

RESEARCH ARTICLE

Institutional resistance: The case of the Chilean Convention 2021–22

María Cristina Escudero 

Facultad de Gobierno, Universidad de Chile, Santa Lucia 240, Santiago, Chile
Email: mcristina.escudero@iap.uchile.cl

Abstract

The Constitutional Convention in Chile, like other constitution-making mechanisms in democracies, carried out its work within the democratic institutional framework. In a democracy, the success of a constitution-making process depends not only on internal factors, such as its capacity for representation and the procedural rules by which it is governed, but also on external factors such as participation, the government's role and other contingent factors. When the process – including both internal and external factors – fails to produce adherence to the new constitution, institutional resistance to changes is very likely to occur. This article argues that the manner in which the political and social spectrum was represented in the Chilean Convention, combined with the way participation was implemented and the rules governing the Convention, insulated it from society and the rest of the democratic institutions. As a result, party and public adherence to the proposal made by the Convention was low and its contents generated institutional resistance from outside.

Keywords: adherence; Chile; Chilean Convention; Constitution-making process; Convention; institutional resistance

I. Introduction

Constitution-making processes in democratic settings are exercised with attention to the limitations they encounter. Limitations depend on how the internal features combine with external factors of the process. Internal features determine who makes the decisions and how they are made, while external factors include provisions for citizen participation, government influence and other contingent factors. Consequently, in a democracy, neither internal nor external factors alone are responsible for the failure or success of the process. On the contrary, the key to the results lies in how both types of factor interact. The political system reacts to the constitution-making process as a whole (internal and external factors), either by adhering to its result or by rejecting the new constitutional text. Consequently, if existing institutions do not adhere to the new constitution and the political costs of opposing change are low, the probability of institutional resistance is high. Therefore, as we explain below, the features of the process must satisfy the necessary conditions to achieve adherence to the new Constitution. The Chilean Convention fell short in this respect.

One important way to understand the relationship between internal and external factors is through the dynamics of decision-making in the Constituent Assembly. Theories used to explain decision-making dynamics belong to two families. On the one hand, “coordination” approaches argue that the focus of decisions are achievements of long-term collective benefits, including rules to overcome obstacles to collective action.¹ Coordination aims for the best outcome for all players. Pursuing this idea, Elster points out that the main consideration that should motivate framers is *reason*, which steers decisions towards the common good. For the process to be optimal, conditions created for impartial decisions and rational motivations need to be improved.²

On the other hand, “distributive” approaches postulate that constitutional decisions are made by considering which rules will improve the participant’s position in the political contest. Hirschl argues that the behaviours of politicians, elites and other institutions play an explanatory role in the results of a constitution-making process.³ As explained by Galligan and Versteeg, the image of coordination is replaced by one of negotiation, power games and the pre-eminence of elite interests.⁴ From this perspective, the results of a constitution-making process would better be explained by rational choice theories that consider actors as subjects intent on achieving their interests.

For the constitution-making process to be successful, both approaches require adherence. In the case of coordination, the new constitution has to create a system of government “that in the short-run offered enough to all parties to win their acceptance and the people’s acquiescence”.⁵ Here, adherence implies the perception that an optimum solution that transcends the underlying power structures has been achieved for all. In the distributive alternative, there will be acceptance of the new text to the extent that relevant political actors do not lose more than they should, given their relative weight in the political system. In Colomer’s words, in the new text there must be no absolute losers who feel excluded from the political game and for whom the cost of opposing it is therefore lower than accepting it.⁶ Whichever approach is used, adherence inhibits institutional resistance.

To be clear, not all democratic scenarios offer space for institutional resistance. In cases where there have been changes in power structures, the constitution-making process has often functioned as a tool to consolidate them.⁷ In such cases, there has been no room for institutional resistance because opposition to constitutional replacement has been cancelled or minimized. This was the case in Venezuela in 1999 and in Ecuador between 2007 and 2008. However, the Constituent Assembly has sometimes been unable to consolidate

¹R Hardin, ‘Why Constitution?’ In *Social and Political Foundation of Constitutions*, edited by D Galligan and M Versteeg (Cambridge University Press, Cambridge, 2013) 59–69.

²J Elster, ‘Clearing and Strengthening the Channels of Constitution-Making’ in *Comparative Constitutional Design*, edited by T Ginsburg (Cambridge University Press, Cambridge, 2013) 2–30.

³R Hirschl, ‘The Strategic Foundations of Constitutions’ in *Social and Political Foundation of Constitutions*, edited by D Galligan and M Versteeg (Cambridge University Press, Cambridge, 2013) 157–81.

