


RESEARCH ARTICLE

# Parity constitutionalism

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## Abstract

In 2021, the Chilean Convention became the first constitution-making body with gender parity. However, the draft – which reflected many gender-related norms – was rejected by 61.89 per cent of voters in the exit plebiscite of 2022. In this article, we argue that although parity constitutionalism has promise and, in the Chilean case, was linked to gender-related outcomes in the constitutional text, parity’s promise may fail to materialize. We thus caution against a naïve view of parity constitutionalism as one of the key legacies of the 2020–22 Chilean constitution-making process.

**Keywords:** Chilean Constitution; feminism; gender rights; parity constitutionalism; utopian constitutionalism

## 1. Introduction

‘Never again without us’ the Chilean feminist movement demanded of the constitution-making process, and in 2021 the Chilean Constitutional Convention became the first constitution-making body with gender parity. However, the draft – which reflected many gender-related norms – was rejected by 61.89 per cent of voters in the exit plebiscite of 2022.<sup>1</sup> And while a majority of female voters voted to reject the draft, they appeared to do so at consistently lower rates than male voters in the equivalent age bracket (the only exception being voters under 34 years).<sup>2</sup>

In this article, we argue that although parity constitutionalism has promise and, in the Chilean case, was linked to gender-related outcomes in the constitutional text, parity’s promise may fail to materialize. In the context of formal constitution-making, parity faces distinctive challenges: even if parity results in women’s descriptive representation in constitution-making bodies, which later translates to gender-related outcomes in the

<sup>1</sup>‘Plebiscito 2022’, *Servicio Electoral de Chile*, 11 October 2022, available at <<https://historico.servel.cl/servel/app/index.php?r=EleccionesGenerico&id=237>>.

<sup>2</sup>G Espinoza, ‘Los apabullantes datos y cifras que dejó el Plebiscito de salida’, *El Mostrador*, 7 September 2022, available at <<https://www.elmostrador.cl/dia/2022/09/07/los-apabullantes-datos-y-cifras-que-dejo-el-plebiscito-de-salida>>.

constitutional draft, the draft might fail to gain widespread support and, in that sense, fail to be substantively representative of the wider population, including women. If parity is divorced from political parties and norms of electoral competition, it may exacerbate the tendency for constitution-making efforts to adopt ‘utopian’ constitutional approaches, which cannot command support from a majority of voters.<sup>3</sup> We thus caution against a naïve view of parity constitutionalism as one of the key legacies of the 2020–22 Chilean constitution-making process. Parity constitutionalism may be here to stay, and in ways that are good for gender justice. But it also requires refining in terms of its relationship with party structures and its ability to contribute to democratic compromises if it is to advance the goals of successful democratic constitutional change.

The remainder of the article proceeds as follows. Part II discusses some rationales for parity constitutionalism and its connection to notions of representation. Part III explores the promise and pitfalls of parity constitutionalism, both from a gender equality and democratic constitutional reform perspective. Part IV illustrates these benefits and dangers by reference to the 2020–22 Chilean constitutional process. Part V concludes the discussion.

## II. Parity, democracy and constitutionalism

Women in most democracies are roughly half of the electorate,<sup>4</sup> and they are equally – and sometimes disproportionately – affected by certain governmental decisions. Concerns for gender justice have thus recently manifested in concerns regarding women’s representation in office – that is, descriptive representation – which is thought to translate into women’s substantive representation – the representation of women’s interests.<sup>5</sup>

Descriptive representation does not always result in substantive representation. Feminism is a contested political project and disagreement is both external (i.e. anti-feminist projects) and internal to feminism (i.e. disagreements within feminism regarding the role and place of women’s agency, particularly in the context of sex and sexual violence, and decisions about care and reproduction).<sup>6</sup> Thus, some elected women might reject the idea that they have any special responsibility for advancing women’s interests, while others may be chosen as candidates precisely because of their capacity to legitimize policies that undermine women’s interests.<sup>7</sup> Further, some studies show that, with a ‘critical mass’, female legislators speak less than when they are in a clearer minority<sup>8</sup> or might face backlash.<sup>9</sup> Finally, women disagree about what women’s interests are – a disagreement

<sup>3</sup>R Dixon and D Landau, ‘Utopian Constitutionalism’ (forthcoming).

