

RESEARCH ARTICLE

It's the procedures, stupid: The success and failures of Chile's Constitutional Convention

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Abstract

Chile's experience with its Constitutional Convention from 2021 to 2022 sheds light on an important issue for comparative reflection: the role of procedures in constitution-making processes. The Constitutional Convention was bound by procedures that were both externally imposed and internally created. Our assessment is that, while some procedures improved representation and deliberation, the most important decision-making procedures were pernicious to the process. We argue that looking at procedures is fundamental when analysing constitutional processes, as the rules that bind rule-making processes can significantly impact not only their functioning, but also their outcomes.

Keywords: Chile; Chilean Constitution; Constitutional Convention; constitution-making procedures; constraints

I. Introduction

On September 4, 2022, Chilean voters overwhelmingly rejected the work of the country's Constitutional Convention. To be precise, the proposal drafted by the Constitutional Convention was rejected by 61.89 per cent of the votes in an election marked by an all-time high turnout of 85.86 per cent of the electorate.¹ This failure was historic and unusual, as were some of the innovations of the process in Chile, including gender parity, regional representation and a proportional Indigenous peoples' quota. As Elkins and Hudson report, out of the 179 plebiscites on new constitutional processes that have taken place in the world between 1789 and 2016, only 6 per cent of these have rejected a newly drafted Constitution.² Chile became one of only twelve countries since 1789 to have rejected a full constitution.³ And this was apparently one of very few instances in history in which a publicly elected constituent body had its work rejected at

¹Servicio Electoral de Chile, 'Total Votación Plebiscito 2022', n.d., available at <<https://historico.servel.cl/servel/app/index.php?r=EleccionesGenerico&id=237>>.

²Zachary Elkins and Alexander Hudson, 'The Constitutional Referendum in Historical Perspective', in *Comparative Constitution Making*, edited by David Landau and Hannah Lerner (Edward Elgar, Cheltenham, 2019), 142–64.

³Ibid.

a referendum.⁴ While the Chilean Constitutional Convention certainly made history, it was unable to convince the Chilean electorate of its vision for the future.

Understandably, public attention turned to the autopsy. What had gone wrong? How had a process that had inspired such hope and attention turned into such a spectacular electoral failure? While alternative explanations point at the substance of the Constitutional Draft Proposal, the behaviour of the conventioners or the role of misinformation, we highlight another factor that massively impacted the outcome of this constitutional process. Our answer is a simple one: it was the procedures. A set of poor procedures not only interacted negatively with each other but also profoundly affected the decision-making conditions within the Constitutional Convention. Our title invokes James Carville's famous quip during the 1992 election campaign, when he was asked about the biggest issue: 'It's the Economy, Stupid.'⁵ In this case, the problem was stupid procedures – both those externally imposed on and those internally adopted by the Constitutional Convention.

In his classic article on constitution-making, Jon Elster notes that constitutional bodies are subject to upstream constraints, including those provided by the forces that decide to convene a constitution-making process in the first place, as well as the mechanism that selects delegates.⁶ In the case of Chile, the process featured several uncoordinated and competing creators that successively constrained the next actor with faulty procedures. The political parties' Accord for Social Peace and the New Constitution (signed mid-November 2019) constrained the Reform Proposal crafted by the Technical Committee (November and December 2019),⁷ written by political representatives and lawyers. The Chilean Congress then codified the Reform Proposal into a law, which amended the current Constitution to allow a constitutional drafting process (2019); the Congress also created unique procedures for that process (2020–21).⁸ All these externally developed procedures then constrained the by-laws of the Constitutional Convention developed by the delegates themselves (2021).⁹ Three external bodies and the Constitutional Convention itself were involved in the creation of different procedures, but in different capacities. Our argument is that this inconsistent rule-making chain hindered the whole process, resulting in a defective product.

⁴Ibid.

