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PRESENTACIÓN

El Derecho Público continúa siendo un terreno fértil en el panorama nacional. A pesar de haber concluido, ya hace un tiempo, dos procesos constituyentes, son muchos los temas de análisis que, desde la academia o la experiencia constitucional vivida, pueden y deben ser valorados. Por ello, la presente edición del Anuario de Derecho Público de la Facultad de Derecho de la Universidad Diego Portales —la número 13, para ser precisos— continúa siendo un espacio para reflexionar sobre los principales acontecimientos sociales, políticos y económicos que presentan una mirada *iuspublicista* en Chile.

El debate nacional, desde el ordenamiento jurídico y con la Constitución Política de 1980 vigente, debe enfrentar las problemáticas acuciantes de la sociedad chilena y ofrecer soluciones jurídicas a tono con sus necesidades actuales. De esta manera, este número reúne a académicas y académicos nacionales e internacionales, con el objetivo de contribuir a una reflexión sobre los retos que continúa dejando el texto constitucional, luego de dos intentos de redefinir sus bases y preceptos.

De este modo, la obra que se presenta se divide en cinco secciones que incorporan debates dogmáticos o jurisprudenciales desde el Derecho Constitucional, el Derecho Administrativo, el Derecho Ambiental y, por primera vez en las ediciones de este Anuario, el Derecho Tributario. Estos, a tono con la misión editorial de este proyecto, son redactados desde un lenguaje claro y sencillo para, ojalá, servir como una plataforma de divulgación y conocimientos para la ciudadanía y para la política pública.

La sección de Derecho Constitucional se abre con un trabajo en el que se conmemoran, críticamente, los 20 años de la importante reforma constitucional de 2005. Enseguida, se incluyen trabajos que estudian temas relativos al rol de la Fuerzas Armadas en el control del orden público o la responsabilidad del Estado por la actuación de las policías. Asimismo, se ofrecen análisis jurisprudenciales asociados a la Ley Integral contra la violencia o la llamada “Ley Corta de Isapres”, esta última con una reflexión sobre la interacción entre los poderes en el campo legislativo entre el Presidente de la República y el Congreso Nacional. Por último,

una mirada nacional y comparada a los problemas de independencia e imparcialidad que presenta el Poder Judicial de Chile.

Como parte de las contribuciones en temas de Derecho Administrativo, sus autores escriben sobre la potestad sancionadora en el Servicio Nacional del Consumidor, la contratación pública a la luz de la reforma de la Ley de Compras Públicas y la línea jurisprudencial que concede acceso a remedios de alto costo tras la interposición de acciones de protección.

Desde la sección de Derecho Ambiental se ofrecen textos que analizan las consecuencias que la Ley de Delitos Económicos desencadena con la modificación de ilícitos que protegen el medio ambiente como bien jurídico. Igualmente, los principales desafíos que afronta la reciente implementación de la Ley N° 21.600, que crea el Servicio de Biodiversidad y Áreas Protegidas y el Sistema Nacional de Áreas Protegidas y una mirada jurisprudencial a casos de actualidad nacional en materia ambiental.

En la sección de Derecho Tributario —como hemos dicho, esta es la primera edición del Anuario en la que hemos incluido una sección destinada, específicamente, al análisis tributario constitucional—, se reúnen autores y autoras para debatir sobre líneas jurisprudenciales que interpretan sobre el cobro de los tributos, las disfunciones en la práctica administrativa del Servicio de Impuestos Internos y los efectos del litio en la tributación minera. Por otro lado, se conversa sobre un estudio nacional y comparado sobre los incentivos tributarios en la investigación y desarrollo, otorgado por la Ley 20.241 de 2008.

Por último, en la sección reservada para la Cátedra de Derecho Constitucional, Jorge Huneeus Zegers, contamos con la contribución de la abogada y académica australiana Cheryl Saunders, expresidenta de la Asociación Internacional de Derecho Constitucional y profesora emérita de la Universidad de Melbourne. La profesora Saunders nos ofrece un interesante trabajo en el que reflexiona sobre las experiencias que dejan los dos procesos constitucionales vividos en el país, las que sitúa —incluso extrayendo lecciones— en la experiencia global de creación constitucional.

Como en todas sus ediciones pasadas, este Anuario no sería posible sin la colaboración de su comité editorial, cuyos integrantes sugieren temas a tratar, así como posibles autores y autoras. Estas últimas, a su turno, son en quienes descansa esta edición. Ellos y ellas ofrecen gentilmente sus trabajos y reflexiones, las que hacen posible, año a año, un nuevo número. La dirección del Anuario de Derecho Público y la Facultad de Derecho de la Universidad Diego Portales les transmiten su agradecimiento por acceder a la invitación y formar parte de este proyecto.

Además, como es tradición en esta publicación, la autoría de los artículos que se ofrecen para la lectura responde a la intención de cuidar una adecuada equidad de género.

Por último, la edición de estilo de este número estuvo a cargo de Lorena Sánchez García, quien con su agudeza y celeridad hizo posible que esta versión viera la luz mucho antes de lo previsto.

Sin más, nos complace invitarles a la lectura de sus diversos textos y a su reflexión, ya que los mismos se presentan con la finalidad de contribuir a la formación, a la cultura jurídica y a la discusión pública en el derecho público nacional.

Domingo Lovera

Reynaldo Lam

Directores del Anuario de Derecho Público

Santiago, septiembre de 2025.

**CÁTEDRA
HUNEEUS**

REFLECTIONS ON CONSTITUTION MAKING IN CHILE, 2019-2023

*Cheryl Saunders*¹

Resumen

Los procesos de creación constitucional de Chile entre 2019 y 2023 fueron dos intentos sucesivos para reemplazar su Constitución de 1980, que databa de la dictadura de Augusto Pinochet. A pesar de ser ambiciosos y distintivos, ambos esfuerzos fracasaron, resultando en la no promulgación de una nueva Constitución y la permanencia de la existente. Estos intentos estuvieron estrechamente ligados al contexto chileno, su historia, condición actual y dinámicas políticas. El primer proceso (2019-2022) surgió tras protestas masivas y estableció una Convención Constitucional totalmente elegida, con paridad de género y escaños indígenas. Esta Convención redactó un borrador que, en un referéndum de salida obligatorio en 2022, fue rechazado por el 62% de los votantes. El segundo intento (2022-2023) se inició con un nuevo acuerdo político y contempló un Comité de Expertos para un borrador preliminar y un Consejo Constitucional electo. El Consejo, dominado por la derecha y centro-derecha, alteró significativamente el borrador inicial, el cual también fue rechazado por el 56% en un referéndum en diciembre de 2023. La experiencia chilena aporta importantes conocimientos a la experiencia global de creación constitucional, destacando la importancia del marco conceptual, las complejidades de la participación e inclusión pública y la necesidad de liderazgo y construcción de consenso. También subraya los riesgos de la polarización, el “exceso de ambición” en el contenido y las limitaciones de los referéndums en contextos profundamente divididos.

1 Melbourne Law School.

1. Introduction

Between 2019 and 2023, Chile engaged in two successive processes, to replace its existing Constitution, dating from 1980, with a new one. While in the end this endeavour failed, in the sense that no new Constitution eventuated,² the attempt was ambitious and the process distinctive in many ways. Appropriately, both the design and operation of the Chilean processes were closely linked to the Chilean context: its history, current condition, and political dynamics. At the same time, however, what occurred in Chile has added to the rich, collective global experience of making and changing Constitutions, and has become part of the global constitutional commons. The purpose of this article is to reflect on the insights that might be drawn from this period of constitution making in Chile that have wider relevance elsewhere.

The article draws on the Jorge Huneeus lecture, which I was honoured to deliver at Universidad Diego Portales in December 2022. The lecture took place at a time when it was known that the first phase of the Chilean process had failed but it was possible to harbour expectations that a second might succeed. The lecture thus was designed to identify insights from global experience with constitution making that might have some application in Chile. The fast-moving pace of events made it impossible to update and finalise the text for the purposes of publication. While it is possible to do so now, the outcome of the 2023 process requires the aims of the piece to be reversed, to harness the Chilean experience for others.

