

Constitution-Making in the 21st Century: Lessons from the Chilean Process

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A distinctive feature of 21st-century constitution making is the role assigned to citizens through various forms of direct participation, as well as special efforts to include groups underrepresented and marginalized in ordinary politics. The legitimacy of these processes increasingly requires a role for actors and groups previously excluded from crucial institutional decisions (Elster 1998; Fishkin 2011; Reuchamps and Welp 2023; Rubio-Marín 2020; Welp and Soto 2020). However, vested interests have proven challenging to overcome amid a global crisis of representation. The failed Chilean process of 2021–2022 provides valuable lessons about the triumphs and pitfalls of embracing an open approach to constitution making.

Chile's constitutional moment is longer than it may appear. The existing 1980 charter, unilaterally drafted by a military dictatorship, underwent significant reforms in 1989 and 2005 (Heiss and Navia 1997; Heiss and Szmulewicz 2018; Ruiz-Tagle 2021; Zúñiga 2005). Former President Michelle Bachelet tried but failed to replace the charter during her 2014–2018 administration. Her attempt, however, inaugurated a new participatory approach to constitution making (García 2023; Organisation for Economic Co-operation and Development 2017). A fresh endeavor emerged following the social uprising of 2019, resulting in the election of a Constitutional Convention in 2021. This highly inclusive body was composed of an equal number of men and women, reserved seats for 17 indigenous delegates from 10 different groups, and independents that ran in lists competing with political parties. The process also considered parallel direct-participatory mechanisms (Fuentes 2023; Secretaría Ejecutiva de Participación Ciudadana 2023; Suárez-Cao 2021). However, the draft produced by the delegates to the Constitutional Convention failed to be ratified by the voters. Following this rejection by 62% in a referendum on September 4, 2022, political elites reclaimed control of the process and opted to proceed with rules that guaranteed its ratification.

Party elites interpreted the defeat of the Constitutional Convention draft as an endorsement of moderate change. Consequently, they formulated a new process consisting of three smaller bodies, in contrast to the previous 155-member

Constitutional Convention. These bodies were obligated to adhere to the 12 constitutional foundations negotiated among party leaders.¹ Only the 50-member Constitutional Council was elected directly by the people. The other two—a 24-member Expert Commission responsible for preparing a draft and a 14-member Technical Committee tasked with resolving controversies surrounding proposed norms—were appointed by Congress, in which the Right held a slight majority of seats. The previous process granted the Constitutional Convention a blank slate to draft a new constitution. The new one instead gave more control to political parties through Congress, which elected two of the three intervening bodies, and enacted the internal regulations of the process.

After receiving a draft agreed to by the Expert Commission, the elected Constitutional Council could approve, approve with modifications, or incorporate new norms into the proposal for the new constitution by three fifths of its members. Whereas the Constitutional Convention had been elected by an electoral system like that of the Chamber of Deputies, the Constitutional Council mirrored senatorial electoral rules. Among the innovations introduced in the election of constitutional delegates in 2021 (Suárez-Cao 2021), only gender parity was maintained throughout the process. Party elites ensured gender parity in the Constitutional Council, the Expert Commission, and the Technical Committee. Unlike in the Constitutional Convention, independents could not form electoral lists to compete for Council seats. Moreover, the representation of indigenous groups was tied to their electoral turnout, which resulted in only one representative elected.² In their contribution to this symposium, Reyes-Housholder, Suárez-Cao, and Arce analyze the durability of gender parity, arguing that it posed the least threat to control by party elites compared to both independents running within lists and reserved seats for indigenous peoples.

The 2021–2022 Constitutional Convention was dominated by left-leaning independents and representatives of social organizations. By contrast, the political right achieved an overwhelming majority in the May 7, 2023, election for the Constitutional Council. The traditional right-wing coalition obtained 11 seats and the far-right Republican Party—founded in 2019—obtained 23, with its campaign based on public

safety, conservative values, and anti-migrant discourse. The Left obtained 16 seats, with a notable absence of traditional centrist parties including Christian Democrats, Radicals, and the Party for Democracy. The Republicans secured enough votes to block any change proposed to the Expert Commission's draft. Moreover, in alliance with the traditional Right, they could approve any change without negotiating with the Left.

The new process was shaped by the outcome of the September 2022 referendum, which enabled party elites to regain control of the constitutional process and implement safeguards to prevent the derailing of constitutional change. The new process reflected the prevailing interpretations of the failure of the Constitutional Convention and provided reassurance to vested interests regarding the direction of the new draft.

FOUR LESSONS FROM CHILE'S CONSTITUTIONAL CONVENTION

The failure of the 2022 attempt at democratic and inclusive constitution making in Chile, as well as the direction undertaken by a new process in 2023, serves as a cautionary tale for contemporary democratic reformers, as signaled by other articles in this symposium. Four concerns should be carefully considered in a participatory constitution-making experience: (1) the difficulties of aligning preferences between citizens and the decision-making body; (2) the need to have clear and shared goals from the beginning to reduce an alienating effect of unforeseen reforms; (3) the challenges of direct citizen participation; and (4) the pros and cons of inclusion.

