

## The process of creating the Chilean constitution: a case study in decolonizing and reframing digital governance

Verónica Paz Mery León

Chilean Constitucional  
Convention,  
Digital Governance,  
Digital Constitutionalism,  
Digital Colonialism,  
Fundamental Rights

veronica@criti.ca

The process of creating the Chilean constitution appears to be one of the most interesting democratic exercises of recent times within the context of a connected society and the increased interest in constitutionalism as a way of shaping and countering digital colonialism and digital constitutionalism, respectively. Consequently, this paper explores how the experience of creating the Chilean constitution contributes to framing and re-imagining the rise of digital constitutionalism by addressing the challenges of digital colonialism within a constitutional framework. The primary goal of this article is to analyse how the path and the digital regulatory provisions of the Chilean Constitutional draft deal with the challenges of digital colonialism. In other words, how digital constitutionalism through the Chilean experience represents an exploring tool to define boundaries and pathways for digital governance.

### Introduction

In 2022, Chile worked on a new constitutional proposal to replace the country's current Constitution, adopted in 1980 during the military dictatorship of Augusto Pinochet, as one of the extraordinary demands of the population during the October 2019 protests.<sup>1</sup>

Augusto Pinochet's Constitution of 1980 contains the fundamental pillars that sustain the country's economic model, however, at the same time, this constitutional framework has built an unequal society, where only a small privileged group can effectively access good public education, maintain good health and undergo old age with some measure of dignity.<sup>2</sup> For this reason, a common thought arose in the collective imaginary of Chilean society: Chile needs to change the Constitution to address inequalities and heal the past.

On October 18, 2019, Chile experienced massive social unrest based on claims about the high public transport prices. These claims triggered the exposure of long-suppressed discontent and profound fatigue resulting from years of injustices.

During the social upheaval, people experienced police repression, uncertainty, and fear. Democracy and political stability were indeed at risk.<sup>3</sup> Hence, after a month of social protests, politicians found a solution: almost all political parties agreed on creating a democratic

process to build a new Constitution for Chilean society. Accordingly, with massive referendum participation, 78,28 per cent of the people<sup>4</sup> voted to have a new constitution written by 155 democratically elected members of the Constitutional Convention: a new body created exclusively with the mandate to propose a new Constitution to Chile, excluding the participation of the Parliament.

Later, after a two-year process, the proposal was overwhelmingly rejected by more than 60 per cent of the population. The constitutional draft would have recognized the indigenous people, environmental rights, universal access rights for health and education, and a new gender equality standard. It would have included more than thirty rights related to digital technologies. However, the mandate for a new constitution remains, and the future constitutional debate will probably take into account many of the elements and experiences of the failed process.

Nonetheless, this process is without a doubt worth exploring, insofar as it represents one of the most interesting democratic exercises in attempting to create a participatory, democratic and legitimate process for proposing a new constitution in the digital age.

In this context, this process is full of complexities and peculiarities that make it a historical phenomenon for Chile, as it was raised as an act of rejection and rebellion against establishing local political and

1 Tereza Dulci and Vania Sadivia, 'El Estallido Social en Chile: ¿rumbo a un Nuevo Constitucionalismo?' (2021) 24 *Revista Katálisis* 43.

2 Ibid.

3 Johanna Maldonado, 'Estallido social y violaciones a los derechos humanos en Chile' (2020) 1 (17) *Revista Espacio Regional* 95.

4 Servicio Electoral de Chile, 'Plebiscito Nacional 2020 fue la mayor votación de la historia de Chile' (*Servicio Electoral de Chile*, 26 October 2020) <https://www.servel.cl/2020/10/26/plebiscito-nacional-2020-fue-la-mayor-votacion-de-la-historia-de-chile/> accessed 10 March 2023.

economic power. However, from a constitutional perspective, this paper only focuses on what I propose is an act of resistance towards the regulatory and technological power of the Global North, which governs the digital space.

As I discuss in more detail later, by *technological power*, I mean the institutional, economic, and political capacity to develop -- and own -- physical and digital infrastructure of digital technologies. By *regulatory power*, I mean the capacity to generate norms and principles to regulate digital and physical infrastructure and their relation to the algorithmic society. These features generate what I call the *digital space* in this paper. Hence, the digital space, broadly speaking, is conformed by rules, principles, people, communities, narratives, digital platforms, and its physical and digital structure.

Concerning these ideas, throughout the paper, I explore three key concepts for my argument: First, I define *digital constitutionalism* as an overarching framework that provides guidance and values to address the challenges and threats to the fundamental rights of the algorithm society. Second, with *digital colonialism*, I refer to a double phenomenon: the technological and regulatory power exercised by large technology companies and states towards other states, communities or people with a historically reduced capacity to confront that power. Hence, I recognize three layers of digital colonialism within the Chilean context: global, local and the level of indigenous communities. Finally, by *decolonization*, I refer to the processes of resistance against technological and regulatory power through a constitutional framework.

I explore how the process of drawing up the Chilean constitution is an act of resistance to digital colonialism and digital constitutionalism, that is, to the regulatory and technological power that somehow determines how to understand and shape the constitutionalization of rights in the digital age. In other words, I show how constitutional thinking can also be decolonial using the example of the Chilean constitutional experience as a way of resistance and decolonization in the face of the expansion of constitutional principles promoting a hegemonized way of understanding and governing technologies and the digital world.

Specifically, I propose that the Chilean Constitutional Convention create a regulatory agency capacity vis-à-vis the Global North and that the digital rights enshrined in the proposal recognize local challenges offering broader solutions and perspectives for developing digital constitutionalism as they represent a resistance to the hegemonized construction of digital space.

Accordingly, and considering this background, this paper is organized as follows:

In section 1, I explore the reasons that allow me to include the Chilean constitutional draft within existing efforts toward 'digital constitutionalism', giving new elements to the discussion. I outline the three layers of digital colonialism and how a constitutional framework of rights and principles is a desirable way to react against its challenges.

In section 2, I focus on the standard-setting work of the Constitutional Convention body as an autonomous and democratic space for decision-making in digital content, counteracting the hegemonic regulatory power coming from the Global North. I highlight the importance of the involvement of civil society and how the participa-

tion mechanisms available -- both for citizen participation and for the members of the Convention -- enabled a democratic space for citizen participation in setting digital content, reflecting a decolonizing effort in confronting regulatory power.

In section 3, I explore possible understandings of digital colonialism, how it manifests itself in Chile, and what a decolonizing effort through the Chilean constitutional proposal would mean in this context. I analyse how digital constitutionalism could address the challenges of digital colonialism. To achieve this objective, I review five fundamental principles embodied in the Chilean constitutional draft, which offer decolonial tools for digital sovereignty and the effective exercise of fundamental rights.

## 1. Chile's draft constitution: a case study of digital constitutionalism

Society is experiencing a pivotal moment regarding its relationship with digital technologies and the questions associated with safeguarding fundamental rights. The Chilean constitutional debate could not escape the global 'constitutional moment' whose primary catalyst is digital technology's disruptive impact.<sup>5</sup> This new face or theory has been conceived of as 'digital constitutionalism', notwithstanding the differences in constructing its definition.

In this context, the Chilean constitutional experience is framed as a good case study for its analysis, as long as Chilean society experiences how digital technology affects existing rights and its disruptive impact on contemporary society.

Although digital constitutionalism is a global phenomenon, a country like Chile asking such questions is doubly complex. It has had to deal with problems that are part of the worldwide discussion and has also had to acknowledge specific challenges to its context as an underdeveloped country. Digital colonialism, in this case, has three layers, including indigenous groups and their malaise within Chile. Consequently, this paper shows how the Chilean constitutional proposal addresses these three layers of digital colonialism through five principles and norms.

