



**“TWO JOURNEYS, TWICE THE LEARNING:
10 TAKEAWAYS FROM THE CHILEAN
CONSTITUTIONAL EXPERIENCE”**

The Horizontal think tank with the support of the Open Society Foundations
September 2024

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Imagen 2 (horizontalchile.cl, 2024)

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Imagen 3 (horizontalchile.cl, 2024)

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¹ Some of the joint publications by both authors are: “Evolución Constitucional: Bases conceptuales y propuestas para pensar la nueva Constitución,” available at: <https://horizontalchile.cl/publicacion/evolucion-constitucional-bases-propuestas-nueva-constitucion/>; “Reglamento de la Convención Constitucional,” available at: <https://horizontalchile.cl/publicacion/reglamento-de-la-convencion/>; The manual on constitutional issues; “Siete nudos críticos del borrador constitucional,” available at: <https://horizontalchile.cl/assets/uploads/2022/06/7-nudos-cri%CC%81ticos-del-borrador-constitucional-pdf.pdf>

ABSTRACT



Imagen 4 (Héctor Millar, s.f)

This document aims to provide practical guidance for policymakers embarking on a process of constitutional change, offering insights drawn from Chile's two recent constitutional processes. The work seeks to offer institutional design advice to increase the likelihood of a successful constitutional path.

The document's structure includes a brief history of Chile's constitutional processes, from the Agreement for Peace and the New Constitution of 2019 to the second exit referendum

in 2023. It then highlights ten key lessons, divided into four sections. A central lesson, introduced at the outset, emphasizes the spirit necessary for the success of constitutional change through the creation of inclusive processes. Subsequent lessons address the role of elections, the drafting process, and citizen participation. Each section analyzes critical procedural and substantive aspects, aiming to distinguish those that produced counterproductive effects on the drafting process from those that contributed to better deliberation.

INTRODUCCIÓN²



Imagen 5 (Héctor Millar, s.f)

PURPOSE OF THIS DOCUMENT

In early November 2019, political leaders from all sectors, legislative advisors, decision-makers, academics, and civil society leaders—including the authors of this document—faced a similar dilemma in a critical social moment: if Chile were to embark on a path of constitutional change, what could be learned from similar experiences in other countries? What institutional designs have contributed to the success of other processes around the world? How can it be designed to generate the right incentives and maximize the chances of adopting a new Constitution? And perhaps the most complex question of all: How to design rules that support decision-making with foresight and long-term vision amid a period of intense internal agitation and social conflict?

During those critical moments when the Chilean constitutional path was being discussed and negotiated, there were very few works to guide decision-making³. It was extremely challenging to find guidelines and directives that could help avoid repeating mistakes or emulate successes experienced elsewhere. Consequently, many crucial decisions for the course of the process were made with scant practical evidence and concrete precedents that would provide the perhaps naive assurance of solid ground. In the end, these questions were answered partly through accumulated international experience and partly through intuition and common sense.

The authors of this document have a predominantly practical background. Our first approach to these kinds of questions began in 2019, linked to the responsibility of designing the Chilean constitutional path.

One of us, as president of a ruling political party, was part of the November 15 agreement that initiated this process. The other author was a legislative advisor in the Chamber of Deputies, where the constitutional reform enabling the first constitutional process was initiated. Subsequently, both of us were users of those rules—one as an elected representative in the Constitutional Convention and the other as the chief advisor to a bloc of convention members. In these roles, we witnessed the “good” institutional decisions made and experienced the complexities of the poor ones. During the second constitutional effort, we collaborated as advisors in the negotiations between political parties that enabled the reform, aiming to preserve positive aspects and correct the negatives from the previous experience. Alongside this, we supported both experts and advisors from think tanks throughout the process.

It is no surprise, given our experiences and the roles we have played over the past five years of constitutional debate in Chile, that we have decided to write a practical and applied document in line with that background. The mission of these pages is to guide decision-making regarding future constitutional changes in other countries, using the Chilean experience as a reference. These are unavoidable, complex determinations, heavily dependent on the political and social context in which they are made. In this context, the fact that Chile faced the task of designing two constitutional processes in such a short period has generated lessons that could be of great value to other decision-makers.

Thus, this document has a clear target audience: policymakers involved in constitutional replacement contexts.

² We are grateful for the collaboration of Universidad Adolfo Ibáñez, especially the schools of law and public policy, for having contributed to a workshop to comment on and refine this document. We also thank all those who attended the workshop for their valuable criticisms and comments that contributed to improve this work. In particular to Isabel Aninat and María José Naudon, representing the university; Josefina Araos; José Manuel Astorga; Cristóbal Bellolio; Gonzalo Blumel; Rosa Catrileo; Rodrigo Correa; Carlos Frontaura; Felipe Harboe; Carmen Le Foulon; Tomás Leighton; Guillermo Larraín; Domingo Lovera; Ignacio Briones; Catalina Salem; and Constanza Salgado. We especially appreciate the committed collaboration of Javiera Parada in the origin and development of this document.

³ Especially important among the negotiators of the first constitutional process was the United Nations Development Program document (2015). *Mechanisms of constitutional change in the world: Analysis from comparative experience*.

Lessons derived from these pages are not aimed at Chile but at processes in other parts of the world that share similar characteristics to those we experienced in 2019 and the subsequent years. It is clear that the constitutional path is closed for our country in the short and medium term, and even if it were to be reopened, the context of such a discussion would be markedly different from the past five years.

At the risk of seeming presumptuous, this document cannot hope to settle the long and fundamental political and academic debates of contemporary constitutionalism. It also does not aim to reduce the complex process of institutional design to a mere transplantation of decisions made at the southern tip of the globe. Finally, some of the Chilean design options that did not succeed here may well be valid and advisable in other contexts, and decision-makers must determine to what extent the Chilean experience can illuminate the dilemmas they face.

Some of the documents that inspired this work, and of which it seeks to be a part of the same bibliographic family, include those published by IDEA International at the beginning of the past decade. Similarly aligned are some documents published by the Netherlands Institute for Multiparty Democracy⁴ and Tom Ginsburg's book "Comparative Constitutional Design"⁵, among others. It is important to clarify that "Two Journeys, Twice the Learning: 10 takeaways from the Chilean constitutional experience" is an infinitely more modest effort compared to the documents that inspired this work. All these efforts are commendable attempts to improve the regulation of legal and constitutional processes of constitutional

change. These anticipatory regulations have demonstrated clear advantages for democratic regimes seeking to balance continuity and change, facilitate consensus among political forces, and promote citizen participation⁶.

Finally, the lessons captured in this text are based on a substantive premise that must be explicitly stated. Guidelines and action recommendations are aimed at fostering constitutional and institutional evolution, rather than a complete break with the existing system. Some of the proposed institutional design suggestions, and consequently the decisions critiqued, may not be shared by the reader if they do not accept this premise or if the context of the country in question involves a radical rupture from the current institutional framework. It is not surprising, then, that this document, due to its practical nature and inclination towards constitutional evolution, aims to establish enduring common minimums and views with skepticism debates that seek to endow constitutional drafting bodies with "constituent power"⁷ and excessive power derived from this status⁸.

Thus, the document seeks to guide, in terms of content, a constitutional change process that aims for a balance between the necessary legitimacy of the constitutional text, derived from such a process, and the perception of legitimacy by those who might identify as "losers" in this process. It also aims to balance rules that break immobility and obstruction with those that provide spaces of certainty and predictability. Finally, it is a call to seriously address the challenge of institutional design, as the Chilean case clearly shows, which significantly impacts

4 Among these we can highlight: "A Practical Guide to Constitution Building" (2011); "Constitutional Reform Processes and Political Parties: Principles for Practice" (2012); y "Constitution Building - A Global Review (2013)". Another related document is "Writing autobiographies of nations: A comparative analysis of constitutional reform processes" of the "Netherlands Institute for Multiparty Democracy" (2009).

5 Ginsburg, T. (Ed.). (2012). *Comparative constitution design*. Cambridge University Press.

6 Negretto, G., & Soto, F. (2022). "¿Cómo se debe regular un proceso constituyente democrático? Reflexiones a partir de la experiencia chilena". *Boletín Mexicano de Derecho Comparado*, new series, year LV, number 163, January-April. 282 p.

7 In the same vein, Ginsburg, T. & Álvarez, I., "It's the procedures, stupid. The success and failures of Chile's Constitutional Convention" (2023). *Global Constitutionalism* 13, 1-10. P. 10.

8 Issacharoff, S., & Verdugo, S. (2023). "Populismo constituyente, democracia y promesas incumplidas: el caso de la Convención Constitucional Chilena" (2021-2022) / Constituent populism, democracy, and failed promises: The case of the Chilean Constitutional Convention (2021-2022). *International Journal of Constitutional Law*, 21(5), 1517-1548. Available at: <https://doi.org/10.1093/icon/moae003>

the success of the constitutional endeavor.

The document is structured as follows: a brief history of Chile's two constitutional processes, beginning with the November 2019 Agreement for Peace and a New Constitution that enabled the first constitutional process, and ending with the December 2023 exit referendum that concluded the second. It then presents ten lessons on constitutional design

divided into four sections: firstly, a central and cross-cutting lesson on the spirit necessary for the successful course of a constitutional change process. Secondly, three lessons on the role of elections in constitutional change processes. Thirdly, three lessons on the drafting process itself. Finally, three lessons on the role of citizen involvement throughout the process. The document concludes with a brief summary of the key lessons derived from this work.



Imagen 6 (UChile, 2022)

LESSONS ON CONSTITUTIONAL FAILURES AND SUCCESSES



SUCCESS OR FAILURE?

Although this discussion exceeds the immediate scope of this document, it is important to address a key clarification. This chapter and much of the subsequent analysis use the term “failure” to describe the recent Chilean constitutional process. This decision was made with careful consideration. We base our assessment on the premise that the process was intended to replace the existing Constitution in Chile, and since it did not achieve this goal, it is reasonable to refer to it as a failure. We believe it is crucial to be candid about the inability of both attempts—and their participants—to reach the desired conclusion.

However, the fact that the primary objective was not achieved does not mean that the process was entirely negative for the country.

In hindsight, there is broad consensus that starting this process was the right decision given the circumstances.

Moreover, it is clear that when the country’s authorities chose a constitutional solution to address the emerging political crisis, the replacement of the constitutional text was not the only criterion by which this decision should be evaluated. An additional parameter for determining whether the decision to initiate the constitutional path was correct or incorrect—and thus whether it was a failure or success—was the ability of this route to foster understanding that would help preserve the existing institutional framework. From this perspective, despite its ups and downs and the risks it posed, the Chilean constitutional process was a success.



Imagen 8 (Héctor Millar, s/f)

LEARNING FROM FAILURES

Attempts to draft new constitutions fail more frequently than is commonly assumed. According to IDEA International, around 20 significant constitutional reform or replacement processes occur worldwide each year. However, between 2018 and 2023, only eight resulted in a new Constitution or a material amendment, all of which were unilateral⁹.

Conversely, cases of agreed reform or replacement, where the body tasked with drafting the Constitution fails to have the text ratified in the designated referendum, are also rare. Of the 179 referendums on constitutional processes held worldwide between 1789 and 2016, only 6% of constitutional proposals were rejected¹⁰.

In comparative constitutional law, there is a wealth of studies on successful constitutional processes¹¹, but research on failed processes is relatively scarce¹². This asymmetry is significant, as a thorough and context-specific analysis of the causes of failure could be as valuable—if not more so—for drawing

practical lessons to improve future constitutional reform or replacement processes¹³.

