

I-CONnect Symposium on the Chilean Constitutional Referendum – Participation, representation and deliberation in constitution-making: tentative ideas from the Chilean case

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On September 4, 2022, Chile held a referendum on a new Constitution, drafted by a directly elected Constitutional Convention. The proposed text introduced interesting innovations, like gender parity in representative institutions, a high degree of decentralization through a so-called “regional State”, clear concern for climate change and the protection of the environment, recognition of indigenous rights, among many other features.^[2] Even the process itself can be considered a laboratory in constitution-making, since it incorporated a large number of participatory mechanisms, in just a one-year timeframe.

Considering this context, it is all the more puzzling how the process transited from an almost 80% approval of the idea of a new Constitution (October 2020) to a roughly 62% rejection of the proposed text. Even more striking, rejection won in all but 8 of the country’s 346 municipalities, and in the poorer areas the difference was even larger than in more well-off localities, in an election marked by the return to compulsory voting which resulted in a historic voting turnout.^[3] What factors can account for these results? What lessons can we learn for future constituent processes? Although there are many competing hypotheses, in this piece I will apply insights from the literature on constitution-making and particularly on the need to properly balance participation, representation, and deliberation.^[4]

Participation

Arguably, one of the points where there seems to be consensus among experts is the need to gather broad and wide participation in the constitution-building process. Not surprisingly, this feature has even gained attention at international human rights bodies, such as the UN Human Rights Committee.^[5]

In this regard, the Chilean process has been exemplary in terms of inclusion, particularly of underrepresented and traditionally marginalized groups. The electoral rules for the Constitutional Convention contemplated gender parity, reserved seats for indigenous peoples accounting for more than 10% of the Convention, and had a significant presence of a wide variety of societal interests ranging from environmentalists to advocates of equal rights to sexual minorities, among others. Additionally, the Convention established

several instances of participation, such as citizens' initiatives of constitutional norms, several public hearings including decentralized sessions in regions, a sort of "territorial week" each month for each convention member, among many others.

In my view these are positive developments, yet they should be carefully considered in light of the next point regarding representation and taking into account that only about 42% of the population voted in two days in the May 2021 Convention election. Naturally, good reasons explain this behavior, such as the context of the Covid-19 pandemic, the de-mobilization strategy followed by an important part of the right-wing electorate, and the context of voluntary voting, yet still none of this accounts for the more than 7% decrease in participation in comparison to the 2020 constitutional entry referendum.

Representation

Regardless of the wave of criticisms they have been facing in recent decades, political parties must play a key role in constitution-making. They perform important functions as intermediaries between social movements and political elites, as well as brokering agreements in the representative bodies and gathering information about citizens' preferences. In fact, in constituent processes initiated by political mobilization and contestation, in order to successfully channel social movements into the drafting body, intermediaries such as political parties are crucial. The Colombian process is paramount of that fruitful entanglement of civil society and political parties in a constructive manner^[6].

As many observers have highlighted, very early on the Chilean process seemed more like a struggle to keep political parties and political elites out of the equation, as demonstrated by the large majority of independents in the Convention as well as both the political movements within the Convention trying to gather independents and mediate between and among them, and the lack of a systematic treatment of political parties in the proposed text itself. Not only were political parties a minority in the Convention, but they were also fragmented and lacked effective leadership^[7].

Deliberation

Notwithstanding the many interesting innovations in inclusion and participation, the deliberation levels both inside the Convention and particularly in the dialogue between the Convention and the broader society, has been a problematic matter. In truth, real deliberation within the Convention was rarely observed, given that a large majority of the members spoke only to their constituencies and in terms of "identities", disregarding more generalizable rationales, casting doubt on the fulfillment of the necessary balance between rationality and emotion in the constitutional debate.^[8] Time-constraints and the design of the rules of the debate also worked against more fruitful conversations in the Convention.

Deliberation was also complicated in the relationship between the Convention and its political and societal context. A context marked this last couple of years by high uncertainty in institutional, socioeconomic, and even personal safety terms. Considering that polls started to show a systematic decline in citizens' confidence in the Convention,

arguably because of some relatively radical proposals and also because of the strident behavior of some convention members,^[9] the Convention not only failed to properly manage this climate of external uncertainty but seemed to have actually contributed to creating more uneasiness in the general population.^[10]

Adding an additional level of complexity to an already charged process, and being aware that this is by no means the most important reason for the referendum's results, one has to recognize that during the campaign leading to the referendum, conditions for a proper "public sphere", for a reasonable citizen deliberation beyond the Convention, were also lacking.^[11] It seems to me that the mass media and social networks played a more negative role for the quality and rationality of the debate on the proposed new constitution. The idea of a public space, crucial in the context of the constituent process, would require a tendency to think of society beyond the exclusive discourse centered on the rights of the individual or on the basis of economic utilities, to think to the level of the exercise of civic virtues. In other words, the construction of political citizenship, to which mass media and social network seemed to have contributed little. On the contrary, the example of the successful civic campaign in South Africa's constituent process shows precisely the virtues of this sort of more genuine public space.