Aligning Preferences Between Citizens and the Constituent Assembly

The mobilization that erupted in October 2019 was the immediate catalyst for the opening of a democratic constitution-making legal mechanism (Escudero 2022). It signaled the need for a new social contract that could open a discussion on the relationship between the state and the market in granting social rights and political inclusion—aspects that were perceived as blocked and frozen by the 1980 Constitution (Heiss 2020). However, the message of the protests—a clamoring for

the Chilean Constitutional Convention warns of a different peril in democratic constitution making: that is, the impossibility of representing and channeling the demands for reform.

Soon after its inauguration, the Constitutional Convention lost the confidence it once had inspired. The low presence of the political right (Larraín, Negretto, and Voigt 2023) and an excessive emphasis on particular issues opened the field to a successful smear campaign by the media and the opposition to the draft (Piscopo and Siavelis 2023). The fact that no social organization or political party could credibly claim to represent the demands of those protesting led political parties to design a highly inclusive process, including gender parity, reserved seats for indigenous peoples, and a rule to enhance the presence of independents. Multiple stages of direct-citizen validation at different points in time and with different rules (i.e., two referenda and the election of Constitutional Convention members) also were expected to link the process to the people.

The hope of overcoming a lasting political representation deficit through these mechanisms, however, was dashed by the inability of the diverse body elected to channel citizen preferences, as Negretto and Keefer argue in their contribution to this symposium. Electoral rules had a particularly pernicious role for representation by making the first referendum and the election of the Constitutional Convention members voluntary and only the final referendum mandatory, thereby highlighting the lack of coordination between two different electorates. In addition, tensions developed between the Constitutional Convention and Congress, which felt threatened by constitutional proposals such as the replacement of the Senate by a Chamber of the Regions. As claimed by Rozas-Bugueño in this symposium, social movements were unable to overcome these difficulties because in their role as constitutional drafters, they soon were assimilated to political practices, losing the aura that made them popular in the May 2021 election.

The Need for Clear and Shared Goals in Constitution Making

A second lesson from the failed Chilean process is the need to have a clear goal broadly supported by the political system, as

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“dignity”—was complex to decipher. The outbreak entailed a convergence of actors and demands that were not easily transferable to a constitutional proposal.

The monopoly of the claim to represent the people by a majoritarian block in a constituent body has threatened pluralism in cases such as Venezuela (Bejarano and Segura 2020). The high fragmentation and lack of clear programmatic proposals of

observed in Spain and Brazil after their military dictatorships. The Constitutional Convention's goal of democratizing political rules inherited from the Pinochet dictatorship to make it possible to achieve greater social justice and inclusion did not translate into concrete constitutional proposals capable of garnering ordinary citizens' support. Thus, the overwhelming 78% approval of the constitutional change in the 2020

plebiscite, as well as the positive emotions of “hope” and “joy” at the beginning of the process (Sajuria and Saffirio-Palma 2023), sharply decreased as the Constitutional Convention discussed the draft.

As discussed by Palanza and Huertas in this symposium, certain innovations in the political system were highly controversial among the elites but did not reach public opinion. The rejected constitutional proposal limited presidential power in major ways, reflecting the consensus among experts on the perils of Chile’s hyper-presidentialism (Palanza 2022). Constitutional negotiations sometimes led to unpredictable outcomes, as was the case with the regulation on the use of “urgencies.” The diagnostic of excessive concentration of power in the executive using urgencies to control the legislative agenda, Palanza and Huertas argue, was correct. However, the proposal resulting from negotiations was not to limit this power but rather to distribute it between the presidency and Congress—which did not solve the problem and even could make it worse. As exemplified by the discussion on executive–legislative relations, a constitution-making process opens issues that may not have been on the agenda at the onset, which ultimately may alienate supporters.

The Challenges of Direct Citizen Participation

Constitutional debates create uncertainty; therefore, political and economic actors often seek to limit their duration. The rush to finish the Chilean process in only one year made it difficult for the Constitutional Convention to include citizens in the discussions about the complex contents of this process. The transparency and openness of its deliberations were not effective in sending a clear message about the meaning of the multiple debates taking place simultaneously.

The Constitutional Convention devoted its first months to heated discussions about its own procedures, including participatory mechanisms. The Popular Participation Secretariat of the Convention was given the task of coordinating 12 different forms of citizen participation (Secretaría Ejecutiva de Participación Ciudadana 2023, 55). Some forms, such as an intermediate referendum³ and a national deliberative forum, were never implemented. Others, such as public hearings and popular initiatives of norms, mobilized high numbers of social organizations and individual citizens. An indigenous consultation was implemented only two months before the completion of the process, with low interest and participation from indigenous communities. The Constitutional Convention achieved the highest public participation in political decision making in Chilean history. At the same time, its ambitious program, detailed in two internal regulations,⁴ encountered significant management issues, resource constraints, and time limitations.