This article falls into three parts. The first of these sketches the terrain of comparative experience with constitution-making to which Chilean experience now adds. The next provides an outline of the recent constitution-making processes in Chile and the context in which they have taken place. The final part of the article explores the Chilean contribution to comparative constitution making theory and practices from four perspectives: concept, process, substance and outcome. In each case the goal is to place what occurred in Chile in comparative context and to identify insights from it that might have resonance for others.

2. The global terrain

Over the past 30 years or so, there has been an extraordinary spate of constitution-making across the world. During this time, which coincides roughly with the

² The qualification is significant; much may also have been gained from the experience of these years. See also on this point Valenzuela, Jose Antonio, Larrain Matte, Hernan, "Two journeys, twice the learning: 10 takeaways from the Chilean Constitutional Experience", Horizontal Think Tank, 2024.

period since the end of the cold war, at least two-thirds of the still-growing number of the member States of the United Nations sought to make new Constitutions or to substantially change existing ones. This period alone thus offers a wealth of global experiences with constituent processes through which trends and some shared challenges can be traced.³

Comparative experience with constitution-making is not confined to this period. The history of what Martin Loughlin has termed “modern” constitutions can be traced to the end of the 18th century, as a by-product of the US and French revolutions.⁴ In both these early cases, the constitutional project seeded ideas that remain influential. They gave rise to a concept of a constitution that was distinctive, and that was interdependent with the manner of its making.⁵

Most obviously, these constitutions were written, in codified form. They provided comprehensively for the exercise of public power.⁶ They norms they prescribed were regarded as fundamental. They usually had the status of law, with all that follows in terms of interpretation, compliance, and enforcement. They also involved deliberate change, of varying degrees, to the pre-existing constitutional order, which typically had evolved over time, through custom and practice. They were thus well-suited to an age of revolutions in North America, Europe and Latin America. All of these factors necessitated a new explanation for the legitimacy of a constitution. This came to be sourced in the people collectively, however described, reinforced by enlightenment theories.

This idea of a constitution or, at least, what superficially looked like it, subsequently spread to states in all regions of the world in ways that make a remarkable story in their own right. The constitutional history of Chile in the early 19th century is one chapter in this story.⁷ On closer inspection, however, there were underlying differences in parts of the world in the way in which the purposes, functions and legitimacy of Constitutions were understood, which help to explain differences in the processes by which they were made. In many places

3 Amongst many works on the subject see Landau, David; Lerner, Hanna, (eds), *Comparative Constitution Making*, (Edward Elgar), 2019.

4 Loughlin, Martin, *The Foundations of Public Law*, (Oxford University Press), 2010, p. 276.

5 Contemporary concepts build on foundations that can be traced back to the earliest communities: Voermans, Wim, *The Story of Constitutions* (Cambridge University Press), 2023.

6 Grimm, Dieter, “The Achievement of Constitutionalism”, Dobner, Petra and Loughlin, Martin, *The Twilight of Constitutionalism* (Oxford University Press), 2010, pp.1, 9.

7 Lovera Parmo, Domingo, “Chile” in Hubner Mendes, Conrado; Gargarella, Roberto; Guidi, Sebastian, *The Oxford Handbook of Constitutional Law in Latin America*, (Oxford University Press), 2022, p. 79, 80-81.

they were introduced through conquest or colonisation.⁸ In some places, including in the Pacific, written Constitutions were introduced in an attempt to ward off colonisation.⁹ In others, of which Japan initially was an example, Constitutions were introduced as part of a broader project of modernisation, in an attempt to emulate what were perceived as the successes of western states.¹⁰

In more recent times, the concept of a constitution has homogenised to a greater degree. Even so, underlying differences remain that are potentially relevant for comparative purposes, even between states with relatively established constitutional systems. There continue to be differences between states in the roles and expectations of constitutions, with flow-on effects for content, implementation effectiveness and durability.¹¹ Relevantly for present purposes, constitutional traditions continue to have different explanations of how constitutional legitimacy draws on the authority of the people.¹² As a result, theories of constituent power are more fully elaborated, and more influential, in some constitutional traditions than others.¹³

Many of the principles, practices, patterns and problems of contemporary constitution making emerged from global experiences over the 19th and early 20th centuries, often in peaks and troughs that were variously attributable to conflict, revolution, colonisation and decolonisation. The more recent phase, which is still underway but may now be drawing to a close, not only drew on them but contributed significantly to them. This phase grew out of a particular period in world history, ushered in by the decline and finally collapse of the then bipolar world, with its competitive geopolitical practices and alliances. One consequence was a surge of democratisation, repudiating forms of authoritarianism, necessitating new Constitutions or, at least, constitutional change. We do not yet understand the extent to which this was actively orchestrated, as opposed to a

8 Colley, Linda, *The Gun, the Ship and the Pen*, (Profile Books), 2021.

9 Colley, op.cit, p. 294, with reference to Tahiti, but with application elsewhere.

10 Yeh, Jiunn-rong, "The Emergence of Asian Constitutionalism: Features in Comparison", in *National Taiwan University Law Review*, No. 39, 2009, p. 44.

11 Consider, for example, so-called "traditional" constitutions as explained in Yeh, op.cit, constitutions that also seek social, economic and political "transformation", constitutions that operate in states with de facto legal pluralism, and constitutions designed to give effect to a peace agreement.

12 Grimm, Dieter, *Sovereignty: The Origin and Future of a Political and Legal Concept* (Columbia University Press), 2015, pp. 39-40; Saunders, Cheryl, "Constitution Transformation", in *Global Constitutionalism*, vol. 10, N° 2, 2021, pp. 237-255.

13 The influence of constituent power theory in Latin America, for example, is suggested by the analysis in Landau, David, "Constituent power and constitution making in Latin America", Landau, David and Lerner, Hanna, *Comparative Constitution-Making*, (Edward Elgar Press), 2019, p. 567.

response to opportunity, but the phenomenon was real enough; and was further stimulated by subsequent events, including the global fiscal crisis.

The contexts in which this all this occurred varied. Some involved states with established institutions and earlier familiarity with forms of democratic practice, in greater or lesser degree. South Africa, Iceland, Nepal and Tunisia are examples that also demonstrate the diversity of experience. Others were polities in which the state was weak or effectively non-existent, or authoritarian government had become the norm, as in parts of Africa or the Pacific. Many states in which Constitution-making occurred over this period also had experienced severe intra-state conflict, to which new Constitutions were seen as part of the answer.¹⁴ The causes of such conflicts were inevitably complex but commonly included a combination of religious or ethnic difference, severe socio-economic disadvantage, and the exploitation or marginalisation of communities in a range of other ways.¹⁵

In terms of geopolitical context, also, this was a period that saw rapid change. Notable features included the rise of arrangements for regional integration with a variety of purposes, structures and achievements, dramatic global economic interdependence, a proliferation of international legal norms and international institutions, the emergence of new and pressing global problems that require collaborative solutions, of which climate change is a prominent example, and the extraordinary development of information technology, social media, artificial intelligence and the global dissemination of fake news. And now, at the end of this period, the world is experiencing the re-emergence of global multipolarity and growing angst about the health and performance of democratic government, including in some erstwhile global role models.

Some of the additional features of constitution making that have emerged from this context deserve particular attention for present purposes. They are interconnected but are identified separately below.

One is the focus on the significance of constitution-making process for both the legitimacy and effectiveness of a new Constitution. An early observer of this phenomenon, political scientist Vivien Hart, noted that constitution-making process had now become as important as substance, in providing a foundation

14 On the significance of different forms of conflict see Samararatne, Dinesha, "Making constitutions work post-war", in *Indian Law Review*, N° 7, 2023, p. 147.