⁴For further discussion on different logics of constitution-making, see G Negretto, *Making Constitutions: Presidents, Parties and Institutional Choice in Latin America* (Cambridge University Press, Cambridge, 2013) 45–48.

⁵ID Galligan and M Versteeg (eds), *Social and Political Foundation of Constitutions* (Cambridge University Press, Cambridge, 2013) 31.

⁶J Colomer, ‘Disequilibrium Institutions and Pluralist Democracy’ (2001) 13(3) *Journal of Theoretical Politics* 235–48.

⁷See (n 4) and D Landau, ‘Constituent Power and Constitution Making in Latin America’, in *Comparative Constitution Making*, edited by D Landau and H Lerner (Edward Elgar, Cheltenham, 2019) 567–89.

changes in all power structures, as was the case in Bolivia between 2006 and 2009.⁸ Hence, there is a chance for institutional resistance if opponents to constitutional replacement retain some veto power within the Constituent Assembly and the political system.

In scenarios in which a crisis of legitimacy occurs without the collapse of traditional politics, it is common for the Constituent Assembly to be limited from the outset by the political agreements that sustain it,⁹ as was the case for Chile, Colombia and Iceland. In such cases, democratic institutionality coexists with the Constituent Assembly more fluidly, but institutional resistance may occur. For example, in Colombia (1991), a political agreement with basic rules ensured the constitution-making process was possible. The Constituent Assembly acted within the bounds of its functions until, at the end, it requested new congressional elections, which had to be agreed upon by the executive to materialize, despite the political elite's opposition.¹⁰ In the case of Iceland, the process also followed the steps given by parliament. Nonetheless, at the end, the Constitutional Council pushed for a referendum to seal the process. Finally, in the referendum, the constitution proposal was strongly backed by citizens, but parliamentary ratification never occurred.¹¹

In a democracy, in which institutional resistance may arise, there are ways to strengthen the constitution-making process vis-à-vis the existing political institutions – mainly through representation and participation as well as adequate rules of procedure – so that it can achieve adherence and overcome resistance to potential changes. To explain the Chilean case, this article is divided into four parts, including the introduction. Part II discusses political resistance to the Chilean Convention's work, emphasizing both internal and external factors. It then turns to the weaknesses of citizen participation and of the procedures that could have mitigated political isolation as another interaction between external and internal factors. The article concludes that the features of the process insulated it from society and the rest of the democratic institutions. As a result, the Convention's proposal failed to generate adherence and met institutional resistance from outside.

II. Political resistance to the Convention: Who decides?

The question of who decides is pivotal in politics. Therefore, while Elster argues that it is better to select individuals with impartial stances, he acknowledges that the idea of a democratic constitution-making process involving individuals selected on a non-partisan basis is unthinkable.¹² Representation plays a dual role: it links the constitution-making process with the citizenry and also with parties that participate in the rest of the political system. Comparative experience also shows that the executive can have various roles in a constitutional process. When it leads, it can either undermine representation or facilitate agreements among different political sectors. The case of Chile invites us to reflect on what kind of representation a Constituent Assembly requires and what role in the process the executive branch should have for coordination or distribution to take place.

⁸MC Escudero, *Asambleas Constituyentes en América Latina* (LOM, Santiago, 2021) 153–85.

⁹G Negretto, 'New Constitution in Democratic Regimens' in *Redrafting Constitution in Democratic Regimes*, edited by M Gandour and LB Mejia (Cambridge University Press, Cambridge, 2022) 1.

¹⁰AM Bejarano, 'La Constitución de 1991: Un Proyecto de Construcción Institucional', in *Hacia el Rediseño del Estado* (Departamento Nacional de Planeación, Bogotá, 1999).

¹¹A Meuwese, 'Popular Constitution-Making: The Case of Iceland' in Galligan and Versteeg (n 5) 469–92.

¹²J Elster (n 2).

In October 2020, Chile decided by referendum to entrust the drafting of a new constitution to a Convention fully elected by the citizens. At that moment, while the political system had been shaken by mass protests, there was no collapse of power structures. Social pressures and the prevailing political uncertainty inclined the Chilean Congress to endow the Convention with special characteristics by approving its gender-equal composition, including seventeen seats (out of 155) reserved for Indigenous peoples, and the participation of independents on an equal footing with the parties. As Squella points out, the composition of the Convention surprised everyone, not so much for its gender parity and the reserved seats, but for its political, social and cultural diversity.¹³ However, the participation of independents in the election meant that the Convention's composition was inherently antagonistic to Congress, especially in ideological terms.