<sup>4</sup>‘Population, female (% of total population)’, *The World Bank*, 2022, available at <<https://data.worldbank.org/indicator/SP.POP.TOTL.FE.ZS>>.

<sup>5</sup>H Fenichel Pitkin, *The Concept of Representation* (University of California Press, Berkeley, 1972); K Celis, ‘Substantive Representation of Women (and Improving It): What It Is and Should Be about?’ (2009) 7(1) *Comparative European Politics* 95.

<sup>6</sup>R Dixon, ‘Feminist Disagreement (Comparatively) Recast’, 31 *Harvard Journal of Law and Gender* 277 (2008).

<sup>7</sup>R Dixon, ‘Abusive Feminism’, *Blog of the International Journal of Constitutional Law*, 6 April 2022, available at <<http://www.iconnectblog.com/2022/04/abusive-feminism/>>.

<sup>8</sup>H Bäck and M Debus, ‘When Do Women Speak? A Comparative Analysis of the Role of Gender in Legislative Debates’ (2019) 67(3) *Political Studies* 576 <<https://doi.org/10.1177/0032321718789358>>.

<sup>9</sup>S Grey, ‘Numbers and Beyond: The Relevance of Critical Mass in Gender Research’ (2006) 2(4) *Politics & Gender* 492.

that has become a key methodological issue in defining women's interests and assessing whether women representatives are more likely to advance them.<sup>10</sup>

Nonetheless, the evidence suggests that women's descriptive representation can increase their substantive representation,<sup>11</sup> and having a critical mass of women in legislative bodies tends to promote increased spending on certain areas, in ways that are non-linear – that is, that go beyond the proportionate increase to be expected from small increases in female legislative representation.<sup>12</sup> Due to the relationship between descriptive and substantive representation, and other, gender justice-related reasons, women's descriptive under-representation in most legislatures worldwide seems particularly troubling. Today, only 26 per cent of legislators worldwide are women<sup>13</sup> and only five countries have female representation at or over 50 per cent in the national legislature.<sup>14</sup> Many countries have responded to this gender representation gap by adopting measures to increase female political participation. Some interventions aim to encourage women to run for office; others focus on reserved seats, or gender targets or quotas (mandatory or otherwise) within political parties or in the slates of candidates. And some countries have gradually shifted from gender quotas to actual gender parity in legislative representation.

The concept of 'parity democracy' was first introduced in Europe, in 1992, in a declaration at the European Summit of Women in Power calling for gender 'parity in the representation and the administration of Nations'.<sup>15</sup> Since then, it has also gained traction in diverse national contexts. In Latin America and Europe, there has been a notable increase in support for gender parity requirements as compared with (minority) gender quotas for women in electoral politics.<sup>16</sup> These trends have also been echoed in processes of democratic constitution-making, particularly in elected constitution-making bodies. For example, in 2011 the body responsible for drafting the rules for the election of the Tunisian Constituent Assembly adopted a requirement of 'vertical parity', which ultimately led to a body with 31 per cent female representation.<sup>17</sup>

Gender parity in the composition of Chile's Constitutional Convention, however, was historically unprecedented, both for a constitution-making body and for Chilean elected

<sup>10</sup>K Celis, 'Gendering Representation' in *Politics, Gender, and Concepts: Theory and Methodology*, edited by G Goertz and AG Mazur (Cambridge University Press, Cambridge, 2008) 89.

<sup>11</sup>For an excellent cross-national survey and discussion, see S Franceschet, ML Krook and JM Piscopo (eds) *The Impact of Gender Quotas* (Oxford University Press, New York, 2012).

