

THE PATH TOWARDS A NEW CONSTITUTION: MANAGING THE DEADLINES OF THE CHILEAN CONSTITUTIONAL CONVENTION

Summary

The Constitutional Convention of Chile, installed on 4 July 2021, is required to draft and approve a proposed new constitutional text within 9 months (i.e. by 4 April 2022), with a possible 3-month extension to 4 July 2022. While noting the specific national context and early stage of the Convention's work, this paper draws lessons from constitution-making processes elsewhere to help the Chilean Convention and the public to have a better sense of the timing of the Convention and the possible challenges to address in order to meet its drafting deadlines.

This paper focuses on three issues: (i) it suggests a timeline for the key phases of the Convention's work; (ii) identifies important decisions about the organisation of the Convention which will affect the timeline; and (iii) considers techniques that might be used if delegates are unable to agree on key issues and time is running out.



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The paper was finalized on 30 August 2021. In elaborating the paper we had in view the proposal of Rules for the Convention approved by the Committee on Rules of the Convention on 28 of August 2021 (hereinafter "proposal of Rules"). The final Rules approved for debate in the committees and plenary might differ from the proposal of Rules cited in this paper.

Key Points

The Convention comprises 155 elected delegates, and, thus, is both diversely representative and manageable in size. Decisions require a two-thirds voting majority. The Convention is separate from Congress and concerned only with constitution-making.

The Chilean process is not unusual in prescribing a fixed duration of 9 months with a possible extension to 12 months. This time-period is not obviously short.

There is no perfect length for a constitution-drafting body and context is crucial. The timeframe for the process needs to be long enough to reach agreement on a constitutional text that is likely to be acceptable and to work effectively, but short enough not to lose momentum.

Allocating time effectively is crucial for success. Comparative experience suggests that bad management of time can make a constitution-making process fail.

There is a commitment to broad public participation. Participation is crucial for political legitimacy, yet it is time consuming, particularly because there is a widely shared understanding that participation should be meaningful.

If the Convention fails to reach agreement as the 12-month deadline approaches, it will face the following options: speeding up the process ('railroading'); seeking a further extension through a constitutional reform; overinclusion of disputed provisions as a compromise; and underinclusion, i.e. leaving disputed issues out of the text.

Recommendations

The Convention requires a clear timeline for the entire constitution-making process, to avoid running short of time in the final phases of constitution-making. The timeline needs to accommodate the range of activities that drafting involves and ensure that key priorities are identified. Setting a clear timeline will enable time to be effectively allocated to each task, and can help to signal potential delays and their implications. We offer such a timeline in this paper.

In setting up a timeline it is useful to divide the Convention's work into 3 phases: (i) installation phase (establishing rules, procedures, committees, and technical secretariat); (ii) elaboration phase (committee deliberation; participation by the public, experts, and civil society; and agreement on specific articles); and (iii) conclusion phase (compilation of texts and harmonization of the complete draft).

The Convention should elaborate a timeline that includes the 3-month extension provided for in article 137 of the current Constitution. This means that the Convention should elaborate a timeline for 12 months, rather than for 9 months, as the latter deadline would probably be too short.

The installation phase cannot be too long. It should not last more than 3 months.

There should be an agreement at the installation stage on how and when to engage the public effectively and generally through public participation. It is also necessary to allow some flexibility to adapt to contingencies.

Before the elaboration phase (phase 2), terms of reference for the work of each of the committees should be developed, to guide their work and facilitate coordination.

Comparative experience suggests that committees tend to be more effective than the plenary at elaborating content, constructive deliberation and achieving agreement.

This has implications for the management of time: the greater the role of committees vis à vis the plenary, the swifter the process is likely to be.

■ If the elaboration phase (phase 2) produces a large number of incompatible or unrepresentative texts, there may be last minute deadlocks and delays. Some measures that can help address this include having not too great a number of committees, ensuring committees are sufficiently representative, and having a harmonization or coordination committee engaged from the very beginning of the process.

■ Considering the high volume of documents the Convention will produce, there must be a system for effective distribution and update of drafts among convention members, committees, and other actors. The Administrative Secretariat of the Convention may play an important role in this regard.

■ There should be drafting discipline at every stage of the process, which means that the bodies concerned should do as much as possible to resolve issues as they arise and avoid deferring issues to the next phase.

