



Chile's 'Procedurally Regulated' Constitution-Making Process

Javier Couso^{1,2}

Accepted: 8 October 2021
© T.M.C. Asser Press 2021

Abstract

After tracing the social, intellectual, and political origins of Chile's demand for a new Constitution (which started in circumscribed circles as early as the late 1990s, but got momentum towards the end of the 2000s), this article describes the semi-sovereign democracy established by the Constitution of 1980, a feature designed by its framers to prevent the dismantling of the particularly radical version of neoliberal economics left in place by the military regime. Then, the piece analyses how the Constitutional Court's conservative jurisprudence contributed to make clear to most Chileans the link between an increasingly unpopular economic model and the constitutional status quo, something which, in turn, led President Bachelet to attempt to introduce a new charter in her second administration (an effort which failed due to the refusal of the conservative parties to replace a fundamental law that was, in fact, largely biased towards their political and economic ideas). The second half of the article is devoted to analyse the way in which the social uprising of October–December 2019 transformed the old demand for a new Constitution into a critically important institutional way to channel what at the time seemed to be a potentially catastrophic social and political crisis. Noting the—rather impressive—capacity of the political party system to agree on the path towards a new charter, the article then argues that Chile's highly regulated constitution-making process represents an instance of what Colón-Ríos (2020) calls a 'procedurally regulated' one, that is, one where an existing constitution is amended to authorize its complete replacement according to the procedures it establishes, but leaving the constituent body leeway to autonomously decide on the content of the new charter. While in tension with traditional understandings of the exercise of the constituent power in cases of complete constitutional change, this feature of Chile's ongoing constitution-making process represents a promising path to introduce a new Constitution in a manner that promotes the rule of law.

✉ Javier Couso
javier.couso@udp.cl

¹ Universidad Diego Portales, Santiago, Chile

² Utrecht University, Utrecht, The Netherlands

1 Introduction

This special issue of *The Hague Journal on the Rule of Law* is devoted to the analysis of the ongoing constituent process of Chile. After exploring the factors that led to the latter, the piece describes the core feature of Chile's constitution-making process, the politics of it, and the challenges it faces. The article then argues that Chile's highly regulated process represents an instance of what Colón-Ríos (2020) calls a '*procedurally regulated*' one, where an existing constitution is amended to authorize its complete replacement according to the procedures it establishes but leaving the constituent body leeway to autonomously decide on the content of the new charter. While in tension with traditional understandings of the exercise of the constituent power in cases of complete constitutional change, this feature of Chile's ongoing constitution-making process represents a promising path to introduce a new Constitution in a manner that promotes the rule of law.

2 The Origins of Chile's Demand for a New Constitution

Not long ago, Chile was generally considered one of the most stable constitutional democracies of Latin America. After a 17-year long dictatorship, the country had managed to embark into what some thought to be a "model" transition (Drake and Jaksic 1999), characterized by the peaceful passage from a violent authoritarian regime into a working liberal democracy, while simultaneously achieving something of an economic "miracle" (which allowed it to more than double its GDP, and reduce the poverty rate from around 40%, in 1990, to 10%, in 2018).¹

From a liberal-democratic constitutional perspective, the troubling side of what looked as an extraordinary positive period of Chile's history, was the fact that the achievements mentioned above were accomplished under a Constitution imposed by the very dictatorship that was substituted by a supposedly model transition. Indeed, even though that charter has been amended 43 times in its 40 years in existence, not one of those reforms were done without the consent of the political 'heirs' of the military regime (that is, the right-wing coalition made-up by "Renovación Nacional" and "Unión Demócrata Independiente" parties).

One attempt to explain the paradox of a successful democratic transition that took place under a constitutional charter imposed by an authoritarian regime, was to argue that the remarkable political, economic, and social achievements mentioned above were accomplished *in spite* of the 1980 Constitution, not *thanks* to it.² This line of argument claims that the key to explain Chile's successful transition lies in its long republican/democratic history, and the fact that it started at precisely the time when the Soviet Union was collapsing (something that had a strong moderating effect in Chile's left). Furthermore, this argument goes, as opposed to the enormous challenges faced by other transitional countries of the "third wave of democratization,"

¹ Ffrench-Davis (2018).

² Couso (2017) and Ugglá (2005).

Chile engaged in a *return* to democracy, not in the *inauguration* of an unprecedented democratic era, as was the case in other transitional countries. Thus, the fact that the Pinochet's regime was an historical aberration for Chile might explain why this country could return without much trouble to its traditional democratic ways.

One element that suggests that democratization in Chile was, indeed, possible in spite of the 1980 charter—and not thanks to it—was that, for the first 15 years of the transition (1990–2005), its Constitution included a clause establishing that the upper house of Congress would be only partially made-up of democratically elected senators. Indeed, during that period, the constitutional charter left in place by the dictatorship contemplated a set of non-elected senators that, due to the way they were selected, ended-up giving control of the upper house of parliament to the right-wing opposition (which was consistently defeated in parliamentary elections by the left of center “Concertación” coalition).

