

## LEGAL UPDATE NEWSLETTER

### FIRST DRAFT OF CHILE'S PROPOSED NEW CONSTITUTION

May 2022

On May 14, 2022, the Plenary of the Constitutional Convention finished voting on the constitutional articles that were pending, and a draft of the new constitution was approved. The draft includes 499 articles so far, with all the approved articles organized by committee and collected in a single document. The articles are numbered in relation to each committee's respective reports, but this is not necessarily the final order.

Currently, a Harmonization Committee composed of 40 delegates is reviewing the articles approved to ensure the technical quality, consistency, and coherence of the text, and identify any potential inconsistencies in the approved content. Therefore, the number of articles may be reduced considerably. That committee has until June 9th to submit its report with recommendations for changes or adjustments to the draft of the new Constitution, without altering its content. These changes will be reviewed and voted on by the Convention Plenary in a final round of voting, after which the final text will be presented to Chile on July 4th for its later ratification by referendum.

**This newsletter provides a short summary of key aspects of the draft, particularly those related to foreign investment in Chile. The draft is still in preliminary form, as its review by the Harmonization Committee and final approval by the Constitutional Convention Plenary are still pending.**

#### Constitutional principles

The draft affirms that Chile is a **“social and democratic state governed by the rule of law. It is plurinational, intercultural and ecological.”** The country is constituted as a Republic of solidarity, its democracy is representative, and it recognizes as intrinsic and inalienable values the **dignity, freedom, substantive equality of human beings and their indissoluble relationship with nature.**

The State has the duty to create the necessary conditions and provide the goods and services **to ensure the equal enjoyment of rights** and the inclusion of its people in political, economic, social and cultural life.

People **are born and remain free, independent, and equal in dignity and rights.** The State must respect, promote, protect and guarantee the fundamental rights recognized in the Constitution and in the international treaties ratified by Chile and currently in force.

**Sovereignty resides in the People of Chile, which is composed of different nations,** and is exercised democratically, directly, and through representatives. The exercise of sovereignty recognizes respect for human rights as a limit.

The Constitution grants **all persons substantive equality,** guaranteeing equal treatment and opportunities in the recognition, enjoyment, and exercise of human rights and fundamental freedoms. It also ensures substantive



equality of gender, mandating the guarantee of equal treatment and conditions for women, girls, sexual diversities and sex-gender dissidences. Furthermore, the State **recognizes and protects families in their diverse forms, expressions and ways of life.**

Persons and peoples are **interdependent with nature and form an inseparable whole with it.** Nature has rights and the State and society have the duty to protect and respect them. To this end, the State shall adopt an ecologically responsible administration and promote environmental and scientific education.

The text also recognizes a series of overarching principles, such as ***buen vivir* (good living), environmental responsibility, the integration of international human rights law, interculturality, probity and transparency, the supremacy of the Constitution and the Law; and fiscal sustainability and accountability.**

**The proposal states that the Chilean State is secular,** and so it respects and guarantees freedom of religion and spiritual belief. It is also a **plurilingual state;** its official language is Spanish, and the languages of its indigenous peoples shall be official in their territories and in zones with a high population density of each indigenous people.

## State form

The draft affirms that **Chile is a regional, plurinational, and intercultural State** composed of **autonomous territorial entities**, preserving the unity and integrity of the State. This means it has the duty to promote the **cooperation, harmonious integration, and appropriate and fair development** of its diverse territorial entities.

The State is organized into **autonomous regions, autonomous municipalities, autonomous indigenous territories, and special territories.** Autonomous territorial entities are legal entities with their own assets, and the political, administrative, and financial autonomy to pursue their objectives and interests. **In no case shall that autonomy threaten the single, indivisible nature of Chile.**

**Peoples and nations that existed prior to the Chilean State shall be consulted and their free, prior and informed consent obtained** regarding matters or issues that affect their rights as recognized in the Constitution.

The State may transfer **to the autonomous entities those powers that are subject to transfer.** The Law shall establish the procedure for resolving conflicts of powers between the State and territorial entities, and these will be heard by the Constitutional Court of Justice.

The institutional framework of **autonomous regions** comprises **the Regional Governor and Regional Assembly.** Each of these regions shall establish its own Regional Statute, which will address how it will be organized and how it will function. **A Council of regional governments** shall be established that will be chaired by the President of the Republic and comprised of regional governors.

The governance of the **autonomous municipality** resides with the municipality, comprising the **Mayor and Municipal Council.** Each municipality shall have a municipal statute prepared by the Municipal Council and laying out its organization and functioning. Additionally, a **Mayors' Council** will be created, composed of the mayors of all the respective municipalities and cities in the autonomous region. The Autonomous Municipalities may **establish enterprises or participate in them, individually or in partnership** with other public and/or private entities.



