127.3, on local governments, provided the duty to regulate "mechanisms to respect and promote the rights of indigenous peoples recognized in this Constitution, in the regions and communes and, especially, in those with a significant population belonging to these peoples."[93]

To be sure, these were not modest gains when compared to Chile's constitutional past.[94] Yet, a more thoughtful approach requires us to pause and reconsider. The recognition included in Article 5.1 risked leading to assimilation and the neglect of important historical claims. While it is also true that this recognition mandated the respect and promotion of both individual and collective rights as guaranteed by the Constitution, statutes, and international treaties, the proposal lacked specific rights. Such an omission turned the mandate into an empty promise. Furthermore, the reference to international treaties did not add

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90 CONSEJO CONSTITUCIONAL [CONSTITUTIONAL COUNCIL], PROPUESTA CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [PROPOSED POLITICAL CONSTITUTION OF THE REPUBLIC OF CHILE] (2023).

91 In Chile, some scholars understand constitutional "values" as weaker than "rules" and fundamental rights (no matter if analytically these last are principles). *See* Enrique Alcalde, *Relacio n entre Valores y Principios Generales de Derecho en la Interpretacio n Constitucional de los Derechos Fundamentales [Relationship Between Values and General Principles of Law in the Constitutional Interpretation of Fundamental Rights]*, 35 REVISTA CHILENA DE DERECHO 463, 469-72 (2008). According to Section 2 of article 5, the Chilean state recognized "the ethnic and cultural diversity of the country and promotes intercultural dialogue under conditions of equality and reciprocal respect."

92 CONSEJO CONSTITUCIONAL, *supra* note 90.

93 *Id.*

94 Under Professor Albert's typology, they could be seen as instances of "minimum political representation." In his words, "[s]ome constitutions take a minimalist approach to codifying rules for Indigenous political representation". *See* Albert, *supra* note 1, at 9.

anything to the State's general duty to respect and promote fundamental rights enshrined in international treaties, outlined in Article 3 of the proposal.[95]

Second, the mechanisms to enhance participation of Indigenous Peoples in Congress were vague, allowing for compliance through simple public forums or minimal engagement. Additionally, the proposal merely allowed the "promotion" of participation rather than "requiring" it. Lastly, these mechanisms—and even more robust forms of engagement—could have been effectively implemented irrespective of the terms of Article 51.2.[96] The backlash against Indigenous rights was accompanied with significant regressions in other areas, such as women's rights and social rights.[97] In December 2023, the Chilean people again voted to reject the constitutional proposal.[98]

The second proposal's forms of recognition were inadequate, potentially ineffective, and arguably counterproductive. As this Essay previously observed, the reason for decolonial constitution-making strategies is to include explicit improvements that cannot be achieved simply by interpreting existing general provisions. The Council's proposal largely failed to accomplish this objective.

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Nearly all accounts of the two constituent processes conclude that the country failed to change its Constitution.[99] From a purely formal perspective, the observation is accurate: the 1980 Constitution remains in force. However, if one looks through the analytical lenses that Professor Albert's Article offers, one may reach a more nuanced conclusion. A closer examination of the foundational principles that guided the second process reveals a noteworthy advancement, as Chile's Constitution now "recognizes indigenous peoples." Yet, this recognition—long demanded by Indigenous Peoples—has come at a big price, as such peoples are, per the Constitution, "part of the Chilean nation."[100] As this

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95 Article 3.1 of the proposal innovated in the relation between domestic legislation and international law, for it declared that the Constitution shall be the supreme law of the land – that reference is absent in the 1980 Constitution, which has permitted some timid forms of constitutional block, as described in Albert for the Colombian case in Albert, *supra* note 1, at 45–47. Moreover, Article 3.1 ordained courts to interpret legislation in accordance with the Constitution, thus merely 'considering' international treatises.

96 As the very pieces of legislation that permitted reserved seats in the first Constitutional Convention shows.

97 Antonia Laborde, *Los principales contenidos de la nueva propuesta de Constitución en Chile, tras siete meses de trabajo*, EL PAÍS (Oct. 24, 2023), https://perma.cc/NY3X-2G49.

98 John Bartlett, *Chile votes to reject new conservative constitution which threatened rights of women*, THE GUARDIAN (Dec. 17, 2023) https://perma.cc/932D-U76Y.

99 *See, e.g.*, Javier Couso, *Chile's Failed Attempt to Get a New Constitution: Or the Challenges of Democratic Constitution Making in a Polarized Era*, 30 SOUTHWESTERN J. INT'L L. 1 (2024); Rodrigo Mayorga, *Chile y el fracaso constituyente*, ANFIBIA (Dec. 17, 2023), https://perma.cc/M4QC-E4W5.

100 CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE, *supra* note 86, at art. 154.4.

provision is embedded in the Constitution, it may well continue to carry significance today and, arguably more significantly, into the future. To borrow from Albert's typology, the clause may open up institutional avenues for inclusion and constitutional change that we may not see today, but may establish a common ground upon which to build a new constitutional future.

V. CONCLUSION

Richard Albert's Article on decolonial constitutionalism discusses constitution-making processes as one of the key instances where law can serve decolonial purposes. The case of Chile is a key example, despite the failure of two consecutive processes of constitutional change. This Essay has analyzed the constituent processes in Chile in recent years through the prism of Albert's typology. In particular, the Essay has focused on the constitution-making dimension that decolonial constitutionalism offers, showing how Chile's two constituent processes adopted opposing views on one of the most important areas of decolonial claims: the rights of Indigenous Peoples. While the first process placed these demands at its center, the second process took the opposite path.

Despite the two rejections of the constitutional proposals, there has been some progress on these demands, but in a political context that is largely unfavorable for Indigenous Peoples. Having exhausted the efforts of constitution-making, it may be for other areas of decolonial constitutionalism—i.e., judicial enforcement and the role of supra-constitutional mechanisms—where these demands may eventually be successful. Exploring the possibility of such avenues shall be the subject of future research.