The distortion involved in a constitutional order that, for a decade and a half, artificially prevented the democratic preferences of Chileans from translating into the control of the Senate cannot be minimized, because it forced the government—which was also under the control of the Concertación coalition for those 15 years—to negotiate each piece of legislation with an opposition coalition that not only had a minoritarian support, but that was largely satisfied with the neoliberal *status quo* left behind by the military regime. In addition to the political impact just described, the constitutional constraint we are analyzing had long-lasting ideological effects. Faced with the impossibility to reform key aspects of the economic model enshrined by legislation—which could only be derogated with the consent of political parties that admired that legacy of the military regime—the government coalition gradually shifted from resignation, to eventually embracing some of the key elements of the neoliberal economic approach they had originally opposed. Thus, by the time the non-elected senators were eliminated (in 2005), the bulk of the public-policy elites of the government coalition had largely naturalized the main tenets of Chile's radical form of free-market economics (such as a pension system based on individual capitalization; the organization of a healthcare system that segregates by income; and a labor law biased against unions).³ There is no space in this piece to detail the different elements of the neoliberal legality left in place by Pinochet's regime (that the institution of non-elected senators prevented from being dismantled during the first crucial decade and a half of Chile's democratic transition), but Carlos Huneeus' characterization of this period as a “*semi-sovereign*” democracy captures well the costs of a transition governed by a charter introduced by an autocracy.⁴

As anticipated above, in 2005 an agreement to introduce a large set of constitutional amendments was reached by the Concertación's government and the right-wing opposition. These included the elimination of the most anti-democratic features of the 1980 Constitution that were still in place (i.e., the partially non-democratic election members of the Senate and the lack of a civilian control of the

³ Güell and Rondón (2011).

⁴ Huneeus (2014).

Armed Forces). After a—rather opaque—period of negotiations,⁵ President Lagos promulgated the 58 amendments agreed upon, stating that with those reforms Chile had finally gotten a fully democratic constitutional charter.⁶

While the country's peaceful transition unfolded—albeit with the constraints on majority-rule already described, behind the country's fast economic growth and poverty reduction, something of a malaise was simmering in large segments of society, especially among those groups that were just above the poverty line. Indeed, already in 1998 a report elaborated by United Nations Development Program (UNDP) office in Chile detected among a large number of Chileans a deep-seated feeling of economic insecurity, due to an economic model where access to good-quality health-care and education, as well as the likelihood of having a decent pension, depended on securing and maintaining a job (so much so that, if unemployment struck, the education of the children and the health care of the entire household would be immediately scaled-back, while saving for a future pension would be suspended). Coinciding with this UNDP Report, a number of intellectuals associated with the left-wing of the government coalition—labelled “*self-flagellants*”—started to question key aspects of the economic model,⁷ while on the other side of this debate, a group labelled as “*self-indulgents*” countered that the malaise was not due to economic insecurity generated by the neoliberal model, but it was merely the consequence of the rapid process of capitalist modernization experienced by Chile.⁸ The political—and, eventually, constitutional—significance of the critical assessment of the “*self-flagellants*” of an economic model that ensured economic growth and poverty reduction, but segregated people by income and in the enjoyment of some basic socio-economic rights, would take more than a decade to gain sufficient political prominence but, eventually, it had an profound influence in the emergence of a ideational link between the rejection of neoliberal economics and a call for a new constitutional order.

At this point, it is worth noting that the first formal call for a new Constitution by a relevant political leader was that of former President—and then candidate—Eduardo Frei Ruiz-Tagle, in 2009. With the incoming Bicentennial of Chile's independence in the horizon, he argued that the time had come to introduce a constitutional charter elaborated in a democratic manner.⁹ While his call was echoed by two

⁵ Fuentes (2012).

⁶ The day of the promulgation of this set of constitutional reforms, President Lagos declared that “*Chile now has a Constitution that does not divide us*” (Lagos Escobar 2005: p. 8). He added that “*We have today a democratic Constitution and this, by the way, has to do with the vital problems of the citizens, because it will not be the same that the future laws of the Republic with which it is precisely a question of providing a solution to those problems are discussed and approved in a Senate entirely elected by universal suffrage, more or less representative of the sovereign will of the Nation, than by a Senate composed by appointed senators or senators for life*” (Lagos Escobar 2005: p. 13).

⁷ Güell (1998) and Lechner (2000). From outside the circle of supporters of the Concertación, Moulián (1997) published a devastating critique of Chile's neoliberal economy and society, in a book that became an immediate best-seller.

⁸ Brunner (1998).

⁹ Couso and Tohá (2009), published an article arguing for a new Constitution a year before Frei included that in his programmatic platform.

other presidential candidates (Jorge Arrate and Marco Enríquez-Ominami), the fact that the person who eventually prevailed in the election, Sebastián Piñera, did not contemplate that in his programmatic platform, made the issue fade away.

In spite of Piñera's rejection of the call for a new Constitution, during his first administration (2010–2014) a number of social movements started to make a link between their grievances and the Constitution of 1980. Groups such as '*Marca AC*' and,¹⁰ most significantly, the student movement that in 2011 cornered Piñera's administration, realized that many of their social demands would be more easily achieved if there was a new charter that did not include the neoliberal clauses of the 1980 charter. This approach of Chile's constitutional problem was echoed by a number of academics, who argued that it was about time that Chile ended with the constitutional legacy of the military regime.¹¹ This provided intellectual ammunition to former President Michelle Bachelet's in her second presidential campaign (in 2013), as we shall see below.

At this point, it is worth describing the principles and rules of the 1980 charter that constitutionalize some key aspects of the neoliberal economic model introduced in the late 1970s by the military regime.¹² Since there is no space in this piece to analyze all of them, we shall describe the most relevant ones. The core principle that gives coherence to Chile's constitutionalization of some elements of its neoliberal economic model, is "*the principle of subsidiarity*." Although not explicitly stated in the text of the 1980 Constitution, this principle is generally regarded by Chile's constitutional scholars to be implicitly recognized by Article 1 of the former.¹³ While it is debatable that the wording of this clause necessarily leads to the notion that the State can only provide a social right if a private entity (including corporations) cannot do so, the fact that this was the interpretation of this principle done by the ideologue of the 1980 charter, Jaime Guzmán, made it an authoritative one within conservative constitutional circles (Cristi 2019).