The **Autonomous Indigenous Territories** are territorial entities with legal status and their own assets, in which indigenous peoples and nations exercise their right to autonomy in coordination with other territorial entities. **The procedure for constituting such entities and their powers** will be established by law. Lastly, the **Special Territories are Rapa Nui and the Juan Fernández Archipelago**, although others may be established by law by virtue of their particular geographic, climatic, environmental, economic, social and/or cultural qualities and separate economic and/or administrative regimes may be set up.

## Government Regime and Political System

A **presidential government regime** is proposed, with some changes in relation to the present Constitution. Broadly speaking, the Executive Branch would be led by the President of the Republic, who is elected by **direct vote every four years, with the possibility of immediate or later reelection for a single additional term**.

A **two-chambered legislative Branch is envisioned**, composed of the **Congress of Deputies** and the **Chamber of Regions**. The Congress of Deputies shall consist of no less than 155 members, elected by direct vote according to electoral district, while the Chamber of Regions will consist of the number of regional representatives defined by law, with a minimum of three per region.

**Both chambers will be involved in formulating the law, but each with their own particular attributions.** All legislative bills will first be processed by the Congress of Deputies, having been initiated by a message from the President of the Republic, a motion from the congressional deputy or deputies, or regional representative(s).

The Chamber of Regions **will only deal with bills approved by the Congress of Deputies involving matters requiring regional approval**. Among others, they include the following: bills reforming the Constitution; those governing justice systems, the Legislative Branch, and autonomously constituted entities; those governing states of constitutional exception; those that create, modify or extinguish taxes or exemptions; those that directly cost expenditure to the State, whose implementation corresponds to territorial entities; and those authorizing territorial entities to create public enterprises.

The President of the Republic retains the authority to **initiate legislative bills. However, the figure of exclusive initiative is replaced by a mechanism of presidential concurrence**. This means that laws on certain types of matters can only be passed if the President sponsors them while the bill is being processed. These include the following: those that incur direct expenses for the State; those related to the administration of the State budget; those that alter the country's political or administrative division; those related to taxation; those that commit or authorize the State to enter into loan agreements; and those that deploy, organize or distribute the Armed Forces.

The **President also retains the authority to enact regulations, decrees and instructions** necessary for the implementation of the law, and regarding non-legal matters. The President may also request authorization from the Congress of Deputies to enact **decrees with force of law** for a period not greater than one year, regarding matters of law.

The general rule is that legislative bills must be passed by a **simple majority of the members present in the Congress of Deputies**. Laws regarding the organization, functioning and procedures of the Legislative Branch and justice



systems, electoral and referendum processes, the regulation of constitutional states of exception, and the regulation of political organizations must be approved by **a majority of sitting members of the Congress of Deputies and the Chamber of Regions.**

Where the President does not approve a bill already passed by the Congress of Deputies, the bill will be sent back with **the observations the President deems pertinent or communicate his or her complete rejection of the bill.** For partial observations, the Congress may override the proposed changes and pass the original bill by a simple majority, while if the President has rejected the bill completely, Congress may only pass the bill with a three-fifths majority of all its members.

## Fundamental Rights

The draft establishes that **fundamental rights are inherent to human beings, universal, inalienable, indivisible and interdependent.** The State must respect, protect, guarantee and promote the full satisfaction and exercise of fundamental rights, and adopt the measures necessary to eliminate all obstacles that may limit or hinder their enjoyment.

**Individuals** are the holders of fundamental rights, **indigenous peoples and nations** are holders of collective fundamental rights and **nature shall be the holder of** the rights that the Constitution declares are applicable to it.

**The right of property is recognized in all its kinds and over all classes of goods,** except those that nature has made common to all people and those that the Constitution or the law declare inappropriable. The law shall determine how property may be acquired, its content, limits and duties. **No person may be deprived of their property except by virtue of a law authorizing its expropriation for public utility or the general interest.** The proprietor shall have the right to **indemnification with the fair price of the good expropriated,** prior to material possession being taken of the good. They will have the **right to contest the legality** of the act of expropriation and the amount and means of payment before the courts determined by the law.

Every individual person and legal entity has the freedom to undertake **and develop economic activities.** Their exercise must be compatible with the rights enshrined in the Constitution and the protection of nature. The content and limits of this right shall be determined by the law, promoting the development of smaller companies and ensuring the protection of consumers.

**The right of workers to participate in the decisions of the company,** through their trade unions, is likewise recognized. The law will regulate the mechanisms through which this right is exercised.

