

# The 'regional State' in the proposed new Chilean Constitution

Positive developments and challenges ahead

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## Abstract

After a year of intense work, the Chilean Constitutional Convention presented a proposal for a new Constitution to the public. This proposal will have to be approved in a referendum to be held on 4 September 2022. It is well-known that Chile is among the most centralised countries in the OECD. Therefore, it is not surprising that among the many innovations of this proposed new Constitution, such as gender parity and the strong focus on the environment, one that stands out considering Chile's history and culture, is the reference to the so-called "regional State". This new form of organizing the State's functions in the territory would mean the creation of new territorial autonomies, such as autonomous regions and indigenous territorial autonomies, as well as strengthening the existing local governments. Moreover, the regional State is also connected to national law-making, since – in case of a positive outcome in the referendum – the historical Senate will be replaced by a Chamber of the Regions, with different functions than the political branch of the legislative, giving rise to a sort of asymmetrical bicameralism.

The proposal would enhance regional authority, especially regarding policy-making and financial matters, with increased normative competences but not legislative powers, unless there is a delegation of legislative powers from the Congress and the Chamber of the Regions. Hence, a connection needs to be drawn between the territorial organisation of the State and the political system that is designed by the proposed new Constitution.

The article discusses both, the proposed model's advantages and its challenges, particularly in terms of the well-functioning implementation of the new organisation of the State and its expected effects on decentralisation and multilevel constitutionalism. Crucial aspects of the institutional design, such as territorial autonomy, asymmetrical bicameralism and financial decentralisation, are not advantages or disadvantages per se. Therefore, the political party system and political culture will be key for translating risks into opportunities, while also amending the text to correct some flaws, if the new Constitution were to be approved.

## Author

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## Keywords

Chile, Constitution, Regional State, Territorial Autonomy, Decentralisation, Asymmetrical Bicameralism, Indigenous Territorial Autonomies.

# The 'regional State' in the proposed new Chilean Constitution

## Positive developments and challenges ahead

### Introduction<sup>1</sup>

Chile is heading to the polls for one of its most important political decisions. The process began when, in the constitutional referendum in October 2020, almost 80% of the citizens approved the writing of a new Constitution. The Constitutional Convention charged with that task began its work in July 2021. After a year of deliberations, the Convention delivered a full proposal that will be submitted to the people in an exit referendum on 4 September 2022.

Both, the constitution-making process and the content of the proposed new Constitution, have been praised for their innovations in crucial areas, such as gender parity, representation of indigenous peoples and emphasis on the protection of the environment.<sup>2</sup> At the same time, many observers have pointed out that one of the most important institutional transformations of the new Constitution is the change in the territorial organisation of the State: from being one of the most centralised States in the Organisation for Economic Co-operation and Development (OECD) to formulating the basis of a far-reaching decentralisation process through a so-called "regional State".<sup>3</sup>

During the works of the Constitutional Convention (CC), it became clear that the process will have a strong emphasis on decentralisation and territorial equality, given the high representation of social and territorial movements, as well as the broad agreement on the disadvantages of the current territorial organisation of the State<sup>4</sup>. However, the deliberations also showed disagreement on the means and ways to overcome the challenges. Two mechanisms played a crucial role to address these differences and also rationalise some of the initial proposals introduced by the Commission for decentralisation and the form of the State: the 2/3 quorum rule for approving any provision to the draft Constitution and the dynamic between the Commissions and the plenary of the CC, which played a moderating role.

The result is an ambitious design of the organisation of the State in the territory, considering Chile's history, political culture, and administrative trajectory. The form of State is defined as "regional", although with particularities in comparison to well-known regional States. What are the main features of this "regional State" and what are the plausible advantages and challenges it introduces? For addressing these questions, the article starts by briefly explaining the regional State. Further, it assesses

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<sup>1</sup> The author is grateful to Prof Wim Voermans and Prof Francesco Palermo for their comments on an early version of the article, and also to the external reviewers of the paper. He also appreciates the support of the Chilean Agency for Research and Development (ANID) and the Universidad Católica del Norte, Chile. I also would like to thank Petra Malfertheiner for her invaluable support throughout the entire publication process.

<sup>2</sup> Javier Couso, 'Chile's 'Procedurally Regulated' Constitution-Making Process' (2021) 12 *Hague Journal of the Rule of Law*, <<https://doi.org/10.1007/s40803-021-00157-3>> accessed 23 June 2022; Mayara Paixão, 'Chile entrega proposta de Constituição ameaçada por rejeição ao texto e a Boric' *Folha de São Paulo* (São Paulo, 4 July 2022) <<https://www1.folha.uol.com.br/mundo/2022/07/chile-finaliza-constituicao-que-pode-virar-pagina-da-ditadura-de-pinochet.shtml#comentarios>> accessed 5 July 2022; Arlette Gay, Christian Sánchez and Cécilie Schildberg, 'The Moment of Truth for Chile's New Constitution' (North American Congress on the Americas NACLA, 13 July 2022) <<https://nacla.org/moment-truth-chiles-new-constitution>> accessed 14 July 2022.

