



# RELEVANT ASPECTS OF THE CONSTITUTIONAL PROPOSAL

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# I.

# GENERAL ASPECTS

## 1.

### POLITICAL SYSTEM AND LAW-MAKING PROCESS

- The proposed new Constitution contains relevant changes in relation to the bodies involved in the law-making process and their respective powers in this area.
- Although the position of the President of the Republic is maintained, there are relevant differences in relation to the powers the President holds under the current Constitution.
- The Chamber of Deputies would concentrate most of the legislative powers, while the Senate would be replaced by the Chamber of Regions, whose legislative powers are significantly limited.

Before going into the details of the legislative process proposed in the new Constitution, below we provide a comparison between the powers of each of the bodies involved in the law-making process in the proposed new Constitution, and the powers provided for in the current Constitution.

-  Powers that are maintained
-  Powers that are amended

<b>PRESIDENCY OF THE REPUBLIC</b>	
<b>CONSTITUTION CURRENTLY IN FORCE</b>	<b>PROPOSAL FOR A NEW CONSTITUTION</b>
Participate in the elaboration of laws and enacting them.	
Summon, stating the reasons, a session of any of the branches of the Legislative Power.	
To issue, after delegation of powers by Congress, decrees with force of law.	
Calling a plebiscite in certain cases.	
Declare a state of constitutional emergency.	
Exercise the power to issue regulations.	
Appointment of the Comptroller General of the Republic.	
Appointing and removing officials of his or her exclusive confidence.	
Appointing and removing Ministers, Undersecretaries and other relevant officials.	
Conduct foreign relations, and signing and ratifying international treaties, conventions or agreements..	
To oversee the collection of public revenues and to decree their investment in accordance with the law, and to decree payments not authorized by law in certain cases.	
Exclusive initiative for proposing laws in certain matters	Mandatory support of the President for the approval of laws in certain matters
Assume, in the event of war, the supreme command of the Armed Forces.	Exercising permanent supreme command of the Armed Forces and the public security forces.
Overseeing the ministerial conduct of judges and other employees of the Judiciary	
Declare war, subject to prior authorization by law, with a record of having heard the National Security Council.	
To dispose of, organize and deploy air, sea and land forces in accordance with the needs of national security.	

1. POLITICAL SYSTEM AND LAW-MAKING PROCESS

**CONGRESS OF DEPUTIES**

CONSTITUTION CURRENTLY IN FORCE	PROPOSAL FOR A NEW CONSTITUTION
Participate in the formation of laws	
Overseeing government actions	
Declare constitutional charges (impeachment) to be admissible or inadmissible.	
	To declare, when the President submits his/her resignation, whether or not the reasons for his/her resignation are well-founded and, consequently, to admit or reject it.
	Approve for the President to be absent from the country for more than thirty days.
	Decide on certain appointments provided under the Constitution.

**CHAMBERS OF REGIONS**

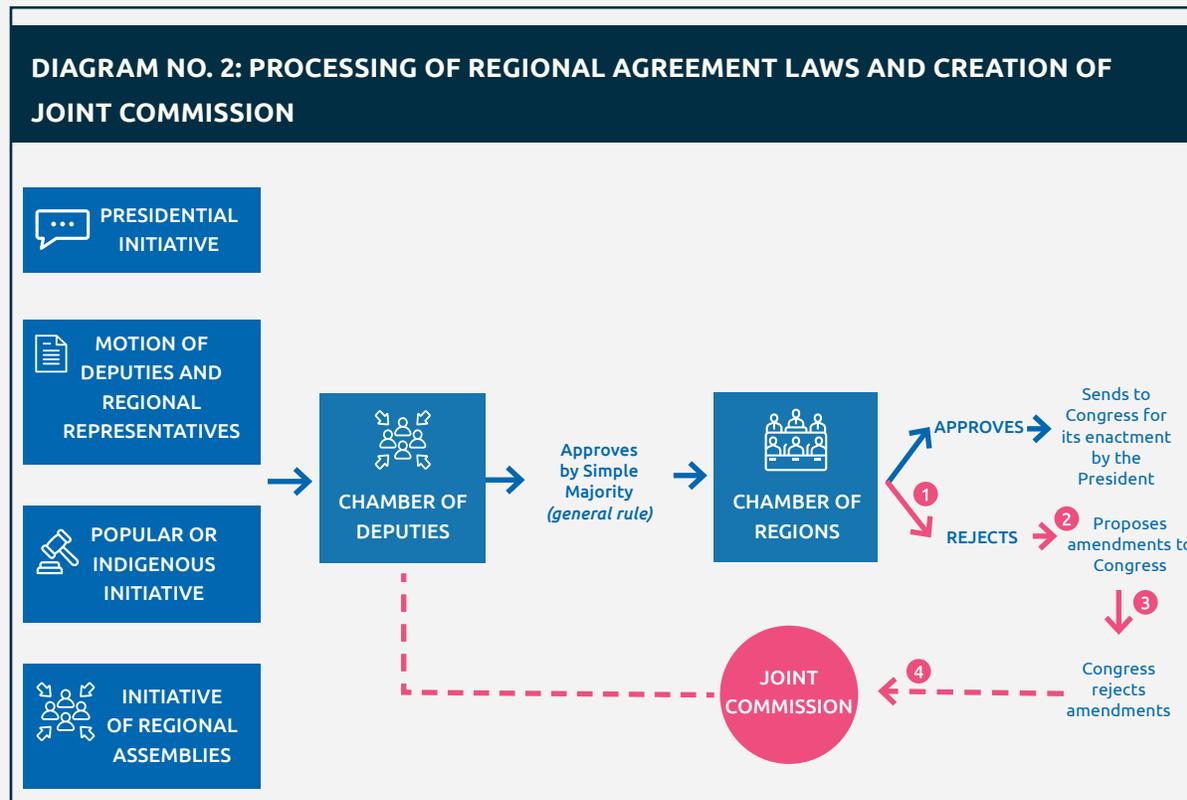
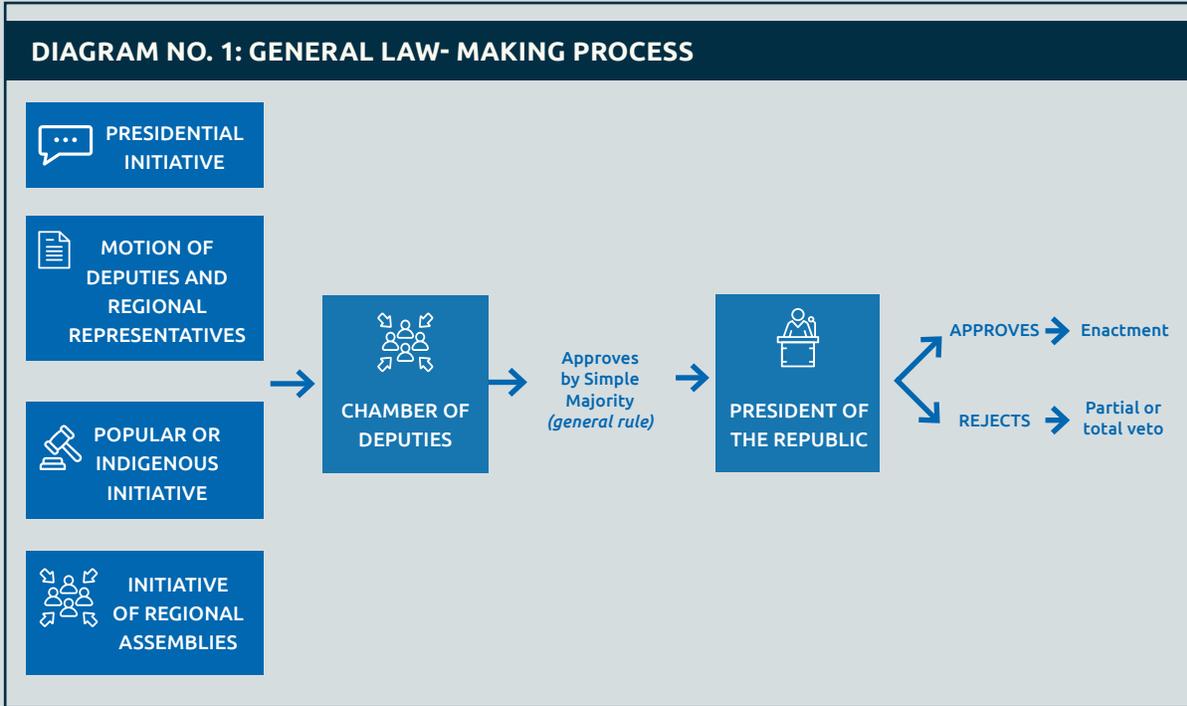
CONSTITUTION CURRENTLY IN FORCE (SENATE)	PROPOSED NEW CONSTITUTION (CHAMBER OF REGIONS)
Resolving constitutional charges as a jury	
Participate in the formation of all laws.	Participate in the formation of laws of regional agreement <sup>1</sup>

<sup>1</sup> Regional agreement laws are those that refer to any of the following 17 matters: (1) reform of the Constitution; (2) regulation of the organization, attributions and functioning of the Justice Systems, of the Legislative Branch and of the constitutional autonomous bodies; (3) regulation of constitutional states of exception; (4) creation, modification or suppression of taxes or exemptions and determination of their progression and proportionality; (5) those directly incurring expenses to the State whose execution corresponds to the territorial entities; (6) those implementing the rights to health, right to education and right to housing; (7) Budget Law; (8) approval of the Regional Statute; (9) regulation of the election, designation, competencies, attributions and procedures of the organs and authorities of the territorial entities; (10) establishment or alteration of the political-administrative division of the country; (11) establishment of the mechanisms of fiscal and budgetary distribution, and other mechanisms of economic compensation among the different territorial entities; (12) authorization to enter into operations that compromise the patrimonial responsibility of the territorial entities; (13) authorization to territorial entities for the creation of public enterprises; (14) delegation of legislative powers; (15) regulation of territorial and urban planning and its execution; (16) regulation of environmental protection; (17) regulation of popular votes and scrutinies; and (18) regulation of political organizations.

**CHAMBERS OF REGIONS**

<b>CONSTITUTION CURRENTLY IN FORCE (SENATE)</b>	<b>PROPOSED NEW CONSTITUTION (CHAMBER OF REGIONS)</b>
<p>Approve the appointment of the ministers and judicial prosecutors of the Supreme Court and the National Prosecutor.</p>	<p>Decide on certain appointments in joint session with the Congress of Deputies.</p>
<p>Decide whether or not to take legal action against a Minister of State.</p>	
<p>To hear disputes of jurisdiction between political or administrative authorities and the higher courts of justice.</p>	
<p>Granting citizenship rehabilitation</p>	
<p>Approve for the President to be absent from the country for more than thirty days.</p>	
<p>To declare whether or not the reasons for the resignation of the President are well-founded and, consequently, to accept or reject the resignation.</p>	
	<p>To approve the regional statutes agreed by a Regional Assembly.</p>
	<p>To hear proposals for the creation of regional-owned companies made by one or more Regional Assemblies.</p>
	<p>To hear requests for delegation of legislative powers made by the Regional Assemblies.</p>

LAW-MAKING PROCESS



Before going into the details of the stages of the law-making process described above, it is important to consider that, unlike the current Constitution, the proposed new Constitution does not establish an exhaustive list of matters that may be regulated through the exercise of legislative power.

Consequently, the proposed new Constitution could allow Congress to regulate other matters, other than those currently foreseen, unlike what is established in the current Constitution, where matters outside the specific list provided in the Constitution may only be regulated through the exercise of the autonomous regulatory power of the President of the Republic.

#### A. INITIATION OF THE PROCESSING OF A LAW

Draft bills may be proposed by presidential initiative, parliamentary initiative by motion of deputies and regional representatives, by popular initiative<sup>2</sup>, by indigenous initiative<sup>3</sup>, or by initiative of regional assemblies (with sponsorship by the Chamber of Regions). Whatever the form of origin, once submitted **all bills will begin the law-making process in the Congress of Deputies.**

In contrast to the current Constitution, the proposed new constitution expands the possibility of submitting draft bills by establishing the popular initiative and the indigenous initiative, although the latter is not regulated in detail.

However, although the possibility of the President of the Republic being able to initiate the legislative process is maintained, the proposal for the new Constitution **eliminates the rule providing that certain matters of law require a bill presented by the President (exclusive presidential initiative).** Instead, it only establishes that certain matters of law will require the **sponsorship or support of the President (presidential concurrence).**

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<sup>2</sup> This may not refer to taxes, alter the budgetary administration of the State or limit fundamental rights.

<sup>3</sup> This type of initiative, unlike the popular initiative of law, is not regulated in the proposed new Constitution. Its requirements and effects are unknown.

Laws requiring presidential concurrence may originate in a presidential initiative or in a motion. They can only be approved if the President provides his or her support during the law-making process, otherwise the bill will be deemed to have been rejected and cannot be insisted on for further processing.

EXCLUSIVE INITIATIVE LAWS	NECESSARY PRESIDENTIAL CONCURRENCE LAWS
Those altering the political or administrative division of the country.	
Those related to the financial or budgetary administration of the State, including amendments to the Budget Law.	
Those imposing, eliminating, reducing or condoning taxes of any kind or nature, establishing exemptions or modifying existing ones, and determining their form, proportionality or progression.	
To contract loans or enter into any other type of transactions that may compromise the credit or <i>financial</i> responsibility of the State, semi-fiscal, autonomous, regional governments or municipalities, and to forgive, reduce or modify obligations, interest or other financial charges of any nature established in favor of the Treasury or the aforementioned agencies or entities.	Those that provide or authorize the contracting of loans or the entering into any other type of operation that may compromise the <i>financial</i> responsibility of the State, semi-fiscal or autonomous entities and forgive, reduce or modify obligations, interest or other financial obligations of any nature established in favor of the Treasury or the aforementioned bodies or entities.
Those providing the air, sea and land forces to be kept in place in time of peace or war, and the rules for allowing foreign troops to enter the country or national troops to leave the country	To regulate the capabilities of the national defense, to allow the entry of foreign troops into the territory of the republic and to authorize the departure of national troops out of it.

EXCLUSIVE INITIATIVE LAWS	NECESSARY PRESIDENTIAL CONCURRENCE LAWS
<p>Those that create new public services or paid jobs, whether fiscal, semi-fiscal, autonomous or State-owned companies; abolish them and determine their functions or attributions.</p>	
<p>Those related to remunerations, retirements, pensions, annuities, and any other kind of loans or benefits to serving or retired personnel (and to the beneficiaries of annuities, if any) of the Public Administration; and those related to the determination of the minimum remunerations of the private sector, the mandatory increase of remunerations and other economic benefits, or that alter the bases used to determine them..</p>	
<p>Those that establish the modalities and procedures for labor collective bargaining, and that determine the cases in which bargaining may not take place</p>	
<p>Establishing or amending rules on or affecting social security in both the public and private sector.</p>	
<p>Those that establish the rules for the disposal, lease or concession of State or municipal property.</p>	
	<p>Those that directly causing costs to the State</p>

## B. LEGISLATIVE DISCUSSION

The proposed new Constitution provides that, as a general rule and except in those cases where the Constitution states otherwise<sup>4</sup>, the Congress of Deputies and the Chamber of Regions shall pass bills by a majority of its members present in the corresponding session<sup>5</sup>.

In the case of a law of regional agreement, the Congress will send the previously approved bill to the Chamber of Regions, which may approve or reject it.

- If approved, the bill will be sent to Congress for it to dispatch the bill to the President for its enactment as law.
- If it is rejected, it may propose **amendments** to Congress. If the Congress rejects one or more amendments, a joint commission (made up of an equal number of deputies and regional representatives) will be convened and will propose new amendments to resolve the discrepancy. These will be voted on first by the Chamber of Regions and then by the Congress. If all of them are approved, the bill will be sent for enactment.

## C. PROMULGATION AND VETO OF THE PRESIDENT OF THE REPUBLIC

Once the bill has been approved, if the President approves the bill, he shall enact it.

If the President *partially* rejects the bill, his or her remarks may be approved by the majority of the Congress. Alternatively, by the same quorum, the Congress may insist on the original bill. However, if the President rejects the bill in its entirety, the Congress must discard the

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<sup>4</sup> In order for the Chamber of Deputies to be in session, 1/3 of its members in office is required.

<sup>5</sup> The favorable vote of the **majority of the members in office shall** be required to approve laws referring to the organization, operation and procedures of the Legislative Branch and the Justice Systems, to electoral and plebiscite processes, and to the regulation of states of constitutional exception and political organizations.

bill, unless it insists on the bill with a quorum of three-fifths of its members. Note that under the current Constitution, Congress can only insist on a vetoed bill with a quorum of two-thirds of its members on both chambers (Senate and the Chamber of Deputies).

The enactment of laws must always take place within 10 days, and the publication of the approved law must be made within 5 business days following its enactment.

**LEGISLATION THROUGH DECREES WITH FORCE OF LAW**

The proposed new Constitution, like the current Constitution, establishes that the President of the Republic has the power to issue decrees with the force of law, after delegation by Congress of its legislative powers, for a period of no more than one year on matters that need to be regulated through a law. We include below a comparison between the current and new Constitution on this matter:

	CONSTITUTION CURRENTLY IN FORCE	PROPOSAL FOR A NEW CONSTITUTION
Subjects on which it may not be applied	Constitutional protections or fundamental rights	
	Nationality and citizenship	
	Elections and plebiscites	
	Powers affecting the organization, powers and status of the officials of the Judiciary /Justice System, the National Congress/Congress and the Chamber of Regions, the Constitutional Court and the Comptroller's Office.	
	Matters that are subject to organic constitutional laws or qualified quorum laws.	
Control	Comptroller's Office	
Nature of the delegatory law	Law	Law of regional agreement

## TRANSITION TO THE PROPOSED POLITICAL SYSTEM

We highlight the following transitional rules:

- The current President of the Republic shall not be eligible for reelection for the following term.
- Parity criteria shall be applicable to the Legislative power in the election to be held immediately after the entry into force of the new Constitution.
- On March 11, 2026, the law-making procedure that is regulated under the new Constitution will become effective. However, the rules related to the quorum for approval of laws and the rules related to the popular and indigenous initiative will enter into force together with the new Constitution.
- On March 11, 2026, the terms of the current members of the Senate will expire, although they will be eligible to run in the elections for the Congress of Deputies and the Chamber of Regions (to be held in November 2025).

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## 2.

## RAMIFICATIONS OF PLURINATIONALITY

- The proposal for a new Constitution establishes that Chile is a Plurinational and Intercultural State. In this edition we will explore its implications.
- In addition, the proposal recognizes 11 pre-existing indigenous peoples and nations.
- Among other things, the proposal includes the recognition of collective rights and the creation of indigenous territorial autonomies.

The Royal Spanish Academy defines a nation as *"a group of people of the same origin who generally speak the same language and have a common tradition"*.

The Constitution currently in force establishes a unitary State (article 3°) and the existence of a single Nation, for example, by referring to *"the national community"*, to the duty of the State to "promote the harmonious integration of all sectors of the Nation" (article 1°) or, most notably, by stating that sovereignty resides essentially in *"the Nation"*.

However, the proposal for a new Constitution innovates in this topic by incorporating two key concepts: *plurinationality* and *interculturality*.

These concepts were an aspect of recurrent discussion throughout the process of deliberation within the Constitutional Convention, driven mainly by the Convention's members that belong to indigenous groups <sup>1 2</sup>.

The proposal states the following:

*"Article 1. Chile is a social and democratic state governed by the rule of law. It is plurinational, intercultural, regional and ecological.*

*Artículo 5.*

- 1. Chile recognizes the coexistence of diverse peoples and nations within the framework of the unity of the State.*
- 2. Pre-existing indigenous peoples and nations are the Mapuche, Aymara, Rapa Nui, Lickanantay, Quechua, Colla, Diaguita, Chango, Kawashkar, Yaghan, Selk'nam and others that may be recognized in the manner established by law.*
- 3. It is the duty of the State to respect, promote, protect and guarantee the exercise of self-determination, the collective and individual rights of which they are holders and their effective participation in the exercise and distribution of power, incorporating their political representation in popularly elected bodies at the communal, regional and national levels, as well as in the structure of the State, its organs and institutions".*

Notwithstanding the fact that the proposal for a new Constitution does not contain a definition of what we should understand by "plurinationality", nor by "interculturality", the Proposal points out the following:

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<sup>1</sup> Thus, for example, it is possible to appreciate in the speech of Elisa Loncón, first president of the Constitutional Convention, during the inauguration of her mandate. See: <https://elpais.com/internacional/2021-07-04/la-convencion-constituyente-que-ten-dra-que-escribir-un-nuevo-chile-echa-a-andar.html>

<sup>2</sup> Elisa Loncón, already in December 2020, published an intervention in which she gave an account of the search of indigenous groups to incorporate plurinationalism and interculturalism in the New Constitution. See: [https://www.scielo.cl/scielo.php?script=sci\\_art-text&pid=S0717-69962020000300150](https://www.scielo.cl/scielo.php?script=sci_art-text&pid=S0717-69962020000300150)

*"Article 34.- Indigenous peoples and nations and their members, by virtue of their self-determination, have the right to the full exercise of their collective and individual rights. In particular, they have the right to autonomy; to self-government: to their own culture; to identity and world view; to heritage; to their language; to recognition and protection of their lands, territories and resources in their tangible and intangible dimensions and the special bond they maintain with these; to cooperation and integration; to the recognition of their institutions, jurisdictions and authorities, their own or traditional; and to participate fully, if they so wish, in the political, economic, social and cultural life of the State.*

The norms mentioned above, on which the notion of the Intercultural Plurinational State is based, constitute an **innovation with respect to all the previous Constitutions of Chile**. This is even more evident when their implications for the organization and functioning of the country and its institutions are analyzed.

In general terms, they highlight (i) the **recognition of different pre-existing indigenous peoples and nations**; (ii) the **ownership of collective rights** that the Constitution recognizes; (iii) their **participation at the level of institutions and political bodies** in the Administration; (iv) the **recognition and special protection of their cultural aspects**; and (v) the **recognition of the right to use resources and the power to demand that they be consulted** whenever there are activities that affect them:

◆ **Chile defines itself as a plurinational and intercultural State:** The proposal states that *"Chile is a social and democratic State based on the rule of law. It is plurinational, intercultural and ecological"*.

◆ **The people of Chile is made up of various nations:** The proposal states that *"sovereignty resides in the People of Chile, made up of diverse nations."*

As we will see below, plurinationality and the exercise of sovereignty will find another point of union in the mechanism of reserved seats as a way of consecrating that the integration of different institutions is also plurinational.

◆ **The State of Chile is intercultural:** The proposal establishes that the State must recognize, value and promote the dialogue between the different world-views of the peoples and nations that coexist in the country, and must *"guarantee the institutional mechanisms that allow for this dialogue, overcoming existing asymmetries in access, distribution and exercise of power and in all areas of life in society."*

It also states that Chile is a **multilingual** State. That is to say, its official language is Spanish, but the indigenous peoples' languages will also be official in their territories and in areas of high population density of each indigenous people: *"every person and people has the right to communicate in their own language in all areas. No person or group may be discriminated against for linguistic reasons"*. The State, for its part, is committed to promoting the revitalization, appreciation and respect for indigenous languages.

Chile's national emblems are the flag, the coat of arms and the national anthem, without prejudice to the fact that *"the State recognizes the symbols and emblems of the indigenous peoples and nations"*.

◆ **Creation of autonomous indigenous territorial entities:** The proposal establishes a Regional State *"made up of autonomous territorial entities and special territories, within a framework of equity and solidarity, preserving the unity and integrity of the State"*. The State assumes the commitment to promote *"cooperation, harmonious integration and adequate and fair development among the various territorial entities"*.

The territorial entities established include **indigenous territorial autonomies**, which are legal entities with their own assets and have the powers necessary to govern themselves in the general interest of the Republic. It is established that **indigenous peoples and nations exercise rights of autonomy** by virtue of these territorial autonomies, and it is the duty of the State to recognize, promote and guarantee their recognition. They will be **created by law, through processes of participation and prior consultation, at the request of the indigenous peoples and nations**, through their representatives. The law will also establish the powers they will hold. However, they "*shall have the powers and funding necessary for the proper exercise of the right of self-determination of indigenous peoples and nations*".

◆ **National Health System:** Public and private health care providers will be part of a National Health System. This system will observe, among others, **the principle of interculturality**. In addition, the proposal states that: "*indigenous peoples and nations have the right to their own traditional medicines, to maintain their health practices and to preserve the natural components that sustain them*". It also establishes that the National Health System "*recognizes, protects and integrates these practices and knowledge as well as those who impart them, in accordance with this Constitution and the law*".

◆ **National Education System:** The proposal includes the creation of a National Education System, in respect of which the autonomy of indigenous peoples and nations is recognized: "*the Constitution recognizes the autonomy of indigenous peoples and nations to develop their own establishments and institutions in accordance with their customs and culture, respecting the purposes and principles of education, and within the frameworks of the National Education System established by law.*"

◆ **National Justice System:** The draft establishes Justice Systems (replacing the current "Judicial Power"), whose purpose is the exercise of the jurisdictional function. **Two Justice Systems are recognized:** (i) a National Justice System; and (ii) the legal systems of indigenous peoples. It is established that, on the basis of

the so-called "Legal Pluralism", the legal systems of indigenous peoples "coexist on an equal footing with the National Justice System". The **manner in which conflicts of jurisdiction** between indigenous legal systems and State entities are to be resolved is **delegated to the law**.

However, it is established that the legal systems of indigenous peoples must respect fundamental rights and the international human rights treaties and instruments to which Chile is a party.

With regard to interculturalism, it is established that these principles will define the structure, integration and procedures of the jurisdictional function: "when dealing with indigenous persons, the courts and their officials must adopt an intercultural perspective in the treatment and resolution of matters within their jurisdiction, taking due account of the customs, traditions, protocols and normative systems of indigenous peoples, in accordance with the international human rights treaties and instruments to which Chile is a party".

It is important to consider that the Council for the Judiciary is also defined as a plurinational body, in addition to being a criterion to be considered in the exercise of its powers. Plurinationality is also a criterion for the membership of the Council of Justice, since two of its members must be elected by indigenous peoples and nations.

◆ **International relations:** : The draft establishes that the country's international relations will be based, among other guidelines, on "*the principles of self-determination of peoples*". Likewise, in the exercise of its international relations, the State commits itself to "*the recognition, respect and promotion of the rights of indigenous and tribal peoples and nations in accordance with international human rights law*", and the promotion of "*regional, political, social, cultural, economic and productive integration between States, and facilitates contact and cross-border cooperation between indigenous peoples*".

## PARTICIPATION OF INDIGENOUS PEOPLES AND NATIONS AT THE INSTITUTIONAL LEVEL

The constitutional proposal establishes that the State must guarantee their "*effective participation in the exercise and distribution of power, incorporating their political representation in popularly elected bodies at the communal, regional and national levels, as well as in the structure of the State, its organs and institutions*".

This political representation in popularly elected bodies is established in the **reserved seats**. In this regard, it is stated that "*in the collegiate bodies of popular representation at the national, regional and communal levels, reserved seats are established for indigenous peoples and nations when appropriate and in proportion to their population within the respective electoral territory.*"

With regard to territorial entities, it is established that they recognize, guarantee and promote (i) the **political and legal recognition** of indigenous peoples and nations; (ii) **their survival, existence and harmonious and integral development**; (iii) the **equitable distribution of power** and spaces for political participation; (iv) the **use, recognition and promotion** of indigenous languages; (v) **intercultural understanding**, respect for diverse ways of seeing, organizing and conceiving the world and relating to nature; and (vi) the **rights of self-determination and autonomy** of indigenous territories.

In relation to the participation of territorial entities in the Regional State, Article 191 of the proposal establishes that "*peoples and nations must be consulted and must give their free, prior and informed consent in those matters or issues that affect their rights as recognized in this Constitution*".

