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Introduction: Social Rights and the Constitutional Moment

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I. CHILE'S CONSTITUTIONAL MOMENT

IN THE 1990S, Bruce Ackerman defined 'constitutional moments' as historic milestones of intense deliberation and change in a country's politics, change that reflects in the country's constitutional settlement.¹

Since October 2019, Chile has been going through its own constitutional moment, a moment that began with popular resistance against rising public transport fees in the capital, Santiago. The uprising went on for weeks, and was initially answered by force. A research team from the UN High Commissioner for Human Rights spent three weeks in the country in November that year, and they detailed extensive allegations and examples of torture and ill-treatment by police against people held in detention, as well as cases of arbitrary detention; official figures in late 2019 reported more than 28,000 people detained within weeks and no fewer than 26 deaths in the context of the protests.²

The turbulent unrest was only appeased with an agreement between the government, the majority of political parties and civil society groups to channel social demands through a participatory process of constitutional reform. The issues brought to the fore by the mobilisation of late 2019 included the increasing cost of living, low wages and pensions, lack of quality education, and a poor public health system;³ in other words, social rights.

A plebiscite was held in October 2020, in which 78 per cent of citizens confirmed their support for the launch of the process to reform the constitution, and 79 per cent favoured the creation of an ad hoc constitutional convention to

¹B Ackerman, *We The People: Transformations* (Cambridge, Mass, Harvard University Press, 1998) 93–94.

²UN Office of the High Commissioner for Human Rights, *Report of the Mission to Chile: 30 October–22 November 2019*.

³Centro de Estudios Políticos, *Estudio Nacional de Opinión Pública No 84* (December 2019).

that end. The 155 members of the constitutional convention, 17 seats on which were reserved for indigenous people, were elected in May 2021. Chile's became the first constituent assembly with guaranteed parity between men and women.⁴ The convention's proceedings began in July 2021, and it is expected that an entirely new constitution will be put to the people in a referendum in late 2022.

Despite being amended several times, to this day Chile's democracy continues to be built on a constitution written under Pinochet. The regime adopted the 1980 Constitution as an attempt to provide a veneer of legitimacy to the dictatorship. The 1980 Constitution contains a number of problematic procedural requirements, such as preventive constitutionality control by the constitutional court, or super majority requirements in both chambers, particularly insurmountable with the anti-proportional electoral system in place until 2018. So-called 'authoritarian enclaves' made it difficult – if not impossible – for progressive governments to bring about law and policy changes, let alone constitutional amendments.⁵ For example, between 1990 and 2005, despite electoral defeats, the right-wing opposition enjoyed a majority in the senate thanks to a sizeable group of non-elected senators.⁶

The 1980 Constitution is also the embodiment of the neoliberal model: it prioritises private property and a market-driven economy, but it does not guarantee education, healthcare and social security for those in need. Chile signed and ratified a number of international treaties that proclaim economic, social and cultural rights, but by and large these rights have not been incorporated into domestic law. The 1980 Constitution, in Articles 19 and 20, recognises only the freedom to choose between different providers, for example, in relation to health and social security, but it does not ensure a minimum content for these rights; the right to education and the right to a healthy environment are not justiciable, and the right to adequate housing is nowhere to be found. That is why, in 2016, the UN Special Rapporteur on Extreme Poverty and Human Rights concluded that 'the formulations used (in the 1980 Constitution) do not generally conform to international standards and are not firmly anchored in the language of rights and obligations. The methods of implementation envisaged are relatively open-ended and non-empowering and do not explicitly include judicial action' in relation to social rights.⁷ Alongside the United States, whose constitution is completely silent about them, Chile is the country in the Americas that has so far most resisted the constitutionalisation of social rights.⁸

⁴V Undurraga, 'Engendering a Constitutional Moment: The Quest for Parity in the Chilean Constitutional Convention' (2020) 18 *International Journal of Constitutional Law* 466.

