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(VENICE COMMISSION)

CHILE

OPINION

ON THE DRAFTING AND ADOPTION OF A NEW CONSTITUTION

**Adopted by the Venice Commission
at its 130th Plenary Session
(Venice and online, 18-19 March 2022)**

On the basis of comments by

**Mr Paolo CAROZZA (Member, United States of America)
Mr Josep Maria CASTELLA ANDREU (Member, Spain)
Ms Janine OTALORA MALASSIS (Substitute member, Mexico)
Ms Hanna SUCHOCKA (Honorary President of the Venice
Commission)
Mr Kaarlo TUORI (Member, Finland)**

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I. Introduction

1. By letter of 5 January 2022, Ms Ximena Rincón González, President of the Senate of the Republic of Chile and Mr Raúl Guzmán Uribe, Secretary of the Senate as well as 22 senators requested an opinion of the Venice Commission on certain questions related to the Constitutional Convention of the Republic of Chile.
2. Mr Paolo Carozza, Mr Josep Maria Castellà Andreu, Ms Janine Otálora Malassis, Ms Hanna Suchocka and Mr Kaarlo Tuori acted as rapporteurs for this opinion.
3. From 28 February to 2 March 2022, a delegation composed of Mr Gianni Buquicchio, Special representative of the Venice Commission, Messrs Paolo Carozza, Josep Castellà Andreu, Ms Simona Granata-Menghini, Secretary of the Venice Commission as well as Mr Serguei Kouznetsov from the Secretariat met with Ms Ximena Rincón González, President of the Senate and a group of senators; Mr Sebastian Piñera Echenique, President of the Republic and Mr Hernán Larraín, Minister of Justice; Mr Diego Alfredo Paulsen Kehr, Speaker of the Chamber of Deputies; Ms Maria Elisa Quinteros Cáceres, President, Mr Gaspar Domínguez, Vice-President and members of the Constitutional Convention; the Constitutional and Supreme Courts, Ms Antonia Urrejola Noguera, incoming Minister of Foreign Affairs and Ms Macarena del Carmen Lobos Palacios, incoming Subsecretary of the Ministry General Secretariat of the Presidency (in the government of President-elect Gabriel Boric); former Presidents of Chile, Messrs Eduardo Frei Ruiz-Tagle and Ricardo Lagos Escobar; Mr Gonzalo De la Maza, Director of the Technical Secretariat for popular participation of the Constitutional Convention; the Bar Association, Association of Judges, national academia, several national NGOs and the international diplomatic community. Ms Otálora Malassis participated in the meetings held in the Constitutional Court and at the premises of the Senate online. The Venice Commission is grateful to the Senate and the Constitutional Court of Chile for the organisation of these meetings.
4. This opinion was prepared in reliance on the English translation of the questions submitted by the Senate of the Republic of Chile. The translation may not accurately reflect the original version on all points.
5. This opinion was drafted on the basis of comments by the rapporteurs and the results of the visit to Santiago de Chile from on 28 February to 2 March 2022. It was examined by the joint meeting of the Sub-Commissions on Latin America and on Democratic Institutions on 17 March 2022. Following an exchange of views with Mr Juan Castro Prieto, member of the Senate, it was adopted by the Venice Commission at its 130th Plenary Session (Venice and online, 18 and 19 March 2022).

II. Background

6. The current constitution of the Republic of Chile was adopted in 1980 during the Pinochet regime. It was amended for the first time in 1989 (through a referendum) and afterwards almost 60 times. The reform of 2019 was carried out to facilitate the current constituent process. In September 2005, under Mr Ricardo Lagos' presidency, extensive amendments of the Constitution were approved by the Congress in a new refounded text, removing from the text the signature of Pinochet and adding that of Lagos and removing also anti-democratic provisions coming from the Pinochet regime, such as senators-for-life and appointed senators, as well as special powers of the Armed Forces.
7. On 15 November 2019, following civil protests initiated on 18 October, almost all political parties signed an agreement (Acuerdo por la paz social y la nueva constitución) stipulating

that a referendum would be held to give Chileans an opportunity to approve or reject the drafting of a new constitution¹ and the mechanism through which it would be drafted.

8. The "constituent process" was formally launched on 24 December 2019, with the publication of Law 21200,² which introduced the amendments to the current Constitution, modifying its Chapter XV. The amended text includes two types of provisions concerning the procedure of changes of the constitution:

- a) amendments to the existing Constitution (Articles 127 – 129) adopted by the parliament (pre-existing),
- b) preparation of a new Constitution of the Republic (Article 130 – 143) by a special body (provision introduced by the 2019 amendments).

9. The national referendum was held in Chile on 25 October 2020 ("plebiscito de entrada"). It had to determine whether a new constitution should be drafted, and whether it should be prepared by a constitutional convention made up by members elected directly for this convention, or by a mixed constitutional convention, composed of an equal number of acting members of Parliament (Congreso) and directly elected citizens. Seventy-eight percent of the voters (out of a total voter turnout of 50,95%) approved the proposal to change the constitution and 79% to have a directly elected constitutional convention, thus enabling the process for the election of a Constitutional Convention formed by 155 people.

10. A second vote, which was held alongside municipal and gubernatorial elections between 15 and 16 May 2021, elected the members of the Constitutional Convention.³ The composition of the Convention is unprecedented. In the first place, 17 seats were reserved for indigenous peoples. Second, the body was elected with gender parity, that is, the voting system was changed so that neither men nor women could have more than 55 percent of the seats in the Convention. And third, independent candidates or candidates non-affiliated to political parties were the majority.⁴

11. The powers of the Convention are limited to the elaboration of the new constitution. According to Article 135 of the Constitution as long as the New Constitution does not enter into force in the manner established in this section, this Constitution will remain fully in force, without the Convention being able to deny it authority or modify it. The same Article provides that "the Convention may not intervene or exercise any other function or attribution of other bodies or authorities established in this Constitution or in the laws." The Congreso and other state institutions continue to exercise their powers. Last para of Article 135 is also important since it provides that the text of the New Constitution submitted to a plebiscite⁵ must respect the nature of the Republic of the State of Chile, its democratic regime, the final and enforceable judicial decisions and the international treaties ratified by Chile and that are in force.

¹ The current constitution is usually described as the "1980 Constitution." It sometimes was referred to as the "2005 Constitution," since it underwent substantial reforms in 2005, including a new promulgation decree which removed the signatures of the members of the Junta from the Constitution, and replaced them with those of democratically elected President Ricardo Lagos and members of his cabinet. This attempt to provide new legitimacy to the Constitution is widely seen as unsuccessful, and hence the Constitution is most often referred to as the 1980 Constitution.

²The text of the law is available at the Library of the National Congress of Chile: <https://www.bcn.cl/leychile/navegar?idNorma=1140340> .

³ Servicio Electoral de Chile (SERVEL) <https://www.servel.cl/estadisticas-2/> .

⁴ According to the comments sent to the Commission by the Senate of Chile, "the independents participated in practice by forming genuine party lists, without being parties, with a majority of candidates who have proven to represent a certain political-ideological vision."

⁵ the term "plebiscite" - "plebiscito" in Spanish – is used with the meaning of "referendum".

12. The Constitutional Convention started its work in July 2021 with a mandate of drafting a democratic constitution until 4 July 2022.⁶ The president will call (through a presidential decree) for a referendum within three days of the date in which he is given notice of the proposal for a new Constitution adopted by the Convention.⁷ The referendum would be held approximately 2 months after the publication in the official gazette (“Diario Oficial”) of the presidential decree that calls for the referendum, with obligatory vote for the citizens.⁸

13. According to the information received by the delegation of the Venice Commission during the visit, the Constitutional Convention works in a transparent way. However, in the last months the discussions have been accelerated and shortened. Public discussions were organised in order to seek direct citizens’ input, particularly with popular initiatives of proposed constitutional norms, with a requirement of 15,000 signatures to be discussed in the Convention.⁹ With respect to the discussion of contents of the popular initiatives, these are transmitted to one of the seven thematic commissions (out of ten). Their proposals are currently in the process of being voted upon in the plenary of the Convention. These seven permanent commissions are:

- Political System, Government, Legislative Branch, and Electoral System;
- Constitutional Principles, Democracy, Nationality, and Citizenship;
- Form of State, Decentralisation, Equity, Land Justice, Local Governments, and Tax Structure;
- Fundamental Rights;
- Environment, Rights of Nature, Natural Commons, and Economic Model;
- Justice Systems, Autonomous Oversight Bodies, and
- Knowledge Systems, Science and Technology, Culture, Art, and Heritage.¹⁰

14. The process of preparation of the proposals by the commissions of the Convention and the approval by the Plenary is on-going. After approval by a simple majority in the competent commission, each proposal goes to the Plenary where it requires a 2/3 majority for approval. If such a supermajority is not reached, then a new discussion in the commission takes place. After the approval by the Plenary of all the chapters of the new constitution, a Harmonization Commission (yet to be established) will undertake a final review of the constitution, correcting formal inconsistencies and proposing further substantive changes to the Plenary in cases where it finds that there are normative inconsistencies.

⁶ The first paragraph of Article 137 of the current Constitution provides that the Convention must draft and approve a text proposal for a New Constitution within a maximum period of nine months, counted from its installation, the which may be extended, once, for three months.

⁷ According to Article 142, second paragraph of the current Chilean Constitution “once the proposed constitutional text approved by the Convention has been communicated to the President of the Republic, he must call within three days of such communication, by means of a supreme decree, a national constitutional plebiscite for the citizens to approve or reject the proposal.”

⁸ The relevant rule is paragraph 8 of article 142 of the current Chilean Constitution which provides that “this plebiscite must be held sixty days after the publication in the Official Gazette of the supreme decree referred to in the first paragraph, if that day were a Sunday, or the immediately following Sunday. However, if in accordance with the previous rules the date of the plebiscite is within the period between sixty days before or after a popular vote of those referred to in Articles 26, 47 and 49 of the Constitution, the day of the plebiscite will be delayed until the immediately following subsequent Sunday. If, as a result of the application of the preceding rule, the plebiscite falls in the month of January or February, the plebiscite will be held on the first Sunday of the month of March.”

⁹ More than 6.000 initiatives were sent to the Digital platform of popular participation . A million people participate with at least one initiative. According to the Rules each citizen can sign a maximum of 7 initiatives. 2496 proposals meeting the requirements of admissibility were published on the platform of popular participation of the Convention: https://plataforma.chileconvencion.cl/m/iniciativa_popular/aprobadas. Seventy-seven initiatives reached the quorum required of 15 000 signatures besides another one from indigenous people (120 signatures) before 1 February deadline, and are being discussed in the 7 thematic committees of the Convention. This information was provided by the team of the School of Law of the Universidad de Chile that is studying such initiatives.

¹⁰ The other three Commissions of the Constitutional Convention are: Popular participation, Rights of indigenous peoples and plurinational and transversal relations. [Convención Constitucional \(cconstituyente.cl\)](http://ConvenciónConstitucional.cconstituyente.cl) .