<sup>3</sup> Raúl Espinosa, 'Los artículos aprobados en el borrador constitucional que ubican a Chile a la vanguardia internacional' (*El Mostrador*, 6 April 2022) <<https://www.elmostrador.cl/noticias/2022/04/06/los-articulos-aprobados-en-el-borrador-constitucional-que-ubican-a-chile-a-la-vanguardia-internacional/>> accessed 7 April 2022; Nick Burns, 'Chile's Proposed Constitution: 7 Key Points' (*Americas Quarterly*, 7 July 2022) <<https://www.americaquarterly.org/article/chiles-proposed-constitution-7-key-points/>> accessed 8 July 2022.

<sup>4</sup> Among many examples, the current centralised unitary State displays significant disparity among municipalities in index of public expenditure per capita, with some of them ranking as developed countries, while a large majority only receive little revenues which can explain the underperforming of their tasks. In the same vein, Chile exhibits a very low percentage of public expenditure autonomously decided by regions or municipalities, with almost half of the average in OECD countries (Organisation for Economic Co-operation and Development OECD, *Subnational governments in OECD Countries: Key Data* (OECD 2018) <<https://www.oecd.org/regional/regionaldevelopment/Subnational-governments-in-OECD-Countries-Key-Data-2018.pdf>> accessed 11 May 2022.

the main virtues and also the plausible challenges it may possess in terms of the autonomy of the territories as well as their shared power in national politics.

## 1 Situating the so-called 'regional State'

The proposal establishes a particular model of regional State. The regional State is composed of "territorial entities" - autonomous regions, autonomous local governments, and indigenous territorial autonomies (ATI, for its acronym in Spanish) – and special territories – all of which have legal personality and their own patrimony, with competencies to govern themselves in the general interest of the republic, in accordance with the Constitution and the law (articles 7 and 187<sup>5</sup>). According to the proposal, all territorial autonomies will have political, administrative, and financial autonomy, in the context of a single and indivisible territory and cannot threaten "the unique and indivisible character of the State of Chile, nor will it allow territorial secession" (Art. 187.4).

In terms of political autonomy, the autonomous regions will have regional governments (RG)<sup>6</sup>, composed of directly elected Governors and Regional Assemblies. RG will approve their Regional Statute, subjected to later ratification by the national legislature. Also, RGs will have broad regulatory (but not legislative) and public policy powers (arts. 220, 224 and 226), including the possibility of "requesting Congress the transfer of legislative powers", with several limits. With regards to administrative autonomy, the proposal establishes the basis for a transfer of public services from the centre to the regions and municipalities, while residual competences always belong to the central state (art. 221), despite the principle of preferential allocation of competences to the local and regional level (territorial subsidiarity). Finally, in relation to financial matters, the new Constitution provides for regional indebtedness, a limited and severely conditioned possibility. Also, it mandates a progressive autonomous execution by subnational governments of a significant part of public spending (art. 245), while recognising macroeconomic and fiscal stability, and fiscal responsibility. Additionally, territorial entities may levy taxes and contributions in accordance with the law, and they could also set forth regional or municipal public businesses, with prior authorisation by law.

Overall, the proposal represents a significant advance in regional authority in Chile, considering its history, and its political, legal, and administrative culture. As is well-known, Chile is one of the most centralised states according to the Regional Authority Index (RAI), which considers both the regional autonomy to decide in certain affairs, as well as the territories participation in national decision-making processes or their shared power<sup>7</sup>. Also, Chile's subnational governments, both regional and local, can only decide autonomously on about 15% of the public budget, out of the total national public budget, whereas the average for OECD countries is 30%<sup>8</sup>. The regional state opens the door to an incipient and progressive process of decentralisation. Still, the regional State is substantively different to the Spanish or the Italian models, with the autonomous communities and the regions respectively.

Regional autonomy is conditioned not only by the Constitution, as is usual in regional States, but also by implementing laws. Additionally, there are two fundamental restrictions to regional autonomy that separate the proposals to mainstream understandings of what a regional State might entail, although the category is quite contested and elusive. First, according to the proposal, regions will have regulatory

<sup>5</sup> From here on, all articles quoted or referenced are taken from the final proposal for a new Constitution of Chile, 2022. The Spanish version is available here <https://www.chileconvencion.cl/wp-content/uploads/2022/07/Texto-CPR-2022.pdf> and all the translations are a responsibility of this author.

