The dual aversion of Chile's constitution-making process

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Chile initiated a constitution-making process in late 2019, after the major political parties signed an agreement to respond to the massive demonstrations that took over the streets in October of 2019. Dominant trends in Chile and Latin America's constitutional thought typically examine this type of process through the lenses of the constituent power or transformative constitutionalism. The authors of this essay offer a different view. They argue that Chile's constitution-making process, as designed by the multiparty agreement, manifests a double aversion: to avoid the Bolivarian way of constitution-making—including its associated constituent power narrative—and to put an end to the institutional and symbolic legacy of the Pinochet regime. In attempting to stay clear of these two negative models, the authors argue that the rules of the constitution-making process have adopted the main features of the post-sovereign model of constitution-making.

1. Introduction

Chile is in the middle of a constitution-making process. In October of 2020, 78.3% of Chileans voted in favor of starting a constitution-making procedure to replace the current Constitution, and 79% voted for the "Constitutional Convention" to be the body in charge of drafting the new constitutional text. The members of the Constitutional Convention will be elected in April of 2021.

Although the Chilean Constitution has been amended several times—most notably in 1989 and 2005—it still contains many norms of the original text, which was imposed by the Pinochet dictatorship in 1980.[1] The Constitution has been

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[1] See a study tracing the origin of each norm of the Constitution in Jaime Arancibia Mattar, Constitución Política de la República de Chile. Edición Histórica. Origen y Trazabilidad de sus normas desde 1812 hasta hoy (2020).

criticized for various reasons, and public opinion has considered it in a negative light.[2] These criticisms range from the excessive and various veto powers that tend to favor the legal *status quo*—which are partly related to the authoritarian regime's plan to entrench certain features of the system[3]—to the narrow way in which the Constitution recognizes relevant social rights, to how the Constitution interrupted Chile's political tradition,[4] and to the existence of a flawed presidential political regime that stimulates legislative gridlock and lacks sufficient incentives to build legislative coalitions and organize governmental agreements that go beyond short-term electoral pacts (as one of us has argued).[5] Some authors have also argued that the institutional arrangements of the 1980 Constitution have, until now, prevented the constituent power of the people from expressing itself,[6] and that, even after all the constitutional reforms, there is a political culture that impedes relevant social transformations.[7]

The Chilean constitution-making process was triggered by massive protests in 2019, as a result of which the political parties approved a multi-partisan agreement (the "Agreement") to initiate a constitution-making process aimed at replacing the current Constitution.[8] The parties that agreed to that process ranged from the right-wing Unión Demócrata Independiente (UDI) to the left-wing Socialist Party. The Communist Party, and a large section of the Frente Amplio (a left-wing political coalition), did not endorse the Agreement. The constitution-making process is both a bottom-up process

2 On public opinion polls, see, e.g., Programa de las Naciones Unidas para el Desarrollo (PNUD), Opinión Ciudadana y Cambio Constitucional. Análisis desde la Opinión Pública (2015).

3 These types of criticisms often include an attack on the Constitutional Court's powers and performance, on the supermajority rules that exist for approving the organic laws—sometimes also on the rules for approving constitutional amendments—and on the electoral system for electing legislators, among others. Responses to these types of criticisms often emphasize that the authoritarian enclaves have been removed by incremental and gradual amendments, that the Constitutional Court's design was agreed in a constitutional amendment approved in 2005 by socialist President Lagos and the Congress, and that the electoral system was replaced in 2015. *Cf., e.g.*, Fernando Atria, La Constitución Tramposa (2013); Claudia Heiss, *Legitimacy Crisis and the Constitutional Problem in Chile: A Legacy of Authoritarianism*, 24 Constellations 470 (2017); Christian Suárez, *La Constitución Celda o "Straightjacket Constitution" y la Dogmática Constitucional*, 24 Universum 248 (2009); Renato Cristi & Pablo Ruiz-Tagle, La República en Chile: Teoría y Práctica del Constitucionalismo Republicano (2006); José García, *Minimalismo e Incrementalismo Constitucional*, 41 Revista Chilena de Derecho 267 (2014).

4 *See, e.g.*, Juan Luis Ossa, Chile Constitucional (2020).

5 Sergio Verdugo, *On the Protests and Riots in Chile: Why Chile Should Modify Its Presidential System*, I•CONnect Blog (Oct. 29, 2019), at: www.iconnectblog.com/2019/10/on-the-protests-and-riots-in-chile-why-chile-should-modify-its-presidential-system/.

6 Fernando Atria, *Sobre la Soberanía y lo Político*, 12 Derecho y Humanidades 47 (2006). *See also* Fernando Atria, *Participación y Alienación Política: El Problema Constitucional*, *in* En el Nombre del Pueblo: Debate Sobre el Cambio Constitucional en Chile 163 (Claudio Fuentes ed., 2010); Atria, *supra* note 3. For a different approach, arguing that the Junta lost the constituent power after the return to democracy in 1989, see Renato Cristi, *Precisiones en Torno a la Noción de Poder Constituyente*, *in* El Constitucionalismo del Miedo 163 (2014). Renato Cristi, El Pensamiento Político de Jaime Guzmán: Una Biografía Intelectual (2d ed. 2011).

7 Fernando Atria, Constanza Salgado, & Javier Wilenmann, Constitución y Neutralización: Origen, desarrollo y solución de la crisis constitucional (2017).

8 Acuerdo por la Paz Social y la Nueva Constitución [Agreement for Social Peace and the New Constitution], Nov. 15, 2019.

pushed by groups favoring a constitutional replacement[9] and an elite-driven bargain that includes rules designed in a top-down way by political parties,[10] which tried to channel the social demands via representative institutions.

There are many ways in which the current constitution-making process in Chile can be explained and analyzed. Many scholars use a sovereign approach to the constituent power to try to understand the process that Chile is undergoing. For example, in their introduction to a symposium on Chile's constitution-making process, Emilios Christodoulidis and Marco Goldoni claim that Chile is living "volatile revolutionary irruptions or norm-giving and dramatically emancipatory social activity," offering a moment of "constituent power";[11] Octavio Ansaldi and María Pardo-Vergara argue that the constitutional scheme has blocked the "people's political agency" and that the idea of the popular constituent power is crucial for understanding the Chilean process as a way to challenge the 1980 Constitution;[12] and Fernando Atria claims that the constituent power can—but does not need to—recognize the Agreement.[13] Other scholars, such as Samuel Tschorne, have decided to use a post-sovereign approach to understand the way the constitution-making process was designed;[14] Benjamin Alemparte has argued that the Agreement represents the institutional interests of the political parties,[15] and one of us has suggested that the institutional arrangements of the Chilean constitution-making process can be understood as a compromise between evolutionist and revolutionary views.[16]

This article offers a different approach. We argue that Chile's constitution-making process is an example of what Kim Lane Scheppele has called "aversive constitutionalism." Aversive constitutionalism pays attention to "the *negative models* that are prominent in

[9] One of the drafting committee members of the constitution-making rules has argued, in a somewhat rhetorical tone, that the "true authors of the constitutional reform were not the parties nor the Congress, but the millions of Chileans that, through social mobilization, have demanded deep institutional and socioeconomic structures." *See* Claudia Heiss, ¿Por qué Chile Necesita una Nueva Constitución? 118–19 (2020) (translation by authors).

[10] Lisa Hilbink shows how the involvement of the major political parties, including the right-wing political parties, is both an advantage and a risk of the process, because the Agreement can be perceived as a closed-door elite bargain. *See* Lisa Hilbink, *¡Nueva constitución o nada! Promesas y trampas del momento constitucional chileno*, 6 Derecho y Crítica Social 96 (2020).

[11] Emilios Christodoulidis & Marco Goldoni, *Introduction: Chile's 'Constituent Moment'*, 31 Law Critique 1, 4 (2020).

[12] Octavio Ansaldi & María Pardo-Vergara, *What Constitution? On Chile's Constitutional Awakening*, 31 Law and Critique 7 (2020).