■ There must be enough time for phase 3. Even if there is coordination and discipline throughout the work at phase 2, comparative experience suggests that phase 3 involves substantial work and enough time needs to be allocated to allow for the harmonization of approved texts and for inputs on the whole draft.

■ Throughout the Convention process, deadlocks should be resolved as they arise. Comparative experience provides valuable guidance on potential techniques for compromise and deferral (e.g. resolving issues by legislation after the Constitution is adopted). In all cases, leadership will be important.

1. The Case for a Timeline

The Constitutional Convention of Chile was installed on 4 July 2021. Under the constitutional reform that took place on 24 December 2019, the Convention must draft and approve a proposed new constitutional text within 9 months from its installation. This would require the draft to be complete by 4 April 2022, although the Constitution also makes allowance for a 3-month extension, which expires on 4 July 2022. The request for an extension can be made 5-15 days before the initial 9-month period is due to expire. Once the final time limit is reached, the Convention is de facto dissolved. The draft is required to be put to referendum and, if it is passed, it will replace the existing Constitution of 1980 as the Constitution of Chile.

The Convention comprises 155 elected delegates, and thus is both diversely representative and manageable in size. Decisions on constitutional provisions require the support of two-thirds of the members of the Convention. The Convention is wholly separate from Congress and concerned only with constitution-making and not with other aspects of government. During the life of the Convention, in November 2021, there will be elections for the President and Congress, with the newly elected bodies taking office on 11 March 2022. These dates also should be factored into any timeline.

Most constitution-making processes begin with some idea of expected duration, whether that is formally prescribed or not. The Chilean process is not unusual in prescribing a fixed duration of 9 months with a possible extension to 12 months. Some constitution-making bodies have had a shorter duration: 4 months for the Constitutional Convention in the United States in 1787; 5 months for the Constitutional Commission of the Philippines in 1986; 5 months (150 days) for the Constitutional Assembly of Colombia in 1991; 90 days for the Constituent Assembly of Timor-Leste in 2001. Other processes have begun with expectations of a similar timeframe to Chile including Tunisia in 2011 and Bolivia in 2006. Others have been longer, typically up to around 2 years, as in South Africa in 1994, Brazil in 1987 and Nepal in 2008.

These comparisons are merely indicative of the range and should be used with caution. Older constitution-making processes, as in the United States, did not involve the level of public participation that is now expected. Constitution-making in a time of acute crisis, as in the Philippines in 1986, may be accomplished more quickly. A constitution-making body that is dominated by a single cohesive group of delegates, as in Timor-Leste, may also be able to move more quickly in completing its task. At the other end of the spectrum, some constitution-making bodies with a longer initial time-frame, including South Africa and Nepal, also functioned as legislatures under

interim constitutional arrangements, making a longer timeframe useful. However, the comparisons tend to show that the duration prescribed for the Constitutional Convention of Chile is broadly within the mainstream.

These examples suggest that there is no perfect length of time for a constitution-making body. Much will depend on the context in which constitution-making occurs. There is a range of relevant factors to be taken into account in determining an overall time-frame. The duration of a constitution-making body needs to be long enough to reach broad agreement on a constitution that is likely to be acceptable and to work effectively. At the same time, however, the time-frame for the constitution-making body needs to be short enough to take advantage of the energy of a constitutional moment, the commitment of delegates to this vitally important and unusual task, and the interest and attention of the public at large.

One other insight to be drawn from comparative experience is that it may be challenging for a constitution-making body to agree on a draft constitution in the time that is initially prescribed, whatever that time may be. Again, experience in responding to this challenge is variable. Some constitution-making bodies, such as the South African Constitutional Assembly, have overcome those challenges and have reached agreement within the time prescribed. Other bodies have secured extensions to the time initially set. In Bolivia, for example, the Constituent Assembly was extended for 4 months beyond the 12 months originally envisaged; in Tunisia, where no timeframe was formally prescribed, a widely expected duration of 12 months for the Constituent Assembly ultimately expanded to 4 years. In a worrying example of a problematic scenario, in Nepal a Constitutional Assembly elected for 2 years in 2008 secured 4 extensions to its tenure through amendment of the Interim Constitution, until in 2012, the Supreme Court ruled that a further extension would be unconstitutional, and the Assembly expired with no Constitution in place. A second, less representative Constitutional Assembly, was elected in 2013 and eventually finalised a Constitution in 2015.

