Constitutional Debate in Chile

Replacement through Amendment?

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Abstract: This article is a response toward George Tsebelis' argument (2018) concerning the incentives for constitutional replacement in Chile. It suggests that Tsebelis' model may work better to explain dynamic of constitutional reforms than dynamic of replacement. As some authors have addressed, this article suggests that there are some crucial exogenous conditions of the constitutional-institutional realm that may influence the possibility of replacing a given constitution and such conditions are not present in the case of Chile. Therefore, Tsebelis' model may help us to analytically explain the space of decision of actors who may have predefined incentives in a context of a "normal" institutional setting. To respond to the question of why some actors are willing to change the *statu quo* in a context of pre-fixed incentives, this articles suggest three of them: actors' perception of the future costs of maintaining the *statu quo*, the game of power between the Executive and the Legislative, and changes in the balance of power triggering the need for change of crucial aspects of the Constitution.

Keywords: constitutional change, 1980 Constitution, Chile, political system, constitutional theory.

Debate constitucional en Chile: ¿Reemplazo vía enmienda?

Resumen: En este artículo se discute el argumento desarrollado por George Tsebelis (2018), quien propone un modelo para entender el reemplazo constitucional en Chile. Se

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sostiene que ese modelo funciona de mejor modo para explicar ciclos de reforma que propiamente de reemplazo. Tal como algunos autores han indicado, se señala que existirían ciertas condiciones políticas exógenas a las normas constitucionales que posibilitarían una transformación sustantiva y son aquellas condiciones las que están ausentes en el caso de Chile. Así, el trabajo de Tsebelis analíticamente nos permitiría modelar el espacio de decisiones en un contexto donde los actores tienen incentivos predefinidos y las reglas del juego son relativamente constantes. Para responder a la pregunta de por qué los actores políticos muestran disposición a cambiar el *statu quo* en un escenario de "normalidad", se sugieren tres factores: la percepción de los actores de veto de eventuales costos futuros de mantener el *statu quo* vigente; el juego de poder Ejecutivo-Legislativo, y la politización de la Constitución en la medida en que cambios en la distribución de poder activan reformas que tocan aspectos cruciales de la misma.

Palabras clave: cambio constitucional, Constitución de 1980, Chile, sistema político, teoría constitucional.

George Tsebelis proposes a suggesting model to rationalise a fact seemingly ever more evident in light of the events of the last three years in Chile: the replacement of Pinochet's Constitution seems very improbable. Tsebelis' model is built up from a series of institutional factors (locks or locking mechanisms), combined with the interests of change resistant political actors. If veto players do not manifest an interest outside the *statu quo*, the probability of change is nonexistent given the current institutional setting.

In this article I address three dimensions emerging from Tsebelis' work: the theoretical debate about constitutional replacement and amendment, the link between Bachelet's proposal and Tsebelis' model, and the incentives for the political actors to amend the Constitution.

Replacement or amendment theory?

Tsebelis' work starts by wondering about the probability of replacing the Constitution in Chile as it was proposed in its programme by the second Michelle Bachelet administration (2014-2018). But as the probability of replacing the Constitution depends on the amendment mechanisms included in the Constitution itself, the analysis of such norms becomes a key aspect for the author. Given that the amending norms require the highest levels of political agreement (or quorums), the probability of generating any substantial change is very low.

Indeed, in Chile, any reform to the constitutional text requires a 3/5ths quorum of the deputies and senators on duty, and 2/3rds for certain special

chapters. It would be convenient to note that the latter are precisely where the main subjects of political controversy reside, as they address the foundations of institutionality (Chapter I), constitutional rights and duties (Chapter III), Constitutional Court (Chapter VIII), Armed Forces (Chapter XI), National Security Council (Chapter XII), and constitutional reform (Chapter XV).

Tsebelis notes the existence of an additional mechanism that seeks to solve eventual power conflicts between the Executive and the Legislative. Article 128 states that if the President rejects a reform totally approved by both chambers, and the Congress insists on it with 2/3rds in both chambers, the President "must enact said project, unless the citizenry is consulted by means of a plebiscite". It is also stated that in case of partial disagreement, the President will be able to consult the citizenry. Yet, the author immediately notes that due to political reasons, a President will hardly want to confront a substantial 2/3rds majority in the Congress, therefore rendering a plebiscite very improbable.

