

RESEARCH ARTICLE

Utopian constitutionalism in Chile

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Abstract

In this article, we argue that the 2022 Chilean draft Constitution helps to articulate the distinction between a transformative constitutional project and a utopian one. Whereas a transformative project lays down markers for social change that will take time to achieve, a utopian project sets out goals that are unlikely to be achieved within any reasonable timeframe. Utopianism is a product of two relationships. The first is the internal relationship between the transformative goals laid out in a constitution and the institutional pathways through which changes will occur. The second is the external relationship between the goals in the text and the views and support of key groups. In Chile, both relationships were problematic. First, the Convention adopted a draft that was heavy on ambitious programmatic content but lacked a clear vision of how to implement it. Second, the Convention produced a draft that was supported by the ephemeral civil society groups galvanized by the 2019 protests but divorced from the vision of Chile's parties and public opinion. Some of this was a product of the peculiar electoral context in which the Convention acted, which has already been corrected. But some of it reflects deeper tensions within transformative constitutionalism.

Keywords: Chile; Chilean draft Constitution; constitutional law; transformative constitutionalism; utopianism

1. Introduction

In September 2022, voters overwhelmingly rejected the Chilean draft Constitution by a decisive 62 to 38 margin.¹ This failed draft, in turn, had been the product of a year of sustained work by an elected Constitutional Convention following massive popular protests in 2019 and an entry referendum where voters supported replacing the 1980 constitution by an even more resounding 80 to 20 margin.²

¹See Catherine Osborn, 'How Chile's Constitution Revolution Missed the Mark', *Foreign Policy*, 9 September 2022, available at <<https://foreignpolicy.com/2022/09/09/chile-constitution-referendum-results-reject-boric>>.

²See Plebiscito 2020, Servicio Electoral de Chile, 26 October 2020, available at <<https://historico.servel.cl/servel/app/index.php?r=EleccionesGenerico&id=10>>.

To comparative scholars, the defeat of the Chilean draft was a significant event, because the draft itself represented a kind of culmination of the trend towards transformative constitutionalism in the Global South.³ The draft reflected broad trends towards the inclusion of newer forms of rights, including socioeconomic, environmental, and indigenous rights, and it advanced some of these rights further than they had been taken in other constitution-making experiences.

For example, the Chilean constitutional draft would have been the first text in the world to include gender parity across all state institutions (the draft itself had been prepared by a Convention elected using parity rules), and it arguably would have included the world's most ambitious and comprehensive environmental provisions. The draft thus seemed to envision sweeping changes to Chilean society, the hallmark of a transformative constitutional project.

In this brief article, we argue that the 2022 Chilean draft helps to articulate the distinction between a *transformative* constitutional project and a *utopian* one. In Part II, we argue that whereas a transformative project lays down markers for social change that will take time to achieve, a utopian project sets out goals that are unlikely to be achieved in any reasonable timeframe. Utopianism is not simply a product of the ambition of a draft; it is mediated by two kinds of relationships. The first is the internal relationship between the transformative goals laid out in a constitution (often but not exclusively in the form of constitutional rights) and the institutional pathways through which changes will occur. The second is the relationship between the goals in the text and the views and support of key political groups, such as political parties, civil society and the public.

In Chile, as we argue in Part III, both of these relationships were deeply problematic. While there were transformative dimensions to the Chilean draft constitution, other aspects were more utopian in character. First, the Convention adopted a draft that was very heavy on ambitious programmatic content but lacked a clear vision of how that content would be implemented. Put another way, the linkage between the many new rights found in the constitution and the institutional or structural changes found in the draft was weak, and this weakness likely would have stymied implementation. Second, the Convention produced a draft that was supported by the ephemeral civil society groups galvanized by the 2019 protests, but divorced from the ideological vision of Chile's major parties and out of step with Chilean public opinion. The result was a resounding defeat in the September referendum.