Factors often identified as contributors to constitutional failure include excessive polarization and resulting distrust among parties at the start of constitutional deliberations¹⁴, the exclusion of political parties from the design of the process¹⁵, imbalances in political representation within the drafting body¹⁶, and procedural rules that hinder consensus-building¹⁷. The failure of the constitutional process in Chile is likely related to several of these factors. One particularly characteristic issue was the presence of short-term goals and personal or group interests that prevented political and social leaders from genuinely committing to finding a consensual and institutional solution.

On the other hand, it is important to note that, simultaneously with the two consecutive attempts to replace the Constitution, the existing Constitution has undergone frequent and significant reforms, both in its text and in its application and interpretation

9 See Zulueta-Fülscher, K., "How constitution-making fails and what we can learn from it" (2023). Discussion paper, Idea Internacional 2/2023.

10 Elkins, Z. & Hudson, A., "The constitutional referendum in historical perspective" (2019), at Landau D. & Lerner H. (eds.), *Comparative Constitution Making*. Edward Elgar Publishing.

11 Probably the processes most often reviewed as cases of successful democratic elaboration are those that gave rise to the Constitutions of Colombia (1991) and South Africa (1996).

12 In this paper we refer to the failure of the drafting process, not to the challenge of implementation and the aspiration to produce a text that effectively produces or consolidates a relevant social transformation. On this matter, it is suggested to review the South African constitutional evolution, Klug, H., "Constitution making and social transformation" (2019), in Landau D. & Lerner H. (eds.), *Comparative Constitution Making*. Edward Elgar Publishing.

13 See García, J. F., "‘Nuevo’ proceso constituyente chileno: ¿lecciones aprendidas?" (2023). IberlCONnect. January 20, 2023.

14 In addition, it is suggested to review O’Leary, B., "Making constitutions in deeply divided places: Maxims for constitutional advisors" (2019), en Landau D. & Lerner H. (eds.), *Comparative Constitution Making*. Edward Elgar Publishing.

15 See García, J. F., *op. cit.*

16 See Ginsburg, T. & Álvarez, I., *op. cit.*

17 It is suggested to review a comparative analysis of the proposed Regulations for the Chilean Constitutional Convention. See Granese, M., "Propuestas de Reglamento para la Convención Constitucional: encuentros y desencuentros" (2021), in *Punto de Referencia* 564, Centro de Estudios Públicos. April 2021.

Notable constitutional reforms include changes to the electoral system that replaced the binomial system¹⁹, the elimination of appointed and lifetime senators, the reduction of the presidential term to four years²⁰, and limits on legislative mandates. Recent reductions in quorum requirements for amending the former “constitutional organic laws” and “qualified quorum laws”, and for approving new constitutional reforms²¹ also represent substantive changes to the 1980 Constitution. Additionally, recent

interpretations and applications of the existing text have tacitly undermined its stability²².

This evidence indicates that, in recent years, the Chilean Constitution has become a fluid and unstable fundamental norm²³. This reality makes it much harder to reach a shared diagnosis of its deficiencies and the changes a new text should promote. Nonetheless, it also underscores the ongoing need for a substantive and comprehensive pact that is broadly valued and respected.



Imagen 9 (CI, 2021)

18 Zulueta-Fülscher, K., op. cit, p. 11.

19 Law No. 20,840 of 2015.

20 Law No. 20,050 of 2005.

21 Law No. 21,481 of 2022.

22 Examples of this are the use of the constitutional reform figure to approve the withdrawal of pension savings during the Covid19 pandemic (early withdrawal of savings that was prohibited by law), circumventing the rules of exclusive initiative in matters of spending and financial administration, or the recent Supreme Court ruling that imposed a solution for the health insurers' crisis with general effects.

23 Verdugo, Sergio “Constitutions as moving targets”, Published online by Cambridge University Press: 21 September 2023, Global Constitutionalism , Volume

BRIEF HISTORY OF CHILEAN CONSTITUTIONAL PROCESSES



Imagen 10 (Héctor Millar, s.f)

4.1. FIRST CHILEAN CONSTITUTIONAL PROCESS (2019-2022)

Agreement for Peace and a New Constitution (November 2019)

In response to the massive protests that erupted in October 2019, known as the “social outbreak,” political leaders from various sectors convened to find an institutional solution to a crisis that threatened to destabilize Chile’s constitutional order. Amid intense protests and one of the most violent and tumultuous weeks in the country’s history, representatives from a broad majority of political forces with Congressional representation reached a consensus to de-escalate the situation: they signed the Agreement for Peace and a New Constitution²⁴.

This agreement committed to peaceful conflict resolution and unequivocally condemned violence as a political tool, while establishing a procedure for drafting a new Constitution. The process included a referendum to decide whether to draft a new Constitution and, if affirmative, citizens would choose the type of body to draft it. This voting would be voluntary. A key procedural rule established by this agreement was that both the voting regulations and the constitutional provisions had to

be approved by a two-thirds vote of the drafting body. Additionally, the agreement provided for a final referendum where citizens could decide on the appropriateness of initiating a constitutional change process and their acceptance of the proposed text. Unlike the previous vote, this vote would be mandatory.

The agreement set out basic rules and fundamental steps for the constitutional path but delegated to a Technical Commission the task of drafting the constitutional reform that would enable the process and detail these generic procedural guidelines. This commission consisted of experts appointed by each of the participating political parties and produced the draft reform, which was then debated in Congress.

The Technical Commission’s proposal was introduced as a constitutional reform in Congress and approved by both houses with a broad majority. Subsequently, changes were made to allow the participation of independent representatives in the Constitutional Convention, establish reserved seats for indigenous representatives, and ensure gender parity in the drafting body.

²⁴ Available at https://www.bcn.cl/obtienearchivo?id=documentos/10221.1/76280/1/Acuerdo_por_la_Paz.pdf

Electoral Processes (October 2020 to May 2021

In the referendum held on October 25, 2020—under voluntary voting rules—Chilean citizens overwhelmingly voted in favor of drafting a new Constitution. This option received 78% of the votes. Additionally, 79% of the votes approved that the new Constitution be drafted by a Constitutional Convention composed entirely of elected members rather than a mixed body including current legislators. Thus, the type of body responsible for drafting the proposed text was determined by citizen choice rather than legislative decision.

Members of the Constitutional Convention were elected in May 2021. The composition was diverse, including broad representation from independents, indigenous members, and gender parity among representatives. It soon became evident that right-wing and center-right forces had failed to secure the one-third of representatives needed to veto provisions, placing them in a weak negotiating position²⁵. Consequently, left-wing and center-left forces held the necessary votes to draft the constitutional text, despite the practical complexities imposed by the large number of independent representatives in reaching the required two-thirds agreements.



Imagen 11 (Héctor Millar, s.f)

²⁵ Different reasons for the design of the constitutional process explain this result, but also the low popularity of President Sebastián Piñera at that time; his opposition to a highly popular bill that allowed citizens to make withdrawals from pension fund savings; and the association of candidates from that sector with the “Against” option in the referendum that initiated the process, an option that was defeated by a wide margin.

Drafting the New Constitution (July 2021 to June 2022)

For approximately a year, the Convention worked on drafting the new constitutional proposal. This process was marked by intense debates over the content of the Constitution and the procedure adopted by the Convention. It was inaugurated on July 4, 2021, to focus on the drafting, voting, and implementation of its Internal Rules of Procedure²⁶, which took about three of the total nine months allocated for the Convention's work.

The first votes on constitutional provisions by the full Convention occurred in February 2022, after more than six months of work. On March 22, 2022, a decision was made to extend the Convention's operational period from nine months to a year, as initially planned in the rules of procedure. By the end of April, the voting on constitutional proposals was completed, and in early May, the process of harmonization and systematization began, culminating in the final approval on May 14, following just over ten months of operation.

Exit Referendum (September 2022)

In September 2022, a draft of the new constitutional text was presented to the public²⁷. This document, with a clear progressive focus on guaranteeing social rights, proposed a series of structural and profound changes to Chilean society and the state. Consequently, along with the characteristics of the drafting process itself, the text faced strong criticism from sectors that considered it radical and detached from Chile's constitutional and institutional history.

The exit referendum resulted in a resounding rejection of the new constitutional proposal. In an unprecedented election—conducted under automatic registration and mandatory voting rules—approximately 62% of voters rejected the document. This outcome left Chile in a state of constitutional uncertainty. Since many opponents of the proposed text campaigned on the need to continue the constitutional process in the event of a rejection, new agreements had to be sought to advance in drafting another proposal acceptable to the majority of Chileans.

²⁶ Available at: <https://www.chileconvencion.cl/wp-content/uploads/2021/10/Reglamento-definitivo-versio%CC%81n-para-publicar.pdf>. In addition to this instrument, the Convention drafted other regulations governing such matters as the participatory, financial and other mechanisms of the drafting body.

²⁷ Available at: <https://www.chileconvencion.cl/wp-content/uploads/2022/08/Texto-CPR-2022-entregado-al-Pdte-y-publicado-en-la-web-el-4-de-julio.pdf>

4.2. SECOND CHILEAN CONSTITUTIONAL PROCESS (2022-2023)

Design (December 2022)

Following the rejection of the first proposal, political and social leaders negotiated the initiation of a new constitutional attempt. On December 12, 2022, the presidents of both chambers of Congress announced the “Agreement for Chile”²⁸, a document signed by representatives of nearly all parties with parliamentary representation. This agreement outlined the path for the second constitutional change process.

The Agreement for Chile included 12 constitutional bases that would serve as the conceptual and legal framework for the drafting bodies. Key points included the recognition of Chile as a “social and democratic state of law,” the presidential nature of the Chilean political system, and a bicameral Congress, along with the provision of social rights through state and private institutions.

Additionally, the document established three bodies for the process: a Constitutional Council made up of 50 elected representatives; an Expert Commission consisting of 24 experts appointed proportionally by both

chambers of Congress; and a Technical Committee on Admissibility, composed of 14 jurists responsible for ensuring that the provisions presented for debate conformed to the previously agreed substantive bases. Similar to the previous process, it included a ratification referendum with mandatory voting, but the total duration of this process would be substantially shorter: five months from the installation of the Constitutional Council.

The provisions drafting process included an initial stage by the Expert Commission, which would prepare a preliminary draft to begin the work of the elected representatives. Subsequently, the Constitutional Council would approve amendments and reforms to the preliminary draft, with a 3/5 majority required. Then, there was a new stage for both the Expert Commission to formulate corrections to the draft and the Council to finalize it, concluding with a final vote in the Council. Certain matters that did not achieve broad consensus between the two bodies or were not finally rejected by 2/3 of the Council members would be referred to a Mixed Commission, consisting of both councilors and commissioners, to resolve these critical issues.



Imagen 12 (Redactado por Daniela Toro, 14 de Diciembre de 2022)

²⁸ Available at: https://www.bcn.cl/procesoconstitucional/detalle_cronograma.html?id=f_acuerdo-por-chile

Election of Representatives (April 2023)

In contrast to the previous process, this one opted for a smaller body: it consisted of 50 representatives, one-third of the members of the Constitutional Convention. The selection rules were the same as those ordinarily applied to ordinary senatorial elections, and, unlike the first process, independent candidates were not allowed to run on their own lists. A correction mechanism was included in the allocation of seats to ensure parity within the body and a procedure was established to include reserved seats for indigenous peoples.

