1 Introduction

This introductory chapter presents the highlights of the relationship between Chile and the OECD. It considers the role of constitutions in modern democracies and the importance of the drafting process to foster inclusiveness and ownership of the text. Finally, it provides readers with an overview of the structure, methodology and definitions used throughout this report.

Towards a new constitution in Chile

Chile has embarked in a multi-stage process to forge a new social contract enshrined in a new constitution. The new text will be drafted by a Constitutional Convention, formed of 155 men and women in equal numbers – a world first – elected last May by direct and popular vote. The Convention will work for nine months to draft the new constitution, a period that may be extended up to a maximum of one year. The overall process of rewriting the constitution will last two years and finish with final public referendum at the end of 2022.

A cross-sectoral political agreement to rewrite the constitution was adopted on October 2019 following social protests that revealed mounting social discontent with unequally distributed income and well-being outcomes. The possibility of a new constitution has long been present in Chilean debate. Indeed, a deliberative process to draft a new constitution was officially announced in 2015 involving first citizen dialogues that would give rise to a broader exercise at the local, intermediate, and national levels (OECD, 2017[1]).[1] According to official numbers, 204 000 people participated in local meetings and 17 000 in the parallel Indigenous consultation.

Apart from being an exceptional opportunity, drafting a new constitution or amending the existing one is for any country a social, political and technical challenge. As the expectations placed on constitutions have increased, they have also become complex and lengthy, and hence more difficult to design. International experiences illustrate a large spectrum of constitutional options, and provide the lessons learned over years associated with each choice. Access to these experiences can help Chile understand the strengths and drawbacks presented by each choice; identify key factors to consider; and learn about different governance models that can be entrenched in the constitution. The OECD has been invited to provide inputs from comparative experience across member countries in terms of the possibilities, scope and dynamics of selected constitutional provisions, based on its long-standing relationship with Chile (Box 1.1).

Box 1.1. Chile and the OECD

The year 2020 was a momentous one in terms of the relationship between Chile and the OECD, as it marked the tenth anniversary of Chile becoming a member country.

Chile's accession process to the OECD started in May 2007 and culminated in May 2010. Throughout it, Chile was exemplary in its efforts to join the Organisation, undertaking major reforms to move closer to OECD standards and best practices. In response to recommendations made by OECD bodies, Chile adopted major pieces of legislation including: on the exchange of bank information for tax purposes; the criminal liability of legal persons for bribery of foreign public officials; the creation of its Ministry of Environment in 2009; and improving the corporate governance of state-owned enterprises such as CODELCO (Corporación Nacional del Cobre de Chile, the National Copper Corporation of Chile) by eliminating the presence of ministers on boards. Chile also improved competition and consumer protection laws, among others.

The accession process, which resulted in Chile becoming the first South American country to join the Organisation, was also an important learning exercise for existing OECD members who have continued to benefit from the Chilean experience in certain areas, for example the open government and transparency reform Chile undertook in 2008.

The OECD accession process is only the start of a journey. As such, the Organisation continues to follow up closely on the country's post-accession commitments. Most recently, Chile has successfully established the main elements of an industrial chemicals management system as recommended by the OECD Chemicals Committee, including through publication of a Globally Harmonised System of Classification and Labelling of Chemicals Regulation. The only area in which commitments are still ongoing is that of digital economy policy. Chile has been working to bring its privacy legislation in line with the relevant OECD standards, and the OECD Digital Economy Policy Committee is waiting for the adoption of a draft bill amending its personal data protection laws, which is currently under discussion in the Chilean Congress.

Once it became a member, Chile flourished as one of the most active OECD countries. Over the past ten years, Chile has worked with OECD experts to continue improving its policies, regulations and institutional frameworks in key areas such as environmental policy, competition, education, skills and abilities, tax policy, governance and anticorruption. The country's membership has helped the OECD better understand Latin America and the complexity and enormous potential of emerging economies. In addition, Chile has been a genuine pillar in the region, supporting the dissemination of OECD best practices and standards. Chile has also achieved significant economic advances, such as the fiscal surplus rule that contributes to the country's economic stability, and the creation of the Autonomous Fiscal Council. During the Chilean chairmanship of the OECD Ministerial Council Meeting (2016), the OECD launched the Latin America and the Caribbean (LAC) Regional Programme and Chile became its first co-Chair along with Peru. Chile also paved the way for the accession of other countries in the region, such as Colombia and Costa Rica. Chile has also enhanced the OECD partnership with regional economic blocks such as the Pacific Alliance and the Asia-Pacific Economic Cooperation (APEC).