This antagonism was evident from the start of the process. First, nearly one-third (31 per cent) of Convention members were independents with an anti-party stance – especially those with anti-establishment positions emanating from the so-called *Lista del Pueblo*, but also from other lists such as *Independientes No Neutrales*. In addition, there were seventeen reserved seats, themselves independent and with a critical vision of all parties.¹⁴ Thus, at least 42 per cent of the Convention distanced itself from traditional politics.¹⁵ The intention to maintain its distance from the establishment was noticeable from the beginning in the Convention's efforts to avoid any resemblance to the functioning of the political system. For example, all the elected groups split according to the radicalism of their members, forming 13 'collectives', a term foreign to traditional politics.

Second, the influence of Chile's traditional parties was greatly diminished. Right-wing parties made up the list with the most votes (31 per cent of the Convention members), but it was still short of the one-third needed to be an important influence on the process. These results were very different from the electoral strength the right achieved in congressional elections of 2017 and 2021. In 2017 it won 46 per cent of the seats in the Chamber of Deputies and 44 per cent in the Senate.¹⁶ It reasserted itself in the 2021 elections when it won 43.8 per cent of the Lower House and 50 per cent of the Senate, at a time when the Convention was fully working.¹⁷ The traditional centre-left's results were also far below its representation in the established institutions: the *Lista del Apruebo* came fourth with 16.1 per cent of the vote, compared with the 31.6 per cent it won in the race for deputies and 48 per cent in the senatorial race in 2017. Despite its reduced vote in the parliamentary elections of 2021 (23.8 per cent of deputies and 36 per cent of senators), it continued to be a political force of weight in contingent politics, while in the Convention only the Socialist Party had any real impact.

In contrast to the traditional parties, the *Apruebo Dignidad* list (AD) – the left-wing alliance between the *Frente Amplio* and the Communist Party, which identifies itself as a challenger to the traditional left – obtained the second-best result, with 18 per cent of the

¹³A Squella, *Apuntes de un Constituyente* (Ediciones UDP, Santiago, 2022) 30.

¹⁴For the Convention electoral results, see <<https://historico.servel.cl/servel/app/index.php?r=EleccionesGenerico&id=223>>.

¹⁵For more details on the results, see MC Escudero and C Calabran *Convención no convencional: la experiencia chilena* (2023) 21 *IdeAs, Idées d'Amériques*, <<https://journals.openedition.org/ideas/15024?lang=es>>.

¹⁶For electoral results of the 2017 parliamentary election, see <<https://historico.servel.cl/servel/app/index.php?r=EleccionesGenerico&id=215>>.

¹⁷For electoral results of the 2021 parliamentary election, see <<https://historico.servel.cl/servel/app/index.php?r=EleccionesGenerico&id=223>>.

seats. AD had minimal parliamentary representation in 2017. Although the alliance won the 2021 presidential elections and grew in numbers in the Chamber of Deputies, it won no more than 1 per cent in the Senate. Its weight in the Convention also benefited from its coordination with leftist movements, the reserved seats and socialists who distanced themselves from the Apruebo list. The dynamic to gather the two-thirds quorum needed for the norms' approval was horizontal among all the collectives that lined up from the extreme left to the Socialist collective. In other words, somewhat more than 50 per cent of the traditional political actors were left without a voice in the Convention.

It is no surprise to see different representation patterns in Latin American Constituent Assemblies. For example, the Colombian Constituent Assembly broke with bipartisanship and incorporated parties previously without parliamentary representation, including some guerrilla forces that laid down their arms and institutionalized themselves as the M19. Representation was more inclusive than Congress. The 2007–08 Ecuadorian Constituent Assembly and that of Venezuela in 1999 displaced the traditional parties and replaced them with new political forces close to Presidents Correa and Chávez, respectively. In these two countries, representation was exclusory and weak in relation to traditional political parties.¹⁸ The difference in Chile's case was that, while the Convention in Chile displaced traditional parties, they remained strong in Congress and other institutions. This is a characteristic the Chilean Convention had in common with Iceland's Constitutional Council.