15. The request addressed to the Venice Commission by the Senate of the Republic of Chile on 5 January 2022 included questions on the majority necessary for the adoption of the Convention decisions, constitutional neutrality and stability, the abolition of the Senate and the Constitutional Tribunal and changes concerning fundamental rights. On 28 February, the Senate, at the initiative of senator Juan Castro, sent additional questions to the Commission. These were related to the organisation of the judiciary; withdrawal from international treaties; the regional, plurinational and intercultural nature of the State, as well as the possible amendment of the current constitution in order to provide for a procedure to follow in case the new draft constitution is not approved in the final referendum.

III. General remarks and scope of the present opinion

16. At the beginning of January 2022, the Venice Commission received from the Chilean Senate several questions relating to the process of preparation of a new Constitution and to some aspects of its content. When the Commission's delegation travelled to Santiago de Chile to hold meetings on 28 February, 1 and 2 March 2022, the Senate's questions were updated and expanded (see above).

17. At the time of this visit, the constitution-drafting process was already well under way, and actually rather close to its end, which has been fixed for 4 July 2022. The process appeared to be at a critical stage: the different thematic commissions were working in parallel, adopting their own texts with a simple majority, sending them to the Plenary for adoption by 2/3 majority, often receiving the text back for failure to reach qualified majority and having to rework it prior to sending it again to the Plenary for a final vote. Only a few texts had been finally adopted, and the discussions followed a very sustained pace. The proposals were frequently and often substantively changed within a few days. Nor did any clear agreement on the proposed solutions in the areas touched by the Senate's questions emerge from the discussions with the delegation's interlocutors.

18. At the time of the preparation of this opinion, there still does not exist a finalised or consolidated text of the new proposed constitution. Under these circumstances, the Commission's replies to the Senate's questions cannot but be rather abstract and general. The Commission aims nonetheless to provide a concrete contribution to the successful work of the Constitutional Convention of Chile, by providing information on international standards and on comparative experience of other modern democracies with a view to helping the Constitutional Convention make its choices in the most informed manner. It is the conviction of the Venice Commission that, in the short time available for the Constitutional Convention to finalise its work, it may greatly benefit from the long and varied experience of the Venice Commission in the area of constitution-making and, through the Commission, from the experience of several states which have undergone similar processes of constitution-writing and have faced comparable institutional choices.

19. The Constitutional Convention of Chile has been invested with the crucial task of preparing a new constitution as the expression of the whole Chilean society, including indigenous peoples and minorities. This process has stirred interest and created very high expectations in large parts of the Chilean society as to the content of the future Constitution and to their role in defining it, and the stakes are therefore very high. It is obviously extremely desirable that the final constitutional text be capable of garnering broad support among the Chilean people, so that it can be adopted by the Chilean popular vote and subsequently implemented successfully. For this to happen, the new constitution will need to be a unifying document capable of restoring public confidence; in the opinion of the Venice Commission, it is necessary that the new constitution:

- meet, to the largest extent possible, the expectations of numerous and very diverse categories of people and political groups;
- be sufficiently clear, and technically thorough and solid;

- be politically viable in order to be duly and promptly implemented after its adoption.

20. In order to meet these three preconditions, it would seem necessary that the new constitution strike a balance among competing requests and aspirations. This in turn often requires resort to a higher degree of generality in the constitutional language and a lesser degree of detail, leaving appropriate flexibility in the text for the interpretation and development of the fundamental principles contained in the constitution by the ordinary state institutions: parliament, the government, the judiciary, and the Constitutional Court. The Venice Commission has previously expressed the view in this respect that the constituent authority should not “cement [...] its political preferences and the country’s legal order [...]”.¹¹ The political authorities should in general have the power to make their own choices of economic, social, fiscal, family, educational, etc. policies through simple majorities, lest elections lose their meaning. The principle of democracy requires that only the most basic constitutional principles and the appointment of certain top office holders (such as the Constitutional Court and Judicial Council members, Ombudsperson...) should be fixed through supermajority requirements (in the constitution or in organic laws), besides the rules on constitutional amendment.

21. In this context, the Venice Commission also wishes to underline that several of its interlocutors in Santiago underlined that the ongoing process of drafting an entirely new constitution represents a new start and a “refoundational” moment for the Chilean democracy; in this context, the Constitutional Convention strives to adopt novel solutions and does not feel bound by the previous constitutional solutions. The mandate of this Constitutional Convention indeed appears to be very broad so that it may decide to adopt new institutional arrangements and solutions which did not exist under the previous constitutions. Nevertheless, it should be remembered that the new constitution will not exist in a historical, juridical, and political vacuum and it will need to operate against the background of the large legal culture and traditions prevailing in Chile. Legal traditions and culture necessarily influence the development and successful implementation of each constitution.¹² Totally disregarding the constitutional culture of the country in designing the new constitution would risk creating a hurdle to the understanding, acceptance, and especially interpretation and application of the new rules by politicians, judges, the administration, the legal profession, academia, and all those who will be called upon to implement the constitution. It would inevitably cause delays and problems and a much higher degree of systemic uncertainty. Furthermore, the impact of new institutional choices on the constitutional culture should be considered: as an example, the choice of unicameralism will be perceived differently if it is maintained from previous experiences as opposed to if it is introduced after a period of bicameralism. For these reasons, the Venice Commission is of the view that the national legal traditions should be duly taken into account when designing the new constitution.

IV. Replies to the Senate’s questions

i. How does the Commission consider that the standard of constitutional neutrality and stability should be achieved, and thus avoid the risk of a "contingent" Constitution?

22. A constitution should set neutral and generally accepted rules for the political process: it is not part of the ‘political game’ but sets the rules for it to be played fairly;¹³ it is a framework within which political and social differences can be harmonised for the peaceful, stable, and constructive governance of the country over time. The Constitution should provide a sense of constitutionalism in society, a sense that the Constitution truly is a fundamental document and not simply an incidental political declaration.

¹¹ Venice Commission, CDL-AD(2013)012, Opinion on the Fourth Amendment to the Fundamental Law of Hungary, §§ 129 ff; see also CDL-AD(2020)001, Report on constitutional amendment, §§ 135-137 and ff.

¹² The Venice Commission referred to the “constitutional culture” as one of the factors influencing the functioning of the formal rules on amendment: CDL-AD(2020)001, Report on constitutional amendment, §§ 18 ff.

¹³ See footnote 9.

23. The stability and ‘neutrality’ of the constitution and avoidance of a ‘contingent’ constitution require legitimacy and collective sense of ownership, which in turn require a transparent, open, and inclusive constitutional process, allowing for a pluralism of views and proper debate of controversial issues.¹⁴ As the Venice Commission has consistently emphasized,¹⁵ the adoption of a new and good Constitution should be based on the widest consensus possible within society; a wide and substantive debate involving the various political forces, non-government organisations and citizens associations, academia, and the media is an important prerequisite for adopting a sustainable text, acceptable for the whole of the society and in line with democratic standards.¹⁶

24. Consultation and inclusiveness do not necessarily lead to absolute consensus, as there will inevitably be divergences of expectations and of political programmes and visions. Broad consensus should however be reached on the fundamental choices. The consultation should be meaningful but the responsibility for processing the inputs received through the consultation process and translating them into the constitutional text where appropriate rests with the constituent organ.

25. The Venice Commission has also pointed out that the procedure for adoption of constitutional amendments or, possibly, new constitutions must abide by the provisions of the Constitution in force.¹⁷ “The amending power is not a legal technicality but a norm-set the details of which may heavily influence or determine fundamental political processes.”¹⁸ “In addition to guaranteeing constitutional and political stability, provisions on qualified procedures for amending the constitution aim at securing broad consensus; this strengthens the legitimacy of the constitution and, thereby, of the political system as a whole.”¹⁹

26. This is consistent with Article 4 of the Inter-American Democratic Charter prescribes that: “The constitutional subordination of all state institutions to the legally constituted civilian authority and respect for the rule of law on the part of all institutions and sectors of society are equally essential to democracy.”²⁰ The requirement of respect for the rule of law (and, thus, for the Constitution in force) also applies to the Constitutional Convention, which is a “state institution.”

27. The same point is developed in the Advisory Opinion on Indefinite Presidential Reelection of the Inter-American Court of Human Rights, which states the following:

“71. Second, Article 3 of the Inter-American Democratic Charter establishes access to power and its exercise—subject to the rule of law—as a constitutive element of representative democracy. *In a representative democracy, the exercise of power must be subject to rules set in advance and of which citizens are informed beforehand in order to avoid arbitrariness. This is precisely the meaning of the concept of the rule of law.* To that extent, to protect minorities, the democratic process requires certain rules that limit the power of the majority as expressed at the polls. Therefore, those who are temporarily exercising political power cannot be allowed to make changes without limit to the rules on access to the exercise of power. Identifying popular sovereignty with the majority opinion as expressed at the polls is not enough to classify a system as democratic. True

¹⁴ CDL-AD(2020)001, Report on constitutional amendment, §§ 202-205.

¹⁵ See among many others: Venice Commission, CDL-AD(2011)001, Opinion on Three Legal Questions Arising in the Process of Drafting the New Constitution of Hungary, §§ 18,19; CDL-AD(2013)010, Opinion on the draft New Constitution of Iceland, § 17.

¹⁶ Venice Commission, CDL-AD(2019)015 - Parameters On The Relationship Between The Parliamentary Majority And The Opposition In A Democracy: A Checklist, paras. 66-67, 85, 113-114.

¹⁷ Venice Commission, CDL-AD(2020)001, Report on constitutional amendment, § 124. CDL-AD(2011)002, Opinion on the concept paper on the Establishment and Functioning of the Constitutional Assembly of Ukraine.

¹⁸ CDL-AD(2020)001, Report on constitutional amendment, § 5.

¹⁹ Ibidem, §§ 15, 38-39; CDL-AD(2015)014, Joint Opinion on the Draft Law “On Introduction of changes and Amendments to the Constitution” of the Kyrgyz Republic, § 23

²⁰ <https://www.oas.org/en/democratic-charter/default.asp>

democratic systems respect minorities and the institutionalization of the exercise of political power, which is subject to legal limits and a set of controls.”²¹

ii. How does the Commission consider that the rule laid down in Article 133 of the Constitution currently in force should be interpreted, according to which "the Convention shall adopt the rules and voting rules thereof by a quorum of two-thirds of its members in office"?

28. The Constitutional Convention of Chile has the right to adopt its own rules of procedure, but is bound by the fundamental principles of the proper legislation deriving from the existing Constitution as amended in 2019. There should be consistency between the rules as enacted in the Constitution and the Rules of the Convention, and, more generally, between the rules in the Constitution and its application by the Convention. The Convention, even having such a specific and foundational role to play, nevertheless has to respect the fundamental principles of lawmaking procedure. This falls under the standard rule of law requirement of congruence between legal rules and the behaviour of officials that are subject to those rules.²² Procedural rules have a major impact on the outcomes of the process. They play an important role towards making the future constitution be seen as a common good.