<sup>6</sup> This comment focuses on the level of the regions, considering that it is the main locus of more "political" autonomy, and the level of government that undergoes more transformations. This is not to say that autonomous local governments also are enhanced in the proposed new Chilean Constitution. Yet, as the article explains, the potentially more interesting innovations are situated at the level of the autonomous regions.

<sup>7</sup> Esteban Szmulewicz and Ignacio Saffirio, 'Propuestas para una descentralización coherente con la equidad territorial' in Javier Cifuentes, Claudio Pérez and Sebastián Rivera (eds), *Qué políticas públicas para Chile. Propuestas y desafíos para mejorar nuestra democracia* (Centro de Estudios del Desarrollo 2017), 112-3.

<sup>8</sup> Organisation for Economic Co-operation and Development OECD, *Subnational Government Structure and Finance. OECD Regional Statistics (Database)* (OECD 2018) <[Subnational government structure and finance | OECD Regional Statistics | OECD iLibrary \(oecd-ilibrary.org\)](#)> accessed 9 June 2022.

power, but not legislative power<sup>9</sup>. Although there is the possibility of delegating legislative power from Congress to the regions, this is subject to a petition by regions and later approval by Congress, which can do so without any further motivation or constitutional warrant for the regions<sup>10</sup>. Second, all regions will have the same competences and powers. A relevant exception in the context of the territorial autonomies is provided for the case of the ATI which might eventually be granted different competences, provided they are set forth in the corresponding law that will need to be enacted<sup>11</sup>. Therefore, this *sui generis* model of a regional State, in fact – if approved – the first in comparative constitutional law to be explicitly defined as "regional State", will require significant legislative development. Legal implementation of the Constitutional provisions, which must be gradual and recognised different territorial capacities, will be key to determining the concrete form of the regional State. The transitional provisions of the new Constitution provide for this gradualist approach, yet it is likely that the transitional period will be even longer than the expected two or three years.

Along these lines, the proposed regional State has some similarities with the form of State in force in Italy under the 1947 Constitution or the *estado de las autonomías* of the 1978 Spanish Constitution. However, at least three contextual differences could introduce more complexity in the implementation of the Chilean regional State. First, the direct election of regional Governors, which plausibly will generate political and social pressures towards greater transferring of competences, more autonomy, and even more financial resources, in the form of direct transfers, taxes or even indebtedness. In the original Italian case, as in Spain today, the Constitution envisaged a parliamentary form of government at the regional level, strongly conditioned by the political system at the national level. Second, the ongoing crisis of representative institutions (political parties, elections, and representative bodies) that can generate pressures for recourse to institutions of semi-direct democracy (art. 155) which, in the hands of regional *caudillos*<sup>12</sup>, could generate a situation of greater governance problems. Third, a delicate socioeconomic situation, which will make it difficult to access the financial resources needed to implement the regional State, and which could also accentuate the territorial inequalities currently observed, in the absence of strong instruments of territorial economic development and inter-territorial solidarity<sup>13</sup>. It is very different to implement a regional State in a context of economic and political stability than in this more complex scenario<sup>14</sup>.

Another important point is that the proposed norms present a lesser emphasis on local governments, which have been the most important subnational level in the last decades. In the case of indigenous territorial autonomies, the Constitution calls for the enactment of a law which will determine the procedure for their establishment and their competences (arts. 234 and 235). The vague wording of the Constitutional provisions means that, eventually, this law could set forth an administrative procedure for the establishment of each ATI, which naturally could raise a number of democratic legitimacy questions. Therefore, it would be convenient that each ATI be constituted by law, and not through a mere administrative procedure.

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<sup>9</sup> In the Chilean academic debate, constitutional law professor and former Chief Justice of the Constitutional Court, José Luis Cea, advocated for the regional State, although with a particular interpretation since it does not allude to the legislative powers of the regional entities, something that the doctrine traditionally considers typical of the regional State (José Luis Cea, 'Hacia el Estado regional en Chile', (1997) 24:2 Revista Chilena de Derecho 337. On the contrary, constitutional law professor Humberto Nogueira proposed political decentralisation within the unitary State which seems to come closer to the regional State in the proposed new Chilean Constitution (Humberto Nogueira, 'El estado unitario, los procesos de descentralización regional y el estado federal' (1985) 12: 34-35 EURE 135).

<sup>10</sup> On the power to enact legislation as a distinctive characteristic of a regional State, see among others Juan Fernando Badía, *El Estado unitario, el federal y el Estado autonómico* (Tecnos 1986) 164; Manuel García-Pelayo, *Derecho constitucional comparado* (Alianza 1993) 242-4; and Ronald Watts, 'Typologies of federalism', in J. Loughlin, J. Kincaid, and W. Swenden (eds), *Routledge Handbook of Regionalism and Federalism* (Routledge 2013) 25.