¹⁰ Coddou Mc Manus and Contreras (2014).

¹¹ See Atria (2013) and Atria et al. (2013).

¹² What's interesting about this issue is that—contrary to what might have expected—the inclusion of core elements of the neoliberal economic model in Chile's Constitution was not done in the '*engine room of the Constitution*' (in Gargarella's well-known image), but in the chapters that declare the principles and values and in the one that recognizes fundamental rights. Indeed, while some might think that economically-relevant constitutional rules included in the organic section of the 1980 Constitution might be linked to neoliberalism (such as the constitutional regulation of annual budgets and the exclusive presidential initiative in matters such as social security, taxation, and public spending, and others), this is not the case, since those provisions *predate* the arrival of neoliberalism in Chile, having been included in the 1925 Constitution (in the case of the constitutional predominance of the executive branch on the annual budget); in the 1943 constitutional amendment (in the case of granting exclusive presidential initiative for the introduction of new public services, the increase of salaries or bonuses to the personnel of the State Administration and the creation of new fiscal companies); and, finally, in the 1970 constitutional amendment (which broadened the scope of the presidential legislative initiative in the domain of taxes, minimum wage for private sector workers, social security and others). Thus, with the possible exception of the constitutional autonomy of the Central Bank, it is hard to argue that the aforementioned constitutional regulations of the 1980 'engine room' can be linked to neoliberal economics. For an account of the constitutional history of the constitutional regulations described above, see Soto (2008).

¹³ See Fermandois (2006). For a critical view on this analysis, see Vallejo Garretón and Pardow Lorenzo (2008).

After implicitly establishing the principle of subsidiarity, the 1980 Constitution includes the recognition of some specific social rights—such as the right to social security and the right to health care—with the proviso that the people will have a fundamental right to choose between the private sector or the State to materialize their provision. This peculiar feature of the charter was unprecedented at the time of its introduction, giving constitutional form to the motto “*private solutions for public problems*”, which summarized the radical version of neoliberal economics imposed by the military regime (Atria et al. 2013; Mayol 2012).

If Article 1 of the Constitution is open to interpretation (allowing non-neoliberal ones), the same cannot be said of Article 19, Number 9, which recognizes a fundamental right “*to choose the health system, be it public or private*”. Consequently, if say, a social-democratic government tries to introduce a universal public health-care system (similar to the U.K.’s National Health System) that would be clearly against the 1980 Constitution, since it would collide with the right to choose between a private or public health-care system. Something similar happens with Article 19, Number 18, which declares that “*State action will be aimed at guaranteeing access for all inhabitants to the enjoyment of uniform basic (social security) benefits, whether they are granted through public or private institutions,*” a clause that, in effect, provides constitutional recognition to private pension fund administrators. Thus, in the same way that Article 19, Number 9 would make unconstitutional the introduction of an exclusively public health-care system, Article 19 Number 18 would most likely be interpreted as constitutionally prohibiting an exclusively public, “pay as you go,” pension system. Another clause that constitutionalizes neoliberal economics is Article 19, Number 21, which exhibits a clear hostility towards state-owned companies, because it requires a qualified majority of members of Congress to adopt legislation authorizing the State to establish public enterprises.

As it can be appreciated, the Constitution of 1980 include a number of highly idiosyncratic clauses aimed at preventing the dismantling of key aspects of Chile’s particularly radical version of neoliberal economics. While the country’s Constitutional Court could have attempted a non-neoliberal interpretation of the clauses described above, it never did so. Actually, it did the opposite, by declaring the unconstitutionality of a large number of progressive bills approved by the Congress. A good example of this conservative jurisprudence is Decision N° 4.317 which declared unconstitutional a provision of a bill (approved in 2018) that sought to prohibit the controllers of private universities from pursuing profit-making purposes. Another example is Decision N° 4.012 (2018), where the Constitutional Court struck down most of a law bill strengthening Chile’s consumer protection legislation. The conservative jurisprudence exhibited by the latter led some authors to refer to this Court as an un-elected “third legislative chamber”.¹⁴

¹⁴ Atria and Salgado (2018).

3 Bachelet's Failed Constitution-Making Process (and Its Legacy)

An important step towards the consolidation of the notion that Chile urgently needed a new Constitution came when former President Michelle Bachelet decided to run for a second presidential term in 2013. After some years at the United Nations', and in light of the massive demonstrations by university students in 2011—when, it is worth remembering, for the first time a social movement made the link between neoliberal economics and the 1980 charter, Bachelet decided that a new Constitution should be one of the three key reforms included in her programmatic platform (along with a tax and an educational reform). At that point, the former President made another crucial decision: In order to provide legal certainty, she announced that the process to get a new Constitution would be “*democratic, participatory, and institutional*”. By this last—crucial—expression, Bachelet meant that the constituent process she was proposing would not be done through the transgression of the existing constitutional order, but instead through the amendment mechanism established in the 1980 Constitution itself.