Regarding the participation of indigenous peoples, the rules changed substantially compared to the previous experience: the number of seats was defined as a proportion of those who voted for representatives of indigenous

peoples through a separate ballot. In the first process, however, seats were determined proportionally to the total number of identified indigenous people from the last census. As a result of these differences, the Constitutional Convention had a total of 17 out of 155 representatives from indigenous peoples (over 10% of the total), while the Constitutional Council included only one (2% of the body).

The election result was an overwhelming victory for right-wing and center-right forces. The Republican Party (right-wing party) secured 22 seats, and Chile Vamos (center-right party) obtained 11, meaning once again a single political sector had sufficient votes to approve a text without the input of the opposing sector. Although the Expert Commission was more balanced, the Constitutional Council, with two-thirds of its votes, could impose a final draft.



Imagen 13 (¿Que constituciones marcaron la historia en Chile, 2022)

Work of the Drafting Bodies (January to October 2023)

One of the most positively evaluated stages in both Chilean constitutional processes was the drafting of the preliminary constitutional draft by the Expert Commission . This body, consisting of 12 center-left commissioners and 12 center-right commissioners, produced a unanimously approved text that was sent to the Constitutional Council. Issues where there was no consensus on the appropriateness of constitutionalization were excluded from the draft and left for democratic debate in Congress. As a result, the text was recognized for its technical quality, as it combined deep transformations in certain areas with continuity and tradition in others. To this day, some aspects of the text are referenced in specific constitutional change debates.

However, in this second stage, the imbalance of forces in the elected body created dynamics similar to the first process. Although the work was more sober and less strident, the final draft text received only the votes of right-wing and center-right councilors. Similarly, many exclusionary and excessive proposals that muddied the environment were presented throughout the process. The result was a text less innovative and revolutionary than the first, with greater elements of continuity but that broadly enshrined a clear political and economic vision at the constitutional level, similar to the first draft's shortcomings. The draft Constitution faced criticism on various issues, including how it addressed state rights and duties, and opponents argued that the “social and democratic state of law” was diluted throughout the text.

29 Un dato revelador consiste en que, en las últimas encuestas de opinión previas a la elección de consejeros constitucionales, donde se consultó sobre la percepción del segundo proceso constitucional chileno, la percepción positiva superaba a la negativa. Una vez electo el consejo constitucional comenzó un declive en la aprobación ciudadana que nunca se revirtió. Ver diapositiva 15 de la presentación de Cadem de agosto de 2023, disponible en: <https://cadem.cl/wp-content/uploads/2023/09/Track-PP-503-Agosto-S5-VF.pdf>

Final Referendum (December 2023)

Political parties aligned similarly to the previous process. The “For” option was supported by some centrist parties (Democratic Party and Amarillos por Chile), center-right parties (Chile Vamos), and right-wing parties (Republican Party). Conversely, the “Against” option was backed by the ruling coalition of left-wing and center-left parties,

including the Christian Democratic Party.

For the second time, and unprecedentedly in comparative constitutional history, citizens rejected this draft constitutional text. The “Against” option received around 56% of the votes, concluding a five-year constitutional debate process in Chile. Consequently, the 1980 Constitution remained fully in force, with limited prospects for resuming substantive debate on its content in the short term.



Imagen 14 (Por Maximiliano Vega, 25 de Agosto de 2023)

CHAPTER I CONSTITUTIONS AND CONSENSUS:



Imagen 15 (Héctor Millar, s.f)

First Lesson: What Spirit Should Inspire a Process? The Focus Should Be on Seeking Common Ground and Points of Convergence

The Chilean constitutional process began in a context of polarization and political confrontation but also had its foundational milestone in a broad political agreement, one of the high points in recent Chilean political history. Thus, there was anticipation and uncertainty regarding the spirit that would accompany this constitutional discussion cycle: whether it would be divisive or collaborative.



Imagen 16 (procesoconsti23, sf)

WHAT DID CHILE DO?

As mentioned in the previous chapter, the electoral result of the first Chilean constitutional process gave a broad majority to left-wing and center-left forces. Although these were composed of a wide diversity of militants and independents with heterogeneous agendas, which made the negotiation process difficult among them, it allowed the exclusion of right-wing and center-right representatives in the drafting process. This was precisely what happened.

The resulting text was, therefore, a compilation of traditional leftist causes and the new progressivism represented by independent constituents. Additionally, there was a manifest distrust in the role that existing institutions, especially Congress, could play. Consequently, the text regulated aspects in detail, excluding them from ordinary political debate despite their debatable constitutional nature.

It is not surprising that the stance on the draft constitutional text was strongly divided in ideological terms. A few months before the referendum, the Pulso Ciudadano survey (June 2022) from Activa Research revealed that 73% of those identifying as “left-wing” were predisposed to approve, while 82% of those identifying as “right-wing” indicated they would reject it. Among those identifying as “center” or “politically neutral,” rejection prevailed, reaching 40% and 44%, respectively³⁰. These figures, along with the mandatory nature of the vote, already indicated the resounding rejection of the constitutional proposal, even though the process had begun with a very favorable pronouncement by the Chilean public.

The second constitutional process involved two institutions. The Expert Committee, balanced by representatives from different political sectors, produced a preliminary draft unanimously approved by its members,

including representatives from the Communist Party on the left-wing and the Republican Party on the right-wing. Unlike the initial process, this text left divisive areas outside constitutional regulation and included a balanced organic and dogmatic design. Although it was not the ideal text for any sector, it did not exclude any political forces, allowing for broad consensus in its approval.

However, subsequently, the Constitutional Council was established. Composed of representatives elected by the citizens, this time a broad majority was given to right-wing and center-right forces. This, once again, allowed them to draft constitutional texts without the input of the opposing sector. The initial stages of the Constitutional Council’s work again showed the inclusion of controversial constitutional provisions directed at a single political sector. Although many of these proposals were discarded during the work of these bodies, the final text was drafted without the participation of minority political sectors and included provisions that hindered the agreement of a broad left-wing constituency with the proposed text.

This resulted in a re-emergence of strong ideological voting tendencies in the surveys. In this second electoral process, 86% of left-leaning respondents expressed their intention to vote “against,” while 70% of right-leaning respondents voted “for” the proposal. Among those identifying with the “center” political position, 38% were against, and 47% of those without a political position were also against³¹. As seen, although the text was more sober and less disruptive than its predecessor, it generated similar reactions to the first process in terms of the predominantly ideological positioning of voters, reflecting a partisan text. This led to a second citizen vote that again expressed opposition to implementing the sought constitutional change.

30 Survey available at: <https://chile.activasite.com/estudios/pulso-ciudadano-54/>

31 Survey available at: <https://elpais.com/chile/2023-12-15/que-dicen-las-encuestas-del-plebiscito-en-chile-ventaja-del-en-contra-con-tendencia-al-alza-del-a-favor.html>

WHAT DID WE LEARN?

Anyone Seeking a Tailored Text Is Likely to Fail

Perhaps the main lesson from the five years of constitutional debate in Chile is that no procedural precautions can correct a divisive and partisan process or text. Similarly, provisions considered as “popular” that could sway voters in favor of the proposed text were unable to make a difference in electoral terms. When evaluating Chile’s constitutional processes and specific procedural debates, this aspect should always be kept in mind, as it largely explains why Chile was unable to replace its current Constitution despite 82% of its citizens expressing support for a new democratic text.

In both processes, public trust, expressed through a majority vote for one political sector, was mistakenly interpreted as a mandate to exclude those outside this sector. Specific and essentially circumstantial votes were read, in both cases, as expressions of the permanent and stable sentiment of the citizenry. The Chilean experience shows that, contrary to repeated assumptions, the ideas of both political sectors in Chile have significant roots, and their exclusion from drafting the

fundamental norm also implies the exclusion of a large part of the country. Moreover, it seems that citizens were not as polarized and distant from each other as their representatives were, and there was no intention among the majority of voters for the constitutional deliberation process and its outcome to become partisan.

Another lesson from the processes is that specific, highly popular content did not change the majority’s judgment on the proposed text. For instance, while the first process proposed the strong enshrinement and guarantee of social rights as a factor that could mobilize voters to approve it, the second process included provisions such as tax exemptions for property owners or other appeals to patriotic or nationalist sentiments. In neither case did these contents reverse the negative trend accompanying the processes, which extended to the constitutional text.

Finally, the Chilean experience also shows that political balance in the composition of the drafting body makes collaboration and agreements likely, while dominance by a homogeneous sector strongly incentivizes the exclusion of others. In other words, those with



Imagen 17 (Caballero, 2023)

30 Encuesta disponible en: <https://chile.activasite.com/estudios/pulso-ciudadano-54/>

31 Encuesta disponible en: <https://elpais.com/chile/2023-12-15/que-dicen-las-encuestas-del-plebiscito-en-chile-ventaja-del-en-contra-con-tendencia-al-alza-del-a-favor.html>

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Finally, the Chilean experience also shows that political balance in the composition of the drafting body makes collaboration and agreements likely, while dominance by a homogeneous sector strongly incentivizes the exclusion of others. In other words, those with significant power tend to use it and exclude their rivals. Thus, the Expert Committee, composed of all political forces and with a high ideological dispersion, achieved what seemed impossible: reaching a unanimous agreement. This was achieved through reciprocal concessions and particularly by producing a limited text where significant matters were not settled at the constitutional level. Naturally, the

work of this institution and the text it produced was the moment when the highest number of people inclined to approve in the final referendum, generating greater public trust³².

In summary, although it is normal and natural for certain matters of ordinary politics to be settled by majority rules, the process of drafting a constitutional text must meet a higher standard. For the legitimacy of constitutional change, the criterion is to meet quorum requirements, where it is advisable to set thresholds higher than a simple majority. However, to maximize the probability of citizen and political validation and for the new Constitution to endure over time and strengthen democratic institutions, the standard must be higher and aim at inclusivity.

While it may not be prudent to draw parallels between the two processes, much less between the two proposals, it is clear that in both constitutional paths, political sectors sought a text that suited the drafters, not the opposing political groups representing significant segments of society. Voters—in both referendums—refused to grant the representatives they had chosen a fundamental charter tailored to their preferences.

The Chilean experience thus highlights the importance of adopting a genuine approach to seeking common ground that constitutes a consensual constitutional text. If this condition is not met, the chances of failure increase, and no procedural designs or substantive limits can ensure a better outcome.

32 See slide 15 of Cadem's August 2023 presentation, available at: <https://cadem.cl/wp-content/uploads/2023/09/Track-PP-503-Agosto-S5-VF.pdf>.



Imagen 18 (Héctor Millar, s.f)

CHAPTER II CONSTITUTIONS AND ELECTIONS:



Imagen 19 (n.d., s.l)

A. SECOND LESSON: IT MAY BE NECESSARY TO HAVE SPECIALLY ELECTED REPRESENTATIVES FOR THIS PURPOSE, BUT IT IS CONVENIENT TO SEEK BALANCE

WHAT DID CHILE DO?

At the time of negotiating the Chilean constitutional path, the level of approval for Congress had plummeted to 17%, making it the institution with the lowest public support among those consulted³³. Additionally, Latin American constitutionalism ideas about the need for a “Constituent Assembly” had permeated the country’s left-wing elites, and the negotiating position of the more conservative groups was weakened. Thus, a significant portion of Chile’s left and right forces, represented in Congress, agreed on a constitutional path that involved consulting the citizens on which body should carry out the process.

The first alternative was a Constitutional Convention, elected entirely by the citizens, and the second was a Mixed Commission, made up equally of elected representatives and sitting parliamentarians. By a wide majority, the citizens chose a fully elected Constitutional Convention, to which Congress would later add certain elements, including parity,

reserved seats for representatives of indigenous peoples, and equal participation for independent candidates without party sponsorship.