⁵Political Dictionary, 'It's the Economy, Stupid', n.d., available at <<https://politicaldictionary.com/words/its-the-economy-stupid>>.

⁶Jon Elster, 'Forces and Mechanisms in the Constitution-Making Process' (1995) 45(2) *Duke Law Journal* 364–96.

⁷'Mesa Técnica Constituyente', Biblioteca Nacional del Congreso de Chile/BCN/Proceso Constituyente, n.d., available at <https://www.bcn.cl/procesoconstituyente/detalle_cronograma?id=f_cronograma-2>.

⁸Biblioteca del Congreso Nacional de Chile, 'Publicación de La Ley N° 21.216: Paridad de Género Para El Proceso Constituyente', 24 March 2020, available at <https://www.bcn.cl/procesoconstituyente/detalle_cronograma?id=f_publicacion-de-la-ley-21-216-paridad-de-genero-para-el-proceso-constituyente>. Biblioteca del Congreso Nacional de Chile, 'Publicación de La Ley N° 21.298: Reserva Escaños o Cupos En La Convención Constitucional a Los Pueblos Indígenas; y Resguarda y Promueve La Participación de Las Personas En Situación de Discapacidad', 23 December 2020, available at: <https://www.bcn.cl/procesoconstituyente/detalle_cronograma?id=f_publicacion-de-la-ley-ndeg-21-298-reserva-escaños-o-cupos-en-la-convencion-constitucional-a-los-pueblos-indigenas-y-resguarda-y-promueve-la-participacion-de-las-personas-en-situacion-de-discapacidad>.

⁹Pleno de la Convención Constitucional, 'Reglamento General de la Convención Constitucional', 5 May 2022, available at <<https://www.chileconvencion.cl/wp-content/uploads/2022/04/Reglamento-definitivo-version-para-publicar-5-mayo-2022-con-anexos.pdf>>.

The procedure-creation processes encompassed the interests of multiple political actors: political parties, partisan academics and lastly the citizen-legislators acting as the Constitutional Convention delegates. This resulted in a lack of connection between the procedures themselves, which consequently harmed the constitution-making process. The absence of coherence and compatibility between the procedures was a fatal flaw – it produced a fragmented decision-making environment that lacked unity, consistency and organization. In other words, procedures yielded substantive choices that affected the operation of the Convention as well as the substance of the Constitutional Draft Proposal.

We will elaborate on this shortly, but it is worth noting that the fact a draft was actually produced within its one-year (extended) time limit, and a relatively coherent one at that, was nothing short of miraculous given the flawed procedural rules. From this point of view, the Chilean Constitutional Process must be seen as an overwhelming success: despite all odds, it produced a draft on which the public got a chance to express its definitive view. This meant that it succeeded in channelling the violent energy of Chile's Social Explosion of October 2019 into an institutional process, characterized by relative peace. Although Chile's social ruptures were not repaired by the constitution-making process – and indeed, some may have been exacerbated – the institutions did hold. As we write, another round of constitutional redrafting is underway.¹⁰ So perhaps the better framing for this symposium should be about the one success of the Constitutional Convention, as well as its more obvious failure to produce an adopted draft.

II. Procedural constraints: Upstream, downstream and midstream

Procedural constraints, following Elster's typology, can be upstream, self-imposed or downstream. Upstream constraints 'are imposed on the assembly before it starts to deliberate' and upstream actors or agencies 'will often seek to impose constraints on the procedures of the assembly or on the substance of the constitution'.¹¹ Downstream constraints are 'created by the need for ratification of the document the assembly produces'.¹² While Elster mentions self-imposed constraints in passing, we want to expand on his typology by defining midstream constraints as procedural mechanisms developed, deliberated and adopted by the constitution-making organ itself. In the case of the Chilean constitutional process, upstream and downstream constraints were externally developed and imposed on the Constitutional Convention, while midstream constraints were internally developed and adopted by the Convention. All these constraints, we argue, hindered the outcome of the process as a whole. The upstream constraints were the procedural norms determined by: (1) the Accord for Social Peace and the New Constitution (signed mid-November 2019), signed by political party representatives; (2) the Technical Committee, composed of 14 lawyers, constitutional experts and/or political scientists endorsed by political parties and driven by these partisan interests; and (3) the Chilean Congress, which amended and added to the proposal draft with two key laws to promote greater