[13] Fernando Atria, *Constituent Moment, Constituted Powers in Chile*, 31 Law Critique 51 (2020). Other scholars who have examined the constitution-making process from the perspective of the constituent-power theory include Jaime Bassa, Chile Decide por una Nueva Constitución 182–6 (2020); Heiss, *supra* note 9, at 126–9.

[14] Samuel Tschorne, *Las claves conceptuales del debate constitucional chileno: Poder constituyente, legitimidad de la Constitución y cambio constitucional*, 160 Estudios Públicos 81 (2020). One of us has also argued that Chile's constitution-making procedure possesses some post-sovereign features. *See* Sergio Verdugo, *Chile's New Constitutional Experiment*, 4 Quaderni Costituzionali 842 (2020).

[15] Benjamin Alemparte, *The Institutional Interest of Political Parties in Chile's Constitution-Making Process*, I•CONnect Blog (Nov. 17, 2020), www.iconnectblog.com/2020/11/the-institutional-interest-of-political-parties-in-chiles-constitution-making-process/.

[16] Sergio Verdugo, *La necesidad del pragmatismo constitucional en Chile: una solución común para constituyentes y evolucionistas*, IberICONnect Blog (Nov. 24, 2020, at: https://bit.ly/3iFiELm.

constitution builders' minds."[17] It is partly backward looking: it looks at past institutions, principles, and processes to construct an idea of what went wrong and how to avoid it.[18] These critiques then constitute the "negative building blocks of a new constitutional order"; they incorporate a "sense of rejection of a particular constitutional possibility."[19]

Aversive constitutionalism is not the same as identifying "anticanonical" materials, such as a morally repugnant precedent (particularly relevant in common law jurisdictions), or simply making arguments from negative ideas.[20] Canonical materials and ideas associated with the anti-canon can overlap with aversive constitutionalism, but the latter, as developed by Scheppele, requires something more. Aversive constitutionalism involves constitutional designers and politicians (and sometimes also judges) positively affirming that a constitutional model or a constitutional idea is wrong, does not fit, or is incompatible with the constitutional plans set out in the drafting process.

Aversive constitutionalism can be inward or outward looking: it can involve the rejection of materials or political ideas from the constitution builders' own jurisdiction, or it can be *comparative* and reject foreign constitutional models.[21] An example of an outward-looking aversion is presented in Sujit Choudhry's article, which uses Scheppele's framework to argue that the infamous American Supreme Court's *Lochner* era has worked as an "anti-model" regarding the adoption and implementation of the Canadian Charter of Rights and Freedoms.[22]

The nature or quality of the rejection required by aversive constitutionalism is also important. The consideration and rejection of a constitutional option by constitution-builders is not necessarily a form of aversive constitutionalism. The latter requires an emphatic rejection with "substantial constitutional weight"; a rejection which manifests a refusal or aversion that communicates something like "this would be horrifying to adopt."[23] In drawing this distinction, Scheppele mentions the example of Poland's refusal to adopt the American federal and judicial models as a rejection that does not fall within the purview of aversive constitutionalism.[24] If there was an aversion in Poland's constitution-making process, it was the rejection of its previous Communist experience.[25]

Aversions such as Poland's are common in other societies undergoing transitions to democracy and can be seen in the South African Constitution's rejection of the

[17] Kim Lane Scheppele, *Aspirational and Aversive Constitutionalism: The Case for Studying Cross-Constitutional Influence Through Negative Models*, 1 Int'l J. Const. L. 296, 300 (2003).

[18] *Id.* at 300.

[19] *Id.*

[20] *See, e.g.*, Jamal Greene, *The Anticanon*, 125 Harv. L. Rev. 379, 403 (2011).

[21] This type of negative model "emphasizes explicit distinction and contrast from other polities' imperfect constitutional experiences as a means for justifying a given polity's advanced constitutional practices." *See* Ran Hirschl, *The Question of Case Selection in Comparative Constitutional Law*, 53 Am. J. Comp. L. 125, 132 (2005). *See also* Vicki C. Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 Harv. L. Rev. 109, 113 (2005) ("Constitutions can also provide basis for resistance to, or differentiation from, foreign la or practice").

[22] Sujit Choudhry, *The* Lochner *Era and Comparative Constitutionalism*, 2 Int'l J. Const. L. 1, 27 (2004) ("Thus, *Lochner* not only influenced the initial drafting of the Charter, but also was invoked to oppose amendments to entrench property rights"). *See also* Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.).

[23] Scheppele, *supra* note 17, at 302–3.

[24] *Id.*

[25] *Id.*

apartheid regime.[26] Other examples of aversive constitutionalism are the United States' rejection of the British "absolute Tyranny over these States,"[27] which involved a specific list such as establishing taxes without consent;[28] and New Zealand's Bill of Rights' rejection of a previous political experience.[29]

Using this framework, we argue that the Chilean constitution-making process can be understood as manifesting a dual aversion or a rejection of two negative models: first, of the Pinochet era and its constitutional plans, and second, of the Bolivarian approach to constitution-making, including its associated constituent power dimension. In rejecting these two models, Chile has embraced some features of the post-sovereign model, as described by Arato.[30]

The remainder of this article proceeds as follows. The next section explains how the dictatorship's constitutional model is operating as the first aversion of the current Chilean constitution-making process. Section 3 outlines the main features of the Bolivarian model, based on a sovereign and transformative approach to constitution-making, and briefly presents the post-sovereign alternative as a contradictory model to the Bolivarian one. Section 4 explains how the Chilean designers of the current constitution-making process rejected the Bolivarian model and, instead, preferred to design a process with some features of the post-sovereign paradigm. Section 5 concludes by pointing out some challenges that the Chilean constitution-making process will face.

2. Chile's constitution-making process and the rejection of Pinochet's legacy

> Since the return to democratic rule, this is the only time that we have the real possibility of enacting a new constitution that can reflect the dreams of Chileans. It is time to put an end to the dictatorship's Constitution, which establishes a system based on [economic] subsidiarity, that does not recognize nor guarantee social rights, that does not establish real citizens' participation [. . .], that does not guarantee the right to water and natural resources, that establishes a super presidentialism that prevents Congress from advancing in undertaking deep social transformations [. . .].[31]

[26] *Id.* at 303–5.

[27] The Declaration of Independence (U.S. 1776).

[28] Scheppele, *supra* note 17, at 308.

[29] D. Erdos, *Aversive Constitutionalism in the Westminster World: The Genesis of the New Zealand Bill of Rights Act (1990)*, 5 Int'l J. Const. L. 343 (2007):

> I argue that the general, perhaps predictable wariness of incumbent politicians with regard to a bill of rights was mitigated by the Labour elites' negative political experiences under the previous and apparently authoritarian government of Robert Muldoon (1975–1984). [. . .] This negative experience produced within Labour a new aversive mindset in favor of reform, particularly in the area of procedural Rights.

Id. at 362. *See also* Bill of Rights Act 1990, No. 109 (N.Z.).
For a different approach on the New Zealand Bill of Rights, see Ran Hirschl, Towards Juristocracy: The Origins and Consequences of the New Constitutionalism (2004).

[30] *See infra* note 51.

[31] Biblioteca del Congreso Nacional, *Historia de la Ley N° 21.200: Modifica el Capítulo XV de la Constitución Política de la República* 270 (Apr. 3, 2020), https://bit.ly/3o9DZ0O [hereinafter *Historia de la Ley N° 21.200*].

