

TRANSCRIPTION:

Chile: Protests, Constitutional Change and the Importance of Chile's Children (Nicolás Espejo Yaksic)

Kira Allmann (0:02): This episode of RightsUp was recorded at the end of 2019, in the midst of ongoing protests in Chile. As a result, the conversation was very much of that moment. But in spite of the delay on our end getting this interview out to you, we think you'll still find the discussion relevant and thought provoking. When the dust begins to settle after a wave of popular unrest, what should happen next? Thanks for listening.

Natasha Holcroft-Emmess (0:36): Welcome to RightsUp RightNow, a podcast from the Oxford Human Rights Hub. I'm Natasha Holcroft-Emmess. Today I'm speaking with Dr. Nicolás Espejo Yaksic, Researcher at the Centre for Constitutional Studies at the Supreme Court of Mexico, children's rights Consultant for UNICEF in Latin America, and a Visiting Fellow at Exeter College in the University of Oxford.

In recent weeks parts of Chile have descended into violent unrest. A rise in subway fares in the Chilean capital of Santiago sparked the first protests, but things have escalated quickly. Demonstrations are now countrywide and challenge broader social issues, such as the increased cost of living, privatisation and growing inequality. Protesters have clashed with security forces, people have been killed, and 2300 people injured. 7000 people have been arrested. Arising out of the protest is a proposal of constitutional change. Chile's Constitution, originally brought in under the military dictatorship of Augusto Pinochet in 1980, has already been amended several times. In light of the recent unrest, politicians have agreed to call a national referendum on the creation of a new Constitution. Today, we will be discussing the protests, the possibility of constitutional change, and the impact on children's rights in Chile. Dr. Espejo, thank you for joining us today.

Nicolás Espejo Yaksic (2:19): Thank you for having me.

Natasha Holcroft-Emmess (2:21): Perhaps we could start by talking about the reasons behind the widespread unrest in the country at the moment. What factors have caused the situation in Chile to escalate in the way that it has?

Nicolás Espejo Yaksic (2:34): Well, I think there are threefold causes for this. First is that, although Chile has achieved a great success in reducing poverty from 40% to 8%, and a large social mobility has taken place in the region — it has one of the highest rates for that — inequality is quite [a] marked feature of Chilean society; actually, [it] is one of the worst if you look at countries with high income and middle-income countries. And that has created, for the last, I would say, maybe 25 years or 20 years, a sustained pressure from people who pass from poverty to middle-income situation[s] to be more aware about what they need and to be more aware about the social inequalities that have been marked progressively within the Chilean society. So, one is, I would say, income inequality and social inequality.

Secondly, I think there's something more cultural, in a way, which is related to the kind of feeling of permanent abuse and humiliation by the... basically by the market, in a way, and by the political class. So, in the first sense, I think there's a marked feeling that [the] Chilean neoliberal economy is extremely helpful, benevolent towards companies, bank[s], private pension systems, private health system, quite indulgent, but when it comes to the daily lives of Chileans, they are really pressed to pay where they have to pay high interest. When there's [a] case of abuse in the market, [there is a] very

mild answer from the criminals and civil system, and this has created a kind of feeling of lack of protection basically, from the more, the most powerful within the society, and also politically, progressive detachment for political class. I think this is quite... maybe these two trends are observable around the world, it's not only about Chile. But [at] quite [a] distance from the political class, which has, in turn, made more difficult at this moment to manage the political crisis.

And thirdly, something that emerged after demonstrations arised, which is that there's a group of people, some related with drug dealers, and there [is] also, I would say, I consider a group of young people mainly, who feel completely detached from society, they have nothing to lose. And these two groups of people are committing a lot of violent acts — looting supermarkets, even hospitals, the subway stations — and this group of people is not in the same track of the majority of people who wants political and social change. But the State has not been able to answer to this social security issue, and this in turn has increased the feeling that we're in a problem, that the government is inefficient and led, sadly so, also to very marked human rights violations by the police force.