⁵MA Garretón, 'Chile 1997–1998: The Revenge of Incomplete Democratization' (1999) 75 *International Affairs* 259.

⁶J Couso, 'The Possibilities and Limits of a Constitution-Making Transnational Legal Order: The Case of Chile' in G Shaffer et al (eds), *Constitution-Making and Transnational Legal Order* (Cambridge, Cambridge University Press, 2019) 275.

⁷UN Special Rapporteur on Extreme Poverty and Human Rights, *Report on his mission to Chile*, UN doc A/HRC/32/31/Add (2016), para 25.

⁸R Gargarella, *Latin American Constitutionalism, 1810–2020: The Engine Room of the Constitution* (Oxford, Oxford University Press, 2013) 145.

Under the 1980 Constitution, social rights are not a matter of public service; they are instead tradeable goods available only to those who can afford them. And affordability is very unevenly distributed as a result of high levels of inequality. As reported by the UN Economic Commission for Latin America and the Caribbean, ‘wealth in Chile is highly concentrated. While the poorest 50 per cent of households owned just 2.1 per cent of the country’s net wealth in 2017, the richest 10 per cent held two thirds (66.5 per cent) and the richest 1 per cent accounted for 26.5 per cent’.⁹ The gap between the average income of the richest 10 per cent and the poorest 10 per cent of the population is 20 to 1, one of the highest rates in the OECD.¹⁰ Chile has the second highest Gini coefficient of income inequality in the OECD,¹¹ and the second lowest rate of public spending in relation to the GDP.¹²

Chile’s constitutional moment unfolded in these socio-economic conditions. The constitutional moment was institutionalised through the mentioned constitutional convention in a process agreed upon by the government, opposition parties and civil society. For Verdugo and Prieto, one of the unique features of the Chilean constitution-making process is that it is ‘both a bottom-up process pushed by groups favoring a constitutional replacement and an elite-driven bargain that includes rules designed in a top-down way by political parties, which tried to channel the social demands via representative institutions’.¹³ Following the mandate of the plebiscite, the constitutional convention was set up ad hoc, called to coexist with parliament (national congress), which continued with its own business while the convention focused on the drafting of the future constitution. Chile may be an example of what Arato called the ‘post-sovereign paradigm of constitution-making’, where ‘none of the actors, institutions, or organs involved in the several stages could claim to fully embody popular sovereignty’.¹⁴

Negretto identifies four factors that explain constitutional replacements in democratic regimes,¹⁵ and Chile displays all four of them: (1) the need to implement significant changes in the basic structures of the state to further democratization, and – in Chile’s case – to revise and remove the remaining authoritarian enclaves mentioned earlier; (2) a context of political crisis, in Chile’s case the social unrest in late 2019; (3) a shift in electoral allegiances

⁹ ECLAC, *Social Panorama of Latin America 2018* (2019) 58.

¹⁰ OECD, *Society at a Glance 2019: OECD Social Indicators* (OECD Publishing, 2019) 98.

¹¹ ‘Income inequality’ OECD Data: <https://data.oecd.org/inequality/income-inequality.htm>.

¹² ‘Government spending’ OECD Data: <https://data.oecd.org/gga/general-government-spending.htm>.

¹³ S Verdugo and M Prieto, ‘The Dual Aversion of Chile’s Constitution-Making Process’ (2021) 19 *International Journal of Constitutional Law* 149, 150–51.

¹⁴ A Arato, ‘Beyond the Alternative Reform or Revolution: Postsovereign Constitution-Making and Latin America’ (2015) 50 *Wake Forest Law Review* 891, 893.

¹⁵ GL Negretto, ‘New Constitutions in Democratic Regimes’ in GL Negretto (ed), *Redrafting Constitutions in Democratic Regimes: Theoretical and Comparative Perspectives* (Cambridge, Cambridge University Press, 2020) 4–7.

and/or balance of power, as a result of which existing institutions no longer serve the interests of those with the power to change them; and (4) the need to modernise and potentially harmonise existing constitutional rules, which in the case of Chile were adopted for and by a regime that was very different from today's democracy.