With those words, Maya Fernández, a member of Congress from the Socialist Party, argued in favor of a new constitution. Several other interventions by legislators—from the far left to the center—during the debates aimed at implementing the Agreement made similar remarks. They emphasized the need to get rid of the dictatorship's legacy, both for symbolic reasons and for the perception that the current Constitution is still helping to preserve the dictatorship's neoliberal and conservative plans, as well as granting excessive veto powers to a minority.[32]

The rejection of Pinochet's constitution and legacy, as seen in these remarks, fits with examples of aversive constitutionalism present in societies undergoing transitions to democracy. However, Chile's rejection of the Pinochet constitutional model differs in an important way from other examples of aversive constitutionalism associated to transitions. Unlike South Africa, where the transition itself involved the development of a new constitutional order, Chile's transition took place in the early 1990s with basically the same constitutional document that had ruled the country since 1980: Pinochet's Constitution. The plan was to introduce amendments to that document, starting in 1989, but there was never a complete replacement of the original text. In other words, Chile's transition to democracy did not involve creating a new constitutional order that would reject the dictatorship's legacy and create a symbolic new beginning. Perhaps as a result of that, Pinochet's Constitution has emerged as one of the negative models in the current constitution-making process. In particular, this aversion focuses on certain democratic deficits associated to the 1980 Constitution and the dictatorship's original embracement of neoliberalism as the country's economic model. Indeed, Pinochet's original constitutional plans aimed at building a democracy protected by the military, and included the existence of power-sharing institutions with strong veto powers, as well as a bill of rights that promoted conservative values, strong economic liberties, and property rights.[33] All these themes are present in the legislative debate concerning the Agreement and have been prevalent in academic work and public opinion.

Because the 1980 Constitution has been amended several times and nobody seriously doubts that Chile is a competitive democracy nowadays,[34] the rejection of

[32] See, e.g., the interventions by representatives Marcelo Díaz (*id.* at 265), Carmen Hertz (*id.* at 266–7), Tucapel Jiménez (*id.* at 274), Jaime Mulet (*id.* at 277–8), Felix González (*id.* at 279–80), Natalia Castillo (*id.* at 282), Maya Fernández (*id.* at 270), Andrea Parra (*id.* at 284–5), Camila Vallejos (*id.* at 306–7), Boris Barrera (*id.* at 328–9), and Vlado Mirosevic (*id.* at 329); senators Felipe Harboe (*id.* at 433–4) and Juan Pablo Letelier (*id.* at 463–4); legal scholars Claudia Sarmiento (*id.* at 118–20), Fernando Atria (*id.* at 129–33), and Francisco Zúñiga (*id.* at 136–7); and the bill presented by former President Bachelet in April 2017 (Bill N° 022-365), which was discussed in the sessions where the interventions took place. All of these interventions and materials can be found in *Historia de la Ley N° 21.200*, *supra* note 31. An interesting example is Miguel Crispi's intervention, which emphasized the democratic deficits of the dictatorship's constitutional model by taking the symbolism about breaking with the dictatorship's legacy further and relating it to the congressional building itself: "The building of Parliament has incredible acoustics. Pinochet probably designed it so that we wouldn't hear what is going out outside, where there are hundreds of thousands of people protesting." *Id.* at 343 (translation by authors).

[33] *See, e.g.*, Robert Barros, Constitutionalism and Dictatorship: Pinochet, the Junta, and the 1980 Constitution (2002); Javier Couso et al., Constitutional Law in Chile (2013).

[34] The 2019 democratic index, for example, considers Chile to be a "full democracy." *See Democracy Index 2019*, The Economist Intelligence Unit, www.eiu.com/topic/democracy-index (last visited Jan. 22, 2021).

Pinochet's legacy is not an obvious instance of aversive constitutionalism (even though it may appear so at first sight). Although many Chileans still blame the Pinochet Constitution for preventing elected majorities from advancing relevant social reforms (e.g. when the Constitutional Court partly prevented the second Bachelet administration from enacting legislative bills aimed at reforming areas such as labor law and consumer protection legislation),[35] many features of the original document no longer exist due to constitutional amendments and legislative modifications to the organic laws. Nonetheless, there are some areas where constitutional reforms have not occurred or where they have not been effective in modifying some features of the original 1980 Constitution. Some scholars and public intellectuals, as shown below, believe that these features partly explain why social reforms have not been advanced in critical areas such as healthcare and the pension system. It is with respect to these areas that aversion towards the Pinochet Constitution can be seen most clearly.

Regarding the democratic deficits of the constitutional regime created by Pinochet, some scholars have argued that the Pinochet Constitution "cheated" on democracy by ensuring that the right-wing minority would always have veto power over elected majorities,[36] creating a sort of semi-sovereign democracy[37] and a straightjacket constitutional system.[38] Others have argued that subsequent constitutional amendments did not really modify its most relevant parts,[39] and thus were not effective in addressing these concerns. As a result, the idea of there being in Chile a "protected democracy," or a regime with democratic deficits originating in the Pinochet Constitution, is a legacy that the current constitution-making procedure aims to reject.

Regarding the Constitution's apparent association with neoliberalism, the bill of rights—and, in particular, the protection of economic liberties and property rights—has undergone few formal modifications, despite innovative judicial interpretations that have expanded the protection of social rights in areas such as healthcare and labor rights.[40] In this regard, the rejection of Pinochet's Constitution can be understood as the rejection of the dictatorship's embrace of neoliberalism as the country's

[35] *See, e.g.*, STC 2935 of 2015, STC 3016 and 3026 of 2016, and STC 2012 of 2018. For criticisms against the Court and against those decisions, see Atria, Salgado, & Wilenmann, *supra* note 7; Fernando Atria, *Sobre el Tribunal Constitucional en la doctrina tradicional (i): El conceptualismo constitucional*, 6 Derecho y Crítica Social 114 (2020); Fernando Atria, *Sobre el Tribunal Constitucional en la doctrina tradicional (ii): Propuestas finales*, 6 Derecho y Crítica Social 161 (2020).

[36] Atria, *supra* note 3; Fernando Atria, *La Constitución Tramposa y la Responsabilidad del Jurista*, *in* Nueva Constitución y Momento Constitucional: Visiones, Antecedentes y Debates 15 (Francisco Zúñiga ed., 2014).

[37] Carlos Huneeus, La Democracia Semisoberana: Chile Después de Pinochet (2014).

[38] Suárez, *supra* note 3.

[39] Pablo Ruiz-Tagle, *La Trampa del Neopresidencialismo: La Constitución "Gatopardo,"* *in* La República en Chile: Teoría y Práctica del Constitucionalismo Republicano 197 (2006).

[40] Some scholars argue that judicial interpretation on these two rights has changed the meaning of the original text. *See* Jaime Bassa Mercado & Bruno Aste Leiva, *Mutación en los Criterios Jurisprudenciales de Protección de los Derechos a la Salud y al Trabajo en Chile*, 42 Revista chilena de derecho 215 (2015). *See also* Miriam Henríquez Viñas, *¿Activismo judicial en la obtención de cobertura adicional para enfermedades catastróficas? Análisis jurisprudencial 2006–2009*, 8 Estudios Constitucionales 401 (2010); Alejandra Zúñiga Fajuri, *El Derecho a la Vida y el Derecho a la Protección de la Salud en la Constitución: Una Relación Necesaria*, 9 Estudios Constitucionales 37 (2011). For an academic proposal reinterpreting the right to healthcare, see Constanza Salgado M., *Derechos Sociales, Protección de la Salud e Interpretación Constitucional*, 22 Revista de Derecho (Coquimbo) 401 (2015).

economic model.[41] As Cardoso has argued, the constitutional problem in Chile is connected with the gradual erosion of public trust in technocratic elites associated with the dictatorship's economic and political legacy.[42] This aversion towards the economic model of the Pinochet Constitution also overlaps with the transformative undercurrent of the Chilean constitutional movement and its emphasis on social, economic, and cultural rights.

The political discourse and public opinion have associated the existence of unprotected social and economic rights and the lack of change in this area in the past decades with legislative gridlock, which is attributed to some features of the constitutional model. However, there is no academic consensus as to why legislative gridlocks occur in the Chilean system and whether, and to what extent, they have prevented social change. The critics of the Chilean Constitution tend to blame the Constitutional Court, the supermajority requirement to modify the Constitution, and the organic laws; others blame the combination of the presidential regime with an electoral system that produces fragmentation in Congress; some challenge the short (non-renewable four-year) presidential term limit; and others blame polarization or ideological differences.[43] Of course, a multi-causal explanation is also possible. In any case, the association between the Constitution and the existence of unprotected social rights seems to be predominant in Chilean politics and public opinion.