15 Haysom, Nicholas, "Conflict resolution, Nation building & Constitution making", in *New England Journal of Public Policy*, N° 19, 2005, pp. 151-170.

for democracy through practice.¹⁶ Core characteristics of the process to which she referred included new emphases on public participation and inclusion in constitution making bodies on bases that paid explicit attention to gender, ethnicity, Indigeneity, and other indicia of marginalisation. The importance of inclusion and public participation has become widely accepted and is often claimed as an emergent requirement of international law.¹⁷ It is attended by uncertainties, however, about the purposes of public participation; how and when it should occur in a constitution making project; how consultation with the public relates to other forms of inclusion, in constitution making bodies, through representation and by referendum; and where the balance lies between broad-based inclusion on the one hand and leadership, consensus-building and elite commitment on the other.¹⁸

Secondly, the Constitutions that emerged during this time typically were ambitious in purpose and scope. Many sought to reform the social and economic conditions of the state in which the system of government would operate, in addition to the system of government itself, relying on the status of the Constitution as fundamental law and taking advantage of a constitutional moment. Use of the Constitution for such purposes was by no means invented in this period, as examples as diverse as Mexico, India and post-war Germany tend to suggest. It was sufficiently prevalent, however, to attract the new label of transformative constitutionalism.¹⁹

Third, despite impressive successes in the decade of the 1990s, of which South Africa was an example that remains a model, many constitution-making projects encountered hitches along the way, dragged on interminably, failed entirely, or were subsequently reversed.²⁰ Even those that came to fruition had mixed success in terms of effective democracy, constitutional stability and, where relevant, sustainable peace. The search for solutions led to heightened expectations of

16 Hart, Vivien, "Democratic Constitution Making", United States Institute of Peace 2003, Special Report 107; see also Commonwealth Human Rights Commission, "Promoting a Culture of Constitutionalism and Democracy in Commonwealth Africa", (Recommendations to the Commonwealth Heads of Government), 1999.

17 Hart, Vivien, op.cit.

18 Work identifying these issues and explores responses to them includes Saati, Abrak, *The Participation Myth* (Umea Department of Political Science), 2015 and subsequent work; Sethi, Amal, *The Veil of Participation* (Cambridge University Press), 2021.

19 Pius Lange, "Transformative Constitutionalism", in Stellenbosch Law Review, N° 3, 2006, p. 351. In time it became linked with the emerging debate on constitutionalism in the global south: for example, Fowkes, James, "Transformative Constitutionalism and the Global South", in Armin von Bogdandy et al, *Transformative Constitutionalism in Latin America*, (Oxford University Press), 2017.

20 Examples include, respectively, Nepal and Kenya; South Sudan and Somalis; Gambia; and Tunisia.

courts with constitutional jurisdiction²¹ and the introduction of “fourth branch” or “guarantor” institutions as a staple of new Constitutions.²² It also stimulated renewed interest in both constitutional eternity clauses and the willingness of courts to hold certain constitutional amendments invalid on implied substantive grounds.²³ It is clear, however, that the answers cannot lie solely, or even largely, with courts or supervisory constitutional bodies. Solutions must lie elsewhere, in the aims and modalities of constitution making processes, in ambitions for new Constitutions and in the attentions paid to implementation in context and over time.

Fourth, the character and extent of international involvement in the process and substance of constitution making evolved and accelerated during this period, affecting all but the most constitutionally self-reliant states. States in the global south,²⁴ in particular, sometimes proactively sought and in any event were offered “support” for their peace and constitution making processes from regional and international institutions, other states, and governmental and intergovernmental bodies of various kinds. External support offers useful resources, knowledge and perspectives, but also has implications for local “fit” and ownership, unless carefully designed and delivered.²⁵ External support typically also comes with pressures of various kinds to apply international legal standards and meet other international expectations in designing a constitution-making process and drafting the constitution.

Inevitably, the result has been a degree of convergence of constituent processes and constitutional texts, feeding into assumptions about the emergence of “global constitutionalism”. This phenomenon should not be overstated, however. Constitutional forms can be far removed from their operation in practice. Constitutions mix and match ideas imported from elsewhere, in ways that can lead to novel outcomes, in context. Experimentation with constitutional forms in any event continues, with gender equity, accommodation of pluralism, and responses to climate change amongst a larger number of areas in which new initiatives are being

21 Mutunga, Willy, “Transformative Constitutions and Constitutionalism: A New Theory and School of Jurisprudence from the Global South?”, in *The Transnational Human Rights Review*, N° 8, 2021, p. 30.

22 Khaitan, Tarunabh, “Guarantor Institutions”, *Asian Journal of Comparative Law*, N° 16, 2021, p. 540.

23 Roznai, Yaniv, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers*, (Oxford University Press), 2017.

24 Dann, Philipp, Riegner, Michael and Bonnemann, Maxim (eds), *The Global South and Comparative Constitutional Law*, (Oxford University Press), 2020.

25 What this involves is explored in: By everyone, Saunders, Cheryl, *External Support to Constitution Building Processes*, (EBA), 2024.

explored. The many challenges to traditional forms of constitutional democracy in an increasingly multi-polar offer provide other reasons to question the reality of global constitutionalism in relation to either the making or the substance, of national constitutions.

3. Constitution making in Chile 2019-2023

3.1 Context

There is enough commonality between most constitution making processes in the 21st century for comparison to be feasible and mutual learning productive. At the same time, however, each context in which constitution making occurs is sufficiently distinctive to have a bearing on the approaches taken, the challenges faced, the choices made, and the practical outcomes achieved. In the next section I provide an overview of aspects of the Chilean process on which I draw later to explore its contribution to the collective global experience. To assist understanding of these, I begin by placing the Chilean process in relevant context.

Context potentially has a multitude of elements for the purpose of understanding constitution making experience. These can conveniently be grouped into three categories for present purposes: the state of the state and its people; constitutional history and background; and geopolitical positioning.²⁶ In each of these respects, the constitution making context in Chile differs in relevant ways from that in constitution making states in other regions of the world as well as from those in Latin America. It differs most obviously from processes in which the state itself is weak, the people are divided by tribal or other allegiances, the constitution is a response to armed conflict, illiteracy is high, there is no prior experience with constitutions or democracy, and there is significant international intervention in the constitution building process, but less obvious differences can be significant as well.

The concept of a Chilean state, its roles, and the implications of membership are long since established in Chile. State institutions exist and are broadly effective.²⁷ Chile ranks highest in Latin America in terms of economic development and was the first Latin American member of the OECD in 2010. Adult literacy rates are relatively high, at 97.16% and Chile ranks 51 in the world in terms of education.²⁸

26 This categorisation is taken from By everyone, Saunders, Cheryl, op.cit.

27 Hillel David Soifer, *State Building in Latin America*, rates Chile amongst the strongest states in Latin America for state capacity in both 1900 and 2000.

28 Statista, Adult Literacy Rate in Chile, 1982-2022, <https://www.statista.com/statistics/1390699/adult-litera->

The people of Chile are effectively homogenous in ethnic terms, with the significant exception of the Indigenous peoples, who constitute 12.8% of the population, from more than ten distinct groups.²⁹ There is significant economic inequality, which has eased somewhat in recent years but is still pronounced,³⁰ and was a catalyst for public protests for well over a decade, culminating in the upheaval in 2019 that ultimately led to the constitution making process.³¹ There are also deep political cleavages, within and outside the political class, dating back at least to the dictatorship of Augusto Pinochet and affecting attitudes to the Constitution of 1980 that he left behind, which the constitution making process sought to replace.³²

In terms of constitutional background, there has been a written Constitution of some kind in Chile for more than 200 years and both the concept and its purpose are familiar. Similarly, despite sometimes long periods of authoritarianism, including the Pinochet dictatorship from 1973, Chileans are familiar with the principles, institutional forms and practices of constitutional democracy, which evolved under the Constitution of 1925 and again, although to an extent that remains contested, under the 1980 Constitution after the departure of Pinochet, from 1988.³³ Like other states in Latin America, Chile is an heir to theories of the potential sovereignty of the constituent power.³⁴ Unlike at least some others in the region, however, Chile is wary of recourse to them.³⁵ Instead, Chile has had a long tradition of maintaining legal continuity in constitutional change, including constitutional replacement.³⁶

From a geopolitical perspective, Chile is an integral part of the continent of South America, with all that follows in terms of geographical, historical, and

[cy-rate-chile/](#).