When it comes to constitution-making, active participation can be as significant as the future content of the constitution; citizen engagement in constitutional processes can have a strong positive effect on deepening society's democratic credentials.¹⁶ The democratic legitimacy of a constitution depends on the extent to which the opinions of those most affected by it are taken into account. In a democracy, only when participation is open, transparent, and meaningful, do citizens have reasons to see a constitutional settlement as their own, to take ownership even when they may not necessarily agree with everything the constitution says.¹⁷ Beyond the symbolic or normative argument for direct citizen participation, the way the established political class, in government and in opposition, respond to the challenge matters enormously as well. Negretto's comparative analysis of constitutional reforms in democratic contexts shows that the combination of popular and elite-driven approaches can determine the success and sustainability of the democratic settlement after the adoption of a new constitution:

Inclusive constitutional agreements at the level of representative elites not only establish legal limits on state action but may also provide opposition parties and citizens alike with the means to make institutional constraints on executive power and civil liberties effective.¹⁸

Chile's constitutional moment is a time of potential transformation for the country. In the 1970s, Chile became the first theatre of operations of neoliberalism.¹⁹ In 2021, however, a majority of the elected members of the constitutional convention pledged to advocate for structural changes in the economic and political system and to support social rights, while right-wing parties obtained less than a third of the seats, diminishing the chances of a blocking minority.²⁰ Gender equality, better recognition of indigenous people, social rights, the protection

¹⁶ TA Eisenstadt et al, *Constituents before Assembly: Participation, Deliberation, and Representation in the Crafting of New Constitutions* (Cambridge, Cambridge University Press, 2017).

¹⁷ K Casla, 'The Democratic Case for Social Rights in Chile's Constitutional Moment' Petrie-Flom Center Harvard Law School (August 2020), <https://blog.petrieflom.law.harvard.edu/2020/08/24/chile-constitution-social-rights-health/>.

¹⁸ GL Negretto, 'Constitution-Making and Liberal Democracy: The Role of Citizens and Representative Elites' (2020) 18 *International Journal of Constitutional Law* 206, 207.

¹⁹ N Klein, *The Shock Doctrine: The Rise of Disaster Capitalism* (London, Penguin, 2007) ch 2.

²⁰ N Massai and B Miranda, 'La mitad de la convención: 77 constituyentes electos provienen de listas que impulsan cambios radicales al sistema' *Ciper* (May 2021), <https://www.ciperchile.cl/2021/05/17/la-mitad-de-la-convencion-77-constituyentes-electos-provienden-de-listas-que-impulsan-cambios-radicales-al-sistema/>.

of the environment and the deepening of democracy were particularly prominent among the 32,000 measures proposed by the 1,400 candidates standing for election to the convention.²¹ As observed by Verdugo and Prieto, the ‘aversion towards the economic model of the Pinochet Constitution also overlaps with the transformative undercurrent of the Chilean constitutional movement and its emphasis on social, economic, and cultural rights’.²² Such democratic impetus shows that the defence of human rights in general, and social rights in particular, need not be solely the business of lawyers, academics, NGOs and international human rights bodies. In other words, Chile’s constitutional moment is also the moment of the democratic case for social rights, where the constitutionalisation of social rights may represent the will of the people, in stark contrast with the 1980 Constitution, where neither social rights nor the will of the people mattered for the regime.

II. THE CONSTITUTIONALISATION OF SOCIAL RIGHTS

Social rights are proclaimed in a number of international human rights treaties, the most significant one being the 1966 International Covenant on Economic, Social and Cultural Rights, signed and ratified by Chile and more than 170 countries around the world. As a matter of international law, states have a responsibility to show how they give effect to these rights in their domestic legal order, including the provision of legal and judicial remedies.²³ Also, as a matter of international law, states may not invoke their internal law as a justification or an excuse for their failure to abide by their international human rights obligations (Article 27 of the Vienna Convention on the Law of Treaties).