<sup>12</sup>KD Funk, HL Paul and AQ Philips, 'Point Break: Using Machine Learning to Uncover a Critical Mass in Women's Representation' (2022) 10(2) *Political Science Research and Methods* 372; S Wang, 'Do Women Always Represent Women? The Effects of Gender Quotas on Substantive Representation' [2022] *Political Behaviour*, <https://doi.org/10.1007/s11109-022-09808-z>.

<sup>13</sup>Facts and Figures: Women's Leadership and Political Participation', *UN Women*, September 2022, available at <<https://www.unwomen.org/en/what-we-do/leadership-and-political-participation/facts-and-figures>>.

<sup>14</sup>*Ibid.*

<sup>15</sup>J Smith, 'Athens Declaration (1992)', *EuroGender*, available at <<https://eurogender.eige.europa.eu/posts/athens-declaration-1992>>.

<sup>16</sup>'Gender and Elections', *Ace Project*, available at <<https://aceproject.org/ace-en/topics/ge/ge2/ge22/the-shift-from-quotas-to-parity-democracy>>.

<sup>17</sup>N Tamaru, O Holt-Ivry and M O'Reilly, *Beyond Revolution: How Women Influenced Constitution Making in Tunisia* (United Nations Development Programme, March 2018), available at <[https://www.inclusivesecurity.org/wp-content/uploads/2018/03/Beyond-Revolution\\_Constitution-Making-in-Tunisia.pdf](https://www.inclusivesecurity.org/wp-content/uploads/2018/03/Beyond-Revolution_Constitution-Making-in-Tunisia.pdf)>.

organs, where women are still under-represented in Congress<sup>18</sup> and, until recently, fell below the regional average of 28.4 per cent,<sup>19</sup> even after the introduction of gender quotas in 2015.<sup>20</sup> Yet, in March 2020, the Senate voted overwhelmingly in favor of a Bill that ensured gender parity in the composition of the constitutional assembly.<sup>21</sup> The measure was the result of a wide political consensus,<sup>22</sup> as well as the feminist movement's relevance in social protests since 2018, coordination among women from across the political spectrum, with women organizations from civil society and women academics,<sup>23</sup> and political leadership by some key women.<sup>24</sup> Further, public opinion remained overwhelmingly in favour of gender parity in the constitution-making process.<sup>25</sup> The election of the *convencionales* took place in 2021, resulting in a Constitutional Convention composed of 77 women and 78 men.

The Chilean bill, and subsequent election, seems to have heralded a new model of democratic constitution-making, defined by a commitment to gender parity in the constitution-making process. We call this a model of 'parity constitutionalism'.

Parity constitutionalism can vary in scope and breadth. For instance, it may apply only to the delegates seated in a plenary constitution-making body, or to the body as a whole and various other sub-organs involved in constitutional drafting, including technical and subject-matter committees. It may apply only to formal processes of constitutional drafting and amendment, or extend to other institutional contexts – including courts, legislatures and 'fourth branch' institutions – involved in processes of small-c constitutional change and development. One model could be considered narrow or 'shallow' in nature, the other broader or 'deeper' in scope. Regardless of these differences in scope, parity constitutionalism consists of two fundamental ideas: women and men should have

<sup>18</sup>*Nuevo Mapa del Poder y Género en Chile (1995–2018)* (United Nations Development Programme, Santiago, 10 March 2020) 45. See also 'Listado de Diputadas y Diputados', *Cámara de Diputadas y Diputados*, available at <<https://www.camara.cl/diputados/diputados.aspx>>. For its Senate counterpart, see 'Listados A–Z', *República de Chile Senado*, available at <<https://www.senado.cl/appsenado/index.php?mo=senadores&ac=listado>>.

<sup>19</sup>*Women in Parliament in 2017: The Year in Review* (Inter-Parliamentary Union, Geneva, 2018).

<sup>20</sup>*Ley No. 20.480: Sustituye el Sistema Electoral Binominal por uno de Carácter Proporcional Inclusivo y Fortalece la Representatividad del Congreso Nacional 2015* (Chile), available at <<https://www.bcn.cl/leychile/navegar?idNorma=1077039>>.

