

LEGAL BULLETIN

November 2020

The Chilean constitutional process: a brief review of the general aspects of the process, expected timeline, and its formal and substantial limits.

Applicable legislation:

- Constitution of the Republic of Chile.
- Organic constitutional law N° 18.700, on popular voting and vote count.
- Organic constitutional law N° 18.556, on the electoral registration system and electoral service.
- Organic constitutional law N° 18.603, on political parties.
- Organic constitutional law N° 19.884, on transparency, limits, and control of electoral expenditure.
- Law N° 20.880, on probity in public service and prevention of conflicts of interest.
- Law N° 20.730, on lobbying and procedures that represent particular interests before the authorities and officials.

Please note that the information hereby provided is for guidance purposes only and does not in any way replace any official interpretations made by the relevant authorities competent in the subjects accosted.

1. Background

As a result of the plebiscite that took place on October 25, 2020, Chile will begin a constitutional process in the coming months. The purpose of this process is to **draft a proposal for a new Constitution**, which, if approved, will replace the charter in force since 1980.

Specifically, the plebiscite asked Chileans on the need to draft a new Constitution, as well as the mechanism to be used for that purpose. The alternative “**Approve**” won by 78.27% of the votes, while 79.99% opted for the mechanism of a “**Constitutional Convention**”.

Unlike other constitutional experiences in Latin America, the Chilean process began as a **reform of the current Constitution**. This means that the rules that define and limit the constitutional process were debated in the National Congress and approved by the quorums considered in the current constitutional text.

Furthermore, the sole purpose of the Constitutional Convention will be the drafting of the new Constitution, and its members **will not be able to exercise the powers of other entities** defined in the current charter.

2. General aspects of the constitutional process

The Constitutional Convention, in charge of drafting the proposal for a new Constitution, will be a body made up of **155 citizens elected** especially for this purpose, called “conventional constituents”.

The conventional constituents will be elected by popular vote, and the rules governing the electoral districts, as well as the electoral system to assign seats in the Convention, will be those currently in force in Chile for the **election of House Representatives**¹.

Any citizen may apply to be a conventional constituent. Nonetheless, those who hold high-level public office positions or managerial positions in guilds or neighborhood councils will automatically cease in their duties from the moment they submit their candidacies.

The conventional constituents will be subject to the same inabilities, incompatibilities, and prohibitions that the current Constitution sets for members of Congress. Moreover, they shall comply with the rules of Law N° 20.880, on probity in public service and prevention of conflicts of interest, as applicable to House Representatives, and with Law N° 20.730, on lobbying and procedures that represent particular interests before the authorities and officials.

The Convention shall elaborate a regulation to define its functioning. Both the rules of the new Constitution and the regulation must be approved by a quorum of **two-thirds** of the incumbent members of the Convention. The Convention is barred from modifying the quorums and procedures for the adoption of resolutions.

Likewise, the Convention shall elect a president and a vice president, as well as a technical secretariat, comprised of people of proven academic or professional appropriateness.

3. Timeline of the constitutional process

The tentative constitutional schedule for the next months is as follows:

¹ The specific laws are the organic constitutional law N° 18.700 on popular voting and vote count; the organic constitutional law N° 18.556 on the electoral registration system and electoral service; the organic constitutional law N° 18.603 on political parties; and the organic constitutional law N° 19.884 on transparency, limits, and control of electoral expenditure.

2021	April 11	Conventional constituents election.
	April 18 – May 17	Deadline for the President to convene the first session of the Convention.
	May 3 – June 1	Deadline for holding the first session of the Convention.
2022	January 3 – February 1	First deadline to deliver the text proposal.
	April 3 – May 1	Final deadline to deliver the text proposal.
	June 5 – July 3	Deadline for the constitutional plebiscite.
	July 13 – August 10	In case the result of the plebiscite is favorable for a new Constitution, deadline for the President to enact the new text.
	July 23 – August 20	Deadline for publication and entry into force of the new Constitution.