29. According to Article 133 of the 2019 Reform, the Constitution establishes a 2/3 quorum for the adoption of the norms (and rules of procedure), and this quorum cannot be changed by the Convention. People voted in the referendum of October 2020 on the basis of, and assuming compliance with, the rules set in the constitutional reform in law 21.200, which included the 2/3 majority in Article 133. The Convention has understood in the Rules of procedure (Reglamento General de la Convención Constitucional) that such quorum applies to the approval of the “constitutional norms” by the Plenary session and to the new formulations and revisions by the Commission on Harmonization of the whole text (Article 96). It is clear to all relevant actors that that rule requires the approval by a 2/3 majority of each of the Constitutional norms. There was some debate regarding whether the 2/3 majority also extended to a last, final, approval of the whole text (rather than to only the approval of each norm). This debate seems to have been resolved in the Rules of the Convention, which approved the 2/3 requirement for each norm, but did not require a final vote on the whole text.²³

30. Only a simple majority is required for the approval of proposals of norms by the Commissions.: Thus, the Plenary of the Convention has the task of approving the Constitution, and the Commissions have a deliberative function and filter the proposals. However, if a Commission proposal is approved by a majority but by less than 2/3 of the members of the Plenary, then the text returns to the Commission and after a new deliberation and a new proposal is presented to the Plenary for a second vote. If the 2/3 quorum is not reached, it is rejected

²¹ Corte IDH, Opinión Consultiva OC-28/21 de 7 de junio de 2021, Serie A No. 28, § 71, https://www.corteidh.or.cr/docs/opiniones/seriea_28_esp.pdf. (Emphasis added.)

²² Venice Commission, CDL-AD(2016)007rev, Rule of Law Checklist, A.2

²³ Thus, article 96 of the Rules of the Convention reads:

“Artículo 96.- Aprobación de las normas constitucionales.

Finalizado el debate, la propuesta de norma constitucional será sometida a votación en el Pleno y se aprobará sin más trámite en caso de obtener el voto a favor de dos tercios de las y los convencionales en ejercicio.

El mismo quorum se requerirá para la aprobación de nuevas redacciones o de rectificaciones que, de conformidad al párrafo 6º de este Título, se realicen a las normas constitucionales ya incluidas en el proyecto de Constitución.

A medida que las normas constitucionales sean aprobadas por el Pleno se

publicarán en el sitio web de la Convención.”

After the approval of norms by a 2/3 majority, there will be an “Harmonization Commission” that will elaborate amendment proposals regarding style, coherence, and other such formal matters. The Convention will receive proposals on such formal amendments, and after voting on these proposals the Presidency of the Convention will declare the process of revision of the text to be finished. The resulting text will be the proposal for a new Constitution (see article 102 of the Rules of the Convention). The Rules of the Convention are available here: <https://www.chileconvencion.cl/wp-content/uploads/2021/10/Reglamento-definitivo-version-para-publicar-enero-2022.pdf>

except in the case of achieving 3/5 of the votes in the Plenary (Art. 97). In this case, the Rules call for a popular referendum (“plebiscito dirimente”), as developed further by the Reglamento de mecanismos, orgánica y metodologías de participación y educación popular constituyente.²⁴ However, notwithstanding its inclusion in the Convention’s rules, such a referendum would first require a new constitutional reform, because it is not contemplated in Title XV of the Constitution and adds a requirement that changes the rule of 2/3 of the members of the Convention for their approval, introducing a direct call to the citizens for each proposal. This proposed “plebiscito dirimente” is different from the final referendum (known as “plebiscito de salida”) required by the new Title XV of the Constitution (see paragraph 32 below).

31. The rules of procedure of the Convention and of the rules of popular participation have added some participatory mechanisms during the Convention work: hearings with the civil society and experts, and people’s initiative for proposals to the Convention (with at least 15.000 signatures from 4 regions) (“iniciativa popular de normas”). Seventy-eight initiatives obtained the necessary minimum number of signatures before 1 February 2022 when the process closed,²⁵ and currently they are being discussed in a Commission and are being voted on for their discussion and approval at the Plenary, applying the same rules as a proposal from one constituent member. It should be positively assessed that the Convention, in addition to traditional mechanisms of legislative procedure, has introduced forms of participatory democracy. It is the responsibility of the Constitutional Convention to give appropriate and meaningful follow up to these initiatives, lest a possible sense of frustration and even lack of confidence in the system may arise.

32. The referendum of the new Title XV of the Constitution stipulates an obligatory vote for the citizens to approve the new Constitution within approximately 60 days after the publication of the decree of the President calling a referendum to decide on the approval or rejection of the new constitution, in binary terms (Art. 142). This referendum gives citizens the last say on the constitutional change proposal. In the case of rejection by citizens, the current Constitution remains in force, without any provision in the new Title XV for the future. In such case applies the general rule: the first (and old) part of the Title XV on the constitutional amendment. The requisite of a final referendum for the approval of the Constitution is another reason to search for a substantial consensus among political forces and the plurality of civil society in Chile, in order to avoid that the plebiscite further polarizes Chilean society and that support for the different alternatives (in favour and against the new constitution) divides along ordinary partisan lines.

iii. What is the Commission’s view on the possibility of transforming the National Congress into a unicameral body? Do you think that this measure could affect political representation in terms of decentralisation?

33. Matters concerning the structure of the legislative branch belong to a group of constitutional solutions in which the scope of states’ freedom is very wide. In fact, it is difficult to find a common European or international standard with regard to the organizational structure of the legislature.

34. There is no general rule in favour or against bicameralism. There are different solutions in comparative constitutional law today and in the past. A number of democratic countries such as Sweden, Finland, Hungary, Portugal, Slovakia, Denmark, and Bulgaria do not have a second chamber. It is also worthwhile to refer to the ongoing dynamic discussion that takes place in Italy or Spain around bicameralism. Each country has a specific tradition and rules on the composition of Parliament, and on electoral rules and functions of each Chamber. But this is not a static approach. Each constitutional tradition evolves, and so the applicable constitutional tradition is not in itself a definitive obstacle to changing the system from a bicameral to a unicameral one.

²⁴ Arts. 37-41 of this Reglamento provide for a mandatory vote for those 18 years of age and older, and a voluntary vote for youth 16-18 years old; it would consist in a single plebiscite with all the questions; and the final say over the consequences of the vote would correspond to the Commission on Harmonization.

²⁵ See footnote 7.

Nevertheless, in other constitutional experience a reform of the second chamber has been more frequent than its suppression (e.g., the cases of the United Kingdom, where the House of Lords was reformed most recently in 1999 and 2014; Belgium in 2014; or the German Bundesrat in 2007). When referring to unicameralism or bicameralism, political and constitutional theory consider different models. From a first point of view, bicameralism institutes the principle of checks and balances within the legislative branch. After a long evolution, the second chamber in the United Kingdom and in Canada now functions to “cool” or moderate the House of Commons. In the United States the Senate serves that same function, but also functions as the territorial or federal chamber, representing the States. Many countries with federal, or even regional and decentralized, structures have adopted this system, with notable differences among them regarding the specific powers and composition of the second chamber. By contrast, unicameralism has often been linked to revolutionary or radical democratic moments, since the French Constitutions of 1791 and 1793 (later, the third constitution of Year III or Thermidor adopted bicameralism). In Spain, the Cadiz Constitution of 1812 and the 1931 II Republic constitution are also unicameral. Since at least 1828 the Chilean tradition has been a consistently bicameral one. Finally, it is important to see where and when the Senate has been abolished in the last decades: in the Latin American context, it happened in Peru (in the context of Fujimori’s Constitution of 1993 and it failed to be reintroduced in 2018) and in Venezuela (in the context of Chavez’s 1999 Constitution), both at the time of authoritarian regimes. While a small sample, these instances suggest a possible correlation in Latin America between authoritarian or populist regimes and the elimination of the second chamber.

35. The Venice Commission has produced some observations and reflections on the question of bicameralism. First of all, in small countries a Senate is less frequent than in larger ones:²⁶

“It would appear that second chambers are particularly unlikely to serve a purpose in the smallest or least populated countries of Europe (Denmark, Norway, Sweden, Finland, Estonia, Latvia, Lithuania, Portugal, Cyprus, Malta, Greece, Slovakia, Bulgaria and Hungary). In other words, all these countries with fewer than 15 million inhabitants deem it unnecessary to operate a second chamber. (...) Moreover, lack of a second chamber has required these countries to establish alternative bodies to represent their various economic, cultural and social interests to complement their single chamber.”²⁷

36. Second, in the context of the decentralization debate, also present in the current constitutional discussion in Chile, the role of the Senate is important:

“The recent development of constitutionally enshrined regionalisation or decentralisation points to the same outcome. Any highly decentralised state needs a second chamber to ensure dialogue between the centre and the periphery. Since the Council of Europe considers decentralisation, or more precisely local self-government, to be an essential component of democracy, second chambers clearly have a bright future.”²⁸

37. Third, a Senate also can have other important roles. “Second chambers are often characterised as embodying a particular measure of wisdom, balance and expertise. Certain chambers have made outstanding contributions to the law-making process and improving the quality of legislation.”²⁹ This results in part from the additional time they typically have to better study the issues: “Second chambers often have more time at their disposal and can interest themselves in topics that are too often neglected by lower houses faced by more urgent matters”.³⁰ This contribution in quality compensates for the delay than can result from the discussion of a bill in both Chambers of the Parliament instead of only one.

²⁶ Chile, according to 2020 data, has more than 20 million inhabitants. CDL(2006)059rev, Report on second chambers in Europe, “Parliamentary complexity or democratic necessity?” by Patrice Gélard;

²⁷ CDL-AD(2006)059rev, Report on Second Chambers in Europe, § 31.

²⁸ Ibidem, § 33.

²⁹ Ibidem, § 40.

³⁰ Ibidem, § 42.

38. Another criticism of a Senate is the cost of second chambers. However, the Venice Commission has found that:

“In practice, these arguments are over-simplified and deserve closer analysis. The so-called high cost of second chambers is actually very relative (...) the numbers of members of parliament in monocameral and bicameral states do not differ significantly. Finally, monocameral systems often include a form of "phantom" chamber, such as Luxembourg's Council of State, which calls on groups of experts, including academics, to consider draft legislation and draft opinions. Such institutions also bear a cost.”³¹

39. The last criticism is related with the less democratic character of some Senates, when members are selected by indirect suffrage (particularly in some federal states). “Indirect suffrage is not in itself undemocratic, but it must be based on clear and transparent rules. Nor is it wrong to use a variety of methods to select members of second chambers”.³² The different methods of election to second chambers are often related with other kinds of representation or the presence of other groups: “insufficient attention has been paid to the possibility they offer of representing groups whose presence in the lower house is limited or non-existent.”³³

40. Bicameralism was a common tendency in the countries of Central and Eastern Europe at the beginning of the political transformation in the 1990s. In most of those countries the bicameral parliament was seen to represent a return to a democratic tradition, after a period of authoritarian rule. In the light of this European experience, the 2000 Forum of Senates pointed out, among other things, the following features relevant to the role of bicameralism:

- strengthening democratic systems by diversifying representation and integrating all members of the nation;
- facilitating the decentralization process and contributing to the regulation of relations between local and regional authorities and the central government.³⁴

41. The analysis of the need for bicameralism and the answer to the question of whether it is a democratic necessity must therefore be made in the concrete situation of a particular State. This is also the case in Chile where bicameralism belongs to the constitutional tradition of the political system in the context of the checks and balances of the presidential form of government.