Besides, the Constitution takes into consideration a series of constitutional organic laws with a special 4/7ths quorum in both chambers, which also include key aspects of the political debate, such as the electoral system, the teaching bill, the political parties bill, the mining concessions, general foundations for the management of the state, the National Congress bill, the Power bill, the state of emergency bill, the Constitutional Court, Regional Councils, Military Justice, and the Central Bank, among other subject matters.

While from a strictly institutional/legal point of view replacing the Constitution is directly related to the amending mechanism, it would be convenient to ask if an analytical distinction is possible. In other words, if the incentives logic at work in amendments would apply to a total replacement as well. For reasons explained below, I believe that the model proposed by Tsebelis works better when confronted with constitutional reform processes than with replacement ones.

The literature —to my mind correctly— has distinguished between the conditions and factors that make possible a replacement, and those that favour an amendment, for two reasons. Firstly and most evidently, the magnitude of the transformation. When speaking of replacing the totality of the Constitution, the political actors start to discuss a large set of political and social power relationships that eventually modify the perceptions and incentives of society at large. This does not happen in more narrow situa-

tions, where the amendments concern a more particular set of interests and actors. Secondly, when political actors debate a total replacement process, the substantial debate of who (a convention? an assembly?) will be in charge of carrying out such changes usually takes place, while during amendment processes such a matter is not included in the debate, as the congressmen themselves are in charge of the reform. While in the replacement debate uncertainty prevails, in the reform debate certainty reigns supreme.

The above has forced the authors to distinguish between replacement and amendment processes, and to theorise about the way in which they influence one another (Elkins, Ginsburg and Melton, 2009; Negretto, 2012). Gabriel Negretto (2012) develops a constitutional replacement theory highlighting certain Constitution-exogenous conditions that may favour its replacement, including deep institutional crises, extreme conflicts between Executive and Legislative, and transition into democracy processes —although to a lesser extent. Negretto adds an institutional factor on account of the increased probability of a constitutional replacement when the political actors in power cannot use the reform instruments to alter the Constitution, and when the Constitution is designed with a high concentration of power. In the case of amendments, the author explains that certain conditions inherent to the Constitution (its extension and level of detail), the rigidity of the reform process, and the level of fragmentation of the party system would play as core factors for the transformation.

If we accept those premises —*i.e.*, that there are certain Constitution-exogenous and endogenous conditions that make a constitutional replacement possible—, Tsebelis' analysis would take into consideration an important but partial aspect of the history of constitutional replacement. As it considers in detail the institutional conditions for replacement —and no other exogenous variables—, Tsebelis' model necessarily predicts a certain kind of results strictly related to the institutional/legal conditions of change. For the same reasons, Tsebelis' model could prove very useful for explaining amendment processes given certain institutional conditions and incentives provided by the actors. But it tells us little about other Constitution-exogenous conditions that could prove to be relevant under certain conditions.

In trying to answer if it is possible to replace Pinochet's Constitution, Tsebelis claims that institutional locks are so massive that unless a political compromise is achieved, the feasibility of success is virtually null. While agreeing with that claim, it would be convenient to analyse a question prior

to the discussion of the reform process: Why did the Bachelet administration, knowing that the opposition did not want to replace the Constitution, insist on proposing a reform to the chapter on reforms?

As Tsebelis is interested in a particular trajectory (replacing the Constitution through the modification of the constitutional amendment mechanism), his conclusions are limited to this sub-set of strategic and institutional incentives to modify the Constitution. Thus, even though Tsebelis' theory is of great help in explaining the constitutional reform process —even if it concerns the chapter linked to the amendment process—, such a model is less useful to anticipate more general conditions that would make a constitutional replacement possible. The latter aspect will be analysed below.

Why seek to replace the constitution knowing there is no chance of success?

