



Managing the risks of inclusion and participation: Chile as a case study

Javier Couso

Briefly describe the approach taken to inclusion in the constitution building process. At what stage(s) in the constitution building process did inclusion occur?

The case of Chile presents a problem that has to be confronted from the outset: It is not at all clear that — over the last century — we ever had a ‘constitution-building process’. Let me explain. After the constitutional charter imposed by General Pinochet’s dictatorship in 1980, the closest thing Chile has had to a constitution-making process was Michelle Bachelet’s second government’s attempt to introduce a new Constitution in 2014-2018, but this process ultimately failed. The reason it failed was that the powerful right-wing opposition never embarked on the constitution-building process (in fact, the opposition was largely happy with Pinochet’s Constitution). So, even though some opposition actors (of secondary relevance) were included in one of the participatory processes designed by the government, their participation did not ‘represent’ the opposition parties, which remained absent from the constitution-making process (hoping that it would fail, as it eventually did). In fact, the only reason the opposition had a few jurists in the body overseeing the participatory process of the country’s incipient constitution making process was to save face if the process pushed by the Government was able to make it into a fully-fledged constitution making process.

Having said the above, even if we are confronting a process that did not manage to produce a constitutional change, there are still insights that can be drawn from the ‘autopsy’ of what ultimately represents a failed constituent process. The most important one, I submit, comes out when answering the following question posed by the conveners of this conference: “*At what stage(s) in the constitution building process did inclusion occur?*”? This because one of the crucial elements explaining the failure of Chile’s constitution-making process is that it did not include the opposition from the outset. And, due to the fact that Chile’s existing constitutional order requires two-thirds of the actual members of parliament to agree on the need to start a constitutional change, the whole process was doomed from the start, as the opposition controlled 45 % of the seats of Congress.

Who was included in the constitution-building process? Were any groups excluded and if so, what were the implications of such exclusion?

As stated above, the crucial actor needed to make the whole constitution-making process work (the right-wing opposition) was not included. Not because it was not invited to do so by the government (it was), but because it did not have any interest in having a new Constitution. The decision by Chile’s right-wing parties to exclude themselves from the constitution-making process had a very concrete implication: it made the whole process fail.

The government's decision to go ahead with the constitution-making process without the agreement of the right-wing parties to embark on such a process was premised on the hope that the eventual massive participation of millions of Chileans in the process would somehow force the opposition to join the constitution-making process. That bet did not pay off – although some 200,000 people participated in the process, that represented less than 3% of the electorate, and, damagingly, they were almost all sympathisers of the centre-left administration of President Bachelet, which gave a partisan flavour to what should have been a national endeavour.

In sum, the clear hostility by the right-wing opposition parties to the constitution-making process launched by Bachelet's government, which led to its self-exclusion from it, was fatal to the whole enterprise.

Was there widespread public participation? What were the benefits and were there downsides?

Around 200,000 people (2.5-3% of the electorate) participated in some of the mechanisms of public participation introduced by the government. For a country of around 18 million inhabitants, the number is rather impressive. Having said this, the fact that there was almost no participation from citizens who sympathised with the right-wing opposition made the number less relevant. In other words, there was a lack of participation from that (very large) part of Chilean society that supports right-wing parties, following the right-wing parties' assessment that Chile does not need a new constitution, and this made the impressive numbers of public participation achieved by the process rather moot.

After a largely consultative process, the final stages of the constitutional reform process stalled. To what extent was this attributable to the approach to inclusion or participation? What might have been done differently?

As it can be appreciated by the replies to the previous questions, the failure of the Chilean constitution-making process was due to the combination of the fact that the existing constitutional order requires a large political consensus to allow the process to continue (two thirds of the actual members of Congress) and the complete hostility towards the very idea of having a new constitution from Chile's right-wing opposition. In other words, given that the opposition knew that without their approval the constitution-making process would go nowhere, they did everything possible to undermine the process.

It is very hard to imagine that any different strategy would have been successful in delivering a new constitution. The fact is that the Constitution of 1980 represents to Chile's right-wing parties an 'insurance'¹ which has served them extremely well over the last thirty years since the dictatorship ended. Thus, the right wing parties had (and still have) no incentive whatsoever in 'opening the door' to any constitution-making process which, in their view, could only have a negative impact on their political interests.

¹ Rosalind Dixon and Tom Ginsburg, 'The Forms and Limits of Constitutions as Political Insurance' (2017) 15 *International Journal of Constitutional Law* 988.

What lessons from Chile's experience might be relevant to other countries engaged in constitution building in a politically polarised environment?

The 'lessons' of Chile's failed attempts to have a democratically-enacted Constitution are threefold. First, the normative ideals regarding how to go about discussing and adopting a new constitution in polarised environments are greatly constrained by the power-politics dynamics of a given society. In other words, it is naïve to think that the often crude partisan politics which characterises 'normal' politics would be somehow 'suspended' when the country gets into a 'constitution-making mode'. To the contrary, in countries with long constitutional trajectories (and perhaps in others as well), political parties and actors know very well that what is at stake in the process of making a new constitution is even more important than any decision adopted in times of 'normal politics'. If this is so, one should expect more, not less, polarisation when it comes to debating a new constitution.

One reason there is often a tendency to downplay the power politics constraints on constitution-making processes is that constitutional theories that have attempted to reconstruct constituent processes of successful constitutional democracies tend to idealise such processes, overlooking the sheer power politics that surrounded and constrained them.

A second 'lesson' that the Chilean case suggests is that it is all well and good to try to articulate 'best practices' in constitution-making processes, but it is extremely important to develop (simultaneously) 'second best' strategies and mechanisms that should be tried when the 'best practices' cannot be achieved due to the political context of a given country.

A final 'lesson' that can be drawn from the Chilean case is that constitution-making processes are heavily path-dependent. Due to this, the legacy of past experiences can make it hard to introduce new mechanisms of constitution making. This suggests that when the introduction of new practices seems imperative, the new modalities ought to be introduced with extreme care, as when a legal 'transplant' is attempted in an area of law where such importation is difficult.

Javier Couso

Javier Couso is Professor of Constitutional Law at Universidad Diego Portales (Chile), and Chair in Global Trends in Constitutionalism at Utrecht University (The Netherlands). A specialist in Comparative Constitutional Law, with an emphasis in Latin American Constitutionalism, he is currently an Associate Member of the International Academy of Comparative Law, after having served in the Executive Committee of the International Association of Constitutional Law and at the Board of Trustees of the Law and Society Association. After holding visiting professorships at the University of California-Berkeley; Melbourne University; the University of Leiden; and the University of Wisconsin-Madison, he currently serves in the editorial boards of the Constitutional Court Review; the Journal of Law and Courts; the Law and Society Review; the International Journal of Law in Context, and the journal Law and Policy. In the period 2014-2015 he served as a consultant to the United Nations in Yemen's constituent process, followed by his role as constitutional adviser to Michelle Bachelet's government in Chile (2015-2018). A regular contributor International IDEA's Constitution Building Program, he was a consultant on constitution-making processes for the Chilean Office of the United Nations Development Program (UNDP) in the period 2013-2014.