This report has been prepared in the context of the drafting exercise of the Constitutional Convention, with the aim of serving as background support for the Convention members in their activities interest for the Chilean political-institutional context and to which the OECD can meaningfully contribute given its comparative knowledge: economic, social and emerging rights; system of government; multi-level governance; constitutional review; fiscal institutions; and the functioning of the central bank. This introduction presents an outline of key ideas concerning the constitution: What is its role? What are its key building blocks? Finally, it guides the reader through this report's methodology and structure.

The role of constitutions

In democratic systems, constitutions are created to ensure that a nation's people receive as good a government as seems possible by creating a solid and sustainable framework of institutions for democracy. Constitutions provide a legal foundation that governs (and binds) the nation's political life, a crucial element for a democracy that is stable and thriving. Constitutions also most often enshrine fundamental rights as a crucial element. Modern democratic constitutionalism is thus grounded on two principles: representative government that allows citizens to participate in public affairs and hold the government to account, safeguarded by the establishment of the separation of powers; and the protection of rights, through which citizens are sheltered from abuses of power (International IDEA, 2014[2]).

In general terms, written constitutions create the framework for government. At a minimum, they identify the body or bodies responsible for making law (legislatures), enforcing it (executives), and interpreting it (judiciaries). In doing so they specify how people are to be chosen as members (elected or appointed), how long they serve, and sometimes the qualifications for membership. A constitutional order also represents "a fundamental commitment to the norms and procedures of the constitution" (Ghai, 2010[3]). Several contemporary constitutions stop close to that point. The vast majority, however, cover much more.

Constitutions emerge not from a vacuum but from pre-existing institutions, economic conditions, social and cultural features, and political objectives of both the people and the numerous political actors that make up a community. Constitutional designs are thus context-driven and necessarily amalgamate political ideology and influence, legal theory, culture, historical experience, and legal technique. A comparative overview of constitutional choices made among the OECD membership points to two important considerations that should precede any examination of choices beyond the minimum:

- Items included in a constitution and the related details associated with each choice result largely from local circumstances, including the history against which the constitution is written. For some areas, "good practices" can be identified that have emerged from constitutional experience around the world, but sometimes there are important local reasons for making a choice that diverges from such good practice. The fact that a local proposal could differ from what is found elsewhere may signal to constitution drafters that they should examine the choice carefully, although that is not in itself a strong argument against the choice. In other words, best practices are not universal, and their adequacy hinges on the national history, context and preferences.
- Every choice made at the level of the constitution – if the choice is legally binding – removes that topic from the play of ordinary legislative policy making. The choice is then said to be entrenched in the constitution. This does not necessarily mean that the choice is irrevocable, only that it will stay in place until a majority sufficient to amend the constitution is assembled. Such "amendment" majorities are usually larger than those needed to modify or repeal an ordinary statute. Choices entrenched in the constitution are "stickier" than choices made by legislatures.

In general, this stickiness counsels against including detailed "programmatic" provisions[2] in constitutions as legally binding. Some constitutions include such provisions as recommendations to the legislature (these are sometimes called "directive principles" [Ireland]) or even as duties for the legislature to act on (as in requirements to enact organic laws, i.e. laws requiring a qualified majority, dealing with specified topics [France]). Some constitutional provisions can be made enforceable only through politics (these provisions receive different labels, such as "political questions" and "non-justiciable" matters). The general rule, however, is that everything included in a constitution is presumed to be legally enforceable. This means that a court may issue an order directing that the provision be complied with. If constitution drafters include provisions in a constitution that are not to be legally enforceable, such should be clarified to the extent possible. In any case, the proposition would benefit from being as clear as possible.