As usually Constitutions do not establish a formal self-destruction and resetting mechanism, Negretto (2017), in light of comparative experience, suggests that in democratic contexts two ways of replacement exist: the first path goes through a political agreement to amend de constitutional reform procedure, establishing in its place a specific replacement mechanism. Such was Bolivia's path (2009). The second way is generating a parallel mechanism based on a political compromise between the political actors or on unilateral decisions of the Executive (Colombia in 1991, Ecuador in 1998, or Venezuela in 1999, amongst others).

In the case of Chile, we need to explain the following paradox: knowing the institutional and political difficulties properly described by Tsebelis, President Bachelet nonetheless sought to replace the Constitution through a totally impracticable path. Despite not having a large enough majority in Congress and despite the massive existing legal barriers, her administration tried the apparent "political suicide" of promising a constitutional change that would not happen. Why?

When she introduced her government programme, President Bachelet promised to establish a new Constitution through a "democratic, institutional and participatory" procedure (Bachelet, 2013). In that occasion, she did not specify exactly which mechanism would be used. It must be noted that such a definition was not free of controversy, as in the middle of the presidential campaign, her constitutional advisers confronted an intense debate about the best path to a constitutional replacement.

The socialist party lawyer Fernando Atria, who was a member of the programmatic committee on these matters, claimed that it was impossible to replace the Constitution following the procedures established by the Constitution itself: "Thus, first of all, it must be understood that there will be no solution to the constitutional problem unless some sort of constitution comes from the outside (...)." (Atria, 2013). Atria stated that as Pinochet's Constitution gave veto power to the rightwing minority, it was delusional to claim that a constitutional replacement was possible using the rules of the Constitution itself. Although he did not suggest a specific solution, he did suggest some sort of political action that did not need to be institutionally valid, but would not be illegal either. For example, he imagined a scenario where the President-elect would summon the more than one thousand elected municipal councillors to a Great Assembly to ask them for a Constitution proposal.

Afterwards, Atria put forward a proposal at the Bachelet command's programmatic committee, with which she would be able to call for a plebiscite through a decree in order to summon a Constitutional Assembly. According to this argument, Article 93 No. 5 of the Constitution explicitly states that the Constitutional Court is in charge of "solving any question that arises on constitutionality regarding the calling for a plebiscite, without harm to the responsibilities of the Election Judging Tribunal". Section No. 16 of the same article adds that such a resolution request could be called for "by petition of the Senate or the Chamber of Deputies, within ten days of the publication date of the decree stating the day of the plebiscite" (Constitution, 1980). That is to say, if the President called for a plebiscite and the Chambers did not object before the Constitutional Court, such an initiative could come through.

Right-wing and moderate centre political sectors criticised these options, considering them unfaithful to the Constitution. They noted that Article No. 15 of the Constitution stated the circumstances for calling for a plebiscite, and that the presidential attribution was not included (*El Mercurio*, 2013). Regardless of the legal debate, it is interesting to highlight the political division caused when moving forward the constitutional replacement; one sector suggested political options seeking a parallel path, while others suggested keeping to the constitutional/legal outline (see proposals in Fuentes and Joignant, 2015).

When Bachelet took office in March 2014, she arrived with the support of 64 per cent of the voting citizenry. Nevertheless, the combined forces of

the centre-left only managed taking hold of 53 per cent of the Senate and 58 per cent of the Chamber of Deputies. That is, she had political support enough to approve simple quorum reforms, but she needed to establish political compromises if she wanted to advance reforms to organic laws or more substantial constitutional reforms that required above 60 per cent of support in both chambers.

In October 2015, Bachelet proposed a constituent itinerary comprising three stages: firstly, the civic participation stage, establishing self-summoned meetings and non-binding regional councils to discuss the main aspects that a Constitution should take into consideration (2016); secondly, the reform stage, where the Congress would reform Chapter XV, on reforms to the Constitution (2017); and thirdly, the decision stage in 2018, where a new National Congress would have to decide the mechanism through which to change the Constitution.