The problem of taking this path, however was that, given that the amendment of the reform chapter of the 1980 charter required two thirds of the actual members of Congress, and that her coalition controlled only about 55% of it, she would need to get the support of at least part of the right-wing coalition that opposed her government. Thus, Bachelet's proposal for a constituent process faced the almost impossible task of persuading a sizable segment of the right-wing coalition—that had never shown interest in replacing the 1980 Constitution—to support her proposal.¹⁵

Given the cold reception of conservatives to Bachelet's constitution-making initiative, she started the 'participatory' phase of her constitution-making plan by calling Chileans to gather in small groups (or to send their proposals via internet) in order to discuss what shape the new charter should have. To ensure that the participatory process would be non-partisan, she appointed a group of observers from different political parties and from civil society. Perhaps fearing that millions of Chileans could join-in the participatory process, the right-wing parties encouraged the inclusion a few constitutional scholars close to them to join the group of observers. However, when the participatory phase gathered only around two hundred thousand participants (almost all of them supporters of Bachelet's coalition), conservatives concluded that a constituent process would not be forced upon them, and discretely distanced them from the process, arguing—when required to do so—that the 1980 Constitution had been the subject of so many amendments that it could hardly be said to be the same charter introduced by the military regime in 1980. Given this fact, they continued, a few amendments would be enough to address Chile's constitutional problem. Another usual argument for not engaging in a constituent process

¹⁵ Conservative groups' reluctance to embark on a full-fledged constituent process during Bachelet's second administration is apparent in the interventions of most constitutional scholars close to the right-wing parties that participated in an important collective volume organized by a right of center think tank (*Centro de Estudios Públicos*). In this volume (Sierra 2015) most of the conservative scholars participating in the initiative were skeptical of embarking on a new constitution.

was that, since the country was not experiencing a social or political crisis that justified the trouble of embarking in a constituent process, it should introduce a few amendments to the existing charter. Faced with this argument, scholars advocating a new charter replied that it would be important to preclude an imminent crisis by proceeding to get a new Constitution, because the 1980 charter had not only an illegitimate origin, but also an ideological bias which often prevented the passing of badly needed progressive legislation.¹⁶

Aside from these debates, the crude fact was that the right-wing parties never seriously considered the possibility of giving their support to the constitutional amendment that Bachelet needed to pursue her ‘institutional’ path to a new Constitution.¹⁷ In light of this political reality, in the end Bachelet proceeded to ask a small group of advisers to draft a proposal for a new charter that was submitted for Congress’s consideration just days before her administration ended, in what represented a merely symbolic gesture. Looking back at Bachelet’s aborted constitution-making process, it is apparent that it failed because Chile’s right-wing coalition did not share her diagnosis regarding the problems exhibited by the 1980 charter.

4 Social Uprising, Political Settlement, and Constitution-Making

After Bachelet’s failed attempt to introduce a new Constitution, President Piñera—in an almost identical fashion that had been the case in his first administration—did not only omit the inclusion in his program a new Constitution but, soon after taking office, declared through his Minister of Interior (Andrés Chadwick) that his administration would not pursue any constitutional change. His second term in office, the President stated, would be devoted to resuming economic growth. During the first 18 months of his tenure—from March 2018 to September 2019, nobody predicted that the most violent and massive social uprising in a generation was about to happen. For the contrary, just days before the beginning of the October 2019 social uprising, Piñera gave an interview declaring that Chile represented something of an “oasis” in a convulsed Latin America.¹⁸

This is not the venue to analyze the origins, main features, and significance of Chile’s 2019 social uprising.¹⁹ In fact, it would likely take years for social scientists

¹⁶ Heiss (2017).

¹⁷ Verdugo and Contesse (2018) have argued that Bachelet’s failed attempt to introduce a new constitution was mostly due to her failure to engage the political parties in the process (and her strategy to make a direct appeal to the people on this matter). While an interesting account, I will argue that no matter how much strong had Bachelet insisted on her call for a new charter before the right-wing parties, they would have not agree to start one, some because they actually liked the Constitution of 1980, others because they were convinced that stable democracies should not engage in such processes. Mindful that the right-wing parties had all but closed the constitutional issue after the 2005 amendment’s, Bachelet’ strategy was to make a new constitution inevitable if enough citizen’s participation was ensured, but the effort proved to be insufficient.

¹⁸ See the web site: <https://www.emol.com/noticias/Nacional/2019/10/08/963586/Pinera-por-America-Latina.html>.

¹⁹ For a description of the 2019 social uprising see Mayol (2019).

to ascertain with some degree of certainty why those dramatic events happened at that point in history. What's relevant for the purpose of this piece is to note that, a few days into the uprising, the social and economic demands that demonstrators were voicing (such as the end of a privately administered pension system, and of the economically segregated health-care structure), eventually gave rise to a call for a new Constitution. This seems to have been the result of the growing public awareness of the fact that the 1980 charter constitutionalized elements of the neoliberal economic model.

Dealing with a level of social mobilization and rioting without precedent since Chile's return to democracy, and with the clock ticking to be forced to ask the opposition-controlled Congress to renew the constitutional state of emergency decreed at the start of the social outbreak—which, incidentally, had propitiated human rights violations by the police and the armed forces, prompting human rights organizations both in Chile and at the international and regional levels to start investigations—President Piñera eventually caved-in to the pressure put on him by the most moderate side of his government coalition and called for a national agreement for a new Constitution. This move, it was expected, would institutionally channel a crisis that was thought could end in a bloodbath.²⁰

Moving fast, on November 15, 2019 a broad spectrum of the political party system agreed, on a constitution-making process that would start with an amendment to the existing charter, and that would consider the following steps: (a) an “entry” referendum, where citizens would be consulted if they wanted a new Constitution and, also, if they wanted the constituent body to be fully elected, or made-up of a combination of members of Congress and representatives especially elected for the constitution-making process; (b) the election of a Constitutional Convention, that would draft the text of the new charter and, finally; (c) an “exit” referendum, where the text agreed upon by the Convention would be submitted for the ratification of the Chilean people. If the new Constitution were to be approved, the existing charter would then cease to exist.