It is clear that some flexibility in the time-frame for a constitution-making body is desirable as, indeed, has been provided for in Chile. On the other hand, there are advantages in keeping within the time-frame if possible, in order to manage the process effectively so as to ensure that enough time is allocated to each phase of such important work. Any timeframe can expand if the constitution-making body's work is not planned with an eye to what needs to be done. In Bolivia, for example, it became necessary to extend the deadline after debate on the rules for the Constituent Assembly took 7 of the 12 months initially envisaged for the entire process. To avoid running short of time in the critical final phase of constitution-making, a timeline for the entire process is useful.

2. Variables

It is impossible to anticipate all the contingencies that might arise in the course of the Chilean constitution-making process. Comparative experience provides some guidance, but the Chilean process also is distinctive in important ways. In addition, because these are still early days, the procedures of the Convention have not been fully defined yet. We have made some general assumptions about how the Convention will work, but there are matters still to be decided that might have implications for the allocation of time. Before explaining the options for a timeline, we note three such variables, in particular. Each of them also is an important aspect of constitution making in its own right. We may revisit the timelines proposed in this paper as these variables become clearer.

The first variable concerns the way in which the work of the Convention and its committees will be focussed. The Convention is charged with the responsibility of writing a completely new Constitution. There are very few substantive limits to its original mandate. It thus has considerable discretion, to be further informed by public consultation. Convention delegates are diverse, with different views on many matters. While these features of the Convention offer great opportunities, if their potential can be seized, they also present challenges. They increase the risk that the initial work of the committees of the Convention is diffuse and contradictory. They may make it more difficult to develop consensus. In either case, both the quality of the work of the Convention and the timeline within which it operates could be affected.

In this regard, the challenge is to decide how the discussions about substance should begin, so as to focus the work of both committees and the plenary. Comparative experience shows several ways in which this has been done elsewhere. Sometimes a dominant group of delegates produces an early draft, on which the constitution-making body works: this occurred in Timor-Leste, for example. Sometimes key features of a constitution are effectively determined by an earlier peace process, when a constitution is required to bring an end to ongoing conflict, as occurred in, for example, Nepal. Neither of these is relevant to Chile, but they demonstrate different ways of providing a framework for substantive deliberation. An alternative that may be more relevant to Chile is that sometimes key principles on which the constitution is to be built are agreed at the outset. In South Africa this occurred before the constitution-making body was underway, but in India and Australia core principles around which the constitution would be built were debated by the constitution-making body itself at the outset of its proceedings. While a process of this kind also can take time, it can save time and focus deliberations in the long run. The Chilean Convention seems to be adopting some version of this view, as it establishes in the proposal of Rules a set of principles meant to inform the Rules and the work of the Convention.

A second variable likely to affect the work of the Convention and the time limits within which it operates concerns how thematic committees (in Chile called ‘commissions’) interact with the plenary and with each other. The issues include the following:

■ How the committees and plenary will interact in the approval and rejection of norms. Currently the proposal of Rules establishes that norms approved by a majority in the committee will have to be approved by a two thirds majority of the plenary, and that norms approved by a committee and by a majority of the plenary that fail to achieve a two thirds majority will return to committees (the proposal of Rules does not provide for a final vote on the whole of the text).

■ How thematic committees will coordinate with each other to avoid overlap and contradictions in practice (especially considering that the proposal of Rules does not provide for a permanent committee tasked with coordination and harmonization operating during the work of thematic committees).

■ Whether in practice the final negotiation and approval of proposals will be mostly done at the level of committees or at the level of the plenary.

These issues will be settled, at least to an important degree, in the Rules of the Convention. They may continue to evolve, however, in response to need, as the Convention proceeds. They have implications for the timeline in at least two ways. First, an effective working relationship between committees and the plenary will assist the Convention to complete its task in a timely way. Secondly, however, they make it difficult to fix a precise time between the second phase of the Convention, as it conducts its deliberations and the third phase, in which it finalises the draft Constitution.

The third variable is connected to the second and concerns the manner in which the Convention will ensure the final draft Constitution is a single, coherent whole. This involves removing gaps and inconsistencies between the work of the committees, accommodating changes made by the plenary and contributing to the resolution of disagreements in ways that fit within the Constitution as a whole. In other constitution-making exercises, these tasks are undertaken by one or more overarching committees, with responsibilities for collation, cohesion, final drafting and the resolution of disagreement. The proposal of Rules provides for a harmonization committee operating after the work of thematic committees is complete, but with powers that appear to be circumscribed to stylistic matters. Once again, an effective process—along the lines mentioned above—not only conserves time but can enhance the quality of the draft.