29 International Working Group for Indigenous Affairs, “The Indigenous World 2022: Chile”, 2022.

30 By everyone Lecaros, Ignacia, “Inequality in Chile: Perceptions and Patterns”, Center for Economic Development at Harvard Faculty Working Paper, N° 436, 2023. The paper describes Chile as “at the high end of inequalities even by Latin American standards”.

31 Lovera, Domingo, op.cit, p. 87.

32 Lovera, Domingo, op.cit, pp. 84-87.

33 Lovera, Domingo, op.cit, pp. 83-85.

34 The influence of these theories persists in the debate around “post-sovereign” alternatives: Arato, Andrew, “Redeeming the still redeemable: Post sovereign constitution making”, in *International Journal of Politics, Culture and Society*, N° 22, 2009, p. 427.

35 Schiappacasse, Franco, “On old revolutions and new constitutions: Constituent power in the Chilean constituent process”, in *Constellations*, N° 1, 2023, pp. 595-609.

36 Couso, Javier, “Chile’s ‘procedurally regulated’ Constitution-Making Process”, in *Hague Journal on the Rule of Law*, N° 13, 2021, p. 235.

institutional linkages, although these also are affected by Chile's location on the Pacific side of the tip of South America. Chile is a member of the Organisation of American States, and so bound by the Inter-American Human Rights System, and is an associate member of Mercosur. Beyond Latin America, Chile has historical and continuing linkages with the United States and Europe, particularly Spain and Germany, and significant connections with other Pacific rim countries. It is a member of APEC and the OECD and also, since 2005, of the European Commission for Democracy through Law (Venice Commission)

3.2 Process

A great deal has been written about the Chilean process since it ended in late 2023, much of it by people who were engaged in it or immediately affected by it, and its principal features are broadly familiar.³⁷ A brief outline is necessary, nevertheless, as a foundation for the reflections to come.

The constitutional processes of 2019-23 sought to replace the Constitution promulgated in 1980 during the military dictatorship of Augusto Pinochet, which had remained in place after his removal from office in 1988. The removal of Pinochet made transition to democracy possible, through a pact between the opposing political forces, which also involved some constitutional change, setting a pattern that was to continue.³⁸ This became a complex constitutional legacy. Even after Pinochet's departure, the Constitution was replete with provisions designed to preserve conservative political authority and neo-economic policies in Chile. It was thus divisive in both symbolic and substantive terms and readily associated with both socio-economic disadvantage and elite control.³⁹ Nevertheless, this was also the Constitution under which democratisation and relatively stable government was achieved and the Chilean economy had prospered. Many of its more egregious features also had been removed through successive constitutional amendments, although again on the basis of cross-party agreement.⁴⁰

From 2014, president Bachelet sought a new Constitution through an innovative inclusive process that would nevertheless have preserved continuity with the Constitution of 1980 and so required cross-party agreement, which

37 The 2024 symposium in *Global Constitutionalism* is one of many examples.

38 Lovera, Domingo, op.cit, pp. 84-86.

39 "Constitutions as moving targets", in *Global Constitutionalism*, N° 13, 2024, pp. 250, 254.

40 Verdugo, Sergio, op.cit, p. 256.

was not forthcoming.⁴¹ The scale of the protests of 2019 changed the dynamic, causing political leaders to enter into an Agreement (2019 Agreement), ultimately enshrined constitutional amendments, to frame a process for making a new Constitution thus, again, preserving legal continuity.⁴² The amendments were developed by a Technical Commission as a new sub-chapter of the Constitution.⁴³ Key elements of these arrangements included an entry referendum, the possibility of a fully elected Constitutional Convention and an exit referendum with compulsory voting. In other important agreed details, the Convention would meet for nine months with the possibility of extension only for another three, after which it would cease to exist; would confine itself to constitution making rather than other public functions; needed a two thirds majority for approval of each clause of the new constitution and for its own rules of procedure; and would begin with a “clean sheet” rather than using the 1980 Constitution as a default. A few broad, substantive limits on the work on the Convention also were agreed, protecting the republican form of government, final judicial decisions and international treaties. These were not subject to judicial review which, however, applied to the procedural commitments.⁴⁴ During subsequent debate in Congress, additional requirements for gender parity, reserved seats for Indigenous members, and electoral arrangements that facilitated the election of independents also were added.⁴⁵

Pursuant to these arrangements, an entry referendum with voluntary voting was held in October 2020 in which a majority of 79%, on a turnout of 51%, voted in favour of a wholly elected, rather than a mixed, Constitutional Convention to draft a new Constitution. The Convention that was elected in 2021 comprised 155 members, achieved gender parity and included 17 reserved positions for Indigenous members. It was broadly left leaning, with a significant proportion of independent members. It approved a Constitution within the maximum 12 month period allocated to it, which was put to referendum, with compulsory voting, in September 2022 and rejected by a majority of 62%.⁴⁶

41 Couso, Javier, “Chile’s ‘Procedurally Regulated’ Constitution-Making Process”, op.cit. pp. 241-242.

42 Agreement for Social Peace and a New Constitution, op.cit, p. 88.

43 Valenzuela and Matte, op.cit.

44 Prieto, Marcelo and Verduga, Sergio, “How Political Narratives Affect the Self-enforcing Nature of Interim Constitutions”, in *Hague Journal on the Rule of Law*, vol. 13 N° 1-2, 2021, pp. 265-293.

45 Larrain, Guillermo; Negretto, Gabriel; Voigt, Stefan, “How not to write a Constitution: Lessons from Chile”, in *Public Choice*, N° 194, 2023, p. 233.

46 Schlappacasse, Franco, op.cit.

In December 2022 the process was revived with a new Agreement (2023 Agreement) between political leaders, also elaborated in constitutional amendments in 2023.⁴⁷ This Agreement identified 12 substantive principles on which the new Constitution would be based including, for example, the unitary and decentralised nature of the state, recognition of Indigenous peoples, the progressive development of social rights subject to the principle of fiscal responsibility and through State and private institutions, a bicameral legislature, autonomous institutions including a Central Bank, fundamental rights including life and property, four states of exception, and the care and conservation of nature. To conduct the process, this Agreement provided for three bodies: an Expert Committee of 24 members, chosen by Congress, to make a preliminary draft; an elected Constitutional Council of at least 50 members to consider and approve the draft, and a Technical Committee on Admissibility of 14 jurists to be elected by the Senate on the proposal of the Chamber of Deputies, to determine compliance with the Agreement. Gender parity was required; supermajority voting requirements were imposed; and provision for Indigenous seats was considerably more restrictive this time around. Timelines again were short, with an exit referendum scheduled for the end of the process, after an eleven-month period.

Again, these procedures were followed. By all accounts, the Expert Committee worked well, preparing an agreed draft.⁴⁸ This time, however, the elections produced a Constitutional Council dominated by the right and centre right, which could satisfy the 3/5 majority requirement without compromise.⁴⁹ The Council retained only 22.6% of the draft of the Expert Committee. The draft as finally agreed was put to referendum in December 2023 and rejected by a majority of 56%

4. Constitution making in Chile in comparative perspective

This part reflects on the contribution of these two Chilean processes to global comparative constitution making experience and considers some of the insights that might be drawn from them for others considering similar initiatives. The

⁴⁷ Agreement for Chile. An account of the requirements can be found in By everyone Candia, Gonzalo, “A New Path Towards a New Constitution: Chile’s 2023 Constitution-making Process”, IACL-AIDC Blog, 2023, <https://blog-iacl-aidc.org/2023-posts/2023/2/9/a-new-path-towards-a-new-constitution-chiles-2023-constitution-making-process>.

