

RESEARCH ARTICLE

# How do constitution-making processes fail? The case of Chile's Constitutional Convention (2021–22)

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## Abstract

This introduction to the symposium 'How do Constitution-Making Processes Fail? The Case of Chile's Constitutional Convention (2021–22)' situates the project in the field of constitution-making, provides context regarding the Chilean case, summarizes some possible explanations for the failure, and describes how each article contributes to the symposium as a whole.

**Keywords:** Chilean Constitution; constitution-making; activation failures; Constitutional Referendum; Constitutional Convention

## I. The failure of constitution-making processes

Constitution-making has become increasingly common,<sup>1</sup> yet comparative constitutional scholars and political scientists often overlook the reasons behind potential failures in these processes (or, as one of us has called them, constitution-making 'activation failures').<sup>2</sup> A recent example of such an activation failure is the rejection of the proposed constitution by the Chilean Constitutional Convention in 2022.

In October 2019, an institutional and social crisis became highly visible in Chile when massive protests took over the streets and challenged the country's political institutions by claiming the protection of an heterogeneous set of social demands such as healthcare, social security and transportation. Shortly thereafter, the political parties responded by offering a highly regulated constitution-making process, later

<sup>1</sup>Jon Elster proposes the concept of 'constitution-making waves', which refers to periods marked by a surge in constitution-making processes. Jon Elster, 'Forces and Mechanisms in the Constitution-Making Process' (1995) 54(2) *Duke Law Journal* 364–96. These historical chronologies can be examined at <<https://comparativeconstitutionsproject.org/chronology>>.

<sup>2</sup>Samuel Issacharoff and Sergio Verdugo, 'The Uncertain Future of Constitutional Democracy in the Era of Populism: Chile and Beyond' (2023) 78(1) *University of Miami Law Review* forthcoming.

endorsed by 78.31 per cent of voters in 2020 (with a turnout of 50.95 per cent).<sup>3</sup> The promise of replacing the Chilean Constitution – originally enacted during the Pinochet dictatorship – was finally feasible. A long-held dream of most Chileans was supposed to allow Chileans to end the structural problems of the political system and advance in the realization of highly unprotected social rights. To materialize this plan, a Constitutional Convention was elected in 2021. However, the proposed constitution put forth by the Convention was rejected by 61.89 per cent of the voters (with a turnout of 85.86 per cent). The magnitude of the failure in the constitution-making process was significant, leaving many perplexed.<sup>4</sup> How did a process that initially garnered 78.31 per cent support ultimately fail so dramatically?

While the unexpected outcome left many taken aback, the failure of constitutional proposals is not unprecedented within comparative constitutional law. Another prominent example is Iceland's recent constitutional experiment, which failed after Parliament lost interest in supporting a constitutional proposal produced through a novel and groundbreaking constitution-making process that had attracted the attention of global scholars.<sup>5</sup> The May 1946 French referendum's rejection of a newly approved constitution at the National Constituent Assembly resulted in a subsequent assembly that led to the short-lived Fourth Republic.<sup>6</sup> In October 1954, the Pakistani constituent assembly convened after the country's independence was dissolved due to institutional resistance from the military and civil servants.<sup>7</sup> In April 2012, the first Egyptian constituent assembly was declared unconstitutional by the Supreme Administrative Court on the grounds of being politically unrepresentative.<sup>8</sup> Israel has failed to produce a unified constitutional document, leading to an 'accidental constitution' built on a gradual and incremental basis.<sup>9</sup> A few years ago, attempts in Sri Lanka, Nepal, and Kenya failed to replace their constitutions.<sup>10</sup> Other examples of constitution-making failures exist, even if

<sup>3</sup>See the 2020 entry-referendum results at <<https://historico.servel.cl/servel/app/index.php?r=EleccionesGenerico&id=10>>.

<sup>4</sup>For the various meanings of *failure* in constitution-making, see Kimana Zulueta-Fülscher, 'How Constitution-Making Fails and What We Can Learn from It' (International IDEA, 2023).

<sup>5</sup>Pasquale Pasquino, 'Constituent Power and Authorization Anatomy and Failure of a Constitution-Making Process', in *Iceland's Financial Crisis: The Politics of Blame, Protest, and Reconstruction*, edited by Valur Ingimundarson, Philippe Urfalino and Irma Erlingsdóttir (Routledge, London, 2016) 230–38; Jón Ólafsson, 'The Constituent Assembly: A Study in Failure', in *Iceland's Financial Crisis: The Politics of Blame, Protest, and Reconstruction*, edited by Valur Ingimundarson, Philippe Urfalino and Irma Erlingsdóttir (Routledge, London, 2016) 252–72.

<sup>6</sup>Robert K Gooch, 'Recent Constitution-Making in France' (1947) 41(3) *American Political Science Review* 429–46.

<sup>7</sup>Mara Malagodi, 'Constituent Assembly Failure in Pakistan and Nepal', in *Constituent Assemblies*, edited by Jon Elster, Roberto Gargarella, Vatsal Naresh and Bjorn Erik Rasch (Cambridge University Press, Cambridge, 2019).

<sup>8</sup>Nathan J Brown, 'Tracking the Arab Spring: Egypt's Failed Transition' (2013) 24(4) *Journal of Democracy* 45; Darin EW Johnson, 'Beyond Constituent Assemblies and Referenda: Assessing the legitimacy of the Arab Spring Constitutions in Egypt and Tunisia' (2015) 50 *Wake Forest Law Review* 1007.

<sup>9</sup>Adam Shinar, 'Accidental Constitutionalism. The Political Foundations and Implications of Constitution-Making in Israel' in *Social and Political Foundations of Constitutions*, edited by Denis J Galligan and Mila Versteeg (Cambridge University Press, New York, 2013).