3. Convention Timeline

The following section suggests a general timeline for the work of the Convention. As with any task that must meet a deadline, it is important to have a timeline to organize the work and to detect potential delays. As already noted, it is impossible to set up a detailed timeline establishing with precision how long each part of the procedure should take. Even a general timeline, however, serves to draw attention to the range of activities that a constitution-making body must undertake. It ensures that key priorities are identified and time allocated accordingly and can also help to identify potential delays and how they shorten the time available for later phases. Such an approach makes it more likely that a draft Constitution will be agreed within the time-frame set.

Given the uncertainties mentioned above, this paper focuses on core tasks that the Constitutional Convention will have to undertake to elaborate a new constitution, and which can substantially impact the timing of this process. We take these core tasks from comparative experience of other assemblies (e.g. a period of negotiation on the final draft at the end) and from particulars of the Chilean Convention that have been already defined (e.g. to create a Technical Secretariat, a task set out in article 133 of the current Constitution of Chile and contemplated in the proposal of Rules). When pertinent we point to how core tasks have been addressed in the proposal of Rules.

We structure the timeline in three phases: (i) an installation phase; (ii) an elaboration phase; and (iii) a conclusion phase. For each phase we identify core tasks and provide an overall assessment of the timing. In doing so, we offer a structure that helps understand the sequence of activities of the Convention as they will develop in time and provides rough estimations for a reasonable timeline for the Convention. At this point rough estimations are useful for managing expectations (both of Convention members and the public) concerning the progress of the Convention and the timing for critical tasks.

We elaborate a timeline assuming a 12-month deadline, i.e., we presuppose that the Convention will request the 3 month extension allowed for in article 137 of the Constitution. We do so because the 12-month deadline seems more realistic than the 9-month deadline, given the number of core tasks and the number of potentially delaying variables we have identified.

Phase 1: Installation

Taks

Installation of the Convention and election of the Directive.

On 4 July 2021 the Convention became operative and elected its President and Vice-President. The plenary started working in the week of 5 July 2021. Further members of the directive were elected on 29 July 2021.

Adopt preliminary rules for operation.

Provisional rules (“Basic Rules for the provisional functioning of the Constitutional Convention”, hereinafter “provisional rules”) were adopted on 14 July 2021.

Define rules of the Convention.

A Commission on Rules was set up on 19 July 2021. On 28 August it approved its proposal of Rules. This proposal needs to include the products of the other provisional commissions and the plenary must debate and approve the Rules.

Set up a framework for dealing with logistics, participation, and other matters regarding the functioning of the Convention.

The Convention provided for Commissions to deal with such matters relating to the installation of the Convention in its Provisional Rules and in the “Rules for the Operation of New Commissions” (adopted on 21 July). All of these Commissions had until 28 August to submit their proposals to the plenary.

Define permanent committees.

These will be set up in the Rules.

Public participation has become an increasingly important part of constitution making. In Chile, there seems to be a commitment to broad and meaningful public participation. This will entail time and work. Participation may operate in different ways in different phases of the Convention. There should be an agreement at this stage on how and when to engage the public effectively, and how to manage public participation (as is being elaborated by the pertinent provisional Commissions). It is also necessary to allow some flexibility to adapt to contingencies that may arise from public participation.

Constitute a “Technical Secretariat”, in accordance with article 133.6 of the Chilean Constitution, and an Administrative Secretariat.

The proposal of Rules refers to both bodies. Since the Convention cannot formally set up its technical secretariat before approving its Rules, the installation of the Secretariat is likely to be completed no sooner than October.

Installation of permanent committees, including election of committee members, their coordinators, rules of operation, provision for public participation, and a timetable.

All this is provided for in the proposal of Rules.

There may be a need at this stage to facilitate the transition between procedure and substance.

The Rules of the Convention will provide for committees, yet those committees may have limited guidance from the plenary regarding the substance of the issues they will be discussing. As discussed in relation to the first variable in Part 2 above, some other constitution-making processes have adopted measures to address this. One such measure that might be particularly useful in Chile is to define terms of reference for the committees. If this or other measures were adopted, they would be adopted in this phase.