<sup>11</sup> On asymmetry as a distinctive characteristic of a regional State, see Francesco Palermo and Karl Kössler, *Comparative Federalism. Constitutional Arrangements and Case Law* (Hart 2019), 55.

<sup>12</sup> The expression *caudillo* refers to a type of authoritarian leader, in the context of Latin America especially.

<sup>13</sup> Esteban Szmulewicz (2020), 'Descentralización, regionalización y desarrollo territorial equitativo. Propuestas para la nueva Constitución de Chile', in Asociación Chilena de Derecho Constitucional (coord) *Tránsito constitucional. Camino hacia una nueva Constitución* (Tirant lo Blanch 2020), 96-8.

<sup>14</sup> Depending on the measurement, the current public deficit of Chile for the year 2021 was of 7,6% according to modest estimates, and of 11,4% according to adjusted measures, both as percentage of the national GDP ([https://www.dipres.gob.cl/598/articles-264776\\_Informe\\_PDF.pdf](https://www.dipres.gob.cl/598/articles-264776_Informe_PDF.pdf)).

## 2 Advantages of the 'regional State'

The form of State presents important virtues such as allowing regions to adopt their own regional statutes, to elaborate, implement and finance an important set of public policies (art. 220), and to have authorities elected and directly responsible to the people, bringing the government closer to the citizens. This idea of "grassroots democracy" is at the core of arguments in favour of decentralisation, for two basic reasons: local and regional government as "schools of democracy", enhancing citizen's development; and greater responsiveness to local concerns, as well as more precise means for accountability<sup>15</sup>. The Chilean proposal addresses these reasons. In addition, it incorporates constitutional principles on decentralisation that will guide both, the interpretation of the Constitution and the implementation of the constitutional norms.

Moreover, the incorporation of principles of territorial equity and inter-territorial cooperation is considered positive. In financial matters, the autonomous revenue of the regions will come fundamentally from regional taxes and contributions, within a general framework established by law. Another source of revenue will be their capacity of indebtedness. The issue of indebtedness should be considered with great caution because it can lend itself to abuses, especially considering the experiences in Latin America.

On another related matter, scholars have highlighted the centrality of coordination and cooperation in the context of multilevel systems. In this regard, one can distinguish between top-down coordination, characterised by a dominant role of the central state, and horizontal cooperation, where there is equality of all levels of government involved<sup>16</sup>. Following this logic, it is still unclear whether the institutions for intergovernmental relations proposed in the new Constitution – the Council of Governors and the President of the Republic at the national level, and Council of Mayors in each region – will make Chile fall under the idea of some sort of "cooperative regionalism", especially considering that financial relations will still be fairly centralised. However, it seems clear that the position of regional governments experiments a notable upgrade whereas the central state will now have to concur and share many competences with the autonomous territories.

Similarly, the risks of unorganised institutional fragmentation are addressed through a set of principles and mechanisms of inter-institutional and inter-territorial coordination and cooperation. This concern presupposes the existence of a strong centralised State that is well-functioning and present in the entire territory of the country, which transitions to a significantly decentralised polity. To this concern, it will be important to observe the implementation of the constitutional precepts by the national legislator, including the regional statutes and those of the ATIs, whose constitutionality can also be controlled before the Constitutional Court. Thus, in our view, it is not a matter of separate and independent institutions resulting from segmented and localised decision-making processes, as a purely centrifugal model might be<sup>17</sup>, but rather one that combines "autonomy" with inter-territorial and inter-institutional coordination and cooperation.

Finally, the proposal calls for an elimination of the existing Senate and its replacement by a Chamber of the Regions. However, this body will not have the same legislative powers as the current Senate does and it will be only concerned with so-called "laws of regional agreement", whereas the newly established Congress of the Deputies will deal with all bills under consideration. This difference between the branches of the legislative has been labelled by some observers as asymmetrical bicameralism<sup>18</sup>.

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<sup>15</sup> For an interesting explanation of these arguments, particularly in the context of developing countries, see especially Larry Diamond, *Developing Democracy. Toward Consolidation* (The Johns Hopkins University Press 1999), 121-9.

<sup>16</sup> Eleonora Ceccherini, 'Intergovernmental relationships in Italy: a feeble but useful model', in Erika Arban, Giuseppe Martinico and Francesco Palermo, *Federalism and Constitutional Law: the Italian Contribution to Comparative Regionalism* (Routledge 2021), 69.

<sup>17</sup> John Gerring y Strom Thacker, *A Centripetal Theory of Democratic Governance* (Cambridge University Press 2008), 16-20.

