

Chile's Path to a New Constitution: Lessons for Libya?

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Augusto Varas²

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- 1 This research paper is part of a series of publications prepared in the framework of the "Dialogue Platform for Peace and Stability in Libya". The project aims to establish a platform for dialogue and exchange between Libya's main political forces, Libyan and international researchers and key actors in the international community on key policy issues for Libya's future.
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Executive Summary

This paper analyses and explains the unique Chilean constitutional process that emerged out of a country-wide protest movement in October 2019. Chile's experience could offer valuable lessons to Libya, a country where the constitutional process is heavily politicised and yet to be agreed on by the main political actors.

The 2019 protests were a reaction to political, social and economic institutions put in place by the authoritarian 1980 constitution. The end of military dictatorship and the election of the first democratically elected government in 1990 was not the opening of a new fully fledged democracy. Mild reforms introduced in 2005 during President Lagos's administration did not change the concentration of political power in the presidency, its economic centralisation in the market and the private sector, and the pre-eminence of Santiago, the capital city, over the other regions. An unsuccessful attempt to change the constitution was promoted by President Bachelet between 2015 and 2017.

Despite important economic and social achievements thanks to centre-left coalitions in government, citizen dissatisfaction with the high concentration of wealth produced a growing social resentment that finally erupted in October 2019 creating a critical situation. Uncontrolled riots and violent street demonstrations sank the country into an anarchical situation, which was overcome thanks to a government-opposition agreement to organise a constitutional process to write a new constitution.

The 155 members of the Constitutional Convention (CC) began their work on 4 July 2021. From this moment until mid-October 2021 the CC focused on defining its procedural rules. During this period several critical issues emerged, such as contestation of the 2/3 rule for the approval of constitutional norms, the immunity of its members and agreement to condemn and punish denialism by CC members.

Important topics to be defined as constitutional norms have appeared, such as the role of the state, the organisation of power, centralisation/decentralisation, natural resources, universal rights, political participation, indigenous communities and work/labour organisations and rights.

At the end of the first stage of the constitutional process it has been observed that the CC's legitimacy has not yet obtained substantial citizen approval. Its work coexists with ongoing presidential and parliamentary political campaigns. The new government will be in charge of the implementation of the new constitution through the application of transitional norms. The simultaneity of these processes creates a political interrelation between them, politicising the constitutional process and introducing constitutional issues into the political competition.

Despite all the difficulties in this first stage of the constitutional process, it is possible to highlight important successes. These include a resolution of the crisis using the existing democratic institutions, CC gender parity, participation by indigenous communities, ratification of the 2/3 approval norm and the largest possible representation of different groups thanks to a new electoral system.

Introduction

As Libya has recently been facing multiple challenges in establishing a permanent constitution, the unique constitutional process initiated in Chile by the popular uprising of autumn 2019 could offer relevant lessons for the Libyan constitutional and political processes. Indeed, the two countries share some similar features, including the importance of natural resources in their economies and finances and a culturally diverse make-up of their populations – issues that have been, among others, at the heart of constitutional debates in both countries.

The end of military dictatorship and the election of the first democratically elected government in 1990 was not the opening of a new fully fledged democracy in Chile. This was due to the fact that the political, social and economic institutions inherited important aspects of the authoritarian 1980 constitution. For example, mild reforms introduced in 2005 during President Lagos's administration did not change the concentration of political power in the president, the neoliberal economic centralisation in the market, the commodification of social rights thanks to the pre-eminence of the private sector and the dominance of Santiago, the capital city, over the other regions. An unsuccessful attempt to change this authoritarian constitution was promoted by President Bachelet in 2015-2017.

Despite important achievements in terms of economic growth and a strong reduction in poverty thanks to 24 years of centre-left coalitions in government, Chile is one of the most unequal countries in the Organisation for Economic Co-operation and Development (OECD).³ In the face of this high concentration of wealth, citizen dissatisfaction gradually grew. This mounting relative deprivation produced growing social resentment, which periodically appeared in street protests throughout the 1990s and 2000s. The 1980 constitutional framework was seen as the main explanation of this unequal situation. This social malaise finally violently erupted into national social upheaval from 18 October to 15 November 2019, unrest close to anarchy created by leaderless mass uprisings, arson of private property and pillage in the main cities. Uncontrolled riots and violent street demonstrations sank the country into a constitutional moment à la Ackerman⁴ and the protests were powerful enough to force the government to agree to initiate a process to work towards a new constitution.

The crisis was overcome thanks to a political agreement between the government and the opposition in Congress to organise a constitutional process to approve the writing of a new constitution by a constitutional convention (CC). Unexpectedly, the Chilean political leaders were able to institutionalise the crisis and find a solution using democratic mechanisms.

The election of the 155 CC members took place on 15-16 May 2021 and was followed by the inauguration of the CC on 4 July 2021. In its first session – held in the premises of the former National Congress of Chile in Santiago – the CC elected its president and vice president and took several key administrative decisions, which will be summarised below. This was the beginning of the first stage of the constitutional process, which continued until the middle of October. Afterwards, the CC will start to discuss the substantive constitutional norms.

While the actual CC debate during this first stage focused on its procedural rules and the drafting of the constitutional text has not yet started, crucial constitutional issues to be discussed were already raised by different social and political groups and parties – in the media and on social networks – during the election of the CC members. During the CC hearings several proposals were also presented by social

3 OECD data (Chile), 2021: <https://data.oecd.org/inequality/income-inequality.htm>

4 "Ackerman propounds four stages that must occur if a political change is to be understood as a constitutional moment. First, proponents of the change must 'signal' that they have the broad, deep, and decisive support of the people for constitutional transformation. Second, the political leaders of the movement must elaborate their transformative agenda into relatively concrete 'proposals' that the people can accept or reject. Third, there must be a 'substantial period for mobilized deliberation' by the people, typically triggered by conflict between two or more of the branches of government, during which the proponents of change gain the deep and sustained support of the majority of the People. Fourth, after one or another position triumphs in the political arena, the courts must 'translate' or 'codify' this political success into 'cogent doctrinal principles' that will govern constitutional law into the future," from McConnell, Michael (1994), "The Forgotten Constitutional Moment," *Constitutional Commentary*. Volume 11, 115-144: <https://scholarship.law.umn.edu/concomm/749>

organisations representing the wide range of political agreements and disagreements currently existing in Chile, divergences that are mainly aligned across the left-right political-ideological divide. This paper will briefly describe and analyse these issues, such as the role of the state, the organisation of power, centralisation/decentralisation, natural resources, universal rights, political participation, indigenous communities and work/labour organisations and rights.

The first stage in this unique constitutional process has ended with approval of its procedural rules. Now, the substantive constitutional work can begin. This paper will conclude with some political considerations on the successes and challenges faced by the CC and preliminary reflections on the future of this distinctive constitutional process. These lessons could be relevant to countries that are facing critical negotiations on their constitutional processes such as Libya.

1. The 1980 constitution: an obstacle to democratisation

The end of military dictatorship in 1990 was not the opening of a new fully fledged democracy. The 1980 constitution remained untouched until 2005, when some mild reforms were introduced during the centre-left administration of President Ricardo Lagos. In 2015 under President Bachelet's centre-left administration, a constitutional process was initiated but it was not continued since the new right-wing government headed by President Sebastian Piñera was not in favour of any change.

