

**THE UNIVERSITY OF CHICAGO**



**Assessing the Rules of the Game:  
The Procedural Flaws of the  
Chilean Constitutional Process (2019-2022)**

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## Abstract

Constitution-making should not, in theory, result in an absolute no-win situation. But Chile's Constitutional Process of 2019-2022 is an example of it. To place the Chilean Constitutional Process in a comparative and historical perspective, out of the 179 plebiscites on new constitutional processes that have been held around the world between 1789 and 2016, only 6% of these have rejected a newly drafted constitution.<sup>1</sup> The failure of Chile's Constitutional Process was as historic as the opportunity to write a new constitution under the conditions that the Chilean Constitutional Convention drafted it: with gender parity, high inclusion of Independent citizen-legislators, regional representation, and a proportional Indigenous peoples' quota. What went wrong? A series of explanations and autopsy reports have been offered but these fail to explicitly identify the feature that, I argue, was essential to determine the success or failure of the Process: its procedural architecture. This paper will argue that procedures significantly and negatively affected decision-making processes in the Constitutional Convention and can be considered one of the main causes of the failure of the Constitutional Process. The Chilean Constitutional Process failed greatly due to both, procedures that were externally developed and imposed on the Constitutional Convention and procedures that were internally developed and adopted by the Convention. The exogenously and endogenously designed procedural architecture that bound the Convention hindered effective decision-making processes and the investigation analyzes some of the most impactful procedures in the Process connected to decision-making in constitution-making. The argument advanced in this investigation evaluates the impact of these procedural features on the decision-making processes and dynamics of the Constitutional Convention from a political epistemology perspective. With a multi-methods approach using

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<sup>1</sup> Zachary Elkins and Alexander Hudson, "The Constitutional Referendum in Historical Perspective," in *Comparative Constitution Making* (Edward Elgar Publishing, 2019), 142–64,

qualitative and quantitative data, this paper analyzes how procedures were developed in the Constitutional Process, the values and limitations of these procedures, and the impact of these procedures on the dynamics of the Constitutional Convention.

### Introduction

This investigation engages with the failure of the Chilean Constitutional Process (2019-2022). The project to draft a *magna carta* to replace the 1980 Political Constitution ratified during General Augusto Pinochet's military dictatorship (and amended substantively in 2005 by former-President Ricardo Lagos) had massive initial popular support after the 2019 Chilean *Estallido Social*, the Social Outbreak protests. To be precise, the referendum that formally began the process of Chile's constitution-making in 2020 had 78.28% of approval (with a 50.95% of voter participation) and a Constitutional Convention was chosen as the preferred organ to redraft the constitution with 79% approval.<sup>2</sup> Two years later in 2022, a referendum was held to reject or ratify the Constitutional Proposal draft; and the results were loud and clear: the Proposal was rejected by 61.89% of the votes, and this election broke a record of voter participation in Chile with an 85.86% of participation.<sup>3</sup> The overwhelming electoral rejection of the Constitutional Proposal is why this Process is categorically considered a failure in this investigation. In other words, Chileans collectively expressed "we want a new Constitution, but *certainly* not this one." And how come? What went wrong for this project to have such a fall from grace? Politicians, academics, and various sectors of civil society have put forward their own arguments and diagnoses for the various causes of failure of the Constitutional Process—and many argue on the importance of some causes

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<sup>2</sup> Servicio Electoral de Chile, "Plebiscito 2020," SERVEL—Servicio Electoral de Chile, n.d., <https://historico.servel.cl/servel/app/index.php?r=EleccionesGenerico&id=10>.

<sup>3</sup> Servicio Electoral de Chile, "Plebiscito 2022," SERVEL—Servicio Electoral de Chile, n.d., <https://historico.servel.cl/servel/app/index.php?r=EleccionesGenerico&id=237>.

over others. This thesis project aims to analyze and evaluate the impact of one of the wildly overlooked causes of failure: the procedural components of the Process.

The research questions I am posing for this investigation are the following: To what extent can the procedural framework of the Constitutional Convention be considered one of the main causes for the failure of the Constitutional Process? Which procedures and in what ways did they impact decision-making and the achievement of democratic reason? These questions are imperative to answer because Chile had an incredible and unprecedented opportunity in its own history and global history to draft a constitution with a completely democratically elected Constitutional Convention with gender parity, active participation of Independent citizen-legislators, complete geographical representation, and Indigenous peoples' quotas—and it failed, badly, by electoral standards. The Chilean people, through a vote, rejected the Constitutional Draft Proposal that was the outcome of a three year long Process with a Constitutional Convention that exercised its function, drafting the Proposal, for a year. Various alternative explanations have been presented to diagnose what was the *main* cause of failure of the Process, and I aim to advance the argument that the procedures the Constitutional Process was bound by are one of its principal causes of failure. This will be argued from a political epistemology perspective as well as from a theoretical constitution-making perspective. What I am interested in is to uncover whether the Process was doomed from the start given the procedures that were imposed on the Convention, and whether the Process was doomed or not after the Convention developed its own procedures. Also, I aim to investigate the role of democratic reason, as a form of collective intelligence, in the process: did the citizen-legislators have optimal or pernicious procedural mechanisms on their side to exercise effective decision-making processes?

Without a consideration for what were the impacts of the procedural architecture that bound the Process and, specifically, the Convention, any explanation that aims to address the failure of the Process would be incomplete. The existing alternative main explanations for why the Process failed include the substance of the Constitutional Draft Proposal, the controversy surrounding the Convention, and the foul play within and outside the Convention. Not analyzing the rules that bound a rule-making process would be myopic when conducting an autopsy on how and why the Process failed. While the argument I advance claims that procedures were a key source of failure for the Constitutional Process given its impact on decision-making processes, this argument does not undermine any of the alternative explanations that seek to advance another main cause of failure. Instead, this project argues that procedures should be included in the discussion of main causes of failure.

Constitution-making is infinitely more complicated than a multi-player board game. However, it is useful to conceptualize my argument with this analogy in mind. Imagine a multi-player board game, symbolizing the Constitutional Convention, in which individuals play, but are allowed to form alliances with other players in a cooperative way; which is why, at the end, it is expected for there to be some relative winners but also some losers. It is a board game that encourages alliances, and so it is possible for there to be more winners than losers. This game comes with an instruction manual from the manufacturing company that created this board game. But part of the instruction manual comes with this following instruction: before the game starts, the participants also need to come up with rules of their own before they start the match, and these rules need to be agreed on by a supermajority of the people participating in the game. And also, the rules created by the participants cannot undermine or disregard the rules in the instruction manual. Before the match begins, this multi-player board game establishes that alongside the

externally developed instruction manual, the players must internally develop rules too. But what happens if, at the end of a match, there are no winners and only losers. The game results in a zero-sum. While there may be stakeholders that would favor from a net and overall loss, this was a game that all players consented to participate in via a majority decision. What went wrong? If no one cheated and if both sets of rules were followed, players' first instinct is to blame one another. Blame their opponents or the allies. But is it the players' fault? That is only part of it. It might be the externally developed instructions manual that is to blame. It might be the internally developed rules that are to blame. Or it might be the interaction between these two. This analogy encapsulates in an abstract way all of the key structural components of the argument posed in this study and is a good resource to keep in mind.

This investigation will begin laying out the central argument and explaining why there is an assumption of overall failure in the Chilean Constitutional Process. Then, I will elucidate all of the alternative main explanations that seek to identify the principal cause of failure of the Process alongside a brief literature review of constitution-making and democratic reason which intersect in their interest on procedures and decision-making. Once this foundation is set up, I will delve into the main framework of constitution-makers and constitution-making that will guide the investigation. This is to evaluate all of the external creators that were involved in designing and imposing procedures on the Constitutional Process. The decision-making behind each procedure will be analyzed as well as how these procedures impacted future decision-making processes. Once the externally developed procedures that constrained the Convention are evaluated, I will analyze how the Constitutional Convention's main decision-making procedure was internally developed and adopted by the constitution-making body and evaluate its effects. Finally, I will evaluate some quantitative data on the demographic information on the Convention's delegates and the roll call

votes of the Constitutional Convention to analyze the impact of these procedures on decision-making focusing on the condition of cognitive diversity as well as party dynamics. And the importance of these decision-making processes alongside their interactions will be evaluated, too.

### The Argument

The Chilean Constitutional Convention was bound by a wide array of procedures which were developed in different stages of the Constitutional Process. Some of these procedures were developed endogenously, meaning certain procedures were drafted and adopted, by and for the Constitutional Convention itself. But some of these procedures were developed exogenously, as institutions and bodies external to the Constitutional Convention drafted and imposed mechanisms to constrain the Convention before the Convention convened for the first time. All of these procedures affected decision-making processes in different capacities, by constraining or facilitating decision-making.

The argument I pose is that the Chilean Constitutional Process failed greatly due to the exogenously imposed and endogenously adopted procedures that the Constitutional Convention was bound by. The Constitutional Convention (CC), the body charged with the drafting of the Constitutional Draft Proposal made up of elected members, was bound by four sets of procedural norms, three externally developed and one internally developed. The three External Norms are: 1) The Accord for Social Peace and the New Constitution (mid-November 2019) signed by representatives of almost all political parties in Chile; 2) the Technical Committee's Reform Proposal (developed in late November- early December 2019), designed by 14 constitutional/political experts; 3) The codification of the Proposal Carried out by the Chilean Congress and their development of additional procedures (2019-2021). And the Internal Norms are the bylaws in the Constitutional Convention's Regulatory Handbook (2021), which the Convention developed, voted on and adopted. All of these norms and their inception processes will be analyzed in a



following section. My central hypothesis is that the procedural frameworks—both, those imposed on by a body external to the Convention and those internally adopted by the Convention—severely stunted the Constitutional Process and can be considered determinant causes of failure.

Despite my argument advances the claim that the Constitutional Convention failed greatly due to its externally and internally designed procedure, I illustrate that these procedures actually promoted and achieved democratic reason. And this produces a concerning tension: that having the quality of democratic reason present in decision-making is not enough to achieve a successful democratic decision-making process. In other words, decision-making processes with the quality of democratic reason, the collective intelligence of the people as it pertains to democratic politics, is either too broad or not enough. Even if all of the components of democratic reason were embedded in the decision-making procedures of the Process, these were not enough to guarantee a successful outcome in democratic politics. This argument will evaluate the impact of procedural features on the decision-making processes and dynamics of the Constitutional Convention from a political epistemology perspective.

The external design of the Constitutional Convention by the Accord for Social Peace and the New Constitution, the Technical Committee and the Chilean Congress generally determined the most decisive procedural features of the Constitutional Convention. And then, the Constitutional Convention's first task was to internally develop, draft and adopt their own bylaws which had to be compatible with the previously determined external norms. The impact of externally and internally developed procedural frameworks will be analyzed on the decision-making faculties of the Convention. And I connect these procedures to the democratic reason framework, which argues that democratic decision-making processes in a cognitively diverse setting with the complementary mechanisms of deliberation and aggregation is a more optimal

decision-making procedure as opposed to a small group of expert elites. And I show that all of these procedures were purposefully embedded in the Process and that the Constitutional Convention achieved democratic reason in their decision-making, but that this quality this was not enough to ensure a successful outcome. Even if this tension cannot be reconciled, I explain how the interactions between different procedures was negative for effective decision-making processes. The specific ways in which deliberation and majority votes are set up and the specific conditions that create cognitive diversity procedurally matter. And while democratic reason may be achieved, a successful democratic decision-making procedure may not necessarily follow. The procedural architecture of the Constitutional Process fulfilled and promoted the mechanisms essential to achieve democratic reason in decision-making but did not ultimately succeed.

#### The Assumption of Failure

Before diving into alternative explanations and the research, I will clarify why it is assumed throughout this investigation that the Chilean Constitutional Process, carried out between 2019 and 2022, was a failure. The two parameters I am considering are the electoral results and the procedural definition of failure. This is because one could consider this Constitutional Process a success in many ways: it achieved its own goal of completing a Constitutional Draft Proposal, it achieved this goal within the maximum allotted time (a year), and it achieved this goal in the middle of the COVID-19 global pandemic. Furthermore, as I am writing this paper, a new Constitutional Process has begun following the rejection of the Constitutional Draft Proposal, the 2023 Constitutional Process. But this analysis particularly focuses on the 2019-2022 Constitutional Process and how it failed to be ratified by the Chilean electorate.

The Chilean Electoral Service (SERVEL) is an “autonomous organism with a legal character and its own resources that exercises the administration, super-vigilance and inspection

of electoral and plebiscite processes” among other functions.<sup>4</sup> The SERVEL conducted and supervised both plebiscites: the National Plebiscite (the “Entry” Plebiscite) that began the Constitutional Process and the Constitutional Plebiscite (the “Exit” Plebiscite) that could ratify or reject the Constitutional Draft Proposal. The results from the 2020 Entry Plebiscite determined that 78.28% of the Chilean electorate approved of Chile drafting a new Constitution. And the Entry Plebiscite also determined that a Constitutional Convention would be the organ charged with redrafting a constitutional proposal with 79% of the Chilean electorate’s approval.<sup>5</sup> In this election there was a 50.95% of voter participation, which, at the time, marked a record in an all-time high of voluntary voter participation, with over 7.5 million Chileans casting their votes.<sup>6</sup> This plebiscite was historic—both in its results and in its voter turnout. But the Exit Plebiscite proved to be even more impactful than its predecessor. The results from the 2022 Exit Plebiscite determined that the Constitutional Draft Proposal was rejected by 61.89% of voters.<sup>7</sup> And in this referendum with a mandatory vote, 85.86% of the Chilean electorate voted, breaking the historical record in voter turnout. This means that more than 13 million Chileans casted their votes and around 7.8 million votes rejected the Constitutional Draft Proposal.<sup>8</sup> More voters rejected the Constitutional Draft Proposal than the total amount of voters that participated in the first plebiscite; meaning more voters rejected the Constitutional Draft Proposal than the number of voters that overall participated in the plebiscite that begun the process of drafting a new constitution. When looking at the country, only eight out of 346 counties/municipalities in Chile, by majority, approved the Constitutional

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<sup>4</sup> Servicio Electoral de Chile, “Nosotros, Historia,” SERVEL–Servicio Electoral de Chile, n.d., <https://www.servel.cl/servel/>.

<sup>5</sup> Servicio Electoral de Chile, “Plebiscito 2020.”

<sup>6</sup> Biblioteca del Congreso Nacional de Chile, “Plebiscito Logra La Mayor Participación Electoral En La Era Del Voto Voluntario,” Biblioteca Nacional del Congreso de Chile, October 26, 2020, <https://www.bcn.cl/portal/noticias?id=resultados-plebiscito-2020>.

<sup>7</sup> Servicio Electoral de Chile, “Plebiscito 2022,” SERVEL–Servicio Electoral de Chile, n.d., <https://historico.servel.cl/servel/app/index.php?r=EleccionesGenerico&id=237>.

<sup>8</sup> “Con Histórica Participación Electoral Propuesta de Nueva Constitución Fue Rechazada,” Biblioteca Nacional del Congreso de Chile, September 10, 2022, <https://www.bcn.cl/portal/noticias?id=historica-participacion-plebiscito-2022>.

Draft Proposal.<sup>9</sup> Only two out of the 56 provinces in Chile approved, by majority, approved the Constitutional Draft Proposal.<sup>10</sup> No region out of the sixteen in Chile approved by a majority vote the Constitutional Draft Proposal.<sup>11</sup> These electoral results on their own and also when mapping these results onto different Chilean administrative and geographical divisions, show a massive and popular rejection of the Constitutional Proposal Draft. And therefore, this Process is considered to have failed to accomplish its own self-imposed goal of drafting a Constitutional Draft Proposal that would be democratically ratified by the electorate.

The results also categorically abide by the procedural definition of failure the Constitutional Process imposed for itself. Article 142 in the Reform Proposal (which the Chilean Congress then codified into Law N°21,200), outlined that if the text is rejected via the Exit Plebiscite, then the Constitution currently in force, will remain so.<sup>12</sup> Nonetheless, it is key to emphasize that in this text nothing was mentioned about a new constitutional process if the current one failed; meaning, there was no procedural or institutionalized “Plan B.” Yet in present time, technically, the Chilean Constitutional Process is still ongoing as the 2023 Constitutional Process was initiated by President Gabriel Boric’s government after the Exit Plebiscite. It is currently taking place and expected to finish by the end of the year.<sup>13</sup> And in parallel, the 1980 Political Constitution remains in force—which was exactly what the Process aimed to change.

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<sup>9</sup> Borja Andrino, “Resultados Del Plebiscito Constitucional En Chile Municipio a Municipio,” El País, September 5, 2022, <https://elpais.com/chile/2022-09-05/resultados-del-plebiscito-constitucional-en-chile-municipio-a-municipio.html>.

<sup>10</sup> Ibid.

<sup>11</sup> Ibid.

<sup>12</sup> Mesa Técnica Constituyente, “Propuesta de Texto de Reforma Constitucional / Acuerdo por la Paz y la Nueva Constitución” (Biblioteca Nacional del Congreso de Chile, December 6, 2019), [https://obtienearchivo.bcn.cl/obtienearchivo?id=documentos/10221.1/78180/1/Propuesta\\_reforma\\_constitucional\\_mesa\\_tecnica.pdf](https://obtienearchivo.bcn.cl/obtienearchivo?id=documentos/10221.1/78180/1/Propuesta_reforma_constitucional_mesa_tecnica.pdf).

<sup>13</sup> Senado de Chile, “Conozca El Cronograma de La Reforma Que Habilita Nuevo Proceso Constituyente,” January 12, 2023, <https://www.senado.cl/noticias/proceso-constituyente/conozca-el-cronograma-de-la-reforma-que-habilita-nuevo-proceso>.

### Alternative (Main) Explanations

The literature covering the Chilean Constitutional Process is extensive. Newspaper articles, opinion columns, statements made by political figures and academic papers have covered the Process, as well as its failure, thoroughly.<sup>14</sup> These sources will be grouped and analyzed as different alternative main explanations that seek to identify the *primary* reason of why the Process failed. This section will outline the different hypotheses presented by a wide variety of sources that address the failure of the Constitutional Process.<sup>15</sup> And after shedding light on the different alternative explanations, I will analyze their interaction with own argument.

Before diving into the alternative explanations, I will reiterate that constitutional processes as well as their potential failure are incredibly layered, complex, and multifaceted phenomena. All of the alternative explanations explored in this section may be disaggregated and separated into more nuanced ones. These alternative explanations may be all correct at the same time and, also, interact with each other. And this is why this section explores the different arguments that claim to identify the *main* reason of why the Process failed.

The different hypotheses can be grouped into four main alternative explanations that aim to diagnose what was the principal cause of failure for the Chilean Constitutional Process. The four outlined in this section are explanations blaming mainly: 1) the substance of the Constitutional Draft Proposal; 2) the controversy surrounding the Constitutional Process; 3) the foul play surrounding the Constitutional Process. I will also analyze a fourth alternative main explanation, 4) Proto-Procedural Arguments. This fourth one explores explanations attributed to effects and impacts of procedures but do not explicitly cite procedures as a cause.