<sup>18</sup> José Francisco García, 'Reshaping the Chilean political regime: three acts and a funeral' (*ConstitutionNet International IDEA*, 25 May 2022) <<https://constitutionnet.org/news/reshaping-chilean-political-regime-three-acts-and-funeral>> accessed 1 June 2022.

Still, it is important to bear in mind that "there is no insignificant bicameralism" as Arend Lijphart rightly has pointed out<sup>19</sup>. All "second chambers" exercise some kind of influence and power, even if it is an asymmetrical bicameralism, since it implies some degree of separation of powers internal to the structure of the legislature, and it is also a body that counterbalances to some extent the executive power and must be considered by the latter. Neither the Congress of the Deputies and Deputies, nor the Chamber of the Regions, the body that would replace the Senate, can impose themselves over the other in the legislative process, which means that in the matters that are within the knowledge of both chambers, which include a significant number and quality of law matters, in addition to international treaties and amendments to the Constitution, their powers are almost identical. In addition, it should be borne in mind that the Constitutional Court will resolve conflicts of competence in matters of regional agreement laws (art. 381) and also in other matters between the Congress of the Deputies and the Chamber of the Regions, or between these institutions and the President of the Republic. The Constitutional Court will be responsible for enforcing an adequate balance of powers.

### 3 Indigenous territorial autonomies (ATI)

ATIs are considered one of the territorial entities of the regional State. Therefore, they shall be geographically constrained, which differs them from examples of culturally-based communities, such as Belgium's cultural-linguistic communities.

Regarding ATI, the scope of self-government and self-determination will be defined by law, which will establish the exclusive competencies of the ATIs and those that are shared with other territorial entities, in accordance with the Constitution. Article 235 states that the ATIs "shall have the competencies and financing necessary for the adequate exercise of the right of free determination of the indigenous peoples and nations", which should be understood within the framework of the competencies established for the organisation of the State as a whole by the Constitution and the laws, as well as the system of sources of law.

The potential for centrifugal force is counterbalanced by two mechanisms. On the one hand, in case of possible non-observance of the constitutional norms by the statutes of the ATIs, the Constitutional Court will be in charge of enforcing the principle of constitutional supremacy. On the other hand, it should be considered that the constitutional mandate of reserved seats for indigenous peoples in the representative institutions at the national level (Congress of the Deputies and Chamber of the Regions) could tend to generate an incentive for their integration into the national political system. They will sit at the national decision-making table, which could moderate the possible centrifugal tendencies that the ATIs might generate. In fact, comparative experience shows that in countries coming from a unitary State and where decentralising reforms affected the entire territory, as will be the case in Chile, the empowerment of the regions led to mechanisms for channelling sub-state grievances at the centre that have become stronger as the process of territorial distribution progressed<sup>20</sup>.

Given that the regulation of the ATIs is much more general, open and subject to legal implementation than in the case of the other territorial autonomies, whose authorities, competences and attributions are more clearly defined in the Constitution itself, the expectations for the law that develops the ATIs will be very high. Therefore, there is a risk that in the end, and given the distribution of competences established in the Constitution, the scope of competences of the ATIs will be very limited, or too broad, which could frustrate the expectations generated.

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<sup>19</sup> Arend Lijphart, *Patterns of democracy: government forms and performance in thirty-six countries* (Yale University Press 2012), 200.

<sup>20</sup> Wilfried Swenden, 'Territorial strategies for managing plurinational states', in J. Loughlin, J. Kincaid and W. Swenden (eds) *Routledge Handbook of Regionalism and Federalism* (Routledge 2013), 70.

Another challenge is the difficulty of the geographic delimitation of the ATI in a country with a mixed population and very little territories that are entirely or even predominantly populated by indigenous peoples. In fact, perhaps with the exception of Eastern Island (Rapa Nui) and some communities in the north of the country, the rest of the regions are of mixed population. Even in terms of the municipalities, the lowest territorial entity, there are only a handful of communes with a majority of indigenous people, most notably in the Araucania region with the Mapuche indigenous people. Even in that case, there will be non-indigenous population within the ATI, perhaps even a significant proportion. Therefore, arrangements need to be considered in the law which "protect the interests of 'minorities within minorities', through power-sharing, cultural autonomy, and devolution to local authorities where these minorities constitute a significant number"<sup>21</sup>. These arrangements are not considered in the draft Constitution, but need to be incorporated in implementing laws since this could be a major problem for the ATIs.