### OWNERSHIP OF COLLECTIVE RIGHTS

The proposal for a new Constitution establishes that "*indigenous peoples and nations are holders of fundamental collective rights*". Let's see which are they.

**a) Right to lands, territories and resources:** It is established that "*the ownership of indigenous lands enjoys special protection*", and that the State must grant effective mechanisms for **their registry, regularization, demarcation, titling, reparation and restitution**, the latter being a preferential mechanism of reparation. It also establishes that "in accordance with the *constitution and the law, indigenous peoples and nations have the right to use the resources that they have traditionally used or occupied, that are found in their territories and that are indispensable for their collective existence*".

**b) Prior consultation before administrative measures that affect them:** The right to prior consultation of indigenous peoples and nations is established with respect to "*the adoption of administrative and legislative measures that affect them*". This norm establishes the State's commitment to guarantee "*the means for their effective participation, through their representative institutions, in a prior and free manner, by means of appropriate, informed and bona fide procedures*".

**c) Traditional use of waters:** The new Constitution proposal recognizes indigenous peoples and nations "*the traditional use of waters located in indigenous territories or indigenous territorial autonomies*". According to this section, the State must **guarantee their protection, integrity and supply**, in accordance with the Constitution and the law.

**d) Other collective rights:** Furthermore, the proposal recognizes that indigenous peoples and nations shall have (1) a guarantee the **free use and exchange of traditional seeds**; (2) right to **repatriation of objects of their culture and its human remains**, and duty of the State to establish effective mechanisms regar-

ding restitution and repatriation, and to guarantee the peoples' access to their own heritage, including objects, human remains and sites culturally significant to their development; (3) the right to **preserve, revitalize, develop and transmit traditional knowledge and ancestral wisdom**; (4) **prohibition of forced assimilation or destruction of their cultures**; (5) the duty to establish positive measures for the **recovery, revitalization and strengthening of indigenous cultural heritage**; (6) recognition of the **cultural rights of the Afro-descendant Tribal People**, ensuring their exercise, development, promotion, conservation and protection; (7) the right to **cultural identity and integrity**, and to **recognition and respect for their worldviews, ways of life and institutions**.

#### **THE INDIGENOUS TERRITORIAL COMMISSION**

The transitory articles state that the President of the Republic will convene an **Indigenous Territorial Commission** within one year of the entry into force of the new Constitution. This Commission will present **proposals for agreements between the State and the indigenous peoples and nations** for the **regulation, titling, delimitation and restitution** of lands.

The commission will be integrated by representatives of all the indigenous peoples and nations, by representatives of the State and by persons of recognized suitability appointed by the President of the Republic.

It shall function for four years and may be extended for another two years.

**COMMENTS AND POSSIBLE IMPLICATIONS**

Plurinationality and interculturality represent concepts that break with Chilean constitutional tradition. Thus, this innovation has repercussions at different levels, from aspects of political representation to the recognition of indigenous traditions in health and seed exchange.

Although its implementation will depend to a large extent on what may be established by the laws that will be passed in the future, it is a matter that will certainly have a structural and systemic impact.

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### 3. RESERVED SEATS AND PARITY

- In this bulletin we will address two new elements that are incorporated throughout the proposed new Constitution: reserved seats and parity.

#### RESERVED SEATS

The proposed new Constitution provides that 3 collegiate bodies of the State will be "plurinational":

- The Congress (Chamber of Deputies), defined as a *deliberative, parity and plurinational body representing the people.*
- The Chamber of Regions, defined as a *deliberative, parity and plurinational body of regional representation.*
- The Justice Council, defined as an *autonomous, technical, parity and plurinational body, with legal personality and its own assets, whose purpose is to strengthen judicial independence.*

Such definitions have a direct impact on the composition of these bodies.

The proposed new Constitution states that **reserved seats will be set for indigenous peoples and nations in the collegiate bodies of popular representation at national, regional, and local levels**, where appropriate, in proportion to their population within the respective electoral territory.

In the case of the **Congress**, these reserved seats will be elected in a single national district. Their number will be defined in proportion to the indigenous population in relation to the total population of the country. Those elected will be added to the total number of members of Congress. In the **Chamber of Regions**, the integration of the seats will be regulated by law.

In general, only the citizens who belong to indigenous peoples and nations, and that are also part of the **Indigenous Electoral Registry** (a special registry administered by the Electoral Service), may vote for the reserved seats.

The **Justice Council** will be composed of seventeen members. **Two** of them will be elected by the indigenous peoples and nations, in the manner determined by the Constitution and the law. They must be persons of proven suitability for the exercise of the position and outstanding in a public or social role.

#### PARITY

If the new Constitution is approved, the following bodies must have a parity composition that ensures that at least **fifty percent** of their members are women:

- The collegiate bodies of the State;
- Autonomous constitutional bodies;
- The superior and directive bodies of the Administration; and
- The boards of directors of public and semi-public companies.

In addition, the proposal also expressly indicates that certain entities and systems will have a parity character (for example, the Congress of Deputies, the Chamber of Regions, the Justice Council and the Integral Care System).

The proposal also states that legally recognized political organizations will implement gender parity in their leadership spaces.

#### **IMPLEMENTATION**

With regard to the popular election of reserved seats, the proposed new Constitution delegates to the law the determination of the requirements, nomination and number for each case.

Regarding parity in popular elections, the proposed new Constitution states that the law will create an electoral system that must guarantee said parity in the composition of the collegiate bodies. Therefore, parity will be promoted in the candidacies for unipersonal positions, and it will be ensured that the electoral lists are always headed by a woman.

#### **COMPARISON WITH THE CURRENT CONSTITUTION**

In the current Constitution, reserved seats and parity rules were included in the constitutional reform that enabled the constitutional process that led to this proposal. Previously, the Constitution did not incorporate either reserved seats or parity rules, so the inclusion of such rules in the proposed new Constitution constitutes an innovation in our current system.

**TRANSITIONAL REGIME**

Below, we highlight some of the transitional rules of the proposal that deal with this matter:

- Regarding collegiate bodies of popular election, parity will be applicable as of the electoral process to be carried out immediately after the entry into force of the new Constitution. The Legislative Power must issue or adapt the electoral law.
- With respect to bodies that are not renewed through elections, as well as boards of directors of public and semi-public companies, parity must be implemented progressively, starting with new appointments and designations.
- With regards to the new collegiate bodies and autonomous bodies, parity will apply from the moment they are installed.
- The General Comptroller's Office will be responsible for ensuring compliance with the parity in the executive and superior bodies of the State Administration.

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## 4. THE REGIONAL STATE

- The proposed new Constitution includes a relevant change in the institutional design, transitioning from a Unitary State to a Regional State, formed of autonomous territorial entities.
- These territorial entities include autonomous communes and regions, indigenous territorial autonomies, and special territories.
- The proposed new Constitution regulates that in no case may the exercise of said autonomy undermine the unified and indivisible character of the Chilean State.

Below, we will analyze the autonomous territorial entities that are part of the Regional State.

### THE AUTONOMOUS COMMUNE

The autonomous commune is the **basic territorial entity of the Regional State**. It is endowed with legal status under public law and its own assets, and it enjoys autonomy for the fulfilment of its purposes and the exercise of its powers.

The proposed new Constitution states that the law will classify the communes into different types. This classification must be considered by the bodies of the State to set differentiated administrative and economic-fiscal regimes for the implementation of policies, plans and programs that address the diverse local realities, and for the transfer of competencies and resources. In addition, the proposed new Constitution provides that the State will guarantee the sufficient financing and resources for the fair and equitable development of the commune.

The public bodies that are part of the autonomous commune are:

- **Municipality.** In it resides the government of the autonomous commune.
- **Mayor.** Is the highest executive authority of the communal government. He will be elected by popular vote, for a four-year term, and with the possibility of immediate reelection.
- **Municipal Council.** It is the collegiate body of popular representation, endowed with normative, resolute and supervisory powers. Its members will be elected by popular vote, for a four-year term, and with the possibility of immediate reelection.
- **Communal Social Assembly.** Its purpose is to promote popular participation in communal public affairs.

The proposed new Constitution states that the autonomous communes may associate among themselves, permanently or temporarily. Such organizations may have legal status under private law, and, subject to the authorization by a general or special law, they may create companies or participate in them, either individually or in association.

## THE AUTONOMOUS REGION

The autonomous region is a political and territorial entity endowed with legal status under public law and its own assets. It enjoys autonomy for the development of regional interests, the management of economic resources, and the exercise of legislative, regulatory, executive, and supervisory powers through its bodies within its competencies.

Each autonomous region will have a **Regional Statute**, regulating its administrative organization and internal functioning. It will be proposed by the Regional Governor to the Regional Assembly, requiring an absolute majority of the members in office for its approval.

The bodies that are part of the autonomous region are:

- **The Regional Government.** It is the executive body of the autonomous region. The **Regional Governor** is elected by popular vote for a four-year term, with the possibility of immediate reelection. Among his exclusive powers are the preparation and presentation to the Regional Assembly of various plans of regional interest, as well as the draft regional budget. It may also call for regional referendums and plebiscites.
- **The Regional Assembly.** It is the representative body of the autonomous region. The regional assembly members will be elected by popular vote, for a four-year term, and with the possibility of immediate reelection. Among its powers, it is important to mention that it oversees the acts of the Regional Government; it issues regional norms that make applicable the laws of regional agreement; it may initiate the law-making process before the Chamber of Regions in matters of regional interest, and it may request the Chamber of Deputies (Congress) to transfer legislative power in matters of regional interest.
- **The Council of Mayors.** This is a consultative body composed of the mayors of all the communes of the autonomous region.

- **The Regional Social Council.** This is the body responsible for promoting popular participation in regional public affairs of a participatory and consultative nature.
- **The Council of Governorates.** This is the body in charge of coordinating relations between the central state and the territorial entities. It will be formed by the President of the Republic (who will preside over it) and the Governors of each autonomous region.

The proposed new Constitution grants more than twenty powers to the autonomous region, including planning, land use planning, and integrated basin management; the establishment of taxes and fees within its territory, subject to prior authorization by law; and the creation of regional public enterprises.

### INDIGENOUS TERRITORIAL AUTONOMIES

Indigenous territorial autonomias (ITA) are territorial entities endowed with legal status under public law, and their own assets. In the ITA, the indigenous peoples and nations exercise **autonomy rights**.

Some relevant aspects are the following:

- **How will they be constituted?** The law, through a process of indigenous consultation, and upon request of the indigenous peoples and nations, will create a specific procedure for their constitution.
- **What are its powers?** The law will establish them. It is noted, however, that the ITA must have the powers and funding required for the adequate exercise of the right of self-determination of indigenous peoples and nations.

### SPECIAL TERRITORIES

The special territories recognized by the proposed new Constitution are Rapa Nui and the Juan Fernández Archipelago. The law may create other special territories and set differentiated economic and administrative regimes for them.

The proposed new Constitution provides that in Rapa Nui the State will guarantee the right to self-determination of the Rapa Nui people, ensuring the means to finance and promote their development, protection, and welfare. It also recognizes the **collective ownership of the rights over this territory to the Rapa Nui** people, with the exception of the individual land rights of its members. Finally, the proposed new Constitution has made explicit that the Rapa Nui territory will be regulated by a statute of autonomy.

With respect to the Juan Fernández Archipelago, it is stated that it will consist of the islands of Robinson Crusoe, Alejandro Selkirk, Santa Clara, San Félix, and San Ambrosio, as well as the maritime territory adjacent to them. Finally, its government and administration will be governed by the special statutes established by law.

The proposed new Constitution also refers to the Chilean Antarctic territory, which is a special territory and border zone in which Chile exercises sovereignty, with full respect for the treaties ratified and in force.

Undoubtedly, the implementation of the Regional State, as designed in the proposed new Constitution, will require the enactment of new laws. However, until such laws are implemented, it is not clear what the precise effect will be on the legislation currently in force that regulates the current authorities, at both the regional and communal levels, regarding their powers and competencies.

### THE REGIONAL STATE IN THE TRANSITIONAL RULES

We highlight the following transitional rules related to this matter:

- The legislator and the organs of the State administration will adapt the regulations related to the Regional State and territorial entities **no less than six months before the election of their authorities.**
- The President of the Republic, after indigenous consultation, and **within two years** following the entry into force of the new Constitution, must send a bill regulating the procedures for the creation, territorial delimitation, statutes of operation, competencies, resolution of disputes between territorial entities and other matters related to the ITA. The Legislative Branch will have a maximum of three years to dispatch it.
- **Within one year** from the entry into force of the new Constitution, two referendums must be called: one in the communes belonging to the province of Chiloé, and the other in the communes belonging to the provinces of San Felipe, Los Andes and Petorca, in order to ratify the creation of the autonomous regions of Chiloé and Aconcagua.
- Within **two years** of the entry into force of the new Constitution, the Legislative Branch must progressively approve laws regulating the financial autonomy and fiscal decentralization of territorial entities. Financial autonomy must be implemented gradually, once the new regional and communal authorities take office.
- The President of the Republic must submit, **within six months** after the entry into force of the new Constitution, a bill defining the body in charge of compiling and systematizing the necessary information to propose - to the Legislative Branch - the formulas for the distribution of tax revenues, fiscal compensation between territorial entities and the resources to be integrated into the various funds. Said body will suggest the formula for the distribution of tax revenues between the State and the territorial entities **as from the discussion of the Budget Law of the year 2025.**

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## 5.

## INTERNATIONAL RELATIONS AND TREATIES

- The proposed new Constitution sets out a number of principles on which international relations should be based and provides for some changes associated with international treaties.
- It incorporates the enshrinement of the reception and international integration of human rights, which is a novelty.
- It also establishes powers for the Regional Government in international affairs and the constitution of Latin America and the Caribbean as a priority area for international relations.

### INTERNATIONAL RELATIONS IN THE CONSTITUTIONAL PROPOSAL

#### a. Principles of international relations

According to the proposed Constitution prepared by the Constitutional Convention, the international relations of Chile must be based on the following principles: (i) self-determination of the peoples; (ii) non-intervention in matters within the internal jurisdiction of the States; (iii) multilateralism; (iv) solidarity; (v) cooperation; (vi) political autonomy; and (vii) legal equality among the States. These principles are not defined in the proposed new Constitution.

### **b. Promotional aspects of international relations**

The constitutional proposal also provides that **Chile's international relations are committed to promoting and respecting** democracy, human rights, gender inclusion and equality, social justice, respect for nature, peace, coexistence and peaceful conflict resolution, and to recognizing, respecting and promoting the rights of indigenous and tribal peoples and nations in accordance with international human rights law.

### **c. Priority zone**

**Latin America and the Caribbean** is declared a **priority area** in Chile's international relations.

## **INTERNATIONAL TREATIES**

### **a. Powers of the Executive and Legislative branches**

The constitutional proposal provides that the President of the Republic has the power to negotiate, conclude, sign and ratify international treaties.

With respect to those international treaties that refer to matters of law, they must be approved by the Legislative Branch, except for those entered into in compliance with a law. The approval of the Legislative Branch shall not be required for measures adopted by the Executive Branch or agreements entered into by it for the fulfillment of a treaty in force, unless they refer to matters of law.

In the case of withdrawal or denunciation of a treaty that has been approved by the Legislative Branch, as well as for the withdrawal of a reservation considered by the Legislative Branch when approving it, the approval of the Legislative Branch shall be required.

### **b. Approval process of international treaties**

The approval process shall be subject, as appropriate to the **procedures of a law of regional agreement**. In addition, the approving agreement may authorize the President to issue, during the term of the treaty, provisions with the force of law that he deems necessary for its fulfillment, but this may not extend to matters of fundamental rights, nationality, citizenship, elections and plebiscites.

### **c. Advertising**

All facts related to the process of negotiation, entry into force, reservations, interpretative declarations, objections, denunciation, withdrawal, suspension, termination and invalidity of international treaties shall be made public.

### **d. Popular initiative**

The **inhabitants of the territory who have reached sixteen years of age**, complying with the percentage and other requirements defined by law, **shall have the initiative to request the President to sign international human rights treaties**.

With respect to the differences between the proposed new Constitution and the current Constitution, the following should be highlighted:

- ✓ The current Constitution, unlike the proposed new Constitution, specifically provides that the provisions of a treaty may only be derogated, modified or suspended in the manner provided for in the treaties themselves or in accordance with the general rules of international law.
- ✓ The current Constitution provides that it is the exclusive power of the President to denounce or withdraw from a treaty, for which he or she shall request the opinion of the Congress. On the other hand, the proposed new Constitution does not expressly grant this power to the President.

- ✓ The current Constitution does not provide for popular initiatives for the signing of international treaties.

### HUMAN RIGHTS

The Proposed Constitution **enshrines the reception and international integration of human rights**. This implies that constitutional status is granted to: (i) the rights and obligations established in international human rights treaties ratified by Chile and which are in force; and (ii) the general principles of international law and customary international law on human rights.

It also establishes the obligation of the State to promote, respect, protect and guarantee human rights in accordance with the provisions and principles of international human rights law, as well as the duty to prevent, investigate, punish and provide full reparations for human rights violations.

The enshrinement of the reception and international integration of human rights is a novelty of the proposed new Constitution, since the current text does not specifically address this issue.

### INTERFERENCE OF THE REGIONAL GOVERNMENT IN INTERNATIONAL RELATIONS

The Regional Government, defined in the proposed Constitution as "*the executive body of the Autonomous Region*", will be responsible, among other duties, for **representing the Autonomous Region before international authorities, within the framework of the national policy on international relations**, with coordination and intermediation functions between the central government and the region.

In addition, the Regional Government **shall have the authority to enter into and execute international cooperation actions**, within the frameworks established by the

treaties and conventions that the country enters into for this purpose and in accordance with the procedures regulated by law.

In contrast to the proposed Constitution, the current Constitution provides that the supreme administration of each region is vested in a regional government, which is not vested with powers in international affairs and matters.

In conclusion, the main novelties of the proposed Constitution are: (i) it incorporates explicit principles on which international relations should be based; (ii) it incorporates aspects that should be promoted in international relations; (iii) it enshrines the reception and international integration of human rights; (iv) it includes powers for Regional Governments in international aspects; (v) it establishes Latin America and the Caribbean as a priority area for Chile's international relations.

However, some aspects of the proposed Constitution have been the object of objections or questions, such as:

- ✓ The reference as a regulatory framework to "**customary international law**" on human rights, since it implies the incorporation of a rather vague concept, unlike the current regulation where the legal framework is determined by those international treaties signed and ratified by Chile, which provide certainty and precision in the application of its concepts and provisions.
- ✓ The **declaration of Latin America and the Caribbean as a priority zone** for Chile's international relations implies a guideline or conditioning for the Executive Branch in the conduct of international relations. In addition, there is a lack of clarity in the scope of this declaration of priority zone.
- ✓ **Publicity** of international treaty **negotiations** may be difficult to apply in practice, as reservation may be necessary for certain cases, such as territorial boundary agreements.

- ✓ Popular initiatives to request the signing of international treaties, which even allow those over 16 years of age to participate, could entail a risk of politicizing international relations.

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## 6.

## AMENDMENT AND REPLACEMENT OF THE CONSTITUTION

- As in the Constitution currently in force, the proposed new Constitution includes a chapter on constitutional amendment.
- However, the proposal innovates in the required quorum and by introducing mechanisms of direct democracy (popular initiative, indigenous initiative and referendums).
- In addition, it includes a Constitutional Assembly as a mechanism for the total replacement of the Constitution.

### CONSTITUTIONAL AMENDMENT

The proposal states that the bills for constitutional amendments may be initiated by (1) presidential initiative, (2) motion of deputies or regional representatives, (3) popular initiative (in this case, 3% of the last electoral roll is required), or (4) indigenous initiative

The quorum for approval of these bills is **4/7 of the members in office** of the Congress of Deputies and of the Chamber of Regions (Legislative Branch).

However, the proposal has a particularity, which is that the President of the Republic must call for a **ratifying referendum** when the amendment bill (already approved by 4/7 of the Legislative Branch) substantially alter the following matters:

- Political regime and presidential term;
- Design of the Congress of Deputies or the Chamber of Regions and duration of its members;
- Regional State;
- Fundamental principles and rights; and
- Chapter on the amendment and replacement of the Constitution.

However, if the amendment bill is approved by 2/3 of the deputies and regional representatives in office, **it will not be submitted to a ratifying referendum.**

#### **POPULAR INITIATIVE FOR CONSTITUTIONAL AMENDMENT VIA REFERENDUM**

The proposal includes a popular initiative for constitutional amendment to be voted by all citizens through a **national referendum**.

Specifically, the proposal states that a minimum equivalent to **10% of the citizens** (according to the last electoral roll) may submit a proposal for constitutional amendment to be voted by national referendum in **conjunction with the next election**. If it reaches the majority, the proposal will be deemed approved.

This alternative does not include any limitation as to the matters that could be subject to amendment.

### THE TOTAL REPLACEMENT OF THE CONSTITUTION THROUGH A CONSTITUTIONAL ASSEMBLY

The total replacement of the Constitution can only be carried out through a **Constitutional Assembly (CA) called by referendum**.

There are 3 alternatives to call this referendum:

1. **Popular initiative** sponsored by **25% of the last electoral roll**.
2. **Decree** of the President of the Republic **approved by 3/5 of the** members in exercise of the Legislative Branch.
3. **Law approved by 2/3** of the members in office of the Legislative Branch.

Having obtained the majority of the votes in the referendum, the CA shall be installed, and shall have the sole purpose of drafting a proposal for a new Constitution. The rules for the election of its members include:

- Parity criteria;
- Territorial equity;
- Independents and members of political parties shall participate on an equal footing;
- Reserved seats for indigenous peoples and nations.

In addition, it is provided that the CA will operate for at least 18 months and will be dissolved once the new Constitution proposal is submitted. Once the proposal is submitted, a referendum must be called to approve or reject it. If approved, it will be enacted and published.

### AMENDMENT OF THE TRANSITIONAL REGIME

As stated in the transitory provisions of the constitutional proposal, **until March 11, 2026, a quorum of 4/7** of the Chamber of Deputies and of the Senate (together, the National Congress) **will be required** for the approval of projects that amend the proposed new Constitution (in case it is approved).

However, if the constitutional amendment bill approved by the National Congress substantially alters (1) the political regime and the presidential term, (2) the design of the Congress of Deputies or the Chamber of Regions and the duration of its members, (3) the Regional State, (4) the fundamental principles and rights, (5) the chapter on Amendment and Replacement of the Constitution, (6) the chapter on Nature and Environment and (7) the chapter on Transitory Provisions, they **must be submitted to a ratifying referendum**. As can be observed, this transitory regime adds **2 matters not foreseen in the permanent regime** of the constitutional proposal: amendment bills that substantially alter the chapter on Nature and Environment and the chapter on Transitory Provisions. Finally, if the amendment bill on any of these matters is approved by **2/3 of the members** of the National Congress, it will not be submitted to the ratifying referendum.

### COUNTERPOINT TO THE CURRENT CONSTITUTIONAL AMENDMENT REGIME.

Although a recent constitutional amendment was passed that lowered the quorum required to approve a constitutional amendment, the rules that were previously included in current Constitution stated the following:

- **Initiative:** Constitutional amendment bills may be initiated by the President of the Republic or by a motion from any of the members of the National Congress (which may not be signed by more than 10 deputies or more than 5 senators).

- **Quorum:** In order to be approved in each Chamber, the amendment bill would require the favorable vote of **3/5 of the deputies and senators in office**. However, if the amendment refers to provisions included in Chapter I (*Bases of Institutionality*), III (*Constitutional Rights and Duties*), VIII (*Constitutional Tribunal*), XI (*Armed Forces, Law and Order and Public Security*), XII (*National Security Council*) or XV (*Amendment of the Constitution and the procedure for drafting a new Constitution of the Republic*), it would require the approval of **2/3 of the deputies and senators in office**.
- **Presidential veto:** The President of the Republic may totally or partially reject a amendment bill approved by both Chambers of the National Congress.

- **If it is totally rejected**, and both Houses insist by 2/3 of their members in office, the President must enact it, unless a plebiscite is convened.
- **If it rejects it in part**, the President's remarks on the bill shall be deemed approved with the favorable vote of 3/5 or 2/3 of the members in office of the National Congress, depending on the matter in question.

If the members of the National Congress do not approve all or some of the remarks of the President, there shall be no constitutional amendment on the points in disagreement, unless the National Congress insists by 2/3 of their members in office on the part of the bill approved by them. In the latter case, the bill shall be enacted unless a plebiscite is convened on the points of disagreement.

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## II.

# PROPERTY RIGHTS AND ECONOMIC FREEDOM

### 1.

## OWNERSHIP RIGHT OVER ASSETS IN GENERAL

- Property is not defined in either the current or the proposed new Constitution. Even so, it is possible to identify conceptual differences between the ownership right that both protect.
- In this edition we review which property may be subject to ownership, the content and limits of this right, its role, and the rules that regulate the State's power to expropriate.

### WHAT IS PROPERTY IN OUR LAW?

In the Chilean legal system, the concept of property historically used is the one set in the Civil Code, whose Article 582, first paragraph, provides that "*dominion (which is also called property) is the right over a tangible thing, to enjoy and dispose of it arbitrarily; not being against the law or against another's right*". Article 583 adds that "*over intangible things there is also a kind of property*".

Both the current Constitution and the proposed new Constitution, frequently use the words "property" and "dominion", but neither of them gives a definition of property. However, as will be seen, from the wording of their provisions, important conceptual differences emerge, some with a significant practical impact.

## THE CURRENT CONSTITUTION AND THE PROPOSED NEW CONSTITUTION: FACE TO FACE

### RECOGNITION OF THE OWNERSHIP RIGHT AND ASSETS TO WHICH IT APPLIES

As in the current Constitution, the proposed new Constitution recognizes the right to ownership.

- The current Constitution does so in its Article 19 (24), stating that "*the Constitution assures to all persons: (...) The right of ownership in its diverse species over all kinds of tangible or intangible property*".
- The proposed new Constitution does the same in the Chapter on Fundamental Rights and Guarantees (Article 78), stating that "*every person, whether natural or legal, has the right to ownership in all its species and over all kinds of goods (...)*".

No major differences can be identified on this issue. It could even be argued that the rule contained in the proposed new Constitution is broader than the current Constitution, since it would provide constitutional protection to the property that may fall on assets that can hardly be subsumed in the nineteenth-century classification that distinguishes between tangible and intangible assets (think of data or energy, for example).

### CONTENT

One aspect that may cause concern is related to Article 78, paragraph 2 of the proposed new Constitution, which states that "*the law shall determine the manner of acquiring ownership, its content, limits and duties, in accordance with its social and ecological role*".

Two relevant changes with respect to the current Constitution can be noted in this rule:

- The indication that the content of the right is determined by law; and
- The enshrinement of a social and ecological role of property, from which emanate limits and duties.

As for the determination of its content by law, in practice this could mean that there is no real constitutional guarantee of the right to ownership, at least in its basic aspects.

Indeed, the current Constitution provides the following: *"only the law may establish the manner of acquiring, using, enjoying and disposing of property (...)"*. What at first glance could be read as a mandate to the legislator to regulate the exercise of the right in question, **serves at the same time to establish its essential content at a constitutional level**, consisting of the ownership of the powers of use, enjoyment and disposition of the property on which the right of ownership lies.

On the contrary, the proposed new Constitution refers to the law for the purpose of determining such content, so there is no assurance that the right will maintain such essential and basic powers or attributes.

#### THE ROLE OF PROPERTY AND ITS LIMITS

On the other hand, the so-called *"social and ecological role"* of the proposed new Constitution replaces the former *"social role"* of the current Constitution.

Neither of the two constitutional texts provides a definition in this regard, although the current Constitution states that the social role *"includes everything required by the general interests of the Nation, national security, public utility and health and the conservation of the environmental heritage"*.