42. The Venice Commission considers that the debate on bicameralism is linked to those of the form of state and the form of government, and the solutions proposed should be coherent with them. Indeed, bicameralism is often a response to regional differences, multi-ethnicity, and multiculturalism. In a society where these aspects display a heightened significance, bicameralism is to be recommended.³⁵ The second chamber can play a fundamental role in maintaining the balance between the center and the components of the state and thus be a kind of guarantor of the vertical distribution of power between the center and the component parts or regions, or even groups, in a state, as pointed out in the opinion of the Forum of Senates cited above. An appropriately designed Second Chamber may play an important role in terms of territorial representation by: (a) strengthening democratic systems through the diversity of representation and (b) strengthening the guarantee of the rights of indigenous people. In addition, bicameralism

³¹ Ibidem, § 30.

³² Ibidem, § 36.

³³ Ibidem, § 38.

³⁴ Forum of World Senates: Le Bicamérisme, une idée d'avenir, Paris, Publications du Sénat, 2000, pp. 113,

³⁵ According to Patrice Gélard, it is “perfectly understandable if small countries and ones that are still establishing their democratic system feel that second chambers are not essential. However they are necessary, and will become increasingly so, in ...states ... that are constitutionally regionalised or heavily decentralised, where second chambers represent geographical areas whereas first chambers represent peoples”: CDL(2006)059rev, Report on second chambers in Europe, "Parliamentary complexity or democratic necessity?"

is also a guarantee for the checks and balances typical of a presidential system and two different bodies are necessary for the impeachment of the President and some other authorities.

iv. If the form of government is replaced, could the presidential mandate and the mandate of the members of the National Congress be altered?

43. It is not entirely clear whether the question is meant to apply only to the mandates of the current President and members of Congress under the present Constitution of Chile, or also to alterations of the mandates of the President and legislators under the new constitution. The Venice Commission will therefore address both questions.

44. As concerns the consequences of a possible change of regime on the current mandate of the President and of the members of Congress, the Venice Commission wishes to stress at the outset that it has expressed no preference for a parliamentary system or for a presidential one. This is a choice which belongs to the constituent power in each case. Tradition and prior practical experience can be relevant in the choice. What is relevant for the Venice Commission is how to preserve a genuine separation of powers with an effective system of checks and balances among institutions:

“The choice between a presidential and a parliamentary system is a political one to be freely made by each single state. However, the system chosen should be as clear as possible, and the provisions should not create room for unnecessary complications and political conflicts. If a presidential system is chosen, certain minimum requirements of parliamentary influence and control should be fulfilled. In a parliamentary system, in turn, basic requirements arising from the principle of separation of powers should be respected.”³⁶

45. In addition:

“Every State has the right to choose its own political system, be it presidential or parliamentary, or a mixed system. This right is not unconditional, however. The principles of the separation of powers and of the rule of law must be respected, and this requires that sufficient checks and balances be inbuilt in the designed political system. Each constitution is a complex array of checks and balances and each provision, including those that already exist in the constitution of another country, needs to be examined in view of its merits for the balance of powers as a whole.”³⁷

46. A first issue to be studied is the term limits of the Presidential mandate. There is no specific and distinct human right to re-election.³⁸ In its Report on term limits (Part I-Presidents),³⁹ the Venice Commission notes that there are a variety of different legal regimes on presidential term limits, depending on each constitution and constitutional tradition. Chile’s current constitution is an example of a limitation on consecutive terms (with no maximum number), like those of Peru, Uruguay, and Switzerland. The general tendency is to include some limitations in presidential systems: “Nearly all states which have adopted a presidential or semi-presidential system impose constitutional limitations on the number of (successive) terms of a president in order to preserve a system of constitutional checks and balances”.⁴⁰ This is the case of Colombia since 2015, when it returned to an absolute prohibition on re-election, adding that this prohibition now may only be amended by referendum or constituent assembly. Ecuador’s 2018 constitution permits only one re-election for the same office. In semi-presidential systems we can mention the case of the French system, which since 2008 has a two-term limit on consecutive presidential mandates. What is important is to avoid an unlimited re-election, as has been applicable in Venezuela since

³⁶ Venice Commission, CDL-AD(2003)019, Opinion on three Draft Laws proposing Amendments to the Constitution of Ukraine, para 14

³⁷ Venice Commission, CDL-AD(2017)005, Opinion on the amendments to the Constitution of Turkey, para 124.

³⁸ See Corte IDH, Opinión Consultiva OC-28/21 de 7 de junio de 2021. Serie A No. 28., para 102.

³⁹ Venice Commission, CDL-AD(2018)010, Report on term limits, Part 1 – Presidents.

⁴⁰ Ibidem, § 90.

2009. The case of Bolivia also goes against the tendency to limit mandates. However, “In the Commission’s view, and in the light of the comparative analysis of the constitutions of the 58 countries under consideration, abolishing limits on presidential re-election represents a step back in terms of democratic achievement, at least in presidential or semi-presidential systems”.⁴¹

47. The place for entrenchment of Presidential term limits is the Constitution.⁴² The aim of the term limits is a check against the abuse of power by the president:

“Presidential term-limits are common in both presidential and semi-presidential systems, and also exist in parliamentary systems (both where the Head of State is directly and indirectly elected), while in the latter systems they are not imposed on prime ministers, whose mandate, unlike those of Presidents, may be withdrawn by parliament at any time. In presidential and semi-presidential systems, term-limits on the office of the President therefore are a check against the danger of abuse of power by the head of the executive branch. As such, they pursue the legitimate aims to protect human rights, democracy and the rule of law. (...) Restriction of the right to be elected of incumbent presidents derives from a sovereign choice of the people in the pursuit of the above-mentioned legitimate aims of general interest, which prevail over the right of the incumbent president. The criteria for such restriction must be both objective and reasonable and may not be discriminatory to the extent that they should be neutral and should not be imposed or removed in a manner that would prematurely remove someone from office or secure the continued service of someone currently holding office (i.e., by lifting term limits). This risk may be averted if such changes do not benefit the incumbent.” (para 120).

48. In conclusion, “term limits can promote accountability of elected officials by helping to prevent inappropriate concentrations of power” (para. 126).⁴³

49. As concerns time limits for members of parliament, the Venice Commission has stressed that:

“69. MPs, unlike Presidents, exercise a representative mandate and form part of a collegiate body. Term limits for MPs therefore are not required in order to prevent the equivalent of an unlimited exercise of power by the Executive. There is academic research that supports the idea that term limits for MPs may have a positive effect in terms of avoiding concentrating power in the hands of a few professional politicians and fostering more accurate representation and increased responsiveness of the elected representatives toward the electorate. However, they also weaken the legislature’s power vis-à-vis the executive branch and diminish the legislature’s role, even when both branches are subject to similar limits. They also may increase the influence of party leaderships, as well as of lobby groups and legislative staff, thus contributing to a migration of power from elected representatives to nonelected officials, which risks impacting on voters’ ability to hold representatives accountable.

70. On balance, therefore, the Commission does not recommend the introduction of term-limits for MPs, although it recognises that it is up to each Constitutional or legal system to decide on their opportunity in the light of the prevailing particular circumstances and the will of the population. The Commission is of the view nonetheless that if term limits are to be introduced for a legislative body, they should be less strict than those that apply to an executive body.⁴⁴

50. Turning instead to the second understanding of the question posed: could a fundamental change in the political system of Chile entail the termination of the mandate of the current

⁴¹ Ibidem, § 101.

⁴² Ibidem, § 127.

⁴³ See also, generally, Corte IDH, Opinión Consultiva OC-28/21 de 7 de junio de 2021, Serie A No. 28.

⁴⁴ Venice Commission, CDL-AD(2019)007, Report on term limits – Part II, Members of Parliament, and Part III, Representatives elected at Sub National and local level and executive officials elected at sub national and local level, §§ 69-70.

President and of the current members of Congress? It is important to note first that the terms of the existing Constitution that establish and delimit the work of the Constitutional Convention impose certain restrictions on the new constitution's ability to terminate the terms of currently-elected representatives. Article 138 reads, "The New Constitution will not be able to put an early term to the term of the elected authorities in popular vote, unless those institutions that are part of it are suppressed or subject to a substantial modification." More generally, the question of the guarantee of the mandate of elected bodies differs from that of security of tenure of judges or of members of state institutions such as an Ombudsman or a High Judicial Council (neither of which exist in the current Chilean constitutional system), which is designed to protect these institutions from interference in their independent work. The Chilean President and the Congress have been directly elected to perform the duties set out in the current constitution. Should the institutional arrangements and the tasks which are attributed to them substantially change, the mandate given to them by the electorate would be affected and it is reasonable to expect the electorate to be given the possibility to choose who is to perform the new tasks.⁴⁵ If the new Constitution does bring about a regime change, it will be essential both to respect existing Article 138 and to include adequate transitional provisions to settle the expiry of the mandate of the office holders elected under the previous constitution and the holding of new elections, while still ensuring institutional stability and continuity.

v. Do you consider it advisable to eliminate the Constitutional Tribunal from the eventual new Constitution of Chile? What is your opinion on the competence of this body to exercise prior review of constitutionality, and is this form of prior review in accordance with a democratic system? If the Constitutional Tribunal were to be abolished, should there still be a system of review of constitutionality; what powers and which body should exercise them?

51. The Venice Commission has consistently supported the existence of constitutional review, although that judicial review can take a variety of different institutional forms:

"The Venice Commission usually recommends providing for a constitutional court or equivalent body. What is essential is an effective guarantee of the conformity of governmental action, including legislation, with the Constitution. There may be other ways to ensure such conformity. For example, Finnish law provides at the same time for a priori review of constitutionality by the Constitutional Law Commission and for a posteriori judicial control in case the application of a statutory provision would lead to an evident conflict with the Constitution. In the specific national context, this has proven sufficient."⁴⁶

52. There do exist constitutional systems in which a Supreme Court of more general jurisdiction is responsible for constitutional review and no separate Constitutional Court has been established. However, the Venice Commission has consistently favoured the establishment of a separate and specialized constitutional court, especially in newer democracies.⁴⁷ A dedicated constitutional court can offer a more effective protection of human rights, separation of powers, constitutional legality, and the supremacy of the constitution than a Supreme Court where constitutional review is one task among others. In addition, the expertise needed in the constitutional review may differ from that typical of an appellate court. Furthermore, the legitimacy

⁴⁵ The Venice Commission has stated that "It is legitimate to replace ministers and other holders of political office following elections; but if in the domestic system an institution enjoys some sort of autonomy or, a fortiori, is defined as "independent" replace key office holders on account of the change in the political majority and under the pretext of a legislative reform appears to run counter to the Constitution and to the Rule of law": CDL-AD(2021)012, Opinion on the draft amendments to the Law on the State Prosecution Service and the draft Law on the Prosecutor's Office for Organised Crime and Corruption of Montenegro, §30). See also, for independent institutions, CDL-PI(2020)014, Urgent Joint Amicus Curiae Brief Of The Venice Commission And The Directorate General Of Human Rights And Rule Of Law (DGI) Of The Council Of Europe On Three Legal Questions Concerning The Mandate Of Members Of Constitutional Bodies in the Republic of Moldova, § 19, §28).

⁴⁶ Venice Commission, CDL-AD(2016)007rev, Rule of Law checklist, para 108.