Social rights can be made directly enforceable, just like any other human right, either via constitutional procedures or in ordinary courts. In addition to judicial enforceability, there are at least three other types of social rights provisions in comparative constitutional law. First, social rights can be constitutionalised as guiding principles of public policy, or non-enforceable policy commitments for public welfare. Second, constitutions may recognise social rights in such way that, although not explicitly made non-justiciable, judges nonetheless interpret them as not intended to create individual entitlements to judicial remedy. And third, social rights can embed the very formulation of the type of state, such as a ‘social republic’ (France) or a ‘democratic and social state’ (Germany

²¹ Observatorio Nueva Constitución, ‘Análisis de las propuestas constitucionales de los (as) candidatos (as) a convencionales ¿Cuáles son los principales temas del debate constitucional?’ (May 2021) <https://www.observatorionuevaconstitucion.cl/2021/05/13/observacion-n3/>.

²² S Verdugo and M Prieto, ‘The Dual Aversion of Chile’s Constitution-Making Process’ (n 13) 156.

²³ UN CESCR, *General Comment No 9: The Domestic Application of the Covenant*, UN doc E/C.12/1998/24 (1998).

and Spain).²⁴ These types of provisions are not mutually exclusive. International and comparative practice shows that, even when social rights are not constitutionalised as directly enforceable rights in court, social rights can symbolically represent the rejection of a neoliberal agenda, and can provide an interpretive guidance for the application of private law (for example, in the case of the social function of private property when regulating the private rental sector).²⁵

In 2013, at least 160 constitutions contained at least two economic and social rights, 26 of them as aspirational rights, 75 as justiciable rights, and 59 with a mixture of both. In 2016, environmental rights were present in 68 per cent of constitutions and were justiciable in 42 per cent, up from 53 per cent and 29 per cent respectively in 2000. In 2016, the right to health was judicially enforceable in 74 countries, 20 more than in 2000. The right to housing is present in 42 per cent of constitutions. Child protection, education, health and social security appear in more than two thirds of the world's constitutions, and are justiciable in at least 40 per cent of them. The right to education is present in 81 per cent of constitutions and is justiciable in 59 per cent. This is why Rosevear, Hirschl and Jung conclude that economic and social rights 'are not only more present in constitutions but they are also more likely to be justiciable than ever before'.²⁶

One of the criticisms of the justiciability of social rights, particularly in the Latin American context, has been that giving judges power to adjudicate social rights has little transformative power, and may even be counterproductive. The critique argues that justiciability tends to favour those who are relatively affluent and have access to court, and does nothing or very little to address structural inequalities. The critique deserves to be taken seriously, and requires the appreciation of nuance, as each country is likely to present a very different reality in this regard. After all, as observed by Landau, 'we may continue to gain a more fruitful understanding of judicial politics by viewing judiciaries as integral parts of their own political regimes'.²⁷ At the same time, the literature on the welfare state has shown that the support of the middle-classes is essential to the sustainability of public services; similarly, broadening the base of support for universal social rights may require striving towards the combination of both less and more transformative outcomes from the justiciability of social rights.²⁸

Liberal egalitarianism and autonomy-based arguments have been used to justify the need for social rights in the terrain of political theory. The proposition

²⁴ J King, 'Social Rights in Comparative Constitutional Theory' in G Jacobsohn and M Schor (eds), *Comparative Constitutional Theory* (Cheltenham, Edward Elgar, 2018) 159.

²⁵ Ibid, 166.

²⁶ E Rosevear et al, 'Justiciable and Aspirational Economic and Social Rights in National Constitutions' in KG Young, *The Future of Economic and Social Rights* (Cambridge, Cambridge University Press, 2019) 40.