Part IV concludes on alternating notes of optimism and pessimism. Some of the utopianism in the 2022 draft was surely a product of the peculiar electoral context in which the Constitutional Convention acted, one that has already been corrected in the new process. But some of it also reflects internal tensions in the practice of transformative constitutionalism itself – problems that make the unfortunate fate of the 2022 draft especially telling.

II. Transformative versus utopian constitutionalism

Transformative constitutionalism has emerged as one of the most important concepts in comparative constitutional law, even as its exact meaning remains subject to contestation. Transformative constitutionalism is normally defined in opposition to preservative constitutionalism. If preservative constitutionalism is intended to maintain the status

³See, for example, Danielle Zaror Miralles, 'Chile's Draft Constitution Looks to the Future: Digital Rights as Fundamental Rights', *ConstitutionNet*, 2 July 2022, available at <<https://constitutionnet.org/news/chiles-draft-constitution-looks-future-digital-rights-fundamental-rights>>.

quo and prevent its erosion, transformative constitutionalism is viewed as an effort to transcend the past and use constitutional law in order to achieve a better future.⁴ In other words, transformative constitutionalism sees the social and political past and present as deeply flawed, and seeks to use constitutional law to transform them over time. In this sense, of course, a transformative constitutional project of necessity has an element of aspiration. Constitutional goals will take time to reach.

Transformative constitutionalism is now often seen as emblematic of constitutionalism in the Global South, and transformative ideas seem to spread easily there – although, as Hailbronner reminds us, transformative constitutional projects are also seen in the Global North.⁵ Moreover, while no particular elements of constitutional design or text by themselves will clearly make a project transformative in nature, there are some aspects of constitutionalism that are often associated with transformative projects. These include, for example, a robust set of socioeconomic rights, as well as a conception of substantive equality that actively works for the inclusion of historically marginalized groups.⁶

We define utopianism as a constitutional project that nominally aims at transformation – in other words, that appears to be a transformative text, but where significant transformation is unlikely to occur in the foreseeable future. Because transformative constitutionalism is aspirational, the line between transformation and utopianism is necessarily fine. Nonetheless, we think the line is worth trying to draw because it highlights ways in which transformative constitutionalism may fail to achieve its goals.

A utopian constitutional project, we argue, is not simply the result of an overly ambitious text, but rather depends on particular factors that relate aspects of the constitutional text to (1) other aspects of that constitutional text, particularly the relationship between rights and structure; and (2) external groups – especially parties, civil society and the public.

On the first point, modern transformative constitutionalism often seems to prioritize rights, particularly newer forms of rights that require positive action by the state. These new rights, in turn, reflect increasing demands on the state by the public and by civil society. But execution of these rights – especially the demanding ones – requires the existence of institutions committed to carrying them out. Chilton and Versteeg find that many constitutional rights do not result in higher levels of on-the-ground enjoyment over time.⁷ Transformative constitutionalists often point to courts as an enforcement mechanism, but a fairly large body of literature shows that courts may have difficulties promoting enjoyment of rights – especially novel ones – when working on their own. Design and scholarship increasingly emphasize other, non-judicial independent institutions as a tool.⁸ Less work focuses on the link between constitutional rights and ordinary political institutions such as legislatures.

⁴See Cass R Sunstein, *The Second Bill of Rights: FDR's Unfinished Revolution and Why We Need It More Than Ever* (Basic Books, New York, 2004); Karl Klare, 'Legal Culture and Transformative Constitutionalism' (1998) 14 *South African Journal on Human Rights* 146.

⁵See Michaela Hailbronner, 'Transformative Constitutionalism: Not Only in the Global South' (2017) 65 *American Journal of Comparative Law* 527.

⁶See, for example, Daniel Bonilla Maldonado (ed.), *Constitutionalism of the Global South: The Activist Tribunals of India, South Africa, and Colombia* (Cambridge University Press, Cambridge, 2013).