The **proposal establishes that the right to social security must be based on** the principles of universality, solidarity, completeness, unity, equality, sufficiency, participation, sustainability and timeliness. **The law shall establish a public Social Security System that will provide protection** in the case of illness, old age, disability, survival, maternity and paternity, unemployment, accidents at work, occupational diseases, and others. The State shall define the



social security policy, which will be financed by workers and employers through contributions and by the general income of the nation.

The **right to health** also comprises the **conditions necessary for people to enjoy the highest level of health possible**, to which end a **National Health System** will be created which will be universal, public and integrated, and may consist of both public and private providers. The law shall determine the requirements and procedures to enable private providers to participate in the system. The National Health System will be financed from the general income of the nation, notwithstanding the law may establish the collection of obligatory contributions with the sole object of obtaining solidarity financing for the system.

The text further recognizes other **fundamental rights such as**: freedom of thought, of conscience, of religion and cosmovision; freedom of expression; the right to live in a safe environment that is free from violence; freedom of personal movement; the right to identity; the right to autonomy and free development of personality; sexual and reproductive rights; the right to life; the right to personal integrity; the right of assembly and of peaceful protest; the right to housing; the right to cities and territory; the right to decent work; the right of free association in trade union organizations; the right to education; etc.

## Protection of the Environment and the role of the State in the Economy

The constitutional text declares that it is the State's duty to adopt actions of **prevention, adaptation and mitigation of the risks, vulnerabilities and effects provoked by the climate and ecological crisis**. It also establishes that nature has the right for its existence to be respected and protected, and to the regeneration, maintenance and restoration of its functions and dynamic balances. The law may establish restrictions on the exercise of certain rights or freedoms to protect the environment and nature.

**A regime of shared natural resources is established**: the territorial ocean and ocean floor; beaches; waters, glaciers and wetlands; geothermal fields; the air and the atmosphere; the high mountains; protected areas and native forests; the subsoil and other resources and goods as declared in the constitution and the law.

**Among the shared natural resources, water and air are inappropriable**, as are those **recognized by international law and those that the Constitution or the laws declare to be such**. The State may grant administrative authorizations for the use of these goods, on a temporary basis, subject to causes of expiry, extinction and renewal, and with obligations of conservation. These authorizations do not generate rights of property.

The **draft incorporates a constitutional statute on the waters**, making the State duty-bound to protect them in all their states and phases. Water use permits will be granted by a National Water Agency and will be conceded based on the real availability of water; the holder being obliged to use such an amount as justifies the concession. The **traditional use by indigenous peoples and nations of the waters** situated in autonomous indigenous territories or indigenous territories is recognized.

On the subject of energy, the State has a duty to guarantee **fair, non-discriminatory access to energy**, as well as regulate and foster a distributed, decentralized, diversified energy grid based on renewable, low-environmental-impact energy.



**On the subject of minerals**, the rule in force under the **current Constitution is reiterated**, which declares absolute, exclusive, inalienable and indefeasible dominion over mines and mineral substances, including metallic and non-metallic minerals, and deposits of fossil substances and hydrocarbons existing in the national territory, without prejudice to ownership of the land in which they are situated. Regulation of the exploration, exploitation and use of these substances must consider their finite, non-renewable character, their intergenerational public interest, and protection of the environment.

The State will **establish a policy for mining and the associated production chains**, considering, at least, environmental and social protection, innovation, the generation of added value, access and the use of technology, and the protection of small-scale mining and the “pirquineros”. **Mining is prohibited on glaciers, in protected areas and other places established by law.**

Finally, it may be noted that the text recognizes as a **general rule the initiative of the State in economic activity**; it may carry on business activities, adopting different forms of ownership, management and organization as determined in the respective regulations. **State companies will be created by law and will be managed under the legal regime determined by the law.**

## Administration of Justice

The draft defines jurisdiction as a public function exercised on behalf of the people, which consists of hearing and judging legal conflicts, by following due process and enforcing the decision, in accordance with the Constitution, laws, and the treaties and international human rights instruments to which Chile is a party.

**Jurisdiction shall be exercised exclusively by the courts of justice and the authorities of the indigenous peoples recognized by the Constitution or associated laws.** The State recognizes the legal regimes of indigenous peoples, and the law must determine the mechanisms that coordinate, cooperate and resolve conflicts between indigenous legal regimes and State entities. **The Supreme Court will hear and resolve challenges against the decisions of indigenous jurisdiction.**

**No other State entity**, person or group of persons may exercise jurisdiction, hear pending cases, modify the grounds or content of judicial decisions, or reopen concluded proceedings. Judges shall only cease to hold office when they reach the age of seventy, they resign, become legally unable, or are removed from office.