¹⁰Senado de Chile, 'Conozca El Cronograma de La Reforma Que Habilita Nuevo Proceso Constituyente', 12 January 2023, available at <<https://www.senado.cl/noticias/proceso-constituyente/conozca-el-cronograma-de-la-reforma-que-habilita-nuevo-proceso>>.

¹¹Elster (n 6) 373–74.

¹²Ibid 373.

inclusivity in the process. These upstream constraints were designed by three different institutional stakeholders in Chile: political parties, partisan academics and the Congress. The midstream constraints were the procedural norms developed and adopted by the Constitutional Convention in its initial phase, which produced the Convention's by-laws.

The Accord for Social Peace and the New Constitution, signed on 15 November 2019 – roughly one month after the Chilean social outbreak protests began marked the first incidence of deliberation and produced a twelve-article document outlining an institutionalized constitutional process led by political party representatives. It was, like any document developed in the heat of crisis, incomplete, necessitating a process for further elaboration. The document's tenth article created a Technical Committee, charged to 'determine all of the indispensable aspects to materialize' the legal architecture that would ground the constitutional process. The Technical Committee of party-associated lawyers then met in November and December of 2019. In thirteen sessions, they went through key procedural norms that would accompany not only the process, but also directly constrain the Convention. The text they produced was a Reform Proposal to amend the 1980 Constitution and to embed in it a procedure to develop a new constitution. Interestingly, at this stage the proposal to establish quotas for Indigenous peoples was rejected because it 'fell outside of the scope of the previous Accord'. This text was also incomplete as it left most procedural decisions to be made at the constitution-making organ's discretion.

By necessity, the Chilean Congress was also involved in the design of the Constitutional Convention. Chile's Chamber of Deputies and Senate passed laws to amend the aforementioned Constitutional Amendment which would codify greater inclusivity. Law No. 21,216, published in March 2020, admirably codified gender parity for the Constitutional Convention, as a result of a multi-party negotiation mainly led by female legislators.¹³ This law also permitted the participation of Independents and the formation of Independent electoral pacts for the election of the Constitutional Convention delegates. The latter provision meant that people with no formal party affiliation could run under an Independents list or under a party list – a decision with significant consequences down the road. The Congress was also the locus of a new push to include special seats for Chile's long-marginalized Indigenous communities. Law No. 21,298, published in late December 2020, codified Indigenous peoples' quotas in the Constitutional Convention and designated that out of the 155 delegates, seventeen seats would be allotted to ten different Indigenous peoples groups, in rough proportion to their population.¹⁴ This law also protected and promoted the participation of disabled persons; it included that a minimum of 5 per cent of all candidates running for the Constitutional Convention had to be reserved for disabled persons.¹⁵ These two laws ensured and protected the participation of Indigenous peoples, people with disabilities, women and citizens with no party affiliation. It is notable that the Congress, viewed with some distrust by the demonstrators in 2019, was the forum in which these inclusive quotas were adopted.

¹³Biblioteca del Congreso Nacional de Chile, 'Publicación de La Ley No. 21.216: Paridad de Género Para El Proceso Constituyente'.

¹⁴Biblioteca del Congreso Nacional de Chile, 'Publicación de La Ley N° 21.298: Reserva Escaños o Cupos En La Convención Constitucional a Los Pueblos Indígenas; y Resguarda y Promueve La Participación de Las Personas En Situación de Discapacidad'.

¹⁵Ibid.