Natasha Holcroft-Emmess (5:48): If we just unpack a few of the different factors, you mentioned income inequality playing a big role in the unrest. Why, in particular, is that such a prominent issue in Chile?

Nicolás Espejo Yaksic (6:00): Well, it is particularly prominent because the Chilean model, both economic and constitutional, was shaped during Pinochet's regime, in order to facilitate neoliberal economic policies. There ha[ve] been attempts and several measures that have tried to decrease the level of autonomy of the market. But still, it's a system that is created, designed and protected by both constitutional rules and, I would say, institutional practices that assure that basically the market will have vast freedom to operate with very, very low incentives to act according to the law. There are many cases in which there has been collusion, for example, in prices in several sensitive sectors, where the CEOs of those companies have been, even in one very famous cases or case, illegal[ly] financing of political parties... The sentence was basically to take a course of ethics at the university. So imagine that someone, who in the context of a very harsh use of criminal law for stealing, they have to suffer the consequences of the system, while they are looking at th[ese] very powerful people, well connected, that basically get rid of what they are doing.

So I think that there's the particularity of the Chilean system — in that it was very well designed, and enclosed, to allow the neoliberal policies to operate substantively — make it extremely difficult to modify, so all the key rules that you want to change in the Constitution have a very, extremely difficult quorum to be modified, and this has created perfect conditions to sustain these policies at their core. All the changes, even if important, I don't think they have challenged the same basic understanding that was designed with Pinochet and their economies in the 80s, and that in a way were accepted, also by the less Left-Centre for many years.

Natasha Holcroft-Emmess (8:14): I wonder if this market model is what lays the foundations, in a way, for the privatisation, which has become an issue in recent times. Privatisation of services like education and healthcare has been reported to be one of the factors in people protesting. Could you tell us a bit about how the privatisation of these kinds of services affects Chileans on a day-to-day basis?

Nicolás Espejo Yaksic (8:39): Well, one thing that is very particular from Chile, is that [it] is kind of a laboratory of privatisation. So, while many States are facing, just now, privatisation, we did it in the 80s, when we did it through a military regime, which facilitated the imposition of this policy; otherwise, [it] would have been much more difficult if you have democracy or Congress, an act of Congress to try to stop th[ese] policies. They basically were imposed as a test of neoliberal policies in

all fields of social life. And actually, if you look at [it] closely, until the last 30 years, actually there's a process of the privatisation, in a way, but still insufficient. But now, the impact is very clear, and I think maybe some manifestations...

First, even if income in Chile— Chile is now, along with Uruguay, the only two high income countries in Latin America, but the cost of living is extremely high, basically because you have to pay a lot from several areas in life, and where reform has taken place, for example, in public health, or in terms of public education, the gap between the quality and speediness to access those services is very sharp. So even if there's advancements on that, the feeling is that if you want to have good access to basic services, well, then you have to pay a high price. And the level of income through wages has not coped with the extremely high level of profits that have been made by these institutions in health and pensions, for example. So we have a very, very strong crisis thinking [about] the future pensions that the Chileans will receive, while the private pension system has one of the highest rates of profit in the market. The feeling is that this is good business and maybe good instruments or financial instruments, but they don't serve the purpose that they were originally designed and [it] was promised to generate [for the] people, that it will be a more efficient, and more effective as well, way of covering that.

So, on the daily life: high rates of debt, of individual and private debt, and also with an experience that if they are not able to cope with th[ese] commercial obligations, then they will be left behind, accessing a public system which has a considerable difference in terms of quality of services in education, health, and pensions at least, just to mention three key sectors.

Natasha Holcroft-Emmess (11:25): One of the things that societies tend to use and hope will address some of these issues are human rights laws, to try and keep things fair and equal. Was it the case that there was a failure of human rights laws in Chile to address these issues, and is that what lit the touch paper for the unrest in the country, do you think?