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<sup>14</sup> Paula Molina, “Triunfo Del ‘Rechazo’ | La (Aparente) Paradoja de Chile: 3 Razones Para Entender El No a La Nueva Constitución Cuando Casi El 80% Estaba a Favor de Cambiarla,” BBC News Mundo, September 5, 2022, <https://www.bbc.com/mundo/noticias-america-latina-62790749>.

<sup>15</sup> Cristóbal Bellolio, “‘Why the Chilean Constitutional Process Failed?’ With Professor Cristobal Bellolio of Adolfo Ibañez University, Chile,” <https://www.law.uchicago.edu/events/why-chilean-constitutional-process-failed-professor-cristobal-bellolio-adolfo-ibanez>.

### *Substance*

The first hypothesis argues that the main reason for the Constitutional Process' failure was the incompatibility of the text with the Chilean political climate. Within this alternative main explanation, there are several and diverse criticisms of the text. These criticisms are as broad in origin from the Chilean political spectrum as they are in content.<sup>16</sup> All points in the political spectrum have voiced some grievance about the content of the text, which is why the content of the criticisms is also so varied. This section will attempt to synthesize the most prominent criticisms directed towards the Constitutional Proposal draft text. It was widely agreed that this was not a “minimalist” constitutional proposal given the level of detail it provided in its 178 pages of content, with 388 articles divided into 11 chapters and including 56 transitory measures.<sup>17</sup> The text was praised and criticized for establishing substantial changes and the rest of this section outlines some of the most significant ones.<sup>18</sup>

The first substantial change was that Chile would be defined as a “parity democracy”<sup>19</sup> instead of a “democratic republic”, meaning that Chile would become a democracy with complete institutional gender parity where women would occupy at least 50% of the state organ positions and legislation would actively aim to achieve gender equality. The second substantial change was that Chile would go from constitutionally omitting the existence of Indigenous peoples, to defining Chile as a “plurinational and intercultural state” that formally recognized 11 Indigenous peoples' groups and nations alongside “others that might be recognized by law.”<sup>20</sup> The draft also created

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<sup>16</sup> Samuel Issacharoff and Sergio Verdugo, “The Uncertain Future of Constitutional Democracy in the Era of Populism: Chile and Beyond,” January 11, 2023, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4323864](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4323864).

<sup>17</sup> Parro Borbolla, Santiago, “¿Cuántos Artículos Tiene La Propuesta de Nueva Constitución?,” Pauta, July 4, 2022, <https://www.pauta.cl/nacional/cuantos-articulos-tiene-la-propuesta-de-nueva-constitucion>.

<sup>18</sup> Camilo Espinoza, Sebastian Reyes, and Joaquín Castro, “La Opinión de Los Expertos: 12 Abogados Analizan La Propuesta Final de Nueva Constitución,” El Desconcierto, July 2, 2022, <https://www.eldesconcierto.cl/reportajes/2022/07/02/la-opinion-de-los-expertos-12-abogados-analizan-la-propuesta-final-de-nueva-constitucion.html>.

<sup>19</sup> Molina, Paula, “Apruebo o Rechazo: 6 Grandes Cambios Que Propone La Nueva Constitución Que Vota Chile,” BBC News Mundo, July 4, 2022, <https://www.bbc.com/mundo/noticias-america-latina-62010439>.

<sup>20</sup> Victor Moreno, “¿Qué Dice La Propuesta Constitucional Sobre Los Pueblos Originarios?,” Universidad de Chile, August 23, 2022, <https://www.uchile.cl/noticias/189512/que-dice-la-propuesta-constitucional-sobre-los-pueblos-originarios>.

Indigenous Regional Autonomies with political autonomy and recognition of Indigenous judicial and legal systems but emphasized that these could not undermine the “indivisible” character of the Chilean state.<sup>21</sup> A third substantial group of changes were in the Political System area: the Senate would be eliminated and two chambers of “asymmetrical” power would be created, a Congress of Representatives (with at least 155 members) for legislation and a Regional Chamber for laws pertaining to “regional accord”<sup>22</sup>; the age to run for President would be lowered from 35 to 30 years old<sup>23</sup>; and it allowed for popular initiative, Indigenous initiative and representatives to propose constitutional reforms in addition to the President and the National Congress as established in the 1980 Constitution.<sup>24</sup> A fourth substantial change was describing Chile as a “social state democratic in rights” that must provide goods and services to enshrine the rights of persons such as, but not limited to: education, housing, healthcare, retirement pensions (except for the armed forces), and work for all. These components are not present in the 1980 Constitution and would turn Chile into a welfare state and contributor in facilitating these conditions.<sup>25</sup> And in fifth place, made nature and the environment an actor in the proposal as an actor with rights that the State and society must protect.<sup>26</sup> These are some of the most progressive and salient elements of the Constitutional Draft Proposal; these were both celebrated and criticized for their progressive character. And the criticisms and votes show a rejection of a single or some of these substantial changes that the Proposal developed.

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<sup>21</sup> Grupo #Constitucionalista, “Estado Plurinacional: Qué Es y Qué Cambia,” CIPER, July 11, 2022, <https://www.ciperchile.cl/2022/07/11/17-estado-plurinacional/>.

<sup>22</sup> “El Poder de Las Regiones y Lo Nuevo Del Sistema Político,” CIPER, n.d., <https://www.ciperchile.cl/2022/08/26/El-poder-de-las-regiones-y-lo-nuevo-del-sistema-politico/>.

<sup>23</sup> Molina, Paula, “Apruebo o Rechazo: 6 Grandes Cambios Que Propone La Nueva Constitución Que Vota Chile.”

<sup>24</sup> “Norma Que Establece El Referéndum Popular de Reforma Constitucional Estará En La Propuesta Constitucional,” 24Horas.cl TVN, n.d., <https://www.24horas.cl/convencionconstituyente/norma-que-establece-el-referendum-popular-de-reforma-constitucional-estara-en-la-propuesta-constitucional-5287598>.

<sup>25</sup> Molina, Paula, “Apruebo o Rechazo: 6 Grandes Cambios Que Propone La Nueva Constitución Que Vota Chile.”

<sup>26</sup> “¿Qué Dice La Propuesta de Nueva Constitución Sobre Las Reformas Constitucionales?,” 24 Horas, August 24, 2022, <https://www.24horas.cl/proceso-constituyente/que-dice-la-propuesta-de-nueva-constitucion-sobre-las-reformas-constitucionales>.

### *Controversy*

The second, and the most flexible, alternative explanation is that the Process failed mainly due to the reputational downfall of the Convention. Scandal, controversy, and incidents of misconduct plagued the Convention of its delegates before the Convention began debating and drafting the Constitutional Draft Proposal. This hypothesis engages with the diagnosis that public opinion was the determinant factor that ultimately caused the Constitutional Process to fail.<sup>27</sup> And this explanation follows the certain logic: the Convention's delegates caused a series of very public controversies, and regardless of the management of these controversies, these either overshadowed the Convention's work or undermined the Convention's work. These outcomes directly led to a decline in the perception of the quality of the work of the Convention and led to an overall negative public opinion about the Convention. The controversies were seen as a reflection of the Constitutional Convention's work and representative of the work carried out by the delegates. Which is why, people that either read the Constitutional Draft Proposal or people who did not read the Constitutional Draft Proposal might both subscribe to this alternative main explanation. Either the many controversies were enough to judge the Convention and its work, or the controversies undermined the Convention's work. Some of the most salient ones are discussed below.

The Inauguration Ceremony of the Convention and the first days of work in the Convention faced a lot of public backlash. During the Inauguration Ceremony, the accessory President of the Constitutional Convention, Carmen Gloria Valladares, was confronted aggressively by one of the Constitutional Convention delegates, Elsa Labraña, demanding to end the Ceremony over protests taking outside of the ex-Congress building (the venue where the Constitutional Convention would

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<sup>27</sup> Molina, "Triunfo Del 'Rechazo' | La (Aparente) Paradoja de Chile: 3 Razones Para Entender El No a La Nueva Constitución Cuando Casi El 80% Estaba a Favor de Cambiarla."



convene for the duration of their duties).<sup>28</sup> Also during the Ceremony, when the orchestra present began playing the Chilean national anthem, left-leaning delegates and delegates from the Indigenous people's quotas began to boo, hiss, and heckle during the performance of the anthem while the other delegates sang it.<sup>29</sup> And after the opening ceremony, the first working sessions of the Constitutional Convention were marked by logistical mishaps. Due to different technical difficulties and issues regarding the sanitary restrictions imposed due to the COVID-19 pandemic, several of the first sessions were cancelled or postponed. The Convention publicly accused the government of then-President Sebastian Piñera of boycotting the process by not providing the Convention the adequate logistical resources to conduct their work.<sup>30</sup>

Other initial controversies also surrounded grievances from the delegates regarding the space where the Convention convened and monetary compensation for the delegates' work. Constitutional Convention delegate Daniel Stingo publicly voiced a grievance that he has not received his monthly salary yet... after two weeks from the first session of the Convention; then-CC President Elisa Loncón also voiced grievances about the space and payment, that “[in the ex-Congress building] there is no space to have lunch (...) people in the Convention have lost weight (...) this is the reality under which the Constitutional Convention has begun its work”. Constitutional Convention delegate Malucha Pinto also declared “I think it is inhumane the way we are sitting down. It's impossible to participate in a commission where one cannot see the others, one must turn to see, we're covered, it's a hierarchy when others are sitting above.”<sup>31</sup>

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<sup>28</sup> Sebastian Dote and Gaspar Marull, “Los Momentos Polémicos e Insólitos Que Dejó La Convención Constitucional,” *El Dínamo*, July 3, 2022, <https://www.eldinamo.cl/politica/2022/07/03/los-momentos-polemicos-e-insolitos-que-dejo-la-convencion-constitucional/>.

<sup>29</sup> Meganoticias, “Entre Pifias y Gritos: Así Fue La Entonación Del Himno Nacional En Instalación de La Convención,” *Meganoticias*, July 4, 2021, <https://www.meganoticias.cl/nacional/342572-video-himno-nacional-constituyentes-pifias-convencion-constitucional-04-07-2021.html>.

<sup>30</sup> Alarcón, Maximiliano and Francisco Velásquez, “¿Obstrucción? Convención Constituyente No Pudo Tener Su Primera Sesión Por Problemas Técnicos Originados Desde El Gobierno,” July 6, 2021, <https://interferencia.cl/articulos/obstruccion-convencion-constituyente-no-pudo-tener-su-primera-sesion-por-problemas>.

<sup>31</sup> Dote and Marull, “Los Momentos Polémicos e Insólitos Que Dejó La Convención Constitucional.”

But arguably the most impactful controversy was the uncovering that Rodrigo Rojas Vade, a CC delegate and political activist who was one of the icons of the Chilean Social Outbreak protests advocating for accessible healthcare as a leukemia patient, was faking having cancer.<sup>32</sup> This confession was revealed after a newspaper investigated him and offered the delegate to come clean on his own that had lied about his true diagnosis (syphilis, immune thrombocytopenia and Behçet's disease).<sup>33</sup> After basing his own political activism, founding the People's List political party (with left-leaning Independents), crowdfunding massively to pay his medical debt, getting elected to the Constitutional Convention and as a Vice President of the *Mesa Directiva* (the internal leadership of the CC) on a fake leukemia diagnosis, this was met with a lot of outrage. This event "diminished trust and caused a profound impact" on the trust of the Chilean citizenry on the Constitutional Convention even after Vade stepped down and renounced his delegate position.<sup>34</sup>

A couple of the later controversies questioned the "seriousness" and the character of the Constitutional Convention given the behavior of some delegates. For instance, Constitutional Convention delegate Nicolas Nuñez during a debating session took the floor with a guitar and began singing a song that he composed name-dropping his fellow delegates.<sup>35</sup> In another incident, he voted through Zoom, while in the shower with the camera turned on. Both events were trending topics in the news and social media.<sup>36</sup> Finally, CC delegates Giovanna Grandón and Cristóbal Andrade from the People's List wore a Pokémon's Pikachu costume and a blue dinosaur costume

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<sup>32</sup> John Bartlett, "Chile Protest Leader Reveals He Lied about Having Cancer," The Guardian, n.d., <https://www.theguardian.com/world/2021/sep/07/chile-protest-leader-reveals-he-lied-about-having-cancer>.

<sup>33</sup> BBC News Mundo, "Rodrigo Rojas Vade: El Escándalo En Chile Después de Que El Constituyente Reconociera Que Mintió Sobre Su Diagnóstico de Cáncer," BBC News Mundo, September 6, 2021, <https://www.bbc.com/mundo/noticias-america-latina-58464987>.

<sup>34</sup> Molina, "Triunfo Del 'Rechazo' | La (Aparente) Paradoja de Chile: 3 Razones Para Entender El No a La Nueva Constitución Cuando Casi El 80% Estaba a Favor de Cambiarla."

<sup>35</sup> T13, "Convencional Núñez Pide Disculpas 'Si Mi Actuar Fue Impropio' Tras Votar Mientras Se Duchaba," T13, May 3, 2022, <https://www.t13.cl/noticia/convencion-constitucional/politica/convencional-nicolas-nunez-pide-disculpas-votar-ducha-03-05-2022>.

<sup>36</sup> Mesa de noticias, "Convencional Nicolás Núñez Realizó Votación En La Comisión de Medio Ambiente Mientras Se Tomaba Una Ducha," El Mostrador, May 3, 2022, <https://www.elmostrador.cl/noticias/multimedia/2022/05/03/convencional-nicolas-nunez-realizo-votacion-en-la-comision-de-medio-ambiente-mientras-se-tomaba-una-ducha/>.

during a break session, costumes they wore during the Social Outbreak protests. According to them, they did it to signal that “the people and October 18<sup>th</sup> are inside the Constitutional Convention.”<sup>37</sup> Incidents like these were seen negatively as circus-like.

### *Disinformation as Foul Play*

Interestingly, a direct counter hypothesis to this alternative main explanation is that fake news, disinformation, and foul play are truly the most paramount reason to explain the Process’ failure. The presence of information disorders like disinformation and fake news are a common occurrence in political conversations. Disinformation is defined as false information disseminated which deliberately aims to mislead; in this definition, falsehood, and the intention to mislead are the key components.<sup>38</sup> Disinformation was employed in the process to generate confusion and attack the Process in multiple occasions, particularly regarding the content and substance of the Constitutional Draft Proposal. Some of the most salient false content claims were: the elimination of the right to private property; the elimination of private education; liberty abortion up until the last week of pregnancy; the elimination of private healthcare.<sup>39</sup> And so this alternative main explanation puts disinformation as a cause of failure of the Constitutional Process; some voters believed in one or more of these disinformations and were persuaded against voting for Proposal.

### *Proto-Procedural Arguments and My Own*

Other arguments provide an alternative main explanation that could closely resemble a procedurally-grounded argument. However, these arguments appeal to the impacts and effects of procedures either without referring to the procedures or without acknowledging the importance of procedures. Which is why, I have decided to denominate these proto-procedural arguments; while

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<sup>37</sup> Dote and Marull, “Los Momentos Polémicos e Insólitos Que Dejó La Convención Constitucional.”

<sup>38</sup> “Misinformation and Disinformation,” American Psychological Association, n.d., <https://www.apa.org/topics/journalism-facts/misinformation-disinformation>.

<sup>39</sup> Paula Molina, “La ‘brutal’ desinformación sobre la nueva Constitución propuesta para Chile (y algunas de las confusiones más difundidas),” BBC News Mundo, July 21, 2022, <https://www.bbc.com/mundo/noticias-america-latina-62245073>.

they refer to the impact of procedures on the Process, they do not explicitly connect the impact to procedures and/or do not emphasize the importance of procedures. One of the most prominent arguments in this alternative main explanation is that adversarial politics were prioritized in the Constitutional Convention as opposed to consensus politics.<sup>40</sup> In other words, that the Convention was unable to reach broad and horizontal agreements encompassing the full Chilean political spectrum given the competition amongst collectives and political tendencies. Competition was prioritized over consensual agreements that held all perspectives in equal standing.<sup>41</sup> The specific impact of this effect and phenomenon will be analyzed quantitatively with roll call data in a later section. But it is key to emphasize that this argument actually describes an effect of procedures without citing the role of procedures in creating these conditions. Arguments like these advance the claim that this was a Constitutional Draft Proposal written solely from a left-wing perspective as the center to-right-wing perspectives were ignored, because they *could* be ignored given the right wing failed to achieve 1/3 of the seats in the Convention needed to competitively challenge the 2/3 quorum. As a result, as the Chilean right-wing delegates were not needed to achieve a 2/3 quorum as the center-to-left-wing parties already had the numbers in their favor, the right wing was marginalized from negotiations. While this criticism often comes from the right wing itself, it has been mentioned by all sectors of the Chilean political spectrum because of the observed lack of consensus within the Convention. Furthermore, to pick at the logic of this claim, I would argue that this argument points at an effect of the original cause of failure: procedures—as procedures played a huge role in setting up these conditions within the Convention.

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<sup>40</sup> Bellolio, “‘Why the Chilean Constitutional Process Failed?’ With Professor Cristobal Bellolio of Adolfo Ibañez University, Chile.”

<sup>41</sup> Molina, “Triunfo Del ‘Rechazo’ | La (Aparente) Paradoja de Chile: 3 Razones Para Entender El No a La Nueva Constitución Cuando Casi El 80% Estaba a Favor de Cambiarla.”

My argument would pose a new alternative explanation on its own, but it does not intend to undermine any of the aforementioned alternative explanations. Instead, my argument is claiming that the procedural features of the Constitutional Process have been wildly overlooked when conducting an autopsy and looking into the causes of failure of the Process. But while the procedures involved in the Process allowed democratic reason to be achieved, the overall decision-making process failed. Procedures were fundamental in shaping decision-making, law-making and dynamics.<sup>42</sup> Either way, my argument is compatible with these alternative main explanations because procedures affected every one of these causes of failure. Procedures impacted: the way decisions were made in what made it onto the Constitutional Draft Proposal; procedures determined how to deal with controversy within the Convention; procedures determined that this Process would be as transparent as it could be; procedures determined who could be part of the Process. But the way the procedures on their own deeply impacted the dynamics of the Constitutional Convention have not been considered as an alternative main explanation for why the Process failed—much less looking at the procedures from a political epistemology perspective. Procedures can be considered as one of the main causes of failure of the Constitutional Process; and as this investigation shows, procedures were elemental in determining its failure.

### Literature Review

This project is situated in the intersection of two bodies of literature: literature on democratic reason and literature on constitutional-making processes. This is because these two bodies of literature already intersect in their special attention to decision-making procedures. Specifically, both bodies consider procedures to be a salient independent variable that have a profound impact on decision-making processes.