⁴⁸ Valenzuela and Matte, op.cit.

⁴⁹ Valenzuela and Matte, op.cit.

reflections are grouped by reference to the four key themes of the Chilean process that also have resonance elsewhere: the conceptual framework; the processes followed; the substance of the draft constitutions produced; and the significance of the outcomes.

4.1 Concept

Every new constitution making process is or should be conceived in a way that is conducive to reaching agreement on a workable constitution that is broadly accepted as legitimate both by the people in whose name it is promulgated and by those responsible for putting it into effect. A range of context dependent variables affects the conceptual framework that ultimately is adopted, including the causes driving constitutional change, the legitimacy and capability of incumbent institutions under the constitution that is in place, constitutional tradition, and political preference. Drawing on these variables and observing the use made of them in comparative experience it is possible to identify and explain “types” or “models” of democratic constitution making and the principles on which they are based. An influential typology, by Andrew Arato, characterises three such models as “Conventions”, “Constituent Assemblies” and “Round Tables”, delineating the “elements” of each.⁵⁰

Typologies of the conceptual framework for constitution making offer insights, but not blueprints. In practice, each new process is conceptualised to meet its own, usually challenging, realities, some of which may be shared with others, leading to similar choices. Chile is a case in point. Key features of the first Chilean process approximate Arato’s Convention model, which in turn draws on the example of the process adopted in the United States.⁵¹ But the rationales for the choices made, other features that complete the package, and local understanding of the significance of what was done make the Chilean framework distinctive and reinforce the relevance of the conceptual framework for any constitution making process and its relationship to the context in which constitution making is intended to occur.

The first Chilean process sought to combine the legitimacy of a constitution made in the exercise of constituent power with procedures to hold the constituent power in check.⁵² The second process imposed substantive as well as even

50 Arato, Andrew, “Conventions, Constituent Assemblies, and Round Tables: Models, principles and elements of democratic constitution-making”, in *Global Constitutionalism*, N° 1, 2012, p. 173.

51 Arato, Andrew, *op.cit.*

52 Couso, Javier, “Chile’s ‘Procedurally Regulated’ Constitution-Making Process”, *op.cit.*, p. 235.

more significant procedural constraints on the elected constitution making body, making equation with the constituent power even more problematic. It nevertheless involved the voters in elections for the “Council” and in an exit referendum, preserving popular engagement to a degree that could have satisfied the requirements for legitimacy had the referendum been approved.

Three interlinked aspects of conditions in Chile fed into the conceptual framework for the constitution-making process.

The first was the ambiguity of the transition that constitution making sought to effect, at least by comparison with transitions from authoritarianism elsewhere. The illegitimacy of the Constitution made during the dictatorship had progressively been attenuated by the long interval since the fall of Pinochet and changes to the constitutional system, in form and operation. A new Constitution in 2022 or 2023 might (or might not) have made changes of a fundamental kind to the system of government and the framework for it. But it would not have involved transition of the kind required in, for example, South Africa after the end of apartheid, or central and eastern Europe after the fall of communism. On the contrary, while the political elite had been shaken by the scale of the protests that occurred, neither the legitimacy nor the capability of the institutions of government were seriously challenged and the system already was broadly democratic in the sense of having fair elections through which power could and did change hands. It followed that there was no need for an interim administration to carry on the business of government while a new Constitution was made, nor for an Interim Constitution to provide the framework for it.⁵³

The second aspect of the Chilean context that fed into the conceptual framework for constitution making follows from the first. The continuity of existing state institutions gave them the opportunity and, in a sense, the responsibility, to lay the foundations for fundamental change to a constitution that was divisive and seen to have been a focus for popular discontent. This was achieved through the agreements of 2019 and 2023 between the participating congressional parties. In a sense these were pacts, although they differed from other “pacted transitions” in both the character of the Chilean transition and the insider status of the participants as members of Congress.⁵⁴ Consistently with the dynamics of a pact, the parties sought to reach agreement on a basis that secured their own interests and divergent hopes for a new constitution as far as possible.

53 Zulueta-Fulscher, Kimana, “Interim Constitutions”, *International IDEA* 20, 2015.

54 Iakovlev, Gennadii, “Preconditions for pacted transition from authoritarian rule”, in *European Political Science Review*, N° 15, 2023, p. 254.

It is worth pausing to reflect on the comparative significance of these Agreements and the lessons that might be drawn from them. There is a starting point in every constitution making process where the parameters are set within a conceptual framework that is either designed or assumed. While this part of the process typically is neither inclusive nor transparent it is invariably formative. What occurred in Chile illustrates the point.⁵⁵ The procedures on which the parties agreed on both occasions determined the nature of the deliberative constitution making body (of which more below), its duration, its voting rules, and its relationship with other institutions established for the purposes of the process. They also included requirements for an exit referendum. In 2019 the agreed arrangements laid the foundations for a highly inclusive Convention with a very broad remit to draft a constitution. In 2023 the Agreement ensured that what now would be a Council was much less inclusive and was bound to work within substantive limits, which were significant. In both cases, the terms of the agreed arrangements contributed significantly to the outcomes of the process. In the circumstances, given their differences, it is remarkable, and creditable, that the parties were able to reach agreement at all on steps towards making a new constitution. On the other hand, both the Agreements and the ways in which they worked out in practice further underscore the importance of this phase of a constitution making process. They reinforce the need for parties negotiating such agreements to consider the likely workability of the arrangements that they put in place as an essential criterion for the success of the constitution making enterprise that also serves their mutual interests.

This approach to the initiation of a new constitution making process in Chile also both facilitated and encouraged the legal continuity between the old and the new constitutions. The participating parties had the numerical strength in Congress to amend the Constitution of 1980 to authorise the making of a new constitution that could replace it, in accordance with the respective terms of their Agreements.⁵⁶ Giving constitutional form to the Agreements also assisted to ensure compliance, while incidentally offering a greater measure of transparency than might otherwise have been the case. It also had benefits in terms of legitimacy, although these were potentially more ambiguous. A sound legal basis for a new Constitution is one measure of legitimacy, the significance of which may vary between constitutional traditions. In this case, on the other hand, the legitimacy of

55 Schiappacasse, Franco, *op. cit.*

56 Lovero, Domingo, *op.cit.*, pp. 88-89.

the old constitution was contested.⁵⁷ The sting of this objection was largely drawn by the extensive involvement of the people, as constituent power, at multiple stages in the constitution making processes put in place. The challenge in Chile in this regard was broadly comparable to that in South Africa, where the chain of legal authority for the new final Constitution could be traced to the Constitution of the apartheid era, mediated by an Interim Constitution, but in any event overcome by the inclusive character of the constitution making process.⁵⁸

The third influence on the conceptual framework for the constitution making process in Chile concerned the distribution of sovereignty and is interlinked with the other two. The terms of the Agreements sought to preclude any assumption of sovereign power by the constitution making body in ways that had occurred elsewhere in Latin America,⁵⁹ and had become associated with “radical neo-constitutionalism”.⁶⁰ To this end, what was described in the first process as a “Convention” was limited to negotiating and agreeing on a new constitution, prevented from taking on any other functions, and compulsorily dissolved at the end of the period allotted to it by the constitutional changes effected through the still powerful Congress.⁶¹ Whether or not the constitution the Convention approved became law would depend on an exit referendum and would not lie with the Convention itself. The Constitutional Council of the second process was even more constrained. In other respects, however, both processes were redolent of the exercise of constituent power, for reasons that were partly attributable to the inclusive composition of the Convention but also to the use of both the entrance and exit referendum.

The outcomes of the Chilean processes suggest the limitations and dangers of the referendum as a step in a constitution making process. These are exacerbated in an age of deep polarisation, unconstrained social media and fake news. They are likely soon to proliferate further, thanks to artificial intelligence. On the other hand, the referendum can contribute positively to a constitution making process as a “downstream constraint” including, albeit as a somewhat blunt instrument,

57 Schiappacasse, Franco, *op.cit.*, p. 3.

58 For an argument that the Chilean agreements, entrenched in the Constitution of 1980, also represented a form of Interim Constitution see Marcelo Prieto and Sergio Verdugo, *op. cit.* p. 265.