In this regard, the first layer is about the challenges that digital colonialism brings at the global level and that society as a whole is trying to address. In general terms, this layer would include challenges that have to do with the development of new artificial intelligence technologies and the governance of digital platforms and threats to fundamental rights, such as the right to privacy, informational self-determination, to freedom of expression, among others. The constitutional draft proposes some norms on digital governance, democracy and privacy that may suggest some ideas on how to address these global challenges at the constitutional level.

The second layer concerns the specific challenges that digital colonialism -- as defined in the paper -- brings to a country like Chile. In this context, the challenges are more specific to local needs and comparative disadvantages with northern countries. Here, digital colonialism acquires some particularities and deeper problems due to the lack of

5 Edoardo Celeste, 'Digital Constitutionalism: A New Systematic Theorisation' (2019) 33 *International Review of Law, Computers & Technology* 76.

knowledge creation capacity, technological development, solid institutions and regulatory autonomy. In other words, these gaps are related to characteristics or conditions generally associated with underdeveloped countries. Hence, the proposal includes norms that, on the one hand, strengthen institutional autonomy and, on the other, promote access to knowledge, digital connectivity and sovereignty over its infrastructure and mechanisms for citizen participation.

The third layer contemplates the challenges digital colonialism could generate for indigenous communities within Chilean society and the rest of the countries, especially the risks or concerns associated with safeguarding ancestral knowledge and mechanisms of incidence and participation in State decisions that could affect their rights. The proposal provides specific rules for indigenous data sovereignty and other mechanisms for indigenous consultation on matters affecting their rights.

That being said, it is now time to address what digital constitutionalism is and how it could be an effective tool to handle digital colonialism. A recent trend suggests establishing specific constitutional parameters to limit the exercise of power in the digital economy, seeking to advance a relatively comprehensive set of rights, principles and governance norms for the Internet. In other words, society is facing a new phase of modern constitutionalism (e.g., digital constitutionalism).

Therefore, the concept of digital constitutionalism could be understood as an overarching framework that provides guidance and values to address how to centre the protection of the rights and freedoms of people in their interactions with institutions and actors in the digital economy.<sup>6</sup> It is the ideology that adapts the values of contemporary constitutionalism to the digital society.<sup>7</sup>

In theory, it seems advantageous to move in that direction, mainly for one reason: because of the drawbacks of regulatory fragmentation. It may appear that the regulatory challenges presented by the advance of digital technologies and the economic models of large technology companies cannot be confronted in isolation. There is a need for a comprehensive agreement on what we, as a society, deem necessary to safeguard. Therefore, constitutional principles are a desirable way to react to the challenges of the algorithmic society and the threats to fundamental rights with specific regard to the role of online platforms and private power because they provide a coherent path despite the complexity created by the different instruments involved in the way technological harms are conceptualized.<sup>8</sup>

Consequently, the constitutional law perspective offers a way to limit the power of different public or private actors performing public functions and ensuring that they remain accountable to the people.<sup>9</sup> It also provides a language of rights, wherein people are safeguarded and protected regarding their fundamental freedoms but also have an opportunity to redress any grievance due to excesses of public and private power.

It is crucial to highlight this point, as some think that distinguishing between online and offline rights or creating specific protections for the digital space is wrong or unnecessary. However, constitutionalizing fundamental rights for the digital space would be a relevant tool for constitutional democracies such as Chile and most Latin American countries as these political systems provide for specific and expeditious legal tools against arbitrary or illegal acts or omissions that constitute a deprivation, disturbance or threat to the constitutional rights and guarantees of individuals (e.g., the remedy of protection in the Court of Appeals, without the need for legal counsel). For instance, the Chilean constitution draft included initiatives that advanced novel rights specific to the digital environment (e.g., the right to participate in a digital space free from violence or the right to digital education). Others at least sought to adapt existing legal principles to new technological contexts.<sup>10</sup>

A concrete example of how constitutional principles would be a good way to react to the challenges of the algorithmic society would be the constitutionalization of the right to digital education. Currently, the Chilean Constitution only establishes the State's duty to stimulate scientific and technological research. In contrast, the new right to 'digital education, to the development of knowledge, technological thinking and language, as well as to enjoy its benefits' provides more concrete obligations for the State. It explicitly stipulates a set of competencies associated with technological skills that the State must guarantee.<sup>11</sup>

As the Constitution is the fundamental norm of the Chilean legal system, establishing the right to digital education as a fundamental right implies, on the one hand, that it is a right that must be respected and promoted by the Chilean State in all regulatory frameworks and public policies related to educational initiatives. On the other hand, it gives citizens a tool for immediate constitutional enforceability in the event of deprivation of this right.

Framing this discussion within digital constitutionalism has different implications for the European Union (EU) than for Latin American countries. In the face of the apparent and almost inexorable tendency to extend constitutional values beyond European borders with a global impact,<sup>12</sup> the rise of the urgency of global digital constitutionalism emerging from the perspective of the human rights system has the enormous challenge of facing the complexities of non-developing countries as they represent further difficulties facing digital colonialism and so on digital governance.

Nonetheless, the EU's regulation undeniably impacts beyond European borders (the so-called 'Brussels Effect'). For example, the Digital Services Act (DSA) has been portrayed as the EU's 'new' digital constitutionalism. With this, the EU aims again to set a global standard in regulating the digital environment. I propose that as a digital constitutionalism example, the Chilean constitutional effort is also a manifestation of resistance to digital colonialism because it challenges the constitutional principles of the EU to establish or influence the local regulatory discussion.

6 Joan Lopez Solano, Aaron Martin, Siddharth de Souza and Linnet Taylor, 'Governing data and artificial intelligence for all: Models for sustainable and just data governance' (2022) European Parliament.

7 Edoardo Celeste, 'Digital Constitutionalism: A New Systematic Theorisation' (2019) 33 *International Review of Law, Computers & Technology* 76.

8 Solano and others (n 6).

9 Joan Lopez Solano, Aaron Martin, Franklyn Ohai, Siddharth de Souza and Linnet Taylor, 'Digital Disruption or Crisis Capitalism? Technology, Power and the Pandemic' (2022) <https://doi.org/10.26116/gdj-euaifund> accessed 16 March 2023.

10 'Propuesta Constitución Política de la República de Chile 2022' (Chile Convención, 4 July 2022) <https://www.chileconvencion.cl/wp-content/uploads/2022/07/Texto-Definitivo-CPR-2022-Tapas.pdf> accessed 21 October 2022. It is also available as a translated English non-official version. See: <https://constitutionnet.org/sites/default/files/2022-09/International%20IDEA%20Translation%20Chile%202022%20Draft%20Constitution.pdf>

11 See Article 90 of Chile's draft constitution 2022.

12 Giovanni De Gregorio 'The Rise of Digital Constitutionalism in the European Union' (2020) 19 *International Journal of Constitutional Law* 41.

I would suggest caution for those advocating extending EU digital constitutionalism to the global level: the imminent extraterritorial application of these constitutional principles must consider local principles from less developed democracies with more complex problems. The Chilean experience suggests a way forward.

## 2. The process of creating the Chilean constitution and the chart of digital regulatory rights and principles

The 155 Constitutional Convention members had to deal with public scrutiny, difficulties in their internal organization and political tensions within their work. They were responsible for transforming the people's demands into a constitutional text that made sense to the whole population. And despite all the difficulties, they managed to function and carry out the task: The Constitutional Convention designed a space for discussion to think and decide which principles and norms Chilean society considers relevant to include in a Constitution.

Moreover, the members of the Convention, exercising their constituent power, deemed it relevant to include a catalogue of fundamental digital-related rights in the highest hierarchical order of the Chilean legal system -- the Constitution -- to guide the State's actions and individuals.

More specifically, this section attempts to answer the following question: how did the Constitutional Convention articulate a capacity for agency vis-à-vis the Global North in creating rules that imagine different regulatory responses regarding the future digital constitutional framework and digital colonialism?