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<sup>42</sup> Tom Ginsburg, Zachary Elkins, and Justin Blount, “Does the Process of Constitution-Making Matter?,” *The Annual Review of Law and Social Science*, July 21, 2009, <https://doi.org/10.1146/annurev.lawsocsci.4.110707.172247>.

*Democratic Reason and Collective Wisdom*

Hélène Landemore has built a formidable case for the epistemic value and virtue of inclusive deliberative democracy that is based on the concept of collective intelligence and wisdom. Democracy is epistemically desirable and more optimal than other alternative forms of government because it performs better regarding decision-making.<sup>43</sup> In other words, democracy is a *smarter* decision-making procedure. And this is grounded on the argument that the innate collective intelligence of democracy comes with the element of cognitive diversity—a property conducive to optimal political decision-making.<sup>44</sup> It will be explored in depth in a later section, but it refers to the diversity of perspectives, experiences, and knowledge that citizens may bring to a democratic decision-making process. And inclusive deliberation and aggregation/majority rule serve as the two mechanisms for democratic reason in decision-making to be achieved.<sup>45</sup> Deliberation and aggregation are not presented as competing decision-making procedures, but complementary to each other. These mechanisms supplement each other in a context of cognitive diversity to produce optimal decisions with the quality democratic reason; that is, achieving collective wisdom in a democratic decision-making setting. This thesis project will apply this argument to the Chilean Constitutional Convention case study. Procedures imposed on and adopted by the Convention were intentionally designed to achieve the condition of cognitive diversity and to promote a positive feedback loop in decision-making supported by deliberation and aggregation. The Constitutional Convention was able to achieve democratic reason, but overall failed to produce a successful democratic decision-making outcome. And this tension will be discussed in relation to the specific procedures involved in the Process. The Process failed by

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<sup>43</sup> Hélène Landemore, *Democratic Reason: Politics, Collective Intelligence and the Rule of the Many* (Princeton University Press, 2012), <https://press.princeton.edu/books/paperback/9780691176390/democratic-reason>.

<sup>44</sup> Hélène Landemore, “Deliberation, Cognitive Diversity, and Democratic Inclusiveness: An Epistemic Argument for the Random Selection of Representatives,” *Synthese* 190, no. 7 (2013): 1209–31.

<sup>45</sup> Landemore, *Democratic Reason: Politics, Collective Intelligence and the Rule of the Many*.

electoral standards but internally accomplished democratic reason—how can these be reconciled, if at all? I argue that procedures are the key to unlocking an understanding this tension.

### *Constitution-making Literature*

Jon Elster asserts, “if there is one task for which ‘wisdom’ would seem highly desirable, it is that of writing a constitution that is intended to last for the indefinite future. In fact, wisdom is not only desirable in light of the importance of the issues but also necessary in light of their complexities.”<sup>46</sup> And this claim sheds light in the theoretical and practical intersection of collective wisdom and constitution-making literature. Constitution-making is an incredibly intricate process, and this process is often characterized by a juxtaposition of passion and detailed technicality. A codified constitution contains the fundamental legal and organizational backbone of a political community, which is why a great level of consensus and coherence is considered optimal for a long-lasting constitution.<sup>47</sup> But nonetheless, it is not uncommon for constitution-making to take place “in times of transition, turbulence, and even violence.”<sup>48</sup> Elster argues that “even in the best of cases, the impact of passion on collective wisdom is ambiguous: while enhancing impartiality, it impedes rational belief formation,”<sup>49</sup> but that a series of procedural conditions and qualities can enhance the achievement of collective wisdom in a constitution-making process.<sup>50</sup> These qualities are not fail-proof prescriptions but rather qualities that could, very-likely enhance collective wisdom in a constitution-making process. These procedural qualities that Elster highlights will be contrasted and compared against the procedural features of the Chilean Constitutional Process.

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<sup>46</sup> Hélène Landemore and Jon Elster, eds., *Collective Wisdom: Principles and Mechanisms* (Cambridge: Cambridge University Press, 2012), <https://doi.org/10.1017/CBO9780511846427> pg. 148.

<sup>47</sup> Gabriel L. Negretto, *Making Constitutions: Presidents, Parties, and Institutional Choice in Latin America* (Cambridge: Cambridge University Press, 2013), <https://doi.org/10.1017/CBO9781139207836>.

<sup>48</sup> Landemore and Elster, *Collective Wisdom: Principles and Mechanisms*.

<sup>49</sup> Landemore and Elster pg. 152.

<sup>50</sup> Jon Elster et al., eds., *Constituent Assemblies, Comparative Constitutional Law, and Policy* (Cambridge: Cambridge University Press, 2018), <https://doi.org/10.1017/9781316998748>.

### Constitution-makers and Constitution-making: Applied to the Chilean Case Study

Constitution-making bodies, as Elster analyzes, are rarely self-created as most have external creators.<sup>51</sup> One of these creators is the institution or the individual that makes the decision to convene a constitution-making body.<sup>52</sup> And another is the institutional mechanism or individual that selects the delegates to the constitution-making body. While delegates can be selected via a democratic procedure, it is often the case that external creators still design the mechanisms through which those delegates are selected. Creators of both kinds impose constraints to limit and bind constitutional process within certain parameters. And each of these institutional actors has, what Elster denominates, an “institutional interest”. This means that each actor involved in creating and designing a constitutional process will typically reserve an important role for itself in the process of drafting a constitution as well as in the actual drafted constitution.

Procedural constraints, following Elster’s typification, can be upstream, self-imposed, or downstream.<sup>53</sup> 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.”<sup>54</sup> These types of constraints are usually developed by the external creators. Upstream constraints are mechanisms by which the external creators exert their power and institutional interest in constitution-making processes. Downstream constraints are “created by the need for ratification of the document the assembly produces.”<sup>55</sup> And while Elster mentions self-imposed constraints in passing, I want to actively expand on his typification by defining that self-imposed or midstream constraints are procedural mechanisms developed, deliberated, and adopted by the constitution-making body itself.

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<sup>51</sup> Jon Elster, “Forces and Mechanisms in the Constitution-Making Process,” *Duke Law Journal* 45, no. 2 (1995): 364–96, <https://doi.org/10.2307/1372906>.

<sup>52</sup> Elster.

<sup>53</sup> Elster.

<sup>54</sup> Elster.

<sup>55</sup> Elster.



The Chilean Constitutional Process involved too many uncoordinated and competing creators that successively constrained creator after creator with faulty procedures. Different external creators imposed a wide array of upstream constraints on the Constitutional Convention. And the Constitutional Convention developed and adopted its own bylaws, its own midstream constraints. Three external bodies to the Constitutional Convention as well as the Constitutional Convention internally, were involved in the establishment of different procedures. And I diagnose that this inconsistent and ineffective rule-making chain plagued the whole process and resulted in the defective creation and implementation of different procedures which yielded flawed decision-making conditions. Table 1 displays all of the actors involved in constraint and procedure creation in the Chilean Constitutional Process within the framework that Elster provides with my own contribution of Midstream Constraints and the externally/internally developed distinction.

*Table 1. Upstream and Midstream Constraints*

	Upstream Constraints (External)			Midstream Constraints (Internal)
<b>Date</b>	November 2019	November–December 2019	December 2019– April 2021	June–September 2021
<b>Institutional Actor</b>	Diverse Political Forces/Parties <i>Diversas Fuerzas Políticas</i>	Constituent Technical Committee <i>Mesa Técnica Constituyente</i>	Chilean Congress <i>Congreso de la República de Chile</i>	Constitutional Convention <i>Convención Constitucional</i>
<b>Text Produced</b>	Accord for Peace and the New Constitution <i>Acuerdo por la Paz y la Nueva Constitución</i>	Reform Proposal for the Constitutional Text <i>Propuesta de Texto de Reforma Constitucional</i>	Mainly: Law N°21,200 (which codified the Reform Proposal), N°21,216 + N°21,298	Regulatory Bylaws of the Constitutional Convention <i>Reglamento General de la Convención Constitucional</i>

#### External Creators

There were three different external creators that imposed upstream constraints on the Constitutional Convention. Interestingly, while these three creators were different, the three actually represented similar institutional interests but different ideological or technical visions on

how to accomplish that institutional interest.<sup>56</sup> These three creators were: 1) the Diverse Political Forces that signed the Accord for Social Peace and the New Constitution signed mid-November of 2019<sup>57</sup>; 2) the Constituent Technical Committee that drafted the Reform Proposal for the Constitutional Text presented in early December of 2019 (which was then codified in Law N°21,200 by the Congress during 2019)<sup>58</sup>; 3) the Chilean Congress that engaged in law creation with additional pieces of legislation that would affect the Constitutional Process during 2020 and 2021.<sup>59</sup> In other words, Chilean political parties, constitutional experts that represented political parties, and politicians were the key external creators in this Constitutional Process. All of these interconnected, but slightly different, actors had a particularly similar institutional interest that was actually codified in the text that the first creators developed. The similar interest between all these external creators was to maintain institutions at the forefront of the Process—institutions would bind, guide, and constrain the Process. The legality as well as the legitimacy of the Process was transparently prioritized. The message was that Chile could achieve radical and systemic political change, but that the change was going to be brought about through existing institutions and legal channels and led by them. This section will introduce the three different external actors, and the following section will thoroughly analyze and evaluate these actors' decision-making processes related to the procedures and constraints these external actors created.

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<sup>56</sup> Benjamin Alemparte, "The Institutional Interest of Political Parties in Chile's Constitution-Making Process," *Blog of the International Journal of Constitutional Law* (blog), November 17, 2020, [http://www.iconnectblog.com/2020/11/the-institutional-interest-of-political-parties-in-chiles-constitution-making-process/#\\_ftn3](http://www.iconnectblog.com/2020/11/the-institutional-interest-of-political-parties-in-chiles-constitution-making-process/#_ftn3).

<sup>57</sup> Diversas Fuerzas Políticas, "Acuerdo Por La Paz Social y La Nueva Constitución" (2019), [https://obtienearchivo.bcn.cl/obtienearchivo?id=documentos/10221.1/76280/1/Acuerdo\\_por\\_la\\_paz.pdf](https://obtienearchivo.bcn.cl/obtienearchivo?id=documentos/10221.1/76280/1/Acuerdo_por_la_paz.pdf).

<sup>58</sup> Congreso de Chile, "Historia de La Ley N° 21.200 Modifica El Capítulo XV de La Constitución Política de La República," Biblioteca Nacional del Congreso de Chile, December 24, 2019, <https://www.bcn.cl/historiadelaley/nc/historia-de-la-ley/7711/>.

<sup>59</sup> Biblioteca del Congreso Nacional de Chile, "Publicación de La Ley N° 21.216: Paridad de Género Para El Proceso Constituyente," March 24, 2020, [https://www.bcn.cl/procesoconstituyente/detalle\\_cronograma?id=f\\_publicacion-de-la-ley-21-216-paridad-de-genero-para-el-proceso-constituyente](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," December 23, 2020, [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-indígenas-y-resguarda-y-promueve-la-participacion-de-las-personas-en-situacion-de-discapacidad](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-indígenas-y-resguarda-y-promueve-la-participacion-de-las-personas-en-situacion-de-discapacidad).

The first “creators” were the political parties involved in the Accord for Social Peace and the New Constitution, which was signed mid-November in 2019.<sup>60</sup> Twenty-eight days after the start of the Social Outbreak and after a week of the most violent protests since the start of the Social Outbreak, one of the most important Accords since Chile’s transition to democracy in 1990 was signed. Prior to the Accord, multiple negotiations took place that were summoned by then-President Sebastian Piñera that involved the then-government, various civil society organizations and political forces. The project of drafting a new Constitution was the single solution that would appease the demands for radical systemic socioeconomic and political reform that the Social Outbreak called for.<sup>61</sup> And materializing this project would be a task led by political parties. During November 14 and 15, a series of meetings, calls, and exchanges that took place in the Chilean Congress building culminated in the presentation and signing of the Accord.<sup>62</sup> During the course of 15 hours, major political parties negotiated, drafted, and signed a 12-article Accord, the *Acuerdo por la Paz y la Nueva Constitución*, that would mark the formal beginning to a (potential) Constitutional Process. The negotiations were not without its tense moments given the conflicting party aims; but ultimately the main political parties in Chile were able to coordinate and materialize a common interest.<sup>63</sup> This Accord was meant to represent “an institutional exit whose objective is peace and social justice through an unquestionably democratic procedure”, i.e., a procedure to draft a new Constitution.<sup>64</sup> This creator also birthed the subsequent two external creators. The Accord mandated the creation of the Constituent Technical Committee and also charged the

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<sup>60</sup> Diversas Fuerzas Políticas, *Acuerdo Por la Paz Social y la Nueva Constitución*.

<sup>61</sup> Gladys Piérola, “Quiénes Condujeron Las Negociaciones Del Acuerdo Constitucional,” *Pauta*, November 15, 2019, <https://www.pauta.cl/politica/papel-bellolio-boric-harboe-desbordes-negociacion-acuerdo-paz-constitucion>.

<sup>62</sup> Gladys Piérola, “Un Año Después: La Frenética y Tensa Negociación Del Acuerdo Constitucional En Tres Momentos,” *Pauta*, November 15, 2020, <https://www.pauta.cl/politica/tres-momentos-de-la-negociacion-acuerdo-constitucional-15-de-noviembre>.

<sup>63</sup> Fernando Atria, “Constituent Moment, Constituted Powers in Chile,” *Law and Critique* 31, no. 1 (April 1, 2020): 51–58, <https://doi.org/10.1007/s10978-020-09258-8>.

<sup>64</sup> Diversas Fuerzas Políticas, *Acuerdo Por la Paz Social y la Nueva Constitución*.

Congress with codifying into law the potential reforms needed to legalize and institutionalize constitutional change.

The second set “creators” were the political party representatives that drafted the Reform Proposal for the Constitutional Text which was developed in late-November to early-December of 2019 by the Constituent Technical Committee and presented on December 6. And, again, the creation of this Committee was mandated by the Accord for Social Peace and the New Constitution. This Committee was composed of 14 lawyers, constitutional experts and/or political scientists that were selected by political parties.<sup>65</sup> And the Reform Proposal text contained thirteen articles (Articles 130-143) that would then be added to the current Constitution.<sup>66</sup> These articles contain the formal legal procedure to begin a new Constitutional Process. Its foundational article calls for the modification of the current Political Constitution of the Republic; particularly “replacing the title of its Chapter XV with the following: Chapter XV. On Constitutional Reform and On Procedures to Elaborate a New Constitution of the Republic.”<sup>67</sup> This foundational change embodies what was agreed upon in the Accord and the shared interest of political parties: a democratic process to write a new Constitution that would be led by institutions and procedures that abided by this interest to keep institutions as the backbone of change. The Reform Proposal text mainly dealt with the convocation of the plebiscites, the election of the constitution-making organ, the election of its members, the ratification of the text via a referendum and the role of the President of the Republic in the Process.

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<sup>65</sup> “Mesa Técnica Constituyente,” Biblioteca Nacional del Congreso de Chile / BCN / Proceso Constituyente, n.d., [https://www.bcn.cl/procesoconstituyente/detalle\\_cronograma?id=f\\_cronograma-2](https://www.bcn.cl/procesoconstituyente/detalle_cronograma?id=f_cronograma-2).

<sup>66</sup> Congreso de Chile, “Ley 21.200 Modifica El Capítulo XV de La Constitución Política de La República,” Biblioteca Nacional del Congreso de Chile, December 24, 2019, <https://www.bcn.cl/leychile/navegar?idNorma=1140340>.

<sup>67</sup> Congreso de Chile, “Ley 21.200,” Biblioteca Nacional del Congreso de Chile, December 24, 2019, <https://www.bcn.cl/leychile/navegar?idNorma=1140340>.

The third set of “creators” but also the “legalizers” of the Process were the parliamentarians in the Chilean Congress. The Congress was not only charged with codifying the Reform Proposal text into law, but they also developed and passed other laws that would procedurally affect the Constitutional Process. The Congress’ first task in the Constitutional Process was formally embedding this institutional process into the current Constitution. These constitutional reforms were the changes needed to institutionalize and legalize a potentially new Constitutional Process within the current constitutional frameworks.<sup>68</sup> But then, the Congress passed laws that added procedural elements that would significantly impact the Process. These laws were passed before and after the National Plebiscite (the “Entry Plebiscite”), but no significant procedural modifications were passed after the Constitutional Convention delegates were elected. In other words, there was no external institutional interference with the Convention after April 2021. The most impactful laws passed aimed to broaden inclusivity within the constitution-making organ. Gender parity, the inclusion of Indigenous peoples’ representatives, and the participation of Independents are the three key procedural designs which were originally designed in the Congress.

#### Exogenously-Created Procedures

This section will analyze the most imperative exogenously created constraints and procedures that impacted the Constitutional Process. These will be analyzed as upstream and downstream constraints. Three main bodies external to the constitution-making body engaged in the creation of procedures that the constitution-making body would be bound by before the organ began exercising its function (developing and finishing a new Constitutional draft), which was also determined by external creators. These are the rules of the game that were developed before the game started, i.e., before the Convention began its work. This section also evaluates the

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<sup>68</sup> Congreso de Chile, “Historia de La Ley N° 21.200 Modifica El Capítulo XV de La Constitución Política de La República.”

processes and mechanisms by which these constraints were developed, debated, and codified into law as Table 2 summarizes. This part will pay close attention to the makeup of these external bodies, the deliberation dynamics, and the quality of debate. Each following heading is a procedure, a procedural quality/feature or mechanism. I will explicitly state which of the three external creators and which of the texts (or which combination of creators and texts) developed the procedure. Then, I will evaluate the procedure’s values and limitations utilizing analytical tools from the constitutional law and democratic reason literatures.

*Table 2. Summary Chart of Externally Determined Procedures*

	<b>Plebiscites</b>	<b>Options for the Constitution Making Organ</b>	<b>Political Parties</b>	<b>Inclusion of Independents</b>	<b>Gender Parity and Indigenous Peoples’ Quotas</b>	<b>2/3 Quorum Rules</b>
<b>Type of Constraint</b>	Upstream and Downstream but Democratically Determined	Upstream but Democratically Determined	Upstream but Later Undermined	Upstream but Democratically Determined	Upstream	Upstream
<b>Democratic Reason Mechanism/ Condition</b>	Aggregation	Deliberation and Aggregation	Deliberation	Cognitive Diversity	Cognitive Diversity	Deliberation and Aggregation

*Plebiscites as Upstream and Downstream Constraints*

The first externally developed procedural mechanisms I will be analyzing are the plebiscites that formally initiated and finalized the Chilean Constitutional Process. The referenda were the procedures that marked milestones in the Process. Plebiscites were procedural features that originated in the Accord for Social Peace and the New Constitution, were elaborated upon in the Reform Proposal presented by the Technical Committee and codified into law by the Congress.<sup>69</sup> These procedures passed through every single one of the external creators, but did not generally change much from their inception in the Accord. The plebiscites are perfectly aligned with the previously discussed framework of upstream and downstream developed by Elster and

<sup>69</sup> Senado de Chile, “Boletín 7769-07 Reforma Constitucional Para Establecer El Plebiscito En Temas de Interés Nacional,” Senado de Chile, December 24, 2019, [https://www.senado.cl/appsenado/templates/tramitacion/index.php?boletin\\_ini=7769-07](https://www.senado.cl/appsenado/templates/tramitacion/index.php?boletin_ini=7769-07).

applied to the Chilean Constitutional Process in this article. The two plebiscites had two procedural differences between them: the number of questions asked and the voting norms for the referendum. And their key similarity is that both substantially ratified or rejected the formal start of the Constitutional Process (as in the Entry Plebiscite) and the end-product of the Constitutional Process (as in the Exit Plebiscite).