5 Chile's Constituent Process as a Case of a “Procedurally Regulated Activity”

In addition to the itinerary just described, the November 15, 2019 agreement included a number of key elements. The most important ones represented crucial mutual concessions by the negotiating parties. In the case of the left of center and left parties, the most important one was to accept that each clause of the new Constitution—as well as the rules of procedure of the Convention—would have to be adopted by two thirds of its existing members. And, in the case of the right-wing coalition, the biggest concession was that, if the Convention failed to agree on a specific matter, the 1980 Constitution would not rule by default on that matter.

²⁰ For an account of the events surrounding the November 15, 2019 agreement on a new Constitution see Escudero and Falcón (2020), Nogueira (2020), Ansaldi and Pardo-Vergara (2020).

The rationale of the right-wing's push for the—demanding—two-thirds quorum, was that they were convinced that they would get at least one third of the seats at the Convention, giving it a crucial veto power. In the case of the left of center and left demand that, if no agreement on a specific matter was achieved by two-thirds of the constitution-making body the existing charter would not rule by default (a feature that came to be known colloquially as the “clean sheet” or ‘*hoja en blanco*’ in Spanish), the rationale was to prevent that the eventual veto of the right-wing would translate into the inclusion by default of any of the clauses of the 1980 Constitution.

A third, critical, feature of the constituent process agreed upon by the negotiators, was the ‘institutional’ nature of the process, that is, the notion that it will not involve a break with the existing constitutional order. Accordingly, it was agreed that a technical committee would be appointed to work on a constitutional amendment proposal of the 1980's charter, so that the latter would include a section allowing for its complete substitution by a new one. The non-disruptive character of the constitution-making process agreed upon in was further strengthened by a clause establishing that:

“The constituent body's (...) sole purpose shall be to draft the new Constitution, not affecting the competences and attributions of the other organs and powers of the State and it will dissolve once the task entrusted to it has been completed. Furthermore, it may not alter the quorum or procedures for its operation and adoption of resolutions.”

As it can be appreciated, the negotiators took pains in making it clear that the process they were launching did not signify a rupture with the existing constitutional order but, instead, one that ensured the legal continuity between the 1980 charter and the future one.²¹ Furthermore, it is worth highlighting the fact that the passage quoted above was emphatic in stating that the body in charge of elaborating the new Constitution would not be able to interfere with the constituted public powers, and that it should limit itself to the sole task of debating and agreeing on a new fundamental charter and then dissolve itself (which implied a clear prohibition imposed on the Convention of assuming full sovereign powers). While the amendment that constitutionally materialized the November 2019 agreement reinforced the legal continuity involved in the process through the introduction of a mechanism to solve controversies within the Convention (establishing that one fourth of its members can ask the Supreme Court to void alleged breaches of the rules governing the process), it did not give the latter jurisdiction to rule on the pertinence of the substance of new charter being drafted.

As it can be appreciated, as a result of the agreement we have been analyzing, Chile's ongoing constituent process can be described as a *highly regulated* one. From this specific perspective, it resembles the South African constitution-making

²¹ The consensus achieved by political parties' negotiation de November 2019 agreement on a regulated constituent process that ensured a legal continuity between the existent constitution and the new one represented a conscious differentiation with the ‘Bolivarian’ ones that took place over the last two decades in Latin America, particularly that of Venezuela (in 1999).

process of 1993–1996 (Klug 2000). With hindsight, it can be said that Bachelet's failed attempt to introduce a new Constitution a few years earlier contributed to this, since the negotiators took for granted the 'institutional' feature that her aborted process contemplated, that is to say, the need to amend the existing charter in order to call for its complete replacement by a new one.

The features of the constitution-making process described above seems to fit Colón-Ríos' (2020) notion of "*constituent power as a procedurally regulated activity*,"²² which, in the words of this author, is one where the: "(...) *constituent power is constitutionalized: it is seen as the power of altering or replacing a constitution according to certain prescribed rules. From this perspective, the fact that even the exercise of an ultimate constitution-making power is subject to law is celebrated as one of the greatest achievements of modern constitutionalism: the domestication of an apparently unruly political force*". Indeed, Chile's ongoing process exhibit precisely the features that Colón-Ríos describes in this form of constitution-making. While legally authorized by a formal amendment of the existing charter, the process explicitly aims at the total replacement of it according to procedural rules, but leaving the constitution-making body leeway to autonomously decide the content of the new charter.

Perhaps due to the fact that it did not participate in the agreement that initiated the process, or because they opposed the constitutional continuity involved in a process where the constituent power is procedurally regulated, Chile's Communist Party strongly criticized the November 2019 accord (and the constitutional amendment that materialized it). Denouncing that the entire operation represented merely the exercise of a "*derivative*" constituent power appropriate for constitutional amendments, but not for introducing a new constitution, the Communists claimed Chileans were demanding a "*fully sovereign*" process involving a constitutional assembly which, in order to be the expression of an "*original constituent power*", it should recognize no boundaries.