In other words, the choice made by the Bachelet administration was what has been called the "institutional path" of seeking a political compromise through the amendment of the chapter on reforms to the Constitution. In April 2017, the President sent the Congress a draft bill to reform Chapter XV, noting that with a 2/3rds consensus among the representatives in both chambers in office, Congress would be able to summon a Constitutional Convention, which would in turn provide a new Constitution. The draft bill states that an organic law approved by Congress will have to regulate the means of the summoning, integration, functions, attributes and civic participation mechanisms of the Constitutional Convention. It is stated that the way of integrating the Convention —the appointing and electing system for its members— will require a 3/5ths approving vote from the deputies and senators in office. It is also defined that the matters dealt with by the Convention will need a 3/5ths and 2/3rds approving quorum, as stated in the current Constitution. Any subject not included in the draft bill will require a 2/3rds approval from the Convention members. The Convention's proposal will need ratification from the citizenry by means of a plebiscite (Mensaje, 2017).

Thus, the Bachelet administration, facing the quandary of replacing the Constitution through a parallel path or through the amendment of the reform procedures, chose the latter. Nevertheless, once having made this decision, they proposed that the current Congress and the eventual Constitutional Convention should act according to the special quorums defined by the Constitution itself. Returning to Tsebelis' model, the framework of

possibilities would be reduced to a known space (Figure 5 in Tsebelis, 2018: 11), and, as noted by the author, it would be very unlikely that the limitations imposed by Pinochet's Constitution could be overcome in such a context. Indeed, right-wing parties questioned the civic participation procedure, and have rejected the idea of approving a reform to Chapter XV (Fuentes, 2016). The presidential candidate of the right-wing coalition, Sebastián Piñera, has spoken in favour of executing certain reforms to the Constitution, but does not approve of a replacement.

The reason behind the presidential decision to persist in such a path and thus limit her political goals is linked to the distribution of power, the political and social climate, and the policy menu available to the different actors (*ideational framing*). From a balance of power point of view, the new administration knew that certain political sectors in its own coalition rejected the idea of establishing a Constitutional Assembly. While everyone agreed on the idea of establishing a new text, some sectors amongst the Christian-Democracy, the Party for Democracy and the Socialist Party suggested that such a transformation should be done through the National Congress. Some sectors among the coalition suggested for a bicameral commission to discuss and approve the new Constitution (Fuentes and Joignant, 2015). Then, despite having a broad electoral support upon taking office, Bachelet did not have the political support of the parties and representatives of her own coalition. Besides, Bachelet did not have any social movement or organised civil society constantly pressing for the establishment of a new Constitution either. The movement "Brand Your Vote", which called for the branding of the ballots by writing "AC" (for Constitutional Assembly, in Spanish) in the 2013 election achieved, according to its own records, 8 per cent branded votes (some five hundred and thirty thousand votes). On top of it, after Bachelet's inauguration, the citizenry manifested pretty divided stances regarding the profundity of changes to the Constitution.[1] Thus, the political power correlation did not allow for a more radical proposal, as it did happen in other Latin American countries.

We must add to the above a political and social climate that did not necessarily make such a change essential. While the citizenry manifests high distrust levels towards the political system and a substantial drop in elec-

[1] The Diego Portales University National Poll recorded in 2015 that 45 per cent of the citizenry thought that a new Constitution was needed, while 34.5 per cent stated that they preferred only reforms to be made. Out of those who preferred a new Constitution to be written, 69 per cent preferred it to be done through a Constitutional Assembly.

toral participation had been taking place (from next to 90% in 1990 to little less than 50% in 2013, in national elections), such a mood has not yet generated a deep and definitive political and social crisis climate, as it occurred in other regions (*e.g.* Colombia 1991, Venezuela 1999, Bolivia 2006-2009). A substantial progress in the standard of living during the last two decades can be observed, and the crucial unemployment, inflation, and poverty variables do not show worrying signs. Therefore, the perception of a pressing institutional change as a response to an eventual crisis is not observed.

Finally, there is a *framing* dimension to the debate relevant to all of the political actors that has been highlighted by the literature (Braun, 2009). When applied to Chile, it becomes relevant to note that virtually all of the political and social actors agree to the premise that any change should be made respecting the current institutionality —despite the fact that the Constitution was imposed by a dictator through evidently illegitimate means (Fuentes, 2013). The idea of "respect for legality" and for the Constitution is a result of the harsh pre-putsch political conflict, and it has become a determining factor. When Pinochet illegally imposed the 1980 Constitution, the opposing parties debated the matter and admitted that any political solution would require that the validity of some form of legality should be recognised, even if it was itself illegitimate. In 1984, the then-leader of the Christian-Democracy, Patricio Aylwin, claimed that in order to move forward in the transition towards democracy, the matter of the illegitimacy of the Constitution should be "deliberately avoided" (Fuentes, 2012). The above implied accepting that any change should proceed within the current institutional framework. The idea of transforming the rules of the game within the Constitution itself is something agreed upon by virtually all of the political actors that have some parliamentary representation.