Drafting is a major activity and takes much time. It requires, or is greatly aided by, professional assistance which could be provided by the Secretariat as well as by aides of Convention members. Skilful drafting can solve conflicts. The Convention also needs a system to distribute drafts, minutes, documents, and the like. All this should be considered when deliberating on the Secretariat and suggests that the Secretariat should be in place as soon as possible, to test and establish its systems at an early stage while there is relatively little flow of information.

Overall assessment:

Given the deadlines set in the Provisional Rules and the Rules for the Operation of New Commissions for the provisional commissions to deliver their outputs, it is likely that key issues necessary for the Convention’s installation before it can move to phase 2 and drafting the Constitution will not be settled before the end of September 2021. This estimation is consistent with Convention Vice-President Jaime Bassa’s declaration at the plenary on 17 August 2021, that the discussion about the contents of the new Constitution will begin in October 2021.

Phase 2: Elaboration

Tasks

Presenting initiatives.

Presentation of proposals for the content of the new Constitution, which will be the object of deliberation by the thematic committees.

In the Chilean process, the proposal of Rules provides that both Convention members and the public may present proposals of content for the new constitution, during a time period to be determined by the Directive which shall not be shorter than 30 days.

Public participation.

Meaningful and widespread participation is expected to occur during phase 2. Many members of the Convention have proposed that some Committee meetings take place outside the capital to promote a more decentralized and inclusive debate. It is also likely that the different Committees will invite experts and members of civil society to present on specific issues.

Committee deliberation.

Each one of the permanent Committees must discuss the proposals, agree on draft articles, and elaborate reports including justification, assessment of public participation, and minority positions. Exceptionally, Committees may divide into subcommittees.

An important element affecting the timing of the process will be the reception, systematization, and resolution of controversies regarding the proposals.

Here drafting discipline will be very important, which means that committees need to do as much as possible not to defer issues to the next phase, by resolving issues as they arise and providing a complete proposal of articles in their areas. In any process where there are several committees working simultaneously on different topics there is potential for duplication and inconsistencies, which needs to be remedied. The proposal of Rules does not provide for a harmonization committee operating during this phase, but it describes as one of the functions of the Secretariat to report to the Directive any “incoherence” in the work of the committees. It is important that the Secretariat identifies – and seeks to resolve – duplication of work or contradictions between different committees as quickly possible.

Plenary discussion and approval of proposed individual norms.

Under the proposal of Rules, the plenary is to first approve the reports of the thematic committees, before debate on the proposals and any amendments presented. Those proposals supported by a two-thirds majority of the delegates will be approved. Proposed norms that fail to achieve the support of a two-thirds majority of the delegates will be returned to the relevant committees to elaborate a second proposal. If this second proposal does not achieve a two-thirds majority, it will be rejected.

Overall assessment:

Phase 2 should start at the beginning of October 2021. It should occupy the bulk of the time and work of the Convention. Though its core tasks can be mentioned briefly, it is important to bear in mind that all this entails the work of several committees, engaging with high volumes of information, including information received during public participation (which involves different activities such as processing and providing feedback), as well as the delegates' own deliberations and negotiations. It should be the longest phase. Assuming the first installation phase takes three months (from early July to the end of September), and that Phase 3 requires two to three months (see below), then this phase should take between six and seven months.

Phase 3: Conclusion

Tasks

Request the three-month extension according to Article 137 of the Constitution.

Extends the deadline for the Convention from 9 to 12 months.

Harmonization and production of complete drafts.

Collect the different areas (or sub-areas) of the proposals and produce a final text for revision. The proposal of Rules provides that at this stage, the committee of harmonization will begin its operation. It is tasked with elaborating a report with suggested amendments for the plenary.

Public participation.

There may be public participation in this stage, likely focused on the consolidated draft of a new constitution. Meaningful participation on the content of the Constitution should have already taken place in phase 2.

Agreement on a complete draft.

It is possible, though risky from the point of view of managing time, that there will be several amendments to the final draft. Under the proposal of Rules, at this stage there should only be discussion of amendments proposed in the report of the committee of harmonization and “harmonization amendments” proposed by Convention members in a 5-day time period following the presentation of the report of the harmonization committee to the plenary.

Even if the main controversies have been resolved by this stage, each amendment will need to be voted separately in the plenary and each will need a two-thirds majority, under current proposal of Rules. If changes are major, consideration may need to be given, again, to the coherence of the whole proposal.

Request a constitutional reform to extend the deadline.