To address this question, I first describe the main actors involved (2.1). Then, I delineate the main participation mechanisms used by civil society and the members of the Constitutional Convention to supply the discussion and outline some of the primary outcomes (2.2). Both elements help to illustrate how the Chilean constitutional process is also a decolonizing experience.

### 2.1. Public participation: Civil society as the main content generator

The Chilean constitution-making process is perhaps one of the most emblematic examples of the attempt to carry out a public, crowd-sourced, and participatory process, emerging 'from the bottom up'.

As a reaction against the established political power and the status quo, the members of the Constitutional Convention were all elected by the citizens, and the participation of the Chilean Parliament was explicitly excluded: more than two-thirds of those elected were outside mainstream political parties. They included many new political actors, activists, independent leaders of social movements, academics, lawyers and, to a lesser extent, former politicians and parliamentarians. The right-wing representatives did not reach a third of the participation. An ideological map of the Convention's membership revealed that the Convention would have a leftist tendency.<sup>13</sup> At least, it would not mostly be composed of the leaders of the political parties that had governed the country for the last 30 years.

13 Isabel Caro and Ximena Toro, 'El Mapa Político De Las Siete Comisiones Permanentes de la Convención Constitucional' *La Tercera* (Santiago, 7 October 2021) <https://www.latercera.com/earlyaccess/noticia/el-mapa-politico-de-las-siete-comisiones-permanentes-de-la-convencion-constitucional/VRLNWNPGWRGGZASRFTQVBIYOPE/> accessed 14 March 2023.

As a result, the makeup and design of the Constitutional Convention were unprecedented in Chilean history: the political agreement that outlined the general framework of the Constitutional Convention established that it had to be integrated equally by men and women, have special seats for indigenous people<sup>14</sup> and promote the participation of those without formal political affiliation.<sup>15</sup>

With the idea of building a process that would be as open and participatory as possible, the Constitutional Convention's Rules of Procedure envisaged significant and impactful public participation.<sup>16</sup> In addition to traditional public hearings, there were constituent public hearings and indigenous consultations, but the most impactful mechanism was the citizens' initiatives. Civil society, the public sector, industry and academia got involved through these participation mechanisms.

Nevertheless, before knowing how the rules of participation would be made, many different organizations from the digital world began to organize and work on documents that proposed content for the constitutional debate. This was the first step taken by industry, academia and civil organizations to frame the general guidelines within which, from different perspectives, the Constitution should consider some aspects of digital regulation. Among these efforts, the following stand out: 'Carta Magna Digital' (Flacso Chile),<sup>17</sup> 'Derechos Digitales y Constitución Política' (Cámara Nacional de Comercio, Servicios y Turismo de Chile),<sup>18</sup> 'Innovación y Constitución'<sup>19</sup> (Brinca) and 'Constitución digital: Documento para el debate constituyente en Chile' (Centro de Estudios en Derecho Informático).<sup>20</sup>

To draw a small map of these actors, I would enlist some of the more relevant organizations that were part of the discussion, participating in public hearings, drafting citizen proposals, and -- some of them -- also working to advise the Constitutional Convention's members: ONG Amaranta, Foundation Alfabetización Digital, ONG Derechos Digitales, ISOC Chile, Flacso, Datos Protegidos, Foundation Kamanau, Abriendo Datos, Foundation Saber Futuro, Wikimedia Chile and the Centre for Information Technology Law Studies at the University of Chile (CEDI). Within the private sector: Asociación Chilena

14 The 17 reserved seats are incorporated in the total of 155 conventional seats and were distributed as follows: 7 seats for the Mapuche people, 2 for the Aymara people, 1 for the Rapa Nui people, 1 for the Quechua people, 1 for the Lican Antay or Atacameño people, 1 for the Diaguita people, 1 for the Colla people, 1 for the Kawashkar people, 1 for the Yagán or Yámana people, 1 seat for the Chango people.

15 'Acuerdo por la Paz Social y la Nueva Constitución' (*Biblioteca del Congreso Nacional de Chile*, 15 November 2020) [https://www.bcn.cl/procesoconstituyente/detalle\\_cronograma?id=f\\_cronograma](https://www.bcn.cl/procesoconstituyente/detalle_cronograma?id=f_cronograma) accessed 20 March 2023.

16 'Reglamento General de la Convención Constitucional', (*Diario Oficial*, 13 October 2021) <https://www.diariooficial.interior.gob.cl/publicaciones/2021/10/13/43076/01/2024421.pdf> accessed 20 October 2022.

17 Patricio Urreola and others, 'Sociedad de la Información y Tercera Ola de Datos Abiertos' (Flacso Chile 2021) <https://flacsochile.org/wp-content/uploads/Carta-Magna-Digital-1.pdf> accessed 20 October 2022.

18 Cámara Nacional de Comercio, Servicios y Turismo de Chile, 'Derechos Digitales y Constitución Política' <https://www.cnc.cl/wp-content/uploads/2021/04/derechos-digitales-informe-3.pdf> accessed 20 October 2022.

19 Equipo Brinca, 'Innovación & Constitución' (*Diario Constitucional*, June 2021) <https://www.diarioconstitucional.cl/procesoconstituyente/wp-content/uploads/2021/06/innovacion-constitucion.original.pdf> accessed 17 March 2023.

20 Centro de Estudios en Derecho Informático, 'Constitución digital: Documento para el debate constituyente en Chile' (2021) 10(1) *Revista Chilena de Derecho y Tecnología* 1.

de Empresas de Tecnología de Información A.G. (ACTI), the Cámara Chilena Norteamericana de Comercio (AMCHAM Chile) and Cámara Nacional de Comercio (CNC).

In addition, I would mention two dynamics that made these participatory experiences particular: First, due to the dislike or hostility that the Constitutional Convention harbours against the private sector or the country's large economic groups, their participation was minimal. Civil society's opinion was much more welcomed than that of these groups. Second, everything seems to suggest that the indigenous peoples' participation was not as substantial as expected. The final draft did not include their drafted initiatives significantly. Perhaps this has to do with a deeper problem of prejudice on behalf of Chilean society and also, I would argue, of the political capacity of indigenous peoples to articulate and obtain sufficient support from other political factions.

Yet, in the discussions on digital regulation, their contribution was interesting. The draft constitution has many of the standards reviewed below because of concerns raised by these groups.

## 2.2 Citizen's initiatives as advocacy mechanisms

One of the most relevant initiatives regarding digital rights was the citizens' initiative submitted by the Centre for Information Technology Law Studies at the University of Chile based on findings from their #ConstituciónDigital project, which sought the constitutional recognition of three related areas: Privacy, Personal Data Protection and Computer/Cyber Security.<sup>21</sup> Remarkably, the final draft included much of the proposal, but many proposals did not succeed: for example, the right to be forgotten and the protection of neuro-rights were rejected.

It is interesting how civil society achieved some of their suggestions in the final drafts by collaborating with members of the Constitutional Convention drafting their proposals. For example, ONG Amaranta collaborated on drafting the right to a space free of digital violence (art. 89).<sup>22</sup> The Foundation Alfabetización Digital crafted the right to digital education (art. 90).<sup>23</sup> Derechos Digitales collaborated on the developments of standards related to democracy, mechanisms of popular participation and direct democracy (art. 152).<sup>24</sup> Also, Wikimedia Chile was involved in the copyright (art. 95) and e-government proposals (art. 178).

This section highlights how and through what mechanisms the Constitutional Convention designed an agency space in decision making. The rules of participation allowed a large number of stakeholders to be involved in one way or another in decisions about how a constitution should safeguard the fundamental rights of people in the digital-

ized era. In other words, the Chilean constitutional process provided a space for democratic thinking and discussion about how Chilean society imagines the development of digital technologies.

That is, it was not only a space of resistance to the forces of local power but also created a space of agency to resist digital colonialism's regulatory and technological power. While at the same time, it can be a learning experience for other processes in the region that demonstrate that Latin American countries can imagine the regulatory future of technologies.