Contrasting with the position of the Communist Party and other leftist groups,²³ the bulk of the Chile's political-party system accepted that the November 2019 agreement launched a process which involves a constitutional continuity with the existing charter. Given the chance to completely replace a Constitution originally imposed by a dictatorship, the opposition parties that were part of the negotiations did not seem to mind that the process represented what was, technically speaking, a peculiar form of exercising a derivative constituent power (peculiar because it involves the complete replacement of the existing charter authorizing the process). While, of course, at that time Colón-Ríos's notion of a "*constituent power as a procedurally regulated activity*" was not yet available, the Chilean negotiators would have welcomed an approach to constitution-making that could have provided theoretical support to what they were doing.

²² Colón-Ríos (2020).

²³ They were joined in this position by a small group of the Frente Amplio, and later, by radical leftist groups that got organized in the context of the election of constituent members.

In the case of the right-wing parties that participated in the accord (Renovación Nacional, Unión Demócrata Independiente and a relatively new party, Evópoli), while still shocked by the fact that the social uprising had forced them to give up a constitutional charter they were more than happy with, they could take some comfort in the fact that the process did not involve a rupture or discontinuity with the existing constitutional order (in other words, with the fact that the constituent process that was about to start would be an ‘institutional’ one, in the terminology Bachelet introduced in 2013). Mindful of the disruptive/fully sovereign connotations that the label “constituent assembly” or ‘*asamblea constituyente*’ has had in Latin America in recent decades, they insisted in naming the constitution-making body that would elaborate the text of the new charter “Constitutional Convention”. This seemingly semantic move, signaled for the right-wing parties involved in the negotiations that Chile was embarking in a legally-bounded constituent process.

While the legal continuity of the process found constitutional expression in a formal amendment of the existing charter, which introduced a new section to the reform chapter of the 1980 Constitution called “*On the procedure for the elaboration of a New Political Constitution of the Republic*,” (which included a detailed regulation of the procedural steps to make a new charter), the fact that the process being established combined a non-sovereign *procedure* coupled with a fairly sovereign capacity to decide on the *content* of the new Constitution was reinforced by the fact that the said amendment included an enforcement mechanism solely to guard the procedural rules of the constituent process, but not for the—rather general—constraints established on the content of the new charter. Thus, while Article 136 provide that at least one fourth of the Convention could request the Supreme Court to void an act of the majority if done violation of the procedural rules set up by the 1980 charter, in the case of general and non-controversial constraints regarding the content of the Constitution (such as the duty to respect the democratic and republican nature of the Chilean state) there is no enforcement mechanism whatsoever.²⁴

To sum up this section, after the failed attempt by President Bachelet to launch a constitution-making process (due to the negative of those who had the key for an ‘institutional’ path to that goal, the right-wing parties), the surprising emergence in October 2019 of a violent, massive and persistent social uprising suddenly transformed the introduction of a new Constitution into a way out of a truly explosive situation. Exhibiting an impressive capacity to negotiate fast under a tremendous amount of pressure, a broad scope of Chile’s political parties agreed on a constituent process that seems to squarely fit Colón-Ríos’s notion of a “*constituent power as a procedurally regulated activity*”, due to the fact that while the procedural features of the process are detailed and include an judicial enforcement mechanism, the constituent body is fairly sovereign to decide on the content of the new charter.

²⁴ Article 136 of the 1980 Constitution, as amended in December of 2019, states that: “*A claim may be made of an infringement of the rules of procedure applicable to the Convention, contained in this section and of those of procedure that emanate from the general agreements of the Convention itself. In no case may a claim be made on the content of the texts in preparation. Five ministers of the Supreme Court, chosen by lot by the same Court for each question raised, will hear about this claim.*”

6 The “Entry” Referendum (and Its Significance)

On October 25, 2020 (after a 6-month delay, due to the COVID-19 pandemic), the “entry” referendum took place. In a peaceful, well-organized, and, considering the pandemic, rather massive electoral event, almost 80% of those who participated in the election voted for the “*Approve a New Constitution*” option, effectively repudiating the 1980 charter. In the case of the second question posed by the entry referendum (giving the option of a fully-elected convention or one combining members of Congress with people elected for the Convention), the vote in favor of the former option also got almost eighty per cent.

The surprisingly high electoral support of the “*Approve*” option had a significant effect in the perceived ‘inevitability’ of a new Constitution. Had, say, the “*Reject a New Constitution*” option been more competitive (getting, say, 35–45% of the votes), an eventual failure of the Constitutional Convention to deliver a new text, or its disapproval in the exit referendum, would have made the constitutional clause that prescribes that—barring the promulgation of a new one—the 1980 Constitution will continue to rule more sociologically plausible. But, the fact that in the entry referendum such a large number of Chileans repudiated the charter imposed by the military made the 1980 Constitution’s survival extremely unlikely.

After the entry referendum the second—critical—step of the constituent process was the election of the Convention, which took place on May 15–16, 2021. In an election that surprised the predictions of almost all public opinion surveys—and all political analysts, the share of independent candidates that got elected (103, or 66% of the total) was as relevant as the fact that the right-wing coalition did not get the expected one third of the Convention (that would have given it a veto power over each new clause of the text of the new constitution). Furthermore, the left of center coalition (representing the parties that used to govern the country in 1990–2010 and then again in 2014–2018) got less than 17% of the seats, while a previously unknown group, the radical left “List of the People” got 18%, a similar number of that the “Apruebo Dignidad” list (a coalition of the leftist “Frente Amplio” and the radical-left Communist Party).

One historical outcome of the election was that 49.5% of the Convention seats went to women, but that was a given, due to the gender parity rule approved in Congress in March 2020. Having said this, it is still a landmark event, since, for example, the total seats occupied by women in the legislative branch reaches only 23% of the total. Lastly, the election of 17 members of Chile’s indigenous peoples (thanks to a constitutional amendment reserving those seats to them) it is expected to put their demands at the center of the agenda of the Convention.