After the rejection of the Constitution proposal from this first process, the political forces agreed on a second procedure, where Congress decided all procedural aspects. A mixed design was chosen, with participation from an elected body and another composed of appointed experts; each party appointed experts in proportion to its representation in Congress.

The elected body, called the Constitutional Council, consisted of 50 members, elected under the same rules as senatorial elections, though this time under mandatory voting rules. The appointed body, composed of 24 experts, was proportionally represented by the various political parties in Congress. Given the political balances at the time of its appointment, it was “evenly matched” in terms of the number of left-wing and right-wing experts in the body.

³³ Encuesta Plaza Pública - Cadem, second week of November 2019. Available at: <https://media.elmostrador.cl/2019/11/Track-PP-305-Noviembre-S2-VF.pdf>

WHAT DID WE LEARN?

It's Important to Seek Dialogue Between Existing and New Institutions

This decision should be taken pragmatically, avoiding abstract constitutional debates that limit institutional design possibilities. The contexts in which these processes begin can vary, and sometimes existing institutions—the Executive and Legislative branches—might have the tools, legitimacy, and public respect to carry out a constitutional replacement process. In this sense, ordinary institutions of a country can be legitimate and efficient drafters of a constitutional text, even in contexts of social and political instability, as seen in Chile³⁴.

However, many of these processes may originate under conditions similar to those in Chile, necessitating the election of representatives solely for this purpose to maximize the legitimacy of the text they produce and to ensure social peace and institutional stability. There are also fundamental reasons to avoid giving a central role to incumbents, as they would be drafting their own rules, leading to conflicts of interest. Nevertheless, it's important to remember that selecting people to draft a new Constitution does not guarantee that the final product will satisfy the public. In Chile, this was not the case.

Thus, it is crucial to balance the necessary legitimacy of origin with certain levels of

predictability and practical sense, maximizing the chances that as few actors as possible are excluded from the process while ensuring realistic implementation. The drafters should have some level of connection with the country's political system, its institutions, and political parties. In the first Chilean process, institutions avoided involvement, distancing themselves from both the most critical decision regarding the methodology for constitutional change³⁵ and the integration of the drafting body. This excessive distance created content at various stages of the process that was not perceived as legitimate by existing institutions and created tension³⁶.

A constitutional replacement process inherently involves a high level of instability, and it is advisable for some elements of procedural design to provide certainty and predictability. Thus, a process that has no substantive limits, where it is proposed to write a Constitution on a "blank slate", as was the case in Chile, could well provide greater certainty in the composition of the drafting body, for example, by giving a role to the National Congress or another ordinary institution, so that the new and old institutions complement each other instead of conflicting.

This could mitigate perceived risks for skeptical groups about the constitutional path. Conversely, if the drafting body is fully

34 Larraín, C., Negretto, G. & Voigt, S., "How not to write a constitution: Lessons from Chile" (2023). Public Choice 194, 233-247.

35 Verdugo, S. & García Huidobro, P., op. cit., p. 10.

36 The most obvious example was the proposal to abolish the Senate, which distanced a good part of the professional politicians from the work of the Constitutional Convention.

elected and disconnected from ordinary politics, it seems reasonable to include safeguards in other dimensions to ensure some level of predictability in the outcome.

However, Chilean experience shows that while procedural definitions about who integrates the drafting body, what rules apply to it, and what procedures are defined for approving provisions are important, none of this replaces the need for substantial political agreements, whether explicit or implicit. These agreements extend beyond consensus among drafters, elected or appointed, to include the groups they represent, who

will typically be responsible for implementing and enforcing the discussed text³⁷.

In summary, as the previous chapter emphasized the importance of seeking reciprocal concessions among ideological sectors to avoid excluding large societal groups, this chapter highlights the relevance of generating agreements between the “old and new order.” Existing institutions must play a role, reflecting a country’s institutional tradition and history, but the spirit of change and reform must also be present, as represented by elected representatives in that particular context. It is about finding a balance between immobility and rupture, what we call constitutional evolution.



Imagen 20 (n.d., s.f)

37 Soto, S. (2023). Two drafts, three referendums, and four lessons on constitution-making in Chile. ConstitutionNet. Recuperado de <https://constitutionnet.org/news/voices/two-drafts-three-referendums-and-four-lessons-constitution-making-chile>.

Political and Technical Experience Will Be Fundamental

It is tempting in a constitutional replacement process to create a break from those representing the previous regime. However, it is important to strengthen the role of professional politicians with experience in high-level political negotiations and the role of political parties.

Therefore, it is advisable to avoid excessive disqualifications or incompatibilities that exclude individuals with significant political experience, current legislators, party presidents, etc., from being part of the drafting body³⁸. It is important that both remuneration and restrictions do not act as deterrents for reputable politicians, making the drafting body composed of people without political experience. This occurred in Chilean constitutional experiences and hindered the formation of broad agreements on complex matters.

Similarly, it seems prudent to channel the experts' role more intensely than merely as advisors to elected officials. In the absence of experienced political representatives, the Expert Committee became the only successful negotiation and deliberation experience in Chile's constitutional processes. Although factors like political balance and less public exposure explain this success, the role of the Expert Committee in the second Chilean process demonstrates that excluding them from the constitutional design is not prudent³⁹.

Avoid Opportunistic Use of the Drafting Role

Any elected position generates incentives for misuse to position candidates for future elections. It is important to include restrictions on immediate re-election for those elected to draft a constitutional text, making it difficult for unsuitable candidates or those without a clear vision of what a Constitution should be. Since constitutional change processes require a long-term perspective, it is crucial that constitutional drafters do not perform their task fearing the short-term electoral consequences of their votes, agreements, or transactions.

However, overly extensive restrictions can have negative effects and discourage experienced politicians from participating in the constitutional change process. If serving on the drafting body leads to medium or long-term political exclusion, only candidates outside ordinary politics, without sufficient political experience or capacities for the challenge, may step forward, leading to a tendency to over-regulate constitutionally and leave few aspects for legislative development⁴⁰.

38 Also relevant in this aspect are remunerations or per diems, excessively long restrictions to run for other public positions, very demanding standards of exclusive dedication, excessively large bodies where the relevance of each elected representative is lower, among others.

39 See García, J. F., *op. cit.*, p. 2.

40 Larraín, C., Negretto, G. & Voigt, S., *op. cit.*

B. THIRD LESSON: HOW TO SELECT REPRESENTATIVES? WITH RULES THAT ENCOURAGE PREDICTABILITY OF THE RESULT AND WITHOUT MARGINALIZING POLITICAL PARTIES

WHAT DID CHILE DO?

Both Chilean constitutional processes involved electing representatives to draft a constitutional text, but there were significant differences in electoral details.

In the first constitutional process, a single body was tasked with drafting, and all its members were elected by the citizens. It was based on the Chilean Chamber of Deputies and had the same number of representatives, 155. The election was conducted under similar electoral rules but with material changes.

Firstly, voting was voluntary, and electoral lists could consist entirely of independent candidates. Under Chilean regulations for electing deputies, independent candidates must compete against party lists, making it very difficult to secure a seat. This change led to 48 constitutional convention members running as independents, plus 40 elected from party lists but who were not party members. In total, 64% of the drafting body had no party affiliation⁴¹.

Secondly, the body had to be gender-balanced, meaning candidate lists had to include an equal number of men and women, with adjustments made afterward to ensure final gender parity. If the quota was not met, adjustments were made ex post to integrate the underrepresented gender. In Chilean deputy elections, only rules

preventing men or women from representing less than 40% of candidates in each list exist.

Finally, within the Convention, there were seven representatives of the Mapuche people, two Aymara, and one representative each from the Diaguita, Atacameño, Quechua, Rapa Nui, Kawashkar, Yagán, and Colla peoples. These seats were allocated within the total of 155 members, requiring a reduction in the number of convention members elected from most Chilean electoral districts.

In the second Chilean constitutional process, there was a general consensus to correct aspects of the first process and address identified shortcomings. Thus, this procedure established a smaller body, mimicking the Senate's structure, with 50 representatives elected from larger districts and fewer seats compared to the previous process. Additionally, the Expert Committee, whose members were politically appointed, was created.

For the Constitutional Council's composition, independent candidate lists were not considered, so all elected representatives competed under party affiliation. The body remained gender-balanced, with similar gender adjustment rules as the first process. Finally, in this process, only one representative of the Mapuche people, Mr. Alihuén Antileo, was elected.

⁴¹ See: <https://elpais.com/internacional/2021-05-18/los-independientes-controlaran-el-64-de-la-convencion-constitucional-en-chile.html>

WHAT DID WE LEARN?

Don't Improvise

As previously mentioned, there are multiple reasons why a country might choose to advance a constitutional drafting process through a specially elected body. A total focus on such a body tends to generate a perception of greater instability. The election of members of a body that drafts a constitutional text autonomously, which is not subject to a referendum, creates a high level of uncertainty. In contrast, if this drafting is done in conjunction with another appointed body (as in Chile's second process) and the text will be subjected to a referendum, this uncertainty is mitigated.

Thus, the greater the instability generated by the electoral process, influenced by the importance of the body in the process, the more important it is to incorporate elements that provide predictability. It is not advisable to improvise regarding electoral rules. Instead, replicating the structure of an existing body (typically the Congress is a good example) allows political parties and citizens to know

what to expect. It also reduces perceived risks for relevant actors, making them more likely to collaborate and get involved from the outset.

Chile's case illustrates that it's not enough to imitate an existing body's structure if other material rules are altered. The introduction of independent lists in Chile's constitutional process initially appeared as a symbolic gesture to increase citizen support and legitimacy. However, during the electoral process, it became a crucial factor in explaining the body's composition. Many analysts argue that this innovation contributed to the failure of the first process⁴².

Finally, not innovating alone does not guarantee that the electoral process will be predictable. The second Chilean process did not significantly alter the rules for electing representatives and retreated from involving independents. However, it still yielded very different results from the Senate election held under the same electoral system just over a year earlier.

42 Ginsburg, T. & Álvarez, I., op. cit. In the same vein, Verdugo, S. & García Huidobro, P., op. cit., pp. 9-10.

Ensure Political Parties Are Represented

It is crucial that the main actors in the political system are involved in designing the rules and procedures. Even if, as was the case in Chile, a constitutional process emerges in a context of high discredit and disaffection with existing political parties, this does not justify their exclusion. These parties will be the ones who will have to adhere to and implement the rules defined by the new text. If they are not involved in setting the rules of the game, it is unlikely that they will adhere to them, especially if they perceive them as unjust or harmful to their interests⁴³. Moreover, comparative experience shows that processes aiming to exclude parties often fail⁴⁴.

Active participation by political parties can also contribute to a better proposal. Parties have a broad view of society, which helps ensure that the constitutional negotiation does not proceed without coherence in the final result. Political parties are more likely to show deference to significant political groups that may have been underrepresented electorally but still represent cultural sectors that should not be completely excluded from constitutional deliberation, as this risks exacerbating tensions over what is at stake⁴⁵.

Additionally, political parties understand the functioning of state bodies, the difficulties of governing and legislating, and the

tensions involved in defining institutional checks and balances. Their representatives are also usually well-trained in complex negotiations under high public expectations and time constraints, a scenario that independents or experts might not be accustomed to⁴⁶.