If the extended time period of 12 months is not enough for elaborating a full and satisfactory draft of a new Constitution, it is legally possible for Congress to reform the Constitution to allow for another extension (see next section).

Presentation of the final draft of the new Constitution to the President.

Overall assessment:

Even if phase 2 finished with a set of approved articles elaborated by the commissions and approved by the plenary, once a complete draft is compiled, there will likely be a need to address questions of coherence as well as several new proposals, as Convention members and interested parties see a draft of the new constitution for the first time. In the Colombian constitution-making process of 1991, about a quarter of the time was spent on this phase; in the South-Africa, about a third; and, in an extreme example, in Brazil in 1987 the great majority of the Convention's time was spent in this phase. Of course each process is different. In the Chilean case, the most time-consuming activities will occur in phase 2.

This context counsels for a comparatively longer phase 2 and a correspondingly shorter phase 3. Yet comparative experience at least suggests the need to allocate a substantial amount of time for phase 3. Even if harmonization is finished before schedule, time could be fruitfully spent improving the coherence and tidying up the language of the text of the new constitution, all of which can be of great help in implementation. Therefore, an estimate of two to three months for this phase does not seem excessive. Phase 2 will have to be monitored closely and the time allocated to phase 3 should mostly depend on whether at the end of phase 2 there are still substantive debates pending (even if these concern the coherence of the text), or if this phase will genuinely only be about harmonization and style.

TIMELINE of the CHILEAN **Convention**

July 4, 2021 - July 4, 2022

**March
20-30**

Request for
extension of
article 137

April 4

End of the
9 months
deadline

**April 5
to July 4**

Extension of
article 137

July 4

End of the
12 months
deadline



JUL AUG SEP OCT NOV DEC JAN FEB MAR APR MAY JUN

1
PHASE

2
PHASE

3
PHASE



**ELECTIONS
IN CHILE**

21 November 2021
Elections of
President and
Congress

19 December 2021
Ballotage of
Presidential
election

11 March 2022
Beginning of term
of President and
Congress members

4. Deadlocks and deadlines

All constitution-making bodies have decision-making rules. These often require a supermajority of delegates to approve the final constitution. In any event, the nature of the constitution as a manifestation of a new social contract and the fundamental law for the state as a whole requires more than bare majority support. What is required is sometimes described as ‘sufficient consensus’. This standard acknowledges that unanimity is unrealistic but also accepts that it is desirable for a constitution to have broad-based approval, both within the constitution-making body and outside it.

Even so, disagreement is inevitable and deadlocks may arise on key issues. These are likely to occur throughout the Convention process and should be resolved as they arise. The resolution of deadlocks that persist becomes increasingly urgent as the end date for the Convention approaches.

There is a range of familiar techniques for resolving disagreements in the context of constitution-making. These include, most obviously, leadership and willingness to seek win-win or compromise solutions, including through trade-offs, on the part of all delegates. Other techniques that may be useful, depending on the nature of the disagreement, include deferral of the disputed issue, perhaps to be resolved by legislation once the constitution comes into force, or ambiguity in the drafting, which may amount to deferral by another name.

Some constitution-making processes have anticipated the possibility of deadlock at the end of the constitution-making process and attempted to deal with it explicitly. South Africa is a case in point. The Interim Constitution of 1993 set out the decision-making process for the Constitutional Assembly, including a process for resolving deadlocks at the point of ratification. That process was complex and unattractive in the South African context, placing pressure on delegates to resolve disagreements between themselves. Key points of the South African procedure were as follows:

■ The Interim Constitution prescribed 2 years for the Constitutional Assembly to conduct its tasks of drawing up a new Constitution and bringing it into law.

■ It stipulated a majority of at least two-thirds for passage of the final Constitution.

■ It provided for the establishment of a ‘committee of experts’; an ‘independent panel’ of ‘constitutional experts’ to be approved by two-thirds of the members of the Constitutional Assembly.

■ If the final Constitution was passed by a majority falling short of a two-thirds majority, the draft would be referred to the committee of experts to try to come up with a unanimous formulation that would attract two-thirds support.

■ If this did not work, but a draft before the Assembly was passed by a majority of delegates, the draft would be put to referendum, where it would require support of 60% of the votes cast.

■ If the draft was not passed at referendum, the Assembly would try again. If ultimately, the Assembly could not agree, it would be dissolved and a new Assembly elected.