The first plebiscite was an externally-imposed upstream mechanism that could democratically trigger a new Constitutional Process. In the Accord, Article 2 established that “A plebiscite will be conducted in the month of April in 2020 that will resolve two questions: a) Do you want a new Constitution? Yes or No; b) Which type of organ should draft the new Constitution? Mixed Constitutional Convention or Constitutional Convention.”<sup>70</sup> This norm was supplemented by Reform Proposal (codified into Law N°21,200) with its Article 130, titled “On the National Plebiscite.”<sup>71</sup> This article further elaborated on the plebiscite that could trigger a new Constitutional Process; it described the ballot and its questions, cited electoral law that would be applied for the plebiscite, the norms for electoral propaganda and campaigning, the role of the Elections Tribunal for validating the results of the plebiscite, and the next steps of the President if the option of drafting a new Constitution is approved. This externally-determined upstream mechanism was democratically contingent—the Constitutional Process could only formally begin depending on the result of a referendum which would determine not only if a new Constitution was going to be drafted, but also the body that would be charged with producing a draft for a new Constitutional text. This plebiscite is colloquially referenced as the “Entry” Plebiscite.

The second plebiscite was an externally-imposed downstream constraint that would democratically ratify or reject the outcome of the Constitutional Process, the Constitutional Draft

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<sup>70</sup> Mesa Técnica Constituyente, “Propuesta de Texto de Reforma Constitucional / Acuerdo por la Paz y la Nueva Constitución.”

<sup>71</sup> Congreso de Chile, “Historia de La Ley N° 21.200 Modifica El Capítulo XV de La Constitución Política de La República.”

Proposal. In the Accord, Article 8 establishes that “Once the new Carta Magna is drafted by the constituent organ, it will be subjected to a ratifying plebiscite. This vote will be conducted under universal mandatory suffrage.”<sup>72</sup> And this norm was complemented with Article 142 in the Reform Proposal (which the Congress then codified into law). Article 142, titled “On the Constitutional Plebiscite” details that after the Constitutional Draft Proposal is finalized and presented, a national constitutional plebiscite will be convoked for the Chilean citizenry to approve or reject the text. The article details that voting will be mandatory for all of those who have a registered electoral address in Chile and how non-participating citizens will be subject to fines unless excepted by a list of valid excuses provided. The article also describes the ballot and the specific questions that will be presented in the ballot. Importantly, the article describes the next steps in the case that the New Constitutional text is approved. The article details that prior to the vote the Constitutional Draft Proposal will be printed and distributed freely to educational establishments, libraries, universities, and state organs. And lastly, that if the text is rejected, then the Constitution currently in force will remain. This downstream constraint allowed the Chilean electorate to adopt or discard the product of the Constitutional Process. The citizenry, as modeled here, is the last check that determined whether the Constitutional Proposal Draft is institutionally ratified or if it should be wholly discarded. This plebiscite is colloquially called the “Exit” Plebiscite.

The outcomes of these upstream and downstream mechanisms were democratically determined, but externally and institutionally imposed. These are the backbone procedural mechanisms that formally initiated and ended the Process according to what Chilean voters expressed. The will of the people was manifested through these plebiscites that Chilean institutions designed, held, and implemented. These constraints democratized the start and the end of the

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<sup>72</sup> Mesa Técnica Constituyente, “Propuesta de Texto de Reforma Constitucional / Acuerdo por la Paz y la Nueva Constitución.”



Process, but unevenly. The reason why this democratization to the Constitutional Process is considered uneven is because of the different voting requirements enforced for the plebiscites. Voting in the entry plebiscite was not mandatory but voting in the Exit Plebiscite was mandatory. This key difference, in the end, proved to be a monumentally significant procedural feature. There is a fundamental inconsistency with making participation in one of these referenda mandatory, and in the other voluntary. Behind this decision, lie partisan interests and erroneous predictions. The center-to-right wing parties that negotiated the Accord believed that a voluntary voting process would favor them, and the center-to-left-wing parties believed that a voluntary voting process would harm them.<sup>73</sup> The right wing ceded to the left wing to have a mandatory vote to the Exit Plebiscite if the Entry Plebiscite and the election of delegates could be held a voluntary vote. The right wing interestingly thought that it did not matter if voting would be mandatory or voluntary for the Exit Plebiscite because they thought the Constitutional Draft Proposal would be ratified by a landslide majority with no issue.<sup>74</sup> So, under this view, the right wing thought it would be more productive for them to be able to exercise influence within and inside the Process because they thought that no matter what, the Constitutional Draft Proposal would pass. And this, of course, in retrospect is incredibly ironic given the exact opposites of these foreseen outcomes took place. The voluntary vote in the plebiscite, as foreseen by all parties alike, favored the beginning of a Constitutional Process. But the voluntary vote in the election of the Constitutional Convention delegates favored the left wing, significantly—contrary to the belief of the right wing. The impacts of this election are evaluated in a later section, too. But the biggest and most significant surprise was that the mandatory vote yielded a decisive rejection of the Process’ outcome. All in all, this

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<sup>73</sup> Eduardo Engel, “El Misterio de Los Nuevos Votantes,” Departamento de Economía Universidad de Chile, December 18, 2022, <https://econ.uchile.cl/es/noticia/el-misterio-de-los-nuevos-votantes-columna-de-eduardo-engel-en-el-mercurio>.

<sup>74</sup> Engel.

decision-making process shows how partisan and institutional interests guided negotiations regarding voting procedures; and also, how these were formed from erroneous calculations.

Elster notes that “the downstream ratification process serves as a corrective device when politicians are unable to adopt a normatively proper constitutional framework”;<sup>75</sup> which is why the Exit Plebiscite can be said to have achieved a corrective check onto the Constitutional Convention and its work.<sup>76</sup> And I wish to change the language and replace politicians to citizen-legislators when referring to the Chilean case study. Through the downstream Exit Plebiscite, the Chilean electorate via a majority vote corrected the decision the Constitutional Convention made by putting forward the Constitutional Draft Proposal—the electorate rejected this Proposal as the best possible constitutional outcome. The Chilean electorate also most definitely satisfy the criteria of democratic reason. It is the most cognitively diverse group and while deliberation was not publicly institutionalized, its aggregation mechanism included an all-time high record of voter participation in Chile. Coupled with the Convention’s assumption of (electoral) failure, this thesis advances the claim that the Chilean electorate’s decision was a decision with the quality of democratic reason. But at the same time, the Convention also achieved democratic reason in its decision-making processes. And this is a salient tension that cannot be reconciled and can be analyzed through how all of these decision-making procedures interacted.

#### *Options for the Constitution-Making Organ and the Duties of the Organ*

The second externally imposed procedure analyzed are the options provided by the external creators for the constitution-making organ. Like the first procedure analyzed, this procedure was externally designed, but democratically determined. The options for the constitution-making organ also originated in the Accord. The Accord provided guidelines and constraints on the makeup of

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<sup>75</sup> Landemore and Elster, *Collective Wisdom: Principles and Mechanisms*.

<sup>76</sup> Issacharoff and Verdugo, “The Uncertain Future of Constitutional Democracy in the Era of Populism: Chile and Beyond.”

the two potential constitution-making organs that could be elected to draft a new constitution. The Reform Proposal added onto what the Accord envisioned and established the specific makeup and size of each of these potential constitution-making bodies. And finally, Congress codified it. The Congress also added more specific procedural features to the organs, but these were so impactful for the Process as a whole that they will be analyzed specifically in following sections.

The two potential bodies that could be charged with drafting a new Constitutional text, as determined initially by the Accord, were a Mixed Constitutional Convention (MCC) and a Constitutional Convention (CC). Article 3 defines that “the Mixed Constitutional Convention will be made up of equal parts of elected members for this specific task, and of exercising parliamentarians.”<sup>77</sup> And Article 4 defines that “in the case of the Constitutional Convention, its members will be completely elected integrally for this particular effect.”<sup>78</sup> In other words, in an MCC, half of the members would be elected, and half of the members would be parliamentarians; and in a CC all of its members would be elected. Article 4 also defined that “the election of the members of both of these instances will be realized in the month of October of 2020 jointly with the regional and municipal elections under universal suffrage under the same electoral system applied in the Deputies elections in the corresponding proportion.”<sup>79</sup> This part of the article declared when the election of either the members of a MCC or a CC would be elected and also declared that all citizens would be able to vote. Contrasting this election with the plebiscites, like the entry plebiscite, this election had universal suffrage, but the vote was not mandatory. The amended Reform Proposal determined (after a delay due to the COVID-19 pandemic) that this election would take place in May 2021, around 7 months after the Entry Plebiscite took place.<sup>80</sup>

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<sup>77</sup> Mesa Técnica Constituyente, “Propuesta de Texto de Reforma Constitucional / Acuerdo por la Paz y la Nueva Constitución.”

<sup>78</sup> “Propuesta de Mesa Técnica,” Biblioteca Nacional del Congreso de Chile, n.d., [https://www.bcn.cl/procesoconstituyente/detalle\\_cronograma?id=f\\_cronograma-3](https://www.bcn.cl/procesoconstituyente/detalle_cronograma?id=f_cronograma-3).

<sup>79</sup> Diversas Fuerzas Políticas, Acuerdo Por la Paz Social y la Nueva Constitución.

<sup>80</sup> Landemore and Elster, *Collective Wisdom: Principles and Mechanisms*.

In addition to this, Article 9 of the Accord detailed that if a MCC is chosen, parliamentarians will renounce their charge in Congress for their time in the constitution-making organ. And it also details that either in the case of an MCC or a CC, members that are elected to the constitution-making organ would be barred from participating as candidates in an election and holding office for a year after they finish their mandate as delegates. Elster notes that above all options for a constitution-making body, a constitutional convention is usually the superior body as it is “elected for the sole purpose of adopting the constitution and does in fact carry out that only task”<sup>81</sup>; it is a focused and temporary body whose members are elected only to draft a new constitution.

It was revealed later that during negotiations, one of the biggest points of contention was the representation mechanisms in the constitution-making organ.<sup>82</sup> Appointing a constitutional assembly, without a plebiscite was a quickly discarded idea. The Chilean center-to-right-wing coalition and the then-governing coalition, initially asked for a 50%/50% parliamentarians and elected members or a 40%/40%/20% with parliamentarians, elected members and technical experts. The opposition, asked for an 80-100% of elected members. Since there was no point of agreement, that was why it was ultimately decided to include the question in the Entry referendum: to let the people choose, which further democratized the Process. The center-to-left-wing parties were the first advocates to bring this question forward in the plebiscite; and the center-to-right-wing parties ceded.<sup>83</sup> This is a key example in which deliberation and majority rule, as general procedures, were tested at different levels. Through deliberation, political parties were unable to reach a point of agreement—and this issue was too consequential an issue to put to a vote amongst

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<sup>81</sup> Landemore and Elster p. 152.

<sup>82</sup> Piérola, “Un Año Después: La Frenética y Tensa Negociación Del Acuerdo Constitucional En Tres Momentos.”

<sup>83</sup> Piérola, “Quiénes Condujeron Las Negociaciones Del Acuerdo Constitucional.”

the political elites involved in the Accord's negotiation. It was ultimately decided to be put to a vote, but a vote including all of the Chilean electorate to make this choice.<sup>84</sup>

And this procedure is an instance that, I would argue, achieved democratic reason through a double-check mechanism. Through deliberation, the representatives of the broad Chilean political spectrum determined the options for a constitution-making body. These diverse political forces were unable to achieve consensus over the organ but were able to agree over the potential options and to put these options to a vote. And this is how and why the constitution-making body, from these predetermined options, was selected via aggregation by the Chilean electorate. While the instance of putting this decision to a vote came from a lack of consensus, I would argue that this indecision resulted in democratic reason being embedded in this procedure. By subjecting this decision to a round of deliberation and then to a majority vote, the Chilean electorate alongside the external creators collaborated in this high-stakes decision-making process.

The Accord also imposed key substantial constraints for the constitution-making body. Article 5 of the Accord noted that “the constituent organ that is chosen by the citizenry will have the sole objective of redacting the new Constitution, not affecting the competencies or attributions of other organs and powers of the state and will be dissolved once their task is fulfilled. Additionally, it may not alter the quorums or the procedures for its functioning or adoption of accords.”<sup>85</sup> And Article 135 of the Reform Proposal asserts that “the Convention will not be able to intervene nor exercise any other function or attribution of another organ or authority than those established in this Constitution or in law,” and that “the text of the New Constitution that will be subject to a referendum must respect the character of the Republic of the Chilean State, its

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<sup>84</sup> Eduardo Olivares and Gladys Piérola, “El Acuerdo Que Señala El Camino a La Constitución de 2022,” November 15, 2019, <https://www.pauta.cl/politica/el-acuerdo-chile-vamos-oposicion-nueva-constitucion-de-2022>.

<sup>85</sup> Mesa Técnica Constituyente, “Propuesta de Texto de Reforma Constitucional / Acuerdo por la Paz y la Nueva Constitución.”

democratic regime, its firm judicial sentences, and the international treaties Chile has ratified that are in force.”<sup>86</sup> These legal provisions ensure that, procedurally, the Convention had certain substantial constraints,<sup>87</sup> which included that the Convention could not undermine Chile’s democratic regime, its sovereignty, its legal framework or the international treaties it is subscribed to. But even these substantial constraints, the Convention had a “blank slate,”<sup>88</sup> no textual or substantive mandatory starting point. A process with a blank slate in this context means that the Chilean Constitutional Convention did not do its work by amending the 1980 Political Constitution, as its aim was to craft a document from scratch.<sup>89</sup> This was relevant because the Convention was essentially free to develop the *magna carta*, from a substantive point of view.

And the final procedural constraint on the constitution-making body imposed by the Accord is in Article 11, which dictates that “the time limit of the functioning of this organ is nine months and can have one three-month long extension.”<sup>90</sup> Elster notes that the optimal duration of a constitution-making process varies but the fact is that historically there have only been “a few cases of firm and credible time limits” because often these bodies “ignore the constraints that upstream actors try to impose on them”<sup>91</sup> given the pressures for the body to finish quickly, but the monumental task that is drafting a constitution. In the Chilean case, while the Convention opted for the extension, it achieved its goal of producing a Constitutional Draft Proposal within its given maximum time limit, a year. And this is a success case regarding constitution-making term limits.

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<sup>86</sup> Mesa Técnica Constituyente.

<sup>87</sup> “Boletín Proceso Constitucional N°1 – Reglas y Límites de La Convención Constitucionales,” *Cariola Díez Pérez-Cotapos* (blog), n.d., <https://www.cariola.cl/en/actualidad-constitucional/boletin-constitucional-no1-reglas-y-limites-de-la-convencion-constitucional/>.

<sup>88</sup> Emilio Garrote, “¿Hoja En Blanco En La Nueva Constitución?,” *Diario Constitucional*, September 20, 2020, <https://www.diarioconstitucional.cl/articulos/hoja-en-blanco-en-la-nueva-constitucion/>.

<sup>89</sup> Rodrigo Correa, “Symposium on Chilean Referendum Part I: Drafting a Constitution on a Clean Slate,” n.d., <http://www.iconnectblog.com/symposium-on-chilean-referendum-part-i-drafting-a-constitution-on-a-clean-slate/>.

<sup>90</sup> *Diversas Fuerzas Políticas, Acuerdo Por la Paz Social y la Nueva Constitución.*

<sup>91</sup> Landemore and Elster, *Collective Wisdom: Principles and Mechanisms.*

### *The Changing Role of Political Parties*

The extent of the role of political parties played in the Process evolved significantly during the creation of all the upstream constraints. Despite political parties initially dominated the Process, their role was significantly diminished and undermined by the time Constitutional Convention delegates were elected, given the upstream procedural mechanisms political parties themselves crafted. The Accord for Peace and the New Constitution as well as the Technical Committee placed established political parties at the center of the process. At a procedural level, political parties were meant to spearhead most of the Process; and it was like that until the Congress, as the third external creator, got involved and unintentionally undermined the role of political parties for the rest of the Process.

Even the first Article of the Accord placed political parties as the fundamental leaders of the Process: “The political parties that subscribe to this accord come to guarantee their compromise with the re-establishment of peace and public order in Chile and the total respect for human rights and the current democratic institutionalidad.”<sup>92</sup> Order and peace were going to be brought about by political parties and political parties would be the link between the citizenry and the possibility of profound systemic and institutional change. The Accord also was involved in the creation of the other external creators and was involved in giving power to the other creators. Article 10 created the Constituent Technical Committee, as “the parties that subscribe to the present accord will designate a Technical Committee that will dedicate itself to the determination of all the indispensable aspects to materialize the aforementioned. The designation of the members of this Committee will have parity between the opposition and the government representatives.”<sup>93</sup> This article created the following external body (to the constitution-making organ) that would be

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<sup>92</sup> Diversas Fuerzas Políticas, Acuerdo Por la Paz Social y la Nueva Constitución.

<sup>93</sup> Diversas Fuerzas Políticas.

involved in the creation of procedures. But this body was also going to have extensive political party involvement. The members of the Technical Committee would be party members from the government party coalition and the opposition party coalitions. While the body would be composed by academics, these were partisan academics. Furthermore, the last Article of the Accord is that “the projects of constitutional or legal reform that emanate from this Accord will be subject to the approval of the National Congress. For those voting rounds, the political parties below are signatories and commit to approve these changes,”<sup>94</sup> and then 11 representatives from political parties signed the accord, dated November 15, 2019. The following parties signed the accord: the Cristian Democratic Party (PDC), Democratic Revolution (RD), National Renewal (RN), Commons Party (C), the Chilean Socialist Party (PS), the Party for Democracy (PPD), the Liberal Party (PL), the Radical Party (PR), the Independent Democratic Union (UDI), Political Evolution (EVOPOLI), and by now-President Gabriel Boric whose party had quit negotiations but remained as an independent supporter.<sup>95</sup> In other words, the Congress would be tasked to codify into law and into constitutional reform the changes needed to commence a constitutional process. And this Accord ensured that the parties represented in the Accord would not try to block the motions needed to make these legislative changes.