<sup>10</sup>Bård Anders Andreassen and Arne Tostensen, *Of Oranges and Bananas: The 2005 Kenya Referendum on the Constitution*, CMI Working Paper WP 13 (2006); Nadarajah Pushparajah and Malini Balamayuran 'The Failure of Constitution-making in Sri Lanka (2015–2019)' (2022) *Millennial Asia* forthcoming, <https://doi.org/10.1177/09763996221087017>.

they have received scarce attention in the literature.<sup>11</sup> In some cases, as in France, new constitutions were adopted later. In other cases, legal orders have found substitutes by using legislative and judicial instruments. This is the case with Israel's Basic Laws.

These examples suggest that constitution-making failures are more widespread than many assume,<sup>12</sup> even though most scholars focus on stories that end with the enactment of a new constitution. Sometimes the narratives depict these instances as commendable for effectively setting a stable democratic system in precarious or post-authoritarian contexts. Notable examples include the Spanish democratic transition (1978), the post-apartheid South African process (1994) and the Colombian constitutional response to the peril of a state teetering on the brink of capture by violent factions and drug cartels (1991). At other times, the spotlight falls on constitutions crafted with dubious democratic legitimacy, ultimately serving as tools to cement authoritarian agendas, such as the case of Chávez in Venezuela (1999) and Orbán in Hungary (2012). These examples matter not because of their non-liberal success but because they reflect a successful non-democratic political project that shows how constitutions can become mechanisms that harm core principles of constitutionalism.<sup>13</sup> What all these examples have in common is that (1) the constitutions were enacted and (2) they have lasted for a meaningful number of years. However, examining the causes behind the failed attempts (the activation failure) at enacting a new constitution has received little attention from scholars.

For example, only a few comparative scholars have focused on Maduro's sham constituent assembly, perhaps because it did not end up replacing Chávez's Constitution.<sup>14</sup> There is surprisingly little research on the French 1946 referendum,<sup>15</sup> and many of the scholars who have praised the Icelandic constitution-making experiment seem to have focused on other projects after that procedure failed.<sup>16</sup> The problem is that many important questions remain unanswered. As these stories of failure can take place elsewhere, the questions and lessons left by failed experiences become essential. Comparative constitutional scholars and political scientists can play a crucial role in addressing this gap by earnestly confronting these unsuccessful endeavours.

How do constitution-making processes fail? What consequences do failed constitution-making processes produce for their countries? How are constitutional

<sup>11</sup>Part of the story can be found in the statistics on failed constitutional referendums shown on the work of Zachary Elkins and Alexander Hudson, 'The Constitutional Referendum in Historical Perspective' in *Comparative Constitution Making*, edited by David Landau and Hanna Lerner (Edward Elgar, Cheltenham, 2019) 142–64; Zachary Elkins and Alexander Hudson, 'The Strange Case of the Package Deal: Amendments and Replacements in Constitutional Reform' in *The Limits and Legitimacy of Referendums*, edited by Richard Stacey and Richard Albert (Oxford University Press, Oxford, 2022).

<sup>12</sup>Michele Brandt et al., 'Constitution-making and Reform Options for the Process' (2011) *Interpeace* 75, suggesting that approximately 50 per cent of the constitution-making processes worldwide fail to produce a new constitution.

<sup>13</sup>Kim L Scheppele, 'Autocratic Legalism' (2018) 85 *University of Chicago Law Review* 545.

<sup>14</sup>Exceptions exist, of course. See, for example, Allan Brewer-Carías and Carlos García Soto (eds), 'Estudios sobre la Asamblea Nacional Constituyente y su inconstitucional convocatoria en 2017' (2017) 119 *Juridicos*.

<sup>15</sup>Exceptionally, it is mentioned briefly in Bruce Ackerman, *Revolutionary Constitutions, Charismatic Leadership and the Rule of Law* (Harvard University Press, Cambridge, MA, 2019) 124–30. See also Charles A Micaud, 'The Launching of the Fourth French Republic' (1946) 8(3) *The Journal of Politics* 292.

<sup>16</sup>Exceptionally, Ágúst Þór Árnason and Catherine Dupré (eds), *Icelandic Constitutional Reform People, Processes, Politics* (Routledge, London, 2020); Jón Ólafsson, 'The Constituent Assembly: A Study in Failure' in *Iceland's Financial Crisis: The Politics of Blame, Protest and Reconstruction*, edited by Valur Ingimundarson, Philippe Urquhalino and Irma Erlingsdóttir (Routledge, London, 2016).

failures relevant to the political dynamics of their countries? This symposium aims to advance answers to these questions by exploring one of the processes that have triggered more attention in the past few years: the Chilean Constitutional Convention that operated between 2021 and 2022. We have invited several comparative scholars to delve into the design, underlying political and institutional dynamics, and context of the Chilean process. Their insights will help us to comprehend the Chilean failure from a comparative standpoint, ultimately advancing our understanding of *how* (and, to some extent, *why*) constitution-making processes fail.

## II. Situating the failure of the Chilean Constitutional Convention

The decision to choose the Chilean Constitutional Convention was based not only on its worldwide popularity among comparative scholars but also on the surprising nature of its failure, which caught even Chilean observers off guard.<sup>17</sup> Initially, as we mentioned in the previous section, the process received widespread popular support after a multi-party agreement that successfully set agreeable conditions for both right and left political parties decided to open the constitution-making process with a referendum.<sup>18</sup> Unlike other Latin American processes such as those of Venezuela (1999) and Bolivia (2009), Peru (1993) and Ecuador (2008), and the authoritarian constitutional agendas of Morales Bermúdez (1979) and Pinochet (1980), the Chilean process did not arise from a process led by a specific *caudillo* invoking the constituent power of the people, or by an autocrat.