For its part, the proposal chose a different path, leaving open the concept of *"social and ecological role"*, which offers to the legislator a greater range of action when setting the limits and duties it deems pertinent. The only reference of the proposed new

Constitution to this concept outside this article is made in relation to the right to the city (Article 52, paragraph 1), which *"is based on the exercise of human rights in the territory, on its democratic management and on the social and ecological role of property".*

## EXPROPRIATION

Perhaps the point of greatest concern is the constitutional statute on expropriation, which suffers important modifications:

- Article 78, paragraph 3, provides that *"no person may be deprived of his property, except by virtue of a law authorizing expropriation for reasons of public utility or general interest declared by the legislator"*. A first question that arises is: At what point is it understood that a person has been *"deprived of his property"*? Must this person necessarily lose all the attributes of the domain for this to occur?
- The current Constitution is more precise in this matter, stating that *"no one may, in any case, be deprived of his property, of the asset on which it rests or of any of the essential attributes or powers of the domain, except by virtue of a general or special law authorizing expropriation for reasons of public utility or national interest, as qualified by the legislator"*. In other words, under the current Constitution, there is no doubt that both "total" expropriation (the right as such) and "partial" expropriation (the property on which it is based or the powers to use, enjoy or dispose of) are prohibited.

The proposed new Constitution then provides that *"the owner shall always be entitled to be compensated for the fair price of the expropriated property"*. There is no indication regarding the meaning of *fair price* in this context.

Some analysts point out that the fair price undoubtedly refers to the *"market value"* of the expropriated property. Although it is true that in our jurisprudence such criterion is well established for the purpose of determining whether the *"enormous injury"*

is configured in the sale or exchange of real estate, nothing can assure that such interpretation will be extended to the constitutional scope.

On the other hand, although the principle of payment prior to taking possession of the expropriated property is preserved, the proposed new Constitution does not state that the payment must be "*total*", as is the case in the current Constitution. At the same time, the rule that payment must be made, in the absence of an agreement, "*in cash*" has been modified.

Lastly, although the proposed new Constitution contemplates the possibility of claiming in court both the legality of the expropriation act and the amount and method of payment, it is also true that the power of the judge to order the suspension of the taking of possession, in light of the merit of the background information provided, as established in the current Constitution, is eliminated.

#### **THE RIGHT TO ACQUIRE THE PROPERTY IS NOT RECOGNIZED.**

In what is a clear consequence of the importance that the principle of free movement of goods has had in our history, the current Constitution enshrines, in its Article 19 (23), what has been known as the "*right to property*" (as distinct from the right of ownership over a good that has already been acquired).

In other words, all persons are assured "*the freedom to acquire the dominion of all kinds of property, except those which nature has made common to all men or which should belong to the Nation as a whole and which the law so declares. The foregoing is without prejudice to the provisions of other precepts of this Constitution*".

The proposed new Constitution does not contain such a provision. On the contrary, its emphasis is placed on those goods that are not susceptible to domination. Thus, it devotes several articles to deal with the so-called "*natural common goods*", among which some are directly not subject to ownership, such as water, air, territorial sea

and beaches, among others recognized by international law, the Constitution or the laws, while others may be in the private domain, but subject to restrictions, since the State reserves the power to regulate their use and enjoyment. Although the current Constitution, as is clear from the rule quoted in the preceding paragraph, also set limits to the freedom to acquire ownership of some property, it requires: (i) *"a law with a qualified quorum"*; and (ii) that *"the national interest so requires"*.

#### REGARDING STATES OF CONSTITUTIONAL EMERGENCY

In relation to states of constitutional emergency, and without prejudice to the elimination of the *"estado de emergencia"* included in the current Constitution, which is beyond the scope of this bulletin, the proposed new Constitution allows to set the same restrictions as the current Constitution: that is, seizure of property and limitations on the exercise of the right to ownership are authorized in states of assembly and catastrophe

In both texts, seizure give rise to compensation in accordance with the law, but the current Constitution adds: *"Limitations imposed on the right to ownership shall also give rise to compensation when they entail the deprivation of any of its essential attributes or faculties and thereby cause damage"*. This provision is omitted in the proposed new Constitution.

#### PROPERTY LAW IN OTHER AREAS

This bulletin contains an overview of how the proposed new Constitution deals with property, as well as the main differences with respect to the current Constitution.

However, said right has an impact on numerous areas, the complexity of which merits a differentiated treatment. Thus, for more information on the relationship of property law with matters such as the constitutional status of water, mining, indigenous

peoples, and the media, as well as the protection of intellectual and industrial property, we invite you to review the respective bulletins that we have prepared on the constitutional proposal.

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## 2.

### ECONOMIC FREEDOM, COMPETITION, AND THE RIGHT OF ASSOCIATION

- There are relevant changes in the rules referring to economic freedom in the text approved by the Constitutional Convention.
- It also addresses aspects related to competition that have caused uncertainty, as well as changes related to the right of association.

#### HOW WAS FREEDOM IN ECONOMIC MATTERS INCLUDED IN THE CONSTITUTIONAL PROPOSAL?

The proposed new Constitution addresses the freedom to undertake and develop economic activities. This right is limited by the rights enshrined in the proposed new Constitution and the protection of nature.

The content and additional limits are left to the laws, which "shall promote the development of smaller companies" and "ensure the protection of consumers".

In addition, the constitutional proposal includes the right of workers to "participate in company decisions", which could restrict the exercise of this right.

In the Constitution currently in force, the right to develop any economic activity has other limits, which correspond to morality, public order, national security and the legal norms that regulate it.

### Comments:

The current Constitution **prohibits laws regulating constitutional rights from affecting their essence**. However, there is no equivalent rule in the proposed new Constitution, so that the laws regulating this right -like any other right- could contain restrictions that directly affect its essence or prevent its free exercise.

## COMPETITION

### • General rules

Unlike the current constitution, which does not address competition, the proposal contains some rules that refer to this subject, even though it does not use the term “competition” directly. It states that "practices of collusion between companies", "abuses of dominant position" and "business concentrations that affect the efficient, fair and loyal operation of the markets", **will be understood as conducts contrary to the "social interest"**, and that the law will establish the penalties for those responsible.

### Comments

The description of prohibited conducts does not conflict with the conducts sanctioned under DL 211.

Regarding concentration operations, the international standard, also used in current legislation, is to avoid operations that are likely to substantially reduce competition. The proposal **innovates and uses terms that have no jurispruden-**

tial or doctrinal basis in Chile or other advanced jurisdictions that have served as a guide to the Chilean one, prohibiting "*business concentrations that affect the efficient, fair and loyal operation of the markets*". This new standard generates uncertainty and can lead to arbitrariness.

The proposed new Constitution **broadens the scope of state action** in the economy, and in certain cases establishes state monopolies in areas where competition currently exists, such as, pensions and health contributions. It is worth asking whether this provision will be applied to sanction these new monopolies if they abuse their position.

- **Criminal action in cases of collusion**

Currently, article 64 of Law Decree No. 211 only allows criminal investigations for collusion to be initiated by means of a complaint filed by the National Economic Prosecutor's Office and once it has been accredited by an enforceable final judgment of the Competition Court.

In the proposed new Constitution, one of the norms regulating the Public Prosecutor's Office grants the power to exercise public criminal action even when this is exclusive to other State bodies according to the law, **when the crimes are against probity, public property or harm collective legal interests.**

### Comments

This rule **affects the leniency**, because the leniency is confirmed by the Competition Court or the Supreme Court at the end of the process, but if a prosecutor can start a criminal action in parallel to the investigation led by the National Economic Prosecutor's Office or the case processed before the Competition Court, the whistleblower will have no guarantee that the Public Prosecutor will not proceed with the prosecution. This could end the effectiveness of leniency, which is the most effective mechanism for detecting, sanctioning and deterring collusion.

- **The Competition Court**

La propuesta de nueva Constitución señala que la jurisdicción “*se ejerce exclusivamente por los tribunales de justicia y las autoridades de los pueblos y naciones indígenas reconocidos por la Constitución o las leyes dictadas conforme a ella*”. Las normas sobre los tribunales de justicia reconocen a los tribunales especiales, como sería el TDLC, como un tribunal de instancia, sujeto a la revisión de la Corte de Apelaciones y eventualmente de la Corte Suprema. Serán “*tribunales de instancia los civiles, penales, de ejecución de penas, de familia, laborales, administrativos, ambientales, de competencia común o mixtos, vecinales, de ejecución de pena y demás que establezcan la Constitución y la ley.*”

### Comments

If the Competition Court becomes a court of instance, it would end its current composition that includes 2 economists and 3 lawyers, since only lawyers with three years of practice who have passed the Judicial Academy can be judges of courts of instance.

It is worth asking whether the Administrative Courts incorporated in the proposed new Constitution - which will hear and resolve cases against the State Administration - will be in charge of hearing free competition cases when the anticompetitive conducts are carried out by the State Administration.

- **Concentration operations and media concentration**

The constitutional proposal provides that the State shall prevent the concentration of ownership of the media and information, that under no circumstances may a State monopoly be established over them, and that the law shall be responsible for safeguarding this precept.

### Comments

It is not clear whether the concentration standard will be the same as the one set for other industries consisting of the "efficient, fair and loyal of markets" or a different one.

#### • Branch bargaining and competition

The proposal establishes the right to collective bargaining, which includes branch, sectoral and territorial bargaining, the choice of which will be up to the workers.

### Comments

This right must be made compatible with the prohibition of collusion, because on both sides, workers and employers of companies that may be in competition with each other, must sit down to negotiate.

## THE RIGHT OF ASSOCIATION

The norm relating to the right of association of the constitutional proposal, as in the current Constitution, provides that individuals have the right to associate without prior permission and that, to have legal status, associations must be constituted in accordance with the law.

However, the proposal **does not include the current provision that prohibits forcing individuals to belong to an association**. The current prohibition of political parties to engage in activities other than their own and obtaining funds from foreign sources is not included in the proposal.

The proposal establishes that the law may restrict the right of association with respect to the police and armed forces.

## NON-ARBITRARY DISCRIMINATION BY THE STATE IN ECONOMIC MATTERS

This right contained in the current Constitution was not included in the constitutional proposal.

### Comments

On the contrary, the proposed new Constitution **favors certain forms of business performance over others**, for example, the laws that regulate the exercise of the right to develop economic activities should promote the development of smaller companies; the obligation of the State to promote the development of cooperatives, protect small mining and *pirquineros*, promote and support indigenous farmers, small-scale fishing, etc.

In the matter of State, regional or local companies, the requirements to form them are lowered, and **there is no constitutional rule that obliges them to compete on equal conditions with private companies.**

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# III.

## TAXATION AND THE ECONOMIC ROLE OF THE STATE

### 1.

#### MAIN PRINCIPLES AND RIGHTS IN TAX MATTERS

- The proposed new Constitution establishes several principles and rights regarding taxation matters.
- Some of these principles and rights, such as equality before the law, non-confiscatory taxes, taxes set by law and no pre-determination of the collected taxes, are recognized in the Constitution currently in force.
- Other principles and rights, such as the “tax system” and the taxation goals, are a novelty with respect to the current constitutional regulation.

#### MAIN TAXATION PRINCIPLES AND RIGHTS INCORPORATED IN THE PROPOSED NEW CONSTITUTION

##### 1. Tax system

The proposal establishes the right to a tax system based on the principles of *equality, progressivity, solidarity and material justice*.

Among its goals, the tax system will have to reduce inequalities and poverty.

## 2. Non-confiscation

The tax system must not, in any case, be confiscatory in scope.

## 3. Taxes must be set by law

Taxes of any kind or nature can only be created, modified, or repealed by law. The same applies to benefits regarding taxes, the determination of their progression, exemptions, and proportionality, notwithstanding the exceptions established by the proposed new Constitution.

These laws are of necessary presidential concurrence and can originate from a presidential initiative or a parliamentary motion. They cannot originate in popular initiatives of law.

## 4. Taxation goals

The proposed new Constitution indicates that taxes may aim at goals other than collection. However, they must always take into consideration certain limits such as *necessity, reasonableness, and transparency*.

Regarding this principle, the draft states that the law may establish taxes on activities that affect the environment and on the use of “natural commons” (*“bienes comunes naturales”*), national public property, or State property.

## 5. No pre-determination of collected taxes

Taxes, whatever their nature, shall be paid into the public treasury of the State or the territorial entities, as appropriate under the proposed new Constitution. Exceptionally, the law may create taxes on activities or goods identified with a territory that directly benefit such territory’s territorial entity.

## CONTRAST WITH THE CURRENT CONSTITUTION

### 1. Tax system

The proposed new Constitution incorporates the concept of a “tax system”, based on the pillar principles of equality, progressivity, solidarity and material justice. Additionally, it stipulates that the tax system will have, among its goals, the reduction of inequalities and poverty.

The Constitution currently in force does not consider a concept of tax system. It only mentions the principle of equality regarding the distribution of taxes and other public charges and does not express a specific goal for taxes.

### 2. Non-confiscatory system

The proposed new Constitution expressly states that the tax system must not, in any case, be confiscatory in scope.

The Constitution currently in force provides that the law may not establish manifestly disproportionate or unfair taxes (“*tributos manifestamente desproporcionados o injustos*”). It has been interpreted that the non-confiscatory principle arises from such mention.

### 3. Taxes must be set by law

The proposed new Constitution expressly establishes that the creation, modification and the repeal of taxes of any kind or nature, as of the benefits applicable to them, the determination of their progression, exemptions and proportionality are matters only to be addressed by the law, notwithstanding the exceptions established by the proposed new Constitution. Such laws are subject to presidential concurrence and may originate from a presidential initiative or a parliamentary motion.

The Constitution currently in force establishes that people have the right to the equal distribution of taxes in the form established by law, which has been interpreted as the principle that taxes must be set by the law. These laws on taxes are the exclusive initiative of the President of the Republic.

#### **4. Taxation goals**

The proposed new Constitution expressly establishes that taxes may have goals other than tax collection, subject to certain limits such as necessity, reasonableness and transparency.

The current Constitution does not establish a specific goal for taxation.

#### **5. No pre-determination of collected taxes**

The proposed new Constitution establishes the no pre-determination of collected taxes as a general principle of taxation. Exceptionally, it allows the possibility of assigning the collection of a determined tax to a specific territorial entity, provided there is a clear identification between the levied activity or goods and the respective territory.

The Constitution currently in force also recognizes the no pre-determination of collected taxes as a general principle. Exceptionally, it permits the destination of collected taxes to national defense purposes or a region or territory clearly identified with the activity or goods subject to a specific tax.

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## 2. DEBT ISSUANCE

- The proposed new Constitution would allow regional and local governments to finance and access funds through debt issuance , but the way in which is regulated could compromise the financial responsibility of the regional and local authorities entities.
- On the other hand, the absence in the proposed new Constitution of principles and mechanisms for the control of indebtedness, public spending and fiscal discipline that are enshrined in the current Constitution could have certain consequences.

### DEBT ISSUANCE IN THE PROPOSED NEW CONSTITUTION

The proposed new Constitution establishes that **only a law could:** (a) authorize the contracting of loans and other operations that can compromise the credit and financial responsibility of the State, its agencies and municipalities, noting that this would not apply to the Central Bank; and (b) establish the conditions and rules under which universities and State-owned companies and those in which the State has a stake can contract loans, which in no case could be made with the State, its agencies and companies.

On the other hand, the proposal establishes that the laws of "*necessary presidential concurrence*" – i.e., those that could only be approved if the President of the Republic grants his *sponsorship* during the processing of the bill – include, among others: (i) those that directly incur **expenses to the State**; (ii) those related to the **budgetary administration of the State**, including amendments to the Budget Law; and (iii) those that **contract or authorize to contract loans** or enter into any other kind of operations that could compromise the **financial responsibility** of the State, the semi-fiscal entities, or autonomous entities, and condone, reduce or modify obligations, interests or other financial charges of any nature established in favor of the Treasury or of the referred agencies or entities.

Regarding the **Central Bank**, the proposal indicates that it may only carry out operations with financial institutions, and that in no way may it grant them its guarantee, nor acquire documents issued by the State, other than in exceptional and transitory situations in which the preservation of the normal functioning of internal and external payments so requires, pointing out that under these circumstances the Central Bank may could buy for a determined period and sell in the open secondary market, debt instruments issued by the Treasury, in accordance with the law.

With respect to **local financial administration**, the proposal grants **financial autonomy to autonomous regions, autonomous communes and indigenous territorial autonomies**, for the realization of their purposes and interests under the terms established by the Constitution and the law. Such financial autonomy would be governed by the principles of sufficiency, coordination, budgetary balance, solidarity and inter-territorial compensation, sustainability, responsibility and economic efficiency. In this sense, the proposed new Constitution grants regional and local governments the power to issue debt in accordance with the **provisions of the law**, which must at least establish: (a) the prohibition of allocating the funds collected to remunerations or to the financing of current expenditure; (b) the mechanisms that guarantee that the debt is fully and duly serviced by the debtor; (c) the prohibition to establish guarantees or sureties from the Treasury; (d) the establishment of maximum debt limits as a percentage of the annual budget of the respective regional and local government, and the obligation to maintain an updated risk rating; and (e) restrictions in electoral periods.

## DIFFERENCES BETWEEN THE PROPOSED NEW CONSTITUTION AND THE CURRENT CONSTITUTION

The main differences between the current Constitution and the proposed new Constitution regarding debt issuance are as follows:

- **Quorum for approval of the law:** The current Constitution states that a qualified quorum law would be required to authorize the contracting of those loans whose maturity exceeds the term of the respective presidential term, which was not incorporated in the proposed draft, and a law on this matter could be approved with a simple majority, reducing the constitutional control that restricted the possibility that a new government must assume high fiscal debt of previous administrations.
- **Public expenditure control principles:** The current Constitution states that borrowing by the State, its agencies and municipalities must be for the purpose of financing specific projects, and the law authorizing such borrowing must indicate the sources of funds from which the debt is to be serviced, whereas the proposed text does not enshrine these public expenditure control principles.
- **Initiative of the law:** The laws of "exclusive initiative of the President of the Republic" contained in Article 65, paragraph 4 (3) of the current Constitution are replaced in the proposal by the concept of "*necessary presidential concurrence*", excluding, however, the *presidential sponsorship* to modify the conditions contracted by the local governments, thus enshrining the administrative, patrimonial and financial autonomy of the autonomous regions, autonomous communes and indigenous territorial autonomies. In addition, these *laws of regional agreement*, because they compromise the patrimonial responsibility of the territorial entities, are also processed in the Chamber of Regions.

- **Budget Law:** Regarding the annual Budget Law regulated in Article 67 of the current Constitution, the proposal for the new Constitution maintains the main guidelines regarding its formative procedure, but adapting it to the new legislative system proposed by the draft of the new Constitution and applying to it the "*regional agreement law*" procedure, which would imply that it be reviewed by a "*special budget commission*" composed not only of deputies but also of regional representatives.

#### EFFECTS IF THE PROPOSED NEW CONSTITUTION IS APPROVED

Regarding the financing and financial stability of regional and local governments, including indigenous territorial autonomies, the rules of the proposal **would allow financing and access to funds through the issuance of debt by regional and local governments** to meet their various financing needs. The possible situation of indebtedness of regional and local governments, especially since the proposed new Constitution leaves the determination of maximum indebtedness in the hands of *regional agreement laws*, could seriously compromise the financial responsibility of the territorial entities and put the fiscal sustainability of the respective territories at risk.

Similarly, the absence at the constitutional level of certain principles and mechanisms for the control of indebtedness, public expenditure and fiscal discipline, which were enshrined in the current Constitution, implies that **it would be those in charge of the legislative branch who could determine important aspects of public indebtedness**, such as the source of financing for the repayment of the contracted debt and the use and destination of the resources obtained from such indebtedness. Of particular relevance would be the future regulatory framework that implements the new constitutional norms on the matter and, especially, the fate of the current legal framework that regulates the financial administration of the State, the current norms that regulate international contracts for the public

sector, and the other budgetary and financial regulations of the public sector currently in force.

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### 3.

## PUBLIC COMPANIES AND SERVICES

- The constitutional proposal establishes that the State will have public initiative in economic activity, which must be governed by the principle of economic efficiency.
- It includes the possibility of creating regional or municipal public companies, which would no longer require a law with a qualified quorum, as established in the current Constitution.
- The proposal does not stipulate that public companies must be governed by the ordinary law applicable to private individuals, unlike the current Constitution.

The proposed Constitution submitted by the Constitutional Convention states that the Autonomous Region through its public entities, can create **regional public companies**, in accordance with the procedures regulated by the Constitution and the law. In view of the foregoing, the following public entities are granted certain powers in this matter:

**a. Regional Assembly:** it is vested with the power to approve the proposal of the Regional Governor, after the ratification by the Chamber of Regions, on the creation of regional public companies or participation in regional companies.

**b. Regional Government:** it is empowered to propose to the Regional Assembly the creation of regional public companies or the participation in regional companies for the management and services of its competence.

**c. Autonomous Communes:** they are vested with the power, subject to authorization by general or special law, to establish companies or participate in them, either individually or in association with other public or private entities, in order to fulfil with the functions and exercise the powers assigned to them by the Constitution and the law. The municipal public companies shall have legal status, their own assets and shall be governed by the provisions of the Constitution and the law.

Regarding **public services**, the proposed Constitution provides as follows: *"it is the duty of the State to provide universal and quality public services, which shall be sufficiently financed. The State shall plan and coordinate in an intersectoral manner the provision, delivery and coverage of these services, under the principles of generality, uniformity, regularity and territorial relevance"*.

**PRINCIPLE OF ECONOMIC EFFICIENCY, ECONOMIC ROLE OF THE STATE AND PUBLIC ECONOMIC INITIATIVES.**

**a. Principle of economic efficiency:** as prescribed in the proposed new Constitution, this principle implies that *"the State shall use its resources in a reasonable, optimal, effective and efficient manner, for the benefit of the people and in accordance with the objectives imposed by the Constitution and the laws"*.

**b. Economic role of the State:** the constitutional proposal establishes that the State must participate in the economy to comply with the objectives established in the Constitution. Accordingly, the economic role of the State is based on the economic principles and objectives of solidarity, economic pluralism, productive diversification and social and solidarity-based economy. Furthermore, the **State must regulate, supervise, promote and develop economic activities**. Finally, it specifically establishes the State's promotion of innovation, local markets, short circuits and the circular economy.

**c. Public economic initiatives:** the proposed Constitution provides that the State will have public initiative in economic activity, and **may therefore develop business activities**, which may take various forms of ownership, management and organization.

Public companies **must be created by law and shall be governed by the legal regime determined therein**. Notwithstanding the foregoing, the rules of public law on probity and accountability shall be applicable to them.

**MAIN DIFFERENCES BETWEEN THE CURRENT CONSTITUTION AND THE PROPOSED CONSTITUTION IN THE REGULATION OF THE STATE'S PARTICIPATION IN THE ECONOMY**

- ✓ The current Constitution, in Article 19 number 21, provides that the State and its agencies may carry out business activities or participate in them **only if authorized by a law with a qualified quorum**.

The proposed Constitution only requires the prior authorization of a general or special law and, in the case of municipal public companies and, in the case of other public companies, they must be created by law. However, the proposed Constitution does not specify the differences between a special and a general law, nor does it specifically mention the quorums of the laws approving the creation of public enterprises.

- ✓ Article 19 No.21 of the current Constitution provides that, in the event that the State and its agencies develop business activities or participate in them, **they must be subject to the ordinary legislation applicable to individuals**, without prejudice to the exceptions that for justified reasons are established by a law with a qualified quorum.

In contrast, the proposed Constitution does not explicitly stipulate that public companies must be subject to the ordinary law applicable to private individuals, but that the law will determine their legal regime, which could be different from that of private companies.

## CONCLUSIONS

The main novelties of the proposed Constitution in the area of public companies and services are: (i) **greater powers of the State bodies to create public companies** with fewer requirements than in the current Constitution; and (ii) the establishment of an **active participation of the State** in economic matters, based on several principles.

However, some aspects of the proposed Constitution in this area have been subject to reservations or questioning, namely:

- ✓ Unlike the current Constitution, the proposed new Constitution states that public companies **can be created through a simple law and will no longer require the approval of a law with a qualified quorum**. Therefore, the participation of the State in the economic activity could cease to be something eventual, in view of the greater ease with which public companies and services can be created.
- ✓ The proposal **omits the existing principle** in the current Constitution **that state companies are subject to the same rules as private individuals** when they compete in the market, which could imply competitive advantages for public companies and disadvantages for private individuals.
- ✓ The **principles governing the participation of the State in economic activity**, such as economic efficiency, solidarity, productive diversification, social and solidarity-based economy, economic pluralism, generality, uniformity, regularity and territorial belonging are **not specifically defined**, making them rather vague concepts without greater certainty as to their application and scope.

✓ Regarding the creation of "universal and quality" public services, it is **not entirely clear** how the State will contribute to the sufficient funding required by the law, **nor whether this will represent a constraint** on private parties to provide public services, **nor the effect it will have on those who currently provide such services.**

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# IV.

## NATURAL RESOURCES

### 1.

#### NATURAL RESOURCES, A NEW APPROACH?

- The proposed new Constitution establishes duties of the State in relation to various elements of the environment.
- It is pointed out that Chile is an oceanic country. It also incorporates the "*maritorio*" as a new legal concept.
- It establishes the right to a vital minimum of *affordable* and *safe* energy.

The proposal agreed upon by the Constitutional Convention is innovative as it incorporates a series of duties of the State in relation to various elements of the environment. Let us see some of them.

#### CHILE IS AN OCEANIC COUNTRY

The proposed new Constitution establishes that Chile is as an oceanic country, recognizing the existence of the *maritime territory* as a legal category that must be specifically regulated. This is related to the imposition of certain **duties on the State**, such as:

- ✓ To conserve, preserve and care for continental, insular and Antarctic marine and coastal ecosystems. It is established that a law should establish "*the administra-*

*tive division of the maritorio, its spatial planning, integrated management and the basic principles that should inform the legal bodies that materialize its institutionalization, through a differentiated, autonomous and decentralized treatment, as appropriate, based on equity and territorial justice".*

- ✓ To protect marine and marine-coastal spaces and ecosystems, promoting the various vocations and uses associated with them, and ensuring, in any case, their preservation, conservation and ecological restoration.
- ✓ Establish a National Port Policy.

### THE "MARITORIO"

The proposal recognizes a new legal concept: the "maritorio". This, like the "territory", **will have a specific regulation** that recognizes its own characteristics in the social, cultural, environmental and economic fields. However, the wording of the proposal is not clear on what will be the limits or borders of the "maritorio", nor what will be the scope and effects of this specific regulation to be implemented with respect to the activities carried out within its limits or borders.

It also states that a law will establish the **administrative division of the "maritorio" and the basic principles** that should inform the laws and regulations that will materialize its institutionalization.

### NEW CONSTITUTIONAL RIGHT IN RELATION TO ENERGY

The proposed new Constitution recognizes that all people have the right to a **minimum of affordable and safe energy**.

The specific duties of the State are (i) to **guarantee equitable and non-discriminatory access** to energy that allows people to satisfy their needs, ensuring the continuity of energy services; (ii) to **promote and protect cooperative energy companies and self-consumption**, and (iii) to **regulate and promote a distributed, decentralized and diversified energy matrix**, based on renewable energies and low environmental impact.

The proposal establishes that energy infrastructure is of “public interest”, without distinguishing the type of infrastructure or its characteristics. Given that there are currently various types of private energy infrastructure, some of which are assets associated with public utilities, it is not clear what would be the effect of declaring them to be of “public interest” at the constitutional level.

#### **WETLANDS, NATIVE FORESTS, SOILS AND PROTECTED AREAS**

The proposal establishes that, with respect to wetlands, native forests and soils, the **State must ensure their integrity, functions, processes and water connectivity**.

In addition, it provides that the State must **guarantee the preservation, restoration and conservation of "natural spaces"** through a single and integrated national system of protected areas of a technical nature. In this context, it also establishes the State's duty to guarantee the participation of local communities and territorial entities.