A significant role for political parties has an added advantage: it avoids purely identity-based or single-issue representation. The first Chilean process saw a high involvement of independents who campaigned as “activists” on specific issues. This led to negotiations where various groups, with little interest in the final document, accepted excessive provisions on certain topics in exchange for including maximalist texts in their areas of interest⁴⁷. This resulted in an incoherent and maximalist draft, which, in Chile’s experience, distanced and contributed to public rejection.

It is worth noting that this advice was followed closely during the second Chilean constitutional process, and yet it still failed. This highlights that neither this nor other lessons guarantee the success of the process. Even bodies dominated by political parties can fail to achieve substantial and lasting agreements on a pact for the future. This underscores the importance of political party representation in the drafting body, which, in the second Chilean process, was a responsibility that the leading party, the young and newly established Republican Party, was unable to fulfill.

43 Larraín, C., Negretto, G. & Voigt, S., op. cit., p. 241.

44 Ginsburg, T. & Álvarez, I., op. cit., p. 9.

45 Ibid., p. 2.

46 Ibid.

47 Larraín, C., Negretto, G. & Voigt, S., ibid.

Separate the Election of Constitutional Representatives from Other Electoral Processes

Ordinary electoral processes compel political parties to prioritize the clarity of their project over their responsibility for the general welfare, which is crucial for the success of drafting a new Constitution. The closer the upcoming election, the more likely representatives will align with the same forces as those in ordinary elections, avoiding concessions and commitments, which complicates an already complex negotiation process.

In the first Chilean constitutional process, the initial phase of the work—crucial for fostering dialogue and understanding—coincided with the presidential and parliamentary election campaigns. Thus, it is not surprising that a conflict-driven attitude predominated, emphasizing differences over common ground and increasing polarization. After the presidential election, President Gabriel Boric sought to promote approaches towards a less ideologized text, but it was too late. There was no room to reverse the path of disagreement taken over nearly nine months.



Imagen 21 (Izquierdo, 2022)

C. FOURTH LESSON: EXIT REFERENDUMS ARE USEFUL SAFETY VALVES, EVEN IN PROCESSES WITH ELECTED REPRESENTATIVES

WHAT DID CHILE DO?

Doctrinally and in comparative experience, it has been argued that electing representatives is sufficient to provide legitimacy to a constitutional process. In such cases, a referendum to ratify the final result is deemed unnecessary.

However, in Chile, it was decided that both processes would culminate in a ratifying or “exit” referendum. In the first constitutional process, an initial referendum was held, asking the public whether they agreed to completely replace the Constitution and

to choose the type of body that would be in charge. This began with just over 78% of “For” votes. Once this stage was completed, a referendum was held to ratify the final text, where the “Against” option obtained almost 62% of the votes⁴⁸.

The second attempt also had a final ratifying referendum, where again the alternative against the document prevailed. In this case, the “Against” option received just over 55% of the votes.



Imagen 22 (n.d, s.f)

48 As noted above, under the rules of voluntary voting, while the final referendum was under the rules of compulsory voting.

WHAT DID WE LEARN?

Choosing Representatives to Draft a Text Does Not Ensure a Final Result Acceptable to the Citizens

Firstly, if the constitutional change process does not include participatory stages, for example, if it is entirely managed by the National Congress or entrusted to individuals appointed by existing institutions, it is advisable to include a final referendum. Otherwise, there is a risk that the new Constitution may be perceived as merely a reform and therefore not fulfill its purpose.

Some argue that in cases where representatives are elected solely to draft a constitutional text, citizen ratification loses its purpose. However, the Chilean experience shows that final referendums are indeed a good idea, especially in a context of social upheaval. When there is a prior social or political

crisis, it is expected that the constitutional drafting process will reflect, to some extent, that conflict. If this is the case, merely electing representatives or having high quorums does not ensure a satisfactory outcome.

The Chilean case clearly demonstrates that society went through different stages during the nearly two years of constitutional work. The overwhelming initial support for starting the process and the election of a large majority of leftist convention members indicated an initial climate favorable to change. This environment evolved over time: the subsequent parliamentary election tilted towards right-wing representatives. Ultimately, in the exit referendum, a wide majority rejected an excessively reformist text.

In the second process, a similar pattern occurred: a more conservative and critical



Imagen 23 (Héctor Millar, s,f)

spirit towards the ruling coalition created a body dominated by right-wing and center-right forces. However, by the end of its work, it became clear that this was not the prevailing sentiment at the time of the referendum on the proposed constitutional text.

It is normal for a constitutional change process to originate in a context of social and political crisis. Additionally, as in Chile's case, it is perfectly expected that the election of representatives may favor candidates seeking to break from the status quo and challenge, at least partially, the existing institutions. Given this possibility, it is prudent to preserve citizens' right to reconsider or reevaluate the concrete and practical outcome of such a reformist spirit⁴⁹. If, after the process is completed, this spirit remains and the representatives' work was faithful to their mandate, a favorable outcome should be expected. However, if, as in Chile, there is disillusionment with a potentially revolutionary spirit, there must be a right for citizens to retract⁵⁰. This principle can also apply inversely, to processes not initially aimed at replacing a constitutional text but exhibiting the same spirit,

allowing citizens to accompany and endorse from the initial idea to the practical outcome.

Moreover, the existence of final referendums raises the standard by which elected representatives must work. It will not be sufficient to claim inclusivity and unity, as occurred in the two Chilean referendum campaigns; this spirit must be evident throughout the drafting process. Final ratifications demand that both the content and the process be exemplary and gain support. While final referendums do not guarantee satisfactory results and can also generate unwanted effects such as distortions in negotiations, the Chilean experiences seem to support their inclusion.

It will be important, in the presence of final referendums, to give due importance to citizen dissemination and participation. These votes can help prevent drafting a proposal that does not generate public support and lend legitimacy to the text. Conversely, a process with low participation, where citizens do not vote, can have the opposite effect. In such cases, even a consensual and technically high-quality text could be negatively affected by citizens' marginalization in its ratification.

49 For Roberto Gargarella "the 'exit referendums' are a terrible tool". He points out that they are unable to fulfill their main promise, which is to provide democratic legitimacy to a Convention that does not have it or has lost it. On the other hand, and what is much worse, "referendums" of this type end up - rather than solving one problem - creating another major one: the citizenry ends up using that solitary expressive opportunity it has, not to talk about the constitution (since, reasonably, it recognizes that it cannot elaborate or say anything sensible about it), but to evaluate the convening authority or entity (typically, the president or prime minister of the day). The consultation then becomes something different: a way of rewarding or punishing the government of the day". Gargarella, R., "The 'exit referendum' as a constituent error" (2022). IACL-AIDC, blog, September 6, 2022. Rodrigo Kaufmann, Luis Eugenio García-Huidobro and Sergio Verdugo, among others, have raised responses to Gargarella's arguments for their relevance in terms of democratic legitimacy and to align the public debate with the preferences of the average voter, and that empirical evidence would show that in most cases they have not become obstacles to the approval of new constitutions.

50 Elster, J., "Forces and mechanisms in the constitution-making process" (1995). *Duke Law Journal* 45, 364-396. P. 383.

CHAPTER II CONSTITUTIONS AND PROCESSES



Imagen 24 (María Cristina Romero, 2023)

A. FIFTH LESSON: IT IS ADVISABLE TO HAVE OPERATING REGULATIONS PREVIOUSLY DEFINED BY A BODY OTHER THAN THE DRAFTING BODY

WHAT DID CHILE DO?

Chile took two very different approaches in its processes. For the first, both the agreement and the constitutional reform enabling the constitutional path established that it would be the Constitutional Convention itself that would discuss and establish its working rules. The only content restrictions were that constitutional provisions and voting regulations had to be approved by a two-thirds quorum.

Thus, on July 4, the Constitutional Convention was installed. One of the first decisions made was to create three committees: the Regulation Committee, the Ethics Committee, and the Budget Committee. For just over three of the total twelve months, the Convention focused on discussing and voting on these working rules, which were finally dispatched on October 13. Only on October 18

did the thematic committees responsible for drafting the constitutional proposal hold their first sessions. Despite not addressing constitutional content during those initial three months, the debate over the rules generated the first frictions, cross-accusations, and tensions within the Constitutional Convention⁵¹.

In contrast, and because the second process was a substantially shorter one, it was determined that the regulations would be drafted jointly by the secretariats of the Senate and the Chamber of Deputies. This would be discussed and approved by a bicameral committee composed of an equal number of deputies and senators. The drafting of this operating regulation was free of controversy. In fact, it was voted on, approved, and applied without major controversy; and there were no significant disputes regarding its interpretation.



Imagen 25 (Comisión Experta, n.d)

51 Soto, S. (2022). Para evitar las borrascas y las situaciones violentas y desagradables: El procedimiento para aprobar las normas constitucionales en la convención. In D. Lovera Parmo (Ed.), *Anuario de Derecho Público 2022* (pp. 61-84). Ediciones Universidad Diego Portales.

WHAT DID WE LEARN?

It is Advisable for the Drafting Body to Have a Regulation in Place Before its Installation

The Chilean experience shows that it is not advisable to entrust the drafting body with the discussion and creation of its own regulations. First, because the members have vested interests and there are perverse incentives to design working rules that benefit those in control of the body, rather than focusing on the success of the text. Despite the fact that there were material limits on the content of the regulations in the first Chilean process (related to voting quorums), this could still have affected the voting flow designed by the Convention, which has been the subject of criticism and analysis⁵².

Secondly, having a regulation at the start of the constitutional drafting allows public attention to focus on substantive debates and content, rather than procedural matters that can be confusing and do not contribute to forming an informed opinion among the public.

At the same time, removing the debate over the rules of the game helps avoid generating frictions and conflicts before discussing the substantive issues. In the Chilean case, the drafting of the regulations was highly divisive and controversial. Rules were discussed that threatened to challenge the fundamental rule of the process: the two-thirds approval of constitutional provisions (for example, when the inclusion of decisive referendums on matters that did not reach that quorum was proposed). Thus, by the time the content debate began, factions, conflicts, and reciprocal accusations had already emerged. The climate for tackling difficult negotiations was no longer optimal.

Another positive aspect of having regulations in place is that it provides predictability and allows all interested actors to integrate effectively. Knowing in advance what types of participatory instances will exist, when contents will be deliberated and voted on, and when there will be a harmonization process enables civil society to get involved, improving the final outcome.

Additionally, removing the period for discussing an internal regulation allows for a shorter constitutional deliberation process, reducing the time during which instability inherent to a constitutional change stage extends. Therefore, it seems prudent for those tasked with drafting a new Constitution to focus every moment on analyzing, debating, and negotiating constitutional content rather than on unrelated aspects.

Finally, regarding the content of the regulation, the Chilean experience highlighted the importance of fostering cross-cutting agreements early on rather than postponing them until the end. If typically in such processes there are small bodies that debate and deliberate, followed by voting stages in a plenary session, it is crucial that cross-cutting agreements occur in these initial stages. Thus, quorums should—at a minimum—be aligned or more demanding in committees or subcommittees. During the first Chilean constitutional process, votes in committees were by simple majority, leading to many proposals approved at that stage being rejected later in the plenary. This left little time to correct and generate new cross-cutting initiatives, resulting in a climate of public disappointment.

⁵² Ginsburg, T. & Álvarez, I., op. cit., p. 8. They show how the final 2/3 vote had a certain consensus in the academy and was discarded by the drafting body for political rather than technical reasons, hindering the drafting process.

B. SIXTH LESSON: IT CAN BE USEFUL TO HAVE AGREED-UPON MINIMUM CONTENT, WHILE BEING CAREFUL NOT TO EXCESSIVELY LIMIT THE DRAFTING BODY'S SCOPE OF ACTION

WHAT DID CHILE DO?