59 Schiappacasse, Franco, *op.cit.*, p. 5.

60 Couso, Javier, “Latin American New Constitutionalism: A Tale of Two Cities”, in Hubner, Conrado (Ed), *The Oxford Handbook of Constitutional Law in Latin America*, (Oxford University Press), 2021, pp. 354, 361.

61 Couso, Javier, “Chile’s ‘procedurally regulated’ constitution-making process”, *op.cit.*, p. 244.

a form of quality control.⁶² In any event, as the Chilean case demonstrates, the referendum may be a necessary legitimating tool in a conceptual framework for constitution making. Whatever difficulties it presents, it can be expected to continue to be used.⁶³ The real challenge is to learn from experiences such as those in Chile to refine its operation in practice.

4.2 Process

The institutional design of the two constitution-making processes in Chile were shaped by the context: most obviously, the Agreements between the parties in Congress but also the general expectations of people, inchoate thought they may have been. Some of the institutions were familiar in comparative terms, including an elected, deliberative body and the referendum, although even these were adapted to the overall constitution-making concept. Other institutions were less familiar and developed for the purpose, including the Secretariat for Public Participation associated with the first process⁶⁴ and the Expert Commission and the Technical Admissibility Commission established for the second.⁶⁵

All of these features are notable, individually and as a package. Three aspects of the design and operation of the Chilean processes deserve particular attention, however, from a comparative perspective.

The first concerns the logistics of the Constitutional Convention, the deliberative body elected for the purposes of the first process. Organising such a body is always a major undertaking. Key challenges include providing rules or by-laws that are suitable for a constitution-making body, establishing procedures that are conducive to building “sufficient consensus” and managing deadlock, scheduling public and media outreach, and managing the circulation of information amongst members. Another challenge, equally significant, is the designation of matters to be considered in committees, the co-ordination of recommendations between committees, and interaction between committees and the plenary.

These challenges were exacerbated for the Chilean Convention by procedures stipulated in the 2019 Agreement and the negotiations that followed. Quite apart

62 Elster, Jon, “Forces and mechanisms in the constitution-making process”, in *Duke Law Journal*, N° 45, 1995, pp. 364, 373.

63 On the increasing incidence of past usage see Tierney, Stephen, *Constitutional Referendums: The Theory and Practice of Republican Deliberation*, (Oxford University Press), 2012, p. 1.

64 Heiss, Claudia, “The new Chilean constituent process: exercising the ‘muscle’ of public participation in an adverse context”, in *ConstitutionNet*, N° 29, International IDEA, 2023.

65 By everyone García Pino, Gonzalo, “Third Time’s a Charm? Chile Embarks on a New Constitution-making Process”, in *ConstitutionNet*, N° 3, International IDEA, 2023.

from the complications presented by its composition, which is considered below, the Convention had to draft an entirely new constitution for a country with deeply divided views on what was desirable in the relatively short time frame of a maximum of one year. Each clause had to be supported by a 2/3 majority. Before starting work the Convention had to develop and adopt its own operating rules, again with a 2/3 majority;⁶⁶ a process that took several months. It is to its credit that it finalised a draft constitution at all, in these conditions and within this time frame. But the process was messy; made insufficient provision for harmonisation of the multiple individual provisions that had emerged from seven committees and had each been approved by a supermajority; and affected perceptions of the Convention amongst the public and in the media.⁶⁷

This experience prompts several reflections that may be relevant for others. One is the need to make provision for drafting and settling the working rules for a deliberative constitution making body in the time allocated for the body and the procedures envisaged for it. This is no simple matter: the working rules are critical to the success of the constitution making process but the need for them to fit both the particular needs of constitution making and local context counsel against taking a prototype off the shelf.⁶⁸ A second reflection concerns voting rules. A requirement for super-majorities is common and appropriate to secure and symbolise the degree of consensus on which a constitution desirably is based. They may also, as in Chile, be influenced by strategic considerations on the part of those shaping the process. Nevertheless, they should also be compatible with the overarching public interest in a deliberative body that agrees on a cohesive and workable constitution.⁶⁹ One final reflection concerns the need to focus and structure deliberations when the task is to draft an entirely new constitution. In some cases this is achieved through principles agreed by negotiating parties before the constitution-making process gets underway, as in South Africa or the second Chilean process.⁷⁰ Where this does not occur, however, there may be value in the deliberative body itself agreeing on a set

66 Lovera, Domingo, *op.cit.*, p. 89.

67 Palanza, Valeria and Sotomayor, Patricia, "Chile's failed constitutional intent: polarization, fragmentation, haste and delegitimization", in *Global Constitutionalism*, N° 13, 2024, p. 200.

68 On the "IKEA theory" see Frankenberg, Gunther, "Constitutional Transfer: the IKEA theory revisited", in *International Journal of Constitutional Law*, N° 8, 2010, p. 563.

69 Compare the critique of the working of the voting rules in the first Chilean process in: Ginsburg, Tom and Alvares, Isabel, "It's the procedures, stupid: The success and failures of Chile's Constitutional Convention", in *Global Constitutionalism*, N° 13, 2024, pp. 183, 188.

70 Murray, Christina, "A constitutional beginning: Making South Africa's Final Constitution", in *University of Arkansas at Little Rock Law Review*, N° 23, 2001, pp. 809, 814.

of principles at the outset, calibrated to strike the balance between generality and specificity that is likely to be useful in context.

A second aspect of the Chilean process that holds considerable interest for comparative purposes was the inclusive character of the first round. On the face of it, the first Chilean process, at least, met and exceeded what often are touted as international standards for public involvement in constitution-making. For a combination of reasons that include the original terms of the 2019 Agreement, additions subsequently made to it by Congress, and voter preferences, the Constitutional Convention itself was diverse, with a preponderance of independent members, gender parity, significant Indigenous representation and representation of people with disabilities.⁷¹ Once in operation, the Convention conducted extensive and innovative public outreach that included provision for popular initiatives.⁷² The process began and ended with the expression of public views through a referendum, in the second of which voting was compulsory. It thus readily met expectations of “national ownership and leadership” and for “inclusive, participatory and transparent constitution-making” as described in, for example, United Nations documentation.⁷³ It offered new insights into forms that participation and inclusion might take.

On the other hand, the Chilean experience rather powerfully confirms the apprehension that has been building for some time amongst close observers of constitution making processes about the limitations of inclusion and its relationship with what might loosely be described as leadership. Most obviously, inclusion clearly was no guarantee of popular acceptance in the exit referendum. The fragmented deliberations in Convention committees and the plenary demonstrated the value of relatively cohesive groupings capable of negotiation and consensus building and confident of being able to maintain discipline on critical issues.⁷⁴ The Chilean experience also highlighted the potential dilemma of descriptive representation in the context of constitution-making.⁷⁵ It adds legitimacy to a process and brings to the table perspectives that might not

71 Ginsburg and Alvares, *op.cit.*, 185. There was a requirement that persons with a disability comprise a minimum of 5% of all candidates.

72 Heiss, *op.cit.*

73 Guidance Note of the Secretary-General on United Nations Constitutional Assistance, September 2020.

74 Palanza and Valanezo, *op.cit.*

75 Phillips, Anne, “Descriptive representation”, in Rohrschneider, Robert and Thomassen, Jacques (eds), *The Oxford Handbook of Political Representation in Liberal Democracies*, (Oxford University Press), 2020, pp. 174-191.

otherwise be considered but may also cause some issues to be pushed beyond the point that current community opinion is prepared to accept.