#### **GLACIERS AND ANTARCTICA**

The proposal includes additional duties of the State to (i) **ensure the protection of glaciers and the glacial environment**, including frozen soils and their ecosystem functions, and (ii) **conserve, protect and care for Antarctica** through a knowledge-based policy oriented towards scientific research, international collaboration and peace.

## DUTIES OF THE STATE AND THE RIGHT TO CARRY OUT ECONOMIC ACTIVITIES

Although the proposal innovates by enshrining these duties of the State, referring to the care of the environment and the preservation of natural resources at a constitutional level, it incorporates a series of elements or concepts whose scope and limits are diffuse, and which could be the object of diverse interpretations.

The question arises as to how these duties of the State can be reconciled with the exercise of other rights enshrined in the proposed new Constitution, such as the **freedom to undertake and develop economic activities**. For example, how could the exercise of the latter right be affected when it is intended to develop economic activities that could affect the *integrity, functions, processes or connectivity* of protected *areas or soils*.

This is relevant, since the proposal establishes that the exercise of this right **must be compatible with the protection of nature**, and that both the **content** and the **limits** of this right will be **determined by law**. If the proposal is approved, and until the laws regulating these matters are passed, it is not clear how a precise weighing of the duties of the State and the rights of individuals could be carried out.

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## 2. ENVIRONMENT

- The Proposal for a new Constitution recognizes nature as a holder of constitutional rights.
- Any person or group could may file a constitutional injunction if the legitimate exercise of nature's constitutional rights was deprived, threatened or disturbed by an act or omission (without requiring that these acts or omissions be illegal).
- It establishes a list of environmental principles and rights and grants relevant powers for the protection of nature and the environment to new territorial entities.

### NATURE AS A NEW CONSTITUTIONAL RIGHTS HOLDER

The Proposal for a new Constitution proposes the **recognition of nature's rights** - turning it into a new holder of rights - providing that nature *"has the right to have its existence respected and protected, to the regeneration, maintenance and restoration of its functions and dynamic equilibrium, which include natural cycles, ecosystems and biodiversity"*. It is important to note that this proposal, despite recognizing nature as a subject of rights, **does not define** what is understood by "nature".

It also expressly provides that the State *"must guarantee and promote the rights of nature"* and that *"the law may establish restrictions on the exercise of certain rights in order to protect the environment and nature"*.

It also provides that **the State and society have the duty to protect and respect the rights of nature** and that the State must adopt an ecologically responsible administration and promote environmental and scientific education.

**The Ombudsman for Nature** is created as an autonomous public agency, with legal status and its own assets, which *"will have the purpose of promoting and protecting the rights of nature and environmental rights guaranteed in this Constitution, in international environmental treaties ratified and in force in Chile, against acts or omissions of the State Administration and private entities"*. This Ombudsman for Nature is expressly empowered to *"file constitutional and legal actions when environmental and nature rights are violated"*.

It also establishes the recognition of the **right to responsible access to nature** for all people, in the following terms: *"everyone has the right to responsible and universal access to mountains, riverbanks, sea, beaches, lakes, lagoons and wetlands"*. It also states that a **law will regulate the exercise of this right, the obligations of neighboring landowners and the applicable liability regime**, among other elements.

## CONSTITUTIONALIZATION OF ENVIRONMENTAL PRINCIPLES

The proposal establishes the following **minimum principles** for the protection of nature and the environment:

- Progressivity
- Precautionary
- Preventive
- Environmental Justice

- Intergenerational solidarity
- Responsibility
- Fair climate action

In addition, the proposal establishes the **principle of “good living”** (*“buen vivir”*), which has no precedent in the Chilean legal system and is proposed as a relationship of harmonious balance: *“the State recognizes and promotes good living as a relationship of harmonious balance between people, nature and the organization of society”*.

With respect to environmental damage, the principle of **environmental responsibility** is included, which entails that whoever damages the environment must repair it, without prejudice to the corresponding sanctions according to the Constitution and the law. Although this principle was already recognized at the legal level, it would now be expressly incorporated into the Constitution. The proposal also specifies that **whoever carries out the mining activity must allocate resources to repair the damages caused, the environmental liabilities and mitigate its harmful effects** in the territories where it is developed, according to the law.

### CONSTITUTIONAL ENVIRONMENTAL GUARANTEES

The proposal provides that all persons have the right:

- To a **healthy and ecologically balanced environment** (the State must guarantee this right).
- To **clean air throughout its life cycle** (in the manner to be determined by law).

In addition, the constitutional proposal enshrines **“environmental democracy”** which includes: (i) the right to informed participation in environmental matters (the law will determine the mechanisms of participation), and (ii) the right to access environmental information in the possession or custody of the State. It is also established that **private parties must provide environmental information on their activities under the terms established by law**.

With respect to water, the proposal establishes that water is essential for life and the exercise of human and natural rights, and that the human right to water, sanitation and the balance of ecosystems will always prevail (with the law determining other uses).

Regarding the role of the State in environmental matters, the proposal establishes a series of duties:

Ensuring access to environmental justice.	Ensure environmental education.	Protecting the ecological and social function of the land.
Adopt actions for prevention, adaptation and mitigation of risks, vulnerabilities and effects caused by the climate and ecological crisis.	Protect biodiversity, preserving, conserving and restoring the habitat of wild native species, in such quantity and distribution as to adequately sustain the viability of their populations and ensure the conditions for their survival and non-extinction.	Guaranteeing and promoting the rights of nature.
Protect waters, in all their states and phases, and their hydrological cycle	Ensure the integrity of wetland ecosystems, native forests and soils, ensuring their functions, processes and water connectivity.	Guarantee the preservation, restoration and conservation of natural spaces through a national system of protected areas.

Ensure the reasonable use of water.	Establish a permanent policy of sustainable development in harmony with nature.	To regulate and promote waste management, reduction and recovery.
Protect animals, recognizing their sentience and the right to live a life free of mistreatment.	Promote education based on empathy and respect for animals.	Establish a policy for the mining activity and its productive chain that must consider, at least, environmental and social protection, innovation and the generation of added value.
Permanently monitor environmental and sanitary risks affecting the health of the country's communities and ecosystems.	Establish a National Port Policy that is organized around the principles of efficiency in the use of the coastline and the principle of environmental responsibility.	Promote dialogue, cooperation and international solidarity to adapt, mitigate and cope with the climate and ecological crisis and protect nature

#### POPULAR AND BROAD CONSTITUTIONAL INJUNCTION

The proposal provides for an action for the protection of constitutional rights which, in the case of the rights of nature and environmental rights, (1) **may be brought by any person or group, or by the Ombudsman for Nature**, and (2) will be heard and

ruled by the **environmental courts** (establishing that there will be at least one environmental court in each region of the country). Currently there are only three environmental courts in Chile, one for the northern, one for the central and one for the southern part of the country.

It is provided that this action may be exercised if, due to an act or omission, the nature and/or persons suffer a threat, disturbance or deprivation in the legitimate exercise of their constitutional rights. It should be noted that the the proposal **does not require that the act or omission be *arbitrary or illegal*** as does the current constitutional injunction ("*acción de protección*") regulated in Article 19 No. 20 of the Constitution currently in force.

### JURISDICTIONS OF REGIONAL AND LOCAL TERRITORIAL ENTITIES

The proposal creates autonomous institutions with legal existence and their own assets that will have relevant powers for the protection of nature and the environment and for the development of projects:

- **Regional Assemblies:** may intervene in environmental assessment procedures (in conjunction with the other competent bodies).
- **Autonomous region:** it will have specific competencies with respect to:
  - The conservation, preservation, protection and restoration of nature, ecological balance and the rational use of water and other natural elements of its territory.
  - Approve environmental decontamination plans (through citizen participation processes).
  - Zoning and integrated basin management.
  - Establish a permanent policy of sustainable development in harmony with nature.

- **Autonomous Commune:** it will have competences in respect of:
  - The exercise of actions to protect nature and its rights recognized by the Constitution and the law.
  - The sustainable and integral development of the commune.
  - Protect communal ecosystems and the rights of nature.
  - Execute environmental protection mechanisms and actions in the manner determined by the Constitution, the law, environmental management instruments and related regulations.

#### DIFFERENCES WITH THE CURRENT CONSTITUTION

The current Constitution does not recognize the rights of nature but assures "all people" the right to live in an environment free of pollution and considers the duty of the State to ensure that this right is not affected and to protect the preservation of nature. The proposed new Constitution **expands the list of duties of the State** and establishes that **the law may establish restrictions to the exercise of other constitutional rights** not only to protect the environment (as does Article 19 No. 24, second paragraph of the current Constitution), but also **to protect nature**.

On the other hand, the **action for the protection of** the rights of nature and the environment is **broader than the current constitutional injunction** ("*recurso de protección*") established in the current Constitution, not only in relation to the actors that may file it (the Ombudsman for Nature, any person or group) but also in relation to the fact that the act or omission that threatens, disturbs or deprives the legitimate exercise of environmental or nature rights is not required to be illegal or arbitrary.

Finally, it is important to note that the constitutionalization of the environmental principles described above, which will become obligatory for all, in accordance with the principle of constitutional supremacy (also included in the proposal), **will influen-**

ce the actions of State agencies and individuals. Certainly, these principles will be invoked by individuals, groups or institutions for the protection of environmental or nature rights before the environmental courts.

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### 3. NATURAL COMMONS

- The proposed text of the new Constitution introduces the category of "natural commons" for which the State would have a special duty of care.
- In addition, the proposed text establishes that some of these assets will not be subject to ownership.

#### WHAT WILL BE THE "NATURAL COMMONS"?

The proposed new Constitution defines "natural commons" as those *"elements or components of nature over which the State has a special duty of care in order to ensure the rights of nature [new constitutional rights holder] and the interest of present and future generations"*. A **non-exhaustive enumeration** of these goods is established, leaving open the possibility of including others by law.

In addition, it is established that some of these assets **will not be subject to ownership** (*"inapropiables"*). Additionally, there are several norms in the constitutional proposal that establish special protections in relation to these assets. See the chart below for more details:

GOODS	NOT SUBJECT TO OWNERSHIP ("INAPROPIABLES")	ADDITIONAL PROTECTION
The territorial sea and its seabed	Yes (territorial sea)	It establishes the State's duty to conserve, preserve, care for and protect marine ecosystems. Special protection is established for the maritime spaces of the Chilean Antarctic territory.
Beaches	Yes	
The Waters	Yes, water in all its states	Authorizations for the use of water shall not be subject to private transactions (" <i>incomerciable</i> "), shall be granted on the basis of the actual availability of water and shall bind the holder to the use justifying the granting of the authorization.
Glaciers	It is not expressly stated. However, the draft states that the waters will be not subject to ownership (" <i>inapropiable</i> ") in all their states.	It is established that the State must guarantee its protection and that of its glacial environment, including the frozen soils and their ecosystemic functions.  It is established that land use and ecological planning plans must prioritize the protection of glaciers.  Glaciers will be excluded from any mining activities.

GOODS	NOT SUBJECT TO OWNERSHIP ("INAPROPIABLES")	ADDITIONAL PROTECTION
Wetlands	No	It establishes that the State must ensure the integrity of its ecosystems, functions, processes and water connectivity.
Geothermal fields	No	
Air and atmosphere	Yes (air)	<p>It establishes that the State shall promote measures to conserve the atmosphere and the night sky.</p> <p>It also states that all people have the right to clean air throughout their life cycle, in the manner determined by law.</p>
The high mountain	No	
Protected areas	No	<p>It establishes that the State shall (1) guarantee the preservation, restoration, and conservation of these natural spaces; (2) monitor and maintain updated information on the attributes of these areas; and (3) guarantee the participation of local communities and territorial entities.</p> <p>Protected areas will be excluded from all mining activities.</p>

GOODS	NOT SUBJECT TO OWNERSHIP ("INAPROPIABLES")	ADDITIONAL PROTECTION
Native forests	No	It establishes that the State must ensure the integrity of its ecosystems, functions, processes and water connectivity.
The subsoil	No	

As mentioned above, the proposed new Constitution states that this new category of "natural commons" could include all those that are so declared in the Constitution or in the law. It is also established that all those "recognized by international law" may not be subject to private ownership.

It also establishes that the State shall be the **custodian of** the "natural commons" and shall have the power to **regulate the use and enjoyment** of those that are in the private domain.

In addition, the **right of responsible and universal access** to some of these "natural commons" is recognized for all people: (1) mountains; (2) riverbanks; (3) the sea, beaches, lakes, lagoons and wetlands; (4) among others defined by law.

**DUTIES OF THE STATE WITH RESPECT TO THE "NATURAL COMMONS" NOT SUBJECT TO OWNERSHIP**

The constitutional proposal states that the State shall: (1) preserve, conserve and, where appropriate, restore them; and, likewise, (2) manage them in a democratic, supportive, participatory and equitable manner.

It is also states that **any person may demand that the State comply with its duties of custody** of the natural commons. The procedure and requirements for this action must be defined by law.

#### **AUTHORIZATIONS FOR THE USE OF THE "NATURAL COMMONS" NOT SUBJECT TO OWNERSHIP**

- They shall be **temporary**.
- They shall be subject to **expiration, extinction and revocation causes**.
- They shall have **specific conservation obligations** justified in (1) the public interest; (2) the protection of nature; and (3) the collective benefit.
- **They shall not generate property rights** (whether they are individual or collective authorizations).

#### **ENVIRONMENTAL SUSTAINABILITY**

The constitutional proposal also establishes the duty of **the State and territorial entities to establish a permanent policy of sustainable and harmonious development with nature**, so that the different authorities must bear this duty in mind when issuing laws, regulations or other acts that regulate the "natural commons".

In order to comply with this duty, it is expressly established that the law may establish taxes on the use of the "natural commons". The law must distribute the resources obtained in this way, with respect to activities that are territorially circumscribed, to the corresponding territorial entities.

### **DO "NATURAL COMMONS" EXIST IN THE CURRENT CONSTITUTION?**

No. However, Article 19 N° 23 of the Constitution currently in force establishes, as an exception to the freedom to acquire ownership of all kinds of property, (1) property that nature has made common; and (2) property that should belong to the Nation as a whole (provided that a law so declares).

On the other hand, Article 589 of the Civil Code establishes that "national assets" are those whose domain belongs to the nation as a whole, and are classified into two categories: (1) national assets for public use, meaning those whose use belongs to all the inhabitants of the nation (including streets, squares, bridges, roads, adjacent sea and beaches); and (2) fiscal or State assets, referring to those whose use does not belong to all the inhabitants of the nation.

### **UNCERTAIN IMPLICATIONS**

The second transitory norm of the constitutional proposal establishes that all the regulations currently in force will remain in force until they are repealed, modified, substituted or declared contrary to the Constitution by the Constitutional Court.

However, until this happens, it is not clear how any incompatibilities or contradictions that may exist between the regulations currently in force and the rules governing "natural commons" contained in the proposal will be resolved. It will most likely require the modification and/or drafting of laws and regulations that clearly establish the scope of the provisions referring to this new category of goods.

It is important to note that the "natural commons" are not systematically treated in the transitory norms. In fact, the proposal only includes transitory norms referring to the situation of water use rights granted prior to its entry into force, which will be considered, for all legal purposes, as water use authorizations. The constitutional status of water is dealt with in another of our bulletins.

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## 4.

## CONSTITUTIONAL STATUS OF WATER

- The proposed new Constitution establishes that water would be a "natural common" good not subject to ownership, for which administrative authorizations may be granted to allow its use. Such authorizations may not be subject to private transactions.
- A specific constitutional statute is established for the protection of water, which includes a prioritization of its uses. This prioritization is not a novelty in our legal system, since it was incorporated in a similar manner in the recent modification of the Water Code.
- New governmental bodies are incorporated in relation to water management.

### SPECIAL WATER PROTECTION

The constitutional proposal establishes that the State must protect water in all its states and phases, and its hydrological cycle. It also states that water is essential for life and for the exercise of human rights and the rights of nature (in the proposal, nature is a subject of rights).

Regarding the use of this resource, the proposed new Constitution establishes an

**order of preference:** the human right to water, sanitation and the balance of ecosystems will prevail. The law is left to determine the other uses, and the State must ensure the "reasonable use of water". It is important to note that in the amendment to the Water Code published in April of this year, the prioritization in the use of water was already incorporated (prevailing the use for human consumption, domestic subsistence and sanitation).

#### **HUMAN RIGHT TO WATER AND SANITATION**

In relation to the previous point, the new Constitution proposal guarantees to all people the "**right to *sufficient, healthy, acceptable, affordable and accessible water and sanitation***", being the duty of the State to guarantee these rights for both current and future generations. It also establishes that the State must ensure "the satisfaction of this right by attending to the needs of people in their different contexts".

#### **WATER AS A "NATURAL COMMON" NOT SUBJECT TO OWNERSHIP**

The proposed new Constitution incorporates the category of "natural commons", which is defined as "elements or components of nature over which the State has a special duty of care in order to ensure the rights of nature and the interest of present and future generations". It points out that some natural commons are not subject to ownership, and includes water among them.

#### **NEW GOVERNMENTAL BODIES**

The text of the constitutional proposal includes rules on the **National Water Agency**, stating that it will be an autonomous body, with legal status and its own assets, and that it will be organized in a decentralized manner. Its purpose is to ensure the sustainable use of water for present and future generations, access to the human right to water and sanitation, and the conservation and preservation of its associated ecosystems.

Its powers include the granting, review, modification and revocation of administrative water authorizations, oversight of the responsible and sustainable use of water and the application of the corresponding administrative sanctions. It also states that it may determine the quality of sanitary services.

It also includes rules on the **Basin Councils** that would be responsible for water administration, without prejudice to the oversight and other powers of the National Water Agency and other competent institutions.

#### WATER USE AUTHORISATIONS

The constitutional proposal contains a rule stating that administrative authorizations for water use will be granted by the **National Water Agency**. Said authorizations (1) may **not be subject of private transactions** (*“incomerciable”*), (2) would be granted **according to the actual availability** of the waters, and (3) would obligate the holder to the **use that justifies their granting**.

#### BASINS AND BASIN COUNCILS

The proposal establishes that the State will ensure a participatory and decentralized water governance system, through **integrated basin management**, with the hydrographic basin as the minimum management unit.

The **Basin Councils shall be responsible for water administration**, without prejudice to the oversight and other powers of the National Water Agency and other competent institutions.

The law shall regulate the powers, operation and composition of the Councils. This shall consider, at least, the presence of the holders of water authorizations, civil society and territorial entities with a presence in the respective basin, ensuring that no actor can achieve control on its own. The Councils may coordinate and associate when

appropriate. In those cases where a Council is not constituted, the administration will be determined by the National Water Agency.

#### **WATER AND ZONING**

In the constitutional proposal, the State and the territorial entities have the duty to organize and plan the national territory. In this context, it is proposed **that management units that consider hydrographic basins** be used.

Planning, zoning and integrated basin management would be the responsibility of the Autonomous Region. The Regional Assembly is in charge of approving, modifying or rejecting the Regional Integrated Basin Management Plan.

#### **WATER AND INDIGENOUS PEOPLES AND NATIONS**

The proposed new Constitution recognizes the traditional use of waters located in indigenous territorial autonomies or indigenous territories by indigenous peoples and nations. It is the duty of the State to guarantee their protection, integrity and supply, in accordance with the Constitution and the law.

#### **CHANGES IN RELATION TO THE CURRENT CONSTITUTION**

Our Constitution only refers to water in Article 19 N°24, when it recognizes the right of ownership in its various species over all kinds of tangible and intangible assets. In its final paragraph it states: "the rights of individuals over water, recognized or constituted in accordance with the law, shall grant their holders ownership over them".

#### **TRANSITION TO A NEW REGIME?**

The thirty-fifth transitory article of the proposed new Constitution states that, with

the entry into force of the new Constitution, **all water use rights previously granted will be considered, for all legal purposes, water use authorizations.** It also establishes that, until the law regulating this matter is enacted, the rules prescribed in the Water Code on the constitution and extinction of authorizations will apply (except for the rules relating to constitution by auction), without prejudice to the processes of review and adjustment of the flow rate to be redistributed in each basin.

Likewise, the transitory norm establishes rules related to the "exploitation rights granted, regularized, recognized or constituted by act of competent authority **before April 6, 2022**", stating, among other things, that they **will be subject to the provisions of the transitory provisions of Law 21,435** (which modified the Water Code).

With respect to the National Water Agency, the transitional provision states that the President must submit a bill for its creation within twelve months. Until such law enters into force, the powers of the National Water Agency will be assumed by the General Water Directorate.

Although it is proposed to establish a prioritization of water uses at the constitutional level, the recent modification of the Water Code had already incorporated a prioritization in a similar sense (human right to access to drinking water and sanitation).

#### **SOME UNCERTAIN EFFECTS**

The proposed change from the current regime of water rights (national public use goods) to a **regime of administrative authorizations** that would allow the use of water, **not subject to private transactions**, prioritizing certain uses, certainly constitutes a fundamental change. In short, it is proposed to move from a regime that recognizes the right of ownership over water rights to a regime that does not admit the right of ownership.

The fact that administrative authorizations are not subject to private transactions means that they **may not be the object of legal relations** or, in other words, that any agreements entered into in this respect would be null and void. In this sense, although the proposal includes transitional rules on this matter, its wording allows for different interpretations regarding the **specific effect on the water rights already constituted and currently in force**. This is particularly relevant, since one of the norms contained in the constitutional proposal, regarding “natural commons” not subject to ownership, states that *“with respect to those natural common goods that are in the private domain, the State’s duty of care entails the power to regulate their use and enjoyment”* in order to preserve, conserve or restore them, as the case may be.

Finally, there are certain concepts incorporated in the constitutional proposal that, because they are not clearly defined, could be subject to interpretation, either at the jurisprudential or administrative level, as long as they are not specified more precisely by law. For example, it is not clear how sanitation would meet the standard of being *“acceptable, affordable and accessible”*.

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## 5.

## CONSTITUTIONAL STATUS OF MINERALS

- The proposed new Constitution provides a relatively short regulation with minimal explanation of the regime applicable to mining activity.
- This contrasts sharply with the current Constitution, which regulates in detail a robust system of mining concessions.
- In this bulletin we will address the proposal prepared by the Constitutional Convention and the main differences that can be identified with respect to the current regulations.

### THE PROPOSAL

La propuesta de nueva Constitución contempla un Estatuto Constitucional de los Minerales que dispone, principalmente, lo siguiente:

- **The State has absolute, exclusive, inalienable and imprescriptible property over all mines and mineral substances**, metallic, non-metallic, and deposits of fossil substances and hydrocarbons existing in the national territory, with the exception of surface clays, without prejudice to the ownership of the land on which they are located. It provides that the exploration, exploitation and use of these substances are acts of a finite and non-renewable nature, of intergenerational public interest and whose regulation must contemplate environmental protection.

- **The protection of the environment through the regulation of the impacts and synergic effects generated as a result of the mining activity**, in the manner established by law. In this sense, it establishes the obligation on the part of whoever carries out the mining activity to allocate resources to repair the impacts caused and mitigate the harmful effects in the territories where the mining project is carried out.
- Glaciers, protected areas, those established by law for reasons of hydrographic protection and others declared by law, are **excluded from all mining activities**.
- **The protection of small-scale mining and *pirquineros***, promoting their development and the use of tools, technologies and resources for this activity's traditional and sustainable exercise.

#### **MINING IN THE CURRENT CONSTITUTION**

The current Constitution establishes a series of guarantees for mining and a detailed concession regime in Article 19, paragraph 24.

- **The absolute domain of the State:** *"The State has the absolute, exclusive, inalienable and imprescriptible dominion over all mines, including the covaderas, metalliferous sands, salt flats, coal and hydrocarbon deposits and other fossil substances, with the exception of superficial clays, notwithstanding the ownership of natural or juridical persons over the land in whose entrails they are located. The superficial lands will be subject to the obligations and limitations that the law indicates to facilitate the exploration, exploitation and benefit of said mines".*
- **Legal mandate for determining which substances are concessional:** It is up to the law to determine which substances may be the object of exploration or exploitation concessions, except for liquid or gaseous hydrocarbons.

- **Concession regime:** The current Constitution establishes a robust system of concessions for the development of mining activities:
  - Constitution by judicial resolution: *"(...) the concessions will always be constituted by judicial resolution and will have the duration, confer the rights and impose the obligations that the law expresses, which will have the character of constitutional organic. (...).*
  - The courts determine the termination of concessions. *It shall be the exclusive competence of the ordinary courts of justice to declare the extinction of such concessions. The controversies that may arise with respect to the expiration or extinction of the domain over the concession shall be resolved by them (...).*
  - Ownership right over the concession: *The holder's dominion over his mining concession is protected by the constitutional guarantee (...).*
  - *The exploration, exploitation or benefit of deposits containing substances not subject to concession may be carried out directly by the State or by its companies, or by means of administrative concessions or special operating contracts, with the requirements and under the conditions that the President of the Republic establishes, in each case, by supreme decree. (...)"*

**A NARROW REGULATION THAT UNDERMINES THE GUARANTEES GRANTED UNDER THE CURRENT CONSTITUTION**

The mining statute included in the proposed new Constitution is quite brief. There are basically 6 mining regulations, which are intended to lay the foundations of the mining panorama, generating a significant change in relation to what exists today in our current Constitution.

However, the content of such a change is not fully defined, but rather a broad framework is left for the legislator to determine:

- **The concession regime for private exploitation is not clearly established, and its determination is left to what is approved** and determined by law.

In this sense, there is clearly less protection for the global idea of concession and the legal-concessionary nature of the mining statute, enshrined in the current Constitution, since none of its articles regulates concessions as the instrument through which the mining activity is developed. Thus, the nature and characteristics of the mining concession title remain unknown.

- The constitutional proposal regulates in a very broad and imprecise manner what is understood by **mining exclusion and prohibition zones**, which generates uncertainty since there is no specific parameter to determine which sectors comprise such areas. In addition, it was proposed to the plenary of the Convention to aim at the closure of all mining activities currently located in such exclusion zones, without establishing a system for the gradual implementation of such closures.
- The proposed new Constitution states that the exploitation of mineral wealth will be authorized considering its finite and non-renewable nature, its intergenerational public interest and its relationship with the environment.

This is an innovation. Therefore, in order for this rule to be applied, it will have to be regulated through laws that must be processed later on.

- Furthermore, these issues must be linked to the new regulation of territories included in the proposal, being especially relevant those referring to the restitution of indigenous territories. In this regard, the proposal includes the creation of an Indigenous Territory Commission with great - and almost absolute - powers to draw up cadastres and establish concrete mechanisms to enable the reparation and restitution of indigenous lands, which could generate uncertainty about its impact on the development of mining.

- Finally, the proposed new Constitution gives special relevance to the protection of the environment in any activity that could put it at risk - an issue that is currently enshrined in our current Constitution - and to the protection of areas excluded from the possibility of mining works. Regarding this point, there is no clarity on how this rule will be applied in practice. Currently, the environmental institutions allow mining activities to be carried out in these types of places as long as certain requirements are met.

In short, the proposal differs notably from the current Constitution, which conceives and defines a special regime of concessions that are protected especially with the constitutional guarantee of the right to property, and entrust the constitution, processing and resolution of controversies to the courts regarding the expiration or termination of such concessions. The current Constitution also establishes a higher approval quorum to change the protection regime of mining concessions, that is, through a qualified quorum law, which has provided stability to this system. This will change if the new Constitution is approved, which entrusts the definition of these matters to a simple law.

#### **TRANSITORY ARTICLES**

The transitory articles state that the Corporación Nacional del Cobre will continue to exercise the rights acquired by the State over copper mining by virtue of the nationalization prescribed in the 1925 Constitution and ratified in the 1980 Constitution, and will continue to be governed by that legislation and the legislation that complements it.

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# V.