None of these procedures were needed in the end, although the committee of experts played a useful role at key points of the constitution-making process. As the deadline for the Constitutional Assembly approached, there were a few outstanding points of disagreement between key groups of delegates, but these were resolved by compromise and agreement just in time.

We do not suggest these procedures can be transplanted without alteration to the Chilean context, where, in any event, a referendum already is part of the process. They may spark ideas, however, about how deadlocks might be resolved in the Chilean context. By way of example: could more modern forms of communication than were available during the South African constitution-making process be used to garner public opinion in Chile, on key disputed points? Would it be useful to have a ‘consensus committee’ of the Convention, whose key role is to build agreement around disputed issues, sometimes through innovative solutions? No doubt there are other possibilities as well, many of which have been explored at the Rules Commission of the Constitutional Convention. Here, what is important is to signal that these procedures help not only achieve sufficient consensus, but also to do so within the established deadline.

5. What is the Constitutional Convention to do if it is approaching the final 12-month deadline and it is still unable to agree on a complete proposal for a new constitution?

Below we map some alternatives. We do not recommend them; each is problematic in some way. We identify them here to draw attention to the possible options and to make the costs of each option transparent. This discussion also further underscores the value of working within an adequately planned timeline.

a. Railroad the process

It may be possible to speed up negotiations so as to try to finish in time. This option entails keeping the same intended content but deliberating and negotiating faster as the deadline approaches. It involves the evident cost that negotiation and deliberation may be of lower quality if it is done in haste. Yet this may not be the case. Particularly if the pending issues are few and discrete, the deadline may serve to the advantage of the Convention, because it may create incentives to overcome deadlocks, as in the South African case. This alternative will not be viable if the delay is significant.

The Convention could introduce in its Rules some specific mechanisms for speeding up the process at the last minute. For example, the proposal of Rules establishes that if there are 20 days or less left for the 9 month deadline or for the 12 month deadline (if the extension is requested), the Directive can propose to the plenary the closure of the debate. Another measure that could be adopted is, for example, to allow the Directive of the Convention, starting in month 9, to set a 10-day deadline for any permanent or special committee to finish its work (if the committee does not finish, the task could then be assigned to another committee¹).

b. Seek an extension through Constitutional reform

While the Chilean Constitution provides for a 12-month extended deadline, it is legally possible for Chilean National Congress to reform the Constitution and extend the deadline (articles 127 and 128 of the Chilean Constitution). In this scenario, the Convention could request congresspersons, or the President, to introduce a project of constitutional reform. In evaluating this alternative, the following issues should be considered:

When to request the extension? This extension would require a two-thirds majority in Congress, and thus a response from Congress may not be swift. The extension needs to be requested with sufficient time in advance. According to our timeline, by the beginning of phase 3 there should be an indication of whether the Convention is likely to extend beyond 12 months and, if this is the case, then it would be advisable to request an extension at this time.

1 We thank Patricio Zapata for suggesting this measure.

■ The viability of this alternative will depend on the political landscape after the November 2021 elections (for Congress and President).

■ How long should an extension be? In determining how long to extend the period of the Convention, Congress needs to consider that too long an extension can have a negative impact on the constitution-making process as a whole, affecting its momentum, credibility, the commitment of delegates, and the interests of the public at large.

■ This alternative would be appropriate if progress is slow and, at the time of the deadline, the Convention has still to arrive at an agreed text for a substantial part of the Constitution.

■ One difficulty of this alternative is that the 12 months deadline was part of the rules already in place at the time on the referendum on a new Constitution of 25 October of 2020, and thus it could be argued that these rules have received democratic sanction.

c. Overinclusion

In seeking to arrive at a consensus under the pressure of a deadline, Convention members may adopt a strategy to include many proposals without due scrutiny and negotiation, to avoid spending time on discussion and evaluation of proposals: “I accept yours and you accept mine”. Experience shows that this is a live alternative (it was an important feature of the Brazilian constitutional process of 1987-1988), yet it is problematic, as it may end in an incoherent and unworkable text. As a matter of principle, the Convention may choose to attempt to express the demands of different sectors of Chilean society, which is a reasonable undertaking. Yet, this needs to be distinguished from the undisciplined inclusion of proposals not for the sake of political inclusion or legitimacy, but merely to achieve agreement under the pressure of time.

d. Underinclusion

Again, experience shows this is a live option when time runs out, but it can affect the quality of the Constitution. When time runs out, constitution-makers may decide to leave some issues out of the Constitution. Again, there may be good reasons for doing so—some issues are better left to ordinary democratic politics or to the work of other bodies such as courts. Yet, the risk is that under the pressure of an approaching deadline some important constitutional matters will be left unaddressed, including some that State bodies will have little incentive to settle after the Constitution is in operation. One of many examples is deferral of a decision on the second legislative chamber in Iraq. Another is the decision, in India, to make the provision of a uniform civil code a goal of the state in non-justiciable directive principles. In neither case has the deferred decision materialized. In both, arguably, the issue was appropriate for inclusion in the Constitution. Time management of the Convention demands demarcating matters that should be addressed in the Constitution and others that can or even should be left to the work of other institutions.