III. Pernicious procedures in the Chilean constitutional process

Nevertheless, there should be little doubt that the procedures imposed on and adopted by the Convention rendered it extremely challenging to do its work. We focus on two main ones. First, the two-thirds decision rule that was the focus of many negotiations in late 2019 had worthy goals, but intricacies about its implementation distorted its initial objectives. Relatedly, the decision to procedurally implement this two-thirds decision rule with a circular voting mechanism for individual norms, with no final vote on the text as a whole, was consequential. Second, and more widely noted, the decision to maximize the participation of independent delegates reflected the sentiment of the moment, but made decision-making more difficult. This second aspect is also intertwined with the circular voting mechanism, and the interaction of these procedures was decisively negative and counter-productive. Each of these contributed to the failure; however, in our view, the most crucial error was to have provisions adopted one at a time, after which they could not be reviewed until the end of the process. This elementary procedural mistake meant that an incoherent initial product was certain, placing impossible burdens on the harmonization process at the end. The consequences of not embedding a positive feedback loop into the process were fatal. Moreover, all these procedures point to an absence of coherence in the decision-making faculties of the constitutional process. The fragmentation and lack of unity among the delegates, as well as the granularity of the adopted constitutional norms, were the product of faulty procedures that hindered cohesive decision-making.

The two-thirds quorum rule and the circular procedure

The requirement of a two-thirds vote was an commendable one, as it is widely agreed that constitutional norms ought, in ideal conditions, to be adopted by supermajorities. Supermajority rules tend to push towards consensus, which helps ensure that fundamental rules are not simply a reflection of temporally limited majorities.¹⁶ The two-thirds vote was first proposed as early as the Accord for Social Peace and the New Constitution, the ninth article of which declared that, ‘The constitutional organ must approve the norms and its voting bylaws of the norms by a quorum of two-thirds of its exercising members’.¹⁷ The supermajority rule took into consideration the deeply divided state of Chilean society. A requirement of approval of internal regulatory procedures and newly drafted constitutional norms by a supermajority would, in theory, promote effective deliberation and approximate consensus. During the Accord’s negotiations, the Chilean center to left wing (which became the most represented sector of the political spectrum in the Convention) argued that this was an excessive measure as the right wing would use this supermajority to ‘easily’ strike down constitutional norms. The two-thirds supermajority voting quorum is the current procedure to reform the Constitution – and the right wing has historically used this feature to its advantage when controlling the Congress to oppose progressive constitutional reforms. While it was agreed in the Accord that a supermajority would bring broader consensus, there was a lot of apprehension that this procedural mechanism would impede the constitution-making body from achieving the political and socioeconomic

¹⁶Elster (n 6).

¹⁷Diversas Fuerzas Políticas, ‘Acuerdo Por La Paz Social y La Nueva Constitución’ (2019), available at <https://obtienearchivo.bcn.cl/obtienearchivo?id=documentos/10221.1/76280/1/Acuerdo_por_la_Paz.pdf>.

changes necessitated by the Social Outbreak.¹⁸ In practice, within the Convention, forces of the left and forces of the right clashed with each other while they were themselves divided; and the mixture of party politics and the participation of Independents also created several confrontations. As a result, members within the Convention rarely saw anyone outside their ideological current as a fellow collaborator, just an opposing force or a barrier to their goals, and effective deliberation did not encompass the entire body.

The Technical Committee, interestingly, did not deepen or elaborate on the role of the application of the requirement of the two-thirds vote for the by-laws and the Constitutional Draft Proposal's norms. Article 133 of their Proposal outlined the functioning of the Convention, and left most of the specific procedural decisions to be made by the Convention, which was wholly intentional. It was ultimately decided by the Convention itself, in its by-laws, that while they would abide by the two-thirds quorum rule to vote on the by-laws and on the norms and articles within the Constitutional Proposal, the plenary would *not* vote on the text as a whole. Provisions would be adopted one at the time by a supermajority vote in the plenary. The task of integrating these norms was left to the end of the process, with a Harmonization Commission charged in Paragraph 6, Article 100 with 'revising the Constitutional Proposal closely considering the technical quality and the coherence of the constitutional text and will identify possible inconsistencies regarding the approved content'.¹⁹ In other words, this Commission, composed of delegates within the Convention, would be able to revise the Proposal's grammar, syntax and spelling, and revise the Proposal's legislative technique. But in the event, forgoing a final vote by the Convention itself was an error. If the Constitutional Convention could not approve the Constitutional Proposal they themselves drafted, how could the Chilean electorate do so?