A third aspect of the process that is useful to highlight for comparative purposes is the work of the Expert Commission in the second Chilean process. Reliance on a body of experts to produce an initial draft of a new Constitution subject to change by an elected constitution-making body in specified conditions is a relatively unusual procedure in contemporary practice and worth noting for that reason.⁷⁶ In Chile, it was a key component of the agreement of the participating parties to initiate another round of constitution-making in the light of experience with the Constitutional Convention and exemplifies the possibility of creative solutions to deal with setbacks. More particularly, however, the Expert Commission deserves noting for the manner in which it carried out its functions, notwithstanding the role of the parties in appointing its members. In principle, it is desirable for constitution making bodies to rise above the preoccupations and machinations of day-to-day politics in the interests of forging a framework for the governance of a polity that is relatively durable and broadly acceptable. In practice, this is a standard that is hard to reach, although it has characterised some of the most successful constitution-making processes.⁷⁷ By all accounts, the Expert Commission rose to the occasion, however, agreeing on a constitutional text accepted by all its members.⁷⁸ While this did not survive the subsequent much less impressive deliberations of the Constitutional Council it offers an example from which others might learn.

4.3 Substance

Three complete draft constitutions emerged from the two Chilean processes: the two that were put to referendum and the draft agreed by the Expert Commission. Although none of these drafts came into force, parts of them may be of interest to others making new constitutions or altering older ones. The ambition of the various drafts also may be instructive for others and is worth noting from a comparative perspective.

76 A broadly similar technique also was used in Fiji in 2012, although the process was never completed: The Constitutional Commission, *Building the People's Constitution: Your Responsibility*, <https://www.c-r.org/resource/building-peoples-constitution-your-responsibility>; and in Gambia in 2019, *Constitutional Review Commission*, <https://www.lawhubgambia.com/constitutional-review-commission>

77 South Africa is a case in point: Hassen Ebrahim, *The Soul of a Nation: Constitution-making in South Africa*, (Oxford University Press), 1998, pp. 189-90.

78 Soto, Sebastian, "Two drafts, three referendums, and four lessons for Constitution-making from Chile", in *ConstitutionNet*, N° 22, 2023, p. 3.

The first Chilean process sought to draft an entirely new Constitution, with relatively little substantive guidance, tackling a range of new issues or older issues in new ways. These included the environment, the place of the Indigenous peoples within the Chilean constitutional order, effective devolution, and public participation in governance. While the treatment of each of these issues was adapted to the Chilean context, all are subjects of considerable interest elsewhere and the Chilean drafts may be influential if and when others decide to go down similar paths. By definition, in the circumstances, the two subsequent drafts differed significantly, both from that of the Constitutional Convention and, although to a lesser degree, from each other. Nevertheless, and interestingly, they also dealt with these subjects, offering a range of approaches on which others can reflect.

The example of the environment illustrates the point. The Convention draft gave it considerable priority, characterising the state as “ecological” in Article 1, including a range of environment related rights and duties, amongst them the “rights of nature”⁷⁹ in the second chapter on Fundamental Rights and Guarantees, and including a lengthy chapter on Nature and Environment in Chapter III. The protection was spread widely to also incorporate, for example, biodiversity, waste management, water and the usage of minerals; to extend to air, sea, space and the “natural commons” more generally; and to make “intergenerational solidarity” a principle to be applied.⁸⁰ In a move that may well attract broader interest over time, the draft provided for an “Office of the Ombudsman of Nature”, with wide powers to promote and protect the relevant provisions of the Constitution, against private entities as well as the state.⁸¹ The two drafts that followed appear to have accorded the environment lesser priority, including it in both cases as Constitution Chapter XVI and lessening both the breadth and depth of protection. In both cases, nevertheless, there was a chapter on the subject, recognising the significance of, for example, biodiversity and mitigation and adaptation in the face of climate change and acknowledging their intergenerational significance. In both cases also the environment, nature and biodiversity were included in the opening foundational provisions in chapter 1 and attracted protection, although in less fulsome form, amongst the rights, duties and guarantees in chapter 2.

79 Art. 103.

80 Art. 128.

81 Arts. 148-150.

Less positive lessons from the substance of the Chilean constitutional drafts might generically be attributed to “overreach” in at least three ways.

One concerns the treatment of issues that are highly contentious, within the constitution making body, the community or both. This is a problem for any constitutional process seeking an appropriate level of consensus, which is exacerbated when it threatens approval of the draft at subsequent stages of the process in consequence of the “downstream effect”.⁸² No doubt there were many such issues in the Chilean processes. One example, however, is the treatment of abortion. The draft Constitution approved by the Convention guaranteed the exercise of “voluntary interruption of pregnancy” subject to regulation by law;⁸³ the draft approved by the Council was understood to be more restrictive than the status quo.⁸⁴ In each case, this issue alone had the potential to influence voters to reject the proposed constitution.

How such issues are best handled depends on the circumstances, including the issue itself. Sometimes compromise is possible and appropriate: the highly centralised form of federation adopted in South Africa is an example.⁸⁵ Sometimes issues can be deferred, with a view to leaving them to later constitutional amendment, legislation or judicial decision.⁸⁶ While deferral carries some risk that an acceptable resolution is postponed indefinitely, it can be a trade-off with benefits for the constitutional project as a whole. Any one of these solutions might have been available to defuse the issue of abortion but the opportunity was not taken.

A new draft constitution may overreach also with the extent of change to existing arrangements. At first glance this may seem paradoxical. Change is the rationale for embarking on a new constitution project. Extensive change may be necessitated by the conditions that prompted the project in the first place. Even so, there is scope for caution about what is changed and what is not. The more that is changed, the greater the potential for misunderstanding and misrepresentation and the greater the challenge of implementation. Considerations that may have a

82 Elster, *op.cit.*

83 Art. 61.

84 Art 16. The draft used a personal pronoun to refer to the unborn, rather than an impersonal one: Reuters.com, Natalia A. Ramos Miranda and Lucinda Elliott “Chile voters sour on right-wing constitution as abortion clause stirs debate”, 6 October 2023.

85 Steytler, Nico, “South Africa’s Negotiated Compromise”, in Blindenbacher, Raoul and Ostien, Abigail, *Dialogues on Constitutional Origins, Structure and Change in Federal Countries*, Forum of Federations, 2005, pp. 36-39.

86 H. Lerner, *Making Constitutions in Deeply Divided Societies*, (Cambridge University Press), 2011.

bearing on decisions about particular existing arrangements include the case for change, the alternatives to change, the constituency for change, and the influence of vested interests in the status quo that might oppose change.

One aspect of the first Chilean draft that prompts these reflections was the replacement of a bicameral Congress comprising a Chamber of Deputies and a Senate with a bicameral legislature comprising a Congress of Deputies and a Chamber of Regions with limited, although not insignificant, powers.⁸⁷ The example is complex, involving competing considerations.⁸⁸ The Senate was associated with institutional gridlock and, historically, with the checks inserted into the Constitution during the dictatorship. A Chamber of Regions was consistent with the Convention's broader goal, of decentralising governance in Chile. On the other hand, the Senate had been a feature of the Chilean system of government for 200 years, was supported by powerful stakeholders, and could readily be associated in the public mind with a loss of checks and balances. These considerations at least suggested caution in adding abolition of the Senate to a constitutional draft that already included a wide range of innovative measures.

Finally, overreach also can take the form of expecting a new constitution to do too much. Arguably, this was the case in Chile, where all drafts were long and the first was particularly detailed and discursive. There is no comprehensive blueprint for the length or content of a constitution; what is deemed to require the status or protection that a constitution offers varies with context. The conditions in which many new constitutions have been made in recent decades also have encouraged the turn towards "transformational" Constitutions,⁸⁹ seeking broad social, economic and political change, as was the case in Chile. Length alone is no impediment to effectiveness as, for example, the Constitution of India shows.

But a draft that is long, detailed, inclusive, and ambitious runs risks. It may be internally inconsistent and so hard to understand. It may be too prescriptive to apply to changing circumstances over time. It may be difficult to implement some of the more ambitious provisions, if they are implemented at all. In any or all of these circumstances, paradoxically, it will fall short of its transformational goals.