Finally, the rejection of the Pinochet Constitution has an expressive or symbolic dimension, whereby Chile can be seen as breaking with the dictatorship's legacy for good—arguably, this can be seen as the final step in the consolidation of Chile's transition to democracy. A previous attempt to express a break with the Constitution through constitutional amendments failed. In 2005, President Lagos replaced Pinochet's signature in the Constitution with his own and presented the 2005 amendment as a "new constitution," which involved not only a break with the past, but also the establishment of a new constitutional order.[44] However, many politicians rejected President Lagos's symbolical gesture and still associated the post-2005 Constitution with the Pinochet regime; scholars still identified some institutional arrangements that can be criticized from a democratic perspective;[45] and even Lagos himself later recognized that his gesture failed to legitimize the Constitution and, instead, promoted

[41] *See, e.g.*, Javier Couso & Lisa Hilbink, *From Quietism to Incipient Activism: The Institutional and Ideological Roots of Rights Adjudication in Chile*, *in* Courts in Latin America 99 (Gretchen Helmke & Julio Ríos-Figueroa eds., 2011).

[42] João Vitor Cardoso, *Cambios socio-económicos y legitimación constitucional: Camino hacia una nueva constitución en Chile*, 6 Derecho y Crítica Social 68 (2020).

[43] See, e.g., a case study considering these factors regarding the reform to the healthcare system: Pablo Villalobos Dintrans, *Why Health Reforms Fail: Lessons from the 2014 Chilean Attempt to Reform*, 5 Health Systems & Reform 134 (2019). *See also* Tschorne, *supra* note 14; Rosalind Dixon & Sergio Verdugo, *Social Rights and Constitutional Reform in Chile: Towards Hybrid Legislative and Judicial Enforcement* (2020) (Unpublished manuscript, on file with authors).

[44] *See* Ricardo Lagos Escobar, *Una Constitución para el Bicentenario*, *in* Reforma Constitucional 19 (Francisco Zúñiga Urbina ed., 2005).

[45] *See, e.g.*, Javier Couso & Alberto Coddou, *Las Asignaturas Pendientes de la Reforma Constitucional Chilena*, *in* En el Nombre del Pueblo: Debate Sobre el Cambio Constitucional en Chile 191 (Claudio Fuentes ed., 2010).

a total constitutional replacement.[46] Moreover, the Constitution remained an instrument that divided Chileans—polls consistently showed strong support for a new constitution,[47] and some of them explicitly connected the constitutional problem with Pinochet's legacy[48]—and subsequent efforts were made to modify and replace it.[49] For example, in 2009 three presidential candidates proposed a total constitutional replacement, and in 2011 the student protests endorsed the demand for a new constitution.[50]

To summarize, the current demand for a new constitution stems from a transformative intention to reject the dictatorship's legacy and its constitutional plans, even though the Constitution has been reformed numerous times and the literature is yet to produce a consensus on the reasons for legislative gridlock in critical areas such as healthcare.

3. The Bolivarian approach and the post-sovereign paradigm

The rejection of the Bolivarian approach—that is, the second negative model—can be seen in many features of the current constitution-making process. By rejecting this model, Chile's constitution-making process has embraced some features of the post-sovereign paradigm, as described by Andrew Arato.[51]

The Bolivarian approach is the kind of transformative constitutionalism that inspired the constitution-makers of Venezuela (1999), Ecuador (2008), and Bolivia (2009). It combines transformative goals and an emphasis on social rights with an unconstrained constituent power theory and a strong executive branch. It also weakens limits on political power, frequently includes forms of plebiscitary democracy, adopts a post-liberal approach to the constitution, and enhances descriptive and symbolic forms of representation.[52]

[46] Ricardo Lagos Escobar, *La Cuestión Constitucional: Reflexiones de un Actor*, 139 Estudios Públicos 197, 198–9 (2015).

[47] PNUD, *supra* note 4.

[48] *See supra* note 32.

[49] José Saldaña, *Reformas Constitucionales en el Chile Democrático: Análisis de Tendencias 1992–2008*, *in* En el Nombre del Pueblo: Debate Sobre el Cambio Constitucional en Chile 85 (Claudio Fuentes ed., 2010). *See also* Claudio Fuentes Saavedra, El Pacto (2012).

[50] *See* Sofia Donoso, *Democratizing Force: The Political Impact of the Student Movement in Chile*, 39 New Perspectives 167 (2016); Jean Grugel & Jewellord Nem Singh, *Protest, Citizenship and Democratic Renewal: The Student Movement in Chile*, 19 Citizenship Stud. 353 (2015).

[51] *See generally* Andrew Arato, Post Sovereign Constitution Making: Learning and Legitimacy (2016); Andrew Arato, *Redeeming the Still Redeemable: Post Sovereign Constitution Making*, 22 Int'l J. Pol. Culture & Soc'y 427 (2009); Andrew Arato, *Beyond the Alternative Reform or Revolution: Post Sovereign Constitution-Making and Latin America*, 50 Wake Forest L. Rev. 891 (2015); Andrew Arato, The Adventures of the Constituent Power: Beyond Revolutions? (2017). One of us has previously claimed that Arato's model seems to fit well with the main rules of Chile's constitution-making process, although briefly. *See* Verdugo, *supra* note 16.

[52] *See, e.g.*, Phoebe King, *Neo-Bolivarian Constitutional Design*, *in* Social and Political Foundations of Constitutions 366 (Denis J. Galligan & Mila Versteeg eds., 2013); Almut Schilling-Vacaflor, *Bolivia's New Constitution: Towards Participatory Democracy and Political Pluralism*, 90 Eur. Rev. Latin Am. & Caribbean Stud. 3 (2011); Javier Couso, *Radical Democracy and the "New Latin American Constitutionalism"* (Yale L. School Lat. Am. Stud. Working Paper, 2013); Jonas Wolff, *New Constitutions and the Transformation of Democracy in Bolivia and Ecuador*, *in* New Constitutionalism in Latin America: Promises and Practices 183 (Detlef Nolte & Almut Schilling-Vacaflor eds., 2012); José M. Díaz de Valdés & Sergio Verdugo, *The ALBA Constitutional Project and Political Representation*, 17 Int'l J. Const. L. 479 (2019).

Although the idea of transformative constitutionalism originated in South Africa,[53] the language of transformative constitutionalism has been used in various and distinct ways in Latin America.[54] In South Africa, as well as in Latin America, the idea of transformative constitutionalism has been utilized to abandon a previous regime and introduce a set of enforceable social rights, with mixed results. In Latin America, the idea of using the constitution as a tool for achieving social transformation has been often accompanied with a classical Sieyesian and/or Schmittian approach to the idea of constituent power.[55] This latter approach typically connects the idea of constituent power with the revolutionary power of the "people" to build a new state that could integrate indigenous peoples, provide for a strong conception of equality, and sometimes remove or disempower the old ruling elites. It is not uncontroversial to say that some transformative experiments in Latin America have been accompanied by populist narratives.[56]

These traits constitute the so-called Bolivarian approach to constitution-making, which is named in honor of one of Latin America's nineteenth-century heroes: Simon Bolívar. The Bolivarian approach to constitution-making has usually appeared in conjunction with a notion of radical democracy, which does not rely much on formal accountability or traditional notions of political representation,[57] and enhances the strong presidential regimes present in many countries in the region.[58] It also typically legitimizes its constitution-making procedures thanks to the presence of a charismatic leader and an elected constituent assembly working with unconstrained powers.

In recent years, scholars have paid attention to several constitution-making experiences in Latin America. On the one hand, there is the Colombian experience (1990–1), which is generally regarded as a positive one, as it succeeded in starting a process of institutional consolidation including bipartisan agreements.[59] The Colombian constitution-making procedure arguably embraced a constituent power narrative,[60] but, unlike its Latin American counterparts, it did not follow a sort of

[53] The term is typically attributed to Karl E. Klare, *Legal Culture and Transformative Constitutionalism*, 14 S. Afr. J. on Hum. Rts. 146 (1998).