During the first Chilean constitutional process, as evidenced in previous chapters, ideological debates regarding the “original constituent power” significantly influenced procedural design. One of the foundational elements was that drafting had to start from a “blank slate.” This meant that the work would not build on an initial text, nor would it address proposals for change to the current text; rather, the drafters would define all elements of the constitutional structure and dogmatics, with virtually no content limits.

Indeed, for this process, the “Agreement for Peace and the New Constitution” contained some substantive limits, characterized as minimal and narrow. Thus, the constitutional reform enabling this process included a new article in the existing Constitution, Article 135, which stated: “The new Constitution text to be submitted to referendum must respect the Republic nature of the State of Chile, its democratic regime, final and enforceable court rulings, and international treaties ratified by Chile and currently in force.”

As observed, restrictions were included to protect acquired rights of third parties and to ensure a minimum level of legal certainty (limits on final and enforceable court rulings), some content-related but quite basic (the “Republic” nature of the State of Chile and its democratic regime), and a fourth point to safeguard diplomatic relations and legal certainty at the international level

(respecting international treaties). Over time, the restriction that generated the most complications was the last one, which was given a rather limited scope. For instance, this allowed for the elimination of granted water rights that could have potentially violated existing free trade treaties ratified by Chile.

For the second process, and as was the trend in various matters, a very different strategy was adopted. The political agreement that allowed for the resumption of the constitutional replacement path established 12 constitutional bases that provided a much more constrained and delineated framework for the two bodies responsible for agreeing on a new constitutional text. The restrictions were so extensive that some actors argued it was no longer a process to draft a new Constitution, but rather a constitutional reform, which distanced many supporters of this second constitutional change attempt.

These bases consisted of a combination of matters from the current institutional framework aimed at safeguarding against potential changes, based on certain consensus generated from the previous process, and matters where both parties agreed to innovate. This way, guarantees were given to reformist sectors within the negotiation process.

Among the first group of restrictions, which ensured the continuity of existing institutions, the following stand out: (i) the democratic

Republic nature of the country, and that sovereignty resides in “the” people, contrasting with the reference to different peoples in the first process; (ii) the unitary nature of the State of Chile, as opposed to the Regional State proposed in the first process; (iii) the existence of a bicameral legislative power, while the previous text proposed a substantial modification of the Senate’s role, among others.

The agreement also provided for the establishment of a “social and democratic state of law,” the recognition of indigenous peoples as part of the Chilean nation, and a commitment to the protection and conservation of nature and its biodiversity. All these points represented innovations in Chilean constitutional history. During this process, there were no disputes regarding the content of the proposal from the Constitutional Council, and the substantive limits were fully respected.

Finally, a procedural element of this second project, as previously mentioned, was the existence of two institutions: an Expert Commission and a Constitutional Council. One of the main tasks of the Expert Commission, composed entirely of professionals with proven skills and political proximity to current parliamentarians, was to provide a preliminary draft that would serve as a starting point for the elected drafters, who had greater democratic legitimacy but lacked the technical knowledge of their counterparts. The drafting of the initial document was largely completed before the election of the elected representatives, and thus the deliberation and negotiation process among experts was not “contaminated” by the election results and the new configuration of forces in the Constitutional Council. This, however, did not prevent its members from resisting the temptation to revert to negotiations once the results and new power dynamics in the Constitutional Council were known.



Imagen 26 (Olmo, 2022)

WHAT DID WE LEARN?

Having Common Bases Helps Reduce Uncertainty, But they Should be Limited

In the Chilean case, having a common framework that established certain safeguards for all political sectors while ensuring certain minimum advances contributed to dialogue. Although the second constitutional process did not end with a favorable result, some of the elements that had been previously agreed upon and were not challenged by the ruling majority⁵³ helped mitigate the drama of the election.

In contrast, the lack of such bases and the excessively generic and ambiguous nature of them did not help reduce uncertainty and conflict in the first Chilean constitutional process. The blank slate as a starting point, in a context of little consensus to begin drafting, led to negotiations between irreconcilable positions. This resulted in the failure of the first constitutional process⁵⁴. The overwhelming success of leftist drafters generated high levels of uncertainty and significantly increased the costs associated with political minorities. It was characteristic of this stage that specific groups, sometimes with reasons and sometimes not, perceived that their identity, political, and social viability were at risk with the approval of the text. This often stemmed from proposals with low political viability but compatible with the process's minimal limits. Thus, maximalist initiatives were approved by majority, creating fear in significant societal groups, and in the absence of procedural barriers or guarantees, social coexistence became polarized, which could not be corrected with potential rejections in subsequent stages of the constitutional discussion.

Thus, the referendum of September 2022 turned into an "all or nothing" choice.

Those supporting the proposed constitutional text saw it as the only opportunity to quickly and effectively implement deep social changes. In contrast, those rejecting it felt—more or less—that their legitimacy to participate equally in social coexistence was at risk. It is precisely the common bases or shared substantive minima that help reduce the all-or-nothing feeling and mitigate the effects a process can have on the "losers" before it begins.

Finally, given that electing representatives for such processes can be necessary, it is useful and practical to provide them with a starting point to channel their deliberation. This does not necessarily mean imitating the second Chilean process. This process recognized the Expert Council's legitimacy to serve as a counterpart with some symmetry to the elected drafters, which may not always be a suitable or politically viable path. But even if the elected representatives were the only ones authorized to vote and approve provisions, it is prudent for them to receive a draft that serves as a starting point and has some cross-cutting technical support.

Having a starting point can serve three purposes. First, it will reduce the total time of the process. Since the decisions of the elected representatives are the most relevant for the public, it would allow attention to focus on the relevant issues where there is divergence. Second, a high-quality and technically rigorous text would carry a certain "auctoritas," raising the standard required of the elected majorities to justify specific changes. Finally, it would create a framework that allows the public and civil society to participate. Having a text from which to propose content to elected representatives contributes to making these proposals viable, while starting a

⁵³ Mainly the character of "social and democratic rule of law", but also certain recognitions in environmental matters or of native peoples.

⁵⁴ Palanza, V. & Sotomayor, P., "Chile's failed constitutional intent: Polarization, fragmentation, haste and delegitimization" (2023). *Global Constitutionalism* 13, 200-209.

process from a blank slate makes a high level of disconnection between the drafting body and civil society's expectations very likely.

Thus, it is possible to have certain constitutional borders that reduce the costs of engaging in such processes. This, combined with the inclusion of procedures that prevent narrow "all or nothing" votes (such as a final ratification vote of the text by the drafting body, subject to relatively high quorums), ensures that the losers of an electoral process do not immediately become opposition⁵⁵. At the same time, having a reference text helps make drafting more efficient, improves the technical quality of the final text, and can contribute to more substantive participation by the public and civil society, without stifling the drafters' space to propose significant changes that justified the start of such a process.

However, it is important that the borders be functional and not excessively limit deliberation. While the first attempt focused excessively on the effectiveness of the body, to

the point of threatening to weaken quorums aimed at ensuring greater representativeness inherent in a constitutional text, the second attempt sometimes placed too much emphasis on veto possibilities between and within bodies. For example, the text in this second instance did not allow substantive changes to the Chilean political system and the structure, powers, and procedures of presidentialism. Finding the balance between these factors is therefore a priority⁵⁶.

In the case of the second process, the 12 constitutional bases can be seen as a valuable element that helped reduce the uncertainty associated with change. Although some of its elements might be viewed as excessive limitations on the quality and depth of deliberation, they are largely explained as a reaction to the first draft. The balance is clearly positive. It was a coherent exercise with the history of progressive evolution of Chilean constitutionalism, reflecting certain core values of the Chilean institutional tradition without turning it into a mere reform process⁵⁷.

55 García, J. F., op. cit., p. 4. In the same vein, Larraín, C., Negretto, G. & Voigt, S., op. cit., p. 245.

56 García, J. F., op. cit., p. 3.

57 Ossa, J. L., Trujillo, J. S., & Ortega, M. P. (2023). Bases institucionales del proceso constituyente: Un análisis de la tradición constitucional chilena. Centro de Estudios Públicos (CEP). Retrieved from <https://www.cepchile.cl/bases-institucionales-del-proceso-constituyente-un-analisis-de-la-tradicion-constitucional-chilena>

C. SEVENTH LESSON: IT IS ADVISABLE TO ADOPT A FLEXIBLE DELIBERATION PROCEDURE THAT ALLOWS FOR REOPENING DEBATES AND ADJUSTING THE TEXT DURING THE PROCESS

WHAT DID CHILE DO?

Once the design of the first Chilean constitutional process was concluded, and before the elections of the members of the Constitutional Convention were held, proposals quickly emerged that incorporated comparative experience and suggested certain contents to be implemented in the operating regulations of the drafting body. For everyone, it was essential not to get bogged down in lengthy discussions about the rules of procedure and to focus the majority of the nine-month debate (extendable to a year) on discussing the constitutional provisions. At the same time, this work highlighted the importance of establishing an internal procedure for discussion and voting that would promote adequate deliberation within the drafting body⁵⁸.

During the discussion of the operating regulations in the first Chilean process, the “Regulations Commission” was formed, composed of 31 of the 155 constituent members, with a strong presence of experts in constitutional matters and notable political leadership. This body was divided into three subcommittees, one of which was the “subcommittee on initiatives, processing, and voting on constitutional provisions.” This committee was dedicated to creating the procedure for debate, deliberation, and voting on rules that would govern the Convention throughout its operation. Throughout the discussions in this instance, it became evident that one of the central aspects to define would be whether the contents approved by the thematic committees and later the plenary would be temporary or final.

Some proposed a circular discussion procedure, which would allow a continuous back-and-forth of texts or reports from the committees to the plenary and then back to the thematic committees, facilitating the constant refinement of documents and the accumulation of successive support⁵⁹. However, the prevailing view enshrined in the Regulations⁶⁰ was the opposite: a procedure where provisions, approved by a majority of members present in the relevant thematic committee, were inevitably submitted to the plenary vote, and what was approved in this instance, according to the established quorums, was irrevocably incorporated into the constitutional proposal. This is clearly reflected in the wording of some articles of the Operating Regulations, which established things like the impossibility of reopening the debate of an approved article within the committee⁶¹, the definitive rejection of proposals that did not meet the necessary quorums on two occasions in the plenary⁶², or that a norm that obtained the necessary two-thirds in the plenary would be considered approved “without further procedure,” and must be published on the Convention’s website⁶³.

Finally, the possibility of having a final vote at the end of the deliberation process was discarded. Its inclusion was proposed as a means for a 2/3 majority of all constituent members to ratify the text to be submitted to referendum. The inclusion of such a ratification could have allowed reopening the debate on provisions that had already been approved with the necessary quorums if the drafters deemed it necessary.

58 Among these it is possible to highlight the contributions of Sebastián Soto (2021), Canessa and Landau (2021), United Nations Development Program (2021) and even García, Verdugo, Lobos, Valenzuela and Astorga (2021) for the Horizontal Think Tank, among many others.

59 See Soto, S (2021). p.14.

60 Constitutional Convention (2021). General Regulations of the Constitutional Convention. Library of the National Congress of Chile. Retrieved from <https://www.bcn.cl/leychile/navegar?idNorma=1166336>.

61 Article 92, third paragraph.

62 Article 94, third paragraph.

63 Article 96.

The reason for not considering it was mainly to avoid the possibility that the inability to obtain the quorum in this final vote would prevent having a text to submit to referendum, as well as the interest in showing final progress and providing certainty to both participants and the public regarding the provisions that would be part of the final draft.