The Convention also followed a circular procedure between its commissions and the plenary. Reports would be drafted by the seven thematic commissions, each made up of 15 to 33 delegates, and specialized in a particular area.²⁰ Each commission followed a set of thematic blocs and subjects determined by the Constitutional Convention's by-laws. The commissions as well as the plenary would hold two types of voting rounds: votes 'in general' and 'in particular'.²¹ Votes 'in general' referred to voting rounds conducted over the general idea within an article or within a series of articles that a group of delegates presents in the form of reports.²² The 'in particular' votes refer to the voting rounds realized after the 'in general' votes, in which the details of every norm were voted on, article by article. A commission would draft a report, then the report would be sent to the *Mesa Directiva*, the internal leadership of the Convention, to evaluate the report's admissibility. It would then be presented in the commission of origin and fine-tuned in coordination with Technical

¹⁸Gladys Piérola, 'Quiénes Condujeron Las Negociaciones Del Acuerdo Constitucional', *Pauta*, 15 November 2019, available at <<https://www.pauta.cl/politica/papel-bellolio-boric-harboe-desbordes-negociacion-acuerdo-paz-constitucion>>; Gladys Piérola, 'Un Año Después: La Frenética y Tensa Negociación Del Acuerdo Constitucional En Tres Momentos', *Pauta*, 15 November 2020, available at <<https://www.pauta.cl/politica/tres-momentos-de-la-negociacion-acuerdo-constitucional-15-de-noviembre>>.

¹⁹Mesa Técnica Constituyente' (n 9).

²⁰Cecilia Román and Paul Follert, 'Guía Para Entender Las Comisiones Temáticas Definitivas de La Convención', 1 October 2021, available at <<https://www.pauta.cl/politica/cuales-son-comisiones-tematicas-convencion-constitucional>>.

²¹¿Cómo Se Tramitan Las Normas En La Convención Constitucional?', *Libertad y Desarrollo*, 22 February 2022, available at <<https://lyd.org/centro-de-prensa/noticias/2022/02/como-se-tramitan-las-normas-en-la-convencion-constitucional>>.

²²This group had to be made up of more than eight, but fewer than sixteen, Constitutional Convention delegates.

Secretary (an external body of experts that supported the Convention).²³ Once the report had been debated and approved by simple majority, ‘in general’ and ‘in particular’, by the individual commissions, it would be passed to the plenary, which would hold votes ‘in general’ and ‘in particular’ as well, but approval required a two-thirds supermajority. If the report was rejected in the plenary, it would go back to the commission of origin for revision. After two rejections, the report would be discarded and could not be reintroduced. A norm approved in the plenary by a two-thirds supermajority would go on to be part of the draft of the Constitutional Convention, to be revised later by the Harmonization Commission.

The makeup of the commissions contributed to the lack of an effective feedback mechanism. The members of these commissions were, to some extent, self-selected for interest in their particular areas and sponsored by the signatures of their fellow delegates. Basic game theory suggests a mismatch between these committees and the plenary, exacerbated by the different voting rules used in each forum. Consider a distribution of members, with preferences on any given issue ranging from 0 to 100. A two-thirds vote requirement implies that proposals would succeed only toward the center of the distribution, so that no group of one third would be able to block it. A 50 per cent requirement would allow many more proposals to be adopted, but there would likely be a disjunct between the distribution in self-selecting committees and the plenary session as a whole. The median member of a committee on any particular issue would be far out of sync with the pivotal supermajority member of the plenary.