Nicolás Espejo Yaksic (11:44): It's an interesting question, I think it has some of that, in two levels I would say. The first level is that the Chilean Constitution, that was designed for the purposes as I just mentioned, is extremely weak in terms of social rights, for example. So even if some social rights are in the Constitution, formally recognised, there are no constitutional guarantees to enforce those rights, or you could only enforce them insofar as they affect one civil and political right, for example, your right to private property or due process. So it's a very... we have a very weak constitutional system in terms of social solidarity, and we never faced this, and constitutional reforms that have been taking place since 1989 (this Constitution is from the 1980s, 1980) but since several reforms have been mainly focused on some civil and political rights, the electoral system, but they haven't been able to target... because of the rules of acceptance, like [the] high quorum that require these reforms by the Congress, so the right wing has kept the key close for constitutional reforms that complete the whole picture of human rights. So, this is one factor.

And secondly, I think that in terms of institutional practices, I think Chileans, we tended to look the other way around when it comes to the structural deficiencies of the police force, for example, [which] is a military police, that is quite autonomous in practice, what they do, so even if formally it should be under their control, the political control of the Ministry of Interior and Public Security, in practice has been quite autonomous. And this, in a way, has meant that the human rights culture has not permeated the institutional practices of the police. And we have seen this where the protocols have not been followed, where there's reports by Human Rights Watch, Amnesty International on institutional practices of police violence, brutality, including sexual violence, that are very concerning. It's a vicious circle I think where you have some constitutional gaps in terms of protection of that social equality part that human rights are also concerned with, but at the same time, institutional practices that have not been culturally influenced by human rights standards. And so that I think has created a

gap in practice that we are paying now. We are paying a high price for looking the other way around for many years, of not facing the structural deficit, mainly of the police when dealing with demonstrations or civil unrest.

Natasha Holcroft-Emmess (14:36): There have been other protests across Latin America in recent months, for example, in Colombia. Do these other protests have anything in common with the demonstrations in Chile?

Nicolás Espejo Yaksic (14:48): Yeah, I think they have good and bad things in common. The good part of things [that] are in common is that I think there's a widespread, not only Latin America, but I'd say more progressively globally, a kind of clear idea that people [are] not willing to accept that just a few managed state affairs, both politically and economically. Secondly, sharp inequalities and feeling of insecurity that is not addressed properly by politics. And thirdly, in the case of Latin America, I would say also this, this specific phenomenon that we didn't have before, which is not anarchists, actually, it's not even that, this warring role of the "*narcos*", using this social discomfort and social demonstrations to take advantage of chaos and control communities. And I can tell you that, very clearly, that has happened in Ecuador, it's happening in Colombia and it's happening in Chile, that's extremely worrying.

And in a way... And also this other group of people who is completely disenfranchised, you see young people that went, for example, to the criminal justice system or the protection system, and they say, "I have nothing to lose, and you know what, I feel fine, at least I have the chance to destroy something and belong to something in the process". But it concerns me a little bit because I think the public discourse and the response to this has not been addressed, nor by governments, nor necessarily so to [the] deepest level by the human rights movement and the Left. So you have, on the one side, the government saying, "This is chaos, we have to provide public order, protect individual rights and property", and on the other hand, you have human rights movement, saying, "Well, we are against police violence, very abusive use of law", but this common factor has been, I guess, overlooked, and it's extremely problematic because if you don't control these groups and, particularly, how the *narcos* are playing a use in this movement, then what you have is a devaluation of the social movement, you have a progressive sense of insecurity, which might lead to calling the armed forces.

So, my concern, my personal concern, and many, I guess many others share these concerns, is how to make a call for public security in order to avoid the consolidation of a feeling of "un-government", which may be used by the extreme Right in the region, to say, "You see, this is what happens with social demonstrations, you see, more Centre-Right wing governments are incapable to deal with this, so we need a harsher response". And you can see that trend in Colombia very clearly, you can see that the Chilean Government, particularly the President, has been extremely tempted by this line. But I really think, if we don't face this properly, I don't know how long he can hold the, you know, the pressure from the Right wings, who actually what they want is to have the militaries back, at least for a while, and get rid of this problem in the ways we subtly you know.