⁷See Adam Chilton and Mila Versteeg, *How Constitutional Rights Matter* (Oxford University Press, Oxford, 2020).

⁸See Mark Tushnet, *The New Fourth Branch: Institutions for Protecting Democracy* (Cambridge University Press, Cambridge, 2021); Heinz Klug, 'Transformative Constitutions and the Role of Integrity Institutions in

On the second point, constitutional transformation obviously requires support from groups that will enjoy political power after the constitution has been enacted. Otherwise, there is a serious risk that the constitutional text will remain a dead letter. These groups are varied, but as a starting point one could emphasize political parties, civil society groups and general popular support. The precise strength of the different groups will vary depending on the nature of the political system. Where parties are strong and institutionalized, for instance, constitutional projects will have trouble succeeding without their buy-in, since they will be necessary to push constitutional projects in both the legislative and executive branches. Depending on the design of the process, the established parties can end the project before it even goes into effect (as occurred, for example, in Iceland),⁹ or they can hamper or undermine its implementation after the constitution has been enacted.

The two forms of utopian constitutionalism – structural and sociological – can also go together in certain cases. If those (s)electd to draft a constitution are independent actors without significant institutional experience or know-how, they may downplay the importance of structures and institutions to realizing political aspirations or rights-based goals. They may also lack a developed sense of what voters will actually support at a constitutional referendum, as opposed to what they say they support in more abstract fora.

There are, of course, complexities to characterizing a constitutional project as utopian in character. For one, many constitutions contain a mix of preservative, transformative and utopian elements. It is thus difficult to characterize a constitutional project as a whole as neatly falling into one or other of these categories. In addition, there are complex issues of timing associated with any judgment about the utopian character of a constitutional project – for example, some programmatic political and economic changes may lack majority support in the short run but gain greater support over time, in ways that make a constitution progressively more transformative and less utopian in nature. Similarly, some constitutional ideals may initially be disconnected from supporting structures, but those structures may gradually develop in ways that reduce the structural utopianism of a constitutional project.

This traffic is not just one way: constitutions that begin life as transformative documents may slide into utopianism as political support for an underlying constitutional vision wanes. Or constitutional structures may degrade, or be attacked or undermined, in ways that introduce an increasing degree of structural utopianism.

What are the costs to utopian constitutionalism? In the long run, if a constitution or constitutional draft is utopian in nature, it is likely to lead to little if any social, political or economic change, and thus to result in increasing disenchantment with democratic constitutionalism as a vehicle for expressing the popular will. In the short-run, utopian constitutionalism can deflect attention from efforts to achieve immediate legislative and policy change.

A utopian outcome can be a result of different kinds of factors. In some cases, utopianism may be the product of a deliberate attempt to abuse transformative constitutionalism for antidemocratic ends. Consider Ecuador in 2008, a constitution that was written under the dominance of President Rafael Correa and his allies. The constitution

Tempering Power: The Case of Resistance to State Capture in Post-Apartheid South Africa' (2019) 67 *Buffalo Law Review* 701.

⁹See, for example, Alexander Hudson, 'Political Parties and Public Participation in Constitution Making' (2021) 53 *Comparative Politics* 501.

was lauded for its innovative nature, particularly its extensive environmental rights and recognition of the rights of nature. We have argued elsewhere that the environmental rights were a sham, included in the draft in order to legitimate other changes that strengthened executive power and weakened checks, and that Correa never intended to implement them.¹⁰

In Chile, the story is different. The elements of utopianism in the draft were largely a product of a Constitutional Convention that was, as others have observed, too dominated by political independents and outsiders.¹¹ This in turn led to a product that was too far from both political elites and the public, and that also lacked a certain degree of political sophistication.

III. Utopianism in the failed Chilean draft Constitution

The Convention produced a draft with an extraordinary list of rights, reflecting many different influences, and heavily influenced by currents of global constitutionalism. These influences included traditional liberal democratic constitutionalism, social democracy and the Bolivarian constitutions, but the rights included in the draft transcended any of these three influences and without question would have put Chile at the global vanguard.