Furthermore, applying a two-thirds rule at the level of individual provisions makes no sense when these decisions could not be revisited as a whole. Anyone who has worked on any legal document, much less a constitution, knows that they are bundles of provisions that interact with each other in complex ways. A constitution is not a sequential list of individual provisions. It is an interactive set of norms, each of which interacts with the others in dynamic and sometimes unpredictable ways to generate a legal framework for the society. This requires, in the typical case, a continuous process of revisiting prior decisions and integrating them as further decisions are made. The Chilean process did not contemplate this basic step, which was not present in any drafting process. The result was a draft that, before harmonization in July 2022, had multiple overlapping provisions on domestic violence, Indigenous rights, sexual orientation and many other demands of the progressive elements in the Convention. The draft had nearly a hundred incompatibilities, typos and grammatical mistakes.²⁴ Leaving the harmonization process to a three-week period in July 2022 required a heroic effort, far too late to bring true coherence to the draft. There was no continuous positive feedback loop that could have made the task at the end much easier.

This circular mechanism, initially proposed by academic Sebastián Soto in the Technical Committee, was supposed to enable a positive loop between the thematic commissions and the plenary.²⁵ In theory, this process would allow commissions to be more open to sending reports, taking the plenary’s initial ‘temperature’ and then being able to modify proposals with suggestions from delegates belonging to different

²³Cecilia Román, ‘El Intrincado Diseño de La Convención Constitucional Que Complica a Los Constituyentes’, 14 September 2021, available at <<https://www.pauta.cl/politica/estructura-convencion-constitucional-secretarias-tecnicas-unidades>>.

²⁴Alexandra Chechilnitzky, ‘Secretaría Técnica Detectó Casi 100 Incongruencias En El Borrador de La Constitución’, *El Mercurio*, 3 June 2022, available at <<https://www.emol.com/noticias/Nacional/2022/06/03/1062904/cronica-constitucional.html>>.

²⁵Sebastián Soto Velasco, ‘Reglamento de La Convención Constituyente. Propuesta de Un Procedimiento Circular Para Aprobar La Nueva Constitución’, Centro de Políticas Públicas UC, April 2021, available at <https://politicaspublicas.uc.cl/wp-content/uploads/2021/04/Arti%CC%81culo-137_Soto-1.pdf>.

commissions.²⁶ Ideally, the process would promote deliberation, trust and the seamless integration of norms in the text. While the circular procedure was a feature of several proposed recommendations,²⁷ most of these anticipated a final two-thirds vote on the document as a whole, to ensure cohesion in the draft and promote cooperation within the Convention.²⁸ The Convention ultimately opted to not have a final vote and, as we argue, this procedural mechanism could have drastically and positively changed the outcome of the process. The logic behind this decision was that a final vote was seen as a potential internal veto mechanism and as a threat to the process overall. And the idea behind voting on constitutional norms one by one was connected to the Convention developing a Constitutional Draft Proposal with a blank slate and not by amending the current 1980 Constitution in force.²⁹ But while this circular mechanism promoted a positive feedback for individual norms, it was unnecessarily convoluted, limiting the most important agreements to be struck in the plenary. Most importantly, as it was not paired with a final vote, it was ultimately counterproductive to the process. The procedures undermined not only the coherence of the decision-making processes within the Convention, but also the cohesion of the Constitutional Draft Proposal.