From a political/ideological perspective, the results of the election felt like an “earthquake” for the right-wing coalition, that only a few weeks before thought it would get at least one third of the seats of the Convention. Furthermore, the right was appalled by the fact that the left of center coalition experienced such an unmitigated electoral disaster, leaving the ideological shape of the Convention biased towards the left and radical left. Having said this, independent analysts celebrated the fact that such a large number of independent candidates got elected, because

they thought that such outcome would make the Convention more ‘representative’ of the Chilean people than, say the current Congress. Furthermore, these observers noted that the election of so many independent candidates eliminated the risk that (had candidates from political parties won the lion’s share of the seats of the Convention) regular Chileans might have thought that the traditional political parties (or “political class”, as they called them) had “captured” the Convention, thus endangering the legitimacy of the entire process. Having said this, other observers argued that the high fragmentation of a constituent body made up of mostly independent groups (without much previous political experience) could find it hard to agree on each clause of the new Constitution by two thirds of the total membership of the Convention.

A final concern that worries some analysts is the negative reaction of the right-wing coalition to its electoral disaster. Indeed, considering that the latter means that they will lack the veto power they had expected to have, some observers worried that they might disengage from the entire process altogether, and start working for the ‘Reject’ option in the exit referendum from the outset. Furthermore, the overwhelming dominance of the left in the Convention raised concerns in Chile’s business community regarding the likelihood that new Constitution would be hostile to business. This concern was reflected in the fact that Chile’s stock exchange dropped almost 10% the day after the election.

It is hard to convey the negative impact that the election of constituent members had in the Chile’s political, economic, and social establishment. While in the first few days after the election some in the right and center-left tried to take an optimistic stand towards the surprisingly leftist character of the Convention, a series of statements by the List of the People and by the Communist Party (issued in the period between the election and the actual beginning of the work of the Convention) to the effect that, first, they did not feel obliged by the constitutional rules governing the constitution-making process (including the two thirds requirement for adopting each clause of the new Constitution) and, second, that they were going to demand the liberation of the so-called ‘political prisoners’ (referring to people prosecuted for violence during the worst period of rioting of the period October–December of 2019), triggered alarm in much of Chile’s elite that the constituent process might take a “revolutionary” turn. This state of agitation somewhat subsided when the leaders of the Frente Amplio coalition reassured public opinion that they would respect the constitutional rules governing the constitution-making procedure, including the two thirds quorum to introduce each new constitutional clause. Although the Frente Amplio leaders expressed solidarity with the request by the List of the People and Communist Party’s concerning the ‘political prisoners’ (to the point of signing with the latter a formal petition to Congress and the Judiciary to do something about it), they also made clear that they thought that it was for the constituted powers of the Chilean state to decide on the matter.

At this point, it is relevant to highlight that the concomitant presidential primaries that took place soon after the start of the Convention’s work (in mid-July 2021), further distanced the Frente Amplio’s position from that of the radical left regarding the nature of Chile’s constituent process. Thus, while the candidate of the former, Gabriel Boric, defended the institutional position of recognizing the subordination of the Convention to the rules set by the existing charter, Daniel Jadue (the Communist presidential hope)

showed ambiguity at best, and hostility at worse, to both the November 2019 agreement and the constitutional amendment that materialize it. This crucial discrepancy had an impact in the Convention, consolidating the Frente Amplios's decision to accept the fact that—procedurally—the Convention was constrained by the existing Constitution, while the Communist Party sided with the Lista del Pueblo in holding a 'fully sovereign' understanding of the process. The fact that Boric defeated Jadue by a large margin no doubt contributed to the consolidation of the institutionalist position in the Convention. While important in terms of providing legal certainty, the divorce of the left just described could, however, become an obstacle when they try to reach the two thirds majority needed to adopt the norms of the future Constitution. In other words, while the important degree of fragmentation of Chile's Constitutional Convention ensures that no party coalition or movement can exercise a veto power over the decisions taken by the majority, that very fragmentation—combined with the two thirds quorum—represents the single most important hurdle to agree on a text to be submitted to the Chilean people for ratification. Indeed, while an opportunistic 'coalition' between the right and the extreme left to veto the approval of the draft seem extremely unlikely, the coordination costs of getting two thirds of the members of the Convention to pass each clause of the new charter will be significant.

7 Conclusion

It is difficult to ascertain the ultimate nature of Chile's constituent process, both because it is still in the making, and due to the fact that it may end up failing to deliver a new charter. Having said this, if successful, it would be an instance of what Colón-Ríos' calls a "*procedurally regulated activity*", that is, one in which a constituent body has been enabled to start to draft a new Constitution by the existing charter, imposing some procedural rules. Indeed, just as this piece was being finished, Chile's Constitutional Convention approved its rules of procedure ('*Reglamento*'), which respected the key procedural constraints established by the existing Constitution, that is, the two-thirds quorum for adopting each clause of the new charter. Considering the uncertainties still surrounding Chile's ongoing constitution-making process, it impossible to draw firm 'lessons' from it but, provisionally, a few insights can be advanced. First, the danger for the long-term endurance of charters that are partisanship or ideologically biased. Second, the limited role that constitutional engineering has in the design of constitution-making processes, vis-à-vis the correlation of forces of the social and political actors pushing for—or rejecting—constitutional transformation. Lastly—but perhaps most importantly, the need to overcome the traditional notion that the introduction of a new Constitution necessarily requires the display a fully sovereign/unbounded exercise of the constituent power. Indeed, Chile's ongoing constitution-making process suggests that a procedurally regulated constituent process (as it happens when the introduction of a new charter is combined with the legal continuity with the old one) represents a promising path to introduce a new Constitution in a manner that promotes the rule of law.