## 3. Digital colonialism: The Chilean constitutional framework as a decolonial tool

I have already mentioned how the Chilean constitutional experience could be framed as an example of digital constitutionalism. I also pointed out that the Chilean constitutional process is relevant because it designed an autonomous, participatory and democratic body to rethink the constitutional principles of Chilean society. In the following sections, I explore how both elements also represent a decolonized and resilient approach to the technological and regulatory power of the Global North.

To this end, in the first part of this section, I explore what digital colonialism would mean, how it manifests itself in the Chilean context and what it implies that the process and digital provisions are a decolonizing tool. Next, I review the five constitutional principles, which provide a constitutional framework for dealing with the three layers of digital colonialism.

It is important to clarify that decolonization processes could mean many things for different communities and countries and that my analysis only focuses on a narrower part of the phenomenon. The Chilean constitutional process reflects a broader and more complicated resistance and other processes of decolonization. This notion demonstrates something different for each person in Chile, including indigenous peoples.

That said, coloniality is what survives colonialism. It names the continuity of established patterns of power between colonizer and colonized -- the contemporary remnants of those relationships -- and how that power shapes our understanding of culture, labour, intersubjectivity, and knowledge production.<sup>25</sup> Thus, data colonialism (or digital colonialism) is the coloniality of power in the digital present.

On that account, I suggest that digital colonialism means two things: in the strict sense of the word, it is an emerging social and economic order for the continued appropriation of data to generate profit.<sup>26</sup> It is also, however, the unilateral regulatory power exercised by the EU on non-EU countries in fields like the digital economy (The Brussels Effect) and what control this produces (e.g., asymmetric trade relations and advantages for EU allies in digital markets).<sup>27</sup>

21 Ibid.

22 Francisco Caamaño, 'Derecho a Un Espacio Libre de Violencia Digital' (Chile Convención, 17 January 2022) <https://www.chileconvencion.cl/wp-content/uploads/2022/01/300-7-Iniciativa-Convencional-del-cc-Francisco-Camano-sobre-Violencia-Digital-2237-hrs.pdf> accessed 20 October 2022.

23 Francisco Caamaño, 'Derecho a la Alfabetización Digital' (Chile Convención, 31 December 2021) <https://www.chileconvencion.cl/wp-content/uploads/2022/01/92-7-Iniciativa-del-cc-Francisco-Caamano-Derecho-a-la-Alfabetizacion-Digital-2.pdf> accessed 20 October 2022.

24 Convencionales Constituyentes Firmantes, 'Sobre Democracia Digital' (Chile Convención, 29 January 2022) <https://www.chileconvencion.cl/wp-content/uploads/2022/03/966-Iniciativa-Convencional-Constituyente-de-la-cc-Maria-Jose-Oyarzun-sobre-Democracia-Digital.pdf> accessed 20 October 2022.

25 Shakir Mohamed, Marie-Therese Png and William Isaac, 'Decolonial AI: Decolonial Theory as Sociotechnical Foresight in Artificial Intelligence' (2020) 33 *Philosophy & Technology* 659.

26 Nick Couldry and Ulises A Mejias, *The Costs of Connection: How Data Is Colonizing Human Life and Appropriating It for Capitalism* (Stanford University Press 2019).

27 Anu Bradford, *The Brussels Effect: How the European Union Rules the World* (Oxford University Press 2019).

In other words, I propose that digital colonialism is simultaneously these two phenomena: the technological and regulatory power that allows only one way of understanding cyberspace to be perpetuated. In effect, digital space becomes hegemonic to the forces that hold this power, making it less open to the possibility of alternative ways of understanding, framing and participating in it.

Consequently, on one side, digital colonialism is the extension of a global extraction process that started under colonialism and continued through industrial capitalism, culminating in today's new form: instead of natural resources and labour, what is now being appropriated is human life through its conversion into data.<sup>28</sup>

A similar idea is developed by Michael Kwet but from the perspective of how the United States is reinventing colonialism in the Global South through the domination of digital technology.<sup>29</sup> In this case, the focus is on US Big Tech transnational corporations, as they use digital technology for political, economic and social domination of another nation or territory. More broadly, digital colonialism is about how dominant powers have used their ownership of digital infrastructure and knowledge to keep the South in a situation of permanent dependency.<sup>30</sup>

Along different lines, but highly related, is the 'Brussels Effect'. This phenomenon refers to the EU's unilateral power to regulate global markets, transmitting the EU's regulations to both market participants and regulators outside the EU.<sup>31</sup>

Furthermore, the author distinguishes between the Brussels Effect's two variants: the 'de facto Brussels Effect' and the 'de jure Brussels Effect'. The de facto Brussels Effect explains how global corporations respond to EU regulations by adjusting their international conduct to EU rules. No regulatory response by foreign governments is needed; corporations have the business incentive to comply with the EU regulation to govern their worldwide production or operations. The de jure Brussels Effect -- which refers to the adoption of EU-style regulations by foreign governments -- builds directly on the de facto Brussels Effect: after multinational companies have adjusted their global conduct to conform to EU rules, they have the incentive to lobby EU-style regulations.<sup>32</sup>

The two phenomena are two sides of the same coin: both are manifestations of colonial power but are exercised by different agents. In the case of digital colonialism, the power is exercised directly by the technology industry (and could also involve States using their ownership of data to regulating behaviours and cultural practices of minorities). In the case of the Brussels Effect -- as a manifestation of digital colonialism -- the focus is on the de facto regulatory power exercised by the EU, even though that distinction is blurred, considering the significant influence technology firms have on shaping governance rules and regulatory discussions.

I briefly describe three examples of how it and its diverse manifestations occur in Chile -- both to better illuminate the meaning of digital colonialism and to give a more concrete idea of digital colonialism at the local level.

In the first place, related to the Brussels Effect, it is worth noting what happened with the discussion of the Chilean draft bill 'Regulating the Protection and Processing of Personal Data and creating the Personal Data Protection Agency'. The team of Mr. Bruno Gencarelli (Head of the Unit for Personal and International Data Protection and Data Flows of the European Union) was actively involved in advising on the whole discussion and processing of the Chilean draft law. Beyond his participation, the bill itself, according to its authors and the congressmen themselves, is intended to update the current data protection law to GDPR standards.<sup>33</sup> Of course, this is not per se bad, but it is a concrete example of how the EU regulatory experience influences the regulatory debate beyond its jurisdiction.

Along the same lines, another manifestation of digital colonialism in Chile is how the market power of the world's large digital platforms not only lets them remain in the regulatory vacuum but also allows them to influence the legislative debate and shape it to their convenience. Since Chile is a small market, there is not sufficient incentive to stay in the country if the cost of staying is higher in the event of specific regulations. Indeed, two bills related to platform regulation still need to be discussed, not to mention the data protection bill referred to above, which has been in Congress for more than five years.<sup>34</sup>

A final example of manifestations of digital colonialism in Chile is related to being an underdeveloped country. Chile is an exporter of raw materials and, as such, a material source for developing digital infrastructure. This situation affects one of the most delicate aspects of 21st-century Chile: ecological sustainability (water, energy, energy storage systems and territoriality). A good illustration is the case of the Data Center to be built by Google in the Cerrillos district.<sup>35</sup> The case has been very controversial, as it will mean excessive water use by the project -- the Data Center requires 169 litres/second to cool its servers, which will undoubtedly have adverse effects on the hydrographic basin of the city of Santiago.

In summary, I make the tentative proposal for 'digital colonialism' as the exercise of technological and regulatory power exercised by large technology companies and states towards other states, communities or people with a historically reduced capacity to be able to confront the exercise of this power. I also argue that these two manifestations of digital colonialism cannot function separately: technological power needs the rules to perpetuate the hegemonized design of digital space.