⁴⁷ CDL-AD(2016)025, Joint Opinion on the Draft Law "On Introduction of Amendments and Changes to the Constitution" of the Kyrgyz Republic, paragraph 47; Rule of Law Checklist, § 108.

of constitutional review, including the role of a 'negative legislator', poses distinctive requirements for the composition of the court and the appointment procedure of its members – requirements which differ from those that apply to a Supreme Court as an ordinary appellate jurisdiction. All these viewpoints speak in favour of a separate and specialized constitutional court.

53. More specific requirements for an adequate system of constitutional judicial review can also be identified:

“[f]ull judicial review of constitutionality is indeed the most effective means to ensure respect for the Constitution and includes a number of aspects First, the question of locus standi is very important: leaving the possibility to ask for a review of constitutionality only to the legislative or executive branch of government may severely limit the number of cases and therefore the scope of the review. Individual access to constitutional jurisdiction has therefore been developed in a vast majority of countries, at least in Europe. Such access may be direct or indirect (by way of an objection raised before an ordinary court, which refers the issue to the constitutional court).⁴⁸ Second, there should be no limitation as to the kinds of acts which can be submitted to constitutional review: it must be possible to do so for (general) normative as well as for individual (administrative or judicial) acts. However, an individual interest may be required on the part of a private applicant.”⁴⁹

54. As concerns the appointment/election of the judges of a Constitutional Court, the Venice Commission has previously stated that the composition of a Constitutional Court and the procedure for appointing judges to the Constitutional Court are among the most important and sensitive questions of constitutional adjudication and for the preservation of a credible system of the rule of constitutional law.⁵⁰ It is necessary to ensure both the independence of the judges of the Constitutional Court and to involve different state organs and political forces in the appointment process so that the judges are seen as being more than merely the instrument of one or another political force.⁵¹ The Venice Commission has also recommended that, if constitutional judges are elected by parliament, their election should be made by a two-thirds majority with a mechanism against deadlocks, and that the mandate of the constitutional judges should be non-renewable.⁵²

55. As concerns the number of justices, the Venice Commission has stated in the past that “[i]t would be better for the number of Constitutional Court judges to be uneven. An even number of judges would place too heavy a responsibility on the President who, in the event of a tied vote, would in practice be forced to take the decision alone by using his casting vote.”⁵³

56. In comparative constitutional law, the paradigmatic form of judicial review is *ex posteriori* control. There are nevertheless at least some a priori mechanisms of control in many constitutional systems. France is probably the best known example, but *ex ante* or preventative review for some issues also exists in other countries. For instance, in Spain *ex ante* review exists for international treaties (Article 95 Spanish Constitution) and for Statutes of Autonomy of the Autonomous Communities (Article 79 of the Organic Law of the Constitutional Tribunal, introduced in 2015). Although it is the exception to the more general rule of *ex post* review, the

⁴⁸ Venice Commission, CDL-AD(2021)001, Revised report on individual access to constitutional justice, [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2021\)001-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2021)001-e), §§ 42 ff.

⁴⁹ Rule of Law Checklist, para. 109

⁵⁰ Venice Commission, CDL-AD(2013)032, Opinion on the Final Draft Constitution of the Republic of Tunisia, § 126.

⁵¹ CDL-AD(2004)043 Opinion on the Proposal to Amend the Constitution of the Republic of Moldova (introduction of the individual complaint to the constitutional court), paragraphs 18-19.

⁵² Opinion on the draft amendments to three constitutional provisions relating to the Constitutional Court, the Supreme State Prosecutor and the Judicial Council of Montenegro; see also: CDL-AD(2007)047, §§ 122,123; CDL-AD(2012)024, § 35; CDL-AD(2011)040 § 24; CDL-AD (2017)001 §§ 58-59.

⁵³ CDL(1995)045, Opinion on the draft amendments to the Constitution of the Republic of Hungary, § 11; CDL-JU(1997)034rev2 Report on the composition of Constitutional Court and comparative table, page 23, section 9.

aims of these mechanisms seem to justify such preventive control: preventing the incompatibility between the Constitution and international treaties or preventing a conflict of legitimacy between the regional Parliament and the national Parliament. For these reasons, the Venice Commission has noted in the past that,

“ex ante constitutional review is seen in many countries, i.e. before the enactment of legislation, as a highly important device for securing constitutionality of legislation. Nevertheless, there is no common European standard as regards the initiators and the concrete modalities of this review. States decide, in accordance to their own constitutional traditions and specific needs, which organs, and to what extent, are authorized to conduct an a priori review and who should have the right to initiate it.”⁵⁴

57. Among these different institutional models, the Venice Commission has concluded in the past, on the basis of comparative constitutional practice, that “the Constitutional Court should be seen as the only and best placed body to conduct ex ante binding review.”⁵⁵ At the same time, it is true that ex ante control might be considered more problematic from the point of view of separation of powers. For this reason, “to avoid over-politicizing the work of the Constitutional Court and its authority as a judicial body, the right to initiate ex ante review should be granted rather restrictively.”⁵⁶ In addition, ex ante review can be organized in a way that minimizes the risk or impression of inappropriate interference of a judicial body in the democratic legislative process. If by ex ante constitutional review is meant the review taking place after adoption by Parliament but before the entry into force of the statute, for instance, the risk is somewhat less pronounced. By contrast, requiring a lower threshold of votes for the exercise of ex ante control than ex post review of legislation (as is currently the case in Chile) appears to the Venice Commission to be unprecedented and to increase the risk of politicization.

vi. As to the compatibility with international standards of

- a. an evaluation system for all judges;
- b. fixed terms for judges of the Courts of Appeal and the Supreme Court;
- c. the removal of judicial immunity;
- d. the establishment of an autonomous body responsible for the management of the judiciary (Judicial council), composed of representatives of state powers, members of civil society and indigenous peoples;
- e. The introduction of a special indigenous jurisdiction, charged with delivering justice to members of indigenous peoples;
- f. the introduction of a gender perspective in the jurisdictional function;
- g. the requirement of gender parity in the judicial structure.

58. It should be stressed at the outset that the independence of the judiciary is a key element of the rule of law: “The exercise of legislative and executive power should be reviewable for its constitutionality and legality by an independent and impartial judiciary. A well-functioning judiciary, whose decisions are effectively implemented, is of the highest importance for the maintenance and enhancement of the Rule of Law.”⁵⁷ “The judiciary should be independent. Independence means that the judiciary is free from external pressure, and is not subject to political influence or manipulation, in particular by the executive branch. This requirement is an

⁵⁴ CDL-AD(2011)001 Opinion on three legal questions arising in the process of drafting the New Constitution of Hungary, paragraphs 34-35.

⁵⁵ CDL-AD(2011)001 Opinion on three legal questions arising in the process of drafting the New Constitution of Hungary, paragraph 37.

⁵⁶ CDL-AD(2011)001 Opinion on three legal questions arising in the process of drafting the New Constitution of Hungary, paragraph 37.

⁵⁷ CDL-AD(2016)007, Rule of Law Checklist, § 39.

integral part of the fundamental democratic principle of the separation of powers. Judges should not be subject to political influence or manipulation.”⁵⁸

59. According to the Venice Commission “The basic principles ensuring the independence of the judiciary should be set out in the Constitution or equivalent texts.”⁵⁹ Then, the Constitution or an Organic Law or the equivalent, and not an ordinary Statute, should define the mechanisms for preserving the independence of the judiciary.

60. Judicial independence is not an end in itself, but its aim is related with the preservation of the fundamental rights of the citizens: “The independence of the judiciary has both an objective component, as an indispensable quality of the Judiciary as such, and a subjective component as the right of an individual to have his/her rights and freedoms determined by an independent judge. Without independent judges there can be no correct and lawful implementation of rights and freedoms. The independence of the judiciary is not a personal privilege of the judges but it is justified by the need to enable judges to fulfil their role of guardians of the rights and freedoms of the people.”⁶⁰

a. Evaluation system

61. Concerning the possibility that judges are subject to an evaluation system:

“[r]egular evaluations of the performances of a judge are important instruments for the judge to improve his/her work and can also serve as a basis for promotion. It is important that the evaluation is primarily qualitative and focuses on the professional skills, personal competence and social competence of the judge. There should not be any evaluation on the basis of the content of the decisions and verdicts, and in particular, quantitative criteria”.⁶¹

62. In respect of quantitative criteria, the Commission has added that “the quality of a judge’s performance cannot be measured by counting the number of cases processed regardless of their complexity, or the number of judgments upheld at the higher instance.”⁶²

63. Additionally, “[e]valuation should not be seen as a tool for policing judges, but on the contrary, as a means of encouraging them to improve, which will reflect on the system as a whole”.⁶³ In this regard, respect must be had for the principle of the primacy of independence. As the Consultative Council of European Judges has explained:

“the fundamental rule for any individual evaluation of judges must be that it maintains total respect for judicial independence. When an individual evaluation has consequences for a judge’s promotion, salary and pension or may even lead to his or her removal from office, there is a risk that the evaluated judge will not decide cases according to his or her

⁵⁸ Ibidem, § 74. See also Corte IDH, Caso del Tribunal Constitucional (Camba Campos y otros) Vs. Ecuador. Excepciones Preliminares, Fondo, Reparaciones y Costas. Sentencia de 28 de agosto de 2013. Serie C No. 268, para 188: “one of the main objectives of the separation of the public powers is to guarantee the independence of judges. The objective of protection stems from the need to avoid the judicial system, in general, and its members, in particular, being subjected to possible undue constraints in the exercise of their function by organs outside the Judiciary or even by those judges who exercise review or appeal functions.”

⁵⁹ CDL-AD(2010)004, Report on the Independence of the Judicial system Part I: the independence of judges, para 22.

⁶⁰ Ibidem, § 6.

⁶¹ CDL-AD(2011)012, Joint Opinion on the constitutional law on the judicial system and status of judges of Kazakhstan, § 55.

⁶² CDL-AD(2014)007, Joint Opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on the Draft Law amending and supplementing the judicial code (evaluation system for judges) of Armenia; § 34.

⁶³ Ibidem, § 24.

objective interpretation of the facts and the law, but in a way that may be thought to please the evaluators.”⁶⁴

b. Fixed terms for judicial service

64. The Venice Commission has clearly stated that “Limited or renewable terms in office may make judges dependent on the authority which appointed them or has the power to re-appoint them.”⁶⁵ “Any possible renewal of a term of office could adversely affect the independence and impartiality of judges.”⁶⁶ For this reason, the Venice Commission strongly recommends that judges’ tenure finishes with retirement.⁶⁷

65. Further, the Commission has clarified that “The retirement age for judges should be clearly set out in the legislation. Any doubt or ambiguity has to be avoided and a body taking decisions on retirement should not be able to exert discretion. [...]”⁶⁸ “[...] The Venice Commission has expressed strong criticism of the reduction of the retirement age when this applies to sitting judges but has expressed no objection in principle to extend the retirement age, if sitting judges retain a possibility to retire under current rules.”⁶⁹

66. According to international standards, judges may only be removed from office by a decision of an independent body on the ground of serious breaches of disciplinary or criminal provisions established by law, following due process and with the possibility of appealing the decision on removal to a higher judicial authority.⁷⁰ The Inter-American Court of Human Rights has decisively confirmed these principles as well.⁷¹

c. Extinction of judicial immunity

67. The Venice Commission has stated that “It is indisputable that judges have to be protected against undue external influence. To this end they should enjoy functional – but only functional – immunity (immunity from prosecution for acts performed in the exercise of their functions, with the exception of intentional crimes, e.g. taking bribes).”⁷²

68. The above, in view of the fact that “[w]hile functional safeguards are needed to guarantee judicial independence against undue external influence, broad immunity is not”⁷³.