These risks can be minimised by careful and perceptive harmonisation procedures during and at the end of the constitution making process. While the principal aim of these is to ensure that the constitution can work as a coherent

87 Proposed chapter VII.

88 Burns, Nick, "Chile's proposed Constitution: 7 key points", *America's Quarterly*, 2022.

89 Mutunga, Willy, "Transformative Constitutions and Constitutionalism: A New Theory and School of Jurisprudence from the Global South", in *Transnational Human Rights Review*, N° 8, 2021, p. 30.

whole, harmonisation procedures may also have regard to the architecture and style of the constitution.⁹⁰ The harmonisation procedures available to the Convention were inadequate, for reasons of time and as a consequence of the manner in which the voting rules originally mandated by the Agreement were given effect. In this respect as well, the constitution making processes in Chile offer insights for others elsewhere.

5. Outcomes

The most obvious, immediate outcome of the two Chilean constitution making processes was the rejection of two complete constitutional drafts at two exit referendums. It was a disappointing end to a period that had begun with such promise, lasted for five years, and absorbed so much national attention and energy. In comparative terms it is unusual —perhaps unique— for two successive constitution making processes to end without the promulgation of a new constitution, leaving the existing constitution in place. Much has been written and, presumably, will continue to be written about how and why both projects ended in this way.

As others have pointed out, Chile may also have gained from these events, in all sorts of ways.⁹¹ They raised the profile of the Constitution amongst the public and the media. They engaged a range of people who had never been involved in such processes before. They did so conditions that advanced the cause of equality by, for example, acknowledging the need for Indigenous representation and twice providing for gender parity. They placed a range of issues on the policy table in a way that still requires them to be taken seriously, whether through the medium of the constitution or otherwise. These issues range from the environment to Indigenous relations with the state to the effectiveness and responsiveness of political institutions to the implications of economic policy for national cohesion. They constitute a new chapter in the long Chilean constitutional story, based on shared experiences. Handled wisely, it has potential to begin to heal divisions over time.

The rejection of the referendums leaves Chile with its existing constitution for the foreseeable future. This reality offers what may be the important comparative

90 The relevance of architecture is suggested by Frankenberg, Gunther, “Comparing Constitutions: Ideas, Ideals, and ideology – towards a layered narrative”, in *International Journal of Constitutional Law*, N° 4, 2006, p. 439.

91 Valenzuela and Larrain Matte, *op.cit.*

insight of all from the Chilean experience. Living with an imperfect constitution is the global norm, whether imperfection stems from some or all of the foundations of the Constitution, its substance, or its operation in practice. This observation holds despite the plethora of constitution making that has characterised the past 30 years. Many of these projects also were incomplete, poorly implemented or subsequently overturned. With hindsight, the history of constitution making in recent decades suggests that, in at least some cases, consideration should be given to living with an existing constitution rather than undertaking the challenge of replacement that, as Chilean experience has now demonstrated again, can be formidable.

Keeping an old constitution rather than making a new one is not necessarily to settle for mediocrity or, even, second best. No Constitution, ever, is perfect. Most imperfections can be tackled, in one way or another. Those attributable to the foundations of the Constitution will gradually fade in significance if the Constitution serves current and future generations well, providing a catalyst for national cohesion of a different kind. Imperfections attributable to the substance of the Constitution can be managed through amendment, strategically handled as well as, in some cases, interpretation by a competent court. Problems attributable to the operation of a constitution, which may be the most common of all can, at least in principle, be resolved through political will underpinned by community pressure, however challenging this is to achieve in practice.

The long period over which Chile has adapted the Pinochet era constitution to contemporary needs and expectations makes this aspect of Chilean experience salutary for comparative purposes as well. As the two attempts to make a new constitution show, nevertheless, in Chile itself there is more to be done. The constitution making processes offer a raft of ideas about what this might be and how to tackle the major issues. It remains to be seen whether and when the opportunity is taken.

6. Conclusions

The Chilean constitution making processes of 2021-23 are amongst the most recent in the long wave that characterised the last three decades of global constitutional experience. The Chilean case was distinctive in many ways, not least because, when it embarked on constitution making, Chile already was a functioning democracy in a functioning state. The Chilean processes attracted

widespread attention from the outset and will continue to do so. Different people will draw different insights from them. This paper has identified aspects of it that presently strike one outside observer as significant contributions to global constitution-building experience that also have potential relevance for others. They are grouped into four inevitably porous categories: concept, process, substance and outcomes.

Some of the most significant insights derive, in one way or another, from the conceptual framing of the Chilean constitutional processes. The paper draws attention to the importance of the conceptual framework for the constitution building processes and to the ways it is shaped by context, both of which are exceptionally well illustrated by the Chilean case. Decisions about conceptual framework may be deliberate or instinctive but in any event are likely to be made at the outset of a process, in ways that may not be inclusive or transparent. This places considerable responsibility on the political leaders involved in the decisions that are made at this stage. The conceptual framework is critical for both the legitimacy and the workability of any constitutional process.

The conceptual framework for constitution-building in turn determines the processes that are followed in ways that Chilean experience illustrates clearly. Other practical, useful insights can be drawn from the processes followed in Chile as well. One likely to have resonance everywhere is that, while inclusion is important in order to justify the status of the Constitution and to encourage public ownership of it, it is not sufficient. The provision for inclusion throughout the Chilean processes was impressive. As Chilean experience also shows, however, effective constitution building also requires leadership and reasonable cohesion around interest groupings to enable the negotiation and compromise on which a lasting constitution can be built. Another insight is the need to focus an otherwise open-ended constitution making process by providing principles by way of parameters, whether these are prescribed in the course of determining the process to be followed or at the outset of the process as it gets underway.

More specific insights into process thrown up by Chilean experience include the need to think through and manage the likely dynamics of the operation of a deliberative constitution making body, to ensure that appropriate working rules are in place early, to design a manageable number of committees around themes that are responsive to need, and to provide for effective harmonization of the evolving draft constitution, between committees and between committees and the plenaries, so that the end product is a cohesive and workable whole.

Despite the failure of the referendums in Chile, many of the ideas with which

both processes engaged have resonance across the world of the 21st century and are likely to have continuing life for this reason. The forms in which they appeared in the successive draft constitutions necessarily were shaped by Chilean conditions and perceptions of Chilean problems. Even so, the mere fact that the drafts sought to make provision for climate change, socio economic rights, Indigenous-state relations and popular participation in governance, to take only a few examples, is ground-breaking albeit in different degrees, and likely to influence others. At the same time, the Chilean drafts also demonstrated the risks involved in being too ambitious, offering lessons on this score as well.

It has been argued in this paper that while the outcomes of these processes were disappointing to many within Chile, they are by no means entirely unproductive. Both within Chile and outside it they provide a platform of knowledge and practice on which others will certainly build. And it is possible that the outcomes offer another insight as well; less obvious but potentially instructive.

While it is still too early to tell, it may be that in time the Chilean processes will prove to have come towards the end of the long and intense phase of constitution making across the world that accelerated from the 1990s and which this paper has described. Even before the Chilean experience, success in finalizing new constitutions already was becoming rare. The combination of the difficulty of democratic constitutional transition in the face of conflict, weak states, geopolitical competition and the manipulation of communication has become increasingly challenging and taken its toll. The phenomenon of democratic backsliding, however described, has begun to divert attention to institutional and other means of shoring up existing constitutions.

If this is correct, another insight follows. On this basis, the Chilean processes may be seen as also coming at the beginning of a new era of constitutional transformation: one that is less idealistic and more pragmatic, focussing more on performance and less on perfection. Chile is well placed to be an exemplar of this approach, by its experience with the progressive democratisation of the Constitution of 1980 to date and by the path it must now follow in the wake of the referendum rejections. As (and perhaps if) this picture becomes more clear, the insights that can usefully be drawn from Chilean constitutional experience will necessarily be different, but no less significant.