In conclusion, although a halfway convincing explanation for the failure of the process would have to recall the difficult context in which it was triggered, including an extremely weak government and the crisis of representation, particularly of political parties, this piece identified some key institutional design features that might explain this experience. The Chilean experience accommodated many positive examples of citizen participation, inclusion of underrepresented and marginalized groups, and even some transformative proposals, such as gender parity, territorial decentralization, recognition of indigenous peoples, and a more active role of the State in social rights. Notwithstanding these bases, striking an adequate balance between participation, representation, and deliberation seems to be a pending tasks for a new constitution-drafting in Chile, as well as an important lesson for future experiences of the constituent power and scholarship on these matters. As the example of the EU Constitutional Convention in 2003, which resulted in the proposed Constitution for Europe, rejected by two member States yet still somehow incorporated in the Lisbon Treaty, and also the example of South African Constitution which was partly questioned by the Constitutional Court and later amended to address those challenges, the good and hard work must and can continue in the effort to constructing a democratic and legitimate Constitution for Chile.

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[1] I appreciate the comments made by professors Wim Voermans, Carlos Huneeus and David Landau to a draft version of this text.

[2] For an overview of the broadly recognized advances, as well as the different concerns about the proposed new Constitution which will be mentioned later in this piece, see “Chile’s Constitutional Moment: Experts Reflect”, *ConstitutionNet, International IDEA*, September 2, 2022, at <https://constitutionnet.org/news/chiles-constitutional-moment-experts-reflect>.

[3] All electoral data can be consulted at <https://www.servel.cl/>

[4] The seminal work on this is still Elster, Jon (1995), “Forces and Mechanisms in the Constitution-Making Process”, *Duke Law Journal*, 45(2), 364–396. <https://doi.org/10.2307/1372906>

[5] See case Marshall v. Canada (CCPR/C/43/D/205/1986), 3 December 1991, and also the Human Rights Committee General Observation of 12 July 1996.

[6] See particularly Eisenstadt, T., LeVan, A., & Maboudi, T. (2017). *Constituents Before Assembly: Participation, Deliberation, and Representation in the Crafting of New Constitutions* (Comparative Constitutional Law and Policy), Cambridge: Cambridge University Press, doi:10.1017/9781316717080.

[7] For a sharp perspective on this point see interview to Carlos Huneeus, June 7, 2022, “Los convencionales fueron incluso más allá contra los partidos que la Constitución de 1980”, *Diario Constitucional*, at <https://www.diarioconstitucional.cl/entrevistas/carlos-huneeus-madge-abogado-y-doctor-en-ciencia-politica-los-convencionales-fueron-incluso-mas-alla-contra-los-partidos-que-la-constitucion-de-1980/>. For a partially critical view of this position, see Luna, Juan Pablo (2022), “Los partidos no funcionan distinto a los independientes”, August 30, 2022, *Tercera Dosis*, at <https://terceradosis.cl/2022/08/30/chile-al-otro-lado-del-plebiscito/>. Although the technical number of independents amounted to a strong majority, it can be argued that the number of “true” independents who did not align with a party was lower.

[8] For a normative account on the desire to minimize the role of passion and to maximize the epistemic quality of constitutional decisions, see Elster, Jon (2012), “The Optimal Design of a Constituent Assembly”, in Hélène Landmore and Jon Elster, *Collective Wisdom: Principles and Mechanisms*, Cambridge: Cambridge University Press, 148-172.

[9] Among the most contested issues, one can list plurinationalism and its applications, the elimination of the Senate, modifications to the organization of the judiciary, clauses regarding the rights of nature, the lack of mechanisms for avoiding political fragmentation, among others.

[10] The many valuable suggestions to make a new constitution-drafting process more deliberative are a demonstration that this variable was not so well included in the design of the already finished process. See especially García, José Francisco (2022), “Apuntes constituyentes: balance y perspectiva futura (final)”, *El Mercurio Legal*, September 6,

2022; and Kaufmann, Rodrigo (2022), “Chile’s constitutional endeavour goes on”, *VerfBlog*, 2022/9/08, at <https://verfassungsblog.de/chile-goes-on/>, DOI: [10.17176/20220908-230743-0](https://doi.org/10.17176/20220908-230743-0).

[11] For the idea of a “public sphere” and its implications, see Innerarity, Daniel (2006), *El nuevo espacio público*, Madrid: Espasa.