²⁷ D Landau, 'Socioeconomic Rights and Majoritarian Courts in Latin America' in C Crawford and D Bonilla Maldonado (eds), *Constitutionalism in the Americas* (Cheltenham, Edward Elgar, 2018) 214.

²⁸ D Landau and R Dixon, 'Constitutional Non-Transformation?' in KG Young, *The Future of Economic and Social Rights* (Cambridge, Cambridge University Press, 2019) 125.

is that everyone needs access to certain material essentials that can enable him or her to become a free and autonomous individual, autonomy understood as the ability to make reasonable and rational decisions based on certain conceptions of standards of adequate behaviour.²⁹ King, for example, argues that the agency threshold:

requires a bundle of resources and opportunities that gives persons a 'real possibility' to engage in basic life planning, including the capacity to frame and achieve long-term goals. The most abstract statement of the social minimum is that it must provide a material foundation of self-respect by making its attainment a real possibility.³⁰

On the other hand, champions of the so-called democratic critique contend that constitutionalising social rights – giving judges too much power to adjudicate on social rights – presents a fundamental conflict with the separation of powers in a democratic society. In their opinion, judicial review of social rights is 'democratically illegitimate', as the substance of rights should be determined by democratically elected and accountable bodies; the legislature – and potentially the executive – would be best placed to resolve substantive disputes and conflicts of interest in society.³¹

The democratic critique of human rights is powerful, and it should be taken seriously by advocates, academics and policy actors involved in constitution-making. Two immediate responses are pertinent. First, besides ensuring the material conditions of freedom, the universal satisfaction of social rights can ensure that individuals can become citizens and make meaningful contributions to the community of which they are part. In this sense, in the 1940s, TH Marshall introduced the notion of 'social citizenship', presenting social rights as essential ingredients of citizenship and advocating for an egalitarian form of welfare based on reciprocal responsibilities between members of society.³² More recently, Benhabib argued that a society that takes human rights seriously requires both a liberal defence of rights – understood as limits to state power – and a civic-republican vision of rights – as accountable power representing the will of the collective; 'Without the basic rights of the person, republican sovereignty would be blind; and without the exercise of collective autonomy, rights of the person would be empty'.³³

Second, constitutionalising social rights does not take the authority away from democratically elected bodies. On the contrary, the fulfilment of social rights requires the involvement of all powers of the state, not only the judiciary.

²⁹ K Möller, 'Two Conceptions of Positive Liberty: Towards an Autonomy-based Theory of Constitutional Rights' (2009) 29 *Oxford Journal of Legal Studies* 757.

³⁰ King, 'Social Rights in Comparative Constitutional Theory' (n 24) 150.

³¹ J Waldron, 'The Core of the Case against Judicial Review' (2006) 115 *Yale Law Journal* 1346.

³² TH Marshall, *Citizenship and Social Class and Other Essays* (Cambridge, Cambridge University Press, 1950).

³³ S Benhabib, 'Reason-Giving and Rights-Bearing: Constructing the Subject of Rights' (2013) 20(1) *Constellations* 38, 46.

Countries exploring new forms of legal or constitutional enhancement of social rights should be encouraged to apply an incrementalist approach to judicial adjudication, so that all powers have the chance to enter into a form of dialogue over the merits and limits of judicial review of social rights. Such incrementalist approach requires caution and restraint from legal operators, particularly at the beginning, and sincere collaboration between judiciary, executive and legislature.³⁴ King's metaphor of social rights as capstone is a helpful one:

I would argue that the idea of social rights as human or constitutional rights must be the crowning piece, the finishing touch (structural, not ornamental) on a broader institutional structure and system of supporting values that will make the real enjoyment of social rights a reality. The scholarly study of constitutional social rights in my view needs to be joined up to the fields of social policy, to political economy, to related fields of law such as labour, private and tax law and to a political philosophy that is a bit more elaborate about the questions and institutions for distributive justice than is even contemporary liberalism.³⁵

That is the very spirit of collaboration, interdisciplinarity and epistemic humility that inspired this book.