## LABOR RIGHTS

### 1. RIGHT TO DECENT WORK

- The notion of decent work has been developed by the ILO, understood as work in conditions of freedom, equity, security and human dignity.
- The Constitutional proposal, in its chapter on fundamental rights, includes the right to decent work, which we review in this bulletin.

#### THE "RIGHT TO DECENT WORK" IN THE PROPOSED NEW CONSTITUTION

There are several elements included in the constitutional proposal that refer to this matter. We will address these elements below.

- **Right to work:** *Everyone has the right to work and free choice of employment.*
- **Working conditions:** *The State guarantees decent work and its protection. This includes the right to equitable working conditions, to health and safety at work, to rest, to enjoyment of free time, to digital disconnection, to the guarantee of indemnity and full respect for fundamental rights in the context of work.*
- **Remuneration:** *Workers have the right to equitable, fair and sufficient remuneration, which ensures their livelihood and that of their families. They also have the right to equal pay for work of equal value.*

- **Prohibition of discrimination:** *Any labor discrimination, arbitrary dismissal and any distinction that is not based on labor competencies or personal suitability is prohibited.*
- **Other guarantees:** Guarantees are also added in relation to the State's duty to generate public policies that "make it possible to reconcile work, family and community life, and care work." A norm is also included that establishes a guarantee in the sense of respecting "the reproductive rights of working people, eliminating risks that affect reproductive health and safeguarding maternity and paternity rights".

It includes a specific mention of rural and agricultural work, stating that the State "guarantees fair and dignified conditions for seasonal work, safeguarding the exercise of their labor and social security rights".

The constitutional proposal recognizes the social function of labor and establishes that an autonomous body should be in charge of its supervision, in order to ensure the effective protection of workers and trade union organizations.

Finally, the proposal includes a prohibition of "all forms of labor precariousness, as well as forced, humiliating or degrading work".

#### WHAT DOES THE CURRENT CONSTITUTION SAY IN THIS REGARD?

The current Constitution establishes a series of guarantees in relation to this matter in its Article 19 N° 16:

- **Right to work:** *The Constitution assures all persons the freedom to work and its protection.*

- **Working conditions:** *Everyone has the right to free hiring and free choice of employment with fair remuneration.*
- **Remuneration:** *Everyone has the right to free hiring and free choice of employment with fair remuneration.*
- **Prohibition of discrimination:** *Any discrimination that is not based on personal capacity or suitability is prohibited, notwithstanding that the law may require Chilean nationality or age limits for certain cases.*
- Other guarantees: The Political Constitution currently in force, further establishes in its Article 19 N° 2 that "[...]In Chile there are no slaves and whoever steps on its territory remains free."

Finally, Art. 19 N°16 of the Constitution establishes that "no kind of work may be prohibited, unless it is contrary to public morals, safety or health, or if the national interest so requires and a law so declares".

#### MAIN NOVELTIES AND COMMENTS

- **Right to work**

The protection of the "right to work" is included in the proposed new Constitution. It is not clear whether this is limited to the **State's obligation to promote public policies** that guarantee access to work, or whether it would extend to the **right to keep a job**, which would affect dismissals.

- **Working conditions**

By **elevating the right to decent work to constitutional status**, this notion can be used as a hermeneutic resource for all labor legislation. Furthermore, labor legislation would need to be interpreted in the light of this concept.

**Uncertainty arises as to the right to fair working conditions**, with no limits being set to identify whether such right is to be understood within the same industry or branch, or within the same company or organization.

On the other hand, the **right to disconnection**, which has been recognized in recent labor legislation (remote work law and law on digital service platform workers), is enshrined and elevated to constitutional status.

It is proposed to **elevate the guarantee of indemnity to constitutional status and broaden its concept**, without establishing parameters in the norm that would allow its scope to be established, to which the labor tutelage procedure would also be applicable<sup>1</sup>.

Moreover, the text of the constitutional proposal **guarantees full respect for fundamental rights at work**, so that it could motivate a legal amendment extending the labor protection procedure - currently applicable only to the guarantees implicitly listed in Article 485 of the Labor Code - to all fundamental rights applicable in the labor context.

- **Remuneration**

While the currently in force Constitution already guaranteed the right to work with fair remuneration, the incorporation of the adjectives *equitable* and *sufficient* in the

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<sup>1</sup> *The guarantee of indemnity is currently set forth in the law in the following terms: "(...) In the same sense, reprisals exercised against workers for the exercise of legal actions, for their participation in them as witnesses or for having been offered in such capacity, or as a consequence of the supervisory work of the Labor Directorate" (art. 485, paragraph 3, final part, of the Labor Code).*

proposal **evidences the intention to strengthen the concept**. It is not clear whether this right is enforceable against the State or the employer, how it is to be determined or what is meant by *equitable, fair and sufficient*.

It is also proposed to elevate **the right to equal pay for equal work to constitutional status**. It is not clear whether such equality should exist within the same company or organization or within the same activity or branch at the national level.

- **Prohibition of discrimination**

The requirement in the Labor Code that at least 85% of the employees working for the same employer must be of Chilean nationality would be **implicitly repealed**.

The **prohibition of "arbitrary dismissals" could have an impact** on the practical application of the ground of "needs of the company" and on the legal enshrinement of the ground of "written eviction by the employer". This prohibition could also increase the possibilities of basing a complaint for labor protection of fundamental rights on the unfairness of the dismissal, with the additional severance and the sanction of not being able to contract with the State through public bids for two years.

- **Other guarantees**

The constitutional proposal **strengthens the State's obligation to ensure the protection of the labor rights** of agricultural and seasonal workers.

The recognition of the social function of labor and the guarantee of protection of workers and trade union organizations through an oversight body, a role currently fulfilled by the Department of Labor with respect to compliance with labor regulations, is elevated to constitutional status. In addition, it **places trade union organizations as entities that the State must protect in themselves**, independently of their affiliates.

Finally, the constitutional proposal reinforces the constitutional protection of **decent work**. However, the criteria for determining what is to be understood as "precarious work" and which activities can be qualified as "humiliating or degrading" and therefore prohibited are unclear.

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## 2.

### THE RIGHT TO UNIONIZE AND TO BARGAIN COLLECTIVELY

- Workers could only bargain collectively through trade union organizations, granting exclusively and exclusively the right to collective bargaining to such organizations.
- As many trade union organizations as deemed convenient may be formed, the existing quorum rules would be repealed.
- The purposes of trade union organizations are extended to those they deem appropriate, leaving without effect the current restrictions on participation in political-partisan activities.
- Collective bargaining is broadened to include negotiation by branch, sector or territory, which could increase entry barriers to certain activities, harm smaller companies and affect the operational continuity of productive sectors.
- Collective bargaining is extended to public employees and the current bargaining restrictions are eliminated with respect to companies that provide public utility, security or supply services to the population.

In this matter the constitutional proposal, in its article 47, states:

*Workers in both the public and private sectors have the right to **freedom of association**. This right includes the right to unionize, to bargain collectively and to strike.*

*Trade unions are the exclusive **holders of the right to collective bargaining**, as the sole representatives of workers before the employer(s).*

*The **right to unionize** includes the right to form the trade union organizations that they deem convenient, at any level, national and international, to affiliate and disaffiliate from them, to establish their own rules, to draw up their own purposes and to carry out their activity without the intervention of third parties.*

*Trade union organizations enjoy legal personality by the mere fact of registering their bylaws in the manner prescribed by law.*

*The **right to collective bargaining is guaranteed**. It is up to the workers to choose the level at which such bargaining will take place, including branch, sectorial and territorial bargaining. The only limitations to the matters subject to negotiation will be those concerning the **unwaiverable minimums established by law in favor of workers**.*

#### MAIN NOVELTIES AND COMMENTS

1. By stating that the right to unionize includes the right to form the trade union organizations that are deemed convenient, it could be understood that this would repeal the rules on the quorum for the formation of trade unions, requiring only a registration in accordance with the law.

2. The restriction that exists in the current Constitution for trade union organizations to participate in political-partisan activities is eliminated, and total amplitu-

de is established with respect to the purposes (which are currently enumerated in the Labor Code).

3. It establishes "trade union entitlement", granting the right to collective bargaining exclusively to trade union organizations, not allowing collective bargaining through workers by themselves or through negotiating groups. This would affect the "negative freedom of association", in particular, the freedom not to join or leave a trade union, since the right to collective bargaining could only be exercised through a trade union organization.

4. The proposal expands collective bargaining to include bargaining by branch, sector or territory. This could tend to rigidify working conditions in each sector, make collective bargaining processes more difficult, create barriers to entry into the sector and harm smaller companies that cannot afford the labor benefits granted by large companies.

5. At present, negotiations are basically focused on remuneration and common working conditions. The proposal broadens the matters to be negotiated by establishing that the only limits are the minimum non-waivable minimums set by law. It also eliminates the current legal restriction on collective bargaining on matters that restrict or limit the employer's power to direct and manage the company.

6. Currently, private sector workers and employees of companies in which the State has a shareholding of less than 50 per cent may bargain collectively. The proposal extends the right to all public and private employees without limitations.

7. If the new Constitution enters into force, the President of the Republic must submit a bill within 18 months of its entry into force to bring labor legislation into line with the provisions of the proposed Constitution in this area.

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### 3. RIGHT TO STRIKE

- The right to strike is held by both individual workers and trade union organizations.
- The trade union organizations decide what interests they will be able to defend through strike action. Consequently, the strike is no longer ascribed to the context of regulated collective bargaining, nor necessarily to labor-related reasons.
- The law may not ban strikes, therefore, the norms that currently restrict the exercise of the right to strike in companies that provide services of public utility, or whose stoppage causes serious damage to health, economy of the country, supply of the population or national security, would be repealed.
- The only limit to strike would be the essential services that could affect the life, safety, and health of people, which reduces the current limitations to the right to strike.

In this matter the proposed new Constitution states:

*Article 47*

*Workers, both in the public and private sectors, have the **right to freedom of association**. This right includes the right to unionize, to bargain collectively and to strike.*

*(...)*

*The Constitution guarantees the **right to strike** of workers and trade union organizations. Trade union organizations shall decide the scope of interests to be defended through it, which may not be limited by law.*

*The law may not prohibit strikes. It may only limit it exceptionally in order to attend essential services whose paralysis may affect the life, health or safety of the population.*

*Members of the police and the Armed Forces may not unionize or exercise the right to strike.*

#### MAIN NOVELTIES AND COMMENTS

- Unlike the right to collective bargaining (which the proposal grants exclusively to trade union organizations), both individual workers and trade union organizations have the right to strike. The right to strike is not prohibited for public servants, as is the case in the current Constitution.
- Trade union organizations, including unions, federations, and trade union centers, are the ones that decide the interests to be pursued through the exercise of the right to strike, which is conceived as a right that can be exercised when such organizations deem it appropriate, no longer circumscribed to the regulated collective bargaining process. This may generate uncertainty with respect to the operational continuity of the companies and, in some cases, doubts as to whether the workers are on strike or not, since it is a right that could also be exercised individually.

- The proposed new Constitution does not specify whether a law may regulate the exercise of the strike; it does not consider prior notice to the employer; it does not consider the collaboration of the State authority to mediate conflicts, nor is the right to temporary closure or lock-out guaranteed to employers.
- The law may not prohibit the right to strike, except for members of the Armed Forces and the Armed Forces of Order and Public Security. The impediment for workers to strike in companies that provide public utility services or whose stoppage causes serious damage to health, to the economy of the country, and to the supply of the population would be repealed.
- The only limit to strike would be the essential services that could affect the life, safety, and health of people, which constitutes a more restricted limitation to the right to strike than the minimum services currently included in our legislation (which include the protection of the company's property and facilities, and the prevention of environmental or health damages).
- If the proposed new Constitution is approved, within 18 months of its entry into force, the President of the Republic must submit a bill to adapt the labor legislation to the regulations of the new proposed Constitution on this matter.

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## 4.

### WORKER'S PARTICIPATION IN COMPANY DECISIONS

- The proposed new Constitution includes the right of workers, through their trade union organizations, to participate in company decisions.
- This means a change in relation to the Constitution currently in force, in relation to what is understood by the power to manage a company.

In this matter the constitutional proposal states:

- **Participation of workers in company decisions:** *Workers, through their trade union organizations, have the right to participate in company decisions. The law shall regulate the mechanisms through which this right shall be exercised.*

In relation to the above, the proposed new Constitution also provides:

- **Right to property:** *Every person, natural or juridical, has the right to property in all its species and over all kinds of goods, except those that nature has made common to all persons and those that the Constitution or the law declares not subject to ownership.*

- **Freedom to undertake and develop economic activities:** *Every person, natural or legal, has the freedom to undertake and develop economic activities. Its exercise must be compatible with the rights enshrined in this Constitution and the protection of nature. The content and limits of this right shall be determined by the laws regulating its exercise, which shall promote the development of small businesses and ensure the protection of consumers.*

#### WHAT DOES THE CURRENT CONSTITUTION SAY IN THIS REGARD?

The current Constitution establishes guarantees in relation to this matter in Article 19 (24) and Article 19 (21):

- **Right to property:** *The Constitution ensures to all persons the right to property in its various forms over all kinds of tangible or intangible property. Only the law may establish the manner of acquiring, using, enjoying and disposing of property and the limitations and obligations deriving from its social function. This includes everything required by the general interests of the Nation, national security, public utility and health, and the conservation of the environmental heritage.*
- **Right to carry out any economic activity:** *The Constitution assures all persons the right to carry out any economic activity that is not contrary to morality, public order or national security, respecting the legal norms that regulate it.*

#### MAIN NOVELTIES AND COMMENTS

- The establishment of this right implies a **restriction to the power of disposition contained in the right of ownership**, which traditionally our legal system has attributed exclusively to the owner.

- At the labor level, the recognition of this right means a change in the conception of the power of management, which is an expression of the rights of property and freedom to carry out any economic activity currently enshrined in the Constitution, a power that to date has been recognized exclusively to the employer, being able to exercise it independently and sovereignly.
- A very broad reference is made to workers' participation in company decisions, without specifying which matters are covered (capital, labor, means of production, safety, strategies, etc.) or to which instances it refers, stipulating that the law must regulate the mechanisms through which this right will be exercised.
- In the proposed terms, the "negative freedom of unionization" would be affected, in particular, the freedom not to join a trade union, since this right could only be exercised through a trade union, with the result that workers would not be able to participate in the company's decisions if they are not members of a trade union organization.
- Currently, workers participate in the company through mechanisms such as the Joint Health and Safety Committee, the Bipartite Training Committee, the right to periodic financial and specific information for collective bargaining, among others.

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# VI. RIGHTS ASSOCIATED WITH INFORMATION AND TECHNOLOGY

## 1.

### PROTECTION OF THE PRIVACY AND INVIO- LABILITY OF THE HOME AND COMMUNICATIONS

- The norms contained in the proposed new Constitution describe in greater detail the rights protected in Article 19(4) and (5) of the current Constitution.
- Some variations are incorporated in the guarantee of inviolability of communications.
- A reference to metadata is also incorporated, which is a world first in this area.

#### PROPOSAL FOR A NEW CONSTITUTION

The proposed new Constitution does not innovate in substantive matters, except for the rule that incorporates the guarantee of inviolability of communications into the metadata of documentation and private communication.

The following is a transcription of the proposed article and a brief commentary on this provision.

*"Article 70.*

*Everyone has the right to personal, family and community privacy. No person or*

*authority may affect, restrict or impede its exercise, except in the cases and forms determined by law.*

*2. Private premises are inviolable. Entry, search or search and seizure may only be carried out with a prior court order, except in cases of flagrante delicto as established by law.*

*All documentation and private communications are inviolable, including their meta-data. Interception, seizure, opening, search or review may only be carried out with a prior court order. "*

This article contains the following elements:

*i) Legal reserve for the assignment of rights*

The **right to privacy** is established in a **broad manner**, indicating the possibility of limiting it through the law. This does not substantially modify the current constitutional regime, which also refers to the law to determine the limits of this right and the possibility of affecting it.

*ii) Private enclosures*

The term "*private premises*" is used. This concept makes it possible to broadly cover enclosures which, given technological advances, had not been explicitly considered in the current constitutional text. This wording **includes not only physical enclosures, but also servers and cloud computing platforms** against physical or remote intrusions that may be made against them.

In this case, the possible entry, search or raid requires a prior court order, except in cases of *flagrante delicto* as established by law.

*iii) All documentation and private communication*

The broad terms "*documentation*" and "*communication*" are used to consider communications that takes place though written means and verbally. In general, it **includes the different types of communication** that can be used, such as, verbal or non-verbal; face-to-face or non-face; synchronous or asynchronous, physical or virtual.

Within the enshrinement of the inviolability of communication, the denominations used in the current constitutional text are maintained. Therefore, the establishment of its inviolability does not substantially alter the current regime in this area in Chile.

The main innovation in this section, in addition to the warrant requirement explained above, is the reference to metadata, which is a world first in this area. This concept, which is usually described as "data about data" will find a level of constitutional protection that was not explicitly envisaged until now. This will entail an extension of the object to be protected through the technical implementations to be made in the field of computer and communications security, guaranteeing at the constitutional level not only the protection of communications and messages sent between subjects, but also of the information referring to these communications (such as the size, author or name of a file, or the date of its recording or editing).

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<sup>1</sup> A more complete definition of metadata is "Information that describes the characteristics of data, including, for example, structural metadata that describes data structures (e.g., data format, syntax, and semantics) and descriptive metadata that describes data content (e.g., information security labels)" Definition contained in the NIST Glossary of Terms. Available at: <https://csrc.nist.gov/glossary/term/metadata#:~:text=Data%20about%20data.,SP%20800%2D86%20under%20Metadata.>

## REGULATION IN THE CURRENT CONSTITUTION

The Constitution currently in force regulates matters related to privacy, protection of personal data, honor and inviolability of the home and communications in Article 19, (4) and (5).

The following is a brief transcription and explanation of the rules governing privacy and inviolability of communications in the Constitution currently in force.

*"Article 19.- The Constitution guarantees all persons: (...)*

*4º.- The respect and protection of the private life and the honor of the person and his family (...); "*

The fourth numeral enshrines in general terms the respect and protection of "*private life*", also protecting the honor of individuals and their families.

**Privacy** is understood as that **dimension of a person's life that they wish to keep out of public space**, including a person's body, objects, places and the possibility of preventing these elements from being known by a third party. **Honor** is understood as the **prestige, fame and good name** that a person has in the eyes of others.

The aim of establishing these rights is to prevent these assets from being affected, either by revealing those aspects that we wish to keep private or by affecting the image that third parties have of us. In short, it is a brief regulation that enshrines these rights in a general manner, delegating the details of their protection and regulation to the law.

*"Article 19.- The Constitution guarantees all persons: (...)*

*5º.- The inviolability of the home and of all forms of private communication. The home may only be broken into and private communications and documents intercepted, opened or searched in the cases and ways determined by law".*

The fifth numeral **establishes the "inviolability of the home"**. This expression is equivalent to "private premises" and, therefore, includes the family home, offices, hotels and any building or real estate that is not open to public access or to the national public good. The inviolability of private communications includes the protection of written correspondence and of telephonic, radio, electronic or any other means of communication, as well as of all private documents carried or kept by individuals in their homes or workplaces. The term "*private communications*" is intended to **cover all non-public communications**.

### **INNOVATION OF THE PROPOSAL IN THIS AREA**

The standard that was incorporated in the proposed new Constitution is an innovation that, if approved, will probably require the assistance of technical guidelines or more detail from sectoral authorities in order to effectively meet this standard. This is because the metadata protection statement alone is extremely broad and unspecific. Not having a description of the scope of this protection, e.g., not distinguishing between types of metadata (descriptive, structural, or administrative), could prevent effective compliance of the constitutional mandate.

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## 2.

## PERSONAL DATA PROTECTION AND INFORMATIONAL SELF-DETERMINATION

- The current Constitution sets out the right to the protection of personal data in article 19 (4), delegating to the legislator the establishment of the form and conditions to determine the way in which this is done.
- The norms contained in the proposed new Constitution describe in greater detail the right to the protection of personal data contained in the current Constitution.
- Rights related to the evolution of IT systems are developed and enshrined, in line with comparative experience.
- It also incorporates a right to computer security, which is a world-first in this area.

### PROPOSAL CONTAINED IN THE DRAFT OF THE NEW CONSTITUTION

The proposed new Constitution innovates in substantive matters regarding the protection of personal data. Below, we transcribe the proposed articles and briefly comment on these provisions.

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“Artículo 87.

1. *"Everyone has the right to informational self-determination and to the protection of personal data. This right includes the right to know, decide and control the use of data concerning him/her, to access, be informed of and oppose the processing thereof, and to obtain its rectification, cancellation and portability; without prejudice to other rights established by law.*

2. *The processing of personal data may only be carried out in the cases established by law, subject to the principles of legality, loyalty, quality, transparency, security, purpose limitation and data minimization".*

This article contains the following elements:

**i) Rights of access, rectification, cancellation, objection and portability (ARCOP)**

It establishes ARCOP rights at the constitutional level , **providing greater precision to the regulations** contained in the current Constitution, which only broadly recognizes the protection of personal data. This enshrinement does not contradict the rules currently contained in Law No. 19,628 on the protection of privacy, but **adds a new right of portability, currently guaranteed only for certain personal data** in the context of phone number portability and financial portability. In any case, an amendment to this law is underway (consolidated bulletins No. 11092-07 and No. 11144-07), which would include all these rights, including the right of portability. It is expected that this bill will be approved at the time the proposed new Constitution comes into force if it is approved.

**ii) Principles in the processing of personal data**

It establishes at the constitutional level **principles relating to the processing of personal data enshrined in the European General Data Protection Regulation**, considered one of the most modern regulations in this regard in the western countries. These

principles are **partially included in the bill reform of the law on the protection of personal data** currently being processed in Congress. However, the proposed new Constitution adds to these principles the principles of **loyalty and minimization**, which are not expressly contemplated in said bill. The possible approval of the aforementioned bill and of the proposed new Constitution will generate a convergence of principles for the processing of personal data contemplated in the legislation and in the Constitution, which will require interpretative efforts to delimit their scope and content.

### iii) Information self-determination

The right to informational self-determination is expressly enshrined. This right recognizes the **power of individuals to control their own information**, which circulates and is stored in various databases, and arises from the increasing intrusion into different areas of society brought about by the development of information technology.

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*"Everyone has the right to the protection and promotion of computer security. The State and individuals shall adopt the appropriate and necessary measures to guarantee the integrity, confidentiality, availability and resilience of the information contained in the computer systems they manage, except in the cases expressly indicated by law".*

This article contains the following elements:

#### i) Right to information security

The right to information security is established. The enshrinement of this right constitutes an **innovation at international level**, as there is no equivalent provision in any other Constitution. This right is in line with the **new bills being processed in Congress**, especially the law on computer crimes (Bulletin 12192-25) and the Cybersecurity Framework Law (Bulletin 14847-06), which aim to improve the standards and legal tools for protection in digital environments available to citizens.

## ii) Adoption of appropriate and necessary measures

This article describes in general terms the suitable and necessary measures to ensure the triad of information, that is, the *integrity, confidentiality* and *availability* of information. It also incorporates the duty to ensure through these measures the resilience of the information. The latter is **rather imprecise**, since resilience is a quality of computer systems and not of the information contained in them

### INNOVATION OF THE PROPOSAL IN THIS AREA

Two rights that were not previously contemplated in the Constitution are expressly enshrined: the right to informational self-determination and the right to information security. The latter is not included in any other Constitution in the world.

The rights enshrined in the proposed new Constitution **will require the enactment of new laws for their practical effectiveness**, considering the addition of new rights to the existing catalogue, and the shortcomings of the current legal regime in relation to their effective enforcement.

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### 3.

## PROTECTION OF FREEDOM OF

## EXPRESSION AND FREEDOM OF THE PRESS

- Article 19 (12) of the current Constitution enshrines the freedom to express opinion and inform, without prior censorship, in any form and by any means, without prejudice to being held accountable for crimes and abuses committed in the exercise of such freedoms, in accordance with the law, which must have a qualified quorum.
- The proposed new Constitution maintains the fundamental core of this right, that is, the prohibition of prior censorship and the responsibility of the individual for the unlawful exercise of this freedom, although it innovates in other aspects.
- The proposal also adds the right to social communication, which includes the right to produce information, to participate equitably in social communication and to found and maintain communication and information media.

### THE PROPOSED NEW CONSTITUTION

The proposed new Constitution presents innovations in relation to the enshrinement of the right to freedom of expression and expressly includes the right to information. Below, we transcribe the proposed articles and briefly comment on these provisions.

## FREEDOM OF EXPRESSION

Freedom of expression is enshrined in the proposed new Constitution in the following terms:

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### Article 82.

*Every person, whether natural or legal, has the right to freedom of expression and opinion, in any form and by any means, which includes the freedom to seek, receive and impart information and ideas of all kinds.*

*There shall be no prior censorship but only the subsequent liabilities determined by law.*

This paragraph considers the following elements:

- **Inclusion of natural and legal persons as right holders**

Unlike the current Constitution, the proposal also includes legal entities among the holders of the right to freedom of expression.

- **Freedom of expression and opinion**

The proposed new Constitution explicitly recognizes freedom of expression, together with freedom of opinion, innovating with respect to the current constitutional text, which only mentions the second of these freedoms. The relevance of this lies in the fact that "expression" has a broader scope than "opinion", as it extends to any communication or manifestation of a person, without the content of the same being a point of view (for example, artistic expressions), nor that the issuer has the capacity to form an opinion (such as, for example, infants). Therefore, this new wording implies a broader protection in this area.

- **In any form and by any means**

Like the current Constitution, the proposal extends this freedom to any form and medium. The importance of this point lies in the social dimension of the exercise of freedom of expression and opinion, which is closely linked to the effective possibility of communicating these ideas or opinions to other individuals. The protection of the exercise of this freedom regardless of the means used would also contribute, by extension, to the protection of the social media that allow its materialization.

- **Freedom to seek, receive and impart information and ideas of all kinds.**

On this part, the proposal takes literally the wording of paragraph 1 of Article 13 of the American Convention on Human Rights (ACHR), and paragraph 2 of Article 19 of the International Covenant on Civil and Political Rights (ICCPR), adding elements not expressly contemplated in the current Constitution. The verbs used allude to freedom of information, i.e., the freedom to access sources of information and opinion, to communicate the content found therein, and for the community to be able to receive such information.

It is worth mentioning that among the paragraphs proposed in the context of the discussion, but which were not approved, are *"shall adopt the necessary measures to ensure pluralism in the media"* and the one that proposed that the State must adopt *"all measures aimed at eliminating xenophobic discourse; the advocacy of racial, religious, sexual or gender hatred. The law may establish responsibilities for violations of this article"*.

- **There shall be no prior censure, but only the subsequent liabilities determined by law.**

In line with current constitutional regulations and international treaties ratified by the State of Chile, prior censorship is prohibited, without prejudice to the subsequent responsibilities established by law. However, the first striking point in this proposal is

the fact that it does not subject to any special quorum the laws that could impose limitations to freedom of expression, through the establishment of such responsibilities.

Secondly, the purposes that could justify the limitation of this freedom were not specified, as is the case with several international treaties, such as, for example:

Second paragraph, article 13 ACHR:

*The exercise of the right provided for in the preceding paragraph may not be subject to prior censorship but to subsequent liabilities, which must be expressly established by law and be necessary to ensure:*

- a) respect for the rights or reputation of others, or*
- b) the protection of national security, public order, or public health or morals.*

Third paragraph, Article 19 ICCPR:

*The exercise of the right provided for in paragraph 2 of this article entails special duties and responsibilities. It may therefore be subject to certain restrictions, which must, however, be expressly set by law and necessary for:*

- a) Ensuring respect for the rights or reputation of others;*
- b) The protection of national security, public order, or public health or morals.*

This omission is noteworthy, since it leaves open the spectrum of admissible reasons for the establishment of limitations to such freedom through legal norms, without prejudice to the limitations and weighing of rights contained in the proposal.