The draft included a detailed and ambitious set of socioeconomic rights that went far beyond those found in the 1980 constitution. These included mainstays such as the rights to health, education and housing, but also less-common rights such as the right to water, food and a vital minimum of energy.¹² Moreover, the socioeconomic rights are defined in a fairly specific way, which emphasizes public provision, rather than Chile's existing practice of relying fairly heavily on private provision for core socioeconomic programs such as health and education.¹³

The draft also included a plethora of new environmental rights. It identified three distinct sets of rights-holders in the constitution: individuals, Indigenous peoples and nature.¹⁴ Nature thus becomes a key rights-holder and environmental rights are interwoven throughout the entire text in a way that intermixes the human right to the environment, the rights of nature itself and duties on the state. In the last category, the constitution creates state duties to provide environmental education, to promote ecological food systems and to combat climate change.¹⁵

The text also includes an extensive set of rights for Chile's Indigenous communities, and more broadly redefined the relationship between these communities and the state. The text defines Chile as a plurinational state made up of the Chilean state and the different Indigenous nations.¹⁶ It instantiates a number of different rights, including the right to prior consultation for economic and other projects (or, in one provision,

¹⁰See Rosalind Dixon and David Landau, *Abusive Constitutional Borrowing: Legal Globalization and the Subversion of Liberal Democracy* (Oxford University Press, Oxford, 2021) 74–80; see also Rosalind Dixon, 'Constitutional Rights as Bribes' (2018) 50 *Connecticut Law Review* 763, 791–801.

¹¹See, for example, Samuel Issacharoff and Sergio Verdugo, *The Uncertain Future of Constitutional Democracy in the Era of Populism: Chile and Beyond* (New York University, New York, 2023).

¹²Chile Constitutional draft of 2022, arts 56, 57, 59.

¹³Ibid, arts 35 (education); 44 (health).

¹⁴Ibid, art. 103.

¹⁵Ibid, arts. 39, 54.

¹⁶Ibid, art. 1 (defining Chile as a 'plurinational, intercultural, and ecological' state).

‘consent’),¹⁷ the right to traditional territories, the right to restitution of land on a preferential basis and rights to language, culture and self-government.¹⁸ It envisions separate Indigenous justice systems.¹⁹

Finally, the draft is striking for the sheer diversity of its rights provisions. In addition to those areas already canvassed, the draft included new rights of victims to truth, justice and reparations, the rights of those with disabilities, the rights of the neurodivergent, the right to sport and the right of *campesinos* and Indigenous groups to use of their traditional agricultural seeds.²⁰

Some commentators such as Gargarella have pointed out that the Convention advanced less in reform of the state – what he calls ‘engine room’ issues – than in constitutional rights.²¹ Our point is more specific: there was relatively little thinking about the relationship between the ambitious new rights proposals and the institutions needed to implement them. To appreciate this point, one needs to focus not only on the main body of the draft Constitution, but also on its transitional provisions, which were written fairly quickly by a special commission near the end of the process.

The draft itself focused heavily on the legislature as a route of implementation. This has long been the route highlighted and favoured by political parties in the Chilean centre and left. The draft constitution included ‘by law’ clauses in major programmatic articles, thus explicitly delegating important issues to the legislature.²² Notably, the legislative implementation process would have left issues to a Congress that was far more conservative than the Assembly. And according to the transitional provisions, changes to the existing legislature would have been fairly gradual, with the existing Congress left in place for a long time. For example, replacement of the existing Senate with a new body called the Chamber of the Regions would have occurred only after four years.²³

The transitional provisions also called on the legislature to pass laws regulating key issues, and in some cases imposed timelines for legislative action. However, in almost all cases the transitional provisions did not impose any consequence on failure to meet the timeline, nor did it create any defaults or workarounds that would have allowed for alternative routes of implementation (such as unilateral presidential action).²⁴ In contrast, in Colombia, the 1991 constitution’s transitional provisions gave then-President Cesar Gaviria extensive executive powers to enact new laws by decree, and he used these powers to promulgate many of the building blocks of the new constitution.²⁵

¹⁷Ibid, art. 191.