References

- Ansaldi O, Pardo-Vergara M (2020) What constitution? On Chile's constitutional awakening. *Law Crit* 31(1):7–39
- Atria F (2013) *La constitución tramposa*. Lom ediciones, Santiago
- Atria F, Salgado C (2018) El Tribunal Constitucional desatado (1): un poder insoportable. *Diario El Mostrador* 23. <https://www.elmostrador.cl/noticias/opinion/columnas/2018/01/23/el-tribunal-constitucional-desatado-1-un-poder-insoportable/>
- Atria F et al (2013) El otro modelo: del orden neoliberal al régimen de lo público. *Debate*, Madrid
- Brunner JJ (1998) Malestar en la sociedad chilena: ¿De qué, exactamente, estamos hablando? *Estudios Públicos* 72:173–198
- Coddou Mc Manus AC, Contreras P (2014) Nueva Constitución y Asamblea Constituyente. La experiencia de “Marca tu voto”. *Anuario de Derecho Público UDP* 121–139
- Colón-Ríos J (2020) *Constituent power and the law*. Oxford University Press, Oxford
- Couso J (2017) Constructing ‘privatopia’. The role of constitutional law in Chile's radical neoliberal experiment. In: Golde McLoughlin (ed) *The politics of legality in a neoliberal age*. Routledge, London
- Couso J, Tohá C (2009) El sistema político chileno y sus desafíos: un nuevo arreglo constitucional para el Bicentenario. *El Chile que viene*. De dónde venimos, Dónde estamos y a Dónde vamos. Ediciones UDP, Santiago, Chile, pp 167–188
- Cristi R (2019) Jaime Guzmán, capitalismo y moralidad. *Rev Derecho UACH* X:87–102
- Drake P, Jaksic I (eds) (1999) *El modelo chileno: democracia y desarrollo en los noventa*. Lom Ediciones, Santiago
- Escudero MC, Falcón JG (2020) Nueva Constitución y proceso constituyente. *IdeAs* 15: <https://doi.org/10.4000/ideas.8417>
- Fernandois A (2006) *Derecho constitucional económico*. Tomo I. Ediciones Universidad Católica de Chile, Santiago
- Ffrench-Davis R (2018) *Reformas económicas en Chile 1973–2017*. Taurus
- Fuentes C (2012) *El Pacto. Poder, Constitución y prácticas políticas en Chile (1990–2000)*. Ediciones UDP, Santiago, Chile
- Güell PE (1998) Subjetividad social y Desarrollo Humano: desafíos para el nuevo siglo. Ponencia en *Jornadas de Desarrollo y Reconstrucción Global*, ID/PNUD, Barcelona
- Güell P, Rondón AJ (eds) (2011) *Notables, tecnócratas y mandarines: elementos de sociología de las elites en Chile, 1990–2010*. Universidad Diego Portales.
- Heiss C (2017) Legitimacy crisis and the constitutional problem in Chile: a legacy of authoritarianism. *Constellations* 24(3):470–479
- Huneus C (2014) *La democracia semisoberana: Chile después de Pinochet*. Taurus, Madrid
- Klug H (2000) *Constituting democracy: law, globalism, and South Africa's political reconstruction*. Cambridge University Press, Cambridge
- Lagos Escobar R (2005) Una Constitución para el Chile del Bicentenario. In: Zúñiga F, (ed) *Reforma constitucional*. LexisNexis, pp 1–18
- Lechner N (2000) Desafíos de un desarrollo humano: individualización y capital social. *Inst y Desarrollo* 7:7–34
- Mayol A (2012) No al lucro: de la crisis del modelo a la nueva era política. *Debate*, Madrid
- Mayol A (2019) *Big bang. Estallido social 2019: modelo derrumbado-sociedad rota-política inútil*. Editorial Catalonia, Santiago
- Moulian T (1997) *Chile actual: anatomía de un mito*. Arcis, Santiago
- Nogueira HN (2020) El camino hacia una nueva Constitución. *Teoría y Realidad Const* 46:433–456
- PNUD Chile (1998) *Desarrollo Humano en Chile. Las paradojas de la modernización*. file:///Users/javier-cousosalas/Downloads/undp_cl_idh_informe1998.pdf
- Sierra L (2015) *Diálogos constitucionales*. Centro de Estudios Públicos (CEP)
- Soto S (2008) *Iniciativa exclusiva del Presidente de la República: un aporte del TC para su interpretación*. Sentencias Destacadas 2007 (Libertad y Desarrollo)
- Ugglá F (2005) “For a few senators more”? Negotiating constitutional changes during Chile's transition to democracy. *Lat Am Polit Soc* 47(2):51–75
- Vallejo Garretón R, Pardow Lorenzo D (2008) Derribando mitos sobre el Estado empresario. *Rev Chil De Derecho* 35(1):135–156

Verdugo S, Contesse J (2018) Auge y caída de un proceso constituyente: lecciones del experimento chileno y del fracaso del proyecto de Bachelet. https://www.mediacionchile.com/wp-content/uploads/2018/10/Auge_y_Caida_de_un_Proceso_Constituyente-1.pdf

Publisher's Note Springer Nature remains neutral with regard to jurisdictional claims in published maps and institutional affiliations.