Although revolutionary narratives were present among some Chilean political actors,<sup>19</sup> the Chilean process aimed to steer clear of revolutionary and authoritarian extremes. Instead, it followed an approach based on a post-sovereign model.<sup>20</sup> Citizens initially supported the process, the rules matched many of the recommendations made by global scholars and the proposal made by the Convention was supported by several

<sup>17</sup>Many non-Chilean scholars defended the constitutional proposal. See, for example, Gautam Bhatia, 'Chile Marks a Notch in Global Constitutionalism', *The Hindu*, 20 July 2022, available at <<https://www.thehindu.com/opinion/lead/chile-marks-a-notch-in-global-constitutionalism/article65659006.ece>>; David Landau, 'The New Chilean Constitutional Project in Comparative Perspective', *International Journal of Constitutional Law Blog*, 16 July 2022, available at <<http://www.icconnectblog.com/2022/07/the-new-chilean-constitutional-project-in-comparative-perspective>>; Diego Gil and Gabriel Negretto, 'Las Razones Para Aprobar La Propuesta de Nueva Constitución', *La Tercera*, 23 August 2022, available at <<https://www.latercera.com/opinion/noticia/las-razones-para-aprobar-la-propuesta-de-nueva-constitucion/XXSLSE77ORDGXLFN45LANXCNGM>>; Roberto Gargarella, 'El Proyecto de Dejar Atrás La "Constitución de Pinochet"', *La Nación*, 16 July 2022, available at <<https://www.lanacion.com.ar/opinion/el-proyecto-de-dejar-atras-la-constitucion-de-pinochet-nid16072022>>.

<sup>18</sup>See 'Acuerdo Por la Paz Social y la Nueva Constitución', 15 November 2019, available at <[https://obtienearchivo.bcn.cl/obtienearchivo?id=documentos/10221.1/76280/1/Acuerdo\\_por\\_la\\_Paz.pdf](https://obtienearchivo.bcn.cl/obtienearchivo?id=documentos/10221.1/76280/1/Acuerdo_por_la_Paz.pdf)>.

<sup>19</sup>Examples abound: a group of Convention members declared the Convention to be sovereign; the procedural rules used the language of the constituent power; and many constitution-makers often referred to other institutions as mere 'constituted powers' (implying an inferior authority). See Marcela Prieto and Sergio Verdugo, 'How Political Narratives Affect the Self-Enforcing Nature of Interim Constitutions' (2021) 13 *Hague Journal on the Rule of Law* 265. Also see Agustín Squella, *Apuntes de Un Constituyente* (Ediciones Universidad Diego Portales, Santiago, 2022) 80, 109, 161.

<sup>20</sup>Sergio Verdugo, 'Chile's New Constitutional Experiment' (2020) 4 *Quaderni Costituzionali* 842–45; Samuel Tschorne, 'Las claves conceptuales del debate constitucional chileno: poder constituyente, legitimidad de la Constitución y cambio constitucional' (2020) 160 *Estudios Públicos* 81.

international observers who praised its progressive nature.<sup>21</sup> For a long time, Chileans have aimed to move past the institutional legacy left by the Pinochet regime and advance a social rights agenda that the existing constitutional framework does not secure. Despite a progressive constitutional proposal that included robust social rights and the protection of several minorities, the process still failed to succeed, leaving many surprised. The question remains: How did this happen?

### *The political context: A history of failures*

Despite being amended over 60 times, the origins of the Chilean Constitution (1980) can still be associated with the Pinochet dictatorship (1973–90). Part of the content of the Constitution's current version can be traced back to the original 1980 constitutional document,<sup>22</sup> which remains connected to the political agenda of the authoritarian regime, at least symbolically.<sup>23</sup> The main critics of the Constitution typically argue that the insufficient protection of social rights in Chile is partly due to the political dynamics that the Constitution has established or promoted.<sup>24</sup> They typically point out the institutional arrangements that increase the number of veto players in the political process, including supermajority rules for approving crucial pieces of legislation,<sup>25</sup> the ex-ante judicial review powers of the Constitutional Court,<sup>26</sup> the difficulties in amending the Constitution<sup>27</sup> and a set of constitutional provisions that are at least consistent with the kind of market economy that the authoritarian regime promoted in the 1980s.<sup>28</sup> An example is the way the Constitution regulates the right to healthcare by securing access to the private system.<sup>29</sup> As one of us will show in this special issue (see Verdugo's contribution), these claims have criticized a *moving target*, as the Constitution itself has changed dramatically and, as one commentator suggests, little remains from the authoritarian enclaves that the Junta designed in 1980.<sup>30</sup>

Different attempts at replacing the Chilean Constitution have existed since the mid-1980s. Initially, the military Junta disregarded a significant multiparty agreement

<sup>21</sup>See (n 17).

<sup>22</sup>Jaime Arancibia Mattar, *Constitución Política de La República de Chile. Edición Histórica. Origen y Trazabilidad de Sus Normas Desde 1812 Hasta Hoy* (Universidad de los Andes – El Mercurio, Bogotá, 2020).

<sup>23</sup>See e.g. Arturo Fontaine, Juan Luis Ossa, Aldo Mascareño, Renato Cristi, Hugo Herrera and Joaquín Trujillo, 1925 *Continuidad Republicana y Legitimidad Constitucional* (Catalonia, Santiago, 2018).

<sup>24</sup>Domingo Lovera, 'Derechos sociales en la Constitución del 80 (y de 1989 y de 2005)' in *En Nombre del Pueblo: debate sobre cambio constitucional en Chile*, edited by Claudio Fuentes (Heinrich Böll-Stiftung, Berlin, 2010).

<sup>25</sup>Guillermo Jiménez, Pablo Marshall and Fernando Muñoz, *La debilidad de las súper-mayorías*, en 41 *Revista de Derecho* (Pontificia Universidad Católica de Valparaíso, Valparaíso, 2013) 349.

<sup>26</sup>Carlos Huneeus, *La Democracia Semisoberana. Chile Después de Pinochet* (Taurus, Santiago, 2014); Fernando Atria, *La Constitución Tramposa* (LOM, Santiago, 2013).

<sup>27</sup>George Tsebelis, 'Veto Players and Constitutional Change: Can Pinochet's Constitution Be Unlocked?' (2018) 25(1) *Política y Gobierno* 3.

<sup>28</sup>Benjamín Alemparte, 'Towards a Theory of Neoliberal Constitutionalism: Addressing Chile's First Constitution-making Laboratory' (2022) 11(1) *Global Constitutionalism* 83.

<sup>29</sup>Eduardo Arenas Catalán, 'Chile's New Constitution: What Right to Health?' (2021) 13 *Hague Journal on the Rule of Law* 295.