The logic behind making political parties spearhead this part of the process was to have an institutional backbone, without having to rely on the government.<sup>96</sup> At the time of the Social Outbreak, the government was facing a severe legitimacy crisis and backlash over almost all actions and measures taken to mitigate the protests. No solution was enough, except the possibility of beginning a constitutional process. This “institutional exit,” enshrined in the Accord’s twelve

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<sup>94</sup> Diversas Fuerzas Políticas.

<sup>95</sup> Diversas Fuerzas Políticas.

<sup>96</sup> Benjamin Alemparte, “The Institutional Interest of Political Parties in Chile’s Constitution-Making Process.”



articles, was meant to show ideological and institutional unity facing massive systemic change. Political parties have been the modern institutional mediators in Chile's political processes.<sup>97</sup> Chile's transition to democracy in 1990 following General Augusto Pinochet's dictatorship was mediated by political parties—political parties were not just a symbol of democracy but the institutional embodiment of Chilean democracy. So, while parties amongst themselves aggregate diverse views into a common platform that citizens can support, they compete against each other for that support. But in this instance, it is evident that despite this underlying competition, deliberation was prioritized in favor of a common goal. Nonetheless, throughout the process of external procedure-making, the role of political parties significantly changed and was radically diminished as the following procedure described will elucidate.

### *The Role of Independents*

The Chilean Congress was involved in procedure creation that went above and beyond what was established by the Accord and by the Proposal. The Congress codified greater inclusivity in the form of two laws and Law N°21,216<sup>98</sup>, published in March of 2020, admirably codified gender parity for the Constitutional Process. This law also permitted the participation of Independents and the formation of Independent electoral pacts for the election of the Constitutional Convention delegates. This latter legal provision meant that citizens with no formal party affiliation could run under Independent lists (those who do not “militate” in a party).<sup>99</sup> The participation of Independents reflected Congress' decision to give into the anti-party mood in Chile after the Social Outbreak protests and an effort to further democratize the Process in light of a

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<sup>97</sup> Benjamin Alemparte, “The Institutional Interest of Political Parties in Chile's Constitution-Making Process,” *Blog of the International Journal of Constitutional Law* (blog), November 17, 2020, [http://www.iconnectblog.com/2020/11/the-institutional-interest-of-political-parties-in-chiles-constitution-making-process/#\\_ftn3](http://www.iconnectblog.com/2020/11/the-institutional-interest-of-political-parties-in-chiles-constitution-making-process/#_ftn3).

<sup>98</sup> Biblioteca del Congreso Nacional de Chile, “Publicación de La Ley N° 21.216: Paridad de Género Para El Proceso Constituyente.”

<sup>99</sup> Eduardo Olivares, “La Verdadera Cara de La Convención: Independientes = 88; Militantes de Partidos = 50,” *Pauta*, May 17, 2020, <https://www.pauta.cl/politica/independientes-son-mayoria-absoluta-de-la-convencion-constitucional>.

Constitutional Convention being chosen as the constitution-making body. The delegates would truly be citizen-legislators.<sup>100</sup> Another law, Law N°21,296, was then passed in December 2020 to facilitate the inscription process of Independents, lowering the number of signatures required to inscribe their candidacy and the creation of official lists with a minimum of two candidates to run for the Constitutional Convention.<sup>101</sup> And this law was a response to potential Independent candidates advocating to “level the playing field” for parties and Independents.<sup>102</sup>

But I argue that Congress did not foresee that these laws would undermine the role that political parties had up until then in the Process. When excluding the 17 Indigenous peoples’ reserved seats, this leaves 138 delegates elected to the Convention. Out of these, 87 delegates ran as Independents. And out of these Independents, 40 ran as Independents through traditional lists associated to a political party without being formally affiliated through that party; 47 (then 46 given Vade’s resignation from the CC) ran as Independents through Independent lists and 1 ran under no list.<sup>103</sup> For the purposes of the remaining analysis, the Independent delegate that ran under no list will be conflated into the delegates that ran through Independent lists. Independents secured more than half of the seats in the Convention. And considering this universe of 138 delegates, only one third of these delegates were formally affiliated with a political party while two thirds were Independents. And with this election, this undermined the leading role that political parties had up until the Constitutional Convention delegates were chosen. When given a choice, the Chilean electorate selected Independents to represent them in the Convention. Nonetheless, it is important

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<sup>100</sup> Gabriel Negretto, “Constitution-Making and Liberal Democracy: The Role of Citizens and Representative Elites,” *International Journal of Constitutional Law* 18, no. 1 (May 21, 2020): 206–32, <https://doi.org/10.1093/icon/moaa003>.

<sup>101</sup> “Menos Firmas, Pero No Podrán Formar Pactos: Congreso Despacha Ley Sobre Independientes En La Convención Constitucional,” *El Mostrador*, December 3, 2020, <https://www.elmostrador.cl/noticias/pais/2020/12/03/menos-firmas-pero-no-podran-formar-pactos-congreso-despacha-ley-sobre-independientes-en-la-convencion-constitucional/>.

<sup>102</sup> “Independientes Meten Presión al Congreso Por Participación En Convención Constitucional: ‘Es Imprescindible Igualar La Cancha,’” *Diario UChile*, November 2, 2020, <https://radio.uchile.cl/2020/11/02/independientes-meten-presion-al-congreso-por-participacion-en-convencion-constitucional-es-imprescindible-igualar-la-cancha/>.

<sup>103</sup> Olivares, “La Verdadera Cara de La Convención: Independientes = 88; Militantes de Partidos = 50.”

to mention that the election that selected the delegates was the election in this whole Process with the least voter turnout. Almost 6.4 million people casted their ballots in this election held over the course of two days in May 2021, with a 43.41% rate in voter participation.<sup>104</sup> This was the election, out of the three in the Constitutional Process, with the lowest amount of voter participation.

The procedures that originated in the Congress that allowed and encouraged the participation of Independents is one of the most impactful procedures in the Process. It triggered a complete shift of power in decision-making in the Process as it minimized the role of political parties in the Convention. And, as it will be demonstrated with quantitative analysis in a later section, impacted the internal dynamics of the Convention but also made possible the condition of cognitive diversity. But it is worthwhile to mention in this section that most delegates present had no legal or political prior experience. In other words, constitutional experts, legal experts, or political experts were not elected in abundance to the Convention. Legal and political experience were not especially prioritized for the election of delegates—instead, diversity and inclusion were. And Elster notes that the delegates in a constitution-making body “do not represent interest, but the knowledge of interest” and that ideally “between them, they might even have the knowledge of how to satisfy those interests” through pooling different solution proposals.<sup>105</sup> And that given this case, it is a desirable epistemic function that the delegates in a constitution-making body not only know about the interests in society but can also figure out how to embed those interests into a very technical document that is, ideally, long lasting. Elster notes that the “utter lack of practical political experience” can and has historically made delegates in a constitution-making body inept at drafting a constitution but could make them apt at knowing and conveying societal interests.

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<sup>104</sup> Rocío Montes, “Vuelco En Chile: Los Independientes Controlarán El 64% de La Convención Constitucional,” May 17, 2021, <https://elpais.com/internacional/2021-05-18/los-independientes-controlaran-el-64-de-la-convencion-constitucional-en-chile.html>.

<sup>105</sup> Landemore and Elster, *Collective Wisdom: Principles and Mechanisms* p. 181.

And this is why the overall net lack of technical legal expertise was not the only Achilles' heel of the Convention. A lack of technical political or legal expertise can be a powerful barrier to a successful constitution-making process. And yet Elster notes that this barrier can be overcome if the inexpert delegates in a constitution-making body are still able to channel the interests of the public effectively. As evaluated in a later section, there is literature that posits that a large cognitively diverse group can and will outperform a homogeneous small group of experts in decision-making. But this was certainly not the case in the Chilean Constitutional Process.

#### *Gender Parity and Indigenous Peoples Quotas*

The two laws that Congress developed and codified that significantly increased inclusivity for the Convention were Laws N°21,216 and N°21,298. Law N°21,216 was published in March 2020 and codified gender parity (alongside the participation of Independents).<sup>106</sup> And Law N°21,298 published in December 2020 reserved 17 seats for 10 Indigenous peoples' groups.<sup>107</sup> These two emblematic procedures became icons of the Constitutional Process within Chile and received international recognition. Legally embedding inclusivity in such a paramount political process like constitution-making is unique in history. Inclusivity determined not only the makeup of the Convention but the values that guided the Convention's work. These procedures were overall positive given the Process institutionally included historically marginalized populations as decision-making actors that could enrich deliberation through different perspectives.

#### *The 2/3 Quorum Rules*

The 2/3 quorum vote rules were first proposed as early as in the Accord for Social Peace and the New Constitution. Its Article 9 declared that "the constitutional organ must approve the

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<sup>106</sup> Biblioteca del Congreso Nacional de Chile, "Publicación de La Ley N° 21.216: Paridad de Género Para El Proceso Constituyente."

<sup>107</sup> 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."

norms and its voting bylaws of the norms by a quorum of 2/3 of its exercising members.”<sup>108</sup> Passing constitutional norms by a supermajority is considered optimal to create as much consensus as possible, which helps ensure that a document as important as a constitution does not reflect a temporary majority. And this was exactly the case in the Chilean Constitutional Process. This early agreement on the requirement of a supermajority to pass norms within a potential new draft of the constitution took into consideration the deeply divided state of Chilean society.<sup>109</sup> By placing a 2/3 supermajority, in theory, this would promote effective, cooperative, and meaningful deliberation that would be conducive to consensus.<sup>110</sup> Voting supermajorities hypothetically facilitate agreement and integrity in a constitution-making process. But in practice, this was not the case, and this did not exactly carry out. As later analysis shows, this 2/3 supermajority clashed significantly with the party composition of the Convention and with its Circular Procedure voting norms. This negative interaction undermined an otherwise prudent and effective decision-making procedure in paper.

It was later revealed that during this negotiation, the mechanism was one of the dealbreakers coming from the Chilean right wing and the then-governing coalition.<sup>111</sup> The hill to die on for the Chilean right, was making sure that the norms that would make it onto a constitutional proposal had to be approved by 2/3 of whatever constitution-making organ was elected to draft a new constitution. The Chilean center-to-left-wing, the then opposition, argued this was an excessive measure as the right wing would use this supermajority to “easily” strike down constitutional norms. Overall, it was agreed that a supermajority would ensure broader

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<sup>108</sup> Diversas Fuerzas Políticas, Acuerdo Por la Paz Social y la Nueva Constitución.

<sup>109</sup> Sanhueza, Ana María, “Arturo Fermandois: ‘El Cuórum de 2/3 Es La Esencia de Una Constitución,’” Pauta, November 20, 2019.

<sup>110</sup> Hélène Landemore and Scott E. Page, “Deliberation and Disagreement: Problem Solving, Prediction, and Positive Dissensus,” *Politics, Philosophy & Economics* 14, no. 3 (August 1, 2015): 229–54, <https://doi.org/10.1177/1470594X14544284>.

<sup>111</sup> Piérola, “Un Año Después: La Frenética y Tensa Negociación Del Acuerdo Constitucional En Tres Momentos.”

consensus, but the stakes were that this would prevent significant changes to make it onto the new constitutional proposal. This is because historically, the 2/3 supermajority voting quorum is the actual procedural mechanism to reform the current 1980 Constitution, and the right wing has used the 2/3 quorum to its advantage to strike down progressive constitutional amendments and reforms. And this is why the left wing assumed that the same would happen in a constitution-making body. The 2/3 supermajority quorum was seen in a negative light in this sense because it would prevent the constitution-making body from making the political and socioeconomic changes that the Social Outbreak demanded. The right-wing parties, having the bargaining chip that they were part of the governing coalition, threatened to pull out of the Accord if the 2/3 voting quorum was not part of it. But of course, this was the right wing's non-negotiable term because they thought they would attain at least 1/3 of the seats in whatever constitution-making organ was elected by the Chilean electorate. But this was not achieved as only 37 right-wing delegates were elected, less than the 1/3 that was needed, which was definitely unforeseen by them given their insistence on the expected benefits this procedure would yield them.

The Technical Commission nor the Congress deepened, changed, or elaborated on the application of the 2/3 supermajority votes; leaving it as it was until the bylaws of the Convention, drafted by the Convention itself added to this procedural mechanism. Article 133 of the Reform Proposal outlined the functioning of the Convention, but ultimately left most of the key specific procedural decisions to be under the Convention's discretion. The bylaws of the Convention and the norms in the Constitutional Draft Proposal had to be subject to this supermajority, but other decisions like administrative or organizational ones did not have to be subject to this quorum. But Article 133 also established that the first task of the Convention would be to hold elections with an absolute majority (50% + 1 of the delegates) and then begin sanctioning an internal regulatory

framework (their bylaws) which must be approved by a 2/3 supermajority. And the most pernicious consequence of this procedure which intended to bring about consensus and integrity to decision-making within the Convention interacted negatively with the following internally designed procedure: the circular voting mechanism.

### Internal Creator

The Constitutional Convention was its own procedural creator, too. The Convention's first task as a constitution-making body was to develop, deliberate, vote, and adopt its own procedures that would regulate their duties as citizen-legislators. The Convention had its inaugural session on July 4 of 2021 and by October 11 the Convention's bylaws had been finalized and approved. The bylaws were embedded in the document titled *Reglamento General de la Convención Constitucional*. It was divided in five sections with multiple subsections titled Paragraphs which were divided into Articles. It is important to mention that a series of academics and think tanks, affiliated with political parties, submitted a series of detailed recommendations for the Convention's bylaws<sup>112</sup> and the Convention adopted some, modified some, and rejected most.

The internal creator, the Constitutional Convention and its creation, the bylaws are considered in this article as midstream constraints. Midstream constraints are a theoretical expansion of Elster's framework and typification of self-imposed constraints. As defined in a previous section, midstream constraints are those developed, deliberated, and adopted by the constitution-making body. These are constraints that emerge from the Convention and are applied to regulate the Convention itself. While the development of midstream constraints was an upstream constraint as the Accord as well as the Reform Proposal by the Technical Committee established

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<sup>112</sup> Ferrero, Mariano and Soto, Victor, "Análisis Comparado de Las Propuestas de Reglamento Para La Convención Constitucional: Principios, Dimensiones y Temas" (Biblioteca del Congreso Nacional (BCN), June 22, 2021), Serie Estudios N° 03-21, <https://obtienearchivo.bcn.cl/obtienearchivo?id=repositorio/10221/32302/3/N%C2%B003-21%20Análisis%20comparado%20de%20propuestas%20de%20Reglamento%20para%20Convencion%20Constitucional1.pdf>.

that the first task of the constitution-making body would have to draft their own bylaws, it is valuable to think about the bylaws as a different type of constraint and the Convention as a different institutional creator. The bylaws of the Convention independently determined key procedures and key substantial matters that would guide the rest of the Convention's work. The bylaws were left to determine the internal organization of the Convention, the decision-making procedures (to submit and vote on norms), mechanisms of participation, ethical considerations, and transparency mechanisms. And this section will focus on its main decision-making procedure, the circular mechanism, as it is also relevant given the continuance from externally-developed mechanisms.

#### Endogenously-Created Procedure: The Circular Mechanism with No Final Vote

A relatively expeditious decision-making procedure was desirable given the Constitutional Convention had a maximum term limit of a year to produce a complete Constitutional Draft Proposal that would be subject to a ratifying plebiscite. The considerations for the structure of a decision-making procedure would establish the deliberation mechanisms and voting mechanisms (abiding by the 2/3 supermajority quorum). And these two requirements and aims are perfectly aligned with the two theoretical general mechanisms conducive to democratic reason: inclusive deliberation and majority vote. This section shows how both democratic reason mechanisms were present in the most important decision-making procedure of the Constitutional Convention. But this section also shows that while both democratic reason mechanisms were present, these were also severely ineffective in practice and may have, to a certain extent, may have undermined the democratic reason achieved. Furthermore, I argue that these general mechanisms do not just have to be present, but their specific characteristics can determine whether these procedures are effective regardless of them achieving democratic reason.

The Convention's circular mechanism had systems of inclusive deliberation and aggregation embedded as part of its primary decision-making procedure. And despite these optimal



conditions being present and achieving democratic reason, the overall Process failed. Yet an argument is advanced in this section that even if the circular voting procedure had deliberation and aggregations, these procedures were overall ineffective and inadequate in regards to decision-making. So decision-making procedures with the quality of democratic reason are not always efficient nor effective at producing successful democratic decision-making.

The Convention followed a circular procedure between its commission and the plenary. The plenary refers to all of the Constitutional Convention delegates and its sessions. And the commission refer to the division of the delegates into seven thematic commissions with its own sessions. Each committee was made up of 15 to 33 delegates and followed a set of thematic blocs and subjects predetermined by the Constitutional Convention's bylaws.<sup>113</sup> The circular procedure is as follows: a report (called, a constituent initiative) is drafted by a commission and it must be signed by a minimum of eight and a maximum of 16 delegates which must include the principles of the proposal and the article/s.<sup>114</sup> The report is then sent to the *Mesa Directiva* (the internal leadership of the Convention)<sup>115</sup> and the *Mesa* must declare the admissibility of the proposal and then redirects it to the commission of origin. Once the proposal is in the commission, it is presented formally by the authors to the rest of the members in the commission with a question and answers portion. Then, a deliberative debate is opened surrounding the proposal. Each commission had its own different procedure, some deliberated and voted on proposals/initiatives on a rolling basis one by one, some deliberated on all the proposals and then voted on the indicatives one by one.<sup>116</sup> With

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<sup>113</sup> Cecilia Román and Paul Follert, "Guía Para Entender Las Comisiones Temáticas Definitivas de La Convención," October 12, 2021, <https://www.pauta.cl/politica/cuales-son-comisiones-tematicas-convencion-constitucional>.

<sup>114</sup> Cecilia Román, "El Intrincado Diseño de La Convención Constitucional Que Complica a Los Constituyentes," September 14, 2021, <https://www.pauta.cl/politica/estructura-convencion-constitucional-secretarias-tecnicas-unidades>.

<sup>115</sup> Biblioteca del Congreso Nacional de Chile, "Convención Constitucional Conformar Su Mesa Directiva," n.d., [https://www.bcn.cl/procesoconstituyente/detalle\\_cronograma?id=f\\_copy9\\_of\\_chilenas-y-chilenos-eligieron-a-los-155-representantes-de-la-nueva-convencion-constitucional](https://www.bcn.cl/procesoconstituyente/detalle_cronograma?id=f_copy9_of_chilenas-y-chilenos-eligieron-a-los-155-representantes-de-la-nueva-convencion-constitucional).