III. THIS BOOK'S CONTRIBUTION

This book seizes Chile's constitutional moment as an opportunity to reflect about the contexts, merits and difficulties of enhancing the status of social rights in a country's basic text. This edited volume arose from collaboration between the Global Initiative for Economic, Social and Cultural Rights, the Human Rights Centre of the University of Essex in the UK, and the University of Concepción of Chile. In 2020 and 2021, this partnership brought together practitioners and academics from Chile and other countries (Argentina, Brazil, Canada, Colombia, Ireland, Mexico, South Africa, Spain, the United Kingdom and the United States) to share and learn from international and comparative practice with the goal of informing the ongoing process of constitutional reform in Chile. More than 30 contributions were compiled and submitted to members of the constitutional convention and other public authorities in Chile in September 2021.³⁶ The following chapters present an extended version of a selection of those essays.

Even today, the majority of comparative constitutional studies in the English language tend to focus on the United States and Europe, and the analysis of

³⁴ J King, 'The Future of Social Rights' in KG Young, *The Future of Economic and Social Rights* (Cambridge, Cambridge University Press, 2019) 317.

³⁵ Ibid, 315.

³⁶ Global Initiative for Economic, Social and Cultural Rights, Human Rights Centre of the University of Essex and University of Concepción (ed), *Derechos sociales y el momento constituyente de Chile: Perspectivas globales y locales para el debate constitucional* (GI-ESCR, 2021).

peripheral legal systems, when it exists, can be found only on the sidelines as a more or less blatant afterthought.³⁷ Unlike common practice in comparative constitutional law,³⁸ this book is anchored in Latin America, in Chile. The specific legal and political opportunity created in this country since 2019 is the very reason for the existence of this edited volume.

The first two chapters are devoted to the political economy of human rights. Bohoslavsky, Fernández and Smart trace the links between Pinochet's regime and the beneficiaries of today's structural inequalities in Chile. The authors show that the benefits of the Chilean economy were unevenly distributed and concentrated within a small and privileged minority. The dictatorship imposed and reproduced radical inequalities that were not challenged on democracy's return. In fact, income, wealth and power inequalities took root solidly during the transition and they are still standing: the economic accomplices of the regime benefited from past and present inequalities. Such a socio-economic outlook explains, in the authors' opinion, why the 1980 Constitution is one of the weakest in the region in terms of the recognition and protection of social rights. Bohoslavsky, Fernández and Smart argue that the current process of constitutional reform requires a profound reconsideration of the distribution of resources as a matter of accountability of the economic accomplices of Pinochet's dictatorship.

Moya and Salgado also look at the relationship between economic policy, the constitution and human rights. The authors focus primarily on the role that the 1980 Constitution – and its interpretation by legal operators – played in the development of neoliberal economic policies in the last four decades. Moya and Salgado end their chapter with a proposal for a new and open constitution for Chile.

Alongside the lessons to be learned from Chile's rich constitutional history, trends in constitutional drafting globally can offer valuable insights for the country's process of constitutional reform. Sprague, Stek, Raub and Heymann present conclusions from a large cross-national comparative analysis of different approaches to the constitutionalisation of the right to equality around the world. Their chapter provides a global overview of the different strategies pursued in 193 countries to recognise equality and non-discrimination in relation to sex/gender, race/ethnicity, language, religion, socio-economic status,

³⁷ Very good exceptions must be noted: R Gargarella et al (eds), *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?* (Farnham, Ashgate, 2006); V Gauri and DM Brinks (eds), *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (Cambridge University Press, 2008); D Bonilla Maldonado (ed), *Constitutionalism of the Global South: The Activist Tribunals of India, South Africa, and Colombia* (Cambridge, Cambridge University Press, 2013); C Rodríguez-Garavito and D Rodríguez-Franco, *Radical Deprivation on Trial: The Impact of Judicial Activism on Socioeconomic Rights in the Global South* (Cambridge, Cambridge University Press, 2015); D Landau and H Lerner (eds), *Comparative Constitution Making* (Cheltenham, Edward Elgar, 2019); P Dann et al (eds), *The Global South and Comparative Constitutional Law* (Oxford, Oxford University Press, 2020).