69. Additionally, it should be noted that “[j]udicial immunity is not an end in itself, but serves the independence of the judge who should be able to decide cases without fearing civil or criminal

⁶⁴ Opinion No. 17 (2014) of the Consultative Council of European Judges (CCJE), “The Evaluation Of Judges' Work, The Quality of Justice and Respect for Judicial Independence”. Par. 6.

⁶⁵ CDL-AD(2016)007, Rule of Law Checklist, §76.

⁶⁶ CDL-AD(2002)012, Opinion on the Draft Revision of the Romanian Constitution, §57.

⁶⁷ CDL-AD(2010)004, Report on the Independence of the Judicial System Part I, § 35.

⁶⁸ CDL-AD(2013)034, Opinion on proposals amending the draft law on the amendments to the constitution to strengthen the independence of judges of Ukraine, §52.

⁶⁹ CDL-AD(2018)028, Opinion on Constitutional arrangements and separation of powers and the independence of the judiciary and law enforcement of Malta, § 42.

⁷⁰ CDL-AD(2016)007, Rule of Law Checklist, page 20, benchmarks ii, iii and iv., §78; CDL-AD(2016)009, Final Opinion on the revised draft constitutional amendments on the Judiciary (15 January 2016) of Albania, §34; CDL-AD(2014)006, Joint opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and Rule of Law of the Council of Europe, and of the OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR) on the draft law on disciplinary liability of judges of the Republic of Moldova, §12.

⁷¹ Corte IDH. Caso Reverón Trujillo Vs. Venezuela. Excepción Preliminar, Fondo, Reparaciones y Costas. Sentencia de 30 de junio de 2009. Serie C No. 197, para. 67-68, 75-79.

⁷² CDL-AD(2010)004-e. *Report on the Independence of the Judicial System Part I: The Independence of Judges adopted by the Venice Commission at its 82nd Plenary Session (Venice, 12-13 March 2010)*. Par. 61.

⁷³ CDL-AD(2015)013-e. *Opinion on draft constitutional amendments on the immunity of Members of Parliament and judges of Ukraine, adopted by the Venice Commission at its 103rd plenary session (Venice, 19-20 June 2015)*. Par. 25.

liability for judicial adjudication done in good faith.”⁷⁴ “[T]he justification for procedural immunity for judges - where it exists - cannot be to protect the judge from criminal prosecution, but only from false accusations that are levelled against a judge in order to exert pressure on him or her”.⁷⁵

d. Autonomous body that carries out the formation and selection of judges

70. The Venice Commission first wishes to underline that, regardless of the type of organism that carries out the formation and selection of judges, it should be established that “[i]nstitutional rules have to be designed in such a way as to guarantee the selection of highly qualified and personally reliable judges.”⁷⁶ Furthermore, the regulation of formation and selection of judges must be guaranteed in the Constitution, just as the “basic principles ensuring the independence of the judiciary.”⁷⁷ Moreover, international standards favour a system with “extensive depoliticization of the process.”⁷⁸ Similarly, “[t]he authority taking decisions on the selection and career of judges should be independent of the executive and legislative powers”.⁷⁹ Consequently, “all decisions concerning appointment and the professional career of judges should be based on merit, applying objective criteria within the framework of the law.”⁸⁰

71. It is the Venice Commission’s view that it is an appropriate method for guaranteeing the independence of the judiciary that an independent judicial council has decisive influence on decisions on the appointment and career of judges.⁸¹

72. The judicial council should have a pluralistic composition with a substantial part and at least half of its members being judges. With the exception of ex-officio members these judges should be elected or appointed by their peers. [A]mong the judicial members of the Judicial Council there should be a balanced representation of judges from different levels and courts.⁸²

73. In order to provide for democratic legitimacy of the Judicial Council, other members should be elected by Parliament among persons with appropriate legal qualification taking into account possible conflicts of interest.⁸³ Additionally, “in order to insulate the judicial council from politics its members should not be active members of parliament.”⁸⁴ Elections from the parliamentary component should be by a two-thirds qualified majority, with a mechanism against possible deadlocks or by some proportional method which ensures that the opposition has an influence on the composition of the Council.⁸⁵

74. The Venice Commission has previously, in relation to the composition of High Judicial and Prosecutorial Councils, strongly supported policies aimed to ensure gender balance in public

⁷⁴ CDL-AD(2013)008-e. *Amicus curiae brief on the Immunity of Judges for the Constitutional Court of Moldova, adopted by the Venice Commission at its 94th Plenary Session (Venice, 8-9 March 2013)*. Par. 20.

⁷⁵ CDL-AD(2013)008-e. *Amicus curiae brief on the Immunity of Judges for the Constitutional Court of Moldova*, § 23.

⁷⁶ CDL-AD(2010)004-e. *Report on the Independence of the Judicial System Part I: The Independence of Judges*, § 8.

⁷⁷ *Ibidem*, § 22.

⁷⁸ CDL-AD(2007)028-e. *Judicial Appointments*, § 3.

⁷⁹ Committee of Ministers of the Council of Europe, Recommendation No. R (2010)12 from 17 November, 2010 on judges: independence, efficiency and responsibilities, p. 46 and 47; Venice Commission, CDL-AD(2011)019, *Opinion on the draft law on the council for the selection of judges of Kyrgyzstan*. § 11.

⁸⁰ CDL-AD(2010)004-e. *Report on the Independence of the Judicial System Part I: The Independence of Judges*, § 27.

⁸¹ *Ibidem*, § 32.

⁸² CDL-AD(2012)024, *Opinion on two Sets of draft Amendments to the Constitutional Provisions relating to the Judiciary of Montenegro*, §23.

⁸³ *Ibidem*, §29

⁸⁴ CDL-AD(2007)028-e. *Judicial Appointments - Report adopted by the Venice Commission at its 70th Plenary Session (Venice, 16-17 March 2007)*. Par. 32.

⁸⁵ Among many others: CDL-AD(2013)007, *Opinion on the Draft Amendments to the Organic Law on Courts of General Jurisdiction of Georgia*, §§52-53

institutions and expressed the view that they should be welcomed and that all efforts in this direction should be praised. However, the Commission also warned that an inflexible legal provision setting a quota along ethnic and gender lines over those of professional competence - taking the country's size and population into account - may undermine the effective functioning of the system.⁸⁶

e. Indigenous jurisdiction

(see Section vii.a) below)

f. The introduction of a gender perspective in the jurisdictional function

75. Besides judicial independence, impartiality is a crucial constitutional principle with respect to the exercise of judicial power. Both the American Convention on Human Rights and the European Convention on Human Rights consecrate impartiality as a requirement of the right to a fair trial.⁸⁷ From this follows that the guiding principle should be that any requirement imposed on the judiciary should contribute to judicial impartiality rather than detract from it. In this sense, the introduction of a "gender perspective" in adjudication is certainly a legitimate political and social choice, and it can be helpful in guaranteeing human rights so long as it is appropriately specified so as to promote impartiality – for example, to take into account the specific situations that disadvantage women, with the aim of securing impartiality by avoiding bias towards them in adjudication. In no case should such perspective entail a privileged position or predetermine an outcome to a case.

76. The introduction of such perspectives may be done with the intention of raising awareness of the barriers and obstacles that historically have limited women's equal access to justice. In this sense, the Inter-American Court of Human Rights has ruled about the obligation of States to guarantee a stronger protection in cases involving women: "[i]n cases of violence against women, the general obligations established in Articles 8 and 25 of the American Convention are complemented and enhanced by the obligations arising for States parties from a specific Inter-American treaty, the Convention of Belem do Pará. Article 7(b) of this Convention specifically obliges the States parties to apply due diligence to prevent, punish and eradicate violence against women."⁸⁸

77. When States incorporate this analytical strategy, they should do it in such a way that it serves as a tool for identifying inequalities which may lead to biases in judicial proceedings, in the service of strengthening judicial impartiality, and not sacrificing judicial impartiality to other social goals.

g. The requirement of gender parity in the judicial structure

78. A number of international treaties require measures to be taken to promote women's equal participation in public institutions, for instance, the Convention on the Elimination of Discrimination against Women⁸⁹ and the Beijing Declaration and Platform of Action (1995).⁹⁰ This legitimate and important aim applies to judicial institutions as well.

⁸⁶ CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §§32 and 35.

⁸⁷ See Article 6.1. of the European Convention on Human Rights and Article 8.1 of the American Convention of Human Rights.

⁸⁸ I/A Court H.R., Case of Fernández Ortega et al. v. Mexico. Preliminary Objection, Merits, Reparations, and Costs. Judgment of August 30, 2010. Series C No. 215. Par. 193. Most recently, see also Opinión Consultiva OC-27/21 de 5 de mayo de 2021. Serie A No. 27. párr. 65; Corte IDH.

⁸⁹ Committee on the Elimination of Discrimination against Women. CEDAW/C/CHL/CO/7. Concluding observations on the seventh periodic report of Chile. 14 March 2018. Par. 15.a.

⁹⁰ United Nations. A/CONF.177/20/Rev.1. Report of the Fourth World Conference on Women Beijing, 4-15 September 1995. Strategic objective G.1. Par. 190.a.

79. As seen, the Venice Commission has previously, in relation to the composition of High Judicial and Prosecutorial Councils, strongly supported policies aimed to ensure gender balance in public institutions and expressed the view that they should be welcomed and that all efforts in this direction should be praised.⁹¹ However, the Commission also warned that “an inflexible legal provision setting a quota along ethnic and gender lines over those of professional competence - taking the country’s size and population into account - may undermine the effective functioning of the system”.⁹² The overall goal is the more effective and impartial administration of justice.

vii. Whether the principle of legal pluralism (entailing a parallel indigenous justice) and the provision of reserved seats for indigenous peoples comply with international standards and what would be their advantages and downsides.

a) Legal pluralism (indigenous justice)

80. The United Nations Declaration on the Rights of Indigenous Peoples proclaims that indigenous peoples “have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law”, “are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity”; “have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development”; and “have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.”⁹³

81. Article 2 of the Indigenous and Tribal Peoples Convention of 1989 (No. 169),⁹⁴ , ratified by Chile on 15 September 2008, provides;

“1. Governments shall have the responsibility for developing, with the participation of the peoples concerned, co-ordinated and systematic action to protect the rights of these peoples and to guarantee respect for their integrity.

2. Such action shall include measures for:

(a) ensuring that members of these peoples benefit on an equal footing from the rights and opportunities which national laws and regulations grant to other members of the population;

(b) promoting the full realisation of the social, economic and cultural rights of these peoples with respect for their social and cultural identity, their customs and traditions and their institutions;

(c) assisting the members of the peoples concerned to eliminate socio-economic gaps that may exist between indigenous and other members of the national community, in a manner compatible with their aspirations and ways of life.