The role of independents in the process

Another foolish procedure was the voting list. As described earlier, the participation of Independents was established as a result of a bill introduced by the Chilean Congress to modify the Constitutional amendment carried out by the Accord and the Technical Committee. The participation of Independents was part of a broader attempt to have greater inclusivity. But it was certainly unexpected when Independents secured a large number of seats. To be precise, considering the universe of 138 delegates (not counting the seventeen reserved seats for Indigenous peoples), 48 delegates ran through Independent lists,³⁰ which were a novel feature of the process. A further 40 delegates ran as Independents through lists associated to a political party without being formally affiliated with the party. So overall, two-thirds of the Convention was controlled by Independents.³¹ This was, of course, reflective of the anti-party mood that was dominant in society. But, as previously analysed, up until that point political parties had spearheaded the constitutional process. The logic behind having political parties spearheading this process was to have an institutional as well as an organizational backbone, without having to rely on the

²⁶Ibid.

²⁷Mariano Ferrero and Víctor Soto, 'Análisis Comparado de Las Propuestas de Reglamento Para La Convención Constitucional: Principios, Dimensiones y Temas' (Biblioteca del Congreso Nacional, 22 June 2021), Serie Estudios No. 03-21, available at <<https://obtienearchivo.bcn.cl/obtienearchivo?id=repositorio/10221/32302/3/N%C2%B003-21%20Analisis%20comparado%20de%20propuestas%20de%20Reglamento%20para%20Convencion%20Constitucional1.pdf>>.

²⁸Carolina Meza and Tomás Jordán, 'Reglamento Convención ONC' (Observatorio Nueva Constitución, April 2021), available at <https://www.observatorionuevaconstitucion.cl/wp-content/uploads/2021/04/Reglamento_Convencio%CC%81n_ONC.pdf>.

²⁹Rodrigo Correa, 'Symposium on Chilean Referendum Part I: Drafting a Constitution on a Clean Slate', *Blog of the International Journal of Constitutional Law*, 1 November 2020, available at <<http://www.icconnect.com/symposium-on-chilean-referendum-part-i-drafting-a-constitution-on-a-clean-slate>>.

³⁰Technically, 47 delegates ran under an Independent list and one delegate ran under no list, but for the purposes of this analysis, they are categorized as having run independently.

³¹Ibid.

government.³² Chile's organized political parties were one of its key assets in the process. In the end, parties played a role in saving the process – the Socialist Party Convention members ended up playing a central role in ensuring that the draft was completed (though they were somewhat at odds with the broader left-wing sector inside the Convention). Nevertheless, this was made much more difficult because of the number of Independents.

The Chilean center to right wing was unable to even obtain a third of the seats in the Convention, which could have given it the power to block proposals. It obtained only 37 seats and only 21 of these members were formally affiliated with an established party.³³ This gave the right wing little bargaining power in discussions and negotiations because of the lack of strength in numbers. As mentioned previously, the dynamics within the Convention were incredibly adversarial and lacked unity. Members were not able to see anyone outside of their views as a fellow collaborator or co-author – just as a hindrance to accomplishing certain goals. But given that the numbers were not on the side of half the Chilean political spectrum, more than often proposals were very left-leaning.

The desire to avoid political parties is one of the central trends of our time. Parties can pose a challenge to democracy, but they are also necessary to make it effective as well as efficient.³⁴ In recent years, we have seen many efforts to bypass political parties and return democracy directly to the people.³⁵ This extends to constitution-making as well, as in the processes run in Iceland from 2010–12, in Mexico City in 2017 and the citizens assemblies held in British Columbia and Ireland. Direct democracy seeks to return power to the people, with politics characterized by direct political participation of citizens in various forms, including sortition, referenda and citizens' assemblies. But efforts to bypass politics often fail. Iceland's citizen constitution ran into the veto gate of the legislature, which put the project into cold storage. British Columbia's citizen assembly was called on to consider a new electoral system and adopted a proposal that failed to meet the supermajority required at a public referendum. To this list, we can now add this leg of the Chilean Constitutional Process.