Lastly, although there was a harmonization stage, this commission was strongly limited procedurally. In this sense, it could only “ensure the technical quality and coherence of the constitutional text” or “identify possible inconsistencies between approved texts.”⁶⁴ Thus, this body did not allow the dominant groups of the drafting body to correct certain contents or adequately address citizen or civil society concerns. The provisions that established a linear procedure became guarantees for those sectors of the convention members who agreed with those contents and were not willing to retreat from their gains.

The second Chilean constitutional process, as mentioned in previous sections, involved the participation of two drafting bodies, despite having different powers and weights for approving or rejecting proposals from their co-drafter. This dual nature meant that the debate had greater elements of circularity.

Additionally, during this second process, the possibility was considered for a “mixed commission,” made up of members from both bodies, to resolve certain content differences in provisions that did not have the necessary quorums for their final approval, nor the quorum that would allow a veto from the revising chamber (Constitutional Council) regarding any norm where the originating chamber (Expert Committee) sought to insist. This allowed for a final and flexible instance for complex debates and the review of drafts to provide greater coherence, correct errors, and respond to citizen concerns or other influential actors. Furthermore, debate in committees required a three-fifths quorum, identical to that of the plenary, to submit provisions to the plenary vote, fostering consensus at the committee level rather than postponing it to the final stage.

Finally, this second process enshrined the possibility of a final vote by the Constitutional Council on the draft to be submitted to referendum. Therefore, it had to receive the favorable vote of three-fifths of its members before the conclusion of the drafting. The rejection of this draft implied the end of the process without a constitutional proposal and did not allow reopening content debates to form the pending consensus.

64 Articles 100 and 101 of the Regulations.

WHAT DID WE LEARN?

Deliberation and Voting Should be Flexible, with Circular Elements that Acknowledge the Possibility of Error and the Need to Correct Them During the Process.

The relatively linear configuration of discussion, deliberation, and voting on provisions generated dynamics that did not contribute to forming agreements throughout the first constitutional process. Because each thematic committee had the option to issue two reports with proposals for provisions to be submitted to the plenary vote, the first round of discussions in committees was characterized by maximalism, a low willingness to negotiate, and compromise. This created incentives for these initiatives to be rejected almost entirely at the plenary level, given the possibility of issuing a new report.

In the “second round,” committees had to moderate the contents of their report to seek the missing votes. However, limited by their previous statements and already established positions, this was not always possible. An additional factor worked against greater moderation, aside from the tendencies of the drafters themselves. The rejection of a second report was politically costly for those voting against it, as it meant its final exclusion from the text and, in some cases, a normative void that hindered its potential approval in the exit referendum. The most frequent result was that second reports repeated certain maximalist elements from their initial versions, specific provisions’ rejections, or even parts of them, and intense vote negotiations to include certain contents definitively.

For all these reasons, the flow of discussion was detrimental to a text of high technical quality and also to the clarity of the debate

in terms of public perception. The first stage conveyed a sense of extremism in proposals and a lack of seriousness in the work, due to reports being almost completely rejected in the plenary. The second phase, on the other hand, did not manage to avoid the approval in the plenary of maximalist provisions strongly pressured by the final nature of that vote.

Another relevant point characterizing the deliberation procedure during the first process was the low capacity of those governing the instance to backtrack on the approval of provisions that generated strong rejection among experts, citizens, and/or interest groups. Given the linear nature of the discussion and the impossibility of revisiting provisions definitively approved by the plenary, the most complex matters that tilted the balance towards rejecting the draft could not be corrected by its drafters, even if they had wanted to⁶⁵. The voting regulations protected groups that wanted to maintain these controversial contents, some agreeing with them and others seeking to keep contents that would mobilize “against” voters.

An example of this is the debate that arose from the norm establishing the right of indigenous peoples to be consulted on matters affecting them. This issue became one of the sources of greatest controversy and debate, as the approved norm stated the “right of indigenous peoples and nations to grant their consent on matters or issues affecting them.” Various academics, experts, and opinion leaders read this as an indigenous veto right going beyond what international treaties and instruments established. Despite numerous explanations from those supporting the draft, arguing that this was not the norm’s intent, once approved by the plenary, it was not possible to agree on

65 See Ginsburg, T. & Álvarez, I., op. cit. p.5.



Imagen 27 (Diario Constitucional, 2024)

a wording that clarified the point and dispelled well-founded fears. The limited competencies of the Harmonization Commission to reopen substantive debates led to the text – ultimately – maintaining the initial wording⁶⁶.

A deliberation and voting procedure with greater circularity elements, with periodic approvals of provisions whose effect was not final and irrevocable, would have reduced the tension of the vote, concentrated the information period on the proposal's content toward the end of the process. Additionally, it would have allowed dominant groups to correct course on issues where technical errors were made or where certain proposals' perception by the public was misjudged. Furthermore, these adjustments could have facilitated the inclusion of excluded groups as the process advanced, given the evident distancing from citizens. This was not possible during the first Chilean process since several highly divisive contents were already irrevocably included in the draft constitutional proposal.

The second Chilean constitutional process did have greater elements of circularity, and each body could reopen debates raised by its counterpart. This, as has happened in other matters, was not a guarantee against constitutional maximalism, but it did help ensure that the final content – submitted to referendum – reflected the final opinion of the majority, especially the Constitutional Council, which procedurally always had the final word. Indeed, during the submission and resubmission of reports between the Expert Committee and the Constitutional Council, dialogue occurred that allowed for the nuances of proposals from the second body that generated public rejection.

However, it is worth mentioning that in the second process, strategic behaviors were also observed that prevented the removal of divisive contents and whose interpretation was not clear. For instance, a norm introduced by the Constitutional Council stated that “the law protects the life of who is to be born,” introducing the prefix “who” instead of “what,” established in the current Constitution. This was interpreted as a modification aimed at making pro-abortion legislation more difficult in Chile. During the transition to the Expert Committee, the possibility of restoring the original wording was voted on, which was rejected by progressive representatives already committed to opposing the proposal and who did not seek to remove this controversial aspect of its content.

Finally, this second process included stages of text review with greater distance and broader perspectives compared to the processing in the Convention. For example, the “mixed commissions” that were established for certain specific subjects allowed for complete revisions of the original drafts and facilitated agreements between both bodies and political sectors. Another example is the final vote by a three-fifths majority of the Constitutional Council, which aimed to ensure that, before the Council concluded, a harmonious outcome that satisfied a broad majority of elected members was achieved.

However, as mentioned in the first chapter of this document, none of these procedural safeguards and corrections prevented the greatest risk of all: the use of power imbalances to create a partisan text in favor of one political sector.

66 Article 191, paragraph 2, proposed Political Constitution of the Republic of Chile, 2022.

CHAPTER III CONSTITUTIONS AND CITIZENSHIP



Imagen 28 (Hitschfeld, 2023)

A. EIGHTH LESSON: THE PROCESS OF DESIGNING PROCEDURAL RULES REQUIRES TIME AND SHOULD BE INSULATED FROM THE CONFLICTS THAT MAY ARISE

WHAT DID CHILE DO?

The design of Chile's first constitutional process had two facets: to some extent, it was conducted quickly and under tremendous citizen and political pressure. However, it also involved a reflective rule-setting procedure, handled by top-level professionals who were insulated from the citizen pressure that the country's tense political moment could exert.

As noted in the introduction, the initiation of an elusive constitutional change process was triggered by a severe social and political crisis in Chile. Street violence and political ungovernability led the center-right governing coalition to embrace a constitutional drafting process as a way to address the crisis. The "Agreement for Peace and the New Constitution," as its name implies, involved an agreement among political elites committed to advancing constitutional change. Additionally, a long-term understanding was sought that would simultaneously contribute to the joint effort to guarantee and restore the lost social peace.

In a race against the clock, the most basic rules of the constitutional process were established. This agreement included holding a referendum; opening to public decision the type of body responsible for drafting the constitutional proposal; the substantive limits of the body; the 2/3 quorum required to approve provisions and the voting regulations; the ratifying or "exit" referendum; the maximum 12-month duration of the entire process; and, finally, and especially relevant to this chapter, the delegation to a Technical Commission to determine "all the essential aspects to materialize" the agreement.

In this regard, it can be seen that the issues debated and defined at the peak of the social crisis were minor, with the main concerns

being the voting quorums, the duration of the process, and the existence of referendums. All additional details were handed over to a technical and more protected body that was to set the specific rules for the process.

The Technical Commission devised and drafted the main rules of the process. Its work lasted just over a month and resulted in a unanimous agreement among its members. There is widespread consensus regarding the quality of its work and the correct way to shape the process. It seems crucial that this body maintained a certain level of secrecy and detachment from the social climate. It is also worth noting that some institutional design options were strongly conditioned by the political and social context, making several of the proposals presented here seem unviable at the time.

Finally, the processing of the constitutional reform in the National Congress was carried out without major modifications to the Technical Commission's proposal. It was approved briefly and expeditiously. However, during its processing, various parliamentarians expressed interest in complementing the procedural rules with subsequent constitutional reforms that would promote the participation of women, indigenous peoples, and independents. The inclusion of these three elements was indeed strongly influenced by popular pressure and the political weakness of the governing coalition. The discussion of these additions was brief and did not undergo thorough analysis, resulting in procedural changes whose impacts, viewed in retrospect, were counterproductive. Among these, the modification of electoral rules concerning independents and reserved seats for indigenous peoples should be mentioned.

WHAT DID WE LEARN?

It is Advisable to Distance the Process of Designing Procedural Rules from the Contingent Events that Triggered It.

The two Chilean constitutional experiences show that the procedural design period is essential and directly influences the likelihood of success of this endeavor⁶⁷. Given the context in which such instances arise, the need for reflection and pause does not always align with the pace of the political world. The challenge is to balance this in a context that invites speed and excess. An example was the Technical Commission, which was dedicated to translating broad and generic agreements into specific procedural rules. It is noteworthy that some of the most controversial aspects that have been identified as counterproductive in subsequent analyses (electoral rules for independents and representatives of indigenous peoples) were precisely those introduced outside this commission, by political actors in a hurried manner and without adequate reflection and debate.

In the concern for timing and the pause needed to create an appropriate process, it is crucial to involve the public in the schedule and procedure on which the constitutional change effort will be based. Engaging people in the constitutional design process as it unfolds risks them not understanding the moments and characteristics of the process. Educating the public in a timely manner will be fundamental to its success.

For the reasons mentioned above, it may be prudent for the procedural rules themselves to include a mandatory pause and reflection period in case the process fails. For those

opposing a constitutional proposal, it will be attractive to suggest restarting the drafting of a new text, especially when there has been an initial referendum, as was the case in Chile. However, this can lead to excessive haste that prevents a proper analysis of the reasons for the initial failure and results in an inadequate determination of the characteristics of a potential second process. Immediate restarting of a constitutional change, solely based on fulfilling prior commitments by political actors, risks another failure when the public is fatigued by the issue. This happened in the Chilean case.

If the initial rules anticipate the possibility of rejection, outline what will happen in that event, and establish a moratorium for initiating a new process, it avoids a rushed and thoughtless restart. At the same time, it allows the constitutional debate not to close finally and irrevocably after a citizen rejection. Such a measure can help reduce pressure and avoid hasty decisions that exacerbate the effects of a failure instead of correcting them. This seems to be, at least in part, what happened in the second constitutional setback in Chile⁶⁸.