#### **RIGHT TO SOCIAL COMMUNICATION**

In addition to freedom of expression, the proposed new Constitution enshrines **the right to social communication**, in the following terms:

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### Article 83

*Everyone has the right to produce information and to participate equitably in social communication. The right to establish and maintain communication and information media is recognized.*

This article, in addition to including a new right within the catalog of those currently enshrined, includes the following elements:

- **Right to produce information**

This term seems to allude to the right to investigate and disseminate information established in Article 19 of the Universal Declaration of Human Rights (UDHR), which constitute essential dimensions for the effectiveness of freedom of opinion, by making viable access to information with which people are able to construct their points of view.

- **Equal participation in social media**

If social media is understood as the channel by which it is possible to exercise a large part of the dimensions of freedom of expression and opinion, the regulation of equitable participation in it can be approached from different angles. The factors on which the scope of the dissemination of ideas and information depends go beyond the possibility of founding media outlets, free and equitable access to basic communication services or the digital education of the broadcaster (all of these elements are included in the proposed new Constitution). For this reason, the scope of this right will probably be subject to further interpretative development.

- **The right to establish and maintain communication and information media.**

While the current Constitution establishes in its Article 19 (12) the "*right to found, edit and maintain newspapers and magazines, under the conditions established by law*"

*and that "the State, those universities and other persons or entities determined by law may establish, operate and maintain television stations", the wording of the proposed new Constitution includes the diversity of social media existing today, mentioning in a general way the "communication and information media".*

This right is connected to freedom of the press, as well as pluralism and decentralization of media ownership and the active role of the State in encouraging the creation of media outlets, which are established in other articles of the proposal.

### **INNOVATION OF THE PROPOSED NEW CONSTITUTION**

The proposed new Constitution broadens the scope of existing rights under the current constitutional text, such as freedom of expression and the right to establish and maintain media outlets, and adds new ones, which contribute to the effectiveness of the exercise of freedom of expression, opinion, and information. In several points they maintain the sense of the wording of the current Constitution, but also introduce other elements present in international treaties on human rights.

However, enshrinement of new and broader positive rights and freedoms (that is, those freedoms that entail the obligation of the State to generate and maintain the necessary conditions for their enjoyment) will require the enactment of new laws and the modification of other existing laws to ensure their effectiveness.

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## 4.

## TELECOMMUNICATIONS, NET NEUTRALITY, AND RADIO SPECTRUM

- The proposal elevates the principle of net neutrality to constitutional status and would be the first time in the world that this principle would be enshrined at the constitutional level. However, the role of the State as guarantor of this principle is not clear.
- The telecommunications infrastructure is of “public interest”, which entails a limit to acts related to the exercise of the ownership right and other acts related to its operation.

### THE PROPOSED NEW CONSTITUTION

The following is a transcription of the proposed articles and brief comments on these provisions.

- **Net neutrality**

*Article 86*

*5. The State guarantees compliance with the principle of net neutrality. The obligations, conditions and limits in this matter shall be determined by law.*

Law No. 20,453 of 2010, as amended by Law No. 21,046 of 2017, set the principle of net neutrality in Chilean regulations, inserting Articles 24 H to 24 J in Law No. 18,168 on General Telecommunications. Subsequently, in 2011, the "Regulation on the characteristics and conditions of net neutrality in the Internet access service" was issued, which specifies the rights and obligations deriving from the principle of net neutrality.

This regulation provides that Internet service providers *"may not arbitrarily block, interfere with, discriminate against, hinder or restrict the right of any Internet user to use, send, receive or offer any lawful content, application or service through the Internet, as well as any other type of lawful activity or use carried out through the network"*.

The paragraph of the proposed new Constitution, in addition to elevating this principle to constitutional status for the first time in the world, raises doubts as to what dimension of net neutrality is protected, the scope of which is not yet a peaceful matter of discussion.

After the discussion of the permissibility of *zero-rating* tariffs in Chile in 2014 (where access to certain applications was offered without this counting towards the consumption of data contracted with an Internet service provider), it has been interpreted that Chilean law guarantees net neutrality in its *negative* dimension. That is, the prohibition of blocking, interruptions and interferences to the legal contents and services provided in the network; but not the *positive* neutrality, that is, ensuring equal access to services and contents in the network, without allowing the selection or prioritization of these.

However, the role of the State as guarantor of the principle of neutrality could once again generate the debate as to whether net neutrality is protected in Chile only in its negative or also in its positive dimension. In other words, what role should the State take in order to guarantee the principle of neutrality.

#### • Telecommunications infrastructure

*Article 86.*

*6. The telecommunications infrastructure is of public interest, regardless of its patrimonial regime.*

The constitutional proposal seems to establish a limit on the right of ownership over the telecommunications infrastructure, but also on the activity of management or operation thereof. Although the scope and consequences of this public interest are still unclear, it is clear that it is a limit to the will of the owners, concessionaires and permit holders.

Currently, there is no such regulation in Chilean legislation for telecommunications infrastructure, although at the end of 2010, through Law No. 20,478 on Recovery and Continuity in Critical and Emergency Conditions of the Public Telecommunications System, and its respective regulation, a special regime was set for certain telecommunications infrastructure declared by the Undersecretary of Telecommunications as critical infrastructure. The purpose of this measure was to ensure the continuity of communications in emergency situations resulting from natural phenomena, generalized power failures, or other catastrophic situations. Certain obligations were established for the telecommunications concessionaires of these infrastructures to incorporate safeguards, operational continuity policies, reporting obligations, among others. This is due to the fact that the interruption, destruction, cut or failure of these telecommunications systems would have a serious impact on the safety of the affected population.

If the proposed new Constitution is approved, it would seem that similar regime would be extended to all telecommunications infrastructure (which is already an ambiguous concept) without specifying the conditions, limitations, or obligations. This would require new legislation, or a reform to the existing one, which should further regulate its scope.

- **Radio spectrum**

*Article 86*

*7. It shall be for the law to determine the use and exploitation of the radio spectrum.*

Although it was proposed in the constitutional discussion, the necessary quorum was not reached to include the radio spectrum as a “**natural common**” good, unlike other natural resources such as water, the territorial sea and its seabed, geothermal fields, the air and the atmosphere, among others.

According to Article 2 of Law No. 18,168 on General Telecommunications *“the radio spectrum is a **national asset**, the domain of which belongs to the Nation as a whole. Consequently: a) no natural or legal person may claim or claim ownership of all or part of the radio spectrum, b) concessions granted to natural or legal persons are, in essence, temporary and c) the beneficiaries of a concession may pay the State the price for the use and enjoyment of the same in accordance with this law”.*

Therefore, what this regulation does is simply to recognize the regime of concessions, permits and authorizations established by the General Telecommunications Law, without addressing the legal nature of the asset itself.

### **INNOVATION OF THE PROPOSED NEW CONSTITUTION**

The Constitution currently in force referred to telecommunications only in in the sense that the State and other entities may establish, operate and maintain television stations, so all matters included in this area are a constitutional innovation.

Regarding the principle of net neutrality, it would be elevated to constitutional status

for the first time worldwide. In addition, we believe that this could revive the debate on the scope of net neutrality.

In addition, with reference to the telecommunications infrastructure recognized as of “public interest”, which would imply a limitation on the acts and contracts that could be carried out, it is not clear how this would be applied. Further legislation would be required to specify its scope.

Finally, the regulation of the radio spectrum is not an innovation to the regime of telecommunications

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## 5.

### NATIONAL DATA PROTECTION AGENCY, CONSUMER PROTECTION AND CONSUMER RIGHTS BUREAU.

- The current Constitution does not explicitly enshrine consumer rights. For the first time these rights - and the correlative authorities - would receive express constitutional treatment.
- The norms contained in the proposed new Constitution incorporate authorities, indicating the powers that would be granted to them for the fulfillment of their functions.

#### WHAT THE PROPOSED NEW CONSTITUTION STATES

The proposed new Constitution contains substantive innovations in the area of consumer rights. Below, we transcribe the proposed articles and briefly comment on these provisions.

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#### **Consumer protection rules**

"Article 81.

*Every person has the right, as a consumer or user, to free choice, to truthful information, to not be discriminated against, to safety, to the protection of his or her health and the*

*environment, to redress and adequate compensation, and to education for responsible consumption.*

*2. The State shall protect the exercise of these rights, by means of effective procedures and a body with interpretative, supervisory, sanctioning and other powers granted by law.*

The aforementioned article contain the following elements:

### **i) Powers granted to the authority**

The proposed article establishes a consumer protection body, avoiding the well-known name of National Consumer Service ("SERNAC" for its Spanish acronym). This, probably with the intention of opening an eventual re-foundation of the institution.

Regarding the powers that this body would hold, it should be considered that - currently - SERNAC has limited interpretative and supervisory powers. Specifically, the criteria contained in its rulings and interpretative circulars are not binding or enforceable. Under current legislation, SERNAC's interpretations are only binding on SERNAC officials. The debate could be raised, eventually, that constitutional recognition of the interpretative powers could imply the possibility that the circulars and opinions issued by the agency would be binding for every person and institution.

Furthermore, if the proposed text were approved, there would be an explicit constitutional acknowledgement of sanctioning powers to an authority that has historically lacked any.

In any case, although it is not expressly established, the existence and practical exercise of these powers would seem to depend on a legal regulation. Legislative complements or a substantive reform of the current legislation would therefore be necessary, particularly with respect to the powers of SERNAC established in the Consumer Protection Law.

## ii) Explicit constitutional enshrinement of consumers' rights

Currently, consumers' rights are not expressly recognized in the Constitution. As can be observed, the proposal contained in article 81 would imply the enshrinement - with constitutional status - of these rights. Until now, recognition has been made indirectly, based on the interpretation of norms and guarantees contained in the current Constitution.

The constitutional recognition of consumers' rights is not particularly unusual. Indeed, 50 constitutions around the world acknowledge the protection of consumer rights in some kind of way. This recognition is particularly noticeable in the Latin American region, where the vast majority of countries include it in some form.

### Data protection regulations

*"Article 376. There shall be an autonomous body called the National Data Protection Agency, which shall watch over the promotion and protection of personal data, with powers to regulate, investigate, supervise and sanction public and private entities, which shall have the powers, composition and functions determined by law."*

The proposed rule innovates in the following elements:

### i) National Data Protection Agency

The approval of the proposed new Constitution would create a constitutionally recognized entity to promote and protect personal data. The creation of this authority was already envisaged at the legislative level, being one of the main focuses of the personal data bill currently discussed and processed in Congress.

If the proposal is approved, the current congressional dispute on whether the Coun-

cil for Transparency or a National Data Protection Agency would be the appropriate authority on matters regarding data protection will cease. This, since an Agency different from the Council for Transparency would be established. In addition, by establishing the autonomy of the Agency, the powers to supervise the regulation of personal data currently held by SERNAC could be limited.

### **ii) Powers granted to the Agency**

It would be granted investigative, regulatory, supervisory and sanctioning powers. Hence, an authority of an inquisitorial nature would be established, which raises questions about its impartiality when determining and sanctioning data processing infractions. In any case, as in the case of the consumer protection bureau, the effectiveness of these powers seems to be subject to the provisions of the law. The data protection bill currently being discussed in Congress includes a procedure to dispute in court the fines that may be imposed by the Agency.

On the other hand, it is curious that the constitutional proposal does not place any emphasis on preventive and educational powers, which the bill does intend to include. The proposed new Constitution emphasizes only the reactive powers of the data protection authority.

## **INNOVATION OF THE PROPOSAL**

Two bodies that are not currently recognized in the Constitution are expressly enshrined. A consumer protection bureau and the National Data Protection Agency.

It also establishes a series of powers that such authorities would eventually have. The exercise of these powers seems to be subject to the imminent legislative development that would follow if the proposal were approved. Finally, the explicit recognition of consumers' rights at the constitutional level could imply a series of procedural

consequences in relation to the protection of these rights, the appropriateness of which will have to be assessed as the process moves forward.

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# VII.

## INTELLECTUAL PROPERTY

### 1. INTELLECTUAL PROPERTY PROTECTION

- The text of the constitutional proposal expressly recognizes Copyright and some Related Rights.
- For the first time since the 1833 Constitution, the protection of Industrial Property is not expressly recognized.

#### PROPOSAL CONTAINED IN THE CONSTITUTIONAL TEXT

The proposed new Constitution does not innovate in substantive matters in relation to Copyright (although it does include some related rights), but expressly recognizes it, stating in this respect that *"The Constitution ensures to all persons the protection of copyright on their intellectual, scientific and artistic works. These include the moral and patrimonial rights over them, in accordance with and for the time specified by law, which shall not be less than the life of the author. The protection of the rights of performers over their performances is ensured in accordance with the law"*.

This article contains the following elements:

- 1) It ensures to all persons the **protection of their Copyright** on their intellectual, scientific and artistic works.
- 2) It ensures to all persons the protection of **both their moral and economic rights** over their works.
- 3) The term of protection shall be that **established by law** and may not be less than the life of the author.
- 4) It ensures the protection of **performers' rights** over their performances.

With respect to Industrial Property, although the Constitutions of 1833, 1925 and 1980 expressly recognized it, the proposed new Constitution does not (understanding as such, trademarks, industrial designs, industrial drawings, topographic circuits, geographical indications and patents of invention).

In summary, the proposed new Constitution **only expressly recognizes some Intellectual Property rights**, such as Copyright and some Related Rights, but **does not expressly recognize Industrial Property**, which is a rather unusual situation at a comparative level considering that there is a close relationship between Copyright and Industrial Property, since all these rights are framed within the broad concept of Intellectual Property.

Notwithstanding the foregoing, it is necessary to point out that both Copyright and Industrial Property do find legal protection in the article of the proposed new Constitution that establishes the **recognition and protection of general property rights**, which states that such protection covers *"all its species and on all kinds of goods"*.

## REGULATION OF THE CURRENT CONSTITUTION

The Constitution currently in force regulates Intellectual Property in article 19 No. 25, which states:

*"The Constitution ensures to all persons...The freedom to create and disseminate the arts, as well as the copyright on their intellectual and artistic creations of any kind, for the time specified by law, which shall not be less than the life of the owner.*

*Copyright includes the ownership of works and other rights, such as paternity, edition and integrity of the work, all in accordance with the law.*

*Industrial property is also guaranteed on patents, trademarks, models, technological processes or other similar creations, for the time established by law.*

*The provisions of the second, third, fourth and fifth paragraphs of the preceding number shall be applicable to the ownership of intellectual and artistic creations and to industrial property".*

### Concluding remarks

Regardless of the proposed Constitutional text, it is necessary to point out that, although Industrial Property is not expressly recognized, it does find protection in the Industrial Property Law 19.039 together with its Regulations, in addition to a large number of Multilateral and Bilateral International Treaties signed by Chile.

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# VIII.

## JUSTICE SYSTEMS AND CONSTITUTIONAL ACTIONS

### 1.

### JUSTICE SYSTEMS

- Justice Systems arise from enshrining Legal Pluralism and recognizing the existence of legal systems of indigenous peoples and nations. Said systems shall exist coordinated on an equal footing with the National Justice System.

#### AN ESSENTIAL ROLE: TO KNOW, JUDGE AND ENFORCE WHAT HAS BEEN DECIDED

In general, it is the courts that exercise jurisdiction, i.e., they hear disputes of legal relevance, decide them and have the power to enforce their decisions, even against the will of those affected.

In Chile, traditionally, this role has been carried out by the Judiciary, deciding disputes on the basis of a single piece of legislation, applicable to all the inhabitants of the country. As we shall see, the proposal elaborated by the Constitutional Convention radically changes this paradigm.

#### LEGAL PLURALISM AND JUSTICE SYSTEMS

The proposed new Constitution makes an unprecedented recognition to *Legal Plura-*

*lism*, that is, to the fact that there would not be a single legal system but several. This results from acknowledging the existence of the legal systems of indigenous peoples and nations. The proposal also states that the authorities of indigenous peoples and nations will exercise jurisdiction.

The legal systems of indigenous peoples and nations will exist on an equal footing with the National Justice System. The proposal does not indicate who may or should be subject to such jurisdictions, nor does it circumscribe them to a specific territory. **These definitions were left to the law**, which should determine the mechanisms for coordination, cooperation and resolution of conflicts of jurisdiction that may arise.

#### SO, WHO WILL EXERCISE JURISDICTION?

According to the constitutional proposal, it is possible to distinguish:

- 1) The authorities of the indigenous peoples and nations recognized by the Constitution or laws; and,
- 2) The courts that compose the National Justice System, which are the following:

#### SUPREME COURT

- With jurisdiction over the entire country, its role is to ensure the correct application of the law and to standardize its interpretation.
- It will resolve challenges against decisions of the indigenous jurisdiction, in a specialized chamber and assisted by a technical advisory board of experts in their culture and own law.
- Composed of 21 members, who will serve for 14 years.

<p><b>COURT OF APPEALS</b></p>	<ul style="list-style-type: none"> <li>• With jurisdiction over a region or part of a region, its main role is to rule on challenges to judgments of Courts of First Instance.</li> </ul>	
<p><b>COURTS OF FIRST INSTANCE</b></p>	<ul style="list-style-type: none"> <li>• Civil, criminal, family and labor courts.</li> </ul>	
	<ul style="list-style-type: none"> <li>• Criminal Enforcement Courts</li> </ul>	<ul style="list-style-type: none"> <li>• These new courts will ensure the rights of convicted persons and the rights and benefits of inmates.</li> <li>• They shall exercise judicial control over prison authorities in the exercise of their disciplinary powers.</li> </ul>
	<ul style="list-style-type: none"> <li>• Administrative Courts</li> </ul>	<ul style="list-style-type: none"> <li>• The proposal includes the creation of these courts to hear claims against the State Administration or claims brought by the State Administration.</li> <li>• There will be at least one per region</li> <li>• The transitory articles state that the President of the Republic, within three years following the entry into force of the new Constitution, must submit a bill establishing the Administrative Courts. These will be the result of the merger of the Tax and Customs Courts, the Court of Accounts, the Public Procurement Court and the Industrial Property Court.</li> </ul>

**COURTS OF FIRST  
INSTANCE**

- Environmental Courts
- They will rule on the legality of administrative acts in environmental matters, the action for the protection of environmental and nature rights, the action for the reparation of environmental damage, among others.
- Although three such courts already exist, the new Constitution proposes that there should be at least one per region.

**COUNTRY JUSTICE <sup>1</sup>**

- It will be composed of County Courts and County Justice centers.
- There shall be at least one County Court in each borough that has a municipality (City Hall). It shall hear legal controversies at the communal level that do not fall under the jurisdiction of another court, in a brief, simple, oral and expeditious procedure.

**A REAL PARADIGM SHIFT**

Legal Pluralism and diverse justice systems represent a paradigm shift within the framework of a traditionally unitary State as Chile.

Many questions remain as to how indigenous justice will be applied and the law they will apply to resolve the conflicts they hear: the proposal only indicates that they must respect the fundamental rights set out in the Constitution and international human rights treaties.

The incorporation of Administrative Courts and Criminal Enforcement Courts is noteworthy.

<sup>1</sup> Although Article 331 of the proposal indicates that these courts are also courts of instance, Articles 334 and 335 treat them separately.

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## 2.

## JUSTICE COUNCIL

- The Justice Council is the new autonomous body proposed by the Constitutional Convention to be in charge of appointments, governance, administration, training and discipline in the National Justice System; within the framework of a proposal that profoundly rearticulates the Judiciary as we know it today.

### THE PROPOSAL

#### a. What is the Justice Council?

The Justice Council is proposed as an autonomous and technical body created to strengthen judicial independence. It will be a parity and plurinational body, that is to say, at least 50% of its members must be women and its members will be elected according to criteria of plurinationality and territorial equity.

It will be composed of 17 members, who will serve for six years and will be renewed every three years:

- 8 tenured judges elected by their peers;
- 2 officials or professionals of the National Justice System (NJS), also elected by their peers;

- 2 members elected by indigenous peoples and nations; and,
- 5 members elected by the Congress (currently the Chamber of Deputies) and the Chamber of Regions (currently the Senate) from shortlists prepared by the High Public Management Council, following a public competition.

Decisions shall be taken by a majority of its members.

### **b. Powers of the Justice Council**

The proposal grants the Justice Council a number of powers, including the following:

- Appoint all NJS judges and officials.
- Take disciplinary measures on such judges and officials, including removal.
- Review the management of the courts of the NJS, and issue instructions regarding their organization and administrative management. It may not, however, review judicial decisions.
- It shall evaluate and qualify the performance of the judges and officials of the NJS. It shall also oversee their training and continuous improvement. Moreover, the Justice Council shall have the direction of the Judicial Academy.
- It shall define the budgetary needs of the NJS and manage and implement its resources.

### **c. Only the National Justice System**

It is important to note that the Council will only be able to exercise its powers within the NJS. In other words, it will not have an impact on the legal systems of indigenous peoples and nations or on special courts that are not part of the NJS.

### HOW DOES THE PROPOSAL DIFFER FROM THE CURRENT CONSTITUTION?

The proposal radically changes the Judiciary as we know it.

**Appointments.** Currently, the Supreme Court, the President and the Senate all participate in the appointment of Supreme Court justices, while the justices of the Courts of Appeals and the Ordinary Courts are appointed by the President from a list of three candidates proposed by the Supreme Court or the relevant Court of Appeals, respectively. Thus, these appointments are not entrusted to a single body, but involve different institutions.

**The Supreme Court as "Court of Cassation".** On the other hand, the current Constitution confers to the Supreme Court the directive, disciplinary and economic superintendence of all the courts of the Nation; powers that would now be exercised by the Justice Council with respect to the courts that make up the NJS. In other words, the Supreme Court would have the sole mission of deciding the matters that the law entrusts it to hear.

### GREATER GUARANTEE OF JUDICIAL INDEPENDENCE?

The decision to entrust the appointment of judges to an independent body, so that the executive and legislative branches do not intervene in their selection and careers, seeks to protect the independence of the NJS.

Experts, such as the Venice Commission, had recommended that the Justice Council should be composed mainly, or at least mostly, of judges<sup>1</sup>. This was not included in the proposal, nor was it included as a requirement that the judges on the Council should come from different courts and tribunals. At the same time, a significant number of members of the Council will be appointed by the Congress of Deputies and the Chamber of Regions, with a simple majority, and there is no requirement that the

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<sup>1</sup> See "Opinion on the drafting and adoption of a new Constitution, adopted by the Venice Commission at its 130th Plenary Session (Venice and online, 18-19 March 2022)". Page 20.

members elected by Congress and the indigenous peoples and nations must have a law degree. These experts have warned that this could undermine the legitimacy of the Council of Justice.

In Chile, judges have traditionally submitted their performance to the evaluation of their superiors. The proposed new Constitution **leaves the evaluation of judges in the hands of a body outside the judiciary** which, because of its composition, **could undermine the independence of judges.**

The Justice Council will be empowered to remove judges. The proposal provides that the decision taken by the plenary of the Council may be challenged *"before the Constitutional Court"*.

### **THE COUNCIL OF THE JUDICIARY IN THE TRANSITIONAL REGULATIONS**

The transitory article states that the President of the Republic, within one year of the entry into force of the new Constitution, must submit a bill on the Justice Council. The article is explicit in stating that the establishment of this body is a priority in the implementation of the new institutional framework.

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## 3. CONSTITUTIONAL JUSTICE

- In this edition we will focus on the chapter of the proposed new Constitution that contemplates the creation of a Constitutional Court, a new autonomous body designed to replace the current Constitutional Tribunal.

### THE CONSTITUTIONAL COURT INCLUDED IN THE PROPOSAL

The proposal entrusts the exercise of constitutional justice to an *autonomous, technical and professional* body named "Constitutional Court", establishing its guiding principles, integration, incompatibilities and disqualifications of its members, powers and the effect of its rulings.

Below, we will describe the main aspects regulated by the proposal, and then refer to the main differences with respect to the current Constitutional Tribunal.

- **Role of the Constitutional Court and its guiding principles**

The proposal provides that the Constitutional Court will be the body in charge of exercising constitutional justice with the purpose of guaranteeing the supremacy of the Constitution, in accordance with the following principles:

- i. Deference to the Legislative Branch;
- ii. Presumption of constitutionality of the law; and
- iii. Search for an interpretation in accordance with the Constitution.

In the exercise of constitutional justice, the decisions rendered by the Constitutional Court shall be based solely on reasons of law.

#### • **Integration of the Constitutional Court**

The Constitutional Court will be composed of 11 members, who will serve for 9 years, will not be eligible for re-election and will be renewed every 3 years.

The appointment of the members of the Constitutional Court shall be made on the basis of technical criteria and professional merit, as follows:

- 4 shall be elected by the Congress of Deputies and the Chamber of Regions;
- 3 shall be chosen by the President of the Republic; and
- 4 shall be elected by the Justice Council.

#### • **Powers of the Constitutional Court**

The proposal confers a series of powers on the Constitutional Court, which must be exercised in accordance with its guiding principles:

- To resolve disputes of power between the Congress of Deputies and the Chamber of Regions, or between the latter and the President of the Republic.
- To hear and rule on the inapplicability of a legal precept.
- To hear and rule on the unconstitutionality of a legal precept.
- To hear and rule on the unconstitutionality of norms of regional statutes, Indigenous Territorial Autonomies and any other territorial entity.
- To hear and rule on claims related to the non-enactment of a law or the enactment of a text different from that which constitutionally corresponds.

- To hear and rule on the constitutionality of a decree or resolution of the President of the Republic that the General Comptroller's Office has deemed as unconstitutional.
- To hear and rule on the constitutionality of the regulations and decrees of the President of the Republic.
- Rule on conflicts of power between autonomous territorial entities, with any other State organ, or between them.
- Rule on conflicts of power between political or administrative authorities and the courts of justice.

- **The rulings of the Constitutional Court**

Rulings will be adopted, in chambers or in plenary session, by the majority of the members of the Constitutional Court and no appeal will be allowed against them. As a requirement to hold the unconstitutionality or inapplicability of a norm, it is established that it must not be possible to interpret it in such a way as to avoid unconstitutional effects.

Regarding the effects of its rulings, if the *inapplicability* of a precept is ruled, it may not be applied in the respective judicial proceeding. If the *unconstitutionality* of a precept is ruled, then the ruling will cause the invalidation of said precept, excluding it from the legal system.

#### **MAIN DIFFERENCES WITH THE CURRENT CONSTITUTIONAL COURT**

Although the Constitutional Court will maintain several of the powers currently exercised by the Constitutional Tribunal, there are important differences in the organic and functional regulation of the two bodies:

SUBJECT	CONSTITUTIONAL TRIBUNAL (CT)	CONSTITUTIONAL COURT OF THE PROPOSAL
Guiding Principles	Not expressly indicated.	<ul style="list-style-type: none"> <li>• Deference to the Legislative Branch;</li> <li>• Presumption of constitutionality of the law; and</li> <li>• Search for an interpretation in accordance with the Constitution.</li> </ul>
Number of members	10 members.	11 members.
Grounds for termination of office	For completing his term or for reaching 75 years of age.	For having completed his term, for supervening legal incapacity, for resignation, for a criminal conviction, for removal and for illness incompatible with the exercise of the role. The proposal does not contemplate an age limit as a cause for termination, as opposed to what is established for judges who are part of the National Justice System.
Preventive and mandatory review of the constitutionality of certain regulations	Preventive control of laws interpreting the Constitution, of constitutional organic laws and of the norms of a treaty dealing with constitutional organic matters, prior to their promulgation.	It does not exist.