The role of the executive varied according to the circumstances. In Colombia's case, the executive's role was important due to President Gaviria's support for the process and his active participation in it. As a result, the democratic institutions generally preserved some linkages with the Constituent Assembly, in that the executive was a bridge between the Constituent Assembly and the political system. By contrast, in Venezuela and Ecuador, the will of the executive was hard to distinguish from that of the Constituent Assembly. The Iceland process differed from the above. It took place with the assent of the prime minister but against the main opposition party. The process developed increasingly became separated from political institutions – including parliament – which gave it 'a cold reception when the constitutional bill was sent to the Alþingi on July 29, 2011'.¹⁹

In Chile, the executive branch played no role in linking the Convention with the political system. Indeed, the constitution-making process was not the enterprise of a single government. Former president Piñera offered a new constitution as a tool of last resort to escape from an acute political crisis. Still, he had neither the capacity to lead nor the ability to participate in it, even avoiding being present at the Convention's inauguration. President Boric, who took office in the middle of the process, was also unable to guide it or shape a broader dialogue either within the Convention or between it and outside political actors, his influence being limited to the Frente Amplio.

In sum, the left-leaning and anti-party/anti-establishment stance of the Chilean Convention, along with the lack of traditional political party influence, isolated the Convention politically, hindering coordination and a distributive outcome. The Constituent Assemblies of Chile and Iceland strongly suggest that, to avoid institutional resistance (or to promote coordination or distribution of results that would generate support), representation must reflect vested interests from political parties with weight in the political system. Comparison with other cases also suggests that the executive may

¹⁸MC Escudero (n 8) 85–120.

¹⁹See (note 11) 486.

offset the representation gap between the Constituent Assembly and the rest of the political system. Other mechanisms of compensation will be explored in the next section.

III. Failed mechanisms to counter institutional resistance: How to decide

Other mechanisms, especially citizen participation and adequate procedural rules, might have attenuated the capacity of institutional resistance. The literature assigns both positive and negative effects to citizen participation. One of the most accepted positive assumptions is that the involvement of citizens increases their awareness of the new constitution and motivation to demand that it be respected, thus giving the process greater legitimacy.²⁰ The decision rules may encourage coordination dynamics or ensure that all the interests in debate have a chance of reaching a new distributive agreement.

As far as participation was concerned, the Convention tried different mechanisms to link citizens to the decision-making process. In the Convention's internal regulations, it envisaged popular initiatives, hearings, town halls and periodic meetings with Convention members, among other mechanisms. On paper, the Convention intended to engage intensively and extensively with ordinary citizens.

Popular initiatives involved significant mobilization. As described by Soto and Suárez, 6,105 initiatives were presented, but only about 2,500 managed to meet the requirements for collecting signatures on the platform. Of these, only 3.3 per cent logged sufficient subscriptions for consideration by the Convention, half of which were approved or partially approved in commissions. Although some elements of the initiatives that reached the Convention were incorporated into the final text, the expectations generated were high in relation to the actual impact obtained.²¹ Furthermore, some initiatives were rejected without discussion because they arrived late for the deliberation and the matter was settled adversely for the citizen initiatives.²²

There was also much interest in participating in the hearings of the commissions, which made efforts to receive as many organizations and people as possible. However, the influence of the hearings on the debates is hard to gauge, and the same is true of the town hall gatherings and the meetings between Convention members and citizens. For example, the discussion of the political system or the environment commissions was guided far more by the Convention members' interests than by the input of external participants.²³ Overall, none of the participatory mechanisms bridged citizens and the Convention.

The procedures adopted also deepened the isolation of the Convention. First, the large number of topics covered did not allow time for coordination or bargaining between interest/political groups, especially between the Constituent Assembly and the outside political system. But it was not only the wide scope but also the details that caused problems. Distrust of traditional institutions made the Convention members reluctant to leave future interpretations to them, so they wrote their transformative intention into the

²⁰For further discussion on participation, see G Negretto, 'Replacing Constitution in Democratic Regimes' in *Redrafting Constitutions in Democratic Regimes*, edited by G Negretto (Cambridge University Press, Cambridge, 2020).

²¹F Soto and O Suárez, 'The Citizen Initiative in Constituent Processes and Its Impact on Chile's Constitutional Convention (2020–22)' (unpublished).

²²Analysis made from the discussion within three commissions, press review, proposals from constituents and interviews with key informants.

²³Ibid.

text.²⁴ The resistance of those in the traditional political sphere to accept institutional change or so much detail on issues in whose resolution they had played no part did not take long to make itself felt.

Moreover, the proposal's transformative imprint was generated without attention to its implementation and the transitory regulations. This opened the field wide to resistance motivated by uncertainty and the adverse effects on stakeholders. Institutional changes such as the elimination of the Senate, changes in the judiciary, the establishment of the regional state and the incorporation of pluri-nationality, among others, provoked a debate outside the Convention that had no containment or counterpart within it.²⁵ These changes also generated many losers in the new constitutional arrangement who were willing to resist.