The 1980 constitution under military dictatorship

The Chilean military dictatorship (1973-1990) tried to legitimise itself with several legal instruments such as constitutional acts (1975-1976), and the 1980 constitution created a neoliberal socio-economic and political order. This was a *subsidiary state* that overprivileged the private sector in the economy and refrained from intervening in areas where individuals or groups in society were able to carry out economic activities by themselves, and that promoted private participation in all spheres of daily life. The 1980 constitution was designed to not be changed, as the article will later explain.

During the 1980s one main difference among the political opposition to the dictatorship on the transition to democracy strategy was over whether to demand a constitutional assembly or to accept the existing constitutional norm which allowed a plebiscite in 1988 to decide if the dictator, General Augusto Pinochet, would remain in power until 1996. In the case that his continuity in power was rejected, a presidential election should be organised in 1989. The final agreement within the opposition (without the Communist Party) was to accept the existing constitutional rule. As a result, in 1988 a plebiscite denied Pinochet the possibility of extending his mandate and in 1989 a fair democratic election was organised and in 1990 Christian Democrat Patricio Aylwin, representing a centre-left coalition, was democratically elected president (1990-1994) for a transitional four-year term.

Despite the end of the dictatorship, the democratisation process at the institutional level (congress, electoral system etc.) was gridlocked because of: a) a binominal electoral system included in the 1980 constitution that made it possible for the right to have half of the Congress with a third of the electorate; b) the existence of senators designated by the military, the president and the judiciary; and c) the excessive need for a 2/3 quorum in Congress to change the constitution. Therefore, it was impossible for the democratisation forces to reach a majority in Congress to modify the existing power structure. At the same time a labour law – *Labour Plan* – enacted by the dictatorship in 1979 limited workers' freedom of association and right to collective bargaining, restricting them to their factories or businesses and impeding sectoral or federal mobilisation. Thus, the historical social and political leadership of labour unions and the strength of the popular movement were denied.

From the 1990 transition to democracy until 2019 there was a growing social demand to change the authoritarian constitutional parameters supporting the neoliberal economy and the semi-sovereign polity. Important national social mobilisations – usually initiated by student organisations – in 1997-1998, 2006, 2011-2012 and 2016 included among their demands a new constitution. In fact, in the 2013 presidential race seven of the nine candidates included a constitutional reform in their programmes. The official media did not reflect the wide support in public opinion for a new constitution.

Because of the above-mentioned social mobilisations, in 2005 President Ricardo Lagos and the right-wing opposition agreed on some limited constitutional reforms, such as giving the president the prerogative to remove the commanders in chief of the military services and the police, eliminating the designated senators and introducing political tutelage of the National Security Council. However, the main authoritarian constitutional architecture remained since the right-wing opposition was not disposed to lose control over the economy.

An unsuccessful attempt to change the constitution in 2015

However, since new diversified political groups emerged in Chilean society, an important change occurred in May 2015, when the government and opposition agreed to change the binominal electoral system and replace it with a more representative new D'Hondt⁵ proportional one. Imagining that this change would enable the centre-left parties to achieve a parliamentary majority in the 2017 election, in 2015 President Michelle Bachelet announced a massive social constitutional consultation, which was carried out from 26 April to 6 August 2016.

This five-stage constitutional debate consisted of:

1. Five months of civic education and information for the citizens to socialise the meaning of the constitution and the key elements in the process.
2. Holding self-convened local meetings and provincial and regional councils so that citizens could propose new ideas to include in the new Constitution. Based on this process, a document called 'Citizen Bases for the New Constitution' would be drawn up. The process was monitored by a Citizen Council of Observers⁶ nominated by President Bachelet in early December 2015.
3. The government drafting a bill for the establishment of a new constitution based on citizen proposals to be submitted for consideration by the National Congress in mid-2017.
4. A bill at the end of 2016 to introduce procedures to replace the constitution. This reform of the constitution would require approval by two-thirds of the National Congress and would include proposals on alternative constitutional bodies: a bicameral commission, a mixed Congress-citizenship commission and a constituent assembly.
5. Deliberation and a decision by the National Congress, to be inaugurated in March 2018, on the mechanism that would be used to change the constitution. The government proposed that such approval should have the support of three-fifths of the members.

More than 220 thousand people from all the regions and counties participated in this process.⁷ People over 14 years of age, migrants living in Chile and Chileans living abroad were allowed to participate. There was a separate indigenous consultation of 17,000 people and a complementary consultation of children and adolescents. Self-convened groups and institutions organised participatory debates at different territorial and institutional levels.

This massive citizen participation procedure resulted in a new constitution project being sent to the Congress in March 2018, five days before the end of its mandate, a bill which did not include all the ideas and proposals that emerged from the massive citizen participatory debate. This advance toward a new constitution was buried during President Piñera's second administration (2018-2022), intensifying public dissent against the authorities in 2019.

Considering this social and political background, the social firestorm that rocked the country from 18 October to 15 November 2019 demanding a new constitution changed the previous stalemate, making possible a multiparty agreement on 15 November calling for a plebiscite on writing a new constitution.

5 The D'Hondt System is a mathematical method for allocating seats which assigns seats to parties in proportion to the number of votes their lists obtain.

6 Consisting of constitutional lawyers, a psychologist, a football player, a business organisation leader, a newspaper director, a civil engineer, a liberal think tank director, an expert in computer law, the president of the National Federation of Private House Workers' Unions, the drummer of a popular band, a radio journalist and an expert from a business association.

7 Organisation for Economic Co-operation and Development (OECD) (2017). *Chile. Scan Report on the Citizen Participation in the Constitutional Process*. Paris, Public Governance Reviews. <https://www.oecd.org/gov/public-governance-review-chile-2017.pdf>

2. The 2019 'constitutional moment'

This section describes the transition in Chile from the anarchical moment in late October 2019 and its transformation into a constitutional process.

Factors contributing to the constitutional moment

The signing of the 'Agreement for Peace and the New Constitution' on 15 November 2019 by all the main political parties and movements and supported by the president was possible because of a combination of several factors: social repudiation of the neoliberal policies of the Piñera government; social outrage due to moral affronts by public officials; and the almost anarchical hours the country experienced under rampant social violence.

i) Social dissatisfaction with neoliberal policies

After twenty-four years of five centre-left coalitions in government, the democratisation forces made possible great improvements but with important limits: poverty was reduced from 38.8% to 11% but household poverty increased from 8.6% in 2017 to 10.8% in 2020; economic growth was multiplied fourfold but inequality remained high; human rights improvements were introduced in terms of truth and justice but the police still violated human rights; divorce and paternity laws and a penal code reform were approved but same-sex marriage was not; universal free health provision was enforced but for a limited number of diseases; the number of students in higher education increased from 200,000 to 1,000,000 but meritocracy was not achieved and many students did not find jobs; a decrease in the housing deficit was experienced but the number of precarious lodgings increased; a huge infrastructure plan – roads, ports, airports – was executed but tariffs steadily increased; regional governments were created but the central government remained too powerful; income tax was increased but inequality did not decrease; macroeconomic stability eradicating historically high levels of inflation was achieved but it was not perceived as contributing to a welfare state; due to a decreasing rate of return private pension funds did not achieve the expected results, which affected middle-class wellbeing; and the police could not cope with increases in delinquency.⁸

In the last five years macroeconomic stability has not spilled over to the rest of society. Due to the implementation of neoliberal policies and only considering labour earnings, 4 out of 10 people remained below the poverty line. In the last decade, due to stagnation of growth and productivity Chile could not close the inequality gap between the richest and the poorest. In 2017, 50% of the lowest-income households had 2.1% of the country's net wealth, 10% accounted for 66.5% of the total and the richest 1% accounted for 26.5%.⁹ Capture by the private sector and commodification of education, health and housing government programmes led to household indebtedness increasing by 8.2% from 2018 to 2019, representing 50.3% of GDP.¹⁰ Labour union powers were still limited and 50% of workers earned less than US\$ 520 a month.¹¹

This context created a timebomb and an unpopular increase in public transport fares (1 October 2019) detonated unexperienced social demonstrations against the dictatorship including destruction of property and vandalism.