As Welp describes in her contribution to this symposium, this experience reveals important similarities with the recent case of Iceland, where democratic innovations and direct citizen involvement ultimately failed to connect the participatory process with formal decision-making institutions. In the Chilean case, promoters of varied and broad direct-participatory mechanisms seemingly overestimated their capacity to compensate for shortcomings in the representative

assembly—notably their lack of shared programmatic goals, weak capacity to negotiate, and inability to explain these negotiations to the public. The complexity of constructing legitimacy in contemporary democratic systems requires direct participation to complement rather than replace effective mediation and public trust in those leading the negotiations.

The Double-Edged Effect of Special Rules for Inclusion

The Constitutional Convention exhibited an unparalleled diversity of socioeconomic backgrounds, contrasting with the composition of Congress. This resulted from several features: rules allowing independents to compete on an equal footing with political parties, which allowed a considerable number of grassroots representatives to reach the Convention; the gender-parity norm that forced parties to seek female candidates beyond the usual members of their power structures; and reserved seats for indigenous representatives. Although the gender-parity rule garnered support, as described by Reyes-Housholder, Suárez-Cao, and Arce, the same was not the case for the other two categories of representatives. Despite the significant presence of experts, many of whom were affiliated with national academic institutions that provided valuable insights for the Constitutional Convention, the prevailing public perception was that the Convention lacked the necessary competencies to draft a constitution (Fuentes 2023; Piscopo and Siavelis 2023). Paradoxically, performative and aesthetic expressions designed to underscore the inclusive and non-elite nature of the Constitutional Convention unintentionally may have had a role in its loss of legitimacy. As argued by Rozas-Bugueño in this symposium, the significant presence of independent delegates and representatives from social movements magnified the difficulties in arranging systematic and organized negotiations. Independent delegates struggled to translate social demands into constitutional provisions.

A similar problem was associated with the unprecedented number of indigenous representatives and the resulting radical departure from the existing status quo regarding indigenous rights and the concept of a plurinational state. Given the low voter turnout among the indigenous population, accusations of overrepresentation of these groups and the majoritarian rejection of issues including plurinationality and the indigenous system of justice had a significant role in the rejection of the text (IPSOS–Espacio Público 2022). Even indigenous voters did not approve of the draft constitution (Pairican 2022).

Disi Pavlic argues in his contribution to this symposium that voting patterns exhibited significant variation among different ethnic groups, with the Approve option garnering relatively more support in rural and indigenous areas. This challenges the idea that indigenous citizens uniformly rejected the constitutional draft, as well as the notion that conflicts among Mapuche groups in Southern Chile heightened support for the Reject option. Indigenous inclusion, however, was not enough to tilt the balance toward approval of the text among the indigenous population and it became a preferred target for the Reject campaign.

In summary, the unprecedented inclusion of women, socioeconomic diversity, and indigenous peoples proved insufficient to secure ratification of the constitutional draft by the electorate. Low indigenous turnout and the limited number of rightist delegates in the Constitutional Convention may have fostered a perception that the assembly was biased and distant from the median voter. This perception is mirrored—albeit with a reversed political dynamic—in the Constitutional Council, where a right-wing majority has marginalized the leftist opposition in the discussion of the new draft.

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CONFLICTS OF INTEREST

The authors declare that there are no ethical issues or conflicts of interest in this research. ■

NOTES

1. The foundations of the new constitutional process were similar to provisions of the 1980 Constitution. They outlined a unitary state, which now featured a decentralized structure, a separation-of-powers system granting the President significant legislative powers, and a bicameral system. The primary innovation was the establishment of a “social and democratic state of law.”
2. Only indigenous candidates from the Mapuche, Aymara, and Diaguita groups competed in a national constituency, compared to the 10 indigenous groups that participated in the 2021 elections for the Constitutional Convention delegates. Indigenous voters could vote for candidates running in the national constituency for indigenous peoples or candidates in party lists. Indigenous candidates were eligible for a seat only if the total votes for their separate register reached 1.5% of total country votes.
3. The referendum was established in an internal regulation of the Constitutional Convention but required a constitutional reform to be passed by Congress, which never occurred.
4. In October 2021, the Convention approved a 91-article “Regulation on Mechanisms, Organization and Methodologies of Participation and Constituent Popular Education” and a 25-article “Regulation of Indigenous Participation and Consultation.”

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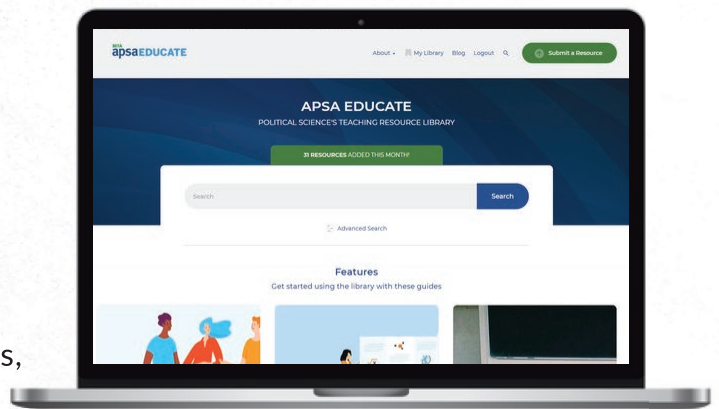
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