<sup>30</sup>Rodrigo PG Correa, 'Overcoming the Pinochet Factor in the Chilean Constitution-Making Process', *ConstitutionNet*, International IDEA, 28 February 2023, available at <<https://constitutionnet.org/news/overcoming-pinochet-factor-chilean-constitution-making-process>>.

in 1985 – which included part of the right.<sup>31</sup> Following Pinochet's defeat in the 1988 referendum, and once the transition to civilian rule was secured, the Junta agreed to make some amendments to the 1980 Constitution. This move succeeded in avoiding having to call a constituent assembly. Chile's transition to democracy would take place in a way that needed to guarantee certain minimums to the outgoing autocrats and ended up strengthening the military,<sup>32</sup> which was considered the protector of the new democratic regime. Then the country initiated a long and windy route to democratize its authoritarian Constitution via incremental amendments.<sup>33</sup> The constitutional reform agenda was a central concern of all the governments that followed the democratic transition, as evidenced by the fact that the first four presidents pledged as candidates to amend the Constitution if elected.

In 2005, a significant amendment was approved. That amendment removed the non-elected Senators, reduced the independence of the military, strengthened and changed the appointment mechanisms of constitutional judges and weakened the National Security Council, among other relevant changes.<sup>34</sup> The Socialist President Ricardo Lagos attempted to present the amendment as a 'new constitutional order', even symbolically removing Pinochet's signature from the constitutional text.<sup>35</sup> But political parties did not agree upon the symbolic replacement of the 1980 Constitution,<sup>36</sup> as they perceived it as still embodying the political model devised by the dictatorship's political agenda. Some claimed that the post-2005 version of the Constitution undermined democracy and identified several pending norms to reform.<sup>37</sup> The Constitution remained closely associated with Pinochet's legacy. Only four years later, former president Eduardo Frei – a Christian Democrat who preceded Lagos as President and was running for office again – proposed a new constitutional project for Chile, but he lost the election by a landslide.

Years later, former President Michelle Bachelet attempted to replace the Constitution in a highly participatory and innovative process. At that time, Iceland's constitution-making crowdsourcing process was fashionable among constitutional scholars.<sup>38</sup> The challenge was how to design a process that could reconcile the need

<sup>31</sup>Matías D Tagle (ed.), *El Acuerdo Nacional. Significados y Perspectivas* (Corporación Justicia y Democracia, Santiago, 1995).

<sup>32</sup>Claudia Heiss and Patricio Navia, 'You Win, You Lose Some: Constitutional Reforms in Chile's Transition to Democracy' (2007) 49(3) *Latin American Politics and Society* 163.

<sup>33</sup>Sergio Verdugo, 'The Role of the Chilean Constitutional Court in Times of Change' in *Constitutional Change and Transformation in Latin America*, edited by Richard Albert, Carlos Bernal and Juliano Zaiden Benvindo (Hart, Oxford, 2019).

<sup>34</sup>See Claudio Fuentes, 'Shifting the Status Quo: Constitutional Reforms in Chile' (2015) 57(1) *Latin American Politics and Society* 99; Humberto Nogueira (ed.), *La Constitución Reformada de 2005* (Librotecnia – Centro de Estudios Constitucionales, Universidad de Talca, Santiago, 2005); Emilio Pfeffer, *Reformas Constitucionales 2005* (Editorial Jurídica de Chile, Santiago, 2005); Francisco Zúñiga Urbina (ed.), *Reforma Constitucional* (Lexis Nexis, Santiago, 2005).

<sup>35</sup>Ricardo Lagos Escobar, 'Una Constitución Para El Bicentenario' in *Reforma Constitucional*, edited by Francisco Zúñiga Urbina (Lexis Nexis, Santiago, 2005) 19–30.

<sup>36</sup>See Patricio Zapata Larráin, *La Casa de Todos. La Nueva Constitución Que Chile Merece y Necesita* (Ediciones Universidad Católica de Chile, Santiago, 2015).

<sup>37</sup>Javier Couso and Alberto Coddou, 'Las Asignaturas Pendientes de La Reforma Constitucional Chilena' in *En El Nombre Del Pueblo*, edited by Claudio Fuentes (ICSO, Santiago, 2010) 191–215.

<sup>38</sup>Katrín Oddsdóttir, 'Iceland: The Birth of the World's First Crowd-Sourced Constitution?' (2014) 3(4) *Cambridge Journal of International and Comparative Law* 1207; Hélène Landemore, 'The Inclusive Constitution-Making: The Icelandic Experiment' (2015) 23(2) *The Journal of Political Philosophy* 166.



for massive participation with deep public deliberation. Bachelet's process, which combined local roundtables with larger deliberations, proved to be an interesting experiment for that challenge.<sup>39</sup> Still, it failed in 2018 after her successor won the presidential election. No political party – not even the parties of Bachelet's supporting coalition – embraced her project after she presented the Bill to the Chamber of Deputies.<sup>40</sup>

Another attempt came after the massive demonstrations of October 2019. Protesters demanded the protection of a heterogeneous set of rights. The demands ranged from public transportation prizes to social security, from the gender agenda to the healthcare system's problems, and from the highly unequal educational system to environmental demands. Faced with increased pressure, the political parties organized a constitution-making process to channel those demands and simultaneously end the Pinochet-era Constitution. Most scholars following the process, including non-Chilean comparative constitutional scholars, were excited about the prospect of replacing the 1980 Constitution. The Chilean process that was opening was supposed to become a beacon for a popular but post-sovereign approach that could have avoided the democratically risky neo-Bolivarian path that other Latin American countries had experienced.<sup>41</sup> It was going to provide a lesson on a successful and democratic constitution-making process that scholars had not examined since the success stories of Colombia (1991) and South Africa (1996).