<sup>21</sup>*Ley No. 21.216: Modifica la Carta Fundamental Para Permitir la Conformación de Pactos Electorales de Independientes y Garantizar la Paridad de Género en las Candidaturas y en la Integración del Órgano Constituyente que se Conforme Para la Creación de una Nueva Constitución Política de la República 2020* (Chile), available at <<https://www.bcn.cl/leychile/navegar?idNorma=1143661>>.

<sup>22</sup>P Figueroa Rubio, 'Históricas: Nada Sin Nosotras. Paridad y Nueva Constitución: El Caso de Chile' (2021) 8(2) *Revista Culturas Jurídicas* 21; P Figueroa Rubio, 'El Largo y Sinuoso Camino Hacia La Convención Constitucional Paritaria' in *Mujeres En Tiempos de Esperanza, Crisis y Pandemia*, edited by BB Polloni (Ediciones Biblioteca Nacional del Congreso, Santiago, 2021) 290.

<sup>23</sup>Marcela Ríos Tobar, 'Paridad: Cuando La Movilización Finalmente Logra Acceso al Poder' in BB Polloni (ed), *Mujeres En Tiempos de Esperanza, Crisis y Pandemia* (Chile: Ediciones Biblioteca Nacional del Congreso, 2021) 297; J Suárez-Cao, 'Blessing in Disguise? How the Gendered Division of Labor in Political Science Helped Achieved Gender Parity in the Chilean Constitutional Assembly' (2022) *Politics & Gender* 1–6.

<sup>24</sup>P Figueroa Rubio, 'Históricas' (n 25); Tobar (n 23) 295; C Reyes-Housholder and B Roque, 'Chile 2018: Desafíos al Poder de Género Desde la Calle Hasta La Moneda' (2019) 39(2) *Revista de Ciencia Política* 191.

<sup>25</sup>P Morales and S Valenzuela, 'Nunca Más Sin Nosotras: La Importancia De La Paridad En El Proceso Constituyente', *La Tercera*, 30 September 2020, available at <<https://www.latercera.com/paula/nunca-mas-sin-nosotras-la-importancia-de-la-paridad-en-el-proceso-constituyente>>.

an equal share of political power; and such equality should begin with the democratic constitution-making process, through mandatory norms of equal gender representation among constitution-makers.

### III. Parity constitutionalism: Promise and pitfalls

Parity constitutionalism has several advantages, although they may vary in strength depending on the context and scope of the model.

Gender representation gaps have different (and potentially overlapping) causes. Parity norms can address some of those causes, particularly those regarding gendered attitudes and biases toward the ‘suitability’ of female as opposed to male candidates for election, gendered networks and structures within political parties, and gendered violence and harassment.

Numerous studies find that parity requirements help to challenge the social norms and attitudes of what ‘legislators’ or politicians look and sound like, or the *attributes* that make a person suited to electoral office.<sup>26</sup> They likewise show that electoral quotas can help reshape internal party norms and networks of power, and even force parties to change and expand their approaches to recruiting candidates.<sup>27</sup>

As noted above, there is also evidence suggesting a correlation between a critical mass of women in parliament and a gender-sensitive approach to policy-making, including attention to areas such as health and education – and this may extend to policies designed to accommodate care responsibilities, both generally and in the parliament itself.<sup>28</sup> There is also evidence that having a critical mass of women in any workplace is likely to reduce the risk of gendered forms of harassment and violence.<sup>29</sup>

These effects might also materialize in constitution-making processes. In this context, parity constitutionalism might have an important role to play in disrupting gendered notions about who are suitable constitution-makers within a context often understood as the ultimate exercise of democratic constituent power. Further, constitution-making often involves long hours and late nights, which might pose risks of harassment and challenges in combining representation and care, hence making changes arising from a critical mass even more important.

Finally, parity – that is, descriptive representation – might also lead to women’s substantive representation in the constitutional draft, and possibly also its implementation. That is, parity in drafting may be associated with ‘deeper’ forms of parity constitutionalism, which involve enshrining commitments to parity in the structure of a range of institutions created under the constitution.