Finally, it is important for the design to include institutions responsible for advising drafters, ensuring that they can incorporate knowledge and perspectives that supplement the capacities of elected representatives. The existence of advisory bodies directly linked to each representative creates high levels of subordination by technical advisors. It can also lead to the hiring of individuals based primarily on political affiliation rather than technical expertise. A centralized and impartial institution providing specialized technical advice could help achieve this goal⁶⁹.

67 Ginsburg, T. & Álvarez, I., op. cit.

68 Verdugo, S. & García Huidobro, P., op. cit., p. 12.

69 Sierra, L., "Los 'expertos' en la Convención Constitucional: Lecciones para un posible nuevo órgano constituyente" (2022), in Punto de Referencia 635, Centro de Estudios Públicos. December 2022. P. 12.

B. NINTH LESSON: THE PROCESS MUST BE SUFFICIENTLY TRANSPARENT TO INVOLVE THE CITIZENS, BUT ALSO INCLUDE MOMENTS OF CONFIDENTIALITY TO REACH AGREEMENTS

WHAT DID CHILE DO?

In the first Chilean constitutional process, as previously mentioned, there was high social agitation, institutional fragility, distrust, frustration, and fatigue with its institutions and mechanisms. In that context, any signs of opacity or secrecy elicited visceral reactions from many decision-makers and were dismissed outright.

Perhaps the only instance of real negotiation in the first Chilean process occurred during the intense moments of the “Agreement for Peace” discussions. Despite the constant presence of the media, during the nearly 48 hours of dialogue, the content of the agreement and how each item was addressed is known only to those who were part of the negotiations. After that, both the work of the Technical Commission, the procedural adjustments approved by Congress, and the drafting of the Constitutional Convention’s Regulations were characterized by a high level of publicity and live discussions. Publicity, as a main principle, was most evident in the discussion of the Constitutional Convention’s Regulations, as can be seen in the minutes of that debate.

In the discussion of that body, and also in the prior debate in the media and seminars, certain proposals were raised to establish reserved spaces for political negotiation.

However, these initiatives were quickly dismissed for the reasons mentioned earlier. In practice, there were moments of confidential conversations, which occurred in informal meetings and with a high presence of private instant messaging chats.

The second Chilean constitutional process showed less reluctance toward private negotiation instances but did not allocate efforts to design procedures that would allow their existence. At the same time, they ensured that the content of these conversations was not completely lost. Reduced media attention also contributed to making it less costly to consider reserved working and dialogue instances. The great urgency and tight deadlines of this second process seem to have influenced time-constrained negotiations where, despite reaching agreements, gaps emerged regarding the reasons justifying constitutional design decisions.

Ultimately, the political outcomes of both processes allowed relatively homogeneous groups to approve constitutional provisions almost unilaterally, despite the supermajority quorums established. This may have reduced the relevance of academic and expert analysis on the constitutional negotiation process itself and public participation.

WHAT DID WE LEARN?

It is Important to Optimize Transparency, Not Maximize It.

Transparency is critical, and the general rule for any institutional design should be the ability to access information about the process of drafting the constitutional proposal and the deliberation itself. However, it is also important to have institutional spaces for reserved political negotiation, the content of which does not disappear. An appropriate balance between transparency and pragmatism should include private conversations, with minutes that can be made public later. This helps reduce the costs of candor and honesty without completely sacrificing the interpretive tools provided by understanding the deliberation process in detail⁷⁰.

It is relevant to consider that any public session, broadcast simultaneously to the public, necessarily risks becoming a platform for making public speeches to voters, political allies, or the public in general. Every decision-maker constantly exposed to these speeches establishes a stance before the public that may later be difficult to change, which can hinder

negotiation processes requiring reciprocal concessions, changes of opinion, and transactions⁷¹. This, in turn, avoids the proliferation of public interventions and favors discussions about specific texts, explaining technical matters rather than establishing general political positions. Thus, addressing the public will be more appropriate in the final stages of the process rather than during decision-making moments.

Moreover, various academic studies support the need for a balance between transparency and private negotiation spaces, which is fully applicable in constitutional dialogue contexts. Stasavage argues that excessive exposure can lead to strategic behavior and loss of sincerity in political deliberations⁷². Similarly, Prat highlights that while transparency strengthens accountability, it can create incentives for political actors to act more for the gallery than to achieve substantive agreements⁷³. Therefore, it is crucial to design mechanisms that allow negotiators to work without the constant pressure of immediate public scrutiny or that focus on specific moments in the drafting process, rather than all instances of it.



Imagen 29 (Paillal, 2023)

70 Larraín, C., Negretto, G. & Voigt, S., op. cit., p. 234.

71 Ibid, p. 244.

72 Stasavage, D. (2004). Open-door or closed-door? Transparency in domestic and international bargaining. *International Organization*, 58(4), 667-703.

73 Prat, A. (2005). The wrong kind of transparency. *American Economic Review*, 95(3), 862-877.

C. TENTH LESSON: IT IS IMPORTANT TO INVOLVE THE CITIZENS BY MAKING GOOD USE OF THE LIMITED ATTENTION SPAN AVAILABLE AND DESIGNING A FEW BUT RELEVANT PARTICIPATION MECHANISMS

WHAT DID CHILE DO?

Chile underwent a process of approximately five years of debate, deliberation, and voting on constitutional matters. During this long and challenging period, there was an expectation that citizens would remain attentive and actively follow the debate, decisions being made, and unfolding events.

For the first constitutional process, a procedure was proposed that lasted nine months, extendable to a year. The first three months were dedicated to discussing operating regulations. The opening act was marked by conflicts involving the elected representatives tasked with drafting the constitutional text. It seems evident that some of the most crucial months for fostering positive citizen engagement with the process were wasted. Beyond the content of the proposal, there were issues with the timing and format of discussions that squandered the window where citizen attention was available to bring the constitutional deliberation closer to the people.

The stage of norm discussion also faced problems regarding how it could be understood by the public. As mentioned in previous chapters, a highly publicized procedure was created, but it involved successive waves of norm approval at the commission level and rejection in the plenary, followed by second and even third attempts in commissions. This created confusion among the public and made it difficult to keep viewers engaged with

the process. The initial votes, which generated the most interest, were marked by provisions with low political viability that were rejected in later stages but were communicated to the public and accepted by a significant portion of it as approved constitutional text.

Secondly, the first Chilean constitutional process involved the approval of a complete draft of the constitutional text, which then had to be harmonized. The problem was that, again, while the public was attentive, they received an unofficial draft of the document, which was incoherent and poorly written. When the final harmonized draft emerged, public attention had already waned, highlighting a communication weakness in the way the process was conducted.

The second Chilean constitutional process repeated several of these issues regarding the brief attention spans of the public. Although the work of the Expert Commission was conducted with less media presence, only emerging in relation to the consensus reached by that body and to transmit good news, the subsequent work of the Constitutional Council repeated the mistake of generating exaggerated proposals that were negatively evaluated by the public. These were often corrected or eliminated, but public attention had already focused on these detrimental elements, leading to a poor evaluation of the Council's work.

WHAT DID WE LEARN?

Citizen Attention is a Scarce Resource: Use it Efficiently.

During the design phase, symbolic moments should be considered, keeping in mind that these instances will significantly influence public evaluation. It is also necessary to have a clear and realistic communication strategy, appropriately funded, that aligns with the schedule and procedural stages of the constitutional change process.

Citizen attention to technical and abstract debates is brief, so the design should account for this and include relevant but brief stages of debate for the public and norm voting. Procedural rules are important because, if well-designed, they can foster positive perceptions of the work. Conversely, rules that encourage unviable proposals or voting with low quorums in initial stages can create misconceptions in public opinion. In the Chilean case, this led to the idea that maximalist texts had constitutional status simply because they were approved in a thematic commission. Subsequent rejection did not fully address public fears, while it disappointed unrealistic expectations from those supporting these contents.

Finally, one of the positive aspects of the long Chilean constitutional deliberation process was public participation. Popular initiatives and public hearings had high levels of involvement and positive reception.

The experience with these two participation tools was positive, although their impact was limited, especially in the first process. Fears and apprehensions in certain sectors skeptical of representation as the only decision-making mechanism were exaggerated.

However, it is advisable to maintain a limited number of participation mechanisms, but well-designed and with procedural rules that ensure their relevance, rather than having many that are not impactful in the constitutional debate. In this sense, the first constitutional process, with its own regulations intended to govern citizen participation, generated expectations that were later disappointed. Only popular initiatives were truly impactful in the drafting, and nearly all of them were rejected by the Constitutional Convention without being properly deliberated, merely replaced by its own initiatives. This grandiose “participation regulations” included instances such as “binding referendums” (intended to allow the approval of provisions that did not meet the two-thirds quorum through binding citizen referendums) or the “national deliberation day,” among others. However, both remained as “dead letters” as they were not used in practice, weakening the perception due to the excessive expectations generated. Conversely, there did not seem to be an adequate effort to socialize the approved texts in either of the two processes.



Imagen 30 (Titelman, 2022)

CONCLUSIONS



Imagen 31 (Héctor Millar, s.f)

It is possible to learn from the two Chilean constitutional experiences to avoid making mistakes in future attempts at constitutional reforms elsewhere in the world. The paradox of this document is that—perhaps—the most valuable lesson from the “failures” of the long Chilean process is not procedural but substantive. The drafting of a new Constitution must arise from a genuine and ongoing effort to find common ground among representative groups of a country’s diversity. There is no design or procedural safeguards that can protect against the temptations of homogeneous groups that, holding the necessary majorities, wish to create a constitutional text tailored to their needs.

Along with this general principle, it is possible to identify certain procedural decisions that can contribute to a successful outcome. First, it is crucial to balance the legitimacy of origin with that of the result. Including elected representatives, while necessary for endowing the process with democratic legitimacy, does not guarantee public acceptance of the final text. The Chilean experience shows that mere election of representatives is not enough. It is also necessary to include mechanisms to ensure that the text is perceived as legitimate and applicable by all social and political sectors. Along with this, it is essential to separate constitutional elections from ordinary ones, aiming to reduce innovations in electoral systems that exacerbate the unpredictable nature of these processes.

The second important lesson is the need for clear and pre-established rules to guide the work of the drafting body, as well as a flexible approval flow that allows for the adaptation and negotiation of content until the end of the drafting process. Predictability and transparency are essential for building trust and effective citizen participation. The

inclusion of a technical starting point, as was done in the second process with the Expert Commission, can facilitate a more informed and structured debate, reducing uncertainty and inherent conflicts in drafting a new Constitution, although, as the facts show, it does not guarantee a satisfactory result.

Finally, education and communication with the public are vital. Engaging society at all stages, ensuring they understand the steps and implications of each decision, is key to the success of any constitutional reform. The Chilean experience suggests that dedicating sufficient time to designing and explaining the text can prevent errors and ensure a more inclusive and constructive debate.

In summary, the failures of the constitutional processes in Chile underscore the importance of institutional design and rules as ways to guide incentives and, consequently, the behavior of political actors. However, there is no formula to guarantee a desired final outcome. The role of actors, institutions, and the social and political context will significantly influence the possibility of creating a text that can become a new Constitution.

Thus, perhaps the most valuable lesson from the Chilean experience is the inconvenience of approaching constitutional debate from a purely partisan logic, seeing it as a mechanism to gain advantages in future political debates. This was observed with varying degrees of intensity in both Chilean processes. This error led to any successes that might have existed in other areas being overshadowed by this lack of cross-cutting approach and forward-looking vision. However, this work also highlights that other erroneous institutional design decisions exacerbated the problem, distancing the citizens from the texts subject to their approval.

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