An entry referendum took place in 2020, and an elected and gender-balanced Constitutional Convention started to operate in 2021. After a participatory process including citizens' initiatives, consultations with indigenous peoples, and other means, the Convention drafted a constitutional proposal. The proposal was progressive in many aspects, incorporating provisions related to global warming, the collective rights of Indigenous communities, and embracing the idea of a gender-balanced democracy, among others. Additionally, it established a comprehensive bill of rights comprising over 100 rights and an unprecedented political system that included direct popular participation, mixed presidentialism and asymmetrical bicameralism. Notably, non-Chilean scholars such as David Landau, Gabriel Negretto and Gautam Bhatia endorsed the constitutional proposal.<sup>42</sup> Even after its defeat at the ballot box, some comparative scholars, including Armin von Bogdandy, argued that the failed proposal would still significantly contribute to developing a contemporary form of constitutionalism.<sup>43</sup>

<sup>39</sup>See Antoni Abati Ninet, *Constitutional Crowdsourcing. Democratising Original and Derived Constituent Power in the Network Society* (Edward Elgar, Cheltenham, 2021).

<sup>40</sup>Sergio Verdugo and Jorge Contesse, 'Auge y Caída de un Proceso Constituyente: Lecciones del Experimento Chileno y del Fracaso del Proyecto de Bachelet' (2018) 4(1) *Derecho y Crítica Social* 139.

<sup>41</sup>José Manuel Díaz de Valdés and Sergio Verdugo, 'The ALBA Constitutional Project and Political Representation' (2019) 17(2) *International Journal of Constitutional Law* 479. Phoebe King, 'Neo-Bolivarian Constitutional Design' in *Social and Political Foundations of Constitutions*, edited by Denis J Galligan and Mila Versteeg (Cambridge University Press, Cambridge, 2013). According to some scholars, however, Bachelet's failure can also be accounted for as a multi-stage constitution-making process. Joel Colón-Ríos, 'Multistage Constitution-Making: From South Africa to Chile' in R Dixon and T Roux (eds.), *Constitutional Triumphs, Constitutional Disappointments* (Cambridge University Press, Cambridge, 2018) 294–311.

<sup>42</sup>See (n 18).

<sup>43</sup>Armin von Bogdandy, 'Chilean Insights for Progressive Constitutionalism' (2023) 83(1) *Heidelberg Journal of International Law* 1.

### Why did it fail? Alternative explanations

Why did Chileans reject the proposal? Was there any problem with the constitution-making design, the procedural rules or the electoral mechanisms? What were the political dynamics that might help us to understand what happened?

While conclusive explanations are premature, there are some indications of the reasons behind the referendum results. Chilean and foreign observers have attributed the blame for this outcome to various factors such as political and misinformation campaigns,<sup>44</sup> media bias<sup>45</sup> and even the presence of fake news.<sup>46</sup> For example, Jennifer Piscopo and Peter Siavelis contend that the referendum's result should be regarded as a triumph of illiberal forces that disseminated misinformation throughout the process, leading to heightened voter unease over domestic concerns.<sup>47</sup> These explanations, however, can hardly explain how such a significant percentage of Chilean citizens (61.86 per cent), with one of the highest voter turnouts in Chilean history (82 per cent), overwhelmingly opposed the proposal.

Some scholars have put forward alternative explanations, such as the proposal not aligning with the median voter's preferences.<sup>48</sup> According to Eduardo Alemán and Patricio Navia, many Chileans had compelling substantive reasons to oppose the constitutional draft. Significant portions of society vehemently disapproved of its purportedly radical and contentious aspects.<sup>49</sup> While some attribute the outcome to communication issues stemming from the Convention's composition of political newcomers lacking relevant political experience, others blame the misconduct and carelessness of many constitution-makers who eroded public support by appearing to be out of touch with citizens.<sup>50</sup>

<sup>44</sup>Noam Titelman and Tomás Leighton, '¿Por qué ganó el rechazo a la nueva Constitución chilena?' (2022) 300 *Nueva Sociedad* 4.

<sup>45</sup>David Landau, 'Introduction: Symposium on the Chilean Constitutional Referendum', *International Journal of Constitutional Law Blog*, 23 September 2022, available at <<http://www.iconnectblog.com/2022/09/introduction-symposium-on-the-chilean-constitutional-referendum>>, explaining that this has been raised in several analyses of the referendum results.

<sup>46</sup>Camila Vergara, 'Chile's Rejection' *The New Left Review*, 9 September 2022, available at <<https://newleftreview.org/sidecar/posts/chiles-rejection>>; Camila Vergara, 'The Oligarchic Takeover of the Constituent Process' (2022) *NACLA Report on the Americas* 453.

<sup>47</sup>Jennifer Piscopo and Peter Siavelis, 'Chile's Constitutional Chaos' (2023) 34(1) *Journal of Democracy* 141. See also Jennifer Piscopo and Peter Siavelis, 'Can Chile's New Constitution Save Its Democracy From the Right Wing?', *Foreign Policy*, 22 May 2023, available at <<https://foreignpolicy.com/2022/05/23/chile-new-constitution-democracy-right-wing-latin-america>>.

<sup>48</sup>María Cristina Escudero and Claudio Calabrán, 'Una convención no convencional: la experiencia chilena', *IdeAs*, 1 March 2023; Sergio Verdugo, 'El Poder Constituyente Impopular' (2022) 46 *Actualidad Jurídica* 207.

<sup>49</sup>Eduardo Alemán and Patricio Navia, 'Chile's Failed Constitution: Democracy Wins' (2023) 34(2) *Journal of Democracy* 90.