On the other hand, another source of ideational framing is the permanent reference to comparative experience. Those who reject the establishment of a New Constitution through a Constitutional Assembly note the negative destabilisation experiences suffered in Ecuador, Bolivia, and particularly in Venezuela. The anti-replacement political discourse is founded on the social, economic and political uncertainty level that a process including a not-necessarily-informed-on-the-meaning-of-the-Constitution citizenry would cause, and Venezuela remains a constant reference (see Arriagada, Burgos and Walker, 2017).

The absence of a political consensus within the governing coalition, a nonexistent social movement pressing for radical changes, and framing fac-

tors keeping the political actors attached to a certain "way of doing things" constitute the reasons behind the path chosen by Bachelet. Not having a substantial political support, the Bachelet administration made a proposal framed within the traditional "way of doing things", allowing veto players to keep playing their role precisely because she wanted to involve them in the constitutional replacement process. The Bachelet administration's secret hope was that a change of mind would be generated in the veto players through an inclusive mechanism, just as Tsebelis states in Figure 6 (Tsebelis, 2018: 23).

Why did modifying the Constitution become politically relevant?

Tsebelis is right in noting that in an institutional setting where a minority exerts broad veto powers, any constitutional amendment becomes very unlikely without their approval. Why then would veto players agree to modify the constitutional *statu quo*?

Chile is an interesting case precisely because progressive modifications to the Constitution that have always required veto players' support have been observed. A first explanation, quoted by Tsebelis, refers to the strategic calculation of the actors, noting that the current institutional design could harm them in the future. Anticipating eventual future costs, veto players open up to changes in the rules of the game. But during the negotiations, such actors will seek to guarantee their veto power through a new institutional design that would enable them to exert the same or greater influence. That is precisely what happened during the 2005 reform, when the veto players accepted the removal of appointed senators, but broadened the powers of the Constitutional Court. This formula guaranteed their control over the modification of the constitutional process while not necessarily needing a majority in the Congress (Fuentes, 2015). This explanation strictly relies on the costs and benefits of political forces disputing power in order to control the political process.

But a second incentive source comes from the tensions between Executive and Legislative. Since the return to democracy, cross-party agreements have emerged between right-wing, centre, and left-wing political actors, who have proposed reducing the power of the Executive and increasing the power of the Legislative. Such a political interests junction allowed, to a certain extent, the generation of constitutional changes in 2005, such as removing the extraordinary legislative period —where only the Executive

could present draft bills—, establishing the institution of state ministers interpellation, and strengthening the inquiry on the activities of the Executive. From a long-term perspective, we notice that the same centralisation of powers in the Executive and the decentralisation of power towards the Legislative logic became evident after the establishment of the 1833, 1925 and 1980 constitutions. Here, the source of the conflict does not lie in parties with a relative majority v. veto players, but in cross-party groups that do not necessarily have privileged access to control the Executive v. those that do (Negretto, 2001; Fuentes, 2012). For the same reason, it is no surprise that during 2017 two initiatives cross-supported by right-wing, centre, and left-wing representatives have already been submitted to the Chilean Congress, one seeking to establish a semi-presidential system and the other seeking to increase the powers of the Legislative relative to the Executive Power.[2]

A third commonly accepted explanation on the political level is the symbolic weight of the Constitution. Its argument notes that the pro-constitutional replacement forces organise their discourse around the "symbolic value" of changing Pinochet's Constitution. The above would allow the pro-change forces to gather around a common goal and rekindle the traditional democracy *v.* dictatorship divide. While Tsebelis does not go to great detail on this argument, he does give Bachelet's initiative to change the Constitution a more symbolic value in some of his assessments, adding that the "discussions involving social rights may have symbolic value, but we have to remember that the constitution of a country is not the place to include good ideas, but workable compromises". He claims in his introduction that Bachelet's proposal to change the Constitution is "an understandable ambition for symbolic reasons (given that the current constitution had been adopted under the Pinochet dictatorship)".