Drafting a new constitution

Both the process by which a constitution is built and its substantive content are the keys to its legitimacy (Böckenförde, Hedling and Wahiu, 2011[4]). The drafting process not only can endow the new constitution with necessary democratic legitimacy, but also can increase public awareness of it; instil a sense of public ownership; and create the expectation that the constitution will be observed by the whole of society (Saunders, 2012[5]). A successful constituent process that will lay the groundwork for future adherence to the constitutional text thus requires that as many relevant sectors and institutions of society as possible participate actively in its different stages. The Venice Commission in its report on constitutional amendment emphasises the participation of civil society and the centrality of parliament during the process.

In order to ensure this, constitutions and constitutional reforms in the past century have been carried out by both sitting parliaments and bodies chosen for the specific purpose of constitution drafting ("constitutional conventions" or "assemblies"); this will be the case with the Chilean Constitutional Convention. In Latin America, 46% of constitutional reform has taken place through a constitutional convention or assembly since 1947 (UNDP, 2015[6]). In other cases, it has been carried out by a selected group of experts. Sometimes, especially after severe civil strife is winding down, it has been drafted through negotiations ("roundtables") among important political actors, including parties and actors outside the existing government structures. Empirical studies suggest that constitutions written by parliaments, by constitutional conventions and in roundtable processes do not systematically produce better or worse constitutions. The most adequate system hinges on the national context, and a constitution's ultimate quality and stability appears to depend more on its substance than on the process by which it was drafted and adopted.

Several features of contemporary constitution drafting are worth noting:

- Except in unusual circumstances, a degree of citizen and stakeholder participation in drafting a constitution is widely believed necessary. The form of public participation varies: election of some or all members of a constitutional convention, for example, or a referendum to ratify a constitutional draft developed either by the parliament or a constitutional convention.
- In constitutional conventions, it is believed crucially important to ensure plural representation of views, to avoid skewed partisan interests from influencing or dominating the discussion. Ensuring the voice of different groups of society, the inclusion of minorities and gender parity are thought to be good practice.
- The general constitution-drafting body often meets in plenary form, but may delegate to a subcommittee the power to reduce general ideas to precise language (a "committee on detail," as in the drafting of the United States Constitution). The drafting body also may form specific thematic committees where specific matters are discussed, and at times could invite external experts. The proposed text is then reviewed by the plenary.
- A substantial degree of transparency in the drafting process is widely thought desirable. According to the UNDP Comparative Study of 95 constitutional reform processes (UNDP, 2015[6]), the vast majority of constitutional conventions opted for open door policies for their assembly deliberations and promoted transparency of the decisions adopted. Yet country experiences show that complete transparency can be difficult to achieve, as relevant discussions can occur in informal meetings. In addition, constitution-drafting bodies at times delegate to a "subcommittee" that can exercise outside the public's view the power to develop compromises on issues that prove difficult to work out within the body.

Structure of the Report and methodology

This report undertakes a comparative study of the constitutional provisions relating to six key building blocks of constitutions that are considered important in the Chilean context and where the OECD can offer relevant expertise, based on the experiences of its members. The countries selected for benchmarking cover wide spectrum of options across the OECD membership, and there are occasional references to partner countries. The countries selected as benchmarks vary depending on the topic that is being discussed.[3]

At the beginning of each chapter, there is an introduction to the importance of the topic and a box of key issues to be addressed, as well as a brief overview of the topic. Each section then identifies core features and considerations, and their historical evolution, with links to specific country examples. Where relevant, the chapter also considers those issues that are usually entrenched in the constitutional text and which are left to the secondary legal framework. The Annex presents a comparative table of the benchmarking countries' constitutional or legal provisions for consideration by the Chilean Constitutional Convention. The way in which key concepts are used is defined in Box 1.2.

Box 1.2. Key definitions in the report

For the purposes of this report , a *constitution* is understood in a formal sense, as a written instrument or instruments that provide a framework for the system of government, national self-expression and the protection of fundamental rights, and that are accepted as fundamental law. Such a law is hierarchically superior due to a special and rigid procedure of amendment and to constitutional review.