[54] One of the distinct ways in which Latin American transformative constitutionalism is typically presented by their advocates is by connecting it with a regional approach, sometimes called *ius commune*. *See, e.g.*, Armin von Bogdandy, Eduardo Ferrer Mac-Gregor, Mariela Morales Antoniazzi, Flávia Piovesan, & Ximena Soley, Ius Constitutionale Commune *en América Latina: A Regional Approach to Transformative Constitutionalism*, *in* Transformative Constitutionalism in Latin America 3 (Armin von Bogdandy, Eduardo Ferrer Mac-Gregor, Mariela Morales Antoniazzi, Flávia Piovesan, & Ximena Soley eds., 2017).

[55] *See, e.g.*, Joel I. Colón-Ríos, *Carl Schmitt and Constituent Power in Latin American Courts: The Cases of Venezuela and Colombia*, 18 Constellations 365 (2011).

[56] *See, e.g.*, von Bogdandy et al., *supra* note 54, at 13–14.

[57] Díaz de Valdés & Verdugo, *supra* note 52.

[58] *See, e.g.*, King, *supra* note 52; David Landau, *Constituent Power and Constitution-Making in Latin America*, *in* Comparative Constitution-Making 567 (Hanna Lerner & David Landau eds., 2019); David Landau, *Constitution-Making Gone Wrong*, 64 Ala. L. Rev. 924 (2013).

[59] For a comparison between the Colombian case and the Venezuelan case, see Ana María Bejarano & Renata Segura, *Reforma constitucional en tiempos de crisis: Lecciones de Colombia y Venezuela*, 1 Revista Latinoamericana de Política Comparada 155 (2008).

[60] *See, e.g.*, Colón-Ríos, *supra* note 55.

Bolivarian approach to constitution-making in other respects: the process was made to include power-sharing arrangements and bipartisan agreements; the electoral regime ensured political fragmentation; and there was no charismatic populist leader attempting to consolidate power and undermine the competitiveness of the political system. For these reasons, Andrew Arato has argued that the Colombian process, despite the existence of a constituent power narrative, actually fits better with the post-sovereign model.[61]

On the other hand, we have the cases of Venezuela (1998–9), Ecuador (2007–8), and Bolivia (2006–9). These three experiences fall squarely within the Bolivarian approach to constitution-making: they were led by charismatic left-wing political leaders, inspired by post-liberal constitutional ideas seeking to restore indigenous rights, and they produced long constitutions[62] with "unprecedented levels of aspirational and ideological content."[63] These constitutions share some common elements, such as pluri-nationalism, presidentialism, and a transformative and radical approach to democratic institutions.[64] Some scholars have criticized these three constitution-making processes, arguing that they served the interests of a dominant party seeking a form of democratic erosion. For example, David Landau claims that the Venezuelan and Bolivian cases are examples of abusive constitution-making processes;[65] Rosalind Dixon has shown how the Ecuadorian case is an example of using rights "as bribes," in which the expansion of rights is linked to "trades" involving the support of changes that erode the democratic minimum core;[66] and one of us has argued that these cases have promoted forms of political representation that tend to personalize institutions[67] and that the Bolivian case included an *insurance* that was later broken by the incumbent regime.[68]

These cases, including the Colombian constitution-making process, have promoted two shared ideas: (i) the idea of transformative constitutionalism, as described above; and (ii) the use of a revolutionary version of the constituent power theory to claim that constituent assemblies have an unconstrained power in seeking to replace the preexisting constituted institutions. As a result of this understanding of the constituent power, previous institutions and procedures are thought to be unable to limit the

[61] *See, e.g.*, Arato, The Adventures of the Constituent Power: Beyond Revolutions?, *supra* note 51, at 333 ("What Colombia had in common not only with South Africa, but with all the round table countries, was its negotiated pre-assembly model, which produced not only an electoral rule conducive of pluralism, but also a level of political legitimacy for it").

[62] *See* Zachary Elkins, *Constitutional Revolution in the Andes?*, *in* Comparative Constitutional Law in Latin America 108 (Rosalind Dixon & Tom Ginsburg eds., 2017).

[63] King, *supra* note 52.

[64] Wolff, *supra* note 52; Couso, *supra* note 52. For a "textual" analysis, see also Mark Tushnet, *The New "Bolivarian" Constitutions: A Textual Analysis*, *in* Comparative Constitutional Law in Latin America 126 (Rosalind Dixon & Tom Ginsburg eds., 2017).

[65] Landau, *Constitution-Making Gone Wrong*, *supra* note 58; David Landau, *Abusive Constitutionalism*, 47 UC Davis L. Rev. 189 (2013).

[66] Rosalind Dixon, *Constitutional Rights as Bribes*, 50 Conn. L. Rev. 767 (2018).

[67] Díaz de Valdés & Verdugo, *supra* note 52.

[68] Sergio Verdugo, *The Fall of the Constitution's Political Insurance. How the Morales Regime Broke the Insurance of the 2009 Bolivian Constitution.*, 17 Int'l J. Const. L. 1098 (2019).

constitution-making processes. For example, as Joel Colón-Ríos has argued, both the Colombian and the Venezuelan processes used a Schmittian approach to remove limits to the constituent power;[69] and the Bolivian Constitutional Court has used a similar perspective to justify removing Presidential term limits.[70] David Landau has criticized how the constituent power doctrine has been used to legitimize a constitutional remake that undermines liberal democratic institutions.[71]

An alternative to the constituent power narrative associated with these Latin American processes is Andrew Arato's post-sovereign paradigm. In his work, Arato has explored the experiences of South Africa, Spain, and Eastern European states to argue that innovations in the design of the process can produce constitutions that are more legitimate in the long run.[72] In short, Arato claims that the "underlying idea [. . .] is to apply constitutionalism not only to result but also to the democratic process of constitution making."[73] Among such innovations, there is the use of roundtable negotiations by constitution-makers, involving diverse actors and institutions, and the enactment of an interim constitution in the context of a multistage procedure. This constitution-making model, by emphasizing consensus and power-sharing institutions, makes it harder for actors to claim that they exclusively represent the sovereign will of the people (as current populist leaders do).[74]

Arato's model also works better in justifying power-sharing institutions that advance a procedure in a bipartisan way. Thus, it could be argued that using mechanisms that seem countermajoritarian in principle—such as supermajority rules, judicial review of previously agreed principles, or confidential internal procedures that aim for rival politicians to find common ground—could be consistent with the post-sovereign model. Additionally, as Arato has argued, these types of mechanisms can put together diverse "legitimation reserves, based on pluralism, inclusion, consensual decision making, legality, and democratic elections."[75] In 2015, Arato argued that this model could justify a non-revolutionary approach to the Chilean constitutional reform agenda.[76]

4. The Bolivarian approach as a negative model for Chile

The Chilean constitution-making process has many features that manifest an aversion towards the Bolivarian approach. Indeed, the process has been designed by the

[69] Colón-Ríos, *supra* note 55.

[70] Tribunal Constitucional Plurinacional, Sentencia N° 0084/2017 (Nov. 28, 2017) (Bol.).

[71] Landau, *Constituent Power and Constitution-Making in Latin America*, *supra* note 58.

[72] Arato, The Adventures of the Constituent Power: Beyond Revolutions?, *supra* note 51; Arato, Post Sovereign Constitutional Making: Learning and Legitimacy, *supra* note 51.

[73] Arato, *Redeeming the Still Redeemable: Post Sovereign Constitution Making*, *supra* note 51, at 428.

[74] *See* Cas Mudde & Cristóbal Rovira Kaltwasser, Populism: A Very Short Introduction 5–20 (2017); Jan-Werner Mueller, What is populism? 9, 20 (2016).

[75] Arato, *Beyond the Alternative Reform or Revolution: Post Sovereign Constitution-Making and Latin America*, *supra* note 51, at 893.

[76] *Id.*

Chilean political parties to prevent what they see as one of its main dangers: a faction's unilateral takeover that could use the opportunity to replace the previous ruling elite and weaken the opposition in order to build a dominant party regime. As a result of this aversion, the constitution-making procedure itself presents features that reject the idea of an unconstrained constituent power,[77] seek to build a multi-partisan consensus, preserve the power-interests of the mainstream political parties,[78] and impose a limited mandate under which, among others, the Constitutional Convention cannot intervene in other institutions, must respect judicial independence, and must allow Congress to continue operating. These aims and features of the Constitutional Convention are in obvious contradiction with some of the outstanding features of the Bolivarian approach.