## 4 The regional State and the national political system

The legislative power is composed of the Congress of the Deputies and the Chamber of the Regions. The Chamber of the Regions is composed of directly elected regional representatives, in an equal number for each region of at least three regional representatives. This Chamber only participates with regards to the so-called "laws of regional agreement", which are processed by both bodies of the legislative power<sup>22</sup>, including all constitutional reforms, laws regulating the organisation, attributions and operation of the justice systems, the legislative power and the autonomous constitutional bodies; laws regulating the constitutional states of exception; laws creating, modifying or suppressing taxes or exemptions and determining their progression and proportionality; laws implementing the rights to health, to education and to housing; the budget law; laws regulating the election, designation, competencies, attributions and procedures of the organs and authorities of the territorial entities; laws establishing or altering the political-administrative division of the country; laws establishing fiscal and budgetary distribution mechanisms, and other mechanisms of economic compensation among the different territorial entities; laws that delegate legislative powers to the Regional Assemblies; laws that regulate territorial and urban planning and its execution; laws that regulate the protection of the environment; laws that regulate popular voting and scrutiny; and those that regulate political organisations; among others (art. 268). In addition, the Chamber has the power to approve international treaties and to participate in the appointment of high authorities. In the case of regional statutes, proposals for the creation of regional companies and requests for the delegation of legislative powers made by the Regional Assemblies, once a proposal has been received, the Chamber of the Regions may approve the project or make the amendments it deems necessary. In the event that the Regional Assembly accepts the amendments, the bill will be processed as a regional agreement law (art. 276).

The Chamber of the Regions is not to be confused with the Regional Assemblies, since the members of the former are not members of the latter, nor do they represent the regional assemblies in the legislative power, although there is an obligation to render a periodic account before the regional assembly "which they represent".

From the point of view of the relationship between the regional State and the national political system, the following considerations should be borne in mind. First, the possibility of legislative delegation to the autonomous regions (art. 268 n), which should be highly exceptional since the law should emanate

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<sup>21</sup> Yash Ghai, 'Autonomy as a participatory right in the modern democratic state', in Zelim Skurbaty (ed) *Beyond a One-Dimensional State: an Emerging Right to Autonomy?* (Brill 2005), 41.

<sup>22</sup> All other matters of laws are only enacted by the Congress of the Deputies, which is why the system has been labeled as "asymmetrical bicameralism". Among others, see Julieta Suárez-Cao, Esteban Szmulewicz, Ismael Toloza and Heinrich von Baer, 'Perfeccionar para consolidar: Las regiones, la Cámara Territorial y el poder compartido en la nueva Constitución' (*Poder y Liderazgo* 28 February 2022) <<https://www.poderyliderazgo.cl/opinion-perfeccionar-para-consolidar-las-regiones-la-camara-territorial-y-el-poder-compartido-en-la-nueva-constitucion/>> accessed 9 March 2022.

from the national legislative bodies and procedures. Second, the legislative initiative of the regions, whose scope is not well specified in the proposed rules (art. 269.2). Third, the relationship between the Chamber of the Regions and the territorial autonomies, especially the Regional Assemblies, since in the proposed rules a certain connection seems to be sought between these entities, which would conflict with the direct mandate of the citizens through elections and the bases of the differentiated principles of representation for the members of both entities. Fourth, probably in the medium or long term a complex point could arise, as has happened in Spain with the most recent statutes of autonomy, if the regions were to seek to expand their powers through the regional Statutes, and this would generate subsequent friction with their necessary approval as "laws of regional agreement", a matter that might be heard by the CC, like in the case of statutes of other territorial entities).

Fifth, the regional representatives shall be elected jointly with the local government and regional authorities, three years after the presidential and congressional elections (art. 254.2). In other words, these elections are decoupled from the presidential and parliamentary elections. Sixth, the Chamber of the Regions participates in joint sessions with the Congress of the Deputies in appointments of high authorities (art. 263), such as the Council of Justice, the Constitutional Court, and the Comptroller General of the Republic, the National Prosecutor, and the National Defender. It should be borne in mind that, given the greater number of deputies, this system of appointments through joint sessions will tend to favour the deputies over the Chamber of the Regions, tending to dilute the power the current Senate has over appointments, which has been considered to be an important source of political stability so far.

Broadly speaking, the governability of the political system can be further complicated by the need to have majorities both in the Congress of the Deputies and in the Chamber of the Regions, given the important number and centrality of the "laws of regional agreement" already mentioned. In addition, this complexity will be exacerbated by the fact that the elections of the Chamber of the Regions are held at a different time than the presidential and deputy elections, which could generate an even greater disconnection between the majorities present in the different representative institutions. On the other side, even if bicameral laws may complicate governance, especially when compared with a unicameral system – an option which was on the table at initial conversations in the Chilean Constitutional Convention, bicameralism can also force political cooperation among majority and opposition, at least when there is a different political majority in the two chambers. The way this tension will play out depends significantly on the maturity of the political system, and especially the party system, to turn this into a chance or into a risk.