SUBJECT	CONSTITUTIONAL TRIBUNAL (CT)	CONSTITUTIONAL COURT OF THE PROPOSAL
Resolution of questions of constitutionality during the processing of bills and treaties	Control of bills or constitutional reform bills and treaties submitted to Congress for approval.	It does not exist.
Resolution of questions of constitutionality of orders issued by certain courts (" <i>autos acordados</i> ")	Control of rulings issued by the Supreme Court, Courts of Appeals and the Election Qualification Tribunal (TRICEL).	It does not exist.
Inapplicability of legal precepts	<ul style="list-style-type: none"> <li>• By a majority of the members of the CT in office.</li> <li>• In any proceeding before an ordinary or special court.</li> <li>• At the request of the parties or the judge hearing the case.</li> </ul>	<ul style="list-style-type: none"> <li>• By a majority of the members of the Court.</li> <li>• It does not apply to matters submitted to the Supreme Court.</li> <li>• Only at the request of the court hearing the case, which may proceed <i>ex officio</i> or at the request of a party.</li> </ul>
Unconstitutionality of legal precepts	<ul style="list-style-type: none"> <li>• By a majority of 4/5 of the members of the TC in office.</li> <li>• It requires that the precept has been declared inapplicable.</li> <li>• Public action to request it to the CT or <i>ex officio</i> by the CT.</li> </ul>	<ul style="list-style-type: none"> <li>• By 3/5 of the current members of the Court.</li> <li>• Requires the existence of 2 or more declarations of inapplicability of the precept.</li> <li>• Public action before the Court, <i>ex officio</i> by the Court or at the request of certain authorities.</li> </ul>

### SOME COMMENTS

The Constitutional Court is proposed as the body that would replace the current Constitutional Tribunal, assuming its role as guarantor of the supremacy of the Constitution in the legal system. However, it is clear that it will have fewer powers than the Constitutional Tribunal, especially, because of the elimination of the powers related to the preventive control of constitutionality of certain rules and bills in process, which is a significant change and is in line with the principle of deference to the Legislative Branch.

The proposal also takes up one of the main objections raised with respect to the current Constitutional Tribunal. This criticism states that the Constitutional Tribunal would operate as a legislative "third chamber", being able to interfere in the content of bills approved by Congress, without having the democratic legitimacy of the latter. On the other hand, however, it has been pointed out that the preventive control of constitutionality is an instance of protection for minorities whose rights may be affected by circumstantial majorities in Congress.

In the constitutional justice contained in the proposal, the prior control of constitutionality of the law is eliminated and a posteriori control is maintained, through the mechanisms of inapplicability and unconstitutionality of a legal precept in force.

However, an important limitation is observed in the inapplicability action, since questions of constitutionality may only be raised by the court before which the pending action is being heard (ex officio or at the request of a party), eliminating the possibility of claiming inapplicability directly by the parties before the Constitutional Court. Moreover, the principles that the proposal enshrines expressly oblige the Constitutional Court to always seek an interpretation in accordance with the Constitution, which will probably make it difficult to rule in favor of an inapplicability request.

Finally, it should be noted that the proposal establishes a Court composed of an odd number of members (11), unlike the current Constitutional Tribunal, which, being composed of an even number (10), allows the situation of a tie to arise, which, if it occurs, must be settled by the President of the Court ("casting vote"), an aspect that has been criticized.

## THE CONSTITUTIONAL COURT IN THE TRANSITIONAL ARTICLES

According to the transitory provisions, the Constitutional Court must be installed within six months after the entry into force of the new Constitution. The Constitutional Tribunal will not be able to hear new cases. It does not specify from when, but the norm continues to indicate that *"all the inapplicability requests already filed in the Constitutional Tribunal must be heard, processed and ruled upon by this body within six months from the entry into force of this Constitution"*.

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## 4. DUE PROCESS OF LAW

- In this edition we will focus on the regulation of due process of law in the proposal presented by the Constitutional Convention to "strengthen the guarantee of equality before the law in the exercise of rights".

### A BIT OF HISTORY: THE REGULATION OF DUE PROCESS OF LAW IN THE CURRENT CONSTITUTION

The due process of law consists of the set of principles and institutions that aim to guarantee equality before the law and protection in the exercise of people's rights.

The 1980 Constitution deliberately omitted to detail the content of the concept of the due process of law, considering that specifying it could end up restricting this guarantee. Under this logic, it was determined to entrust the legislator to "*always establish the guarantees of a rational and fair procedure and investigation*"<sup>1</sup>.

This was stated in the minutes of the Ortúzar Commission, pointing out that due process of law "*is a concept which, firstly, is already incorporated into universal legal doctrine and, secondly, is a concept whose clarifications can evolve over time and be picked up and specified by jurisprudence, so that a field is left open in this respect*"<sup>2</sup>.

<sup>1</sup> Constitution of the Republic, Article 19 N°3.

<sup>2</sup> 103rd Session of the Ortuzar Commission, January 16, 1975.

Thus, the requirements of the "rational and fair" procedure have been determined by the legislator and developed by national doctrine and jurisprudence. It has been said that its fundamental content considers: (i) the notification and hearing of the affected party, (ii) the presentation, reception and examination of evidence, (iii) the ruling within a reasonable period of time and (iv) the possibility of appealing the ruling before an equally impartial and objective higher instance.<sup>3</sup>

#### THE PROPOSAL: SPECIFICATION OF THE CONSTITUTIONAL DUE PROCESS GUARANTEES

The proposed new Constitution regulates the due process of law in more detail than the current Constitution.

- **Right to due process of law**

The constitutional proposal maintains a recognition of the right of every person to a rational and fair trial in which the guarantees provided for in the Constitution are safeguarded, in addition to those established in the law and international treaties. However, there is a shift in focus by emphasizing the right of individuals to the due process of law, rather than prescribing it as a direct obligation of the legislator.

Then, the proposal provides for specific due process of law requirements<sup>4</sup>:

- **That it be brought before a competent, independent and impartial tribunal, "*previously established by law*".** It is not specified prior to what time the court must be established, unlike the current Constitution, which specifies that it

<sup>3</sup> EVANS, Enrique (2004) p. 144, quoted by BUCHHEISTER, Axel and CANDIA, Gonzalo (2007) "*Sociedad libre y debido proceso: una relación necesaria. Comentario de fallos de inadmisibilidad en el caso 'Tocorna'*", *Sentencias Destacadas 2007, Anuario de Doctrina y jurisprudencia* (Santiago, Instituto Libertad y Desarrollo) p.211.

<sup>4</sup> Article 109 of the proposed new Constitution.

must be established "*prior to the perpetration of the act*". This lack of definition could undermine the guarantee of not being tried by special commissions.

- Provide for the **right to be heard and tried under equal terms**;
- Guarantee the right to be tried within a **reasonable time**.
- That it be decided by a **well-founded ruling**;
- To ensure the existence of an **adequate and effective remedy**.

Although these guarantees have been developed at the legislative and jurisprudential levels, their express incorporation at the constitutional level is a novelty - with the exception of the proscription of special commissions. It is striking that no mention is made of the right to provide evidence and to have it duly examined.

On the other hand, the proposal alludes to due process' guarantees with strong judicial language that raises the question of whether they can also be asserted in non-judicial proceedings.

- **The process should be adjusted and appropriate to the age or disability of the persons concerned**

Another now feature of the proposal is the guarantee of assistance and adjustments to procedures that are necessary and appropriate to the age or disability of the persons concerned.

- **Specification of the minimum safeguards in criminal proceedings**

In criminal matters, the current Constitution is concerned with ensuring that the law cannot presume criminal liability as a matter of law, and that no crime can be punished by a penalty other than that established by law before it was committed, unless the new law is favorable to the person concerned. This is maintained in the proposal.

The minimum guarantees of criminal procedure are currently regulated in the Code of

Criminal Procedure, especially in Title I of Book One, entitled "Basic Principles".

The proposal, however, elevates several of the provisions of the Code of Criminal Procedure to the status of constitutional guarantees and defines a list of "minimum criminal procedural guarantees", including the following:

- Investigative actions that deprive, restrict or disrupt the exercise of rights must have **prior judicial authorization**;
- **The right to know the background of the investigation**, subject to the exceptions set out in the law;
- **Presumption of innocence** until a final conviction.
- **Freedom is the general rule**, and precautionary measures are exceptional, temporary and proportional. The law shall regulate their procedure and requirements.
- **"Ne bis in idem"**: The right not to be subjected to a new proceeding, investigation or criminal prosecution for the same act for which there is a conviction, acquittal or final dismissal by an enforceable judgment;
- **Exceptionality of detention or internment of juveniles**, which in any case ought to be for the shortest appropriate period of time.

#### CONSTITUTIONAL INJUNCTION AND DUE PROCESS

The current Constitution does not formally contemplate the possibility of filing a constitutional injunction for the violation of due process of law but restricts such a possibility to violations of the guarantee not to be tried by special commissions.

On the other hand, the proposal contemplates a constitutional injunction that would be admissible against any threat, disturbance or deprivation *"to the legitimate exercise of fundamental rights"*.

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# 5.

## ARBITRATION AND ALTERNATIVE DISPUTE RESOLUTION MECHANISMS

- In this edition, we will focus on the novelties introduced by the proposal of the Constitutional Convention ("CC") on arbitration and alternative dispute resolution mechanisms.

### THE PROPOSAL

- **Promoting of collaborative conflict resolution mechanisms**

Alternative dispute resolution methods consist of those means other than ordinary justice to resolve disputes. They commonly include negotiation, mediation, conciliation and arbitration.

The constitutional proposal establishes that it will be the duty of the State to promote and implement collaborative conflict resolution mechanisms that guarantee active participation and dialogue. However, it does not specify the requirements and effects of such mechanisms, which can only be determined by law.

- **Arbitral justice shall always be voluntary: forced arbitration is outlawed**

The proposal also states that arbitral justice will always be voluntary and, consequently, provides for the elimination of compulsory arbitration from our legal system.

The prohibition of compulsory arbitration is a consequence of the principle of free adjudication, which reflects a decision to give priority to this principle over other considerations that could make compulsory arbitration advisable, such as the decongestion of the ordinary courts or the benefits of the specialization provided by arbitration.

- **Prohibition of arbitration in contentious-administrative matters**

On the other hand, a prohibition of arbitration in matters within the jurisdiction of the Administrative Courts is also proposed. Only the latter will be able to hear and rule on actions brought against the State Administration or promoted by it, as well as other matters established by law.

This raises the question of whether the State will be able to agree to arbitration mechanisms when entering into international contracts, for example, to access credit.

- **Preference for permanent, impartial and independent dispute settlement bodies for foreign investment disputes**

Finally, in the area of investor-state dispute settlement (also known as ISDS), the proposal establishes that permanent, impartial and independent dispute settlement bodies should be preferred when negotiating the respective investment treaties.

**HOW DOES THE PROPOSAL DIFFER FROM THE CURRENT CONSTITUTION?**

The proposed new Constitution contains important changes in the area of arbitration and dispute resolution mechanisms.

- **The constitutional recognition of alternative dispute resolution mechanisms** is a novelty in our legal system, even though the legislator had tried to promote their use by legal means.
- **Arbitration shall always be voluntary; there shall be no compulsory arbitration.** Current legislation stipulates that certain disputes must necessarily be settled by specialized arbitrators. These refer, for example, to the partition of assets; the liquidation of communities or of a conjugal partnership, differences between partners of a public limited company<sup>1</sup>; among other hypotheses regulated by law. This will change if the proposal is approved.
- **Exclusivity of the Administrative Courts.** Currently, our legislation does not contain a prohibition to arbitrate in contentious-administrative matters. On the contrary, to date there are different systems, such as the public works concession system, where an arbitration instance is contemplated as a dispute resolution mechanism. In this sense, the prohibition envisaged represents a paradigm shift.

The transitional rules should clarify when and how these changes would be implemented: what will happen to arbitration clauses that exist in contracts signed with the State Administration, or what will happen to ongoing compulsory arbitrations.

#### A PRO-ARBITRATION CONSTITUTION?

One of the provisions that has caused most interest has been the one that enshrines as a principle **the voluntary nature of arbitration**, eliminating compulsory arbitration. While some argue that this rule would disregard a long legal tradition, others argue that the proposal better recognizes the very nature of arbitration, based on the will of the parties and enabling it in all matters where the parties consider it appropriate.

<sup>1</sup> *Notwithstanding the provisions of Article 125, paragraph two of the Corporations Law.*

However, this discussion has diverted the focus from other rules that leave more doubts than certainties:

- A clear example of this is the **preference for permanent dispute settlement bodies** established in the proposal for the resolution of disputes under **investment treaties**.

Indeed, when referring to permanent dispute settlement bodies, the proposal does not specify whether it would be sufficient for the institution administering the respective arbitration to be permanent (as is the case, for example, with the Permanent Court of Arbitration or ICSID); or rather, whether it should be a permanent investment court that decides a possible conflict, as was established by the European Union and Canada in their Comprehensive Economic and Trade Agreement (CETA).

This is particularly relevant, as there is an important debate in the international arena as to whether permanent investment courts should be preferred over arbitration.

- On the other hand, the **proscription of arbitration in contentious-administrative matters** could tie the hands of the State if it is understood that it prevents it from contemplating such a mechanism in the framework of international contracts. Indeed, this could prevent it from accessing such contracts.

#### ARBITRATION IN THE TRANSITIONAL RULES

The transitory provisions state that compulsory arbitration proceedings which, at the time of the entry into force of the new Constitution, are pending in arbitration courts will continue to be processed until they are concluded.

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## 6. CONSTITUTIONAL ACTIONS (PART I)

- In this edition we will focus on the constitutional actions included in the proposed new Constitution, that is, those tools that the Constitution grants to individuals to obtain adequate protection of their rights.

### WHAT ARE CONSTITUTIONAL ACTIONS?

These are the means contemplated by the Constitution, so that any person may resort to justice to obtain that it adopts the pertinent measures for the reestablishment of the rule of law or an adequate reparation for the cases in which the State has incurred in the violation of these.

### WHAT DOES THE PROPOSAL CONSIST OF?

- **There is a paragraph on "Constitutional Actions" which contains 4 actions:**
  - i) Action for protection of fundamental rights ("Tutela Action"):**
    - It allows any person who is affected in the exercise of his fundamental rights to have recourse to justice so that it may promptly remedy the situa-

tion by re-establishing the rule of law.

- It may also be filed when, through an act of the authority, the Chilean nationality is not recognized.

**ii) Amparo action:**

- It allows any person who is arrested, detained, or imprisoned in violation of the Constitution or the laws to resort to justice so that it may re-establish the rule of law, ensuring due protection for the affected party.
- It may also be filed by anyone who unlawfully suffers a deprivation, disturbance or threat to his freedom of movement or individual security.

**iii) Compensation for imprisonment without conviction:**

- It allows any person who is acquitted or not convicted to request financial compensation for each day he/she has been imprisoned, according to a daily amount to be fixed by law.
- This compensation shall not apply when the imprisonment has been decreed on the basis on the conduct of the accused.
- The proposal does not indicate how this action should be exercised or which court will hear it. Nor does it indicate against whom it may be brought, which raises the question of whether it may be brought against the private plaintiff who requested the imprisonment or even against the judge who ordered it.

**iv) Action for compensation for judicial error:**

- - It grants to any person who has been convicted by a ruling rendered with an unjustified error or lack of judicial service, the right to be compensated for all damages caused by the process and the conviction.
- It is indicated that the same indemnification will be applicable for administrative actions or decisions derived from the judicial process that, due to lack of service, generate damage.
- Beyond pointing out that the person must have been convicted, the proposal does not circumscribe this action to one type of matter, so it could be

derived from judicial errors in criminal, civil, administrative, etc. matters.

- Again, the proposal does not specify how the action should be brought, nor the competent court to hear it.

- **In addition, in the chapter on "General Principles", the proposal includes a nullity action:**

By establishing the principle of "constitutional and legal supremacy", the bill expressly establishes the nullity action. This may be exercised against any act of the authority that has been issued in breach of the Constitution or the laws, to pursue both the declaration of nullity of the act, as well as to enforce the responsibilities and penalties provided by law.

**HOW DOES THIS PROPOSAL DIFFER FROM THE REGIME OF CONSTITUTIONAL ACTIONS CONTAINED IN THE CURRENT CONSTITUTION?**

<b>HOLD</b>	a) In similar terms	Amparo action
	b) With substantial reforms	Constitutional injunction → the proposal includes a "Tutela Action" which scope of application and processing significantly differ from the current constitutional injunction.

<b>INCORPORATE</b>	a) As a complete novelty	<ul style="list-style-type: none"> <li>• Compensation for imprisonment without conviction</li> </ul>
	b) As a recognition of a legal tradition developed under the current constitutional order	<ul style="list-style-type: none"> <li>• Nullity action</li> <li>• Compensation for judicial error</li> </ul>
<b>EXCLUDE</b>	None of the traditional constitutional actions are excluded <sup>1</sup> .	

### NEW DEVELOPMENTS AND THEIR POSSIBLE IMPLICATIONS

- **Public law nullity**

Although the current Constitution does not expressly include this action, the nullity of public law has been widely recognized in doctrine and jurisprudence as an application of the principle of legality, enshrined in Articles 6 and 7 of the current Constitution.

In any case, the express recognition of this action in the proposed new Constitution represents a significant change, because despite its importance, the action of nullity of public law has been entirely endowed with content by doctrine and jurisprudence. In this sense, both its essential characteristics and certain procedural aspects related to its exercise continue to be highly debated.

However, the proposal does not directly settle these discussions, since it was decided to delegate to the law the determination of the terms and conditions under which this action should be exercised.

<sup>1</sup> The appeal for loss of nationality is subsumed within the constitutional injunction or “Tutela Action”.

- **Compensation for judicial error and imprisonment without conviction**

By including the compensation for judicial error, the proposal consolidates an action that finds implicit recognition in the current Constitution, as it is derived from the application of the general principle of State liability.

Likewise, the proposal goes on to directly qualify imprisonment without conviction as a form of judicial error that deserves compensation. This relates, for example, to the application of pretrial detention for persons who are not finally convicted.

- **The Tutela Action**

Undoubtedly, the Tutela Action that replaces the constitutional remedy conferred by the current Constitution ("*recurso de protección*") introduces many relevant changes, significantly broadening its scope of application and modifying its processing. We will address this particular action in a separate bulletin.

## TRANSITIONAL REGIME

With respect to the action for nullity under public law, the forty-sixth transitory provision of the proposal establishes that, until the law providing for the general procedure on administrative litigation is enacted and provided that there is no special procedure, **both the nullity of an administrative act and the declaration of illegality of an omission may be lodged before the civil court of the domicile of the authority complained of.**

Then it is added that the term to file this claim will be **90 calendar days from the time the challenged act is known**, which represents a relevant difference with respect to the current regime of the public law nullity action.

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# 7.

## CONSTITUTIONAL ACTIONS (PART II - THE CONSTITUTIONAL INJUNCTION)

- In this edition we will focus on the Constitutional injunction (“Tutela Action”) included in the proposed new Constitution. This action introduces important modifications with respect to the current Constitutional injunction (“*recurso de protección*”), significantly broadening its scope of application.

### THE NEW ACTION FOR THE PROTECTION OF FUNDAMENTAL RIGHTS

Leaving behind the current constitutional injunction (“*recurso de protección*”), the Constitutional Convention proposes the constitutional enshrinement of an “*action for the protection of fundamental rights*”, which, beyond the renaming, includes a series of relevant substantive and procedural modifications:

*"Any person who, as a result of an act or omission, suffers a threat, disturbance or deprivation in the lawful exercise of his fundamental rights, may bring an action, either by himself or anyone on his behalf before the court of instance determined by law, which shall immediately adopt all the measures it deems necessary to re-establish the rule of law. This action may be brought as long as the violation persists. The action shall be processed summarily and in preference to any other case before the court".*

**HOW DOES IT DIFFER FROM THE CONSTITUTIONAL INJUNCTION ALREADY PROVIDED FOR IN THE CURRENT CONSTITUTION?**

- **Expansion of the catalogue of rights protected by means of the action**

Among the main innovations introduced by the proposal is the considerable broadening of its scope of application. The action may be exercised in respect of any "*fundamental right*", without limitation, leaving behind the restrictive enumeration of rights that currently allow for the filing of a constitutional injunction.

This is especially relevant considering the incorporation of new rights, such as the right to housing, the right to the city and territory, the right to adequate food, among others, which, if the constitutional proposal is approved, would be protected through this action. This will probably result in increased litigation and will entail a budgetary burden for the State.

In addition, the proposal incorporates the possibility of filing this action against administrative acts or resolutions that deprive or deny Chilean nationality.

- **The Tutela Action will proceed with respect to any action or omission that may infringe fundamental rights**

The proposal eliminates the reference to an "*arbitrary or illegal*" act or omission, which is what the current constitution injunction requires for it to be processed. Thus, the Tutela Action will apply in the case of any action or omission that involves a threat, disturbance or deprivation of fundamental rights.

This amendment will also broaden the scope of application of the Tutela Action, as it will be less strict in terms of its requirements.

- **Procedural changes: court that will hear the action and appeal system**

Perhaps one of the changes that has generated most debate is the modification of the court that will hear the Tutela Action. The proposal removes its knowledge from the Courts of Appeals where it is currently submitted, to hand it over to the courts of first instance, which will be in charge of hearing and ruling on it.

Regarding the procedure, the proposal indicates that the Tutela Action will be processed *"summarily and in preference to any other cause"*, without giving further details.

An appeal may be filed before the respective Court of Appeals against the judgment issued by the court of first instance. Exceptionally, this appeal may be heard by the Supreme Court only *"if there are contradictory interpretations of subject matter of law of the action, as sustained in two or more final judgments issued by courts of appeals"*, thus relegating this court to a more secondary role.

A series of remarks have been made in connection with these changes:

- Although handing over the knowledge of this action to the first instance courts favors the principle of proximity of the court, there is concern that it will not provide the rapid and timely solution required for the protection of fundamental rights, given the well-known overload of the first instance courts. In addition, this will have repercussions on the other matters under the jurisdiction of these courts as they will be postponed, extending proceedings that are already lengthy.
- In addition, the removal of these matters from the jurisdiction of the Courts of Appeals will naturally result in greater jurisprudential dispersion. At the same time, it has been pointed out that the Courts of Appeals, entrusted for more than 40 years to hear these matters, had accumulated an important tradition and jurisprudence.

- **Limits and exceptions to the exercise of the Tutela Action**

The constitutional proposal innovates in another aspect, by expressly incorporating a limit to the exercise of this precautionary action, which **will only be applicable when the affected person has no other action, recourse or procedural means** to claim his right, with the exception of those cases in which, due to its urgency and seriousness, it may cause imminent or irreparable serious damage. Therefore, the new text directly addresses the issue of the appropriate remedy, which has been debated on several occasions in our higher courts of justice.

- **Opportunity for its filing**

Although the current Constitution does not establish a specific time limit for the filing of an constitutional injunction, the regulations on the matter stipulates that it must be filed before the competent court *"within a period of thirty calendar days from the execution of the act or the occurrence of the omission or, depending on the nature of the same, from the time that news or certain knowledge of the same has been obtained"*; a regulation that has been the subject of various debates in the doctrine.

On this point, the constitutional proposal establishes that the action for the protection of fundamental rights may be brought *"as long as the infringement persists"*.

**WHAT ABOUT THE RECOURSE FOR ECONOMIC PROTECTION ("AMPARO ECONÓMICO")?**

Although the remedy of economic protection is usually studied as a constitutional action, it is not enshrined in our Constitution, but in Law No. 18,971, of the Ministry of Economy, Development and Reconstruction. In this sense, the fact that such action is not part of the current proposal cannot be understood as an innovation with respect to the current Constitution, nor as an intention to suppress it.

However, the way in which such action is regulated in the law<sup>1</sup>, makes its survival under the new Constitution uncertain. This is also taking into consideration that the proposal conceives the State undertaking a more active role in the economy, which will have public initiative in economic activity and will be able to develop entrepreneurial activities.

In any case, the infringement of the freedom to undertake and develop economic activities may be protected by means of the Tutela Action.

### TRANSITIONAL REGIME

One of the transitory provisions of the proposal establishes that, until the law regulating the procedure for Tutela Actions is enacted, the **orders issued by the Supreme Court** for the processing and ruling of the current constitutional injunction **will remain in force** and the competent court to hear such actions will continue to be the **respective Court of Appeals** (whose resolutions may be appealed before the Supreme Court).

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## 8.

## INSTITUTIONS OF THE CRIMINAL PROCEDURE SYSTEM

- In this edition we will focus on the rules that the proposed new Constitution provides to regulate key institutions of the Criminal Procedure System, specifically, the Public Prosecutor's Office and the Public Defense Attorney's Office.

### THE NEW CONSTITUTION PROPOSAL

The proposed new Constitution, as the current Constitution does, contemplates the existence of the Public Prosecutor's Office and, as a novelty, incorporates the Public Defense Attorney's Office at a constitutional level, defining and regulating its powers and organization.

As for the Public Prosecutor's Office, its definition and its powers remain almost unchanged. However, the great novelty lies in the creation of a "*Committee of the Public Prosecutor's Office*" that would have oversight powers.

On the other hand, with regard to the Public Defense Attorney's Office, the incorporation of this body to the constitutional text, the elimination public defense attorneys hired through public tenders and the modifications in the election process of the National Public Defense Attorney are a highlight.

## PUBLIC PROSECUTOR'S OFFICE

It is defined as an autonomous and hierarchical body, with legal status and its own assets, whose role is to exclusively direct the investigation of the facts constituting a crime, those that determine the punishable participation, and those that prove the innocence of the accused.

The proposed new Constitution also states that the public criminal action will be exercised *exclusively on behalf of society*, in the manner provided by law. This is without prejudice to the right of the victim and other persons determined by law to exercise the criminal action.

The organization and powers of this body, the qualifications and requirements that prosecutors must meet for their appointment and the grounds for their removal must be regulated by law. This is notwithstanding the fact that some of these issues were included in the new Constitution proposal.

### How does the proposal differ from the current Constitution?

- **Who can bring a criminal action**

First, a **relevant change** is introduced regarding **who can bring the criminal action**.

- Our current legal system grants the right to act with respect to certain crimes exclusively to specialized institutions (for example, the Internal Revenue Service in matters of tax crimes; or the National Economic Prosecutor's Office in relation to crimes against competition).
- The proposal changes this paradigm, providing that the exclusive power of certain bodies to file complaints and lawsuits *"shall not prevent the Public Prosecutor's Office from investigating and exercising public criminal action in the case of crimes that threaten probity, public assets or harm collective legal interests."*

In this way, the Convention aimed to ensure that the exercise of criminal action does not depend solely on a specific administrative body. This, bearing in mind cases of high public interest in which the Public Prosecutor's Office was unable to initiate investigations into certain crimes because the bodies empowered to do so did not exercise criminal actions; and thus, taking up the positions put forward by the current National Prosecutor, Jorge Abbot or the National Association of Prosecutors of the Public Prosecutor's Office itself.

For their part, both the National Economic Prosecutor and former members of the Competition Court have been critical of this position, warning that it opens the door to contradictory rulings on the same matter, or that it would jeopardize the effectiveness of the leniency system.

- **Institutional changes**

There are also differences between the two texts at the organic level. Among these, the following are worth mentioning:

- 1. The creation of the Public Prosecutor's Office Committee**, composed of regional prosecutors and the National Prosecutor, who will be its chairman. The main role of this committee will be to establish the criminal prosecution policy and the criteria for the fulfillment of these objectives. It will also be responsible for advising the National Prosecutor in the direction of the agency, evaluating and qualifying the performance of the officials of the Public Prosecutor's Office and exercising disciplinary authority over the latter, among other powers.

- 2. Mechanism for the appointment of the National Prosecutor.** The National Prosecutor will no longer be appointed by the President of the Republic, at the proposal of the the Supreme Court, with the agreement of the Senate. Instead, it will be appointed by the Congress and the Chamber of Regions, in joint session, from a list of three candidates proposed by the President of the Republic.

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<sup>1</sup> This was the position he maintained in his presentation to the Convention in November 2021.