As I said before, the Chilean constitutional experience means many things. It has other internal resistance efforts, especially towards the local political elite, that have reproduced an economic and social

28 Coudry and Mejias (n 25).

29 Michael Kwet, 'Digital Colonialism: US Empire and the New Imperialism in the Global South' (2019) 60 (4) *Race & Class* <https://ssrn.com/abstract=3232297> accessed 17 March 2023.

30 Michael Kwet, 'Digital Colonialism: The Evolution of American Empire' (2021) 3 *ROAR Magazine* <https://roarmag.org/essays/digital-colonialism-the-evolution-of-american-empire/> accessed 21 October 2022.

31 Bradford (n 26).

32 Ibid.

33 See the First and Second Reports of the Committee on Constitution, Legislation, Justice and the Rules of Procedure. Available at: <https://www.camara.cl/legislacion/ProyectosDeLey/informes.aspx?prmiD=11661&prmiBOLETIN=11144-07>.

34 See Bills No. 14561-19 and 14785-24. Available at: <https://www.senado.cl/>.

35 Alberto Arellano, 'Las Zonas Oscuras de la Evaluación Ambiental que Autorizó 'a Ciegas' el Megaproyecto de Google en Cerrillos' (CIPER, May 26 2020) <https://www.ciperchile.cl/2020/05/25/las-zonas-oscuras-de-la-evaluacion-ambiental-que-autorizo-a-ciegas-el-megaproyecto-de-google-en-cerrillos/> accessed 14 March 2023.

model sustained by the Constitution, enabling, at the same time, the reinforcements of all kinds of hegemonic relations.

However, I only address one aspect of this phenomenon: how the construction of the space to discuss the constitutional principles and the digital elements of its final constitutional proposal are both an effort of resistance to the power exercised by digital colonialism. Therefore, I argue that the Chilean constitution-making process challenges the technological and regulatory power of the countries of the Global North through a constitutional framework.

In this context, what would it mean to address the challenges raised by digital colonialism through a constitutional approach? How exactly does the Chilean draft constitution show a decolonized response to the emergence of global digital constitutionalism? To answer these questions, I explore what decolonization means in this context and how the Constitutional Convention and the constitutional principles are both an effort in that direction.

Accordingly, decoloniality became the project of what today is called the epistemic reconstitution.<sup>36</sup> It means delinking from the praxis of living modelled by modernity. In other words, structural decolonization seeks to undo the colonial mechanism of power, economics, language, culture and thinking that shapes contemporary life.<sup>37</sup>

The same idea is reflected in the concept of epistemic decolonization, which is primarily a call to dismantle this way of thinking and its self-arrogated hegemonic authority. It is also a call to re-centre the knowledge enterprise onto our geo-historical here and now.<sup>38</sup> In other words, it is about decolonizing knowledge.

With these schemes in mind, decolonization is about re-imagining existing relationships to recognize that exploitative and inequitable past and try to make this present and future more equitable and inclusive in digital spaces. It is about re-centring and empowering people in that process.

I would suggest that the core idea of decolonizing has to do with the notion of resistance against power. It involves engaging new voices, cultures, and ideas to guide the development of technology. Following this idea, as described below, the origin of the process, the formation of the Constitutional Convention, the composition of its members, how they were organized internally, the participation mechanisms available to all citizens, and the involvement of civil society, industry and academia, all represent an exercise in resistance to digital colonialism.

Moreover, the very decision to include certain rights with constitutional hierarchy (and not others, and not elsewhere) demonstrates a revealing energy in the presence of the perils of digital colonialism. What I mean by this is that not only in the process but also in the

outcome, there was an effort to design constitutional rules that would provide the Chilean legal and constitutional framework with strong principles to help address digital colonialism.

While constitutional rules can mean many things, they can reproduce the hegemonic model that governs the digital space. With the rise of digital constitutionalism, constitutional principles are becoming an important tool to safeguard values and fundamental rights that society considers essential to protect. These constitutional principles shape and frame the digital space: thus, they are becoming a way of ruling how this space should be, develop, and interact with each other.

My suggestion is that digital space is built from a hegemonic perspective because of the phenomenon of digital colonialism. The regulatory and technological power prohibits the development of new ways of understanding the digital environment. An innovative constitutional approach to this problem would create a different structure for understanding digital governance. Accordingly, the Chilean Constitutional proposal provides a framework for digital policymaking wherein its guiding principles are based on digital sovereignty through the protection and development of digital infrastructure, the protection and promotion of local knowledge, and democratic, participatory processes. In short, the underlying idea is that it proposes a state whose mandate is to protect the public interest and facilitate digital sovereignty.

Hence, the Chilean constitutional draft represents, through constitutional rules, a way to deal with digital colonialism. However, in what manner has this digital space been constructed from a colonial perspective? How does the constitutional proposal deal with the three layers of digital colonialism?

All these questions relate to how the digital space is usually described and understood. As I mentioned at the beginning of this paper, the digital space is shaped by rules, principles, values, people, communities, narratives, digital platforms, and its physical and digital structure. Because of the complexity and diversity of its elements, the digital space should be as open, pluralistic and inclusive as possible. One way to give form this ecosystem is through a constitutional framework.

However, as demonstrated through some examples, digital colonialism threatens an open and inclusive digital environment. Instead of promoting inclusivity, it advocates regulations designed to be applied by countries with world economic power and an institutional framework capable of maintaining and exercising that power. For Chile, as an underdeveloped country, it is too challenging to address and counter the power of the big platforms without these capabilities. That is why it is necessary to have a constitutional framework that takes care of the disadvantages and special needs that must be protected.

Nevertheless, the Chilean proposal provides other ways of approaching the understanding and construction of digital space. It shows that, for this to be possible, it is necessary to confront the structure of the constitutional regulatory framework from a different perspective. Resistance, in this case, has to do with acknowledging the particularities of underdeveloped countries that further deepen the risk that digital colonialism poses, namely of violating people's fundamental rights and how through principles and rules at the constitutional level the country can better address the problems associated with technology.

36 Walter Mignolo argues that decoloniality is a different concept from decolonization. Decolonization was the expression commonly used during the Cold War to refer to the struggle of decolonization in Africa and Asia, but leaving intact the political theory and political economy. See his interview: <https://www.e-ir.info/2017/01/21/interview-walter-mignolopart-2-key-concepts/>.

37 Shakir Mohamed, Marie-Therese Png and William Isaac, 'Decolonial AI: Decolonial Theory as Sociotechnical Foresight in Artificial Intelligence' (2020) 33 *Philosophy & Technology* 659.

38 Veli Mitova, 'Decolonising Knowledge Here and Now' (2020) 49 (2) *Philosophical Papers* 191.

In the following sections, I explore how the proposal unleashes technological and regulatory power by establishing five fundamental pillars based on the idea of the State as a protector of public interest for digital sovereignty and the effective exercise and protection of fundamental rights in the digital age: First, the proposal protects and encourages the safeguarding and development of digital infrastructure and establishes universal connectivity. Second, it promotes and encourages the safeguarding and creation of local knowledge. Third, it recognizes the informational self-determination right, indigenous data sovereignty and an autonomous data protection agency for accountability. Fourth, the proposal enshrines communications rights and provides rules for democratizing and regulating digital platforms. Finally, it creates alternative models of advocacy and democratic participation, including indigenous consultations.

Thus, I can now suggest my central hypothesis with this overview in mind. The Chilean constitutional-making process is an experience of resistance to digital colonialism and digital constitutionalism as an expression of the Brussels Effect. In other words, the Chilean constitutional digital framework is an example of resistance and decolonization in the face of the expansion of constitutional principles that promote a hegemonized way of understanding and governing technologies and the digital world.

In this sense, the proposal provides examples of dealing with the three layers of digital colonialism through a decolonial approach. Rather than enumerating the substantive differences between this proposed constitutional framework and the norms from the Global North, this paper seeks to highlight how this proposal itself acknowledges the political and institutional differences between the North and the South.