## 5 Challenges ahead

The development of territorial autonomies will require high levels of inter-institutional coordination. Although there are certain institutions for this purpose, particularly the Council of Governors and the President of the Republic at the national level (Council of Governorates), and the Council of Mayors at the level of each region, this can be expected to be laborious, especially with respect to indigenous autonomies. The Council of Governorates, whose general function is to "coordinate relations between the central State and the territorial entities" and whose powers under article 230 relate to matters pertaining to relations between the central level and the regions, will be key to addressing these difficulties. The fact that the Council is chaired by the President of the Republic suggests that its management will depend on the (good or bad) management of the President, and not on the institution itself.

On the contrary, the lack of an institution for coordination between levels of government with directly elected authorities may lead to political problems that are not institutionally aired, but channelled through informal or extra-institutional channels, or to problems of coordination of public policies, or to an excessive "judicialisation" of political grievances in the Constitutional Court through disputes over

competencies or powers. The experience of the Covid-19 pandemic in the two regional states with the longest history, Spain and Italy, points precisely to the need for such multilevel coordination bodies<sup>23</sup>. The same has been emphasised in the current literature on multilevel constitutionalism, either decentralised, regional or federal, wherever there are different levels of government and not just one, as in the unitary state with mere administrative decentralisation<sup>24</sup>. On the contrary, in countries where such forums do not exist, such as Mexico, Brazil, the United States, Ethiopia, Nigeria, it was necessary to resort to ad hoc arrangements (when it was done and possible). These, however, only took effect several months after the beginning of the pandemic, with the obvious negative consequences.

In comparative constitutional scholarship, positive examples of multilevel coordination include so-called "cooperative federalism" in Germany and Switzerland. In the case of Germany, the role of the *Bundesrat*, the sort of interlocking executive federalism and the fiscal solidarity all point towards an institutional culture of "multilateral bargaining and consensus-seeking"<sup>25</sup>. During 2020, the first year of the Covid-19 pandemic, both countries proved cases in point about coordination during crises, yet authors have raised questions regarding the challenges of "horizontal cooperation of 26 autonomous actors" in the Swiss case<sup>26</sup>, and the sustainability of Germany's central state financial "generosity"<sup>27</sup>. The bottom line from the lessons of the recent pandemic is that, despite disagreement on whether centralised or decentralised systems are more effective, three key problems need to be especially addressed for multilevel government to properly function: a) an unclear division of powers between the centre and the regions; b) a high level of administrative capacity and political power among regions; c) weak intergovernmental relations, especially when a regional/territorial chamber is lacking at the central level<sup>28</sup>.

Another complex issue will be administrative decentralisation. Considering that the origin of this regional State is a sort of devolutionary process, in the context of an existing strong central administration organised territorially, one would have expected an important role for the central administration, at least in the transitional phase. In this sense, the brief mentions of the deconcentrated territorial administration of the state is striking, because it is plausible to expect that the central administration will have to continue providing public services and satisfying public needs for a certain amount of time. All this will be left to elaboration in parliament; hence the real face of the regional State will only be seen after the legal implementation of the constitutional provisions.

Thirdly, fiscal decentralisation, although limited by legal authorisations and a framework of coordination and fiscal responsibility, and even macroeconomic stability, could also generate certain problems, for example, in terms of taxes and contributions that are redundant or inefficient from an economic point of view, and considering the enormous territorial socioeconomic disparities in the country, which in comparative experience has shown to be a problem for the real development of regional autonomy<sup>29</sup>.

Understood in this way, territorial cooperation and solidarity can serve to deepen territorial autonomy, beyond a merely individualistic or isolationist vision of autonomy. In other words, in constitutional theory, multilevel governance arrangements, such as the proposed regional State, can deepen constitutionalism, on the one hand, insofar as they offer a way of distributing and limiting power, and

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<sup>23</sup> Cheryl Saunders, 'Grappling with the Pandemic. Rich insights into intergovernmental relations', in Nico Steytler (ed) *Comparative Federalism and Covid-19: Combating the Pandemic* (1st ed.) (Routledge 2021) <https://doi.org/10.4324/9781003166771>, 387-9.

<sup>24</sup> Cheryl Saunders, 'Challenges of Multi-level Constitutionalism', in Elizabeth Fisher, Jeff King, and Alison Young (eds), *The Foundations and Future of Public Law: Essays in Honour of Paul Craig* (Oxford University Press 2020) DOI: 10.1093/oso/9780198845249.003.0017, 354-5.

<sup>25</sup> Tanja Börzel, *States and Regions in the European Union: Institutional Adaptation in Germany and Spain* (Cambridge University Press 2001), 45-8.