**3. Impediment of reelection of National and Regional Prosecutors.** Currently, the Constitution prevents their reelection for the immediately following period. The new Constitution proposal, on the other hand, does not prevent it at all for the future.

It is interesting to note that, in the case of the Regional Prosecutors, it is set that they may return to the position *they held in the Public Prosecutor's Office*. That is to say, apparently, not only they may not be elected again, but they also may not have a role other than the one they had before such position.

**4. Prosecutors' term in office:** Currently, the National Prosecutor and Regional Prosecutors serve for 8 years. The new Constitution proposal reduces this period to 6 and 4 years, respectively.

**5. Requirement of a law degree and minimum age to be a prosecutor:** The law degree is only required for the National Prosecutor, although it could possibly be required for regional and deputy prosecutors, by virtue of a law.

In addition, all age requirements for the exercise of the position are eliminated.

**6. Public accountability:** The National Prosecutor and the Regional Prosecutors must render a public account of their performance on an annual basis. The former before Congress and the latter before the respective Regional Assembly.

### **Some comments**

The National Association of Prosecutors issued a statement against the creation of the Committee of the Public Prosecutor's Office. It stated that it is essential that the Public Prosecutor's Office continues to be hierarchical, with unipersonal authorities (National Prosecutor and regional prosecutors) that have the responsibility and com-

petencies that allow them to provide the conditions for their subordinates (Deputy Prosecutors) to exercise their role of investigation and criminal prosecution in an optimal manner and with clear objectives. On the other hand, in its opinion, the existence of a committee will generate the perception that there is debate regarding such objectives, which will generate an "understandable passivity" on the part of the prosecutors<sup>2</sup>.

### **PUBLIC DEFENSE ATTORNEY'S OFFICE**

The proposal defines the Public Defense Attorney's Office as an autonomous body, with legal status and its own assets, whose role is to provide public legal defense to defendants, from the first action of the investigation until the complete execution of the ruling imposed.

It also states that the Public Defense Attorney's Office may appear before international human rights organizations.

The new Constitution proposal set that the legal defense provided by the Public Defense Attorney's Office may not be tendered or delegated to private attorneys. Exceptionally, private attorneys may be hired in the cases and forms regulated by law.

Finally, the new Constitution proposal introduces modifications to the election process of the National Public Defense Attorney.

### **How does it differ from the current Constitution?**

The first thing to note is that the Public Defense Attorney's Office does not currently have a constitutional regulation, unlike the Public Prosecutor's Office. It is Law No. 19.718 that regulates its organization and functions, so the incorporation of this service into the constitutional text is a novelty.

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<sup>2</sup> Letter to the editor of *La Tercera*, dated March 21, 2022, sent by Francisco Bravo López, President of the National Association of Prosecutors.

Secondly, in accordance with the provisions of Law No. 19,718, the Public Defense Attorney's Office is currently a service with legal personality and its own assets but is subject to the supervision of the President of the Republic through the Ministry of Justice. On the other hand, the new Constitution proposal expressly set that it will be an autonomous body, and also states that its external independence must be guaranteed.

Third, as of today, the institutional design of the Public Defense Attorney's Office contemplates public defense attorneys and private attorneys selected in tenders called by the Public Criminal Defense Tender Council. However, the proposed new Constitution eliminates this tendered figure, being exceptional the hiring of private attorneys in the system.

Another novelty is related to the appointment of the National Defense Attorney. Currently, the latter is appointed directly by the President of the Republic under the selection standards of the High Public Management system. On the other hand, in accordance with the autonomy granted to this agency with respect to the Executive Branch, the new Constitution proposal regulates a joint election process between the Congress of Deputies and the Chamber of Regions, from a short list of three candidates proposed by the President of the Republic.

### **Some comments**

The Association of Public Defense Attorneys valued the idea of the constitutional autonomy of the agency. In turn, they expressed their agreement with the approval of the new Constitution proposal that conceives a completely public provision of the defense service, as they understand it as an advance to guarantee the rights of all persons in relation to the current mixed system<sup>3</sup>.

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<sup>3</sup> Consult the following link: ADEF expresses its "concern" about the creation of the Superior Council after the indication approved in the Justice Systems Commission ([cnnchile.com](http://cnnchile.com))

However, there are those who warn that the criminal defense system is not prepared for the elimination of tendered criminal defense attorneys, who currently represent almost 80% of the professionals that provide services in the Public Defense Attorney's Office.

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## 9.

## RIGHTS OF INMATES AND CRIMINAL ENFORCEMENT

- In this edition we will focus on the rights that the proposal drafted by the Constitutional Convention recognizes for inmates and the rules regarding the enforcement of criminal sanctions.

### DESCRIPTION OF THE PROPOSAL

The proposal now enshrines, at the constitutional level, the rights of persons deprived of their liberty and identifies the State as their main guarantor.

On the other hand, the proposal innovates by incorporating rules for the enforcement of criminal sanctions, providing for the exclusivity of the State and ordering the creation of new courts for this purpose.

### RIGHTS OF INMATES

In general, the proposal enshrines the right of all persons deprived of their liberty not to suffer limitations to rights other than those strictly necessary for the execution of

the criminal sanction, and establishes the obligation of the State to ensure dignified treatment and full respect for their rights and the rights of their visitors.

In particular, the following rights are also established:

### **1. Rights of women and persons who are pregnant**

The proposal enshrines the right to have access to the health services they require before, during and after childbirth, to breastfeeding and to a direct and permanent link with their son or daughter. This, always taking into consideration the best interests of the son or daughter. The incorporation of this right in the Constitution is a novelty, notwithstanding the fact that it was already recognized in international treaties ratified by Chile<sup>1</sup>.

### **2. Prohibition of torture and solitary confinement**

In this regard, it is established that no person may be subjected to torture or other cruel, inhuman or degrading treatment or forced labor.

This right was already enshrined in our legal system, as it was drafted in the same terms in the Pact of San José of Costa Rica (ratified by Chile), as part of the Right to Personal Integrity.

It also establishes the prohibition of isolation or solitary confinement of persons deprived of their liberty, which is a novelty for our system, since this sanction is currently expressly permitted by the Prison Regulations.

### **3. Right to petition**

This right has two aspects:

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<sup>1</sup> For example, in the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), General Comment No. 14 of the Committee on the Rights of the Child, the United Nations Guidelines for the Alternative Care of Children, among others.

- The right to petition both the prison authority and the criminal enforcement court to protect their rights.
- The right to maintain personal, direct and regular communication and contact with support networks and legal advisors.

#### **4. Right to social insertion and integration**

It establishes the duty of the State to guarantee a penitentiary system oriented to the insertion and integration of persons deprived of liberty. The State must have civilian and technical personnel and trained agencies to achieve this end.

### **NEW DEVELOPMENTS IN CRIMINAL ENFORCEMENT**

#### **1. Principles and duties in the penalty enforcement system**

The proposal states that this system will be organized on the basis of respect for human rights and its objective is not limited to criminal enforcement, as it must also incorporate the integration and social insertion of convicted persons.

Therefore, it recognizes the State as the main guarantor of persons deprived of liberty, and incorporates among its duties the protection and effective exercise of fundamental rights.

This is a novelty at the constitutional level, since it recognizes the purpose of the imposition of custodial penalties as well as security measures, which will have implications in terms of their application and interpretation.

#### **2. Exclusivity of the State in criminal enforcement**

In general, the constitutional proposal establishes that only the State can execute the enforcement of criminal penalties and measures depriving of liberty, through public

institutions specially established for these purposes (penitentiary establishments).

To reinforce this idea, it is stated that this role may not be performed by private parties. It should be noted that there have been various interpretations of this rule. Some point out that its content is not new, since criminal enforcement has always been the responsibility of the State. Therefore, it would not refer to exclusivity in the administration of penitentiary establishments, but rather to their control. Others, on the other hand, see in this article the end of the concessionaire system for prisons, which arose after serious problems of overcrowding faced by the prison system in the 2000s.

### **3. Prison conditions**

For the insertion, integration and reparation of persons deprived of liberty, the proposal states that penitentiary establishments must have spaces for study, work, sports, art and culture.

In addition, in the case of pregnant women and nursing mothers, the constitutional proposal imposes on the State the duty to adopt the necessary measures in terms of infrastructure and equipment.

### **4. Creation of Criminal Enforcement Courts**

Finally, the constitutional proposal creates the Criminal Enforcement Courts, which will ensure respect for the fundamental rights of persons who are convicted or subject to security measures, as recognized by the Constitution and international human rights treaties in force.

In particular, the purpose of these tribunals will be:

- To hear and rule any dispute or matter related to the execution of penalties and security measures;
- Exercise control over the disciplinary powers of the prison authorities;

- To protect the rights and benefits of inmates in correctional facilities; and
- Any other duties established by law.

The introduction of these courts is a novelty, in that a specialized judiciary is entrusted with overseeing compliance with the rights and duties of persons serving a custodial sentence or measure, which is currently entrusted to the Guarantee Courts (*“Tribunales de Garantía”*), which also perform other tasks.

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# IX.

## AUTONOMOUS BODIES

### 1. AUTONOMOUS BODIES

- The proposed new Constitution incorporates new autonomous bodies with constitutional status and eliminates others that are currently included in the Constitution.
- The Transparency Council is elevated to constitutional status.
- In the case of the General Comptroller of the Republic, some relevant changes have been added.

The Constitution currently in force establishes the following autonomous bodies: the National Television Council, the Public Prosecutor's Office, the Constitutional Court, the Electoral Service, the Office of the General Comptroller of the Republic, the National Security Council and the Central Bank.

Although in the proposed new Constitution most of these bodies preserve their constitutional recognition and autonomy, others are added (either by raising their recognition to constitutional level or by creating new bodies): the Transparency Council, the Justice Council, the Public Criminal Defense Office, the Ombudsman's Office, the Ombudsman for Children's Rights, the Ombudsman for Nature, the National Water

Agency, the Civil Service Directorate and the National Data Protection Agency. However, the National Television Council and the National Security Council are eliminated.

Let's take a look at some of these new autonomous bodies.

### NEW AUTONOMOUS BODIES

- **The Ombudsman's Office**

The main role of this body will be to supervise State bodies in the fulfillment of their human rights obligations. In addition, and similar to the National Human Rights Institute (NHRI), it is an autonomous corporation under public law with legal status and its own assets, it will be able to make **recommendations on human rights, bring legal actions** and safeguard and preserve the records gathered by truth, justice, reparation and guarantees of non-repetition commissions.

The purpose of the Ombudsman's Office is the "**promotion and protection of the human rights** guaranteed in the Constitution, in the international human rights treaties ratified and in force in Chile, as well as those arising from the general principles of law and the imperative norms recognized by international law, **in the face of acts or omissions of the State Administration and private entities that exercise activities of public service or utility**, in the manner established by law".

In the proposed new Constitution, the Ombudsman will be appointed by the majority of the members of the Congress and the Chamber of Regions in joint session, from a list of three candidates drawn up by social and human rights organizations. The Ombudsman will be in office for 6 years (without reelection), will not be removed in his office and will enjoy inviolability in the exercise of his powers. In addition, there will be regional ombudsmen who will function in a deconcentrated manner, as established by law.

An important novelty is that the constitutional proposal significantly strengthens this new body, in relation to the current role of the NHRI, by establishing that the Om-

budsman's Office will have the power to **supervise State bodies** in the fulfillment of their human rights obligations, and to **follow up and monitor the recommendations** made by international organizations **and the rulings against the State of Chile** issued by international human rights tribunals.

The transitory articles state that within two years following the entry into force of the new Constitution, the President must submit a bill regulating the Ombudsman's Office.

- **The Ombudsman for Nature**

The Ombudsman for Nature is a complete innovation of the proposed new Constitution. The purpose of this body is "the **promotion and protection of the rights of nature and environmental** rights guaranteed in this Constitution, in international environmental treaties ratified and in force in Chile, against the acts or omissions of the State Administration and private entities".

It will have the power to **supervise State agencies in the fulfillment of their obligations regarding environmental and natural rights** and to **bring constitutional and legal actions** when such rights are violated.

The Ombudsman for Nature shall be appointed by the majority of the members of Congress and the Chamber of Regions, in joint session, from a list of three candidates drawn up by environmental civil society organizations.

This body evidences the change from anthropocentrism to **ecocentrism** proposed in the proposed new Constitution.

The transitory articles state that within two years following the entry into force of the new Constitution, the President must submit a bill regulating the Ombudsman for Nature.

- **The National Water Agency**

This body will have the important role of granting, reviewing, modifying, expiring or revoking water **use authorizations**. It will also have to lead and coordinate the agencies with competence in water matters, ensure compliance with the National Water Policy, promote the creation of basin councils and oversee the responsible and sustainable use of water, among other specific powers.

The Agency is part of the special concern shown by the proposed new Constitution to establish a specific regime for the protection of water and the recognition of the human right to water.

The transitory articles state that, within twelve months, the President must send a bill for (i) the creation of the National Water Agency, (ii) the regulatory adaptation of water use authorizations, and (iii) the regulation of river basin councils. Until such law enters into force, the functions of the National Water Agency will be assumed by the General Water Directorate.

**THE TRANSPARENCY COUNCIL IS ENSHRINED IN THE CONSTITUTION.**

The Transparency Council was created by Law 20.285 as an autonomous corporation under public law, with legal status and its own assets. The proposed new Constitution elevates its recognition to constitutional status.

The proposal replicates the same general powers that the law currently entrusts to the Transparency Council, although the latter contains the details of its specific powers. These are (1) to **promote the transparency of the public service**, (2) to **supervise compliance with the rules on transparency and publicity of information** of the State bodies and (3) to **guarantee the right of access to public information**. The mechanism for the appointment of the councilors is entrusted to the law.

The enshrinement of the Transparency Council denotes the increased importance given to the transparency of the exercise of public services.

**PROPOSED CHANGES IN RELATION TO THE OFFICE OF THE GENERAL COMPTROLLER OF THE REPUBLIC**

Although its constitutional autonomy is not a novelty in our legal system, the proposed new Constitution introduces some changes in its specific powers:

CONSTITUTION OF 1980	PROPOSAL FOR A NEW CONSTITUTION
It exercises control over the <i>legality of the</i> acts of the State Administration.	It exercises control over the <i>constitutionality and legality</i> of the acts of the State Administration.
	It is described as a <i>Technical</i> body
It oversees the income and investment of the funds of the Treasury, municipalities and other agencies and services determined by law, and examines and judges the accounts of persons in charge of the assets of these entities.	To audit the receipt, accounts and expenditure of public funds.
Keeping the <i>general accounts</i> of the Nation	
	Ensure compliance with the <i>principle of probity in the public service</i>

It is also interesting to note that the proposed new Constitution, unlike what is established in the current Organic Constitutional Law, includes within the scope of its oversight **all companies in which the State has an interest, legal entities that have fiscal resources or manage public assets**, and others defined by law.

In addition, it is established that it may issue mandatory opinions "for any authority, official or worker of any organ of the State Administration, of the regions and of the boroughs, **including the directors of public companies or companies in which the State has a shareholding**". Thus, the scope of its powers is broadened in relation to the statute that currently governs the Comptroller's Office.

Another novelty of the constitutional proposal is that it establishes that when the Comptroller's Office issues an opinion that modifies its administrative jurisprudence, it must be consulted before a **Council of the Comptroller's Office**.

In the proposed new Constitution, the Comptroller is appointed by the President with the agreement of the majority of the members of Congress and the Chamber of Regions, in joint session. In the Constitution currently in force, the Comptroller is also appointed by the President, but with the agreement of 3/5 of the senators in office.

Finally, the proposal **does not include the minimum requirements to be General Comptroller of the Republic**, unlike the current Constitution, which establishes that the General Comptroller must have at least ten years of law degree, be at least forty years of age and possess the other qualities necessary to be a citizen with the right to vote.

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## 2. THE CENTRAL BANK

- The proposed new Constitution establishes that the Central Bank will be an autonomous body of a technical nature, similar to what is established in the current Constitution.
- However, there are some relevant differences with respect to its current regulation, which could impact its future operation.

### PROPOSAL FOR A NEW CONSTITUTION

The Central Bank is defined as "an autonomous body with legal status and its own assets, of a technical nature, responsible for formulating and conducting the monetary policy", and then adds that "the law will regulate its organization, powers and control systems, as well as the determination of coordination instances between the Bank and the Government".

It also states that the purpose of the Central Bank shall be, in particular, to ensure price stability and the normal functioning of internal and external payments in order to contribute to the welfare of the population, having to take into account the general orientation of the government's economic policy when adopting its decisions.

In addition, it states that, in order to fulfill **its objectives**, the Central Bank must consider financial stability, exchange rate volatility, **employment protection, care for the environment and natural heritage** and the principles set forth in the Constitution and the law.

As for its **powers**, it states that these would be the regulation of the amount of money and credit in circulation, the execution of credit and international exchange operations, the issuance of norms in monetary, credit, financial and international exchange matters, and others established by law.

With regards to the limitations to which the Central Bank would be subject, it establishes that it could only carry out transactions with financial institutions, and that it could in no way grant them its guarantee, nor acquire documents issued by the State, its agencies or companies. Exceptionally, it could acquire and sell instruments issued by the Treasury. Furthermore, no public expenditure or loan could be financed with direct or indirect credits from the Central Bank. In addition, the Central Bank would have the **obligation to report periodically to Congress**.

The senior management and administration of the Central Bank would be entrusted to a Council. The general regime applicable to it, which, in summary, would be as follows:

- **The Council would be composed of 7 Councilors appointed by the President of the Republic, with the agreement of the majority of the members of the Congress of Deputies and the Chamber of Regions, in joint session.**
- **Councilors would serve for a term of ten years, would not be eligible for reelection and would be renewed on a partial basis.**
- **The Councilors would be professionals with proven expertise and experience in matters related to the Central Bank's competencies.**
- **The Chairman of the Council, who would also be the Chairman of the Bank, would be appointed by the President of the Republic from among the members of the Council, and would serve for a term of five years or the lesser time remaining on the Council, and could be reelected for a new term.**

- Councilors may be removed from office by resolution of the majority of the members of the Supreme Court. Removal may only be based on the circumstance that the affected Councilor has committed serious acts against public probity, or has incurred in any of the prohibitions or incompatibilities established in the Constitution or the law, or has concurred with his vote to decisions that seriously affect the achievement of the Bank's purpose.
- Those who in the 12 months prior to their appointment have participated in the ownership or served as director, manager or chief executive of any company that provides financial intermediation services may not be members of the Council, without prejudice to the other disqualifications established by law. Once they have ceased in their positions, the members of the Council shall have the same incompatibility for a period of twelve months.

#### **DIFFERENCES BETWEEN THE PROPOSED NEW CONSTITUTION AND THE CURRENT CONSTITUTION**

The proposed new Constitution is much more extensive in regulating the Central Bank than the current Constitution, establishing at the constitutional level matters that are currently found in the Organic Constitutional Law of the Central Bank ("LOC"), such as its purpose, powers and its Council.

Regarding the definition of the Central Bank, the proposed new Constitution is similar to the current Constitution, except that the proposed new Constitution adds that the Central Bank would have its own legal status (which is currently provided for in the LOC) and that it would be in charge of formulating and conducting monetary policy.

In addition, the proposed new Constitution takes from the LOC the provision indicating that the Central Bank, when adopting its agreements, shall take into account the general orientation of the Government's economic policy, but **innovates by adding that the law shall determine, among others, the coordination instances between the**

**Central Bank and the Government**, a provision that is not currently contemplated in the current Constitution or in the LOC. The proposal is also innovative in the incorporation of the **principles to be considered by the Central Bank for the fulfillment of its objectives**, pointing out, among others, the protection of employment, the care of the environment and natural heritage.

There are several differences in relation to the Central Bank Council: it is currently regulated by the LOC and not by the Constitution; the **number of councilors is increased from 5 to 7**; and, given the elimination of the Senate proposed in the text of the new Constitution, it **would no longer be the Senate but the Congress of Deputies and the Chamber of Regions who must jointly agree on the appointment** made by the President of the Republic.

Finally, other aspects of the current Constitution (and also of the LOC) that were not included in the proposed new Constitution are those related to cases of foreign war or danger of war and the principle of non-discrimination, which are the following current provisions:

- *"In case of foreign war or danger thereof, to be qualified by the National Security Council, the Central Bank may obtain, grant or finance credits to the State and public or private entities."*
- *"The Central Bank may not adopt any agreement that means in a direct or indirect way to establish different or discriminatory rules or requirements in relation to persons, institutions or entities that carry out operations of the same nature."*

### **EFFECTS OF CHANGES TO THE CENTRAL BANK IF THE PROPOSED NEW CONSTITUTION IS APPROVED**

The proposed new Constitution is approved, many matters applicable to the Central Bank will depend on the provisions of future laws regulating its organization, powers and control systems.

This would be the case, for example, with the appointment of counselors made by the President of the Republic, since it would have to have the agreement of the majority of the members of the Congress of Deputies and the Chamber of Regions, in joint session, in circumstances in which these authorities do not currently exist and are created by the proposed new Constitution, so it will depend on what the transitory norms establish.

Under certain circumstances, the Councilors of the Central Bank could be removed from office by a resolution of the majority of the members of the Supreme Court. The members of the Supreme Court would be appointed by the new Justice Council. Thus, the permanence of the members of the Board of the Central Bank will depend to a large extent on the Justice Council.

In addition, since the proposal states that the removal of Central Bank Councilors may be based on the circumstance that the Councilor concerned has voted in favor of decisions that seriously affect the achievement of the Central Bank's objectives, it could be interpreted that a Councilor whose vote does not consider financial stability, exchange rate volatility, employment protection, environmental protection or natural heritage could be removed from office.

Finally, the new inability to serve on the Council for those who in the 12 months prior to their appointment have been involved in the ownership or served as director, manager or chief executive of any company providing financial intermediation services limits access to the Central Bank, a technical body, to persons with expertise and technical capabilities in financial matters.

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# X.

## TRANSITIONAL RULES

### 1. TRANSITIONAL RULES

- The transitory norms establish the transition regime between the norms of the Constitution currently in force and those of the new Constitution, in the event that the latter is approved.
- The proposed new Constitution includes 57 transitory articles.
- These articles deal with the implementation of the political system, the Regional State, fundamental rights, water rights, and justice systems, among other topics.

#### CURRENT CONSTITUTION AND CURRENT REGULATIONS

The proposal establishes that the new Constitution will become effective as of the date of its publication in the Official Gazette, which must be made within ten days following its enactment. As from such date, the Constitution currently in force will be repealed.

All current regulations shall continue to be in force until they are repealed, modified, substituted or declared contrary to the Constitution by the Constitutional Court.

## TRANSITIONAL RULES RELATED TO THE POLITICAL SYSTEM

We highlight the following:

- The current President of the Republic **shall not be eligible for re-election** for the following term.
- **Parity** shall be applicable to the Legislative Branch in the election to be held immediately after the entry into force of the new Constitution.
- Until March 11, 2026, and for the approval of **constitutional reform projects, the favorable vote of 4/7** of the members of the Chamber of Deputies and Deputies and the Senate will be required. However, the projects approved by the National Congress that substantially alter the political regime and the presidential term, the design of the Legislative Branch, the form of the Regional State, the fundamental principles and rights, the chapter of constitutional reform and replacement of the Constitution and that of nature and environment, and the transitory provisions, **must be submitted to a ratifying referendum**, unless the approval quorum was 2/3.
- On March 11, 2026, the **legislative procedure** governing the new Constitution will become effective.
- On March 11, 2026, the terms of office of the **current members of the Senate** will expire, although they will be eligible to run in the elections for the Congress of Deputies and the Chamber of Regions, which will be held in November 2025.

## TRANSITIONAL RULES RELATED TO THE REGIONAL STATE

We highlight the following:

- The legislator and the agencies of the State Administration shall **adapt the regulations** related to Regional State and territorial entities no less than 6 months prior to the election of their authorities.
- The President of the Republic, **after executing an indigenous consultation**, and within two years following the entry into force of the new Constitution, must submit a bill regulating the procedures for the creation, territorial delimitation, competencies, etc., of the **Indigenous Territorial Autonomies**. The Legislative Branch will have a maximum of three years to dispatch it.
- Within one year from the entry into force of the new Constitution, two referendums shall be called: one in the communes belonging to the province of Chiloé, and the other in the communes belonging to the provinces of San Felipe, Los Andes and Petorca, in order to **ratify the creation of the autonomous regions of Chiloé and Aconcagua**.

#### TRANSITIONAL RULES RELATING TO FUNDAMENTAL RIGHTS

The President of the Republic is entrusted with submitting the bills aimed at the creation, adaptation and implementation of the following systems:

SYSTEM	DEADLINE FROM THE ENTRY INTO FORCE OF THE NEW CONSTITUTION
Social Security	Twelve months
System of Care	Twelve months
National Health	Eighteen months
National Education	Twenty-four months
Public Education	Twenty-four months
Integrated Public Lands	Twenty-four months

The Legislative Branch must conclude the processing of these bills within a period of no more than twenty-four months from their submittal. It is not indicated what would be the consequence in the event that these deadlines are not met.

#### **TRANSITORY RULE REGARDING THE CREATION OF AN INDIGENOUS TERRITORIAL COMMISSION**

The President of the Republic shall convene an **Indigenous Territorial Commission** within one year of the entry into force of the new Constitution. This Commission shall present proposals for agreements between the State and the indigenous peoples and nations for the regularization, titling, demarcation, reparation and restitution of lands.

The commission shall be composed of representatives of all indigenous peoples and nations, representatives of the State and persons of recognized competence appointed by the President of the Republic.

It will operate for four years and may be extended for another two years.

#### **TRANSITIONAL RULES RELATING TO WATER, ENVIRONMENT AND MINING**

We highlight the following:

- The President of the Republic, within a period of twelve months, must submit a bill for the creation of the **National Water Agency** and the regulatory adaptation of **water use authorizations**. It should also regulate the **basin councils** and **water users' organizations**.
- With the entry into force of the new Constitution, all water rights previously granted will be considered, for all legal purposes, **water use authorizations**.

- The President of the Republic, within a maximum period of three years from the entry into force of the new Constitution, shall implement the **Policy for Soil and Native Forest Restoration**.
- The President of the Republic, within one year of the entry into force of the new Constitution, will convene an **Ecological Transition Commission**. This Commission will be in charge of designing proposals for legislation to implement the norms related to nature and the environment, and will be made up of members of academia, civil society organizations, representatives of indigenous peoples and relevant public agencies.
- Corporación Nacional del Cobre (CODELCO) will continue to exercise the rights acquired by the State over copper mining by virtue of the nationalization prescribed in the 1925 Constitution and ratified in the 1980 Constitution, and will continue to be governed by such regulations and the legislation that complements them.

#### TRANSITORY NORMS RELATED TO THE NATIONAL JUSTICE SYSTEM

We highlight the following:

- Compulsory arbitrations that at the time of the entry into force of the new Constitution are pending in arbitration courts will continue to be processed until they are concluded.
- For judges of the Supreme Court, the fourteen-year term of office will be computed from the entry into force of the new Constitution.
- The President of the Republic, within three years after the entry into force of the new Constitution, shall submit a bill establishing the **Administrative Courts**. These will be the result of the merger of the **Tax and Customs Courts**, the **Court**

of Accounts, the Public Procurement Court and the Industrial Property Court.

- The **Constitutional Court** must be installed within six months after the entry into force of the new Constitution. The current Constitutional Court will not be able to hear new cases. It does not specify from when, but the norm continues stating that *"all inapplicability requests already filed in the Constitutional Court must be heard, processed and ruled upon by this body within six months after the entry into force of this Constitution"*.
- The President of the Republic, within one year of the entry into force of the new Constitution, must submit a bill on the **Justice Council**. The article is explicit in stating that the establishment of this entity is a priority in the implementation of the new institutional framework.
- The President of the Republic, within two years following the entry into force of the new Constitution, shall submit a bill regulating the **Ombudsman's Office** and the **Ombudsman for Nature**.

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