Natasha Holcroft-Emmess (18:17): Do you think that the means used to respond to the protests have been proportionate?

Nicolás Espejo Yaksic (18:22): I think it's an extremely dynamic process. So, it depends— I could answer this question depending on the week you're asking it. So, for [the] purposes of trying to understand what's happening, I would distinguish some things.

First, I do believe that it has been demonstrated that the police ha[ve] been inefficient and ineffective in providing social order, public order.

Secondly, there's a structural use of human rights violations and lack of effective political control from the government in relation to the police, mainly, and so there's a quite well-established feeling that there's disproportionate use of force, and this has been demonstrated very independently, even by courts, but also by human rights institutions and organisations. But secondly, I think that the lack of political intelligence and leadership from the Government— the President has been very erratic, and so the political solutions have been very weak, in a way. So this, in turn, has maintained the conflict, working mainly for people who do[n't] want the solution for the conflict.

But the people still require public order, in order to move on and to get to the point where everything all started in my view, which is that we need a fairer, just society. And that's the whole process of constitutional... of moving towards a new Constitution. Unless we solve the problem of public security in our countries when this happened, I think that the social movement will be substantially compromised, and that's very worrying, moving forward, [for] the social agenda that we want to push for.

Natasha Holcroft-Emmess (20:18): One of the aims of the recent protests has been to secure constitutional change. Could you tell us a bit about why having a new Constitution is important to the protesters?

Nicolás Espejo Yaksic (20:31): Well, I think there are maybe two big reasons behind this movement.

First, that it's a Constitution that, even if it was accepted, has not been created or designed by the people in Chile; it was designed and imposed by Pinochet in the 1980s and then, in a way, was our trade card for our democratic transition. We had to, in a way, accept that as part of the better deal we could have [had] probably in the early 90s. But a deal that, actually, from a perspective of human rights, social justice, and even from the perspective of the people might feel that the Constitution means something to them, it was a big, big loss. For people, the Constitution, it felt, I guess, if not distant to many people... the only knowledge of the Constitution is that it works, basically, to defend the status quo and to defend the powerful. It's not seen as an instrument of social justice, the protection of human rights.

And also, I guess, people — because social characterisation of the Chilean society has changed dramatically — I think people is also more empowered, feeling that they don't just want to be ruled by a Constitution. They want to see that the Constitution is their own frame of normative action for the present and the future, and I think there's a big, big gap present there.

Natasha Holcroft-Emmess (21:59): How will the politicians go about bringing about this constitutional change? We know that there's likely to be a referendum, but what are the kind of mechanics to "get" a new Constitution?

Nicolás Espejo Yaksic (22:11): Well, there has been an initial agreement among the political class, with the exclusion of the Communist Party and some sections of [the] progressive Left-wing movements... But I would say, the majority of the political spectrum, and society, has agreed to this certain track for getting a new Constitution. So that implies three things. Now the details ha[ve] been now discussed and the devil, you know, hides in details, but I would say first, that there will be a political referendum in April so people can vote if they want to have a new Constitution or not.

If you say yes, you have two options about the mechanism. One is to have a convention which we call a "*convención mixta*" — so, it's a convention that is formed by people from the parliament and people elected to that purpose. Or the second option is an open convention, where people will be elected

only for the purposes of designing and agreeing to a new Constitution; they could not run, then, to the parliament for the next election, so with some restrictions...

And then that process would be ratified by a second referendum, where people should accept if the, you know, the proposal from this convention is in line with what people think. So, this is more or less the general track, I think there's clarity about this.

But now the details are, in many ways... for example, some, mainly the political parties from the Left, are pushing for quotas, for example, women, indigenous peoples, that may participate there. Some of us are pushing for allowing, for example, that the referendum may be voted by adolescents as well, so that the age will be lowered to 16 years of age, and also that there may be quotas for adolescents, otherwise, I mean, probably that convention will not have a direct participation of adolescents. Others are discussions about how they reach agreement in terms of wh[at] is the quorum necessary to approve the changes in the Constitution.