If we take a closer look at the Chilean constitution-making process, it is in the Agreement where the aversion against the Bolivarian way and a preference for Arato's model can be seen more clearly. At a political level, the far right (associated with the principles defended originally by the Pinochet Constitution) and the far left (associated with the transformative aims that have also inspired the Bolivarian political agenda) have excluded themselves from important aspects of the process. With the exception of one political leader (Gabriel Boric), the far left did not sign the Agreement and, instead, argued that the Agreement was the result of an elite bargain that rejected the people's claims, or that it gave a veto power to the right-wing parties during the constitution-making process.[79] Also, even though most of the right signed the Agreement, a large part of that coalition openly campaigned against drafting a new constitution. Nevertheless, all of the relevant right-wing presidential candidates had supported the demand for a new constitution even before the October 2019 plebiscite took place. During the legislative debates that took place when discussing the implementation of the Agreement, many legislators from the right and the left emphasized the importance of honoring the Agreement's content.[80]

[77] Many scholars have used the constituent power lenses to understand Chile's process or the criticisms against the 1980 Constitution. *See, e.g.*, Christodoulidis & Goldoni, *supra* note 11; Ansaldi & Pardo-Vergara, *supra* note 12; Atria, *supra* note 13; Bassa, *supra* note 13; Heiss, *supra* note 9. The constituent power theory has been used frequently in the past to justify a constituent assembly or to criticize the 1980 Constitution. *See, e.g.*, Sergio Grez Toso, *La Ausencia de un Poder Constituyente Democrático en la Historia de Chile*, 3 Revista Izquierdas 1 (2009); Fernando Muñoz León, *"Chile es una República Democrática": La Asamblea Constituyente como Salida a la Cuestión Constitucional*, Anuario de Derecho Público 60 (2013); Gabriel Salazar, En el Nombre del Poder Popular Constituyente (Chile, Siglo XXI) (2011); Francisco Zúñiga Urbina, *Nueva Constitución y Operación Constituyente*, 11 Estudios Constitucionales 511 (2013). For a criticism against these types of approaches for understanding the Agreement, see Tschorne, *supra* note 14.

[78] *See, e.g.*, Alemparte, *supra* note 15.

[79] See, e.g., the interventions by representatives Carmen Hertz (in *Historia de la Ley N° 21.200*, *supra* note 31, at 266–7), Jaime Mulet (*id.* at 277–8), Felix González (*id.* at 279–80), Hugo Gutiérrez (*id.* at 207–8, 318–19), and Camila Vallejos (*id.* at 306–7), and the intervention of senator Alejandro Navarro (*id.* at 472–4).

[80] See, e.g., the interventions by the right-wing representatives Luciano Cruz-Coke (*id.* at 271–2), Juan Fuenzalida (*id.* at 273), Sebastián Torrealba (*id.* at 275–6), Andrés Longton (*id.* at 287–8), and Luis Pardo (*id.* at 291), and of senators Francisco Chahuán (*id.* at 476–7), Felipe Kast (*id.* at 480–1), Andrés Allamand (*id.* at 485–487), Juan Antonio Coloma (*id.* at 481–2), Juan Castro (*id.* at 471–2), and Kenneth Pugh (*id.* at 464–5); by the left-wing representatives Matías Walker (*id.* at 271), Pepe Auth (*id.* at 276–7), and Andrea Parra (*id.* at 284–5), and by senators Felipe Harboe (*id.* at 433–4) and Juan Pablo Letelier (*id.* at 463–4).

The Agreement itself is also an attempt to elude a populist capture of the process—whether right or left wing—partly due to how Chileans have criticized the Bolivarian constitution-making procedures and the deterioration of some of their democratic regimes. It is, in other words, a form of aversive constitutionalism centered on the Bolivarian way, particularly as it has taken place in Venezuela. The rejection of the Bolivarian way as manifested in Venezuela has been a common political theme in the past years: both President Piñera and former President Bachelet have decried the human rights situation and the rise of authoritarianism in Venezuela; and politicians who support that regime are a far-left minority. Many politicians fear a Chávez-type constituent assembly, and some even expressed those fears during the Congressional debates.[81]

Seemingly in response to these dangers, the Agreement includes a highly regulated process that constrains it in a multilevel way, utilizes language aimed at avoiding the connection with a Bolivarian rhetoric that could be associated with an unconstrained runaway sovereign assembly, and signals institutional continuity with the current democratic regime.

First, after the parties signed the Agreement, the legislators approved a reform to the current Constitution and included the constitution-making procedure's details.[82] The rules regarding the constitution-making process include a plebiscite—which took place in October 2020—where Chileans had to vote on two issues:[83] (i) whether they wanted a new constitution; and (ii) whether the new constitution was going to be drafted by either a Constitutional Convention—following the same electoral procedure of the Chamber of Representatives—or a Mixed Convention composed of elected citizens and sitting legislators. In both cases, the delegates will be regulated by the same norms that apply to current legislators, such as the lobby regulation, the list of inabilities, and the campaign regulations.[84] This reform can be understood then as signaling the need for institutional continuity: it uses the current Constitution and its institutions as the legal framework for the constitution-making procedure.[85] Moreover, the current Constitution will remain valid until the new constitution is approved.[86]

Second, we need to pay attention to the symbolic aspect of the language used by the drafters of the rules that regulate the constitution-making process. The constitution-making body—unlike many of its Latin American counterparts—is

[81] For example, the right-wing representative Camila Flores attacked the "Latin American obsession of transforming the constitutions, changing them, starting from scratch" (*id.* at 331). The left-wing senator Letelier argued that Chile would be among a small Latin American group of countries that has established a pact like the one he was approving (*id.* at 463). Legislators from the left also presented defensive arguments when mentioning the Venezuelan experience. See, e.g., the interventions by Karol Cariola (*id.* at 185) and Felipe Harboe (*id.* at 433).

[82] Law No. 21.200, Modifica el Capítulo XV de la Constitución Política de la República, Dec. 23, 2019, Diario Oficial [D.O.] (Chile).

[83] Constitución Política de la República de Chile [C.P.], art. 130.

[84] *See id.* arts. 130, 131, 132, 134.

[85] *See* Tschorne, *supra* note 14, at 105. *See also* Verdugo, *supra* note 15.

[86] Constitución Política de la República de Chile [C.P.], art. 135.

called "Convención Constitucional" rather than "asamblea constituyente," a constituent assembly.[87] This wording broke with the language associated with Bolivarian constitution-making bodies in the region and, as Lisa Hilbink points out, it produced skepticism.[88] Some of the far-left legislators, who opposed the Agreement, argued that they wanted a sovereign assembly, and that the Constitutional Convention provided for by the Agreement was far from that.[89] For example, a member of the Communist Party argued that the Agreement does not establish a true constituent assembly "because the convention only has derivative constituent power."[90] He added that future delegates would lack constituent power because legislators were "constrain[ing] the exercise of the sovereign power of the people."[91] In responding to these kinds of criticisms, another representative from the left replied that the name "Constitutional Convention" was a concession to the right-wing parties, but that it was just a name, and that there was no difference between a constituent assembly and a constitutional convention because both are elected organs.[92]

Third, various features of the Convention and its regulation stand in obvious tension with the constituent-power theory commonly associated with the Bolivarian approach, and gesture towards institutional continuity. Congress has retained the power to reform the rules that govern the constitution-making process, and it has used it to reach other multi-partisan agreements, such as the one that ensures that the composition of the Convention respects the gender-parity principle,[93] the modification of the process's timeline due to the Covid-19 pandemic,[94] the inclusion of reserved seats for indigenous peoples,[95] and the lowering of the cost barriers for independent candidates.[96] All of these norms are included in the text of the current Constitution, and they show how the political parties are controlling and regulating a process that is not supposed to resemble a sovereign assembly: the only task of the Convention is to draft a constitutional text within the corresponding framework.