8 Durán, Gonzalo and Kremerman, Marco (2021), *Los Verdaderos Sueldos de Chile*. Santiago, Estudios de la Fundación SOL; Durán, Gonzalo and Kremerman, Marco (2021), *La pobreza del "modelo" chileno: la insuficiencia de los ingresos del trabajo y las pensiones*. Santiago, Estudios de la Fundación SOL; Garretón, Manuel Antonio (ed.), Emmanuelle Barozet, Gonzalo D. Martner, Carlos Ruiz E., Gonzalo Delamaza, Raúl, Zarzuri, Claudio Fuentes (2016), *La gran ruptura. Institucionalidad política y actores en el Chile del siglo XXI*. Santiago, Editorial LOM.

9 Comisión Económica para América Latina (CEPAL) (2019), *Panorama Social de América Latina*. Santiago, CEPAL.

10 Libertad y Desarrollo (2020), "Radiografía al endeudamiento de los hogares chilenos." Temas Públicos N° 1455-2. Santiago. Libertad y Desarrollo. <https://lyd.org/wp-content/uploads/2020/07/tp-1455-deuda-hogares.pdf>

11 Durán, Gonzalo and Kremerman, Marco (2021), *Los Verdaderos Sueldos de Chile*. *op.cit.*

ii) Dissatisfaction with the elite

Together with this social unrest, recurrent signs of disconnection between the elite in power and the collective beliefs and values in society were evident in several areas. On the one hand, after three decades of social evolution the principle of equality became a massive normative social horizon. These political beliefs and values contrasted with a power elite that was not concerned with the collective interest but privileged private and individual interests, thereby continuing to delegitimise itself. Repeated business collusion scandals¹² (toilet paper, chicken, drugstores) deepened the perception of social injustice and the existing institutions were not able to prevent or contain the malicious use of private and corporate power.

This contrast between social values and the way those in power exercised it together with multiple moral affronts by government authorities (e.g. minimising the effect of transport fare increases on family budgets, suggesting buying flowers because they were not affected by the increasing inflation; ridiculing the elderly for visiting public health centres) infuriated the lower and middle classes and contravened their social standards of justice and equity.¹³ This social outrage was another factor behind the massive collective actions aimed at changing the power structure.

The radicalisation and levels of violence observed during the upheaval constituted the main challenges facing the authorities and explained their ensuing reaction. After that weekend a majority (59%) perceived that democracy was in danger.¹⁴

iii) Ineffective response from the government

The president and his cabinet did not understand the nature of the protest. They reacted badly and slowly, proposing a limited social agenda and militarising the conflict. This political inability to control the crisis reached its peak when the president stated “We are at war against a powerful enemy.” Accordingly, he convened the controversial National Security Council, including the heads of the military, to take part in the decision-making process, as had happened during the dictatorship.

He transferred his political responsibility to the parliamentarians by presenting a series of bills to maintain public order: anti-looting, anti-hood and anti-barricade laws; bills to protect the police; modernising the intelligence and police systems; creating a special team of government lawyers to file criminal complaints against the police; a special mixed team of police and prosecutors; increasing the police’s air capacity; and a mechanism for filing complaints about human rights violations.

This militarised response worsened the crisis and from the beginning of the social unrest (18 October 2019) to the political agreement on a new constitution (15 November 2019), the country was in chaos.¹⁵ The chronology of the crisis was as follows:

- 4 October: High school and university students jumped over the Santiago metro ticket barriers en masse.
- 18 October: The protests escalated, subway stations were destroyed and services were suspended, and the police repelled protesters with tear gas, intentionally shooting protestors in the head with rubber bullets and violating human rights.
- 19 October: A state of emergency was declared and a curfew were enforced in various cities. The president reversed the subway fare rise.
- 20 October: The President stated “We are at war against a powerful implacable enemy who does

12 Donoso, Vania & Lopez, Fernando (2016). Escándalos Corporativos en Chile: Impacto en los precios accionarios de las empresas involucradas. Santiago, *Gestión y Tendencias*, 1(2), 2-6. <https://doi.org/10.11565/gesten.v2i1.10>

13 Varas, Augusto (2021), *Legitimidad del monopolio y uso de la fuerza en Chile*. Santiago, Editorial Catalonia, Chapter 1.

14 Activa Research, *Pulso Ciudadano. Especial Octubre 2019*. Santiago. <https://chile.activasite.com/wp-content/uploads/2019/10/Pulso-Ciudadano-Crisis-en-Chile.pdf>

15 Varas, Augusto (2021), *op.cit.*, Chapters I and II.

not respect anything or anyone, who is willing to use limitless violence and crime.”

- 25 October: The largest demonstration ever in the country took place in the capital city (at least a million people on the streets of Santiago) and thousands demonstrated in other parts of the country.
- 30 October: The APEC and COP 25 international meetings in Chile were cancelled.
- 10 November: The government ratified the beginning of a process to establish a new constitution.
- 15 November: The government and the opposition reached an agreement to hold a plebiscite for the citizens to decide if they wanted a new constitution. The referendum took place on 25 October 2020.

The ‘constitutional moment’ moved forward in Congress, the political space where the agreement was finally reached. The main actors were cabinet members, senators and representatives from various political parties able to lead the power elite – the business community, the media, the right and the left (except the Communist Party) and social organisations – to reach an agreement on a constitutional reform to make possible a plebiscite on the organisation of a constitutional convention, a situation never experienced in Chilean constitutional history. The publication of the constitutional reform making the plebiscite possible was passed on 24 December 2019.

The new constitution: reform or revolution?

Various political actors in the CC have opposite views on their terms of reference. Right-wing and some centre-left political parties and social organisations consider that these terms were already defined and a limited mandate was established by the 24 December 2019 constitutional reform. On the other hand, other centre-left and more radical groups led by the Communist Party argue that the 25 October plebiscite was the original legitimate source of the CC. Therefore, the CC was fully sovereign and able to modify its terms of reference dictated by Congress since all the previous institutional arrangements were products of a constitutional body illegally enforced by the dictatorship (1980 Constitution).

Recently, alongside a reformist approach, the CC has confirmed the 2/3 rule for the approval of constitutional norms but at the same time with the support of radical left groups it approved the possibility of organising special plebiscites to approve/reject by 3/5 norms that will not achieve 2/3.