There are, however, also pitfalls to a model of parity constitutionalism. Some of these challenges are common to legislative settings. First, as noted previously, descriptive

<sup>26</sup>See, for example, TD Barnes and MR Holman, ‘Gender Quotas, Women’s Representation, and Legislative Diversity’ (2020) 82(4) *Journal of Politics* 1271; DZ O’Brien, ‘Gender Quotas and Women’s Political Leadership’ (2016) 110(1) *American Political Science Review* 112.

<sup>27</sup>Barnes and Holman (n 26).

<sup>28</sup>R Dixon, ‘Women in Our Democracy: Here’s the Good News, and the Not So Good’, *Sydney Morning Herald*, 14 October 2022, available at <<https://www.smh.com.au/politics/nsw/women-in-our-democracy-here-s-the-good-news-and-the-not-so-good-20221012-p5bpb3.html>>.

<sup>29</sup>SD Jonsdottir et al., ‘Risk Factors for Workplace Sexual Harassment and Violence Among a National Cohort of Women in Iceland: A Cross-Sectional Study’ (2022) 9(7) *The Lancet Public Health* e763, available at <[https://doi.org/10.1016/S2468-2667\(22\)00201-8](https://doi.org/10.1016/S2468-2667(22)00201-8)>.

representation does not always translate into substantive representation; moreover, there is no agreement regarding what women's interests are. If one is committed to a constitutional feminist project – that is, to a particular conceptualization of women's interests – the risks of failure are substantial: there is not only a danger that increases in descriptive representation will not translate into substantive representation, but also that descriptive representation's weaponization by opponents of feminism will occur, so that high-profile women are appointed with the express aim of eroding gender equality gains, or even democracy itself.<sup>30</sup>

Second, how should we think about commitments to parity, given an intersectional feminist approach that is sensitive to the interests of women from different backgrounds? Clearly, it is insufficient for the democratic legitimacy of a constitution-making body to have a critical mass of women. It must include sufficient numbers of women with diverse backgrounds and experiences, including experiences of racial and economic marginalization, and representatives with diverse sexual and gender identities. Commitments to gender parity do not always go hand in hand with this kind of broader, intersectional commitment to inclusion and representation – especially the representation of non-binary individuals.<sup>31</sup>

Some challenges, however, are more distinctive to constitution-making processes. It is one thing for a constitutional draft to be feminist in nature – as we suggest the Chilean draft was – but quite another for a draft to become binding law, be implemented or gain majoritarian approval.

Formal constitutional change usually happens within certain windows, and if a window is lost, it might take a long time for change to materialize. Increasingly, democratic constitutional change also requires that voters approve of the draft at a national plebiscite or referendum.<sup>32</sup> If parity results or encourages a draft that goes beyond, in terms of political and social change, what a majority of voters are willing to endorse, parity may ultimately contribute to a form of *failed* democratic constitutional reform.<sup>33</sup>

#### IV. Parity Constitutionalism in Chile

Some of these benefits and pitfalls can be observed in the Chilean constitution-making process. In this context, parity constitutionalism resulted in a gender-sensitive draft, which arguably reflected intersectional perspectives as well as the demands of various Chilean feminist organizations.<sup>34</sup>

<sup>30</sup>See, for example, Dixon, 'Abusive Feminism' (n 7).

<sup>31</sup>§ Knispel, 'Women Quotas in Politics Lead to Unintended Consequences', University of Rochester New Center, 12 May 2020, available at <<https://www.rochester.edu/newscenter/gender-electoral-quotas-unintended-consequences-432792>>.

<sup>32</sup>See R Albert and R Stacey (eds), *The Limits and Legitimacy of Referendums* (Oxford University Press, New York, 2022).

<sup>33</sup>R Dixon and D Landau, 'Utopian Constitutionalism' (n 3).