Most of the benchmark countries have such a constitution, although in Canada and Austria more than one instrument comprises the written constitution. The exception is New Zealand, which has no written entrenched constitution of this kind; instead, rules are provided in statutes, judicial decisions and, importantly, a treaty with some of the country's Indigenous peoples of New Zealand.

Constitutionality is understood as the notion that the authorities' actions shall be at one with the values, normative arrangements, institutional designs, and political processes promoted by a constitution, be it a single legal text, a series of separate legal texts or provisions, or a non-written constitution.

Special laws (also called *organic laws or qualified majority laws*) are those above ordinary laws but below the constitution in the hierarchy of laws. Special laws require a qualified majority (i.e., require majorities larger than simple ones) to be adopted, amended or repealed.

Ordinary laws or statutory laws are those subordinate to constitutional and special laws, and are easier to adopt and amend as they usually only require a simple majority of the legislature.

In terms of the types of constitutional reviews, *intense or strong-form review* occurs where either the Constitutional Court or the ordinary courts have the last word regarding interpretation of the constitution, and the constitutionality of a statute or act. Alternatively, a *mild or weak-form judicial review* is a form of judicial review in which judges' rulings on constitutional questions are expressly open to legislative revision in the short run. Courts are given the opportunity to explain why in their reading a challenged statute is unconstitutional, but the legislative deliberations are not bound by the court's arguments.

This report presents building blocks that may individually either be chosen or not. The combination of the chosen items in practice, however, will not be neutral. For example, more fundamental rights can be added in a very generous declaration in order to give the maximum amount of rights to the people and protect them from the institutions or from other citizens (horizontal effect), on the one hand; on the other, large powers can be granted to the constitutional court. The latter case however leads to lessening power of the parliament, in spite of the fact that the people at large generally retain more democratic control over the parliament than over the judiciary.

The OECD emphasises that constitution making is a sovereign national process that must be fully owned and led by the Chilean people. This report thus aims to provide a comparative range of options as found in the constitutions of its selected OECD member states, with full awareness that there are no “one size fits all” constitutional models. In order to ensure that the comparative exercise is useful, the report has attempted to present trends and examples that could be relevant and operative in Chile. Following an introduction to some of the building blocks of contemporary democratic constitutions (Chapter 2), there is a comparative overview of the constitutional inclusion and design of economic, social, and new rights (Chapter 3), systems of government (Chapter 4), multi-level governance (Chapter 5), forms and models of constitutional review (Chapter 6), fiscal institutions (Chapter 6) and central banks (Chapter 8).

Chapters 7 and 8, related to fiscal governance and central banks respectively, differ in significant ways from the rest of the report. These two chapters draw on OECD data and official recommendations more heavily than the others, given the long-standing tradition of the OECD advising countries specifically on those issues and the Organisation’s support for particular institutional designs surrounding those topics. They also draw on economic analysis more than legal or public governance considerations, as do the other chapters.

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Notes

[1] The process was organised into three main stages. First, an online individual questionnaire gathered 90 804 responses. Next, there were local self-convened meetings of 10 to 30 people, taking place mostly in private spaces but also in universities, schools, churches and other social spaces. Finally, more institutionalised participation took place through local *cabildos* or town hall meetings at the provincial and regional level.

[2] According to the RAE, in its legal dictionary, a programmatic norm is one that "does not contain imperative propositions or establish sufficient mechanisms to ensure its application, but is limited to formulating a program of action, criteria or legislative policy guidelines, or to declaring rights whose definitive consecration, endowing the declarative norms with full effectiveness, is left to the subsequent intervention of the secondary legislator.

[3] Australia, Finland, Germany, New Zealand, Portugal, Spain and Switzerland have been analysed as central benchmarking countries for the majority of topics. France has been analysed as part of the chapters on system of government, constitutional review and multi-level governance. Costa Rica has been analysed as part of the system of government chapter and for the chapter of central banks. Colombia has been examined to inform the analysis on constitutional review and multi-level governance. Austria and Mexico have been analysed for the chapter of constitutional review. Examination of the Netherlands and Greece complemented the analysis of multi-level governance. The chapter dealing with central banks has focused on the euro area as a whole instead of individual countries, and in addition on Poland, Turkey and Mexico.