¹⁸Ibid, arts. 34, 66, 79.

¹⁹Ibid, art. 309.

²⁰Ibid, arts. 24, 29, 55, 60.

²¹See Cecilia Román, ‘Constitucionalista Gargarella sobre el borrador: “Pone a Chile en la línea del modelo predominante en América Latina”’, Emol, 12 June 2022, available at <<https://www.emol.com/noticias/Nacional/2022/06/12/1063769/constitucionalista-roberto-gargarella-borrador-constitucion.html>>; see generally Roberto Gargarella, *Latin American Constitutionalism, 1810–2010: The Engine Room of the Constitution* (Oxford University Press, Oxford, 2013).

²²On by law clauses, see Rosalind Dixon and Tom Ginsburg, ‘Deciding Not to Decide: Deferral in Constitutional Design’ (2012) 9 *International Journal of Constitutional Law* 636.

²³See Chile Constitutional draft of 2022, art. trans. 13th(2).

²⁴See, for example, ibid, art. trans. 27th, stating that the President should present Congress Bills dealing with health in eighteen months, and education in 24 months, and that Congress should pass these laws within 24 months of presentation, but not providing any consequences for failure to act.

²⁵See Constitution of Colombia, art. trans. 5–6 (1991).

The Chilean draft's heavy reliance on legislative implementation combined problems of will and capacity. That is, the legislature almost certainly would have been unwilling to implement many of the provisions found in the draft; even if it had been willing, the sheer volume and detail of new legislation required would have taken many years, perhaps even decades.

Of course, the legislature is not the only body that can be involved in implementation. In Colombia after 1991, the new Constitutional Court played a protagonist's role, staffed with judges wielding a new conception of judicial role and armed with expansive new powers.²⁶ The Colombian Court issued several massive structural orders in cases where it found widespread violations of socioeconomic rights. We are sceptical, however, that a similar pathway would have emerged in Chile. The Chilean judiciary historically had a conservative reputation,²⁷ although in recent years that reputation has changed and the judiciary (particularly the Supreme Court) has developed a more progressive approach.²⁸

The draft constitution reflected ambivalence towards the Constitutional Tribunal, which would be renamed a Constitutional Court. The likely reason for this ambivalence was distrust, particularly from the left, towards the historic role played by the institution. The appointments mechanism for the Constitutional Court would have been overhauled, but the court would also have had its powers weakened by eliminating its *ex ante* review powers and limiting the scope of referrals to the court during concrete ordinary cases.²⁹ The Constitutional Court would have continued to exist, but it would not have been in a position to lead the transition. If anything, the changes seemed design to ensure that the Constitutional Court could not hinder the transition.

The draft Constitution would also have made significant changes to the ordinary judiciary.³⁰ Perhaps the most notable was the creation of a new Judicial Council with power over appointments, promotions and other matters.³¹ Further, the individual complaint mechanism (which could ultimately be heard by the Supreme Court) was strengthened and expanded to include a broader set of rights, including the social rights largely excluded from the existing instrument.³² Notably, the changes to the composition of the ordinary judiciary would have been gradual. The transitional provisions in the draft called for a rapid replacement of the personnel on the Constitutional Tribunal³³ but a more gradual transition in the rest of the judiciary, including the Supreme Court. Existing

²⁶See, for example, Manuel Jose Cepeda Espinosa, 'Judicial Activism in a Violent Context: The Origin, Role, and Impact of the Colombian Constitutional Court' (2003) 3 *Washington University Global Studies Law Review* 529; Manuel Jose Cepeda and David Landau, *Colombian Constitutional Law: Leading Cases* (Oxford University Press, Oxford, 2017).