³⁸ M Tushnet, 'Comparative Constitutional Law' in M Reimann and R Zimmermann (eds), *The Oxford Handbook of Comparative Law*, 2nd edn (Oxford, Oxford University Press, 2019).

disability, migration, sexual orientation and gender identity. The chapter uses cases from around the world to highlight how constitutions have been used to advance equality for people at the margins, identifying where countries are making progress towards achieving equal rights and where progress is stalling or critical gaps remain that undermine equal opportunities.

The next three chapters draw lessons for the judicial enforceability of social rights in South Africa, Colombia and the Inter-American human rights system, respectively. First, Liebenberg reflects on the aspirations, achievements, disappointments and lessons from the constitutionalisation of social rights in South Africa. The country's 1996 constitution was enacted with the aim of laying the foundations for the construction of a post-apartheid society based on social justice, improving the quality of life of all citizens, and unlocking the potential of each person. Central to this aspiration was the inclusion of a set of judicially enforceable socio-economic rights in the constitutional bill of rights. Liebenberg's chapter tracks the debates and struggles surrounding the inclusion of socio-economic rights in the South African constitution, the achievements, as well as the limitations of their constitutional entrenchment. The author draws a set of conclusions regarding what constitutional projects such as Chile's, which for some shares a similar transformative aspiration, can learn from South Africa's unfinished experiment with justiciable socio-economic rights.

Newman focuses on one of the youngest rights in comparative constitutional law: the right to access information. Colombia's 1991 constitution recognised this right for the first time not only as a fundamental right in itself, but also as an instrument to participate, seek accountability and guarantee other human rights, including social rights. Relying on both Colombian and Inter-American case law, Newman presents the transit of access to information from an ordinary right in administrative law to a fundamental human right. The author shows the significance of access to information for social rights in a case study by concentrating on the value of transparency in the criteria of beneficiaries of a social assistance programme in the midst of the Covid-19 pandemic. This example evinces, the author contends, that by making information available to the public, citizens are empowered to question schemes called to protect and fulfil social rights, holding public authorities to account over the implementation of such schemes.

Rossi looks at the evolving case law in the Inter-American human rights system in relation to the justiciability of economic, social and cultural rights, and its impact on domestic legal systems in the Americas. The author identifies different phases in the Inter-American jurisprudence with a particular focus on *Lagos del Campo v Peru* (2017) and *Comunidades Indígenas de la Asociación Lhaka Honhat (Nuestra Tierra) v Argentina* (2020). In these cases, the Inter-American Court of Human Rights changed direction from its previous approach, and declared the violation of Article 26 of the American Convention on Human Rights, on economic, social and cultural rights, which traditionally had not been considered directly justiciable. Rossi's chapter presents some

of the ups and downs in the evolution of the Inter-American approach to the justiciability of socio-economic rights, including the opportunities and challenges to translate this evolving jurisprudence onto the domestic legal contexts in Latin America.