Interestingly, this goes back to our initial reference to Elster's model of upstream constraints and institutional interest. There was a severe clash between the institutions that imposed upstream constraints and the actual elected delegates in the Convention, which consequently shaped the Convention's own midstream constraints (its by-laws). The institutions initially involved in developing the fundamental procedures in the Convention were not aligned with the interests of the Convention's elected delegates.³⁶ Political parties and traditional politics dominated the procedural genesis of the Convention, while the elected Convention was mostly made up of Independent delegates who vehemently rejected party politics and dynamics. This means that the foundational procedures were designed to constrain the kind of political actors who were involved in the initial procedure-creation processes: politicians, political party members and partisan

³²Benjamin Alemparte, 'Towards a Theory of Neoliberal Constitutionalism: Addressing Chile's First Constitution-making Laboratory' (2022) 11(1) *Global Constitutionalism* 83–109.

³³David Landau, 'Introduction: Symposium on the Chilean Constitutional Referendum', *International Journal of Constitutional Law Blog*, 23 September 2022, available at <<http://www.iconnectblog.com/2022/09/introduction-symposium-on-the-chilean-constitutional-referendum>>.

³⁴Samuel Issacharoff and Verdugo, Sergio, *The Uncertain Future of Constitutional Democracy in the Era of Populism: Chile and Beyond*, New York University School of Law Public Law Research Paper, 2023, available at <<https://ssrn.com/abstract=4323864> or <https://doi.org/10.2139/ssrn.4323864>>.

³⁵Hélène Landemore, *Open Democracy* (Princeton University Press, Princeton, NJ, 2020).

³⁶Issacharoff and Verdugo (n 34).

academics – not mostly independent citizen-legislators. This may explain a lot of the procedural architecture embedded in the Convention's own by-laws and its differences with the upstream procedural mechanisms crafted by Chilean institutions. It also explains the incompatibility between the different procedures that were created, the granularity of the text and the lack of unity in decision-making. The lesson for constitution-making processes is that, as Elster told us long ago, procedures matter. The key error in Chile was the Convention's decision to adopt provisions one at a time, without the possibility of revisiting them along the way, and without the possibility of an up-or-down vote at the end by the same majority.

IV. Conclusion

In an old volume on the United States Constitution, Sanford Levinson asked authors to consider the stupidest provision of the text.³⁷ The unfolding of the procedural constraints in the Chilean constitution-making process seems to have been a series of decisions, some of which may have made sense in isolation, but combined to create a hamstrung process. An incoherent draft was a predictable result. One can only thank the initial decision-makers for ensuring that the Convention was a constituted power and not a constituent one. This wise decision was the most important upstream constraint of all. The main lesson highlighted in this article is that rules and procedures in a constitution-making process matter and can be dispositive causes of failure or success.

Even from the perspective of the dark days of 2019, one had to be somewhat optimistic that Chile could resolve its deep political problems. It had functioning and long-standing political parties; it had a very old commitment to the rule of law.³⁸ The main cleavage in society was unidimensional and socioeconomic, which means it involved the distribution of capital at the end of the day. While its unidimensional cleavage regarding socioeconomic inequality is multilayered, the constitutional process lost sight of its main goal: to rid itself of the last vestige of the legacy left by Pinochet's military dictatorship. Such problems are relatively easier to resolve than, say, cleavages based on religion, language or ethnicity. It is true that the constitution-making process brought to the fore long-standing issues of Indigenous identity, which will make the next round of constitution-making more complicated. But by and large, Chile should have been able to cross the bridge to a new constitution. Instead, failures of the process led it astray – and resulted in a missed opportunity. While the Chilean Constitutional Convention certainly made history, it was unable to convince the electorate of its vision of the present nor future. Yet we suspect that history will note it as an important step in the long process of reforming the Chilean constitution, introducing new ideas and interests into the debate.

³⁷William Eskridge and Sanford Levinson, eds., *Constitutional Stupidities, Constitutional Tragedies* (New York University Press, New York, 1998).

³⁸Pablo Ruiz-Tagle, *Five Republics and One Tradition: A History of Constitutionalism in Chile 1810–2020* (Cambridge University Press, Cambridge, 2021).