Therefore, the final constitutional norms will be the result of an unanticipated collaboration among reformists and revolutionaries in the CC.

3. The constitutional process¹⁶

As has been indicated, the constitutional process was possible thanks to a government-opposition agreement to hold a plebiscite to decide on a new constitution. This agreement was transformed into a constitutional reform including the composition of the CC, its organisation and its working procedures. However, the mandates of CC members' constituencies created unexpected controversies among them.

The creation of the Constitutional Convention

Under the pressure of violent riots across the country the government coalition and the opposition parties reached a historical agreement to move forward and write a new constitution to replace the one inherited from the dictatorship. Thanks to a reform of the current constitution, the "Agreement for Peace and the New Constitution" made a unique political process never observed in national constitutional history possible.

This constitutional process was organised along the lines defined by the 24 December 2019 constitutional reforms, modifying chapter XV of the constitution by establishing 'Procedures for the Writing of a New Political Constitution of the Republic' (Articles 130-142). These constitutional amendments made it possible for the CC to start its work on 4 July 2021.

The 15 November 2019 political agreement and the constitutional reforms that followed allowed a national plebiscite to be organised on 25 October 2020 to reject ("I reject") or approve ("I agree") the organisation of a constitutional convention (CC) composed of 155 members to propose a new constitution. In addition, the 'I agree' option had two alternatives regarding the body in charge of drafting it: a CC consisting of elected citizens and current parliamentarians in the same proportion or a convention fully composed of elected citizens.

The agreement also provided that the CC must draft a constitutional text and not an amendment to the current constitution. The exclusive purpose of the CC is to draft and approve a new constitution, so it cannot intervene or exercise any other function of other existing institutions or authorities. In addition, in drafting the new constitution it must respect the character of Chile as a republic, its democratic regime, final and enforceable judicial decisions and the international treaties in force ratified by Chile. Since the objective was to generate a high degree of consensus on the constitutional text that will be proposed to the 2022 plebiscite, the CC must approve the norms in the new constitution and the voting regulations with a quorum of two thirds of its members in office.

Despite the health crisis due to the Covid-19 pandemic, the plebiscite – with voluntary voting – was marked by a massive turnout at the polls (50.9%). The 'I approve' option obtained 78.27% of the preferences and the option of a CC composed exclusively of elected citizens was the winner with 78.99% of the votes, incidentally expressing citizen's distrusts of the current incumbents in Congress. The CC has nine months to write a new constitution, which can be expanded up to a year. After this period a new plebiscite – this time with mandatory voting – will be organised to approve the final draft constitution.

i) Composition

The election of the CC members (15-16 May 2021) used the system for electing Representatives (*Diputados*). The new electoral law (Nº 20,840, 27 April 2015) changed the previous binominal system to a proportional D'Hondt one, with 28 electoral districts, each with 3 to 8 Representatives depending on the size of the population. At the same time, the new law expanded the number of Representatives and Senators to 155 and 50 respectively. There is also a quota. Neither male nor female candidates may exceed 60% of the total number of candidates and neither can be less than 40%. This new electoral system improved both political and female representation in Congress.

¹⁶ The main information sources are the National Congress Library (<https://www.bcn.cl/portal/>) and PlataformaContexto+ (<https://plataformacontexto.cl/>)

The 24 December 2019 constitutional reforms and others that followed in 2020 provided that the CC should be composed according to a gender parity norm, also including independent candidates – non-governmental and grass roots civil society organisation leaders – and 17 indigenous community representatives elected with a special electoral system. Considering the low legitimacy of political parties (2% support in 2019¹⁷), independent individuals were allowed to have their own lists, independent candidates could be included in party lists and off-list independent candidatures could also be submitted. The party lists should also contain a quota of persons with disabilities. Among the candidates elected to the CC, 26% were independents associated with parties, 30% were fully independent and 11% were independents in the seats reserved for indigenous representatives.¹⁸ The unprecedented inclusiveness of the Chilean constitution-making body was praised by the United Nations.¹⁹

Responding to their constituencies, seventy-seven elected members of the CC (excepting the pro-government ones), share common proposals²⁰ including ending the subsidiary role of the state, overcoming the extractive economy, decentralising power, protecting the environment, recovering land for native peoples, plurinationality, strengthening labour rights, establishing food sovereignty, changing the pension system, ensuring the right to quality public education and strong criticism of the course that the post-dictatorship transition took alongside the policy of agreements promoted for decades by the centre-left *Concertación* coalition.

ii) Organisation and working procedures

On Sunday 4 July 2021, the first session of the CC was held in the premises of the former National Congress of Chile in Santiago. Ms. Elisa Loncón Antileo, representative of the most numerous indigenous community, the Mapuche, was elected president and Jaime Bassa Mercado, a constitutional lawyer and member of the *Partido Convergencia Social*, part of the *Frente Amplio*, was elected vice president. Later, to improve the representation of all the groups participating in the convention, seven other members were elected as deputy vice presidents, creating a governing body of nine members to collaborate with and facilitate coordination between the heads of the CC and its plenary and working committees.

In addition, in its third working week eight temporary committees were organised. These were named Procedural Rules (*Reglamento*); Ethics (*Ética*); Budget and Governance (*Presupuesto y Gobierno Interior*); Popular Participation and Territorial Equity (*Participación Popular y Equidad Territorial*); Human Rights, Historical Truth and Bases for Justice, Reparation and Non-Repetition Warranties (*Derechos Humanos, Verdad Histórica y Bases para la Justicia, Reparación y Garantías de No Repetición*); Communications, Information and Transparency (*Comunicaciones, Información y Transparencia*); Indigenous Participation and Consultation (*Participación y Consulta Indígena*); and Decentralisation, Equity and Territorial Justice (*Descentralización, Equidad y Justicia Territorial*). Similarly, the CC approved an External Committee of Assignments, in charge of determining norms for the administration of the CC budget provided by the government.

Afterwards, the Regulation subcommittee approved seven thematic commissions, ratified by the plenary, to address the substantive issues in the new constitution: the political system, government, legislative power and the electoral system; constitutional principles, democracy, nationality and citizenship; the legal form of the state, territorial equity, fiscal, political and administrative organisation; fundamental rights, political and civil rights; fundamental economic, social and cultural rights, collective rights of the

17 Centro de Estudios Públicos (CEP), *Estudio Nacional de Opinión Pública, Diciembre 2019*. Santiago, CEP. https://www.cepchile.cl/cep/site/docs/20200116/20200116081636/encuestacep_diciembre2019.pdf

18 The elected members represent the whole political and socio-economic spectrum. The pro-government party 'Vamos por Chile' won 37 seats; non-party constituents grouped into two electoral lists, 'Non-Neutral Independent' and 'The People's List,' won 26 seats; the leftist 'I approve Dignidad' made up of the Frente Amplio and Chile Digno including the Communist Party obtained 28 seats; the 'Approval List' composed of Concertación, Nueva Mayoría, the Liberal Party, the Progressive Party and Citizens got 25 seats; independents, candidates outside electoral pacts and grass root organisation leaders won 11 seats; and 17 seats were reserved for indigenous peoples elected under a special quota regime, including gender parity, to represent their communities.

19 Ríos Tobar, Marcela (2021), "Chile's Constitutional Convention: a triumph of inclusion." Santiago, United Nations Development Program (UNDP) in Latin America and the Caribbean.