**Several general justice principles are recognized.** These are the right of access to justice; effective jurisdictional protection; inexcusability and non-delegability; enforcement of decisions by the forces of public order; substantiation and clear language in sentences; free access to jurisdiction; jurisdictional responsibility of judges for crimes, lack of substantial observance of the law, or distorted administration of justice; protection of the identity of children and adolescents; parity and gender perspective; plurinationality, legal pluralism and interculturality; and other principles.

The **National Justice System** will be made up of neighborhood justice systems, tribunals, the Courts of Appeals and the Supreme Court. Administrative tribunals will be created to hear and judge proceedings brought against the State Administration or promoted by it, and other matters established by law.



The constitution creates a **Justice Council**, as an autonomous, technical, parity and plurinational body, responsible for the appointment, governance, management, training and discipline of the National Justice Regime. It will comprise eight judges elected by their peers; two officials or professionals elected by their peers; two members elected by indigenous peoples; and five members elected by Congress, following a public selection process.

The **Public Prosecutor's Office** is still constitutionally recognized, and the **Public Defender's Office** is granted constitutional status, as they are related to the jurisdictional function, but do not form part of the National Justice Regime. A **People's Defender's Office** will also be created, which will be responsible for promoting and protecting human rights against acts or omissions of State administrative entities and those that provide public services; as well as a **Nature Defender's Office** in charge of promoting and protecting the rights of nature and the environment.

Finally, constitutional justice will remain in the hands of a **Constitutional Court**, an autonomous, technical and professional body responsible for ensuring the supremacy of the Constitution, and whose decisions will be based solely on legal grounds. It will be conformed of eleven members, four elected by Congress and the Chamber of Regions in joint session, three elected by the President of the Republic and four appointed by the Council of Justice, following a public selection process. **Its authority is limited to situations that occur after laws take effect.**

## Other topics

In addition to the above, the draft refers to other topics, including the following:

- **Electoral System:** the creation of an electoral system is mandated in accordance with the principles of substantive equality, parity, gender alternation and others contemplated in the Constitution and the law. Municipal, regional and regional representative elections will be held three years after the presidential and congressional elections. Voting will be mandatory for people who have reached eighteen years of age and optional for people who are sixteen and seventeen years old.
- **Reserved seats:** reserved seats will be established for indigenous peoples and nations in popular representation collegiate bodies, and only citizens belonging to such peoples and nations and who are registered on a special registry held by the Electoral Service will be able to vote for them.
- **Principles of public integrity: such as probity, transparency, accountability and the right of access to public information.** Corruption is declared to be contrary to the common good and an attack on the democratic system.
- **Regulation of the Police and Armed Forces:** The President of the Republic is responsible for national defense and is the supreme chief of the Armed Forces. The police report to the ministry responsible for public security. These are policing institutions, but not military institutions, and their jurisdiction covers the entire country.
- **States of constitutional exception:** of assembly, siege and catastrophe.



- **Participative democracy:** citizens have the right to participate in matters of public interest in an incidental or binding manner. Direct democratic tools are enshrined such as the popular law initiative, the initiative to repeal a law, regional direct democracy mechanisms, regional or communal referendums and public hearings.
- **Nationality and citizenship:** with requirements for obtaining, losing and claiming nationality.
- **Tax principles:** the tax system shall be based on the principles of equality, progressiveness, solidarity and justice, but shall never be confiscatory.
- **Fiscal decentralization: regional governments and municipalities will enjoy financial autonomy to fulfill their functions.** Territorial entities, their representatives and authorities must be responsible for the consequences of failure to comply with their financial obligations.
- **Public employment:** admission to public functions shall follow an open, transparent, impartial and agile process that prioritizes merit, specialty and suitability for the position.
- **Penitentiary system:** only the State may enforce sentences and deprivation of liberty measures, using public institutions specially established for these purposes. The function established in this article may not be exercised by private individuals.
- **Environmental justice:** environmental courts will be constitutionally established and there shall be at least one in each region of the country.
- **Central Bank:** The Central Bank is constitutionally recognized as an autonomous technical entity with its own legal identity and capital, which is responsible for formulating and implementing monetary policy.
- **The Comptroller General of the Republic:** its constitutionality and legality control functions are described, as is its authority to issue opinions and inspect State administrative entities.
- **Electoral Service:** an autonomous body with its own legal identity and capital, which is responsible for managing, monitoring and inspecting electoral and referendum processes, and other functions.
- **Constitutional reform:** a constitutional reform procedure is established, where projects that substantially alter certain aspects of the Fundamental Charter require a ratifying referendum. Furthermore, a procedure is established to replace the Constitution, based on a Constituent Assembly convened by a constituent referendum.