<sup>50</sup>Francisco Zúñiga, 'El rechazo en el plebiscito chileno de 4 de septiembre de 2022: perspectivas constitucionales' (2022) 3 *Cuadernos Constitucionales* 77; Alemán and Navia (n 50). According to some polls, the main reason voters had for rejecting the proposal was the constitution-makers' demeanour throughout the process. See 'Encuesta CEP N°88', Centro de Estudios Públicos, available at <<https://www.cepchile.cl/encuesta/encuesta-cep-n-88>>. See also 'Encuesta Cadem-Plaza Pública No. 452', dated September 2022, available at <<https://cadem.cl/wp-content/uploads/2022/09/PP-452-67-esta-de-acuerdo-con-que-Chile-tenga-una-nueva-Constitucion.pdf>>, suggesting that a high level of public distrust of the constitution-makers largely explains the referendum outcome. Aldo Mascareño et al., 'Apruebo y rechazo en septiembre 2022: Expectativas, decepciones y horizontes communes para el nuevo proceso constitucional',



On the other hand, many observers have placed special attention on analysing the shortcomings in the design and procedure of the process to explain its failure. There are several explanations to this end, with some blaming the process outcome on the electoral rules that benefited independents incapable of providing appropriate representation.<sup>51</sup> In contrast, others emphasize the dire consequences that arose from the Convention's decentralized drafting procedure.<sup>52</sup> Some even suggested that the inclusion of an exit referendum led to electoral extortion, significantly restricting the proposal's deliberation.<sup>53</sup> Finally, exogenous factors also influenced the outcome, including the President's unpopularity, the worsening economic conditions, and the migration and security crises.<sup>54</sup>

Some of these explanations are more plausible than others. It is possible that the failure could be approached better from a multi-causal perspective.<sup>55</sup> Whatever the answer is, this symposium attempts to provide different perspectives that identify a diverse set of issues that comparative and global scholars can examine, such as the way the process connected to previous political ideas emphasized by a former president that had little power over the Convention, how the institutional design and procedural shortcomings hampered consensus building within the Convention, or the existence of continuous changes to the existing Constitution, making it hard for any constitutional designer to agree on a common diagnosis of what exactly is wrong with Chile's political system. The lessons that can be learned from the Chilean Convention connect not only to the possible explanations for the failure, but also to the challenges that need to be addressed by constitution-making processes that arise in democratic settings. One common explanation that seems to be addressed by a number of participants in this symposium connects to the membership election of the Convention itself. The Convention was socially

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Punto de Referencia No. 643 del Centro de Estudios Públicos, January 2023, available at <[https://www.cepchile.cl/wp-content/uploads/2023/01/pder643\\_mascarenoetal.pdf](https://www.cepchile.cl/wp-content/uploads/2023/01/pder643_mascarenoetal.pdf)>.

<sup>51</sup>Issacharoff and Verdugo (n 2); Mauricio Fabian Belmar and Benjamín Villarroel, 'Writing a Constitution Without Parties? The Programmatic Weakness of Party-Voter Linkages in the Chilean Political Change' (2023) 21(1) *Politics* 1.

<sup>52</sup>Guillermo Larrain, Gabriel Negretto and Stefan Voigt, 'How Not to Write a Constitution: Lessons from Chile' (2023) 194(3) *Public Choice* 233; Javier Couso, 'Making Sense of Chile's Failed Constituent Process', *International Journal of Constitutional Law Blog*, October 2022, available at <<http://www.icconnectblog.com/2022/10/i-connect-symposium-on-the-chilean-constitutional-referendum-making-sense-of-chiles-failed-constituent-process%ef%bf%bc>>.

<sup>53</sup>Roberto Gargarella, 'El 'plebiscito de salida' como error constituyente', *IACL-AIDC Blog*, 6 September 2022, available at <<https://blog-iacl-aidc.org/new-blog-3/2022/9/6/plebiscito-salida-error-constituyente>>; Roberto Gargarella, 'Rejection of the New Chilean Constitution: Some Reflections', Oxford Human Rights Hub, 14 September 2022, available at <<https://ohrh.law.ox.ac.uk/rejection-of-the-new-chilean-constitution-some-reflections>>. Opposing this argument, see Sergio Verdugo, 'Referéndum y procesos constituyentes: ¿extorsión electoral o veto ciudadano?' (2023) 47 *Actualidad Jurídica* 245; Eugenio García-Huidobro, «En defensa del plebiscito de salida chileno», *IACL-AIDC Blog*, 27 September 2022, available at <<https://blog-iacl-aidc.org/new-blog-3/2022/9/27/en-defensa-del-plebiscito-de-salida-chileno>>.

<sup>54</sup>Alemán and Navia (n 50); Piscopo and Siavelis (n 48).

<sup>55</sup>Along these lines, see for example Detlef Nolte, 'Chile's Constitutional Reform Process Rebooted' (2022) 4 *GIGA*, available at <<https://www.giga-hamburg.de/en/publications/giga-focus/chile-s-constitutional-reform-process-rebooted>>; David Landau, 'Introduction: Symposium on the Chilean Constitutional Referendum', *International Journal of Constitutional Law Blog*, 23 September 2022.

inclusive but, as others have emphasized, it was also politically unbalanced.<sup>56</sup> This could be explained by the focus on independents becoming members of the Convention, the under-representation of both the right-wing and centrist voters, and the role of the Communist Party in articulating the far left<sup>57</sup> while making sure that an affective polarization setting elevated the costs of those of the centre-left to oppose their proposals<sup>58</sup> and excluded most of the right-wing delegates from the relevant negotiations.<sup>59</sup>

### III. Contributions to this symposium

The overarching theme described above connects with procedural and electoral explanations. The distinct institutional design options, such as referenda, public participation mechanisms, procedural rules, judicial-like control mechanisms and institutional connections with constituted powers, will engender an array of political economy ramifications that can significantly influence the success of constitution-making.<sup>60</sup> Some of the articles featured in this symposium delve into the design implications that contributed to the Convention's unsuccessful outcome, emphasizing an often forgotten aspect. In multi-stage processes such as that in Chile, those charged with drafting the constitutional proposal will be subject to a series of externally imposed restrictions.<sup>61</sup>

First, Eugenio García-Huidobro focuses on elucidating the design shortcomings that afflicted the constitution-making process outlined by the Chilean Congress through the 2019 multi-party agreement and its supplementary constitutional reforms. He suggests that by putting two competing constitution-making models on the ballot, the political elites delegated to the voters a highly conflictive aspect of the process design that prevented cooperation between them at critical stages when consensus-building was most needed. This competition among political elites over the constitution-making model led to increased polarization in the months following the 2019 agreement. According to García-Huidobro, the Chilean case suggests that some varieties of elite cooperation that employ accumulation strategies in the design of constitution-making processes can severely undermine the self-enforcing capacity of an interim constitution in polarized contexts.