Another procedural aspect that complicated the Convention's work was that the commissions decided by a simple majority and the plenary by a majority of two-thirds. In the commissions, decisions were imposed without enough effort to find a consensus that could be sustained in the plenary. The representatives in the commissions were more radical than the collective to which they belonged, and proper political synchronisation was lacking.²⁶ Reports were rejected wholesale only to be reformulated again in the commission. Issues important to citizens fell at the first vote without any explanation other than the lack of agreement. This distanced the Convention from public opinion.²⁷

The Constituent Assembly's transparency showed the internal ideas and discussions in detail, but without keeping to the forms of an orderly deliberation. Publicity and transparency are important values in the decision-making process, especially if there is an atmosphere of mistrust. However, they also exposed moments of extreme tension, disorder and informality that observers found difficult to understand. Elster argues for the need to maintain moments of confidentiality to facilitate agreements that are harder to reach under the public eye.²⁸ In the case of Chile, it should be added that the total transparency of the process made it more confusing and difficult to follow. On many occasions, it was used to ridicule the Convention and its members.

Finally, the two-thirds requirement for decision-making did not serve to generate broad agreements, as was the initial intention. Given the Convention's representation, the two-thirds excluded the right and important sectors of the center-left. Moreover, to achieve two-thirds on the topics most important to the different groups, a dynamic of aggregation rather than deliberation was generated to reach points of agreement.²⁹ That is to say, the votes were obtained in exchange for voting in favour of the other's issues rather than by accommodating perspectives on various subjects (by coordination or bargaining).

In summary, there were design aspects that did not enhance the Convention's coordination capacities or its potential as a scenario for distributive negotiations open to all the system's political actors and institutions. There were factors that reduced the

²⁴ A Squella (n 13) 25.

²⁵ See (n 22).

²⁶ T Jordán and P Figueroa, 'Chile: la Convención requiere una articulación política urgente' (2022) *El País*, available at <<https://agendapublica.elpais.com/noticia/17926/chile-convencion-requiere-articulacion-politica-urgente>>.

²⁷ For public opinion data on the Constituent Assembly, see CADEM survey, available at <<https://cadem.cl/wp-content/uploads/2022/04/Track-PP-432-Abril-S3-VF.pdf>>.

²⁸ J Elster, 'Forces and Mechanisms of the Constitution-Making Process' (1995) 45 *Duke Law Journal* 364–396).

²⁹ See (n 22).

costs for those opposing the decisions of the Convention: the scanty influence of citizen participation, the negative impact of the transparency of the process, and the voting formulae of the commissions and plenary sessions. Moreover, there were factors that multiplied the number of losers ready to resist: the large number of issues the Constituent Assembly covered, the great detail of its proposals and the lack of a counterpart to explain its effects and implementation. As a consequence, issues were approved without expanding their external bases of support and, internally, by generating artificial majorities. All these features inhibited adherence and facilitated institutional resistance.

V. Lessons from the Chilean constitution-making processes

The Convention had a diverse social, cultural and political composition. However, its left-leaning and anti-party/anti-establishment stance, plus the little influence of traditional political parties, isolated it politically. While this isolation is important in explaining lack of adherence and institutional resistance, it is not the sole reason. For one thing, the deficiencies of the mechanisms for participation in the process and the over-complex procedures made it impossible to retain public support for the Convention, with the result that criticizing it involved no great cost for traditional political actors. Moreover, the executive did not create a bridge between the Constituent Assembly and the established institutions, especially Congress. In other words, the internal and external features of the process did not create the conditions needed either for successful coordination or distributive politics. Consequently, the strong adherence that would have prevented institutional resistance did not occur.

The Convention's operating rules reinforced its isolation by other means as well. On the one hand, the Convention had a maximalist agenda that was further enhanced by the work of the commissions, mostly composed of Convention members who were mistrustful of the implementation stage. The greater the detail in the proposals, the more resistance they encountered from the actors and institutions they affected. The transparency with which the Convention worked weakened its credibility and thus paved the way for its critics. Moreover, its procedures also increased uncertainty for still-powerful traditional actors and institutions.

The two-thirds quorum did not serve to generate cross-party (elite) agreements as intended. The lack of influence and participation of the right and part of the centre-left parties made them react more strongly to the changes that directly affected them in their current institutional positions. Moreover, the counterweights of participation and procedures failed to strengthen the Convention *vis-à-vis* the established democratic institutions that, in the end, successfully resisted the Constituent Assembly's proposal.

Acknowledgements. This article is part of the research fund Fondecyt de Iniciación No. 11220945.