<sup>116</sup> Paul Follert, "El Largo Camino Que Recorre Una Norma Para Ingresar En La Nueva Constitución," Pauta, January 23, 2022, <https://www.pauta.cl/politica/como-aprobacion-normas-convencion-constitucional-procedimiento>.

the support of the Technical Secretary (external body of experts that provided support to the Convention)<sup>117</sup> aided the delegates when necessary with recommendations to systematize the text.<sup>118</sup> Once this process is through, a complete proposal and report is developed which has the history of the norms, a synthesis of the opinions manifested in deliberation, results on all the votes casted on the proposal, and the explicit text and articles that would hypothetically make it to the Constitutional Draft Proposal.<sup>119</sup>

Then, the proposal would make it to the plenary. The proposal would be voted “in general” first—considering the proposals guiding principles and articles. If it is rejected, it returns to the commission of origin where it was deliberated, and the commission has the chance to make changes and submit a new proposal to the plenary with a time limit of 15 days. Once the “in general” votes are finished, the “in particular” phase begins and at this stage the specific articles are voted on, the potential constitutional norms. The “in particular” votes are where the 2/3 supermajority vote quorum is enforced, as those norms that are approved “in particular” officially make it to the Constitutional Draft Proposal. If a norm is rejected “in particular” but is voted favorably (with more than a simple majority), it returns to the commission of origin to make the corresponding changes. Once the changes are made, it returns to the plenary and is subject to another vote. If it fails to be approved by a 2/3 supermajority for a second time, it is discarded permanently. But if it passes, it makes it onto the Constitutional Draft Proposal.

This all sounds exhausting and convoluted, and it is because it was. Individual proposals were voted individually “in general” and “in particular” and both were subject to different positive

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<sup>117</sup> Biblioteca del Congreso Nacional de Chile, “Convención Constitucional Aprobó Propuesta BCN Para Secretaría Técnica,” October 29, 2021, <https://www.bcn.cl/portal/noticias?id=convencion-constitucional-aprobo-propuesta-bcn-para-secretaria-tecnica>.

<sup>118</sup> Felipe Ramírez, “¿Cómo Funcionará La Convención Constituyente?,” Universidad de Chile, April 8, 2021, <https://portaluchile.uchile.cl/noticias/174252/como-funcionara-la-convencion-constituyente->.

<sup>119</sup> “La Secretaría Técnica de La Convención: Su Rol, Quiénes y Cuántos Miembros,” Centro de Estudios Públicos, n.d., <https://www.plataformaconstitucionalcep.cl/monitor/la-secretaria-tecnica-de-la-convencion-su-rol-quienes-y-cuantos-miembros/>.

feedback loops. The reasoning behind this circular mechanism is that it would allow reports a chance to be perfected, through additional deliberative debate, discussion, and votes.<sup>120</sup> Furthermore, this circular mechanism would allow commissions to take the plenary's temperature to add or modify their ideas with suggestions coming from delegates outside of their commission. And this would, hypothetically promote a positive interaction between the norms within the text.

It was ultimately decided by the Convention itself in its bylaws that while the 2/3 quorum would be abided by, the plenary would not vote on the text as a whole. And this, I argue, undermined the aforementioned values of this well-intentioned but exhausting mechanism. Within the Convention this was one of the points with the most contention. The Convention opted out of having a final vote because it was seen as a hinder to the process and as a potential veto mechanism. Decisions could not be revisited by the delegates. After the (draft) Constitutional Draft Proposal was finalized, it was revised by the Harmonization Committee which would ensure that there were no major inconsistencies or typos within the text. The Harmonization Committee was composed of 40 delegates once they had disbanded from their thematic commissions. And this Harmonization Committee found over a hundred incompatibilities, typos, and grammatical mistakes during the revision process, which the Convention corrected and then turned in the (final) Constitutional Draft Proposal. The Harmonization period lasted in total three weeks in 2022<sup>121</sup>—three weeks to comb through a year's worth of decisions and work carried out for the potential future Chilean *magna carta*. I argue that the Harmonization Committee was not enough to ensure complete coherence of the text.

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<sup>120</sup> Soto Velasco, Sebastián, “Reglamento de La Convención Constituyente. Propuesta de Un Procedimiento Circular Para Aprobar La Nueva Constitución” (Pontificia Universidad Católica de Chile – Centro de Políticas Públicas UC, April 2021).

<sup>121</sup> Biblioteca del Congreso Nacional de Chile, “Convención Entrega Propuesta Final Del Texto de La Constitución y Da Por Terminado Su Trabajo,” June 28, 2022, [https://www.bcn.cl/procesoconstituyente/detalle\\_cronograma?id=f\\_copy17\\_of\\_chilenas-y-chilenos-eligieron-a-los-155-representantes-de-la-nueva-convencion-constitucional](https://www.bcn.cl/procesoconstituyente/detalle_cronograma?id=f_copy17_of_chilenas-y-chilenos-eligieron-a-los-155-representantes-de-la-nueva-convencion-constitucional).

Legal documents, especially complex ones like a constitution, have provisions that interact with each other in intricate ways. A constitution is not made up of a laundry list of articles outlined in a sequence. Articles are interactive norms that when combined generate the legal framework for a political community. And in a process that prioritizes coherence, this would entail revisiting previous decisions when other decisions are integrated successively. But by not having constant revision of the interaction between norms as norms are added into the process, this undermined the positive feedback loop that the circular mechanism intended to have. There was a positive feedback loop for individual constitutional norms, but there was no systematic feedback loop to make sure these norms interacted well with each other as they were passed. This incentivized actors, which were in theory encouraged to act cooperatively, to strategically act based on a lack of trust which yielded a lack of cooperation. Furthermore, the message this casted to the Chilean electorate was negative: if the Convention could not approve its Constitutional Draft Proposal as a whole, how could the Chilean electorate?

This circular procedure had mechanisms of deliberation and aggregation embedded into it. Each proposal and norm went through multiple filters and rounds of deliberation and voting mechanisms, with the possibility of being improved in each one of these rounds. This circular procedure did not promote outright perfection, it promoted correction and adjustment; which is why proposals “in general” and norms “in particular” could have second chances when passing through this process. The circular mechanism also had minor input from technical experts from the Technical Secretary which would ensure guidance with drafting a legal norm.<sup>122</sup> Not a voting session was held without deliberative debate on any matter that preceded it. It was a consistent chain where deliberation and aggregation were blended and worked to complement each other in

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<sup>122</sup> “La Secretaría Técnica de La Convención: Su Rol, Quiénes y Cuántos Miembros.”

the decision-making processes within the Convention—until the final stage. By eliminating the possibility of a final vote and replacing it with a harmonization process, this obstructs and interrupts that previously productive blend of deliberation and aggregation. There was no final deliberative debate or vote on the completed Constitutional Draft Proposal. And I would argue that this feature undermined the quality of democratic reason within the Convention, despite mechanisms of deliberation and aggregation were present for deciding which individual norms made it onto the Constitutional Draft Proposal. Deliberation and aggregation faculties were not present to make decisions about the overall text at all, or about how individual norms interacted with each other within the text. In other words, decision-making had the quality of democratic reason within the Convention in regards to the norms of the Constitutional Draft Proposal but not in regards to the interactions between the norms in this Proposal.

Despite the circular procedure was cumbersome, it favored correction and improvement, which was important to have in a decision-making body where not all of its members had the specific technical legal or political knowledge that often dominates constitution-making. Deliberation enlarged the pool of ideas, arguments, and information available to the Convention, differentiated bad from good arguments and were conducive to consensus on better solutions.<sup>123</sup> <sup>124</sup> Deliberation was supplemented by voting rounds determined by a supermajority rule. Articles and proposals would circulate around thematic commissions and the plenary—often more than once—to have a chance to be improved. But these mechanisms designed to have a consistent feedback loop were absent from the last decision-making stages. And this absence of democratic reason at the end, undermined the quality of democratic reason that had been consistently present

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<sup>123</sup> Jon Elster, ed., *Deliberative Democracy*, Cambridge Studies in the Theory of Democracy (Cambridge: Cambridge University Press, 1998), <https://doi.org/10.1017/CBO9781139175005>.

<sup>124</sup> Landemore, *Democratic Reason: Politics, Collective Intelligence and the Rule of the Many* p. 97.

in the Convention up until that point, just when evaluating its procedural workings. Elster notes how it is favorable for the work of a convention to have a clear-cut division of labor between committees and a plenary.<sup>125</sup> And overall, the division of labor nor the circular procedure—regardless of their complexity—were weak decision-making procedures or procedures that did not have democratic reason. But their interaction with the no final vote procedure and the lack of positive loop in between individual norms undermined their epistemic and decision-making value.

### The Impact of Procedures on the Constitutional Convention's Dynamics

As mentioned, procedures that were externally developed were essential in creating the unique conditions that marked the Chilean Constitutional Process in regard to its levels of inclusivity. Citizen-legislators in a completely elected Constitutional Convention with gender parity, regional representation and Indigenous people's quotas were charged to draft a proposal for a new Chilean constitution. External procedures determined these highly inclusive conditions for constitution-making. And these procedures had a monumental impact on the makeup of the Convention as well as the internal behavior of the Convention when looking at voting patterns. This section will evaluate the specific impact of three procedures that aimed to broaden the inclusivity and further democratize the Chilean Constitutional Process: gender parity, Indigenous peoples' quotas, and the participation of Independents, with a focus on the third one. These three procedural features of the Constitutional Convention were developed externally and imposed on by the Chilean Congress. The previous section analyzed how and why these procedures were introduced, adopted, and imposed on the Convention. But this section will analyze specifically how these features impacted the Convention's ability to achieve cognitive diversity and/or democratic reason, as well as the voting behaviors and pattern that were created as a by-product

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<sup>125</sup> Landemore and Elster, *Collective Wisdom: Principles and Mechanisms*.

of these procedures. This section will ultimately evaluate if these procedures, which were arguably conducive to one of the most unique constitution-making conditions in history given the high levels of inclusivity they produced, were beneficial or pernicious to the Convention’s task. The argument advanced in this section does not claim that inclusivity or diversity is intrinsically harmful to a complex democratic process—instead, it highlights the opposite. But it does provide a warning in assuming that inclusivity in democratic processes guarantee success. Considering quantitative and qualitative evidence, this analysis demonstrates that while procedures were aligned with the democratic reason decision-making framework, the Process failed. And this section particularly looks at the dynamics of the Convention, focusing on the condition of cognitive diversity and party unity considering voting behavior.

### *Cognitive Diversity*

This section will consider a dataset that contains all of the publicly available information of the Constitutional Convention delegates. The information considers their gender, age, macro-zone represented, the list and/or party they ran under, their educational level, and profession. And this dataset will be used to analyze the presence of cognitive diversity in the Convention.

Cognitive diversity refers to the “variety of mental tools that human beings use to solve problems or make decisions in the world.”<sup>126</sup> In other words, a mental toolkit that is the product of a unique living experience. Specifically, it refers to a diversity of ways of seeing the world, interpreting problems in it and working out solutions to these problems” and “denote more specifically a diversity of perspectives (ways of representing situations and problems), diversity of interpretations (ways of categorizing or partitioning perspectives), diversity of heuristics (ways of generating solutions to problems) and diversity of predictive models (ways of inferring cause

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<sup>126</sup> Landemore, *Democratic Reason: Politics, Collective Intelligence and the Rule of the Many*.

and effect).”<sup>127</sup> But as Landemore argues, cognitive diversity is “conceptually distinct from both some of its causes (e.g., gender, ethnicity, or, more fundamentally, genes) and some of its symptoms (e.g. differences in viewpoints or opinions,”<sup>128</sup> meaning cognitive diversity goes beyond broad representation of different groups but gets to a diversity in cognitive processes. In other words, “the diversity that really matters is not primarily a diversity of opinions, values, perspectives (as end-results rather than processes), or even a diversity of social and economic backgrounds” but instead the diversity that matters are “the internal, psychological property that determines how each individual sees the world, interprets its problems and makes predictions in it.”<sup>129</sup> The idea of cognitive diversity and the wisdom of crowds is most definitely novel, as sociological and political literature in the 18<sup>th</sup> century and before had a long tradition of calling the crowds a mob with no control over their passions or emotions.<sup>130</sup> Crowds were characterized as the opposite of rational; and democracy could work despite this diagnosis, via a representative system where the educated, rational, and fit-to-rule, could govern. Several arguments in this and the last century have advanced to refute or partially challenge these arguments. But the arguments on the power of cognitive diversity and democratic reason actively aim to destroy these claims.

This abstract concept has a foundation in Hong and Page’s extensive work with mathematical modeling and algorithms.<sup>131</sup> The Hong-Page theorem states that “a group of low-ability, cognitively diverse problem solvers can outperform a more uniform group of high-ability problem solvers”<sup>132</sup> demonstrated with a series of computational experiments. And despite the

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<sup>127</sup> Landemore, “Deliberation, Cognitive Diversity, and Democratic Inclusiveness: An Epistemic Argument for the Random Selection of Representatives.”

<sup>128</sup> Landemore.

<sup>129</sup> Landemore.

<sup>130</sup> Gustave Le Bon, *The Crowd: A Study of the Popular Mind* (Courier Corporation, 2002).

<sup>131</sup> Lu Hong and Scott E. Page, “Groups of Diverse Problem Solvers Can Outperform Groups of High-Ability Problem Solvers,” *Proceedings of the National Academy of Sciences* 101, no. 46 (November 16, 2004): 16385–89, <https://doi.org/10.1073/pnas.0403723101>.

<sup>132</sup> Daniel Kuehn, “Diversity, Ability, and Democracy: A Note on Thompson’s Challenge to Hong and Page,” *Critical Review* 29, no. 1 (January 2, 2017): 72–87, <https://doi.org/10.1080/08913811.2017.1288455>.



application of this kind of mathematical modeling to political theory has been criticized and has limitations<sup>133</sup>, it is still recognized that diversity, if anything, will always be a positive factor in decision-making.<sup>134</sup> It is theoretically considered by Landemore to be a condition of optimal deliberation; meaning it is foundational to the concept of democratic reason. This is the condition of optimal deliberation because it dictates that cognitive diversity within a group matters more than individual epistemic competence; and cognitive diversity brings with it collective wisdom, and when applied to a context of democratic decision-making, democratic reason. The theorem that demonstrates that “a diverse set of agents is epistemically superior to a comparable group of experts”<sup>135</sup> has broad implications for political decision-making.

I argue in this paper that externally imposed procedures created the optimal conditions for cognitive diversity to be achieved in the Constitutional Convention, and that cognitive diversity was a feature in the decision-making of the Convention. This supports the argument that democratic reason was achieved within the Convention, as decision-making reflected and represented an environment of decision-makers with a broad range of experiences, knowledges, perspectives, and problem-solving abilities. The Convention was structured in such a way that promoted inclusive deliberation complemented with aggregation mechanisms in the context of a cognitively diverse and democratically elected group of citizen-legislators. But the Process still failed. Prior sections demonstrated the value of the laws aimed at broadening the levels of inclusivity within the Convention and the democratization of the Process through the plebiscites as the most important upstream and downstream constraints that guided the Process. And this

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<sup>133</sup> John A. Weymark, “Cognitive Diversity, Binary Decisions, and Epistemic Democracy,” *Episteme* 12, no. 4 (2015): 497–511, <https://doi.org/10.1017/epi.2015.34>; Antoine Houlou-Garcia, “Collective Wisdom, Diversity and Misuse of Mathematics,” trans. Cadenza Academic Translations, *Revue Française de Science Politique* Volume 67, no. Issue 5 (2017): 899–917.

<sup>134</sup> Kuehn, “Diversity, Ability, and Democracy: A Note on Thompson’s Challenge to Hong and Page.”

<sup>135</sup> Patrick Grim et al., “Diversity, Ability, and Expertise in Epistemic Communities,” *Philosophy of Science* 86, no. 1 (2019): 98–123, <https://doi.org/10.1086/701070>.

section will break down the impact of these high levels of inclusion on the Process on the criteria of cognitive diversity. While cognitive diversity is an abstract concept that is not measured in a standardized way and that is not equal to some of its causes (socioeconomic backgrounds and differences in opinions), I will show through some indicators the diversity and the cognitive diversity present within the Convention.

First, tables 3 and 4 summarize the frequency of several demographic variables which demonstrate diversity and representation at a basic demographic level. These tables show the frequency distribution of the delegates’ gender, age range and macrozone. This data is relevant because it shows that the Constitutional Convention, at a basic level, had gender parity, broad representation of different age groups and generations, and a complete geographical representation of Chile. Table 3 particularly shows the relationship between different age range and gender within the Convention. Gender was equally represented in the Convention, as Law N°21,216 mandated (77 members were male-identifying and 77 members were female-identifying) and all in all, there was vast generational representation. But the age group with the broadest representation was 30 to 39 years old, and the age group with the narrowest representation was 20 to 29 years old. Table 4 particularly shows the macrozone representation. Chile has 16 regions that extend over the longest country in the world, but its government and its institutions are highly centralized. Which is why macrozone representation is important to be included in this conception of diversity. While the most represented area is its Metropolitan Region (the capital, Santiago) with 21 women and 20 men, each macrozone except the Austral macrozone has around 20 representatives.

*Table 3 Gender and Age Group Distribution in the Convention*

Gender	Age Range (years old)					Total
	20-29	30-39	40-49	50-59	60 and above	
Female	6	29	18	15	9	77
Male	3	26	17	19	12	77

*Table 4 Gender and Macrozone Distribution in the Convention*

Gender	Macrozone						Total
	Great North	Metropolitan	Central	Central South	South	Austral	
Female	9	21	11	20	11	5	77
Male	10	20	13	18	13	3	77

Turning to figures, these show a more in-depth level of cognitive diversity through the different academic and professional backgrounds of the Constitutional Convention delegates. There was a variety of educational levels represented in the Convention, as well as professions. This data analysis is important because it supports the argument that the Convention was not just a group of technocrats or experts or just a group of lawyers, academics and politicians drafting a new Constitution. It is observable that several professional backgrounds were represented, which are accompanied by different skill-sets alongside different problem-solving abilities.

Figure 1 displays the variety of educational levels represented in the Convention. Diversity in education levels range from a completed elementary school education to a wide array of graduate degrees, and everything in between. The representation of a wide array of educational experiences is valuable to broaden inclusivity in the context of a foundational democratic process like constitution-making because it ensures that an educational qualification is not used as a barrier to participation in such process. In this Process, representation was prioritized over technical expertise insofar as a certain degree or academic qualification was not required to run for a delegate position. Academic qualification was not used as a barrier to participation in the Constitutional Convention. And this diversity in educational experiences can yield different perspectives which consequently can be conducive to different approaches to problem identification and solving, an important component in cognitive diversity.