Therefore, the next milestone in the process will be the election of the 155 conventional constituents, which will take place on **April 11, 2021**. It should be noted that this election will be held simultaneously with the elections for regional governors, mayors, and city councilors.

The reviewing process of this election must be concluded within thirty days after it has taken place. The proclamation sentence will be communicated to the President of the Republic and the National Congress, within three days from its issuing and, within three days from the aforementioned communication, the President of the Republic will call for the inaugural session of the Constitutional Convention, which shall be held within fifteen days after the publication of the presidential decree that summons the Convention.

The Convention shall draft a new Constitution proposal within a maximum period of **nine months**, which may be extended, only once, for a further **three months**.

Once the Convention has fulfilled its objective, and within the following three days, the President shall convene a new **constitutional referendum** for the citizens to ratify the proposed new Constitution. Such plebiscite shall be held sixty days after the publication of the presidential decree that calls it. Voting in this referendum will be mandatory.

After the constitutional referendum has been held, the electoral reviewing process must be concluded within thirty days. The proclamation decree shall be communicated to the President of the Republic and the National Congress, within three days from its issuing.

Within the next five days, if the result of the referendum is favorable to the proposal for a new Constitution, the President shall convene a plenary session of the Congress for the enacting of the new constitutional text. The new Constitution shall be published in the **Official Gazette** within ten days from its enacting, and **will come into force** on that date.

4. Limits of the constitutional process

The Chilean constitutional process has a series of limitations, set by the constitutional reform that permitted the process. Thus, it is possible to distinguish between procedural limits, those that protect deliberation that takes place within the Constitutional Convention; and substantial limits, or those principles that the new constitutional text submitted to a plebiscite may not transgress.

4.1. Procedural limits

- **Quorum for adopting resolutions:** The constitutional reform set a quorum of two-thirds for the approval of the rules of the new Constitution, as well as for the definition of the procedures of the Convention. This is a relatively high quorum, which seeks to encourage broad political agreements instead of the imposition of one circumstantial majority over another.
- **Electoral system:** The fact that the rules for the election of conventional constituents are the same that those for the election of House Representatives suggests that the political composition of the Convention will not differ much from that of the House Representatives. Nowadays, no political sector holds more than two-thirds in that Chamber, so a different scenario is unlikely to happen in the Convention.
- **Technical Secretariat:** The Convention must designate a technical secretariat that consists of people of proven academic or professional relevance. This entity must ensure that the drafted text is consistent and respects the substantive limits set by the current Constitution.
- **Complaints procedure:** In case of violation of the procedural rules of the Convention, a quarter of its members may file a claim before the Supreme Court. This procedure aims to prevent a majority from breaching the rules for debating and adopting resolutions within the Convention.
- **Validity of the Constitution of 1980:** During the existence of the Constitutional Convention, the current Constitution will remain fully in force. The Convention is barred from assuming other powers than those expressly conferred for the drafting of a new Constitution.

- **Ratifying referendum:** Finally, it should be reiterated that the final product of the Constitutional Convention will only be a proposal for a new Constitution, which must be approved by the citizens in a ratifying referendum, where voting will be compulsory.

4.2. Substantial limits

- **Republican nature:** The constitutional text submitted to referendum must preserve the republican nature of Chile. Hence, it is forbidden to establish a different form of government in the new Constitution, such as, for example, a monarchy.
- **Democratic regime:** Likewise, the Chilean democratic regime must be respected. In other words, the new Constitution may not impose an autocratic or totalitarian regime.
- **Judicial rulings:** The proposal for a new Constitution may not affect rulings issued by the Chilean courts that are final and enforceable. This means that the new constitutional text is prohibited from reopening already resolved judicial procedures.
- **International treaties:** Finally, the text submitted to plebiscite must respect the international treaties ratified by Chile that are in force. This encompasses a wide range of instruments, such as human rights treaties, economic and free trade agreements, among others.

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