Are we looking at a merely symbolic incentive to draw together the anti-dictatorship forces? Or are there other elements at stake? If the Constitution only holds symbolic value, why promote a change?

In addition to the strategic incentives of the actors and the already portrayed Executive-Legislative dynamics, another potential answer can be found in the contents of a particular Constitution. In Chile, the constitution

[2] On this subject, see Senate Bulletin No. 11.237-07, which modifies de Constitution in regards to the presidency of the Council of Ministers and the replacement of deputies and senators appointed to state ministers; and the deputies' reform proposal to modify the Constitution, "The agreement in the Chamber to modify the Constitution", *La Tercera*, July 23rd, 2017, available at: http://www.latercera.com/noticia/acuerdo-la-camara-reformar-la-constitucion/ [accessed on July 25, 2017].

does not only define the political distribution of power between the particular state institutions, but also circumscribes a series of aspects linked to the social and economic relationships, including the state's limitations for public entrepreneurship, the voluntary nature of unionising, the right to water, the right to life of "those not yet born", amongst others. Just as Tsebelis states at the end of his paper, the Constitution spreads its dominion through the so-called organic laws, which consider a broad range of fundamental matters to social life. Thus, the politicisation of the constitutional debate is not explained as much by the historical symbolism of having been born in a dictatorship, but more importantly, by the social contingency subjects that have a constitutional dimension to them (*e.g.* water and abortion rights), which alter the rules of the constitutional game (*e.g.* direct election of regional governors), or which require a high quorum for reform (Education bill, labour reform, retirement system reform, amongst others). Inasmuch as political forces managed to conquer greater spaces of power, they also generated the conditions for debating subjects that gained a greater constitutional value. The above stimulated the activation of constitutional-related arguments by each one of the subjects included in the agenda.

Bachelet's most recent legislative proposal had precisely that effect. The government presented a legalisation of abortion project, under three cases (when the mother is in danger, when the foetus is unfeasible, and when the pregnancy is the result of a rape). The project was approved by both Chambers in July 2017. Nevertheless, the veto players —in this instance more conservative— called for the Constitutional Court to declare it unconstitutional. As the Court consists of 6 conservatives and 4 centre-left members, an eventual rejection of the regulation is expected. The important thing to note is that the case has opened a political debate about the powers of the Constitutional Court, its composition and the selection mechanisms for its members. The president of one of the main right-wing parties, National Renovation, opened up to the possibility of making changes to the Constitutional Court, stating that

> it does not seem proper to use the Constitutional Court to solve political conflicts […] When norms have been violated, (the Constitutional Court) is a tool to be used […]. The Constitutional Court is an institution to be watched. I think it has some boastful powers. If it can, for example, repeal complete bills, if it can say 'this bill is null' […]. And the designation system should be revised as well […]." (Monckeberg, 2017).

Synthesising the original argument, it seems relevant to distinguish between conditions for constitutional replacement and conditions for constitutional amendment. There are contextual conditions —exogenous to the constitutional norms— that enable a more radical or substantial transformation. Such conditions are not present in Chile: President Bachelet did not have a significant majority in favour of replacement, there was no social movement relevantly pressing for change, and a terminal crisis of the political system perception was not present either. Thus, Tsebelis' work would allow us to analytically model the decision space in a normality context, *i.e.*, in the context of a reform process where the actors have pre-defined incentives and the rules of the game are relatively constant. We suggest as well that in order to answer the question regarding why political actors are ready to cooperate when the rules of the game are kept constant, we can think of three sources of cooperation stimulation: the veto players' perception of eventual future costs of maintaining the current status quo; the executive-legislative game; and the politicisation of the Constitution inasmuch as changes in the distribution of power boost reforms that touch on crucial aspects of the Constitution. Thus, we suggest that a theory of institutionally mediated incentives, which make changes to the distribution of power, influence the order of preferences and redefine the framework of the politically feasible is needed. PG

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