*Figure 1 The Constitutional Convention's (CC) Composition by Educational Level*

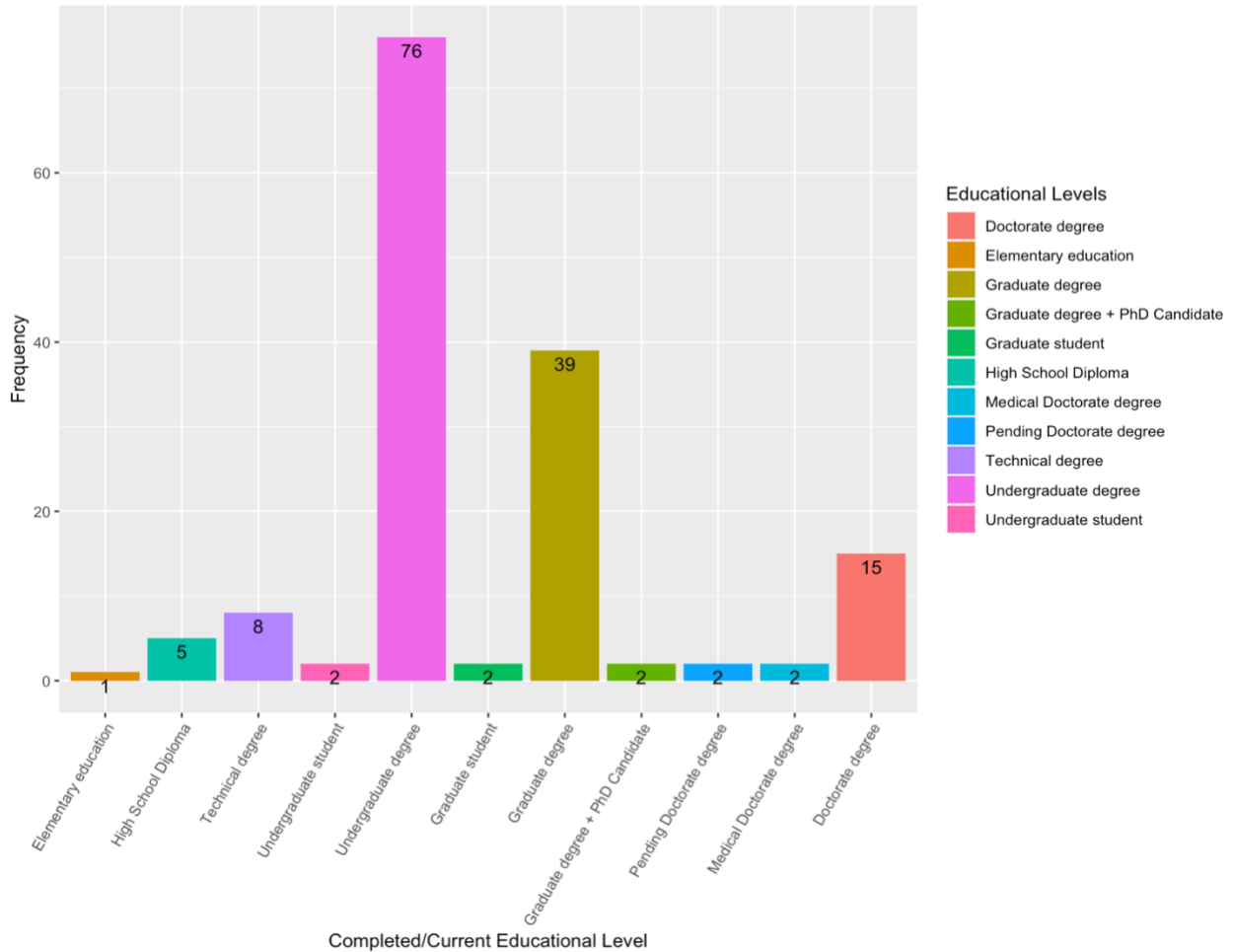
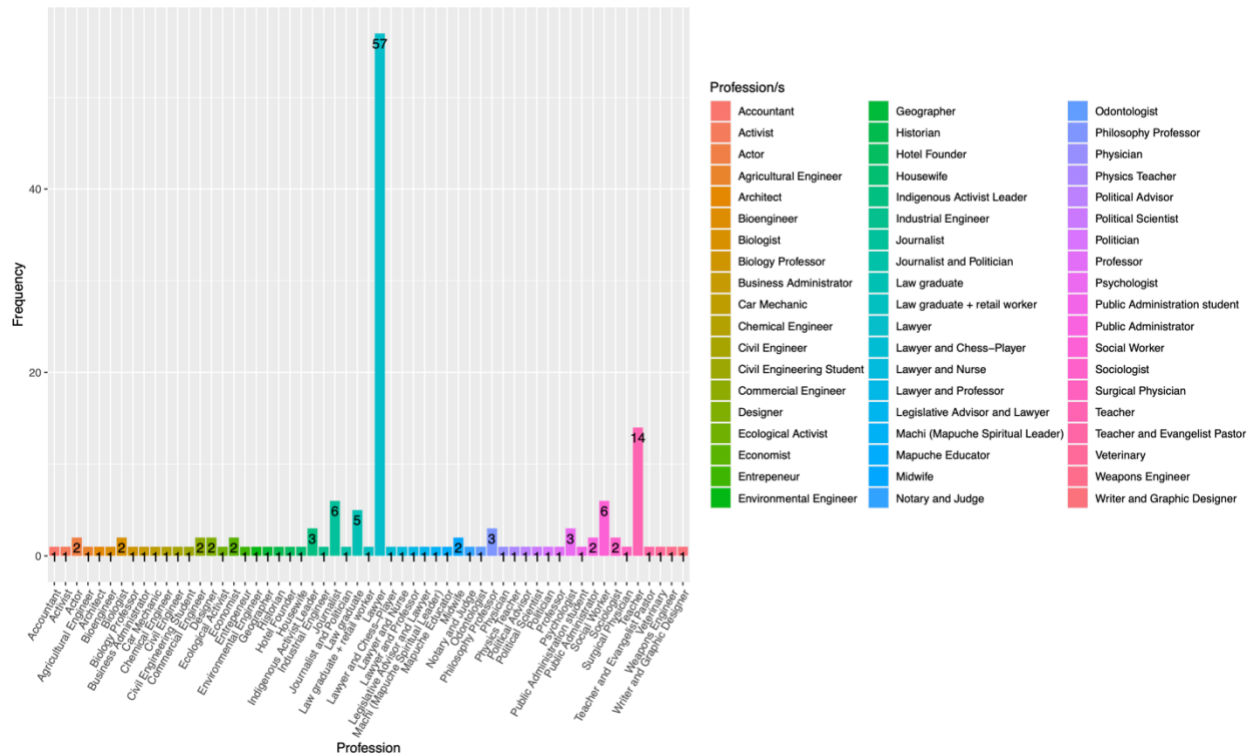


Figure 2 displays the variety of professions represented in the Convention. And this professional diversity yields very similar valuable effects as educational diversity. And I argue that this information is truly the key to unlocking the argument that there was cognitive diversity present in the Constitutional Convention given the vast array of cognitive processes represented in the constitution-making body.

*Figure 2 The CC's Composition by Professions*



As previously mentioned, constitution-making is an incredibly complex and technical process. Technocratic arguments already favor technical expertise over representation and inclusivity, but these arguments are doubled-down on specifically when applied to constitution-making considering the intricacies and legal expertise “required” to partake in such a process. Nonetheless, it is key to note that literature differentiates experts from expertise and has a series of approaches when defining what is an expert. But despite these different approaches, there is general agreement that technical expertise does not just come from a specific educational and theoretical background, it can also come from practice and, ideally, from a combination of both. This is why, aside from looking at educational experience, it is also helpful to look at professions when making a judgement of what constitutes of expertise and an expert. But nonetheless, it is clear from the later part of the creation of external procedures (in allowing the participation of independents and not putting any sort of educational or technical requirement) and from the votes of the Chilean electorate, that the Convention delegates were not all supposed to be lawyers, legal

experts, or politicians—the opposite, actually. Which is why the Convention delegates can be considered as citizen-legislators, citizens first, and legislators only within the context of the Convention. And Landemore argues that cognitive diversity can and will make up for a lack of technical expertise. Cognitive diversity on its own is already valuable and conducive to democratic reason, but cognitive diversity can also make up for a lack of technical expertise on the subject matter at hand in a process of democratic decision-making. Nonetheless, as the Chilean case study shows, cognitive diversity (alongside systematic procedures of deliberation and aggregation) was not enough to convince the Chilean voters that the Constitutional Draft Proposal produced by this Convention should be ratified. The rejection of a Constitution drafted in a Convention with the quality of cognitive diversity is a significant outcome.

Without the procedures that the Chilean Congress designed or imposed onto the Convention, this degree of representation (and therefore, cognitive diversity as demonstrated in this section) would have not been achieved. Regional representation would have been achieved given the electoral laws that ensured proportional district representation. But it is highly doubtful that the Chilean electorate would have been willing and/or able to elect a perfectly equal distribution of women and men to the Convention. And most definitely, this degree of Indigenous peoples' representation would not have been possible without these explicit pieces of legislation that reserved 17 seats out of the (originally) 155 (then, 154 given Vade's resignation) seats in the Convention for the ten different Indigenous peoples' groups represented. Furthermore, the facilitated participation of Independents, arguably, is what most influenced the conditions for there to be cognitive diversity in the Convention. As Independents are individuals not formally affiliated with political parties, these are people who have most definitely not been formally or professionally involved in politics. By actively involving people that do not have a political

background or profession, lots of non-political background and professions were represented. And with it, backgrounds that require different skill sets, perspectives, and problem-solving abilities.

*Party Dynamics: Voting Behavior and Patterns*

This section will consider two datasets which contain all the roll call votes casted in the Constitutional Convention divided by phase, the Regulatory Phase and Substantive Phase. The Regulatory Phase dataset contains the 1009 roll call votes casted that determined the contents of the Regulatory Handbook or Bylaws. The Substantive Phase dataset contains the 3508 roll call votes casted that determined the contents of the Constitutional Draft Proposal. These two datasets will be analyzed regarding party unity, focusing primarily on the patterns by political party and by political tendency. Analyzing these frequency distributions and standard deviations is valuable to understand the consistency of voting behavior within the parties and tendencies in the Convention. This is because this Constitutional Convention, in line with the ideals of democratic reason, intended, to achieve a horizontal process with high levels of representation and inclusion to create fertile ground for consensus. And the previous section demonstrated that certain externally-developed procedures created optimal conditions to have high levels of inclusion which were conducive to the achievement of cognitive diversity, as I argue.

The Chilean Congress passed specific laws that allowed and facilitated the participation of Independents in the election to select the Constitutional Convention delegates. In other words, Independents were encouraged and incentivized to participate. And this reflected the Congress appealing to the anti-party mood in Chile after the Social Outbreak protests. If a new constitution would be drafted in Chile, it would be by and for “the people”—and this was demonstrated in the majority vote that chose a Constitutional Convention over a Mixed Constitutional Convention as the constitution-making body. Chileans, by electing with an overwhelming majority a Constitutional Convention whose all members had to be elected citizens, demanded to be rid of

traditional-party politics the minute they were given the option. Nonetheless, as evaluated earlier, up until that point and until the CC began exercising its functions, traditional party politics procedurally led the Process.

Figure 3 shows the distribution of general political parties represented. I specify that this is the general political party distribution because most delegates ran under very small Independent lists and delegates representing Indigenous peoples ran under their particular groups. In total and in detail, there were technically 51 different lists/parties represented among the 154 delegates in the Constitutional Convention.<sup>136</sup> But when conflating all of the Independents in one category and all of the delegates belonging to different Indigenous peoples groups in one, we are left with 12 “political parties”: 10 of these are established Chilean political parties, one contains all the delegates that ran as Independents, and one contains all the delegates representing Indigenous peoples groups. As Figure 3 shows, Independents held the concentrated majority, a total of 87 of the 154 delegates ran through independent lists, over half of the Convention. The second largest unified concentration are the 17 Indigenous peoples’ reserved seats. And after that, three established political parties were tied at 10 delegates at having the third greatest concentrations. But to put these numbers in perspective, the largest proportion of delegates established political parties held in the Convention was 6% or less, each. Having delegates that are “nonpartisan” is valuable to a constitution-making body to the extent that they will not be tied to representing party interests, but it is a limitation as it makes the achievement of consensus (in this case with a 2/3 supermajority) significantly more burdensome.<sup>137</sup> These general political parties, except for

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<sup>136</sup> “Elecciones En Chile: Candidatos Independientes y de La Oposición Dominan La Asamblea Que Redactará La Nueva Constitución,” BBC News Mundo, May 17, 2021, <https://www.bbc.com/mundo/noticias-america-latina-57139669>.

<sup>137</sup> Gabriel L. Negretto, “Democratic Constitution-Making Bodies: The Perils of a Partisan Convention,” *International Journal of Constitutional Law* 16, no. 1 (May 12, 2018): 254–79, <https://doi.org/10.1093/icon/moy003>.



the first two, the Independents and Indigenous peoples' quotas, are ordered from left to right in the Chilean political spectrum.

Figure 3 The CC's Composition by (General) Political Parties

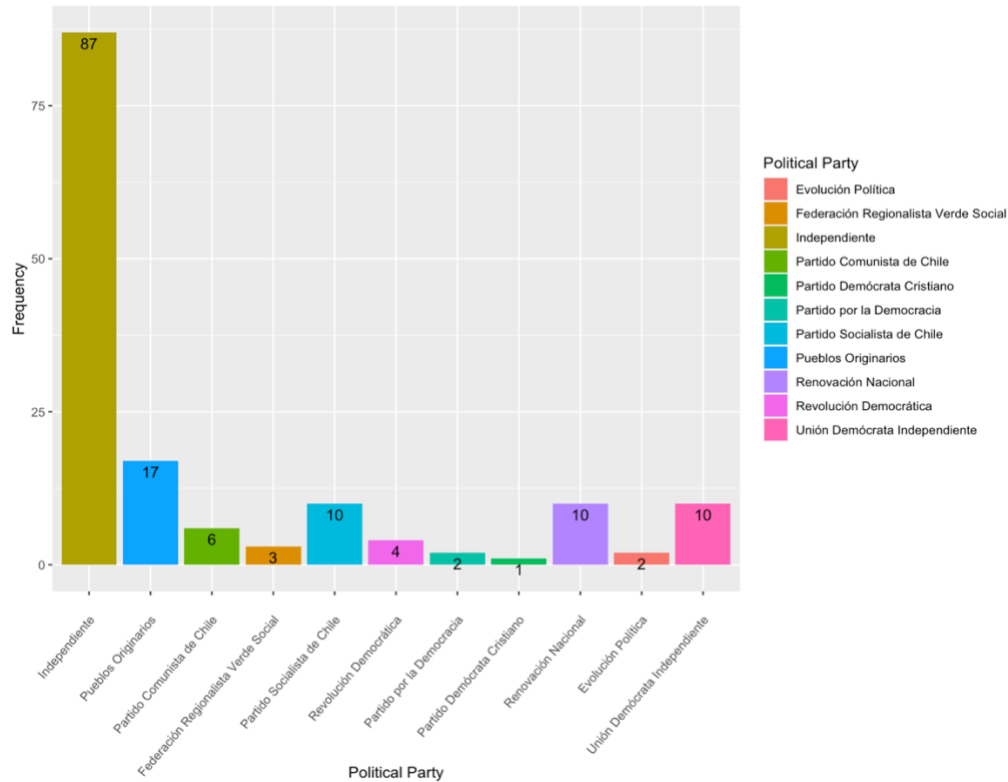


Figure 4 shows the distribution of different political tendencies represented. Again, I have grouped Independent, all those not formally affiliated with a political party, into a single category and delegates representing Indigenous peoples into another category. Running with an Independent list is not the same as having an Independent affiliation, which is why the number of Independents decreased. Some delegates that ran with an Independent list supported a party. So, this figure aims to focus on a simplified distribution of affiliations. Government or *Oficialismo* refers to the governing coalition of political parties—considered here as current President Gabriel Boric’s coalition which encompasses center-to-left-wing parties. And Opposition or *Oposición* refers to the opposing coalition—considered here as the current opposition of center-to-right-wing parties. This distribution is relevant because of the argument made on the salience of the 2/3

supermajority voting quorum paired with the presence of Independents. Considering the Opposition (center-to-right-wing parties) failed to secure a third of the seats in the Convention, the Chilean right was left with no bargaining power in agreements as they did not have an informal “veto” power, meaning the numbers to block motions. As a result, I argue that an entire sector of the Chilean political spectrum was ignored in negotiations; they did not have to be taken seriously because they did not have the numbers of be meaningfully included in negotiations. This thesis does not consider whether the left-wing or the right-wing actors were “good faith” actors in negotiations. But it does consider the way numbers and representation impacted the dynamics of deliberation. The way that the Convention was composed with these political affiliations was counterproductive because it yielded an environment of adversarial instead of consensus politics; delegates from different ideological currents saw each other as barriers and obstacles to their own goals instead of fellow collaborators, all because “what really mattered” was achieving a 2/3 supermajority. And in this case, allowed for the right wing to be set aside in negotiations because they could not pose a credible threat or obstacle, which bred more tension within the Convention.