<sup>26</sup> Eva Maria Belser, 'Managing the coronavirus pandemic in Switzerland. How federalism went into emergency mode and struggle to get out of it, in Nico Steytler (ed), *Comparative Federalism and Covid-19. Combating the Pandemic* (Routledge 2021), 139.

<sup>27</sup> Gisela Farber, 'Germany's fight against Covid-19. The tension between central regulation and decentralised management', in Nico Steytler (ed), *Comparative Federalism and Covid-19. Combating the Pandemic* (Routledge 2021), 68.

<sup>28</sup> Elisabeth Alber, Erika Arban, Paolo Colasante, Adriano Dirri, and Francesco Palermo, 'Facing the pandemic. Italy's functional 'health federalism' and dysfunctional cooperation', in Nico Steytler (ed), *Comparative Federalism and Covid-19. Combating the Pandemic* (Routledge 2021), 30.

<sup>29</sup> Guerino D'Ignazio and Pedro Carballo, 'Asimetrías y diferenciaciones regionales tras la reforma del título V de la Constitución italiana' (2004) 12-13 *Teoría y Realidad Constitucional* 385.

provided they deepen the responsibility and accountability of democratic institutions. However, on the other hand, multilevel systems can also undermine equality before the law and further complicate the fulfilment of the will of the majority as expressed in national law<sup>30</sup>. For constitutionalism and multilevel government to complement each other, it is necessary to provide adequate channels of coordination and cooperation between the different levels, as well as to ensure the intervention of the general interest and the common good, above particularisms, and also the legal control of respect for the rule of law, and the adherence to the system of distribution of competences and attributions.

In this line, it is worth mentioning the generic competence of the Constitutional Court to resolve "conflicts of competence or attributions that arise between the autonomous territorial entities, with any other organ of the state, or between them, at the request of any of the aforementioned". For this last purpose, it will be important to change the mentality of the legal interpreters of the new Constitution (the courts of justice, the Constitutional Court and the Comptroller General of the Republic, typically) to leave aside the centralised unitary state and adapt to the principles and logic of the new regional State, in order to prevent the constitutional control of the multilevel distribution of competences from becoming a tool for greater centralisation in the system<sup>31</sup>.

## Conclusions

In conclusion, the regional State in the proposed new Constitution represents a significant progress in regional authority in Chile, considering its history and culture. The model will open up a wide range of processes that will be implemented in the coming years through laws, public policies and even changes in the political culture. Still, the political, administrative, and financial autonomy of the territorial entities is a major change and, as such, presents a number of challenges.

This article has highlighted the pros and cons of the regional State under the proposed Chilean new Constitution. Overall, taking a systematic lecture of the constitutional provisions, despite the emphasis on the concepts of "autonomy", "rights", "non-tutelage" and others along similar lines, it would be wrong to interpret these concepts in an individualistic or isolationist perspective. First of all, the territory is unique and indivisible, and secession is prohibited. Secondly, principles of solidarity and territorial equity are enshrined in a series of norms, in addition to a set of more specific and concrete mandate. For instance, the State "shall make unconditional direct transfers to territorial entities that have fiscal revenues of less than half of the weighted average of these" and that the "regions and communes that have revenues above the weighted average of fiscal revenues shall transfer resources to those with revenues below the average" (art. 249).

However, considering the previously stated comments, it will be very important that the laws for the development of the regional State adequately convey the transition from a sort of "disjointed archipelago" of a complex network of institutions at the territorial level, and their relationship with the central level, to a coherent and articulated system of "collaborative or cooperative territorial development"<sup>32</sup>. Yet legal change is insufficient. If the new Constitution were to be approved, whether this profound institutional, political, and administrative transformation culminates in a cultural and paradigmatic shift, is a development that we should observe in the following years.

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<sup>30</sup> Cheryl Saunders, 'Challenges of Multi-level Constitutionalism', in Elizabeth Fisher, Jeff King, and Alison Young (eds), *The Foundations and Future of Public Law: Essays in Honour of Paul Craig* (Oxford University Press 2020) DOI: 10.1093/oso/9780198845249.003.0017, 347-8

<sup>31</sup> Daniel Halberstam and Mathias Reimann, 'Federalism and Unification: Comparing Methods, Results, and Explanations across 20 Systems', in Daniel Halberstam and Mathias Reimann (eds), *Federalism and Legal Unification* (Springer 2014)

<sup>32</sup> Fundación Chile Descentralizado...desarrollado, 'Análisis de los avances en Descentralización de la Convención Constitucional Documento de Trabajo al 9 de marzo de 2022' (9 March 2022) <<https://chiledescentralizado.cl/wp-content/uploads/2022/05/Analisis-de-Avances-de-Descentraliza-cion-de-Convencion-Constitucional-09.03.22-FChDD-HvB-NB-AS.-2-2.pdf>> accessed May 11 2022.