And thirdly, some debate about if there should be a kind of— I mean, the discussion now is that we have to choose a new Constitution from the very beginning, so they say it's like an open white paper. But at the same time, there's some concerns about, for example, what about basic human rights obligations that the State has already taken under international human rights law, for example. Should we consider that the discussion starts from all treaties adopted by the Chilean Government, and from then to the top onwards... We also discuss that. So that is from a human rights perspective, we would obviously try to expect that we are not going to start reviewing our basic commitments as a country towards international human rights law. But at the same time, the development of international human rights law has been extremely dynamic, even cultural rights. These for me, in a way, they are the base of human rights, but at the same time, these are the kinds of debates that we have not had in the past in Chile. So, I would expect that the convention discusses about the specific role and extension that you grant, for example, to social rights. So, think about, for example, like the South African Constitution. So, all these discussions, I think, we might still [need] to find and strike a balance between not reviewing basic agreements, that we... I think, they are achievements that if we open to discussion, it might be dangerous, but at the same time, we need to give a space for a real political debate, otherwise it will be a façade of a convention.

Natasha Holcroft-Emmess (26:16): Is the hope to introduce greater protections for human rights, and are there other content-based aspirations for the constitutional change?

Nicolás Espejo Yaksic (26:27): So, I think there are two aspects in which, maybe, the Constitution and the way we think about the future Constitution are relevant.

First, there's a, as in all Constitutions, there's definition of who you are, and this definition is extremely important. I think that part of the detachment of people with the Constitution in Chile is that they haven't participated in this discussion, “who we are”, how you see yourself from a normative point of view, as moral philosophers discuss. So, this is that, what is the ontological description of who we are, and the normative expectations that we put in the Constitution? So, for example, the Chilean Constitution, until now, has a very precise definition of a State that only intervenes if the market fails, or the private sector fails. So, it's a subsidiary role — solidarity is not a constitutional principle. I do believe that solidarity has to be a constitutional principle, along with freedom and equality. It's one stronger vision that we have a common cause. I think this is at the heart of the discussion, more structurally.

And secondly, to the things that are specifically related with the Constitution as it stands today. First, I would say the importance of social rights, social and cultural rights. So, for example, Chile is a country

which does not recognise indigenous peoples in the Constitution. It's a Constitution that does not even recognise the rights of the child. And social rights are very weakly identified, and that obviously makes the role of the constitutional tribunal mainly a role of the guardian of the market and the private property or, in the best of the cases, civil and political rights, but not social rights. So, I think one big, big fight, a struggle, will be to enshrine second or third generation rights. Water, I think will be at the heart of this discussion, housing...

And secondly, in the specific part of the regulations, a more participatory political system because, for example, there's no public initiative to create a law in Chile, so that means that only the President or Members of the Congress— but always, it's a very strong presidential system, the people feel detached from the legal process entirely. So, I think that to have [a] more direct and participatory basis of framing laws and deciding at the local level what they think, that in general, this has been a very important gap in the political system. So, I think that in the definition of what kind of society we are, and secondly, in terms of rules, a stronger concern, recognition of social rights, and second and third generation rights, and also a more democratic participatory political system, which may in turn help to diminish the strong gap between the politics and the daily lives of peoples.

Natasha Holcroft-Emmess (29:36): If we just turn now to think about the impact of the situation in Chile on children or young people's rights, and what might be done to strengthen those in the future, how is the unrest across the country affecting children's rights?

Nicolás Espejo Yaksic (29:52): Well, this is a very sad part, and concerning part of the process, I would say there are two levels.

First, there has been many reports of police violence against children, and particularly adolescents, in the case of social demonstrations, but also quite widespread and irrational use, for example, of chemical projectiles and use of that to this population, that, for example, are affecting schools — you will see children running with the smoke and things like that. So you have children affected, their health, directly by this.