²⁷See Lisa Hilbink, *Judges Beyond Politics in Democracy and Dictatorship: Lessons from Chile* (Cambridge University Press, Cambridge, 2007).

²⁸See G José Francisco García and R Sergio Verdugo, *Activismo Judicial en Chile: Hacia el Gobierno de los Jueces?* (Ediciones Libertad y Desarrollo, Santiago, 2013). For a close read of changing jurisprudence dealing with social rights on the Constitutional Tribunal, see Jaime Bassa Mercado and Bruno Aste Leiva, 'Mutacion en los criterios jurisprudenciales de protección de los derechos a la salud y al trabajo en Chile' (2015) 42 *Revista chilena de derecho* 215.

²⁹See Chile Constitutional draft of 2022, art. 378 (composition), art. 381.

³⁰For an overview, see Paola Truffello García and Denisse Espinace Olguín, *Los Sistemas de Justicia en la propuesta de nueva Constitución* (Biblioteca del Congreso Nacional de Chile, Santiago, 2022).

³¹Chile Constitutional draft of 2022, art. 342.

³²*Ibid.*, art. 119.

³³*Ibid.*, art. trans. 45th (requiring the conformation of the new Constitutional Court within six months and prohibiting the Constitutional Tribunal from hearing new cases).

personnel would have been left in place, while the newly lowered retirement age would not have applied to existing senior judges and the fourteen-year term limit on Supreme Court judges would have applied only prospectively, starting from the date of the new constitution.³⁴

Perhaps distrusting both of these classical routes of implementation – legislative and judicial – the political independents who played a large role in the Convention pushed towards a third, more novel route of implementation: the creation of non-judicial independent accountability institutions. The draft maintained long-standing, high-capacity bodies – particularly the Chilean Contraloría General de la República – largely intact. But it also added a plethora of new institutions, such as a general human rights ombudsperson (Defensoría del Pueblo), a specialized ombudsperson for children’s rights and a specialized ombudsperson for the rights of nature.³⁵ It also added other bodies, such as a national agency for the protection of data³⁶ and a national water agency.³⁷

Interestingly, these new institutions were not given a role in implementing the constitution in the transitional provisions (which again emphasized the legislature); indeed, they would need to have been created by Congress before coming into existence. The sheer number of these institutions, and the paucity of detail concerning them in the constitution, would suggest a problem. Some of these institutions may never have been created;³⁸ others would have struggled to build institutional capacity.

Thus, the 2022 draft reflects a systemic mismatch between the ambitions freighted on the text and its ability to implement those ambitions. Having said that, we do not want to ignore the structural changes that the draft would have brought, which may have caused durable changes to the orientation of the state. Some of the most important were changes to the basis in representation in the Congress. These include the reserved seats for Indigenous groups and the adoption of gender parity across all state institutions,³⁹ a change that is analysed elsewhere in this special issue.⁴⁰

A second dimension of utopianism relates to the interaction between a constitutional text and external constituencies, including political parties, civil society and the public. The Convention was elected at a peculiar moment, heavily impacted by the anti-party and anti-institutional ethos of the 2019 protests, and under unusual electoral rules (for Chile) that were very friendly to independent lists. The result was a Convention that was both far to the ideological left of the Congress and included a clear majority of independent delegates, despite Chile’s tradition of well-institutionalized parties.⁴¹ Analysts have pointed to the unusual electoral rules as playing a key role in spurring the problems

³⁴Ibid, art. trans. 40th.

³⁵Ibid, arts. 123–25 (general human rights ombudsperson); 148–50 (ombudsperson for nature); 126 (ombudsperson for children)

³⁶Ibid, art. 376.

³⁷Ibid, art. 144.