20 Unholster (2021, *El mapa ideológico de la Convención*. Santiago. <https://www.unholster.com/prensa/2021/8/23/el-mapa-ideologico-de-la-convencion-los-constituyentes-ubicados-de-extremo-a-extremo>

indigenous nations pre-existing the state; environment, rights of nature, common goods and economic model; and justice systems, autonomous control and reform of the constitution bodies.²¹

The constitutional reform that created the CC provided that “It will be up to the President of the Republic, or to the bodies that he determines, to provide the technical, administrative and financial support that is necessary for the installation and operation of the Convention.”²² Accordingly, a special unit – the Administrative Secretariat of the CC – was created at the Ministry of the General Presidential Secretariat. However, considering the unanticipated government demand for administrative support and budget restrictions due to high expenditure during the pandemic this backing was improvised, creating tensions between the CC and the government and resulting in the resignation of two of its directors. The main discrepancies between the CC and the government on the amount of financial support for the CC are still creating tension, with the CC requesting more budget and the government limiting the amount. Between the lines could be observed government reluctance to encourage the writing of a new constitution.

With several requests from the press to have access to the CC debates, it was determined that the media would have access to the CC commissions and plenary sessions through a system of rotating shifts.

Similarly, to prevent lobbying and corruption by actors external to the CC trying to protect their interests, a standard for transparency was decided. Since the constitutional reform indicated that the CC members “will be subject to the norms of Law No. 20,880, on probity in public functions and prevention of conflicts of interest, applicable to Representatives, and to Law No. 20,730, which regulates lobbying and actions that represent private interests before the authorities and officials,” it was agreed that within a month the CC members would have to make a public declaration of assets and interests, including registering professional, labour, economic, union and charitable activities; and their real estate in Chile and abroad, water rights, concessions, shares, companies and recordable personal property, including assets of the spouse. Holders of over one million dollars would have to establish special mandates or sell shares and securities.

It was also agreed that the CC must have a registration system for hearings and meetings requested by or held with lobbyists or interest groups. CC members must record their trips, including the cost, destination and purpose of the activity; and record official and protocol donations they receive in the exercise of their functions. A platform to request a meeting or audience with one or more representatives of the CC was organised. By mid-August 1,200 meeting requests were received.²³

To make citizen participation possible and link the CC’s work to interested social organisations and individuals it was decided that the Decentralisation Commission would work in four main regions across the country to receive social input and commission hearings would be organised.

Collaboration agreements with national institutions were signed with the Library of Congress and public universities to provide documentation, personnel and technical advice for the CC’s work. The Resident Coordinator of the United Nations System and representatives of UN agencies, funds and programmes operating in Chile offered their cooperation in the constituent process.

Main controversies in the Constitutional Convention

Due to the aim to create the CC as a fully sovereign assembly, early challenges to its constitutional mandate emerged: the 2/3 rule to approve the constitution has been questioned, the immunity of the CC members has been disputed, a CC right to prevent the presence of people denying human rights

21 The plenary finally approved the following commissions: Political System, Government, Legislative Power and Electoral System; Constitutional Principles, Democracy, Nationality and Citizenship; Form of State, Decentralisation, Equity; Fundamental Rights; Environment, Rights of Nature, Natural Assets Commons and Economic Model; Justice Systems, Autonomous Bodies of Control and Constitutional Reform; Systems of Knowledge, Science and Technology, Culture, Art and Heritage.

22 Ministerio Secretaría General de la Presidencia (2019), *Ley Núm. 21.200 Modifica el Capítulo XV de la Constitución Política de la República, Artículo 133*. Santiago, Ministerio Secretaría General de la Presidencia. <https://www.bcn.cl/leychile/navegar?idNorma=1140340>

23 Convención Constitucional (2021), *Convención Constitucional realizó balance a dos meses de su inicio*. Santiago. https://www.chileconvention.cl/news_cconstitucional/convencion-constitucional-realizo-balance-a-dos-meses-de-su-inicio/

violations has been proposed and the CC's sovereign right to accept resignations and replacements of members has been approved. All these issues have been disputed across right-left political and ideological divides.

i) The 2/3 rule

As previously mentioned, one important topic has been the attempt by the radical left in the CC to change the 2/3 rule to approve the new constitutional draft by eliminating the norm established in the 15 November agreement and provided for in the constitutional reform creating it. Rejection of this rule would strengthen the CC's sovereign constitutional framework and procedures but it would open a constitutional feud that would need to be resolved by the Supreme Court.

As a first step toward full sovereignty, it was decided that the CC plenary should approve/reject the 2/3 rule by a simple majority. The CC approved the 2/3 rule. However, at the same time the radical left was able to approve specific plebiscites on norms that reached 3/5 but not 2/3. On this issue the right-wing minority was not able to get 39 signatures (25%) to ask the Supreme Court to invalidate this norm, which has to be formalised in a new constitutional reform.

ii) CC immunity

Another critical issue was immediately raised by a large number of left-wing CC members. It regarded the continuing imprisonment of people convicted due to the 18 October national uprising. In this context, the CC disseminated a 'Declaration of the Constitutional Convention on persons deprived of liberty on the occasion of the social revolt and the judicialisation [introducing politically confrontational issue in courts] of the political and social conflict that the state maintains with the Mapuche nation,'²⁴ requesting the senate to accelerate the approval of the legal pardon of those involved in those events. The political and legal rationale behind these demands was that those acts considered criminal occurred in a context where the legal system was unable to provide actual justice. The Senate is still debating this bill.

iii) Denialism and right-wing participants

Similarly, in discussion of denialism initiated by the *CC Human Rights, Historical Truth and Bases for Justice, Reparation and Non-Repetition Warranties* commission, it approved an amendment to prevent a former naval attaché of Pinochet during the dictatorship from participating in the commission hearings. It also approved another amendment prohibiting the attendance at the hearings of four right-wing organisations considered 'deniers.' The rationale behind these amendments was to prevent the re-victimisation for the 18 October-15 November uprising of human rights victims during the dictatorship. At the end of a broader discussion with the CC governing body, the commission finally approved the inclusion of right-wing NGOs in the hearings and recognised that it did not have the power to veto any CC member's presence. As part of the negotiation the retired admiral decided not to attend hearings with former prisoners during the dictatorship and uprising protesters.

In this debate the CC discussed and approved a norm that establishes a definition of *denialism* to sanction representatives who engage in "any action or omission that justifies, denies or minimises, apologises or glorifies crimes against humanity that occurred in Chile between 11 September 1973 and 10 March 1990 and human rights violations that occurred in the context of the social uprising in October 2019 [that] justifies, denies or minimises the atrocities and cultural genocide of which the indigenous peoples and Afro-descendant tribal people have been victims throughout history, during European colonisation and by the Constitution of the State of Chile."²⁵ The precept must be ratified by the CC plenary and relative sanctions are to be defined.

24 Information available at: https://www.chileconvencion.cl/news_cconstitucional/primera-declaracion-de-la-convencion-constitucional/

25 Information available at: <https://www.chileconvencion.cl/wp-content/uploads/2021/09/Propuesta-reglamentaria-Comisio%CC%81n-de-E%CC%81tica.pdf>

4. Key constitutional issues

Now that the CC's procedural rules²⁶ are effective, the next discussion will be about its substantive constitutional work.