<sup>34</sup>See, for example, proposals from Corporación Humanas with ContextoCL+: 'Hacia una Constitución Feminista: 15 puntos mínimos', 3 March 2021, available at <<https://www.humanas.cl/wp-content/uploads/2021/04/Constitucion-Feminista.pdf>>; *Por un Reglamento Feminista* (Articulación Territorial Feminista Elena Caffarena, 2021), available at <<https://nadasinnosotras.cl/wp-content/uploads/2019/08/Reglamento-Feminista.3.0.pdf>>.

First, the draft consistently employed inclusive language. Second, the basis of the constitutional order included the principles of gender equality and ‘gender-parity democracy’, as well as parity requirements in the composition of certain state organs.<sup>35</sup> Third, the draft included the need for a ‘gender perspective’ (without defining it) and/or an ‘intersectional approach’ (understood as cases in which multiple categories of subordination overlap)<sup>36</sup> in provisions related to political participation and institutional design<sup>37</sup> and fundamental rights.<sup>38</sup> Particularly notable is the requirement of a gender perspective and an intersectional approach in the exercise of the judicial function and the training of justice administration officials.<sup>39</sup> Fourth, the draft’s lengthy list of constitutional rights included several gender-related rights, such as gender equality and non-discrimination,<sup>40</sup> reproductive and sexual rights,<sup>41</sup> and rights related to care-work.<sup>42</sup> Fifth, the draft evidenced a commitment to eradicate gender violence, explicitly mentioned as a right to live free of violence at the hands of the state or private parties,<sup>43</sup> and addressed in several provisions concerning the scope of fundamental rights and the role and duties of the state and its organs.<sup>44</sup> Finally, the draft adopted a range of structural features that embodied norms of deep parity – that is, it incorporated the promotion or requirement of gender parity in various *future* political bodies, including the legislative,<sup>45</sup> the decision-making instances of the police and armed forces,<sup>46</sup> the judiciary,<sup>47</sup> autonomous constitutional organs<sup>48</sup> and a new Constituent Assembly in the event of constitutional change or amendment,<sup>49</sup> among others.<sup>50</sup>

These results suggest that parity constitutionalism – that is, descriptive representation – resulted in substantive representation of women’s interests. In fact, a recent study on gender parity’s impact in the voting results of the Convention concluded that although both women and men were more loyal to their political conglomerates than to their gender, women were more loyal to their gender than men, particularly in themes related to gender, culture and science, and political systems.<sup>51</sup> The study also suggests that voting outcomes would have been different without gender parity, with approximately 28 rules

<sup>35</sup>Propuesta: Constitución Política de la República de Chile’ (2022) ch 1, arts 1, 6, 10 14, available at <<https://www.chileconvenion.cl/wp-content/uploads/2022/07/Texto-Definitivo-CPR-2022-Tapas.pdf>>.

<sup>36</sup>Ibid art 25(5).

<sup>37</sup>Ibid arts 6, 165, 193, 296.

<sup>38</sup>Ibid arts 25, 35, 37, 44, 50, 61, 89.

<sup>39</sup>Ibid arts 311, 312, 343.

<sup>40</sup>Ibid arts 19, 25.

<sup>41</sup>Ibid art 61.

<sup>42</sup>Ibid arts 45, 50, 56.

<sup>43</sup>Ibid art 27.

<sup>44</sup>Ibid arts 27(2), 312, 35, 37, 40, 51, 61, 162, 172.

<sup>45</sup>Ibid art 252.

<sup>46</sup>Ibid arts 297, 299.

<sup>47</sup>Ibid art 312.

<sup>48</sup>Ibid art 350.

<sup>49</sup>Ibid art 387.

<sup>50</sup>Ibid arts 161, 162, 305, 342.