Second, Tom Ginsburg and Isabel Álvarez's article includes other procedural elements of the Chilean process that carried significant weight, several of which were also externally imposed: time constraints (also later addressed by the essay authored by Valeria Palanza and Patricia Sotomayor), supermajority voting rules, the circular procedure among the plenary and the committees, and the significant role of the members of the Convention

<sup>56</sup>See Isabel Aninat, 'New Forms of Representation and the Failure of the Chilean Constitutional Convention', *International Journal of Constitutional Law Blog*, October 2022, available at <<http://www.iconnectblog.com/2022/10/i-connect-symposium-on-the-chilean-constitutional-referendum-new-forms-of-representation-and-the-failure-of-the-chilean-constitutional-convention>>; Issacharoff and Verdugo (n 2).

<sup>57</sup>Squella (n 20) 143.

<sup>58</sup>Squella (n 20) 78.

<sup>59</sup>See Fernando Atria, *El Proceso Constituyente y Su Futuro Después Del Plebiscito* (La Casa Común, Santiago, 2022).

<sup>60</sup>Tom Ginsburg, Zachary Elkins and Justin Blount, 'Does the Process of Constitution-making matter?' (2009) 5 *Annual Review of Law and Social Science* 201. See also the various contributions in Landau and Lerner (n 12); Tom Ginsburg, *Comparative Constitutional Design* (Cambridge University Press, Cambridge, 2012).

<sup>61</sup>Elster (n 1).

not affiliated with any political party – which partly confirms the electoral-based arguments identified in the previous section of this introduction. This line of thought implicitly recognizes that constitution-making failures in democratic settings cannot be attributed solely to individual political actors.

Instead, such failures can be the result of contributions from multiple institutional actors, and understanding their respective roles can be crucial for designing more effective constitution-making processes in the future. María Cristina Escudero provides a plausible analysis by examining the Constitutional Convention through the ‘institutional resistance’ lens. Her research focuses on the resistance exhibited by key external political actors, such as judges, legislators and political parties – what some might call the ‘constituted powers’ – against the proposals put forth by the Convention. She links this resistance to how the rules of the process created insulation between the Convention and other democratic institutions in Chile. Her perspective prompts us to seek a delicate equilibrium between institutional continuity and constitutional reform. While this balance initially existed, it became strained and was eventually lost over time.<sup>62</sup>

Partly following the premises set by the previous articles – particularly the essay by Ginsburg and Álvarez – two articles connect the problems of procedural constraints with content-based explanations. First, Valeria Palanza and Patricia Sotomayor focus on the proposed political system approved by the Convention. Even though they also identified some procedural issues, such as the Convention’s decentralization, the brief timeframe and its unbalanced composition, Palanza and Sotomayor zoom into the work of the specialized drafting committee that had to put together a difficult compromise. The focus on the lack of shared understanding among constitution-makers regarding what to do about the reform of the political system is an excellent example of how a process that lacked incentives for collaboration could not solve that important matter consistently.

Second, Marcela Prieto and Rosalind Dixon focus on the gender aspects of the proposal and the procedure. They advocate for the concept of gender constitutionalism and note that, despite the appeal of the gender equality demands, the project could not materialize if the type of political representation that was emphasized was not embedded in the broader party structure. The limits faced by the women’s agenda may have been present in Chile and other countries experiencing similar challenges. If we take the articles of both Palanza and Sotomayor, and Prieto and Dixon, we can infer that the content of crucial norms included in the constitutional proposal is largely dependent on the political dynamics generated by questions of procedure and design.

Other content-based articles suggest that the content of the proposal was also shaped by context-dependent factors and short-term perspectives that were influential at the time of the drafting. First, Adam Chilton, Cristián Eyzaguirre and Mila Versteeg focus on the proposal’s social rights aspects. They show how the constitutional promise of social rights is not backed by strong evidence and argue that we should not consider a constitutional replacement attempt as the only alternative for making progress on social demands. This fact, which is easy to identify in the literature on social rights enforcement, is particularly important in Chile, as social rights demands were probably the main driver of the popular demand for constitutional replacement.<sup>63</sup> This leads us to optimistic and pessimistic

<sup>62</sup>Prieto and Verdugo (n 20).

<sup>63</sup>According to some polls, the primary reason why those in favour of the ‘approval’ option in the exit referendum was the constitutional draft’s inclusion of a progressive social rights agenda. See, for example, ‘Encuesta CEP N°88’, Centro de Estudios Públicos, available at <<https://www.cepchile.cl/encuesta/encuesta-cep-n-88>>.

messages: while not all is lost – alternatives for social progress exist outside the constitutional replacement mechanism – it is easy for politicians to blame the Constitution for unfulfilled promises. The idea of a ‘social rights scapegoat’, which the authors develop effectively, is helpful not only for understanding the impact of the constitutional recognition of social rights, but also as a condition for understanding the politics of that recognition.

The promise of social rights does not just trigger problems of using the constitutional project as a ‘magic bullet’,<sup>64</sup> as one of us has suggested; it also can connect the constitutional project to what David Landau and Rosalind Dixon call ‘utopian constitutionalism’. In their article, Dixon and Landau claim that relevant parts of the constitutional proposal advanced by the Convention went beyond the idea of transformative constitutionalism – which is very popular in Latin America – and instead adopted a type of utopia that diverged from the parties’ interests and differed from the preferences of Chilean public opinion. Even though the problems of utopian constitutionalism can take the form of rights as bribes (which Dixon identifies in another work following the process of Ecuador),<sup>65</sup> and it is unlikely that the proposal advanced a sort of authoritarian agenda,<sup>66</sup> the problems of utopian constitutionalism remain in the Convention’s proposal.