³⁸This happened to a number of institutions under the 1925 Constitution. See Eugenio García-Huidobro and Sebastián Guidi, ‘Bertoldo’s Court: Constitutional Delegation in the Design of Judicial Institutions’ (2021) 9 *Latin American Legal Studies* 127.

³⁹See Chile Constitutional draft of 2022, art. 161.

⁴⁰See Rosalind Dixon and Marcela Prieto Rudolph, ‘Parity Constitutionalism’ (2023) *Global Constitutionalism* (forthcoming).

⁴¹See Samuel Issacharoff and Sergio Verdugo, *The Uncertain Future of Constitutional Democracy in the Era of Populism: Chile and Beyond* (2023), available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4323864>.

produced by the draft, in part because they allowed a Convention composed of many delegates with very little or no prior political experience.⁴²

The draft achieved some goals of the centre-left Chilean parties, including making amendments easier, eliminating most supermajorities required to change certain laws and adding additional socioeconomic rights. But the overall vision was quite different, a point that can best be appreciated by comparing the 2022 draft with the Socialist President Bachelet's 2018 draft reform.⁴³ The latter draft emphasized the long-standing vision of the left-leaning parties to unlock electoral politics by eliminating the vestiges of Pinochet's countermajoritarianism, as well as replacing the neoliberal and Catholic emphasis of the 1980 text with a social democratic gloss. The 2022 draft, in contrast, reflected considerable distrust of popular institutions, and moved beyond social democracy to engage identity issues. The think-tanks within the established parties had little influence over the 2022 process.⁴⁴

Many of the ideas in the far more complex 2022 draft came instead from the grassroots civil society organizations that sprang up after the protests. These organizations acted as conduits on particular issues, such as the environment (an area of activism from which many delegates were drawn). But at least some of this organization proved ephemeral as the energy behind the protests waned. The traditional parties reasserted themselves, and substantial elements of the Chilean centre and even left showed hostility (or indifference) to the new draft ahead of the September 2022 referendum, contributing to its defeat. Even if the draft had survived the referendum, the persistence or re-emergence of strong parties would have made implementation very challenging.

The referendum also provided evidence that there was a mismatch between the draft and the views of the general public. Several provisions became flashpoints of controversy, including some rights of Indigenous groups, such as restitution of land and prior consultation, the vaguely defined and open-ended right to abortion and even provisions dealing with the healthcare, pension and education systems, which opponents framed as threats to middle-class entitlements.⁴⁵ Ironically, these provisions were written in

⁴²See, for example, Javier Couso, 'Tras el fracaso constitucional, Chile quiere justicia social con gradualidad', *Democracia Abierta*, 11 October 2022, available at <<https://www.opendemocracy.net/es/fracaso-constitucional-chile-quiere-justicia-social-gradualidad>>.

⁴³See Presidente de la Republica, Boletín No 11.617-07, Proyecto de Reforma Constitucional (2018).

⁴⁴Consider the proposal prepared by the right-wing Libertad y Desarrollo think-tank, which had similarities on key points to the Bachelet proposal (and referred to it extensively), but was radically different from the Convention's draft. See Marcela Cubillos et al. (eds), *Con Control de Cambios: Construyendo Propuestas Constitucionales desde la Perspectiva de una Sociedad Libre* (2021), available at <<https://www.plataformaconstitucionalcep.cl/monitor/con-control-de-cambios-construyendo-propuestas-constitucionales-desde-la-perspectiva-de-una-sociedad-libre>>.