The Agreement also establishes several limits to the Convention, which, again, seem incompatible with the idea of a sovereign assembly. There are procedural limits, including a nine-month deadline with a possible extension of three additional months;[97] a specific rule setting the place where the Convention will operate; and supermajority rules for approving the norms of the new constitution and the corresponding Convention's voting rules.[98] The supermajority rule was a concession that left-wing

[87] *See id.* art. 131, which includes examples of this type of language.

[88] Hilbink, *supra* note 10, at 100.

[89] See, e.g., the interventions by Felix González (in *Historia de la Ley N° 21.200*, *supra* note 31, at 279–80) and Camila Vallejos (*id.* at 208, 306–7).

[90] See, e.g., the intervention by Hugo Gutiérrez, in *id.* at 207.

[91] See, e.g., the intervention by Hugo Gutiérrez, in *id.* at 318.

[92] See, e.g., the intervention by Leonardo Soto, in *id.* at 281. For a similar approach, see Bassa, *supra* note 13, at 181–2.

[93] Constitución Política de la República de Chile [C.P.], transitory provision no. 31.

[94] *Id.* transitory provision nos. 33 and 41.

[95] *Id.* transitory provision nos. 43, 44, 45, 46.

[96] *Id.* transitory provision no. 29.

[97] *Id.* art. 137.

[98] *Id.* art. 133.

leaders made to the right-wing parties, which is why some legislators from the far left argued that the Convention is not going to be a truly sovereign body.[99] Without this concession, it was unlikely that the parties from the right would have agreed to open a constitution-making process.[100]

It could be argued that this supermajority rule is not a clear sign of Chile's rejection of the Bolivarian model. The Bolivarian processes that took place in Bolivia and Venezuela had a two-thirds rule for approving the new constitution, whereas the Colombian process only had a simple majority rule. However, the function that the supermajority rule will play in Chile is distinctive: during the legislative debates, those who spoke in favor of the supermajority rule emphasized consensus and dialogue as fundamental to democracy.[101] Given the electoral system, which uses a modified version of the Chamber of Representatives' formula and which will secure a fragmented Convention, the supermajority rule is likely to provide an incentive for reaching consensus and building multi-partisan alliances. The Convention's electoral system makes it highly unlikely that a single faction will occupy more than half of the seats. As a result, a two-thirds majority will be harder to achieve, and the Convention's enactment of norms will require multi-partisan consensus. In Venezuela, by contrast, the electoral system allowed the Chávez political coalition—the Polo Patriótico—to get 93.1% of the seats of the assembly with only 62.1% of the votes,[102] thus rendering the supermajority rule moot in terms of encouraging the need for broad consensus.[103]

The rules also explicitly prohibit the Convention from modifying its procedures. When the process is over, the Convention must dissolve itself,[104] and there is a remedy before the Supreme Court in case the procedural limits are not respected.[105] Additionally, the Agreement limits the Convention's powers to the approval of a constitutional text, thus forbidding the Convention from intervening in the functioning of other institutions.[106] For example, Congress needs to continue working, the President remains in office, and judges cannot be dismissed. There are also substantive limits that constrain what the new constitution can regulate (although the Agreement also establishes that judges cannot review the new constitutional text).[107] The Convention is obliged to respect the republican nature of the Chilean state and its democratic

[99] See the interventions by representatives Felix González *Historia de la Ley N° 21.200*, *supra* note 31, at 279–80); Carmen Hertz (*id.* at 266–7); Jaime Mulet (*id.* at 277–8); Camila Vallejos (*id.* at 306–307); Hugo Gutiérrez (*id.* at 207–8, 318–19); and from senator Alejandro Navarro (*id.* at 472–4).

[100] Legislators from the right explicitly valued this rule, as a condition for the new constitution to be created by consensus that could secure their influence. See, e.g., the interventions by senators Kenneth Pugh (*id.* at 465); Juan Castro (*id.* 472); and Andrés Allamand (*id.* at 485). As the conservative senator Juan Antonio Coloma stated during the legislative debates, "we accepted [the Agreement] in exchange for the two-third quorum majority for any approval." *Id.* at 481–2 (translation by authors).

[101] See remarks by Marcelo Diaz (*Historia de la Ley N° 21.200*, *supra* note 31, at 205); Ricardo Lagos-Weber (*id.* at 452); Juan Castro (*id.* at 464–5); and Kenneth Pugh (*id.* at 471–2).

[102] The opposition, on the contrary, got 34.5% of the votes but elected only 4.6% of the delegates. *See* Bejarano & Segura, *supra* note 59, at 167.

[103] By contrast, in Colombia no party achieved more than 35.7% of the seats. *Id.* at 165.

[104] Constitución Política de la República de Chile [C.P.], art. 137.

[105] *Id.* art. 136.

[106] *Id.* art. 135.

[107] *Id.* art. 136.

regime; it should respect final judicial decisions; and it is not supposed to violate international treaties to which Chile is a party.[108] After the Convention has approved the new constitutional text, the Convention's proposed constitution will be voted in an "exit plebiscite," where voting will be mandatory.[109] If citizens approve the new constitution, the President will convene Congress to promulgate the constitution while promising to respect and obey it. Then, the new constitution will be published in the Official Gazette, and, on that date, the current constitution will be derogated. This is the common way in which ordinary statutes are published. If a majority of citizens reject the new constitution in the exit plebiscite, then the current Constitution will remain in force.[110]

Finally, these norms make explicit reference to Article 5 of the Constitution, thus emphasizing that sovereignty resides essentially in the Nation and adding that "[i]t is forbidden for the Convention, any of its members, or groups of them to attribute themselves the exercise of sovereignty by assuming other powers than those explicitly recognized by this Constitution."[111] These specific words enshrine a prohibition that is clearly at odds with an understanding of the constituent body as sovereign and lacking any constraints. Indeed, this provision aims to prevent the Convention's delegates from claiming that they are "the people" and, therefore, from claiming that they possess unlimited political power.

These features confirm that Chile's constitution-making process is trying to break with the Bolivarian way and the constituent power theory. Instead, Chile seems to be attempting to follow the post-sovereign paradigm. Nevertheless—although unlikely, given the norms we just described and the lack of a rising dominant party or a *caudillo*—the constituent-power theory could still be embraced by the members of the Convention, who might then act as a sovereign body. Whether the Convention will respect the rules and promote multi-partisan agreements in order to approve a new constitution cannot be guaranteed yet.

5. Conclusion: The challenges of Chile's dual aversion

As we showed in the preceding sections, there are two negative models that influenced the design of Chile's constitution-making process: the Pinochet constitutional legacy and the Bolivarian approach to constitutionalism. If the constitution-making process fails to deliver a new constitution or if the new constitution is associated with institutional arrangements and power dynamics that prevent social changes, then the process will fail to reject the Pinochet model. If, on the contrary, the constitution-making process advances a transformative constitutional document that undermines the competitiveness of the democratic system, then the process will fail to reject the Bolivarian model. To guarantee the process's success, Chile needs to navigate between

[108] *Id.* art. 135.
[109] *Id.* art. 142.
[110] *Id.* art. 142.
[111] *Id.* art. 135 (translation by authors).

both aversions and find a path that can be accepted by both the political elite and public opinion. However, navigating this path of "dual aversive constitutionalism" will not be an easy task, for different reasons.

First, a narrative focused on transformative constitutionalism and close to the Bolivarian approach is present in Chile's political discourse. As polls and recent demonstrations in the country suggest, a social push for constitutional change in Chile seems to be strongly linked to a desire for transformation that would entail, among other things, prioritizing norms pertaining to social rights within the Convention.[112] The expectations and hopes of Chileans regarding the new constitution are high. According to a pollster, 70% of the citizens who voted to initiate a constitution-making process in the recent constitutional plebiscite hope that the new constitution will end with social inequalities in social security, education, and healthcare; 35% of them want to put an end to "Pinochet's Constitution"; and 31% expect the new constitution to improve salaries and general "quality of life."[113] Of course, constitutions cannot, on their own, provide and satisfy this kind of social rights in the short term.[114] Still, constitution-makers can design more effective political processes, with fewer veto players and more incentives to build governmental coalitions that can potentially defeat the threat of gridlock and successfully address social inequalities and secure social, economic, and cultural rights.