In particular, I identify some guidelines in the constitutional draft that recognize the shortcomings of underdeveloped countries (e.g., the lack of AI regulation, personal data protection, the need for universal connectivity, digital literacy, the digital divide, and sustainability standards, among others). However, while their recognition at the constitutional level is not necessarily novel at the global level, they constitute a decolonial tool. At the same time, I highlight some provisions that have a novel approach to protecting certain fundamental rights and that also constitute a decolonial tool (e.g., the right to a violence-free digital space, rules on consumer protection and national involvement in telecommunications).

I claim that the digital rights enshrined in the proposal recognize local challenges and offer broader solutions and perspectives for developing digital constitutionalism. At the same time, they represent a resistance to the hegemonized construction of digital space, offer some tools of resilience, and challenge the hegemonic structure of cyberspace by recognizing different ideas and local realities.

Before going into the details of the constitutional principles, it is important to highlight four reasons why it is important to focus on them: firstly, for Chile's future constitutional debate. Although Chileans rejected the proposal, the future discussion won't start from scratch. Particularly in this field, there was broad agreement. Therefore, the consensus on digital standards will undoubtedly form the basis and conceptual framework for future constitutional discussion. Secondly, we should look at the principles of the draft due to the probability of them influencing Latin American constitutional and regulatory discussions. Many countries are currently debating draft bills

on digital regulation. Thirdly, some constitutional rules could bring fresh perspectives to the EU's regulatory framework with the rise of digital constitutionalism. Lastly, these rules can open the discussion on the usefulness, limitations and challenges of establishing constitutional rules governing the digital sphere.

### 3.1. Universal connectivity and sovereignty over its infrastructure

The proposal constitutionalizes the right of universal access and establishes conditions for connectivity (art. 86.1 and 86.2).<sup>39</sup> It also obliges the State to 'overcome the gaps in access, use and participation in the digital space and its devices and infrastructure' (art. 86.4) and to participate in and promote the development of telecommunications and information and communication technology services (86.3).<sup>40</sup> The proposal establishes another interesting rule, namely that telecommunications infrastructure is of public interest (art. 86.6) and net neutrality (86.5).<sup>41</sup>

Also, there are some provisions related to the environment that could be of interest, since they indirectly affect the digital infrastructure. For example, access to water was established as a fundamental right: 'Everyone has the human right to sufficient, safe, acceptable, affordable and accessible water and sanitation. It is the duty of the State to guarantee it for present and future generations' (art. 57).<sup>42</sup>

This norm and other provisions of the chapter on 'Nature and the Environment'<sup>43</sup> substantially alter the current constitutional status of Chilean natural resources and would undoubtedly impact the platform's business model (for example, the water-cooling system for data centres).

These principles address the effects of digital colonialism at the local level (second layer) from two perspectives: First, not having access to the internet generates a more evident digital gap between countries and within countries; since it fosters technology dependency, decreases citizen participation, affects the State's relationship with the people, economic development, technological innovation and affects the exercise of other fundamental rights.

In Chile, digital inequality remains a big problem, especially in rural and remote areas that still lack internet connectivity.<sup>44</sup> Hence, establishing the right to digital connectivity and information and communication technologies implies to Chilean society the possibility of developing an institutional and legal architecture for its development, participation and exercise of fundamental rights in the digital society. In other words, recognizing this fundamental right is the baseline from which to begin to challenge digital colonialism, since without this right, it is impossible to even think about generating local knowledge and infrastructure and democratic citizen participation.

<sup>39</sup> See Article 81 and 82 of Chile's draft constitution 2022.

<sup>40</sup> See Article 86.3 of Chile's draft constitution 2022.

<sup>41</sup> See Articles 86.6 and 86.5 of Chile's draft constitution 2022.

<sup>42</sup> See Article 57 of Chile's draft constitution 2022.

<sup>43</sup> See Chapter III of Chile's draft constitution 2022.

<sup>44</sup> Roberts Molina and others, 'Acceso y conectividad a Internet Regulación en Chile y experiencia comparada' (Biblioteca del Congreso Nacional de Chile, 1 June 2021) [http://www.bcn.cl/asesoriatecnicaparlamentaria/detalle\\_documento.html?id=79483](http://www.bcn.cl/asesoriatecnicaparlamentaria/detalle_documento.html?id=79483) accessed 7 March 2023.

The second element relates to the previous one and concerns sovereignty over telecommunications infrastructure. Digital development, telecommunications infrastructure activities, and providing services over that infrastructure impact a country's growth and development. Consequently, establishing that telecommunications infrastructure and networks are in the public interest implies setting the incentives elsewhere, as it would place a limit on the acts and contracts that could be carried out, promote the development of local infrastructure, and encourage the State to finance (or participate), more significantly in the internet and other infrastructure projects that improve people's connectivity.<sup>45</sup>

Accordingly, recognizing the right to universal connectivity, the protection and promotion of local telecommunications infrastructure, and the set of rules that protect the natural resources from environmentally unsustainable digital infrastructure projects already implies a recognition of a different reality and challenges the development of foreign technological power.

### 3.2. The right to knowledge and digital education

The proposed text contains rules related to the right to access to knowledge: access to scientific progress (art. 61.4), cultures, arts and knowledge (art. 92 and art. 96), information (art. 61.2 and Art. 167) and education (Art. 35.7).<sup>46</sup>

The proposal also constitutionalizes the right to knowledge, establishing the right to participate freely in the creation, development, conservation and innovation of diverse knowledge systems and the transfer of their applications, as well as the right to enjoy their benefits (art. 96.1). It also promotes its equitable and open access, which includes exchanges of knowledge with, and communication of knowledge to, society as widely as possible (art. 96.2).<sup>47</sup> It also establishes the State's responsibility to stimulate, promote and strengthen the development of scientific and technological research (art. 97.2) with permanent monitoring of environmental and health risks affecting the health of communities and ecosystems (art. 97.3).<sup>48</sup>

In this regard, the proposal states that science and technology, their applications and research processes should be developed according to bioethical principles of solidarity, cooperation, responsibility and with full respect for human dignity (art. 98). Furthermore, it establishes that there will be a National Council of Bioethics (art. 99.1). This is an interesting standard, with a forward-looking look at the development of the technology and its risks.

The proposal also recognizes the right of Indigenous peoples and nations to preserve, revitalize, develop and transmit traditional and ancestral knowledge (art. 96.3).<sup>49</sup> Finally, the proposal constitutionalizes the right to digital education to develop technological knowledge, thinking and language and to enjoy its benefits (art. 90).

These norms, together with the provisions that strengthen privacy, personal data protection and the rules that regulate technological development through the principles of bioethics and environmental sustainability, provide a robust constitutional framework for the protection of the fundamental rights of Chilean society. They also address two layers of digital colonialism: the one affecting the local level and the one specifically affecting indigenous communities. As I mentioned earlier, Chile has a lower capacity for innovation, knowledge generation, technological development and regulatory autonomy than countries in the Global North.<sup>50</sup> Consequently, these disadvantages strengthen digital colonialism and negatively affect the construction of an inclusive digital space.

In this way, the proposal recognizes other types of knowledge and the importance of developing skills and local technological language that promotes the creation of alternative digital platforms and technological infrastructure models. Recognizing access to knowledge as a fundamental right also enables the development of people with the capacity to create local regulatory frameworks.

Hence, there are a series of norms for the State to promote research, discoveries and knowledge, thus extending the historical predominance of science over other forms of knowledge, taking seriously the knowledge produced by the arts, humanities, ancestral, territorial and popular knowledge. At the same time, recognizing the right to digital education implies, among other things, acknowledging the gap in digital literacy levels in the country.

### 3.3. Democratization and regulation of digital platforms

The set of provisions I review in this section can be examined from two perspectives. The first has more to do with content and platform regulation. The second has to do with the platforms' ownership.