The previously mentioned key constitutional issues were already identified by the main political and social organisations during the Bachelet government (see 1.2 above). In addition, several CC members were elected because of their roles in social and political organisations and unions which had their own policy proposals. Similarly, the CC commissions organised several hearings with different political and social groups making it possible for those concerned with constitutional issues to present their views on these topics. There is no unanimous agreement on these issues and different groups defend different and opposing opinions.

There is a right-wing/centre-left divide but it is not clear whether the alignment around each of these items will be the same, and different *ad hoc* coalitions could emerge around some of them.²⁷ However, as provided for in the constitutional reform that made the constitutional process possible, the decision on each of these issues will be decided by a 2/3 majority.

An important discussion on the length of the coming constitution has taken place behind the scenes: whether it will contain a large number of rights and dispositions or it will be restricted to a short list of key constitutional norms, leaving other issues to be solved by common laws. Considering the wide social, political and cultural representation at the CC, a large list of fundamental rights would be possible.

4.1. The role of the state

One of the most important issues to be discussed in the CC is the role of the state in the economy – the *subsidiary state*, as is stated in the 1980 Constitution and is embedded in all the main legal bodies. The main effect of this constitutional provision has been a commodification of the main social rights (education, health, pension funds, housing) and a reallocation of fiscal resources from the state sector to private corporations through subsidies or vouchers for them to perform state roles as crucial as in education, health and other social service provision. One consequence of these norms has been economic discrimination in service provision and the purchase of national private institutions by foreign capital, as has occurred in the health and insurance sectors.

Due to the economic discrimination of the majority of the population under these provisions, an alternative model opposite to the subsidiary state, a *social-rights state* with a supportive role has been proposed by a majority of CC members. According to this new socio-economic model the government should protect individual civil rights, including political participation, the distribution of wealth through wages, the exercise of collective rights and a set of social benefits oriented to the wellbeing of the individual.

4.2. Organisation of power

The presidential regime established by the 1980 Constitution constituted a political system which concentrates a remarkable amount of power in the executive, a presidential regime that has a significant accumulation of prerogatives with co-legislative privileges and in which the president has the exclusive initiative on bills involving fiscal expenditure. The president can also make direct demands to Congress such as requiring discussion of laws, requesting that a session be called in any of the branches of Congress, monitoring the conduct of judges and others employees of the judiciary, controlling the collection of public revenue and even has veto power over approved bills. The Congress has the right to invite the president of the republic to discussions of bills in the plenary or in commissions, and to approve or reject international treaties before their ratification. The main criticisms of the presidential system are: its remarkable accumulation of prerogatives; the permanence of governments with unstable

26 Ministerio del Interior y Seguridad Pública (2021), *Diario Oficial*, Miércoles 13 de Octubre de 2021. Santiago, Ministerio del Interior y Seguridad Pública.

27 Cfr. Mireya Dávila (2020), "Los *think tanks* de la derecha en tiempos de crisis." Santiago, *Barómetro de Política y Equidad*. Volumen 17, septiembre.

public support; problems associated with dual incumbent legitimacy (the president is elected in a separate election to that of the Congress and so their sources of legitimacy are different); little flexibility in crisis control (confronted by a majority opposition in Congress, the president has no possibilities to reach agreements to solve political and economic crises); and that the new proportional system (2015) created multi-party representation in Congress making it difficult for the president to organise supportive majorities.

Therefore, there are some proposals to move towards a parliamentary system that allows the formation of coalitions and ensures a minimum of governance thanks to a reconfiguration of the power balance between the executive and Congress. The parliamentary majority would nominate the head of government, who would have the support of a solid coalition.

An intermediate proposal is for a semi-presidential system with a president of the republic as head of state and a prime minister as head of government, the first with direct democratic legitimacy and the second with indirect legitimacy dependent on her/his support among representatives in Congress. This would mean separating the functions currently concentrated in the president of the republic, reserving for the president the supreme leadership of the armed forces, representation of the state in its international relations and participation in the appointment and/or nomination of senior officials in the state bureaucracy and the judiciary.

These alternatives have different supporters crossing different groups and political parties and there is no clear political or other alignment on this issue whatsoever. Since this is the core of power organisation in society, this issue will be one of the main concerns for the CC.

4.3. Political participation

Political participation is one of the most controversial issues among the Chilean political class, which has mistakenly seen it as a way to minimise the role of representative institutions, weakening parties and opening space for instability. The neoliberal centralised state-society-market power relations the country has experienced over the last four decades have created a widespread social demand for citizen participation channels. Centre-left governments have been permanently subject to this tension, even when they were able to implement a few significant mechanisms for citizen participation.

New direct democracy mechanisms have been proposed by NGOs and academic centres. These proposals include: national, regional and communal referendums to settle issues of public interest; popular bill initiatives; popular referendums on specific legal or government issues; programmatic voting, i.e. the removal of incumbents if they are not fulfilling the programme for which they were elected; repeal of laws and mandates of authorities; and participatory budgets at the national, regional and local levels.²⁸

Likewise, it has been proposed to deepen citizen participation in the government bodies already considered in citizen participation law No. 20,500 to guarantee its compliance and the appointment of a person in charge of citizen participation in government services and in municipalities. Substantial reform of Law 19,418 on *Neighbourhood Councils and Community Organisations* to deal with these issues has also been proposed.

4.4. Centralisation/decentralisation

Historically, Chile has been a highly centralised country and, according to Article 3 of the current constitution, the state of Chile is unitary. Municipalities have limited capacity to raise their own income, have limited expenditure authority and local investment initiatives are significantly lower than the OECD average level. While in OECD countries 60% of public investment is carried out by subnational governments, in Chile 12% is, but local governments are responsible for providing health and education services to the majority of the population. The concentration of activities in the Metropolitan Region of Santiago is outstanding.

28 Espinoza Troncoso, Rodrigo (2021), "Democracia directa ¿en qué consiste y en qué contribuye?" Santiago, *Opinión Experta*, Contexto+. <https://plataformacontexto.cl/cms/wp-content/uploads/2021/04/Democracia-Directa-Espinoza.pdf>

Nevertheless, some decentralisation processes have been implemented. Regional governments were created in 1991, regional council members were elected in 2014, and on 11 April 2021 regional governors were elected as well. The law on *Strengthening the Regionalisation of the Country* (2018) allows the President to transfer to regional governments some competences of ministries and public services in the areas of territorial ordering, productive development and social and cultural development. However, the administrative measures to strengthen financial decentralisation empowering regional governments, to establish norms on fiscal responsibility and to create funds to provide subnational governments with the necessary administrative and financial tools to handle their new duties are pending.

In the current constitutional moment, there is a generalised citizen demand to enforce and strengthen real decentralisation. Traditional conservative right-wing groups are opposed to a real decentralisation model but progressive centre-left groups hold that there is a need to decentralise the unitary state and distribute power to regional authorities, local governments and municipalities, and to create regional agencies for the implementation of subnational public policies.