Two remaining lessons connecting to the broader Chilean political context, which are often overlooked by external observers, are important to observe. Zooming out of the Convention, we can also identify that the Convention worked within an ideological narrative that was not novel in Chile, which helps provide an understanding of why the Convention could not offer a plausible solution to the political system problems briefly identified by Palanza and Sotomayor. The first lesson comes from José Francisco García, who examines the connection of the Constitutional Convention’s rules with Bachelet’s previous failed attempt at replacing the Chilean Constitution. Bachelet had argued and campaigned for a constitution-making process that could endorse the need to promote a participatory, institutional and democratic constitution. García argues that the political ideas and narratives that inspired Bachelet’s attempt survived its procedural failure, remained during the Constitutional Convention’s functioning and are likely to survive its failure. Those ideas are attractive because they align well with Chile’s political traditions while reducing the costs of compromise for rival political parties. Another critical lesson underlying this article is the tragic consequences that can follow from failing to delve into the causes of a constitution-making failure before embarking on a new process. An illustration of a critical error that affected the outcome of both failed experiences was the exclusion of political parties during essential stages of the drafting process.<sup>67</sup> Had the causes of the first failure been thoroughly considered, it is plausible that some of the errors that resulted in the second failure could have been precluded or mitigated.

<sup>64</sup>Sergio Verdugo, ‘The Chilean Political Crisis and Constitutions as Magic Bullets’ *VerfBlog* (2019), available at <<https://doi.org/10.17176/20191104-162816-0>>.

<sup>65</sup>Rosalind Dixon, ‘Constitutional Rights as Bribes’ (2018) 50(3) *Connecticut Law Review* 767.

<sup>66</sup>Sofía Correa, interviewed on the program *Hablemos en Off*, Radio Duna, 20 June 2022, available at <<https://www.duna.cl/programa/hablemos-en-off/2022/06/20/sofia-correa-me-parece-que-el-diseno-de-la-cc-que-concentra-el-poder-en-una-camara-en-sintonia-con-el-presidente-es-mas-autoritario-uno-de-los-problemas-del-texto-es-la-concentracion-de-poder-y>>.

<sup>67</sup>Compare Verdugo and Contesse (n 41), explaining that the first constitution-making process failed after not being successful in mobilizing on its side President Bachelet’s coalition and the political parties belonging to it, with Belmar, Fabian and Villarroel (n 52).

The second lesson is in Sergio Verdugo's work, which closes this symposium. Verdugo argues that the Chilean Constitution became a 'moving target' because its unstable content (explained by frequent formal and informal constitutional changes) has partly changed the problems of Chile's constitutional framework. Therefore, replacement attempts have the difficult task of updating their diagnosis of the constitutional problem if they are to succeed. Verdugo summarizes the many constitutional changes existing from 1989 until May 2023 and shows how some outdated criticisms have remained in the contemporary constitutional debates, while also ignoring the main problem of Chile's constitutional framework. For Verdugo, the main problem connects to a dysfunctional party system based on a presidential regime that does not provide incentives for legislative collaboration due to a combination of electoral and political rules that have been approved in previous years. Nevertheless, the Convention seemed to have ignored this problem and even offered a path that could arguably have maximized it.

#### IV. What can comparative and global scholars learn from the Chilean failure?

This symposium emphasizes the insights the Chilean experience can offer for understanding post-sovereign approaches to constitution-making in democratic contexts. It also helps to fill a gap in the literature by identifying the reasons for and consequences of failed constitution-making processes. Undoubtedly, there remains a considerable amount of discussion regarding this failed experience. Nevertheless, this symposium presents three crucial contributions that merit careful consideration.

First, the importance of institutional and procedural design in constitution-making processes, particularly in multi-stage ones.<sup>68</sup> The Chilean case dramatically reveals the consequences that this can have on the failure of such processes. Some scholars contend that designing constitution-making processes is impossible,<sup>69</sup> even considering it an oxymoron. Yet the Chilean case highlights the dramatic consequences of not weighing the political variables arising from the different institutional alternatives at stake.

Second, the Chilean process sheds light on the challenges post-sovereign approaches to constitutional-making face in consolidated democratic settings. In addition to confronting the fragmentation caused by the proliferation of increasingly vocal minorities, post-sovereign constituent assemblies must engage the predictable resistance from other governmental branches. As noted by one of us, these processes put the constituted powers in a sticky position, as they are expected to cooperate with a process that may lead to their suppression or significant alteration.<sup>70</sup> Moreover, constitution-making processes must grapple with the challenges and threats confronting all contemporary constitutional democracies, mainly when constitution-making is presented as a credible alternative for addressing them. Simply put, constitutions should not be sold as magic bullets.

Third, the Chilean Constitutional Convention offers lessons on political representation. As the first organ of its kind to have gender parity, understanding how the process

<sup>68</sup>Michele Brandt et al. 'Constitution-making and Reform Options for the Process' (2011) *Interpeace* 52. 'If the idea of the constitutional moment has any significance, it is probable that the really key moment is when the process is being designed, rather than when the design is being applied.'

<sup>69</sup>Luis Eugenio García-Huidobro and Sebastián Guidi, 'Bertoldo's Court: Constitutional Delegation in the Design of Judicial Institutions' (2021) 9 *Latin American Legal Studies* 127.

<sup>70</sup>Caryn Devins, Roger Koppl, Stuart Kauffman and Teppo Felin, 'Against Design' (2015) 47(3) *Arizona State Law Journal* 609. See *contra* Sanford Levinson, 'On the Inevitability of "Constitutional Design"' (2016) 48 *Arizona State Law Journal* 249.

could benefit women is important. Something similar could be said of the rules benefiting independent candidates and establishing reserved seats for Indigenous peoples. Nevertheless, the Chilean example also shows that a balance between ideological representation and descriptive/symbolic forms of representation is not always easy, tensions may exist and political parties may be weakened as a result.<sup>71</sup>

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<sup>71</sup>Sergio Verdugo, 'The Paradox of Constitution-Making in Democratic Settings: A Tradeoff Between Party Renewal and Political Representation?', *International Journal of Constitutional Law Blog*, September 2022, available at <<http://www.iconnectblog.com/2022/09/i-connect-symposium-on-the-chilean-constitutional-referendum-the-paradox-of-constitution-making-in-democratic-settings-a-tradeoff-between-party-renewal-and-political-representation>>.