Article 8 provides:

1. In applying national laws and regulations to the peoples concerned, due regard shall be had to their customs or customary laws.

2. These peoples shall have the right to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognised human rights. Procedures shall be established, whenever necessary, to resolve conflicts which may arise in the application of this principle.

⁹¹ CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, § 35.

⁹² Ibidem.

⁹³ Articles 1 -5.

⁹⁴ UN declaration of the rights of indigenous peoples; ILO Indigenous and Tribal Peoples Convention of 1989(No. 169).

3. The application of paragraphs 1 and 2 of this Article shall not prevent members of these peoples from exercising the rights granted to all citizens and from assuming the corresponding duties.

Article 9 provides:

1. To the extent compatible with the national legal system and internationally recognised human rights, the methods customarily practised by the peoples concerned for dealing with offences committed by their members shall be respected.
2. The customs of these peoples in regard to penal matters shall be taken into consideration by the authorities and courts dealing with such cases.

82. The Chilean State must therefore establish the required legal mechanisms to protect the rights of indigenous peoples, including in order to guarantee equality before the law, equal treatment, and non-discrimination. The Venice Commission recalls that “[p]articipation of minorities in public life is primarily founded on formal recognition of the principle of equality”.⁹⁵ It is relevant to note that about 1,565,915 Chileans identify themselves as indigenous, representing 9% of the population.⁹⁶

83. The Inter-American Commission on Human Rights (IACHR) has pointed out that “indigenous peoples can exercise their right to autonomy or self-government through their own authorities and institutions, which may be traditional, but also of recent creation,”⁹⁷ and has pointed out that this can be beneficial since “respecting the rights to indigenous autonomy or self-government, allows States to guarantee stability and a harmonious and democratic coexistence of all the inhabitants of their territories.”⁹⁸

84. Therefore, the existence of legal and cultural pluralism, within the regional, plurinational, and intercultural State system which is currently being debated within the Constituent Convention of the Republic of Chile, should be understood as a legitimate constitutional strategy aimed at guaranteeing the right to self-determination of the indigenous people of that country notwithstanding the unity and integrity of the country. Precedents of indigenous jurisdictions exist in some other Latin American constitutional systems (e.g., Ecuador, Bolivia, and to some extent Colombia⁹⁹), as well as in the United States and Canada.

85. The Constitution and the state must respect the collective right to culture and self-determination of the indigenous peoples. In turn, the indigenous justice system should respect the human rights recognized by the Chilean State in its constitution and in the international treaties to which it is a party. In an opinion on Bolivia, the Venice Commission expressed the view that in providing for a parallel indigenous system, the Constitution needs to contain guarantees of internationally-recognized human rights, including in particular (i) the explicit recognition of the principles of fair trial and equal access to justice as guiding principles in the application of indigenous jurisdiction and (ii) the express prohibition of cruel, inhuman, or degrading treatment.¹⁰⁰

⁹⁵ CDL-MIN(1998)001rev. *Summary Report on Participation of Members of Minorities in Public Life*. Pg. 2.

⁹⁶ IWGIA - International Work Group for Indigenous Affairs. *Indigenous Peoples in Chile*. Available in: <https://www.iwgia.org/en/chile.html>. 02/18/2022

⁹⁷ IACHR. OEA/Ser.L/V/II. *Right to self-determination of Indigenous and Tribal Peoples*. (ES) Par. 150

⁹⁸ IACHR. OEA/Ser.L/V/II. *Right to self-determination of Indigenous and Tribal Peoples*. (ES) Par. 150 See also United Nations Development Group, *Guidelines on indigenous peoples' issues*, UNDG. HR/P/PT/16, p. 15 (recognizing that “the right to self-determination can be expressed through the formal recognition of traditional institutions, internal justice, and conflict resolution systems, and ways of socio-political organization”).

⁹⁹ It is worth emphasizing that the percentage of the overall population that identifies as belonging to indigenous communities in Chile is much closer to that of Colombia than Ecuador or Bolivia.

¹⁰⁰ CDL-AD(2011)038 at 50

86. Establishing a special indigenous jurisdiction should also comply with the principle of the rule of law, which requires some degree of unity and coherence between indigenous and state jurisdiction.

87. In conclusion, in the opinion of the Venice Commission an indigenous justice system must have a meaningful degree of autonomy if it is to be a means of realizing self-determination. At the same time there needs to be a careful and substantial system of coordination between the indigenous justice system and the ordinary justice system. Where the constitutional choice is made to maintain an autonomous and parallel indigenous justice system, the IACHR has also indicated that “it is up to the State to make efforts so that in practice there is a harmonious coexistence between the State and indigenous system of administration and justice”¹⁰¹ and, to that extent, “it is necessary to promote coordination between [these systems] in order to avoid disagreements in the resolution of conflicts and in the administration of projects and economic resources.”¹⁰²

88. In the Venice Commission’s view, for the constitutional design of the indigenous justice system and related legislation, a free, prior, and informed consultation should be developed so that indigenous people can genuinely and meaningfully participate and expose their thoughts, necessities, and expectations of a new justice system.

89. In order to ensure this coordination successfully without compromising the rule of law, a significant number of crucial and complex issues will need to be addressed. For example: is the jurisdiction of the indigenous system applicable only to disputes between indigenous persons; should it have jurisdiction only over civil matters or also over criminal ones; if it has criminal jurisdiction, is that determined by the identity of the offender or the victim; can there be a choice by the parties to revert to ordinary jurisdiction; what are the limits of substantive indigenous law; how would the difficult questions of co-ordination between indigenous and ordinary courts be resolved, etc. In short, if the new Chilean constitution includes a recognition of a parallel indigenous justice system, a great deal will still need to be resolved in order to make it viable and compatible with the rule of law in general.

90. It is proposed that representatives of the indigenous peoples will sit on the proposed new Judicial Council. It is unclear whether this will entail some competence of the Council over indigenous justice. This is a matter which will require particular attention.

b) Reserved seats for indigenous people

91. Regarding the provision in the electoral system of seats reserved for indigenous people, the Venice Commission’s Code of Good Practice in Electoral Matters provides that “In accordance with the principles of international law, the electoral law must guarantee equality for persons belonging to national minorities, which includes prohibiting any discrimination against them. In particular, the national minorities must be allowed to set up political parties. Constituency delimitations and quorum regulations must not be such as to form an obstacle to the presence of persons belonging to minorities in the elected body. Certain measures taken to ensure minimum representation for minorities either by reserving seats for them or by providing for exceptions to the normal rules on seat distribution, eg by waiving the quorum for the national minorities’ parties, do not infringe the principle of equality. It may also be foreseen that people belonging to national minorities have the right to vote for both general and national minority lists. However, neither candidates nor electors must be required to indicate their affiliation with any national minority.”¹⁰³

¹⁰¹ IACHR. OEA/Ser.L/V/II. Right to self-determination of Indigenous and Tribal Peoples. (ES) § 161.

¹⁰² Ibidem.

¹⁰³ CDL-AD(2002)023rev2, Code of good practice in electoral matters, 1.2.4.; see also CDL-AD(2005)009, Report On Electoral Rules And Affirmative Action For National Minorities’ Participation In Decision-Making Process In European Countries, §§ 67-68.

92. Considering that indigenous people belong to groups that have historically been discriminated against and suffer the consequences of social and structural inequalities, instituting various forms of affirmative action can serve as an adequate mechanism to make them part of the decision-making process in the democratically elected political organs of the state. Therefore, the Venice Commission considers that contemplating, at the constitutional level, reserved seats in parliament for indigenous people is a measure consistent with the realization of the principle of equality within the right to political participation, in terms of Articles 23.1.c and 24 of the American Convention on Human Rights; 1 and 21.2 of the Universal Declaration of Human Rights; and 25.c and 26 of the International Covenant on Civil and Political Rights.

93. The realization of the proposal to reserve seats for indigenous peoples would require considerable further specification for it to be fair and functional. It must be achieved based on measures that consider Chile's historical, political, and cultural context, as well as through mechanisms of prior, free and informed consultation. This may be done through political parties, independent candidacies, as well as candidacies determined by their traditional authorities. It will also be necessary to specify how such reserved seats will appropriately balance and address the needs of multiple different indigenous communities in Chile, of widely varying size, some of which are very dispersed throughout the country and others which are geographically more concentrated in certain regions.

viii. Whether a possible withdrawal from international free trade agreements and its effects on acquired rights under them (in particular the right to property) complies with international standards.

94. Free-trade agreements are a consequence of particular economic and social policies that a State may prefer at a given time. Their conclusion, as well as withdrawal from them, falls within the sovereign decision of each State.

95. However, "[T]he principle *pacta sunt servanda* (agreements must be kept) is the way in which international law expresses the principle of legality. It does not deal with the way in which international customary or conventional law is implemented in the internal legal order, but a State "may not invoke the provisions of its internal law as justification for its failure to perform a treaty" or to respect customary international law... The principle of the Rule of Law does not impose a choice between monism and dualism, but *pacta sunt servanda* applies regardless of the national approach to the relationship between international and internal law..."¹⁰⁴

96. In addition, it is necessary to consider the possible limits imposed by the current Constitution on the new text approved by the Convention. Article 135 of the current Constitution states that the new text must preserve Chile's republican form of government and democratic regime, as well as guarantee the compliance with final court rulings, and the same with "ratified international treaties." An important observation here is that Article 135 refers to all ratified international treaties currently in force, and is not limited only, for instance, to human rights treaties or to treaties regarding membership in international organizations. Both of these points suggest that free trade treaties must be included among the international legal obligations that the new Constitution must respect, and that denunciation of or withdrawal from such treaties must be undertaken only within the legal rules and procedures of public international law; the new Constitution cannot abrogate those treaty obligations merely through an automatic constitutional rule or through a new rule of municipal law. Of course, the new constitution can provide for the mechanisms by which future Chilean governments may, in a manner consistent with the public international law of treaties, withdraw from existing free trade agreements, and can impose substantive or procedural limitations on the conclusion of new free trade agreements or other treaties.

¹⁰⁴ CDL-AD(2016)007rev at 47-48

ix. Whether the reformulation of the constitutional provision on the right of property in more restrictive terms than the current constitutional provision would go against international standards.

Do you consider that the idea of non-abolition of fundamental rights includes the principle of non-regression of rights and freedoms?

What criteria and standards should be followed in case it is decided to recognise a right or freedom in a different way from the way it was recognised in the previous constitutional text?

97. Modern constitutions normally contain extensive catalogues of fundamental rights. These provisions are generally open to amendment, while in some countries certain rights are considered to be so fundamental (such as the right to human dignity in Germany or dignity and equality in South Africa) that the constitution provides that their core substance is not open to amendment.

98. International human rights treaties are intended to set out minimum standards. States are permitted and even encouraged to provide more extensive rights in their constitutions, so long as these do not violate the minimum international standards. States are also entitled, within the margin of appreciation permitted to them, to achieve a balance between different competing rights which best suit their constitutional traditions and culture. The international treaties, which are a subsidiary system for protection of fundamental rights, should not necessarily be frozen into the primary system for protecting rights.