Although transformative constitutionalism can take (and has taken) forms other than the Bolivarian way, the history and context of the region, as well as the push for transformation in Chile, might take the process in the Bolivarian direction. In

[112] See a full discussion about this in Dixon and Verdugo, *supra* note 43. *See also* Patricio Navia & Sergio Verdugo, *From Institutional Design to Expanding Rights: The Growing Support for a New Constitution in Chile, 1990–2018* (2018) (Unpublished manuscript, on file with authors).

[113] Cadem, *Monitoreo Post Plebiscito 2020* (Oct. 25, 2020), www.cadem.cl/wp-content/uploads/2020/10/Post-Plebiscito-VF.pdf.

[114] The literature on social rights shows that recognizing a social right does not necessarily bring more public spending or increase the state budget in related areas. It does suggest that it is possible for litigation to advance in certain areas and it is likely that a symbolic recognition of social rights could be useful in the Chilean case. However, the literature has shown the limits of these advantages, it has also proved that litigation on social rights can be harmful for the poor, and that electoral accountability may be harmed. *Cf.* Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India and South Africa (Oscar Vilhena, Upendra Baxi, & Viljoen eds., 2013); David Landau, *The Reality of Social Rights Enforcement*, 53 Harv. Int'l L.J. 190 (2012); David Landau & Rosalind Dixon, *Constitutional Non-Transformation?*, *in* The Future of Economic and Social Rights 110 (Katharine G. Young ed., 2019); Adam Chilton & Mila Versteeg, How Constitutional Rights Matter (2020); Adam S. Chilton & Mila Versteeg, *Rights Without Resources: The Impact on Constitutional Social Rights on Social Spending*, 60 J. of Law and Econ. 713 2017); Daniel M. Brinks & Varun Gauri, *The Law's Majestic Equality? The Distribution Impact of Judicializing Social and Economic Rights*, 12 Perspectives on Pol. 375 (2014); Florian Hoffman & Fernando Bentes, *Accountability for Social and Economic Rights in Brazil*, *in* Courting Social Justice 100 (Varum Gari & Daniel M. Brinks eds., 2008); Avi Ben-Bassat & Momi Dahan, *Social Rights in the Constitution and in Practice*, 36 J. Comp. Econ. 103 (2008).

As one of us has argued in the Chilean context, the constitutional replacement process is unlikely to be a magic bullet addressing and satisfying social demands. *See* Sergio Verdugo, *The Chilean Political Crisis and Constitutions as Magic Bullets: How to Replace the Chilean Constitution?*, VerfBlog (Nov. 4, 2019), https://verfassungsblog.de/the-chilean-political-crisis-and-constitutions-as-magic-bullets/.

particular, it might be difficult to decouple the transformative aims of the process from their associated constituent power narrative, even despite the Agreement's features just described. If this risk is materialized, then the rules of the process may be compromised by a popular sovereign narrative claiming that the nature of the "people's power" should not be constrained, even by rules designed to secure a multipartisan process with power-sharing institutions.

This risk is plausible because the process is led by parties that have lost credibility, and Chile is now a fertile ground for populist leaders to become influential and argue in favor of an unconstrained constituent power. At the time of writing (December 2020), no single leader seems capable of capturing the process, but this could change. Indeed, some politicians from the far left have recently called for Congress's dissolution, invoking a sort of sovereign power argument. Still, those calls have been quickly undermined by the parties that supported the Agreement, including the parties from the left.[115] As of today, the constitution-making process—which started with a roundtable negotiation to figure out a way to respond to the massive protests—is still organized in a multilevel way, with power-sharing arrangements that require the existence of bipartisan agreements and with many actors and institutions that have a say in the process, including citizens, delegates, sitting legislators, and perhaps also judges.

Second, so far, the model of aversive constitutionalism we have described is present solely in the Agreement and plausibly among some political parties. It is not clear whether the Convention's elected members will share these negative models or propose different ones. In other words, even though a relevant part of the constitution-builders (i.e. members of Congress) rejected the Pinochet and Bolivarian models, the delegates may break with this dual aversion, in different ways. The rules of the constitution-making process are the result of a compromise between different versions of the two negative models and, therefore, some politicians from opposite sides can still defend the negative models within the Convention. Thus, a right-wing delegate may still defend the principles of the Pinochet Constitution and, on the contrary, a left-wing delegate may want to advance some features of the Bolivarian model. If the factions within the Convention do not treat the procedure as a power-sharing device to reach consensus, the process may be gridlocked. Radical views from either the right or the left will only need a third plus one of the seats of the Convention to make a credible threat of boycotting the process. If a group of delegates believes that they are better off with the current Constitution, they can organize themselves to veto the process or to make demands that are unlikely to be accepted by the Convention's majority. If gridlock happens, the process can fail to deliver a new constitution or, perhaps, it will create an opportunity for a dominant faction to get rid of the institutional constraints and embrace the sovereign paradigm of the constituent power doctrine.

Third, although the aversion to these negative models—the Bolivarian way to constitution-making and the Pinochet Constitution—shares some features, it also

[115] *See, e.g.*, *Partidos de Unidad Constituyente rechazan idea propuesta por ME-O de disolver el actual Congreso*, El Mostrador (Oct. 28, 2020), https://bit.ly/3sLg6Al.

presents some contradictions. First, the aim of rejecting Pinochet's Constitution and legacy puts a strain on the efforts to maintain some sort of institutional continuity. Yet, the preservation of some institutional continuity is an important feature of rejecting the Bolivarian approach. This tension was emphasized during legislative discussions concerning the Agreement, where Félix González, a member of Congress from the left, (among others) argued that the constitution-making process proposed in the Agreement, with its two-third quorum and regulations, was still a process "under the tutelage of the Pinochet Constitution" and that Pinochet's Constitution was effectively "granting permission" for the Convention to operate.[116] Second, the rejection of a "protected democracy," as designed by the Pinochet Constitution, and which relied on supermajorities, is in tension with the Convention's required quorum of two-thirds for approving constitutional norms. Yet, the establishment of mechanisms for ensuring multi-partisan agreements is an essential feature of rejecting the Bolivarian approach.

The rejection of the Bolivarian way does not mean that the Chilean process will necessarily lack transformative features. Not every form of transformative constitutionalism is necessarily Bolivarian: there are other ways in which this process could prove transformative for Chile. One of those ways involves consolidation of the transition away from the Pinochet era. A reform of the armed and police forces, which have been accused of corruption and violation of human rights, particularly in the context of the latest protests in the country,[117] might help to achieve this goal. Another approach might involve, as one of us has argued, a feminist rethinking of the Chilean Constitution.[118] Finally, an emphasis on social, economic, and cultural rights, as well as the potential inclusion of indigenous rights, could also play that role. Transformation achieved in these ways and through the post-sovereign model may provide stability and legitimacy in the long term.

Ultimately, Chileans want a transformative constitutional process. We should hope for the kind of transformation that will strengthen democracy, consolidate power-sharing institutions, and advance towards a more egalitarian society. That is, the kind of change that will last.

[116] *Historia de la Ley N° 21.200*, *supra* note 31, at 280 (translation by authors).

[117] *Carabineros, FF.AA. y financiamiento ilegal de la política: Las razones de la caída de Chile en ranking de transparencia*, Emol (Jan. 29, 2019), https://www.emol.com/noticias/Nacional/2019/01/29/935985/Carabineros-FFAA-y-financiamiento-ilegal-de-la-politica-Las-razones-de-la-caida-de-Chile-en-ranking-de-transparencia.html; *Chile: Mandos de Carabineros deben ser investigados penalmente por violaciones de derechos humanos*, Amnistía Internacional (Oct. 14, 2020) https://www.amnesty.org/es/latest/news/2020/10/chile-mandos-carabineros-deben-ser-investigados-por-violaciones-derechos-humanos/.

[118] Marcela Prieto Rudolphy, *A Feminist Rethinking of the Chilean Constitution?*, I•CONnect Blog (Nov. 5, 2020), www.iconnectblog.com/2020/11/symposium-on-chilean-referendum-part-iii-a-feminist-rethinking-of-the-chilean-constitution/.