<sup>51</sup>United Nations Development Programme and Telar, *Paridad de Género y Representación Sustantiva de Las Mujeres. Análisis del Impacto de la Paridad de Género en Las Votaciones de la Convención Constitucional en el Periodo de Discusión de Normas Constitucionales* (United Nations Development Programme and Telar, June 2022) 4, available at <<https://www.estudiospnud.cl/informes-desarrollo/paridad-de-genero-y-representacion-sustantiva-de-las-mujeres-analisis-del-impacto-de-la-paridad-de-genero-en-las-votaciones-de-la-convenion-constitucional-en-el-periodo-de-discusion-de-normas-consti>>.

not being approved in that scenario, including those related to Indigenous peoples (which included the pluri-national nature of the state)<sup>52</sup> and the biggest changes in environment and development model, gender, decentralization and form of state.<sup>53</sup> Of course, like many in its field, this study raises the question of what it means for someone to be 'loyal to their gender' – or, in other words, what counts as women's interests.

At the same time, one might also ask whether gender parity contributed to the 'utopian' nature of the proposed constitutional draft, and hence its ultimate defeat at the 2022 constitutional referendum.<sup>54</sup> While convention delegates often represent more polarized views than the median voter, this may be especially true for delegates without a party affiliation or elected as part of reserved seats. Additionally, 65.1 per cent of the *convencionales* had a distinctly 'feminist' profile,<sup>55</sup> which suggests that parity may have contributed to shifting the median convention delegate further to the left, compared with the median voter in Chile.<sup>56</sup>

Landau, for example, suggests that some of the Constitution's gender-related provisions, like those on reproductive rights and voluntary termination of pregnancy, might have played a 'single issue' role in voting decisions.<sup>57</sup> A 2021 poll among Chileans showed that although 73 per cent of respondents were in favour of abortion, only 41 per cent thought it should be completely free,<sup>58</sup> whereas the constitutional draft put to Chilean voters contained no clear limitation on reproductive rights or the voluntary termination of pregnancy.<sup>59</sup> And the pluri-national nature of the state, which generated considerable backlash from the electorate, was also a demand of feminist organizations.<sup>60</sup>

The independent nature of many *convencionales* might have also made it less likely that they would be willing, or able, to compromise on a text that could gain support from ordinary citizens.<sup>61</sup> Independent, non-aligned women (and men) constitution-makers may have fewer incentives to engage in compromise than women and men counterparts

<sup>52</sup>Ibid 8.

<sup>53</sup>Ibid 9.

<sup>54</sup>R Dixon and D Landau, 'Utopian Constitutionalism' (n 3). Other factors are the exclusion of major political forces and the marginalization of traditional political parties. See, for example, D Landau, 'Introduction: Symposium on the Chilean Constitutional Referendum', *Blog of the International Journal of Constitutional Law*, 23 September 2022, available at <<http://www.iconnectblog.com/2022/09/introduction-symposium-on-the-chilean-constitutional-referendum>>; JM Piscopo and PM Siavelis, 'Chile's Constitutional Chaos' (2023) 34(1) *Journal of Democracy* 151; S Issacharoff and S Verdugo, *The Uncertain Future of Constitutional Democracy in the Era of Populism: Chile and Beyond* (NYU Law and Economics, New York, 11 January 2023).

<sup>55</sup>Observatorio Nueva Constitución, 'Observación No. 4: Género y Nueva Constitución' (Observatorio Nueva Constitución, 13 July 2021) 18, available at <<https://www.ccs.cl/html/CAC-documents/Observatorio-Nueva-Constitucion/Observaciones/ObservacionN04.pdf>>.

<sup>56</sup>GN Negretto, 'Deepening Democracy? Promises and Challenges of Chile's Road to a New Constitution' (2021) 13(2) *Hague Journal on the Rule of Law* 339.

<sup>57</sup>Landau, 'Introduction: Symposium' (n 54).

<sup>58</sup>'73% de Los Chilenos y Chilenas Está a Favor del Aborto', *Ipsos*, 23 September 2021, available at <<https://www.ipsos.com/es-cl/73-de-los-chilenos-y-chilenas-esta-favor-del-aborto>>.

<sup>59</sup>Landau, 'Introduction: Symposium' (n 54).

<sup>60</sup>A Mascareño et al, 'Apruebo y Rechazo en septiembre 2022. Expectativas, decepciones y horizontes comunes para el nuevo proceso constitucional', *CEP Chile*, 24 January 2023, available at <<https://www.cepchile.cl/investigacion/apruebo-rechazo-septiembre-2023-expectativas-decepciones-horizontes-para-el-nuevo-proceso-constitucional>>.