99. While it has generally happened that new rights have been introduced and the scope of protection of existing ones has been extended, there may be calls for adjusting or limiting or even reducing the legal reach of some constitutional rights; either because they must be balanced against other conflicting rights, or because they have in some cases been judged as going too far, thereby unduly restricting the legitimate democratic powers of parliament and the government to legislate for the common good. The constitutional amendment of fundamental rights provisions can either serve to extend or to restrict the scope of protection afforded to the individual, in both cases subject to reasonable debate and disagreement in a democratic society.

100. The necessity of amending the constitutional language on fundamental rights in order to take into account the developments in the society over time depends in large part on the level of detail of the constitutional provisions and on the interpretive role of domestic courts.¹⁰⁵ For example, if the provisions are formulated in very broad and general terms, it might become necessary to introduce necessary restrictions by way of a constitutional amendment if they are interpreted broadly by domestic courts. Very detailed constitutional provisions (fixing for example the time-limits for pre-trial custody or indictment) inevitably may require amendments both for decreasing and for increasing the level of protection, when the specifications of the right in the text no longer correspond to societal needs. For these reasons, the experience of the Venice Commission demonstrates that the inclusion of more, and more detailed, rights in a constitution does not necessarily correlate to higher or lower levels of the protection of human rights in a society. But more rights and more detailed specifications of rights are more likely to require adjustment over time, either through constitutional amendment or through more active judicial control of the catalogue of constitutional rights.

101. It should be underlined that for individuals of any given political and constitutional community, a continuous debate on the fundamental rights of the individual also ensures that these rights are not taken for granted. Debates on fundamental rights issues have "significance in encouraging people to recognise themselves and each other as self-confident bearers of rights, as equal members of a human rights community which will continue to exist only for as long as

¹⁰⁵ CDL-AD(2010)001, Report on constitutional amendment, § 159 ff.

the bearers themselves exercise their rights".¹⁰⁶ At the same time it should be emphasized that a continuous democratic debate on the contents and implications of fundamental rights in no way contradicts their entrenchment in the constitution or in international instruments. In this respect it should also be borne in mind that, at least in countries where the constitutional provisions on fundamental rights are not very detailed, regulation and specification of fundamental rights is to some extent left for the ordinary or organic legislator. Debates on these issues will therefore more often result in legislative changes than in constitutional amendments. Constitutional and treaty provisions may be subject to reinterpretation and specification, and here democratic debate plays an important role, even where the decision in the concrete case typically lies in the hands of a constitutional court or a corresponding body of constitutional review.¹⁰⁷

102. As concerns general clauses in the constitution prohibiting any amendment which would restrict human rights and freedoms, the Venice Commission considers that they should not have a chilling effect on the introduction of new provisions responding to societal developments, knowing that the scope of protection of competing human rights is often intertwined with and dependent on a balancing of opposing claims. This risk is greater when the constitutional provisions are very detailed.¹⁰⁸

103. In the Commission's view, the constituent legislator of Chile may introduce changes in the formulation of the human rights provisions at the constitutional level provided that such changes do not go against customary international law and ratified international treaties. These provisions should be expressed in a manner that does not prevent their development over time.

104. As concerns specifically the right to property, it is protected under article 21¹⁰⁹ of the American Convention on Human Rights and 17¹¹⁰ of the Universal Declaration of Human Rights. The right to property is not an absolute right, and it could be subject to restrictions; the Inter-American Court of Human Rights has stressed Article 21 of the American Convention states that the "law may subordinate [the] use and enjoyment [of property] to the interest of society". Thus, the Court has held that, in accordance with Article 21 of the Convention, a State may restrict the use and enjoyment of the right to property so long as the restrictions are: a) previously established by law; b) necessary; c) proportional, and d) with the aim of achieving a legitimate objective in a democratic society."¹¹¹ Similar conditions exist under the European Convention on Human Rights, and the Venice Commission has recalled that the "right to property can be subject to certain limitations in the public interest and subject to the conditions provided for by law."¹¹²

¹⁰⁶ Ibidem, § 149.

¹⁰⁷ Ibidem., §§ 146 ff.

¹⁰⁸ CDL-AD(2005)003, Joint Opinion on a Proposal for a Constitutional Law on Changes and Amendments to the Constitutional of Georgia

¹⁰⁹ Article 21. Right to Property

1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.

2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.

3. Usury and any other form of exploitation of man by man shall be prohibited by law.

¹¹⁰ Article 17

1. Everyone has the right to own property alone as well as in association with others.

2. No one shall be arbitrarily deprived of his property.

¹¹¹ I/A Court H.R., *Case of the Saramaka People. v. Suriname. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 28, 2007 Series C No. 172*. Par. 127.

¹¹² CDL-AD(2021)011. *Georgia - Joint Opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on the recent amendments to the Law on electronic communications and the Law on broadcasting, adopted by the Venice Commission at its 126th plenary session (online, 19-20 March 2021)*. Par. 22.

105. The Inter-American Court of Human Rights has held that “in cases of expropriation, the payment of a compensation constitutes a general principle of international law.”¹¹³ Regarding to the way that the compensation is to be calculated, the Inter-American Court of Human Rights has ruled that “it corresponds to the States to establish the standards to determine payment of a compensation in domestic law for an expropriation, pursuant with its regulations and practices, provided these are reasonable and pursuant with [sic] the rights acknowledged in the Convention.”¹¹⁴ A just compensation must be guaranteed, “which derives from the need to look for a balance between the general interest and the owner’s interest”¹¹⁵. Similarly, it must be “prompt, adequate and effective”.¹¹⁶ The Constitutional Convention of Chile will need to ensure that these minimum requirements are respected in the new texts on property rights.

106. In conclusion, in designing the new constitutional provisions concerning the protection of the right of property and possibly of other fundamental rights, the Constitutional Convention should take into account its international obligations. This is true not only of the right to property. During its visit to Chile, the delegation of the Commission received a number of expressions of concern about proposals advanced in the Convention to restrict the scope of various human rights – for example, freedom of expression,¹¹⁷ freedom of religion and belief, and freedom of education – in ways that would be inconsistent with Chile’s international treaty obligations. For the reasons set forth at the outset of this opinion, the Commission deems it premature to comment on the specifics of these proposals as they are still under review and in a process that subjects them to frequent changes. The applicable general principle remains constant, however: the level of protection of any constitutionally protected right may not be less than the international guarantee. The need for the legislator and ultimately the courts to carry out a balancing of competing rights under the general requirements of necessity and proportionality should be taken into account by the constituent legislator as well, being mindful of what was said above: the political authorities should in general have the power to make their own choices of economic, social, fiscal, family, educational, etc. policies through simple majorities, lest elections lose their meaning.

x. Whether the binary option which will be provided in the constitutional referendum is compatible with the need to achieve broad agreements and consensus and whether there should be additional options offered to the voters.

107. The plebiscite options of the Constituent Convention are binary: concretely, 1) if a new Constitution is to be adopted or 2) if the new Constitution is rejected and the current Constitution continues to exist. This is in line with article 142 of the Chilean Constitution.

108. From the point of view of the Revised Guidelines on Referendums (CDL-AD(2020)031), III,5, the preference is for a binary question. However, a vote “on two or more alternatives is...not excluded (multi-option referendum)”, when “two or more alternatives may be proposed”. In this case, “voting for the *status quo* should be possible”.

¹¹³ I/A Court H.R., *Case of Salvador Chiriboga v. Ecuador. Reparations and Costs. Judgment of March 3, 2011 Serie C No. 222*. Par. 60.

¹¹⁴ I/A Court H.R., *Case of Salvador Chiriboga v. Ecuador. Reparations and Costs. Judgment of March 3, 2011 Serie C No. 222*. Par. 61.

¹¹⁵ I/A Court H.R., *Case of Salvador Chiriboga v. Ecuador. Preliminary Objections and Merits. Judgment of May 6, 2008 Series C No. 179*. Par. 96.

¹¹⁶ I/A Court H.R., *Case of Salvador Chiriboga v. Ecuador. Preliminary Objections and Merits. Judgment of May 6, 2008 Series C No. 179*. Par. 96.

¹¹⁷ In particular, see Article 23 of the Constitutional Convention’s Ethics Regulations, which provides: “Denialism (“Negacionismo”). Denialism shall be understood as any action or omission that justifies, denies or minimises, apologises for or glorifies the crimes against humanity that occurred in Chile between 11 September 1973 and 10 March 1990, and the human rights violations that occurred in the context of the social upheaval of October 2019 and after.

Denialism shall also be understood as any action or omission that justifies, denies or minimises the atrocities and cultural genocide of which the native peoples and the Afro-descendant tribal people have been victims throughout history, during European colonisation and since the constitution of the State of Chile.”

109. The Venice Commission observes that the rules on the plebiscite are currently clear and have been made known to the citizens and the political stakeholders. Consequently, changing these rules would risk violating the principle of legal certainty.

“Legal certainty has several functions: it helps in ensuring peace and order in a society and contributes to legal efficiency by allowing individuals to have sufficient knowledge of the law so as to be able to comply with it. It also provides the individual with a means whereby he or she can measure whether there has been arbitrariness in the exercise of state power. It helps individuals in organising their lives by enabling them to make long-term plans and formulate legitimate expectations”.¹¹⁸

110. If adjustments in the questions to be put to the referendum were considered necessary, they must be made through constitutional amendments, and should be duly and timely discussed with all the stakeholders. At this very late stage in the constitutional drafting process, it seems unlikely that such a change in the rules could avoid disrupting expectations and stability. At the same time, the Commission recognizes that almost everyone with whom it has consulted, across a wide span of the Chilean political spectrum, acknowledges that there must be some form of serious constitutional change in Chile, based on the widest possible consensus among the Chilean people.. Nevertheless, it is the view of the Venice Commission that if the possibility of a third option is offered, it ought to be through the political commitments of the relevant political actors to carry through a genuine reform after the plebiscite, rather than to change the terms of the formal revision process at this stage.

V. Conclusion

111. The Senate of Chile has asked the Venice Commission to reply to a series of questions which relate to the process of preparation and the content of the new Constitution of Chile. These questions have been updated and expanded alongside as the work of the Constituent Convention of Chile has progressed. At the time of the preparation of this opinion, there still does not exist a finalised or consolidated text of the new constitution of Chile. Under these circumstances, the Commission’s replies to the Senate’s questions cannot but be rather abstract and general. The Commission aims nonetheless to provide a concrete contribution to the successful work of the Constitutional Convention of Chile, by providing information on international standards and on the comparative experience of other modern democracies, with a view to helping the Constitutional Convention make its choices in the most informed manner. It is the conviction of the Venice Commission that, in the short time available for the Constitutional Convention to finalise its work, it may greatly benefit from the long and varied experience of the Venice Commission in the area of constitution-making and, through the Commission, from the experience of various states which have undergone similar processes of constitution-writing and have faced comparable institutional choices.

112. The Venice Commission remains at the disposal of the authorities of Chile for further assistance in this matter.

¹¹⁸ CDL-AD(2012)014-e. *Opinion on Legal Certainty and the Independence of the Judiciary in Bosnia and Herzegovina adopted by the Venice Commission at its 91st Plenary Session (Venice, 15-16 June 2012)*. Par. 24.