Therefore, related to digital content and platform regulation, the draft recognizes the right of every person, natural or legal, to freedom of expression and opinion, in any form and by any means. It includes the freedom to seek, receive and impart information and ideas of all kinds (art. 82).<sup>51</sup> The proposal also recognizes the 'right to produce information and to participate equitably in social communication'. It includes 'the right to establish and maintain communication media and information' (83.1). Furthermore, the proposal enshrines a rule on the pluralism of information (art. 83.2).<sup>52</sup>

Still, the proposed Constitution includes a novel norm that establishes a 'right to participate in a digital space free of violence' (art. 89.1) with special protection for women, children, adolescents and sexual and gender diversity and dissidence (art. 89.2).<sup>53</sup> Such a principle could mean many things. For instance, it could refer to content, privacy, hate speech or revenge porn. I highlight it because it undoubtedly opens the discussion on the tension between this right as a public priority, the guarantee of freedom of expression and the possible responsibilities of digital platforms.

45 According to 2019 research, foreign companies are the main providers of Cloud, Hardware, telecommunications and IT security services in the Chilean State's Information and Communications Technology (ICT) market. For more details: <https://www.trendtic.cl/2019/09/top-10-proveedores-tic-del-estado-de-chile/>.

46 See Articles 61.2, 61.4, 35.7, 92, 96 and 167 of Chile's draft constitution 2022.

47 See Articles 96.1 and 96.2 of Chile's draft constitution 2022.

48 See Article 97.2 and 97.3 of Chile's draft constitution 2022.

49 See Article 96.3 of Chile's draft constitution 2022.

50 The country's current investment in science, technology and innovation is 0.34 per cent (the current Government expects to raise it to 1 per cent). Regarding Chile's international investment position, Chile currently remains below OECD countries, which invest on average 2.68 per cent of GDP. See: <https://www.latercera.com/que-pasa/noticia/tras-anuncio-de-presidente-boric-inversion-en-investigacion-y-desarrollo-busca-llegar-a-los-us2400-millones-y-que-privados-aporten-el-50/KGOA7LQIDRFVVEZ5ZF6ZSYW6TM/>

51 See Article 82 of Chile's draft constitution 2022.

52 See Article 83.1 and 83.2 of Chile's draft constitution 2022.

53 See Article 89 of Chile's draft constitution 2022.

At the same time, the proposal constitutionalizes and extends consumer rights, including to ‘users’: every person, as a consumer or user, has the right to free choice, truthful information, non-discrimination, safety, protection of their health and the environment, adequate redress and compensation, and education for responsible consumption (art. 81.1).<sup>54</sup>

This provision is a real change in the Chilean constitutional framework, since there are currently no consumer rights at the constitutional level, let alone the term ‘users’. Although the interpretation of this provision is open, one possible consequence is that these rights and duties of protection apply to digital platforms. In turn, the constitutional recognition of the National Consumer Service (Sernac) would strengthen its oversight and sanctioning faculties.

In parallel, while the text did not explicitly recognize communication as a human right, the proposal contains a rule prohibiting the concentration of ownership over platforms, encouraging the creation of communication and information media and their development at the regional, local and community levels (art. 84).<sup>55</sup> It also establishes the existence of public platforms. It adds that ‘there shall be public communication and information media on different technological formats’ (art. 85).<sup>56</sup>

There are at least two possible interpretations of this rule. One, it could directly empower the legislator to create public social networking platforms. Another is for the State to develop traditional media but to ensure that they will be broadcast, for example, on YouTube.

These norms are relevant from the perspective of the effects of digital colonialism at the global level, given that the constitutional proposal has a series of media and content-related norms that not only promote new voices in the media and greater State participation but also seek to regulate digital platforms. The right to freedom of expression is in tension while protecting vulnerable groups from digital violence is elevated to a constitutional level. At the same time, while the proposal recognizes the rights of consumers and ‘users’, the provision challenges the economic model of technology companies and how media giants determine public sphere protocols and selectively define the limits to free speech according to their business interests.

These rules must be examined with some caution due to the duality of the State being a guarantor to enable these rights but simultaneously a potential oppressor. Especially in the Latin American political context, there is a significant risk of government capture of the public debate to position the official narrative as the only legitimate and truthful one through the use of State media and privately owned nationally run media.

### 3.4. The right to informational self-determination, indigenous data sovereignty and an autonomous Data Protection Agency for accountability

The proposal enshrines a right to informational self-determination and the protection of personal data (Art. 87.1). Furthermore, it establishes several principles for its processing, which must respect lawfulness, fairness, quality, transparency, security, purpose limitation and

data minimization (Art. 87.2).<sup>57</sup> Moreover, the proposal included the right to information security (Art. 88).<sup>58</sup> Finally, the proposal creates a Data Protection Agency.

All this is relatively standard in the EU data protection regulation (e.g., GDPR), but for the Chilean regulatory framework, it is a significant step forward in updating our constitutional rules and counteracting the advance of digital colonialism at the local level.

In parallel, a couple of norms seek to protect indigenous data sovereignty and address digital colonialism in its third layer. For example, the State recognizes the right of Indigenous peoples and nations to preserve, revitalize, develop and transmit traditional and ancestral knowledge (art. 96.3)<sup>59</sup> and the right to informational self-determination and the protection of personal data. This right includes the right to know, decide and control the use of one’s personal data; to access, be informed of, and oppose the processing of these data; and to the rectification, cancellation and portability of these data (art. 87.1).<sup>60</sup>

These norms and others related to the access to knowledge were inspired by the citizens’ initiative ‘Sovereignty of indigenous peoples over their data and information and protection of ancestral knowledge’.<sup>61</sup> This proposal sought to regulate the collection and use of indigenous data as well as protect ancestral knowledge. Although the articles proposed here were not fully considered, they were essential to the constitutional debate.

Chile needs to update and improve its legislation on data protection and indigenous data sovereignty. The constitutional recognition of this umbrella of rights related to privacy, the right to data protection and indigenous data sovereignty would generate a legislative implementation and constitutional practice that would provide the State and its citizens with a catalogue of fundamental rights commensurate with the risks associated with the massive processing of data and its exploitation by large technological corporations.<sup>62</sup>

### 3.5. Safeguarding democracy

The constitutional draft proposes several norms related to citizen participation, transparency and accountability mechanisms. They challenge hegemonic models of democracy that cannot address issues of inequality and colonial difference and offer possibilities to imagine counter-hegemonic alternatives for democratizing democracy from below and through digital tools. This constitutional framework expands popular participation through less traditional and completely innovative participation mechanisms for the current constitutional norms.

57 See Article 87 of Chile’s draft constitution 2022.

58 See Article 88 of Chile’s draft constitution 2022.

59 See Article 96.3 of Chile’s draft constitution 2022.

60 See Article 87.1 of Chile’s draft constitution 2022.

61 Juan Huincabal, ‘Soberanía de los Datos Indígenas y Protección del Conocimiento Ancestral’ (Chile Convención, 2 January 2022) [www.chileconvencion.cl/wp-content/uploads/2022/02/75-Soberania-de-los-pueblos-indigenas-sobre-sus-datos-e-informacion-y-proteccion-al-conocimiento-ancestral.pdf](http://www.chileconvencion.cl/wp-content/uploads/2022/02/75-Soberania-de-los-pueblos-indigenas-sobre-sus-datos-e-informacion-y-proteccion-al-conocimiento-ancestral.pdf) accessed 20 October 2022.

62 A good example is the current draft law regulating the protection and processing of personal data and creating the Personal Data Protection Agency, which has been in the Congress for more than five years. The constitutional enshrinement of these rights would give a new rhythm to the processing of these projects and constitute a framework within which the legislator could act.