The four options set out above are not exclusive. They may be combined among themselves, or with deadlock mechanisms such as the ones mentioned above. The last two alternatives are pathological: they will have some attraction under the pressure of a deadline, but they carry a threat of deficiencies for a Constitution.

In evaluating alternatives, other than considering their respective costs, a key question to ask is why the process is delayed. If the reason is very contingent and was overcome (say, a natural disaster forced the Convention to suspend some sessions) and the delay is not too great, then the process may be sped up to meet the deadline. If the reason is a persistent deadlock, then railroading may not be possible, and seeking an extension should be considered, together with adopting some measure to address the deadlock.

References and resources

Basic Documents of the Chilean Constitutional Process

“Constitution of the Republic of Chile” (includes Law 21.200 of 24 December 2020, a constitutional reform which introduced to Chapter XV of the Constitution a set of articles on the “procedure to elaborate a new Constitution of the Republic”).

[Available here](#)

“Normas básicas para el funcionamiento provisional de la convención constitucional” (“Basic Rules for the provisional functioning of the Constitutional Convention”), approved by the Convention on 14 July 2021 and modified on the 10 and the 14 of August 2021.

[Available here](#)

“Reglamento para el funcionamiento provisional de las nuevas comisiones” (“Rules for the provisional functioning of the new commissions”, approved by the Convention on 21 July 2021 and modified on the 10 and the 14 of August 2021.

[Available here](#)

Propuesta de Reglamento de la Convención Constitucional (adoptada el 28 de agosto de 2021 por la Comisión de Reglamento) [propuesta de Reglamento].

[Available here](#)

Comparative constitution-making processes

Brazil: Keith S Rosenn, “Conflict Resolution and Constitutionalism: The Making of the Brazilian Constitution of 1988’ en Laurel E Miller (ed), Framing the State in Times of Transition: Case Studies in Constitution Making (United States Institute of Peace Press, 2010) 435-466

[Available here](#)

India: Madhav Khosla, India’s Founding Moment: The Constitution of a Most Surprising Democracy (Harvard University Press, 2020).

Iraq: Zaid Al-Ali, The Struggle for Iraq’s Future: How Corruption, Incompetence and Sectarianism Have Undermined Democracy (Yale University Press, 2014)

Nepal: Mohan Lal Acharya, “Constitution-Making Process in Nepal: An Assessment and Lessons for the Future’ en Budhi Karki y Rohan Edrisinha (eds), Participatory Constitution Making in Nepal: Issues for Process and Substance (Programa de las Naciones Unidas para el Desarrollo, 2014)

South Africa: Writing One Law for One Nation 1994-1996.

[Available here](#)

Timor-Leste: Annemarie Devereux, “Overview of the constitution-making process in Timor-Leste” en Timor-Leste’s Bill of Rights: A Preliminary History (ANU Press, 2015)

[Available here](#)

Tunisia: Zaid Al-Ali and Donia Ben Romdhane, ‘Tunisia’s new constitution: progress and challenges to come’ Open Democracy, 16 February 2014

[Available here](#)

Literature

Michelle Brandt et al, Constitution Making and Reform: Options for the Process (United States Institute of Peace Press, 2011) esp part 2.1.5 on Timetables

[Available here](#)

Daniel A Farber, “Racing the Clock: Deadlines, Conflict and Negotiation in Lawmaking’ en Frank Fagan y Saul Levmore (eds)The Timing ofLawmaking (Edward Elgar: 2017)

Hanna Lerner, “Constitution Writing in Deeply Divided Societies: The Incrementalist Approach’ (2010) 16 Nations and Nationalism 68-88

[Available here](#)

Cheryl Saunders, “Constitution Making in the 21st Century” (2012) 4 International Review of Law 1

[Available here](#)



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