To make this possible it has been proposed that the *Regional Governments Law* (1992) should be modified to make all public investments defined at the subnational level; to establish territorial planning instruments – zoning and urban regulations on housing density, land use, location of equipment, industry, green areas, road structure, urban limits and densities and priorities in land urbanisation – in conjunction with the relevant county authority; to environmentally certify significant public and private projects; and to enforce direct management of administrative tools for the promotion of productive entrepreneurship in the regions.

4.5. Natural resources

According to the latest *National Environmental Poll*,²⁹ 64% of Chileans consider that there has been no improvement at all in the country's environmental condition and 23.5% say it is worsening.

In the last 40 years socio-environmental conflicts related to water and pollution have erupted in Chile due to the subsidiary role of the state. Uncontrolled exploitation of land and marine and coastal areas has worsened natural degradation. 'Sacrifice zones' are the consequence of favouring investment over the right to life, health and education. Rural communities are being seriously affected by a lack of water, while the agro-export model continues to expand at the expense of native vegetation and the soil. Large-scale mining continues to destroy glaciers and the salmon industry is damaging the ecosystem in various localities in the south of the country. Over time this development model has been proved to be unsustainable.

Therefore, a set of guidelines for environmental protection have been developed by environmentalist NGOs to support the work of the CC. However, business groups opposing environmental regulations argue that these restrictions would conspire against robust GDP.

a. Water

The 1980 Chilean constitution separates water from land, creating a water rights market. Water appears in the constitution as a property right and the legal system grants water concessions, a protection comparable to human rights, the rights to health, food and housing and the human right to access water. Water rights are perpetual and can only be exercised by their owners when their property rights are threatened or disturbed.

In the current constitution there is no express recognition or guarantee of the right to access water or to its protection for the ecosystem, food and subsistence. Water basins are managed independently and only water right owners such as mining companies can participate in their administration. This system has created a great concentration of water rights in the hands of large companies: eleven water owners possess 50% of the water rights. The result has been a lack of public information preventing government from managing this common good, particularly with the current climate emergency due to a persistent

29 Ministerio del Medio Ambiente (2019), *Encuesta Nacional Ambiental, 2019*. Santiago, Ministerio del Medio Ambiente. <https://www.pais-circular.cl/ciudad/encuesta-nacional-ambiental-casi-el-40-de-los-chilenos-recicla-y-un-30-dice-preferir-productos-con-menos-empaques/>

drought. The solution proposed by centre-left CC members is to nationalise water resources and rights, thus restoring state ownership of water. Water right owners and right-wing CC members oppose this.

b. Mining

Exploration and exploitation of mining deposits is currently regulated by the *Constitutional Organic Law of Mining Concessions* (Law No. 18,097) issued in 1982 during the dictatorship. It grants an indefinite right to exploitation concessions and in the event of expropriation of a concession for the exploitation of a mining deposit the government must compensate the concessionaire for both the direct damage (capital loss) and the loss of profit (a reasonable projection of the future profitability that the concessionaire expected to obtain).

Therefore, *the National Federation of Copper Workers* has proposed that the CC should strengthen the role of the state in safeguarding the exploitation of mines by Codelco (the state-owned copper corporation) and establish that any deposit discovered in Chile should be exploited by the state and raise the tax on large mining companies.³⁰

Both international and national copper corporations are against these proposals and threaten to sue the Chilean state if the current legal status of their operations is changed.

c. Forestry

One of the first economic measures at the beginning of the dictatorship was a promotion of wood exports in the form of pulp and chips. The 1974 Decree Law 701, one of the oldest afforestation subsidy policies in the world and in force between 1974 and 2012 to promote forestry development, established incentives for forestry activities such as bonuses for afforestation and stabilisation of dunes on soil suitable for forestry.

After several decades, it was observed that although this measure was adopted to protect native ecosystems it was not always enforced, making it possible for the state to subsidise private corporations to replace native forests with commercially profitable tree plantations, providing incentives to increase the area of forest plantations while reducing native forests, thus triggering a loss of biodiversity and a reduction of the native forest.

These policies and authorised forest exploitation are affecting the fundamental rights of the inhabitants of these territories, many of whom are indigenous or socially vulnerable, and are endangering the right to live in a pollution-free environment. Therefore, indigenous communities and environmentalist organisations have proposed that the new constitution should guarantee the protection of nature by establishing that nature has rights, overcoming the idea that the environment is just an object for indiscriminate use by human beings.

4.6. Universal rights

As previously indicated, in response to the concentration of power and the resulting social inequity due to the private sector delivering social services and the shrinking of state welfare institutions, there is a demand for the inclusion of social rights and their enforcement by the state in the new constitution.

The social rights required in the new constitution are positive ones. In addition to individual rights such as freedom of opinion, conscience, association and petition, the constitution should indicate how social rights (to education, health, housing and social security) will be guaranteed by the state through public policies and laws.

If this constitutional amendment is approved it will be necessary to define how these rights will be enforced, whether by the judiciary, Congress or the Constitutional Court.

30 Federación de Trabajadores del Cobre (2021), *III Propuesta nacional de los trabajadores del cobre para el futuro de Codelco y una minería sustentable para Chile*. Santiago, FTC. <http://www.guiaminera.cl/wp-content/uploads/2021/07/PROPUESTA-NACIONAL-FTC-JULIO-2021.pdf>

It is highly likely that other rights considered in Chile to be ‘value issues’ would be included in this list, such as same-sex marriage, homoparental adoption and free abortion.

4.7. Indigenous communities

The conservative hegemonic view traditionally considers Chile, despite class differences, to be a cultural unity. The ‘Chilean nationhood’ myth was particularly disseminated during the dictatorship through military commemorations. Nevertheless, according to the 2017 Census³¹ more than 12% of the people who live in Chile consider themselves to belong to an indigenous community. However, no chapter or article of the constitution refers to the recognition of these peoples, their culture, their rights or protection. The only constitutional text since independence to allude to them was the 1822 constitution, which established that the Congress should “take care of the civilisation of the Indians of the territory.” This discrepancy has rendered the topic even more crucial in the new constitutional process.

Discussion of Chile as a multicultural and plurinational country has been mainly introduced by indigenous community representatives at the CC. They consider that their constitutional recognition would be the first step allowing indigenous communities – not responding to party logics and structures – to open new options for parliamentary representation and the recognition of Chile as a plurinational and intercultural country.

As was previously mentioned, a special provision contained in the 24 December 2019 constitutional reform created 17 seats reserved for indigenous peoples in the CC. These representatives were elected under a special quota regime. Together with gender parity, this special inclusion of indigenous communities represents a radical change in the national approach to this issue. According to polls, 97% of Chileans approved the proposal to constitutionally recognise native peoples and 82% approved granting them reserved quotas both in Congress and in the eventual body in charge of drafting a new constitution.³²

The representation of indigenous communities in the CC is a clear and definite sign that a constitutional norm recognising Chile as a plurinational and intercultural country would be approved.

4.8. Work and labour organisation

The labour law – the *Labour Plan* – enacted by the dictatorship in 1979 granted employers the maximum possible freedom to set workers’ pay and schedules and dismiss them. It locked the unions and collective bargaining in a legal cage which reduced workers’ rights to a minimal expression of them.