54 See article 81.1 and 81.2 of Chile’s draft constitution 2022.

55 See Article 84 of Chile’s draft constitution 2022.

56 See Article 85 of Chile’s draft constitution 2022.

For example, the proposal for the new constitution establishes the right of citizens to participate in an incident or binding manner in matters of public interest, including digital tools, thus opening up the possibility of having both citizen initiatives mechanisms and those activated by the representative authorities. It also allows for submitting citizens' legislative initiatives, citizens' initiatives for derogating norms, and regional and communal assemblies, among others (art. 152.2 and 152.3).<sup>63</sup>

At the same time, it establishes a set of rules for the transparency, accessibility and accountability of State actions. The two most innovative standards, in my view, are the following: one that mandates the State to set out mechanisms to modernize its process and organization (art. 178)<sup>64</sup> and the other that guarantees transparency of public information by facilitating their access in a clear, timely, periodic, proactive, readable and open format (art. 167).<sup>65</sup>

Furthermore, the draft recognizes the right of indigenous peoples and nations to be consulted before the adoption of administrative and legislative measures that may affect them and must guarantee the means for their effective participation, in advance and freely, through their representative institutions and employing appropriate, informed and good faith procedures (art. 66 and art. 191).<sup>66</sup>

The Chilean constitutional proposal has its approach to democratic participation. By enshrining the right to popular participation through digital tools, it is underlined that they provide broadened participation and allow new voices to be heard in the decision-making process of the country's communities. People's sovereignty and an effective right to democracy are the basis for challenging the crisis of digital governance.

The risks of digital colonialism associated with democracy, in my opinion, are transversal to its three layers. The proposal contains interesting rules that together seek to protect the democratic participation of its citizens, peoples and nations. By expanding the mechanisms of participation -- beyond traditional suffrage and even through digital tools -- of transparency and accountability, greater spaces for decision making in the different territories of the country are enabled, the greater political involvement of its inhabitants and, therefore, a strengthening of democracy is generated.

To summarize, this section aimed to highlight the proposed constitutional provisions embodying the five key principles for a decolonized constitutional proposal on digital governance: first, universal connectivity and sovereignty over its infrastructure; second, the right to knowledge and digital education; third, democratization and regulation of digital platforms; fourth, the right to informational self-determination data sovereignty and an autonomous data protection agency; and finally, people's sovereignty and an effective right to democracy.

I analysed how exactly the constitutional principles of the Chilean proposal challenge the usual understanding of digital space and its development. In other words, I explored how these provisions offer a decolonial approach to digital constitutionalism through

what I consider to be the key features of a decolonized approach to digital governance.

As explained, the draft constitutional proposal contains many norms and principles that, from a decolonial lens, offer specific guidelines or ideas for creating a constitutional regulatory framework that challenges digital colonialism and constitutionalism and, therefore, the hegemonized construction of the digital space.

However, from a more general approach, the proposal has three additional features:

Firstly, it takes a position regarding how digital development should move forward to be consistent with the values and rights of individuals, constituting an outstanding example of what could be the rise of digital constitutionalism in Latin America. The constitutional draft considers technology as an enabler (e.g., the right to universal access to digital connectivity and information and communication technologies to exercise the right to education, freedom of expression, knowledge, and others). Still, at the same time, some rules aim to protect some fundamental rights from technological harm (including the right to cybersecurity, self-determination and the right to participate in a digital space free from violence).

Secondly, the constitutional provision offers a decolonial take on the ongoing development of digital constitutionalism in the EU. Consequently, and through an organic reading of the digital provisions, there is a different approach towards configuring an inclusive, just and democratic digital space.

The set of rules seems to follow a general constitutional principle suggested by the proposal: the Estate must ensure that everyone can exercise their rights in digital spaces (art. 90). In other words, the digital space understood in this way is one in which all people can exercise their rights. To obey that principle, the norms crystallize the importance of having universal access and a model of knowledge development that allows the exercise of other rights to be operationalized.

Lastly, the proposal explains how Chilean society should preserve public goods and interests. It delivers a message about what values a digital community should care about.<sup>67</sup>

## Concluding thoughts

In this paper, I have explored how the Chilean constitutional process, among all its complexities, is worth studying from the digital colonialism and digital constitutionalism perspectives.

The main idea was to examine digital colonialism and how the Chilean constitutional proposal and the provisions related to digital governance constitute a way to counteract its risks. To achieve this, I first explored the general characteristics of digital colonialism and the types of powers involved. As a methodology, I proposed the existence of three layers of digital colonialism – at the global, local and indigenous communities' levels – to explore how the five highlighted constitutional principles are a decolonizing tool of the digital space.

63 See Article 152 of Chile's draft constitution 2022.

64 See Article 178 of Chile's draft constitution 2022.

65 See Article 167 of Chile's draft constitution 2022.

66 See Article 60 and 191 of Chile's draft constitution 2022.

67 For a more in-depth reflection on the regulatory impacts of the constitutional proposal, I recommend reviewing the report prepared at Critica, available on its website: <https://criti.ca/>

Consequently, I situated the Chilean experience as an example of digital constitutionalism, which has at least three consequences: First, it is a concrete example that reflects a trend within regulatory solutions for digital governance. Second, I explore how, in the Chilean context, it is a desirable way to deal with the risks of the digital society. Finally, it challenges the expansion of EU digital constitutionalism beyond its borders. The importance of situating the discussion within digital constitutionalism is -- assuming that constitutional principles can shape the digital space -- it is a territory that should be contested.

Secondly, I have briefly reviewed the characteristics of the Constitutional Convention and how it designed a space for decision making that demonstrated a capacity for autonomy and regulatory agency vis-à-vis the unilateral power of the EU. I reviewed how the mechanisms of popular participation allowed, to a greater or lesser extent, the involvement of civil society organizations in the discussion of digital standards and how they were eventually reflected in the final content of the proposal. This arrangement allowed me also to demonstrate this experience as a decolonizing effort in the face of digital colonialism.

Thirdly, I have proposed that digital colonialism means two things simultaneously and that one does not work without the other: I claimed that digital colonialism is the technological and regulatory power held by countries in the Global North. Through concrete examples, I show how this phenomenon can frustrate the development of domestic regulations or solutions and how it can affect people's fundamental rights in the Global South differently and more dramatically. Consequently, I proposed that decolonizing efforts in this context involve the resistance that can be exercised through a constitutional framework within the Chilean legal system.

As a result, I have argued that the Chilean constitutional proposal is an example of resistance to digital colonialism through a constitutional approach. Therefore, I made a concrete review of the proposed constitutional norms to illustrate how the chart of digital rights -- and other related principles -- can deal with the challenges and the three layers of digital colonialism.

Finally, I have proposed five key principles contained in the Chilean constitutional proposal, providing a different and local perspective on understanding the digital space and addressing digital colonialism: first, universal connectivity and sovereignty over its infrastructure; second, the right to knowledge and digital education; third, democratization and regulation of digital platforms; fourth, the right to informational self-determination, indigenous data sovereignty and an autonomous data protection agency for accountability; and finally, people's sovereignty and an effective right to democracy.

I have outlined how, without an inclusive and decolonized perspective, the construction of digital space through constitutional norms may reflect a biased and self-interested view of the values and rights it seeks to protect, in the sense of not bringing into account the local realities of countries outside the Global North, promoting an understanding of the internet and its governance that can be abusive or simply non-enforceable for developing countries.

More broadly, this paper highlights how the Chilean constitutional effort contributes to the necessary discussion within digital governance and public policy towards the rise of global digital constitutionalism. I have aimed to contribute to the debate on rethinking and build-

ing constitutional principles from a decolonial perspective towards the construction of digital space and its sovereignty. It is an invitation to create a common territory to develop an open and inclusive digital space that respects the human rights of all individuals and communities by encouraging, protecting and acknowledging the diversities of the Global South.

Copyright (c) 2024, Verónica Paz Mery León.



Creative Commons License

This work is licensed under a Creative Commons Attribution-Non-Commercial-NoDerivatives 4.0 International License.