*Figure 4 The CC's Composition by Political Tendency*

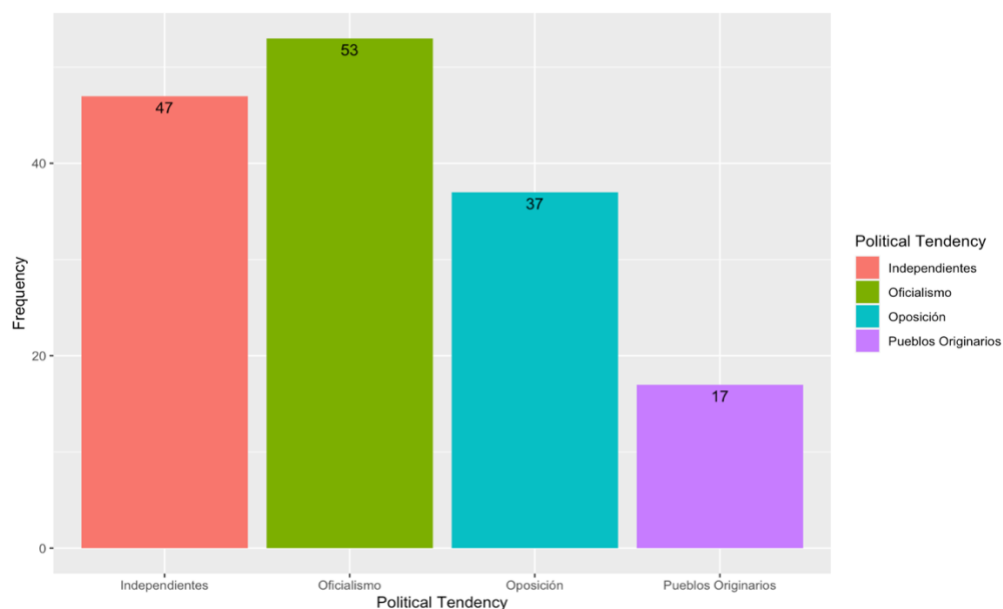
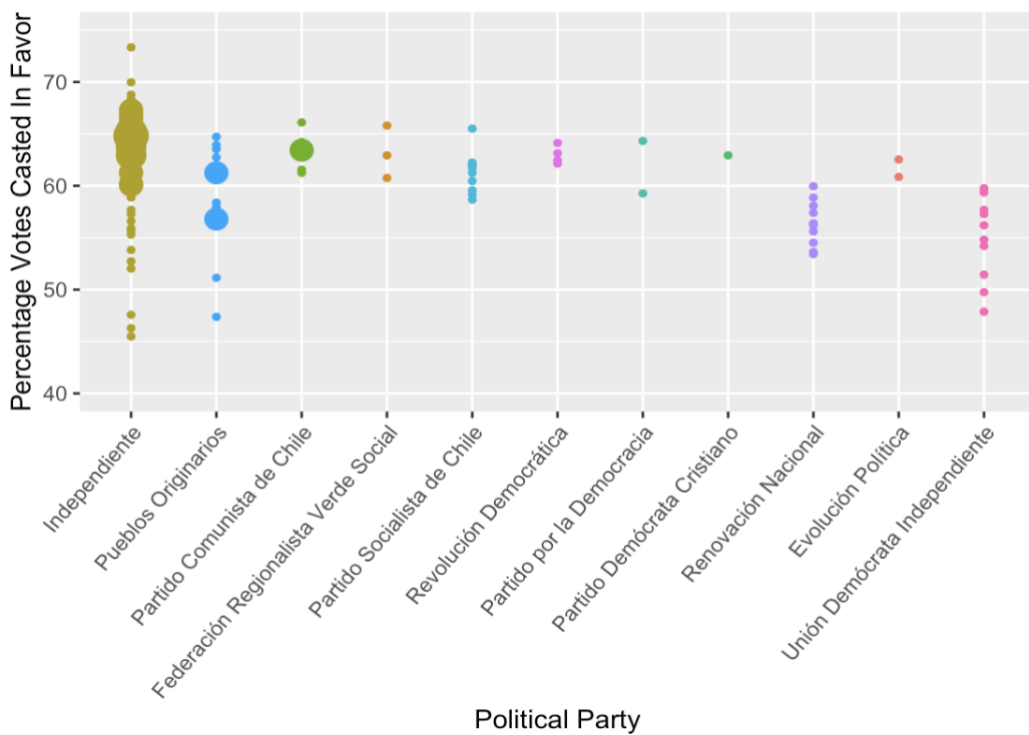


Figure 5 shows the frequency distribution by political party regarding the in-favor votes casted by the Constitutional Convention delegates in the Regulatory Phase of the Convention’s work. Visually, the distributions are relatively similar in the sense that the average for each seems to be around 60-70% of the votes casted in-favor for each general political party. Not even getting into actual statistics, just visuals, I aim to show that political parties in the regulatory phase acted very similarly. Despite ideological differences, their voting patterns show there were not many internal divergences within political parties nor substantial differences relative to other parties. Again, these parties (except Independents and Indigenous peoples’ quotas) are ordered from left to right wing. When drafting the bylaws, political parties according to their voting behavior, acted similarly internally and compared to each other.

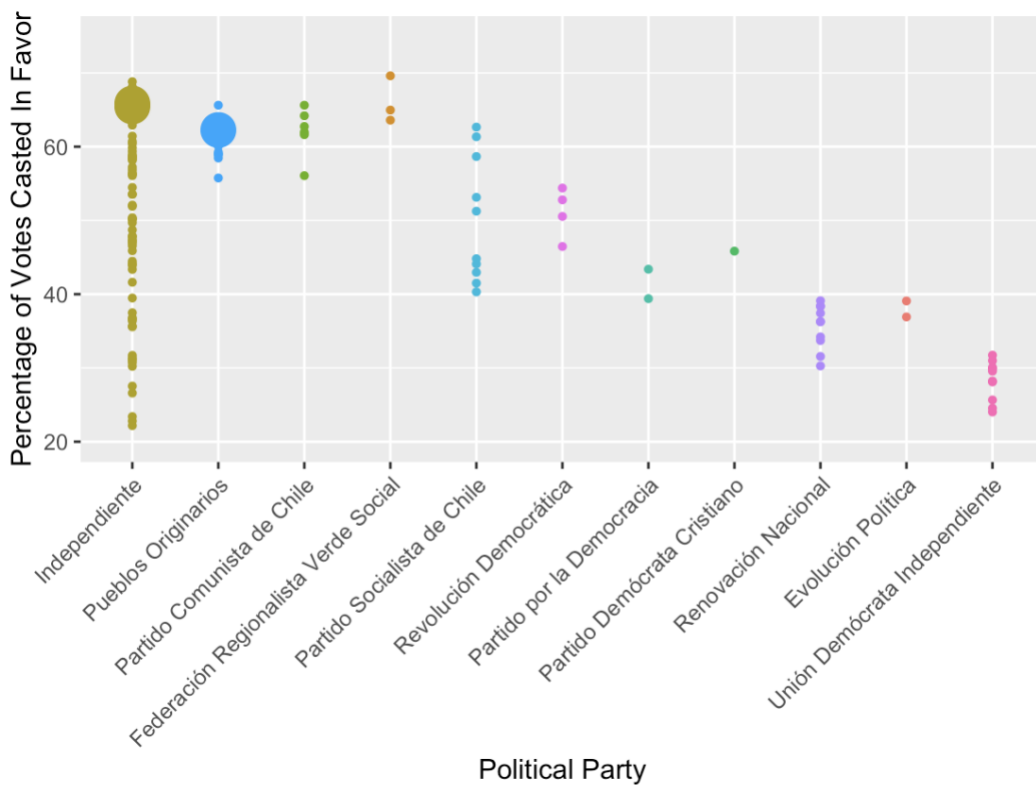
*Figure 5 Frequency Distribution of In-Favor Votes during the Regulatory Phase by Political Party*



But Figure 6, in contrast, shows a completely different voting pattern and behavior. During the substantive phase, when the votes determined what kind of content, policies and norms went

into the Constitutional Draft Proposal, parties began establishing very distinct behavior to each other. Independents have the biggest widespread voting frequency, meaning Independent members voted differently to each other. It makes sense that they did not demonstrate party unity as they were not an established party, they were Independents. On the other hand, there is radical contrast between the party unity of Independents and the party unity of established parties.

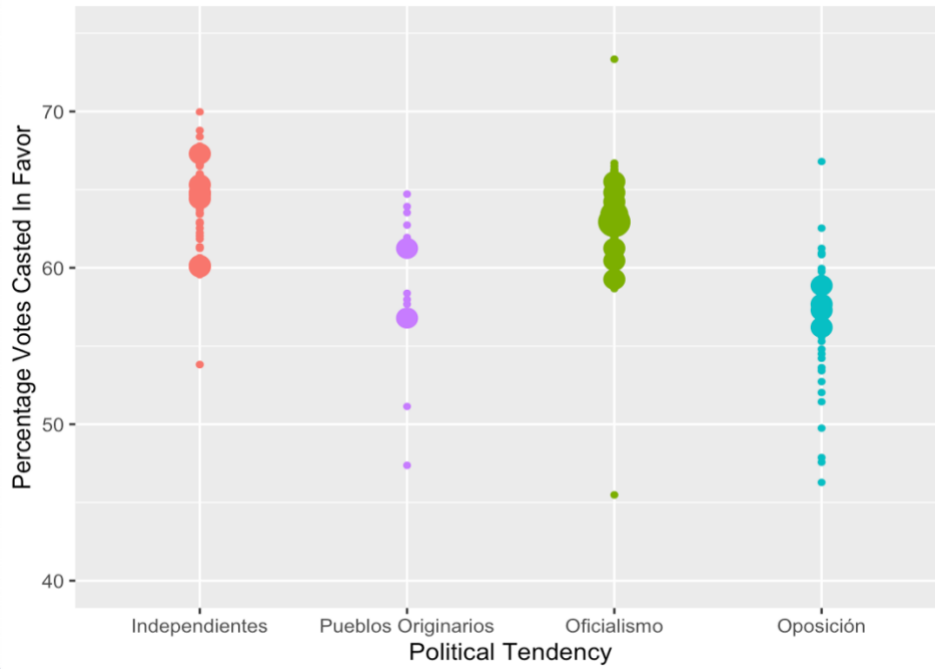
*Figure 6 Frequency Distribution of In-Favor Votes during the Substantive Phase by Political Party*



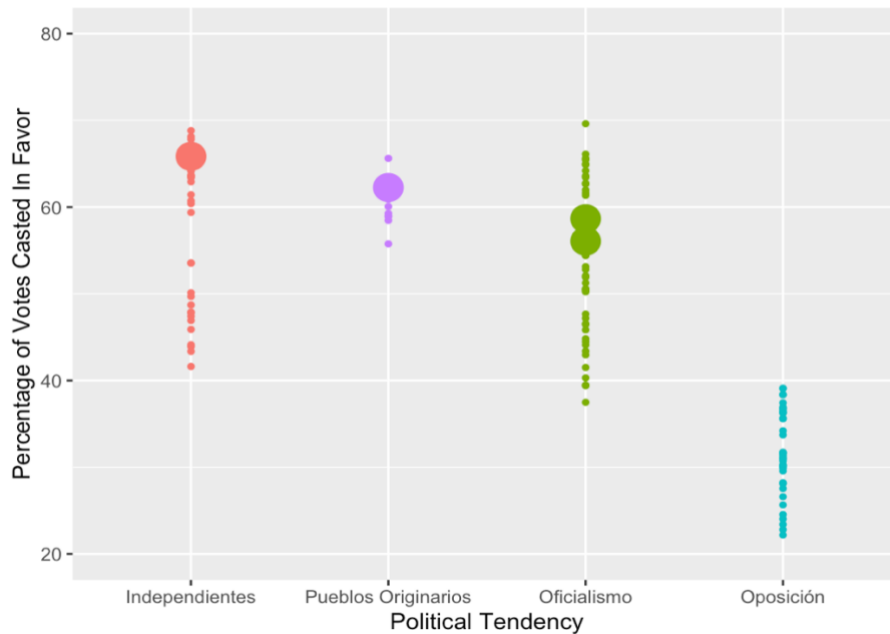
Figures 7 and 8 show the frequency distribution in the regulatory and substantive phases of votes casted in favor by members of different political tendencies. Boiling down groupings by political trends allows for a more digestible interpretation for those who are not familiar with the Chilean political landscape. While it is a simplification and that can be a limitation, it is a useful way to process the information. Figure 7 shows that there was not much tendency unity during the regulatory phase for the debate for the Opposition coalition and the Indigenous peoples' groups.

But that there was tendency unity for Independents and the Government coalition. While the Government coalition does have outliers in both extremes, it displays unity within the trend.

*Figure 7 Frequency Distribution of In-Favor Votes during the Regulatory Phase by Political Tendency*



*Figure 8 Frequency Distribution of In-Favor Votes during the Substantive Phase by Political Tendency*



*Table 5 Standard Deviation of In-Favor Votes in the Substantive Phase by Political Tendency*

<u>Political Tendency</u>	<u>Standard Deviation</u>
Independientes	8.54
Oficialismo	8.30
Oposición	4.95
Pueblos Originarios	2.36

Table 5 and Figure 8 show the frequency, distribution, and deviation in the substantive phase by political tendency. Table 5 numerically shows via the calculation of standard deviations what is visually displayed in Figure 8. Table 5 and Figure 8 show that the Independents had the biggest deviation, which is unsurprising given their whole point was not to behave like a political party. But surprisingly (or not), the second largest deviation is the Government's party coalition. The Chilean center-to-left-wing parties very publicly became ideologically fragmented, but this data confirms it numerically and contained in this constitution-making body. The opposition coalition, the center-to-right-wing parties displayed a decreased standard deviation by around 35%, showing that they remained relatively united throughout the substantive phase according to their voting behavior. But the political tendency with the smallest standard deviation and the narrowest frequency distribution is the Indigenous peoples' groups. Their voting patterns remained relatively consistent within that political trend. But also, a potential confounding variable could be that their standard deviation is lower because they are also the smallest group with only 17 members. Nonetheless, these voting behaviors show that in the Convention, Independents and the Government coalition lacked unity within their political tendency, while the Opposition coalition displayed more unity, but the most united political tendency were the Indigenous peoples' groups.

#### The Chilean Constitutional Process: A Stillborn Convention?

This analysis has advanced an argument that highlights the role procedures played in the failure of the Chilean Constitutional Process. The rules of the game that the Process was bound by are an imperative piece to solve the puzzle that is the evaluation of the Chilean Constitutional

Convention's failure. As these procedures illustrate, the Process was a stillbirth. The external and internal creators of procedures were uncoordinated and had competing interests, which they could not articulate into rules that would determine the trajectory and constraints of a rule-making process.

And this paper has evaluated these procedures through the lens of democratic reason, the achievement of collective wisdom in matters relating to democratic decision-making and politics. The three components of democratic reason: the condition of cognitive diversity and the complementary mechanisms of deliberation and aggregation were wholly integrated into the Process. Procedures deliberately embedded these three components into the decision-making processes of the Convention; and yet, these were not enough to successfully produce a Constitutional Draft Proposal that the Chilean electorate could ratify. The implications of this case study paired with this theoretical framework are grave. It means that either having the quality of democratic reason in decision-making is not enough, or the procedural components within democratic reason are not specific enough to guarantee successful democratic decision-making.

Deliberation in the form of debate, communication and discussion was present and was prioritized at every stage of the Process. The first two external creators solely relied on deliberation to advance their procedural proposals embedded in the Accord for Peace and the New Constitution alongside the Reform Proposal. The other two creators, one external and one internal, the Chilean Congress and then the Constitutional Convention implemented systems of deliberation supplemented by majority voting. Aggregation and majority voting procedures are present within the decision-making frameworks of the Congress and the Constitutional Convention. But for the Constitutional Convention, this manifested in a 2/3 supermajority voting quorum for its bylaws and potential constitutional norms. And the condition of cognitive diversity was also present as a direct result of procedures which prioritized high levels of inclusion of different backgrounds,

experiences and abilities. And yet, these general procedural mechanisms were not enough to save the Process or much less guarantee the success of this decision-making process.

And this paper advances an explanation for this incongruity and tension: the negative interactions between procedures. The way some of these procedures interacted undermined their decision-making value. The primary example of this that I provide is the interaction of the inclusion of independents, the 2/3 voting quorum and the circular procedure. These three procedures were devised by three different institutional actors (the Congress, the Accord, and the Convention itself). And all these actors had differing institutional interests. Which is why, while all these procedures had their own significant epistemic value for decision-making, their value was undermined by their interaction. I cannot pinpoint which procedure was the most pernicious because I advance the argument that the interaction of these procedures was what was most pernicious. But I show how the inclusion of Independents, the defining feature of the Convention which ensured that its delegates would truly be citizen-legislators (citizens first, legislator by context), triggered a significant change of trajectory that would alter the composition of the Convention and therefore not only the kind of content they produced but their decision-making when it came to the rules that they would develop and the engagement with the rules previously (and externally) devised to constrain them.

Another example considering the interaction of different procedures is the changing role of political parties throughout the Process. Parties, partisan academics, and political elites had a monumental role in channeling the energy of the Social Outbreak protest into an institutionalized and democratic process. But these actors ironically undermined their own role in the Process when the Congress passed the norm that would facilitate the participation of independents in the Convention. And lastly, the interaction between the differing procedural norms and voting



requirements for the plebiscites as upstream and downstream constraints was negative. By having two plebiscites, and in between an election to choose the CC delegates, all with different voting requirements and conditions this produced significantly different rates of voter turnout and with it, different levels of societal consensus. All in all, my analysis shows that procedures, much like how constitutional norms were passed within the Constitutional Convention, were treated as a laundry list of constraints, and were not weaved cohesively.

Democratic reason was achieved in the Constitutional Process—but this was not enough. Procedures were meticulously crafted to ensure that the decision-making processes that took place included extensive deliberation, thorough majority and supermajority votes to aggregate decisions, and all in the context of a Constitutional Convention that was cognitively diverse. But these same procedures often made decision-making ineffective and inefficient at times and were greatly responsible for the internal dynamics of the Constitutional Convention. Democratic reason is a multi-layered concept with various normative, epistemic, and political implications. And it is a concept that is considered foundational in advocating in favor of democracy as not only the most inclusive decision-making procedure, but also the *smartest*. The inclusivity that democracy brings with it, alongside the complementary procedures of deliberation and aggregation yield democratic reason in decision-making. But this case study demonstrates that these broad mechanisms may simply not be enough.

Tragically this means that, as this argument advances, the Convention most likely did not stand a chance at succeeding in its task—and the reason why lies in the myriad of creators that were involved in procedure-creation and the wide array of procedures that were individually designed but their interactions were either unforeseen or misinterpreted. Different creators with different institutional intentions and visions subsequently constrained the following creator. And

this resulted in an inconsistent chain of rule-making processes instead of a coherent and cohesive interactive set of rules that would constrain the Process. Even if these procedures created the conditions for decision-making with the quality of democratic reason to take place, democratic reason was not sufficient nor effective at ensuring a successful democratic outcome by the Process's own standards. The Chilean electorate rejected the work of the Constitutional Convention; and I argue that one of the keys to understanding this rejection lies in the Process' overall procedural architecture that determined how the decision-making processes behind that work were going to take place. Any alternative explanation that does not consider the way that procedures guided the Process and determined the trajectory of decision-making would be myopic. This behind-the-scenes work, the crafting of the rules of the game, by different institutions and actors proved to be essential at understanding how the Process failed.

### Conclusion

Thus, as advanced in this paper, a wide array of procedures and the development of those procedures were key in determining the trajectory and fate of this past 2019-2022 Chilean Constitutional Process. The procedural architecture of the Constitutional Process can be considered one of the main sources of its failure. The Process was bound by procedures that were externally developed and imposed onto the Constitutional Convention by external institutional actors. And the Process was bound by procedures internally developed by and for the Convention itself. Despite some of these procedures, when evaluated individually, might have had significant value to facilitate and encourage democratic decision-making, the interaction of these procedures (developed by different creators) was fundamentally negative. Most procedures were faulty from their inception in theory and/or had a negative practical impact when applied to the Convention.

These procedures were analyzed using a political epistemology framework which advocates in favor of democracy as the optimal decision-making procedure with three conditions

that yield democratic reason. Under this framework, democracy is an epistemically smarter form of decision-making, because of its quality of collective wisdom applied to democratic politics. And wisdom is a quality that is desirable in constitution-making processes. While constitution-making often occurs in a time of crisis, extreme passion, and emotion for systemic change it remains so an incredibly technical process. Consensus facilitated by deliberation and aggregation in decision-making within a cognitively diverse context is considered optimal. But even if this broad framework was present in the Chilean case, the specific procedures, the creators of those procedures, and the specific composition of the constitution-making body are extremely relevant and decisive within this framework.

Rules in a rule-making process matter. The existing autopsy reports on the main causes of failure of the Convention fail to acknowledge the impacts of procedures on the Process the minute after these procedures were developed and established. But as I have elucidated, taking a step back and evaluating the rules of the game is valuable to understanding how and why this Process failed. The procedural architecture of the Chilean Constitutional Process carries a heavy burden of blame in its shoulders and provides a cautionary warning for future constitution-making processes: procedures, can and will, make all the difference.

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