This law was modified in 2014 but the strength of labour unions to negotiate was not fully restored. Therefore, a proposal from union leaders, researchers and academics collected by the *National Workers Central* (CUT) establishes the need to create decent jobs, including a feminist vision valuing all jobs and a contract without discrimination. Specifically, the proposal stresses the need to integrate maternity rights within labour rights and to include pre- and post-natal care, eliminating the burden of reproduction costs exclusively on women.³³

The proposal also underlines the need to maintain freedom of association, which includes autonomous unionism and collective bargaining at all levels, together with the right to hold multi-union strikes. Similarly, a universal social security system protecting workers and their families in the event of a crisis, coordinated with a training plan, should be established in the new Constitution.

31 Instituto Nacional de Estadísticas (INE) (2017), *Estimaciones y Proyecciones de la Población de Chile 1992-2050 (Total País)*. Santiago, INE. <https://www.censo2017.cl/>

32 Centro de Estudios Interculturales e Indígenas (CIIR) (2021), *Estudio de opinión pública: pueblos originarios y nueva constitución*. Santiago, CIIR. http://www.ciir.cl/ciir.cl/wp-content/uploads/2021/03/Estudio-de-Opinion_Marzo_2021-1.pdf

33 Central Única de Trabajadores (CUT) (2020), *Propuesta constitucional del mundo laboral*. Santiago, CUT-FES. <https://cut.cl/cutchile/2021/06/30/trabajo-decente-consejo-asesor-de-la-cut-presenta-las-propuestas-constituyentes-del-mundo-sindical/>

The *Confederation of Production and Commerce* (CPC) – the national business association – considers that these demands do not generate a real balance between workers and employers in strikes and negotiation processes and could have harmful effects since replacing workers on strike is necessary to keep production going. It also stresses the importance of freedom of association and that union membership should be voluntary.

Conclusion and lessons learned

The first three months of the CC's work have been extremely rich, and have made visible the main political differences among its members. This was particularly observed during the discussion of the procedural rules, when reformist and revolutionary sectors confronted several issues such as the 2/3 approval rule and the CC's sovereign decision on the resignation and substitution of CC members. At the same time, during its hearings the CC has been receiving constitutional proposals from different sectors on a variety of topics. It remains to be seen whether these proposals will be accepted and translated into constitutional norms.

Successes

The first stage in this unique constitutional process ended with the approval of its procedural rules by the plenary in September. Now, the substantive constitutional work will go ahead at full steam from November 2021. Meanwhile, several issues need to be highlighted.

- **First, despite all the social criticism and discontent with democratic institutions the crisis was solved institutionally through democratic means.** The key role played by (discredited) political parties in Congress made possible the deactivation of the most critical social and political conflict with a comprehensive agreement. Paradoxically, Chile is today more democratic than before the crisis.
- **Second, its gender parity and the 2/3 approval norms provide the constitutional body with high legitimacy.**
- **Third, the special integration of indigenous community representatives** through a particular electoral process **showed Chile's actual plurinationality.**
- **Fourth, the largest possible representation of different groups** was possible thanks to the new electoral system.
- **Fifth, the CC leadership has provided full transparency of the constitutional process** in plenaries and commissions.

These key elements in the Chilean constitutional process could make an international contribution to similar experiences in other countries.

Challenges

The CC has faced several challenges, one of the most important ones being its social legitimacy. Public opinion is concerned about the expediency of CC work and the CC directorship is worried about the convention's social legitimacy.

CC legitimacy

As previously indicated, the election of the CC members was highly legitimated and organised according to the existing rules for elections to Congress, making a high level of social and political inclusiveness possible. Therefore, at the first meetings for the first time the candidates had the possibility to confront their opposing views, creating a quite contentious environment. These intense initial discussions were criticised in public opinion.

Therefore, in its first working month the CC had only 30% approval and 47% disapproval. As an effect of its political polarisation, 61% of those who identify with the left approved of the CC versus 8% on the right.³⁴ Among those who identify with the centre and those without political identification there was more disapproval than approval. The reasons for approval were that the CC was working to generate positive changes, that it has moved forward with its task and its president is perceived as doing a good job. The reasons for disapproval are the slowness of the work, excessive expenses, deviation from its central constitutional functions to political ones and the personal agendas of some CC members.

Another source of criticism has been the attempt by some CC members to break with the original constitutional mandate, particularly the attempt to replace the 2/3 majority to approve constitutional norms with a simple majority. Even though this was not approved, the CC approved another proposal not included in its terms of reference to organise plebiscites to settle matters that do not reach the two-thirds quorum, replacing it with a three-fifths one. However, a constitutional reform is required to be able to make these changes possible.

At the same time, the CC's legitimacy has been questioned since the very beginning by a minority group representing right-wing organisations and political parties and supported by official media conglomerates. The right-wing strategy seems to be to achieve support for the rejection of the draft constitution when it is submitted to a plebiscite. Since this final plebiscite will have mandatory voting and considering that around 49% of the electorate did not vote in the plebiscite initiating the process, this is a possible scenario.

Therefore, the CC has been forced to focus on its legitimacy, step up its work, move forward at a higher speed and achieve working majorities at a faster pace. Thanks to the organisation of a moderate core group, informal and formal mechanisms to resolve disagreements have been found.

The coexistence of the CC with an ongoing political campaign

A presidential election and the election of a new Congress³⁵ is scheduled for this coming 21 November and a presidential run-off will follow on 19 December. This two-month period will produce an interaction between competition between the candidates and the CC debate on constitutional norms, e.g. if the government sends a bill to reform the pension system and at the same time the CC discusses social security as a citizen right. In this context, the CC debate will be influenced by political campaigns and vice versa.

The political competition in course, including important campaign offers by the candidates, will create possible conflicts between the new winning coalition in government and the CC regarding the effect of some constitutional norms it approves, e.g. a political system and social security changes. These norms could be in tune with or opposed to those in government and pressures from both sides would make the process more complex.

34 Criteria (2021), *Agenda Criteria, julio-agosto 2021*. Santiago, Criteria.
https://www.scribd.com/document/519523799/Agenda-Criteria-Julio-2021#from_embed

35 100% of the House of Representatives (Diputados) and 50% of the Senate.

A new government will be tasked with implementing the new constitutional norms

Another topic of concern not directly related to the CC work is the future problematical coexistence with a new Congress and the elected government that will assume office on 11 March. The CC will probably continue its work until the end of July 2022. Afterwards, the new government and Congress will be in charge of the implementation of the new constitutional norms.

These new norms will have two different effects. Some of them will have immediate effects (e.g. the presidential role vis-à-vis the military in peacetime) but others will have transitional procedures regulated by common laws that will be discussed by Congress and the new government to make them enforceable. Therefore, in some way the constitutional process will *de facto* continue until these transitional norms are fully defined and approved, and it could continue in time under another administration.

If the drafters opt for a parliamentary or semi-presidential system, the new Congress and other authorities could remain in power until the end of their mandate and the new political system could be implemented for the next mandate. However, this has also been a matter of dissent since it would also be possible to immediately change the old authorities and replace them with new ones if substantial changes in the political system are approved. Since a new organisation of political power implies not only the definition of the prerogatives of public officials but also the associated electoral system – and probably new norms for political parties – these legal aspects will necessarily be discussed and approved by future parliament and government incumbents.

Finally, if the draft constitution is rejected by the people the current constitution will be maintained and the constitutional process will be closed, as occurred with Bachelet's one. However, this rejection would probably create a new deep social and political crisis.

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