<sup>61</sup>Negretto, 'Deepening Democracy?' (n 56).



who are subject to party discipline. Independents do not have the same incentives to follow majority attitudes and may see a decision to do so as departing from their mandate as independents elected to represent a particular community of interest.

Given these factors, perhaps it was unsurprising that 61.89 per cent of Chilean voters rejected the constitutional draft in the exit plebiscite.<sup>62</sup> Thus, although parity constitutionalism has many advantages, particularly in challenging gender stereotypes about who can be constitution-makers and may result in a ‘feminist’ draft, the draft might still fail to garner widespread popular support. That is, descriptive representation might not result in effective substantive representation of all women – and of a majority of voters.

## V. Conclusion

Parity constitutionalism is one of the most important legacies of the 2020–22 Chilean constitution-making process. It promised to introduce new perspectives of constitution-making and makers and to herald a gender-sensitive draft.

Even as Chile has grappled with the constitutional draft’s defeat, it has begun to embark on a new constitutional process, led by the political parties. One of the striking features of this new process, and notable carry-over from the 2020–22 constitution-making process, is that it continues the newfound commitment to parity constitutionalism, at least in the organs in charge of drafting, discussing and approving the constitutional draft.<sup>63</sup>

At the same time, parity constitutionalism without well-functioning and representative political parties and responsiveness to the views of the median voter<sup>64</sup> may lead to limited substantive change. It may contribute to a form of ‘utopian’ constitutional politics, whereby constitution-makers adopt a draft that is seen as too extreme to command the support of a democratic majority. Democratic constitutional reform might therefore be stillborn.

For parity constitutionalism to survive, it may require rethinking it in ways that connect it more closely, relative to the Chilean case, to party structures and commitments to compromise and democratic responsiveness. Instead of being ‘above’ or beyond party structures, parity norms should be designed to give parties incentives to field diverse female candidates in winnable seats or positions on a party list. This could also help to avoid the twin dangers of abusive *and* utopian constitutionalism.<sup>65</sup>

As others have noted, this may be a general lesson of the Chilean constitutional process. Popular participation may be critical to democratic legitimacy, but there is also

<sup>62</sup>‘Plebiscito 2022’ (n 1). Equally, it is important to note that the gender provisions were cited as decisive to their vote by 5 per cent of voters. See A Mascareño et al, ‘Apruebo y Rechazo’ (n 60).

<sup>63</sup>‘Acuerdo por Chile: Definen Consejo Constitucional, Comité de Expertos e Itinerario Para Nuevo Proceso Constituyente’, *Republica de Chile Senado*, 12 December 2022, available at <<https://www.senado.cl/noticias/proceso-constituyente/acuerdo-por-chile-definen-consejo-constitucional-comite-de-expertos-e>>.

<sup>64</sup>See S Issacharoff, *Fragile Democracies: Contested Power in the Era of Constitutional Courts* (Cambridge University Press, New York, 2015); S Issacharoff, *Democracy Unmoored: Populism and the Corruption of Popular Sovereignty* (Oxford University Press, New York, 2023).

<sup>65</sup>R Dixon and D Landau, *Abusive Constitutional Borrowing: Legal Globalization and the Subversion of Liberal Democracy* (Oxford University Press, Oxford, 2021) 71–74. See also R Dixon, ‘Constitutional Rights as Bribes’ (2018) 50(3) *Connecticut Law Review* 767.

an important role for democratic elites in ensuring democratic stability and *change*.<sup>66</sup> Without the support of political parties, with experience in, and incentives to, appeal to ordinary voters, processes of democratic constitution-making risk becoming too ambitious and counter-majoritarian, hence failing to get off the ground.

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<sup>66</sup>See, for example, A Sethi, 'Looking Beyond the Constituent Power Theory: The Theory of Equitable Elite Bargaining' (on file with author), forthcoming.