⁴⁵See, for example, Paula Molina, 'Triunfo del "rechazo" | La (aparente) paradoja de Chile: 3 razones para entender el no a la nueva Constitución cuando casi el 80% estaba a favor de cambiarla', *BBC News Mundo*, 5 September 2022, available at <<https://www.bbc.com/mundo/noticias-america-latina-62790749>>; Javier Couso, 'Making Sense of Chile's Failed Constituent Process', *International Journal of Constitutional Law Blog*, 4 October 2022, available at <<http://www.iconnectblog.com/2022/10/making-sense-of-chiles-failed-constituent-process>>; Guillermo Pérez, 'The Illusion of Indigenous Representation', *International Journal of Constitutional Law Blog*, 29 September 2022, available at <<http://www.iconnectblog.com/2022/09/the-illusion-of-indigenous-representation>>; Sergio Verdugo, 'The Paradox of Constitution-Making in Democratic Settings: A Tradeoff between Party Renewal and Political Representation?', *International Journal of Constitutional Law Blog*, 24 September 2022, available at <<http://www.iconnectblog.com/2022/09/the-paradox-of-constitution-making-in-democratic-settings-a-tradeoff-between-party-renewal-and-political-representation>>.

ambiguous enough terms that it is likely they could have been moderated considerably by the Congress during implementation.⁴⁶ Regardless, the ambiguity became a weapon to activate the fears of opponents of the draft.

The existence of at least some of these provisions may have indicated, again, that most members of the Convention acted on a political position that was very different from that held by the median voter in Chile. At the very least, it suggested that the members of the Convention lacked a strong sense of what their fellow citizens would support at a national referendum.

IV. Conclusion

In this article, we have sought to use the failed 2022 Chilean draft to clarify the difference between a transformative constitution and a utopian one. Utopianism, we argue, is produced not so much by the ambition of a draft as by, first, the link between rights and other goals, and institutional pathways to carry out those goals, and second, the fit between a draft and support by key actors such as political parties, civil society and the public.

The Chilean process is not over. In a twist, elections to the Constitutional Council in the new process were dominated by the ideological right, which will now work with a draft prepared by a congressionally selected Expert Commission under complex procedural rules. Whether the new draft, and the design of the new process (which, for example, used very different electoral rules from the last effort) will be sufficient to cure the problems we have identified here remains to be seen. In an ironic twist, the very failure of the first process may have fed a dynamic where the new Constitutional Council is again misrepresenting Chilean society, in this case by swinging too dramatically to the right.

Beyond Chile, our analysis of utopian constitutionalism suggests a broader research agenda, which we intend to carry out in subsequent work. One line of questioning treats the relationship between the context in which constitution-making is carried out, as well as its procedural rules and the problem of utopianism. One observation is that constitutional replacement in a democracy is often carried out in times of crisis, which increasingly seems to mean when political parties have lost legitimacy and power in a polity. Hudson finds that popular participation has the most influence in these contexts, precisely because the parties are not there to act as conveyors of ideas.⁴⁷ His leading example of such influence, the Icelandic draft, never even took effect because the parties killed the draft in the ordinary legislature. Designing a process so that it provides links between the constitution-making body and key stakeholders is important – perhaps particularly so when constitutions are being made in times of deep political crisis.

Perhaps even more pressing is an analysis of the pathologies of modern transformative constitutionalism, which can transmute into utopianism. The Chilean 2022 draft Constitution is arguably the most transformative-laden text ever produced. Its failure ought to be sobering for those committed to the writing and implementation of constitutions for transformative goals. Much constitutional discourse, in Latin America and elsewhere, has

⁴⁶See David Landau, 'The New Chilean Constitutional Project in Comparative Perspective', *International Journal of Constitutional Law Blog*, 16 July 2022, available at <<http://www.iconnectblog.com/07/16/the-new-chilean-constitutional-project-in-comparative-perspective>>.

⁴⁷Alexander Hudson, *The Veil of Participation: Citizens and Political Parties in Constitution-Making Processes* (Cambridge University Press, Cambridge, 2021).

focused on an ever-expanding, ever more ambitious catalogue of rights, but more attention in transformative projects must be placed on selecting and improving the pathways through which transformation is to be carried out. This involves more than simply pointing towards the 'engine room' of constitutions⁴⁸ – it requires better work to link substantive goals with institutional pathways for carrying out authentic change.

⁴⁸See Gargarella (n 21).