Secondly, I feel concerned. So, *I'm worried, I am stressed*. You are listening, reading, following Twitter, and this create a stress on you — imagine in the case of children. I think that there has been a strong concern that all this tension in news and conversations in the family obviously creates a stress in children. I think this is very concerning stuff and I also think we, as adults, [have] not been trained in a way to, how to cope with stress, with political stress, with your children. Until now, Chileans were... it was quite frank, while I'm in the West... this was not a real problem. But nowadays, I can imagine that even parents don't have enough capacity, so instruments to, how to deal with this.

But the other part is also that there's maybe the greatest opportunity that we have, in terms of not only saying how, what is wrong with the State and children, but what could be right with the State and children, and that is where I think that we have a huge opportunity to recognise children in the Constitution, I would say their *rights* in the Constitution, not only children, and to allow that this might be the first constitutional process where you can clearly see children taking place in the framing of that Constitution. And that doesn't mean only to have your article [that] says best interest of the child, but also in the process itself — that means participatory intervention of children and adolescents that might shape the kind of discussion that we're having about the Constitution. Because I think this is very important. We, as adults— when I think about the Constitution, I think about principles, rights, rules that give powers, immunities, etc. But if you ask a child, "What do you think the Constitution is?", multiple might want people to be able to be happy, that people love each other, that people can say whatever they think, they want to express themselves. This is a way of building Constitutions as well, you know, and understanding rights. If we miss this opportunity, to include children and

adolescents in the process, we will miss a big, big opportunity, not only to repeat the kind of Constitutions that we already know, [but] the possibility to have a new Constitution that we have never had before. This is the importance of children in that process.

Natasha Holcroft-Emmess (33:03): That's so interesting, the role that children could play in designing a Constitution.

Nicolás Espejo Yaksic (33:10): I think that there's a, sort of a widespread understanding these days that the legitimacy of a Constitution is not only or even mainly given by the constitutional rules themselves, but by the process by which you agree on those rules. And if children are social agents, political agents, as I do believe they are, as the UN Convention on the Rights of the Child recognises, well, they also have to see the Constitution as something that they feel that there's a transgenerational legitimacy about this — so not only given, but they have a say in, and also some constitutional rules that may allow next generations, future generations of children, to continue participating.

And this is mainly *the* right of children, that they, in all things and all matters that involve them and affect them, they need to be heard and take into account. Our political process doesn't consider that. But you have the lobby and the pressure from all kinds of groups, but when it comes to children, this is extremely poor. So, I think that we will have a more friendly, child-friendly the Constitution, that's my expectation. But I'm more dubious that that will be as a result of a process or participation in the constitutive moment, and I would expect that that is something that we have to reach.

Natasha Holcroft-Emmess (34:43): I think that maybe goes back to what you were saying about the Constitution forming part of the identity of the nation and who the nation is, and obviously the future of the nation is the children and the young people. And so it sounds like participation would go some way towards achieving that identification with the values of the Constitution.

Nicolás Espejo Yaksic (35:03): Yes, absolutely. And I think our responsibility, also as human rights defenders, is to move on forward to the kind of debates I think children deserve, which is, “What kind of society do you dream of? Which kind of family and which kind of relations with your parents do you want to have?” and how to make [a] more participatory political system for children.

Natasha Holcroft-Emmess (35:25): Thank you so much for joining us today, we really appreciate it.

Nicolás Espejo Yaksic (35:28): Thank you for having me and congratulations always to the work of the Human Rights Hub in Oxford.

Kira Allmann (35:43): RightsUp is brought to you by the Oxford Human Rights Hub. Our Executive Producer is Kira Allmann. This episode was produced, edited and hosted by Natasha Holcroft-Emmess. Music for this series is by Rosemary Allmann. And Sarah Dobbie does our show notes. Subscribe to this podcast wherever you like to listen to your favourite podcasts.