The following two chapters pay attention to persons with disabilities, one of the latest social groups to be recognised by international law as particularly vulnerable to human rights abuses. Moreno, Stein and Heymann provide a global overview of the different strategies that national constitutions in 193 countries take to guaranteeing equality and non-discrimination, social rights and other human rights for persons with disabilities. Using the UN Convention on the Rights for Persons with Disabilities as the normative framework, the chapter evaluates the current state of constitutional protection for persons with disabilities worldwide, describing how these protections have changed over time, and emphasising both success stories and remaining gaps. To make it most relevant for Chile's ongoing process, the chapter focuses especially on changes in countries that have enacted new constitutions after ratifying or acceding to the UN Convention, adopted in 2006 and in force since 2008. The chapter also includes a selection of cases from courts around the world to illustrate how constitutional provisions have been used to advance equality, highlighting the importance that constitutional guarantees, or their absence, have for the implementation of rights and freedoms for persons with disabilities.

For their part, Marshall, Ponce de León and Marchant address the conditions for effective political participation of persons with disabilities in Chile's constitution-making process, as well as the potential of such process to achieve a more inclusive constitution for persons with disabilities. On the basis of the UN Convention on the Rights of Persons with Disabilities, the chapter introduces the conceptual framework that identifies the opportunities and difficulties that such participation entails. The authors reflect about the possible outcome of a constitution-making process that includes norms advancing the cause of inclusion, respect, support and accessibility for persons with disability.

The book concludes with a selection of chapters that delve into what the constitutionalisation of social rights may mean in relation to laws and policies on education, housing, health, social security and the environment.

Henríquez offers an overview of the main transformations in Chile's educational laws over recent decades to contextualise the constitutional debate and the origins of the education system in place. The author focuses on three milestones: first, the changes introduced during the dictatorship in the 1970s and 1980s; second, the approach to education of the first democratic governments in the early 1990s, characterised, according to Henríquez, by a continuity policy; and third, the modifications introduced under President Bachelet (2006–10 and 2014–18). The author finally presents a series of proposals that could strengthen the role of the state as a guarantor of the right to education.

The national focus is complemented by the international analysis presented by Contreras, Silva and Dorsi. Their chapter explores the potential impact of

implementing in Chile the 2019 Abidjan Principles on the human rights obligations of states to provide public education and to regulate private involvement in education. The authors' review of international human rights standards and comparative constitutional practice examines the possibilities of enshrining the right to a free and public education of excellent quality in the next constitution.

Casla and Valenzuela concentrate on the right to adequate housing as part of the right to an adequate standard of living. The first section presents the content and significance of this right in light of international and comparative law, with examples from Mexico, Spain, Germany, the Netherlands and the UK. In the second half, the chapter explores some of the legal and policy implications of enhancing the status of the right to adequate housing in Chile's new constitution, specifically in relation to the responsibilities of housing developers, the legal recognition of the social function of housing and homeownership, and the need to protect tenants with strong habitability standards and security of tenure in the private rental sector.

Zúñiga-Fajuri makes the case for the constitutionalisation of the right to healthcare as a social right. The author argues that health efficiency principles cannot be used in all decisions concerning the allocation of health-related resources, as such an approach leads to greater health inequalities. Based on an analysis of the evolving approaches to health theory and practice in the country, Zúñiga-Fajuri defends a liberal egalitarian model for the distribution and application of health resources, which in the author's view, will make it possible to introduce the required changes to achieve the objectives of equity and efficiency.

In her chapter, Barrantes explores the potential opportunities of incorporating social security as a right into the new Chilean constitution. Relying on international human rights principles, Barrantes examines the role social security can play through its redistributive capacity, contributing towards wellbeing, poverty reduction, increased cohesiveness and social inclusion. Together with a comparative look at constitutions in other Latin American countries, the analysis draws a series of recommendations within the particular context of Chile.

Although institutional progress has been made in recent years, Delgado and Hervé argue in the last chapter that policy efforts have fallen short in the protection of the environment. The difficulties and challenges Chile is facing are not mere issues of good governance. The authors contend that the issues will not go away with ad hoc legislation on water resources, glaciers, biodiversity, land management, forestry or fisheries. The current constitutional framework and interpretations have undermined the necessary reforms. To bring about a truly transformative shift in society, Delgado and Hervé write, Chile requires a fairer, greener constitution.