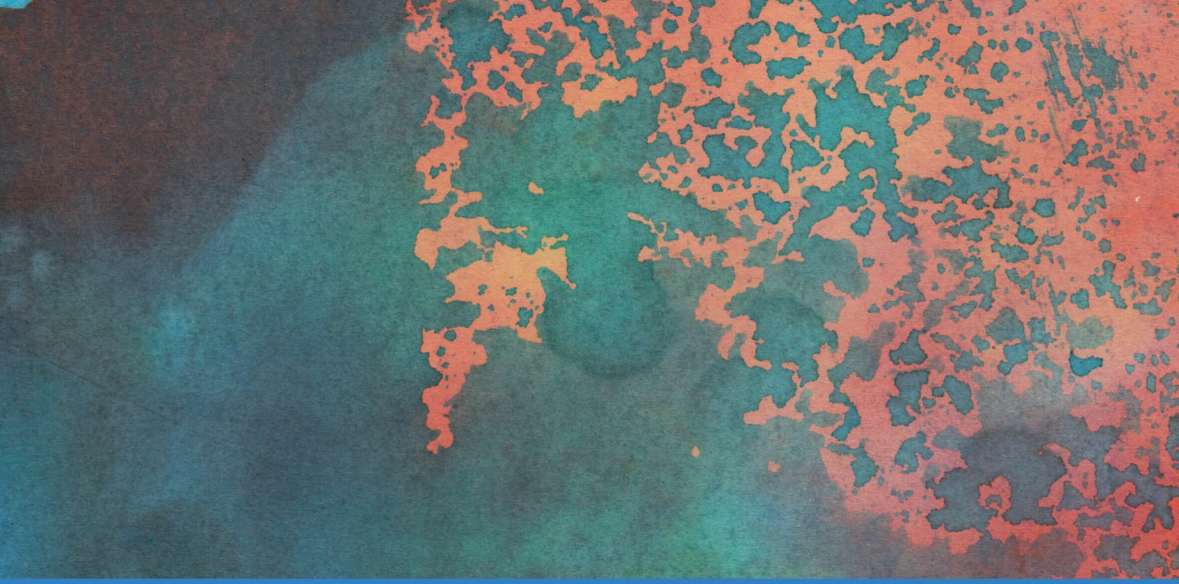

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DELIBERATIVE CONSTITUTION-MAKING

OPPORTUNITIES AND CHALLENGES

Edited by
Min Reuchamps and Yanina Welp

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ROUTLEDGE

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4 Gender and deliberative constitution-making

Claudia Heiss and Monika Mokre

4.1 Introduction

Democratic theory identifies gender as a relevant source of misrecognition and inequality in public deliberation, as well as a key element to assess the quality of democracy. While legal studies have increasingly assumed a gender perspective, constitutionalism has only recently developed a specific concern for the role played by gender in constitution-making (Baines and Rubio-Marin 2004). This chapter seeks to contribute to this literature by approaching constitution-making and deliberative democracy from a gender perspective, where gender issues are understood as embedded in intersectional societal structures. On the basis of theoretical considerations and two case studies, we aim to elaborate the nexus between the participation of women's organizations and individual women in law-making and the outcome of these procedures, i.e., legislation shaped towards the specific interests and needs of women in general and specific groups of women.

The theoretical section starts from the position of women in democracy and extends the gender perspective to an intersectional approach. It then discusses the role of constitutions in democratic societies and of constitution-making procedures with a focus on civil society and deliberation.

The two case studies are the development of gender-related basic legislation in the European Union (EU) and Chile. These case studies in no way exhaust the many ways in which gender issues influence the contents of constitutions and the forms of constitution-making. As comprehensive representativeness cannot be achieved by this article, the case selection is based on the principle of the 'most different' cases. In this way, a great variety of possible constitutional developments and outcomes can be presented.

The two case studies have in common that gender issues and the participation of women have played a paramount role in constitution-making. They differ in that (1) unlike Chile, the EU is not a nation state; (2) EU Treaties (the EU equivalent to national constitutions) have developed over a long time, while the Chilean constitutional process has been relatively short; and (3) the ongoing Chilean constitutional process is a very recent phenomenon, which coincides with a belated expansion of women's rights after the military dictatorship, while gender legislation in the EU goes back to the 1950s.[1]

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4.2 The partial inclusion of women in democracy

According to Robert Dahl (quoted after Urbinati 2012: 469), democracy begins with the 'moral judgment that all human beings are of equal intrinsic worth'. Still, in early periods of modern democracy, slaves, people without property, and women were legally excluded from citizenship rights (Brubaker 1994:71).

> [E]ven when citizenship is formally extended to ever-broader groups of subjects, widespread enjoyment or practice of citizenship is not thereby guaranteed. Rather, there is often a gap between possession of citizenship status and the enjoyment and performance of citizenship in substantive terms.
>
> (Bosniak 2005: 195)

It is of crucial importance here that political rights and protection have been mostly understood as part of the public sphere, while women's lives have been relegated to the private sphere. 'The integrative effect of citizenship rights [is] applied to male citizens, while for women family relationships and marriage should form the most important social relations' (Appelt 1999: 89, translation by the authors). Strategies for women's empowerment and participation in politics can develop 'from above', through political institutions, or 'from below', through civil society activism (cf. Siim 2000). In practice, these two strategies frequently go hand in hand.

4.3 An intersectional approach

Arguably, the partial exclusion of women from democracy must be approached from an intersectional perspective as women are included/excluded in different ways depending on their ethnicity, nationality, and class (cf. Crenshaw 1995; Siim and Mokre 2018). Intersectionality is to be differentiated from a 'multiple discrimination' approach. Exclusions due to race and gender do not simply add up but lead to specific problems for, e.g., black women or lower-class women. In contemporary migration societies, national citizenship plays a paramount role here. For example, in the EU, gainful employment frequently is a condition for residence permits and naturalization. While this is a problem female citizens do not encounter, for immigrant women, care responsibilities can lead to their exclusion from legal residence or the acquisition of citizenship. Among indigenous women in Chile, discrimination has the triple source of gender, class, and ethnicity, as exemplified by Lorenza Cayuhan, a Mapuche woman imprisoned in 2015 accused of stealing tools from a forestry company. Cayuhan was forced to give birth in front of a prison guard and while shackled. The case reached the Supreme Court and led to the first judicial ruling in the country that mentions the concept of intersectionality. The court followed the '100 Brasilia rules', basic standards to guarantee access to justice for people in vulnerable conditions.

> The problem with the logics of exclusion and enclosure is that they assume that such identities as "woman" and "immigrant" preceded citizenship

> and were excluded from it. Becoming political involves questioning such essential categories as "woman" or "immigrant" as given and assumes that they were produced in the process of constituting citizenship and that they are internally, not externally, related to it.
>
> (Isin 2002: 4)

'"Citizen" is a general and artificial identity' (Urbinati 2012: 476), but in its concrete understanding, it is based on societal relations and power distribution in society.

4.4 Constitutions as mirrors and actors of societal development

'The imaginary of modern constitutionalism rests on the founding role of the people expressed in a constitutional agreement' (Negretto, quoted after Welp and Soto 2020: 2). The term 'imaginary' already hints at the fact that, in most historical cases, people were not involved in constitutional procedures. In more recent times, however, citizens have been included in several cases of constitution-making. Arguably, the factual and symbolic significance of constitution-making is nowadays enhanced by direct engagement of the population. 'Ginsburg et al. (2009) point out that constitutions gain weight when they are developed in extraordinary contexts of popular mobilization, which include extra-parliamentary processes of ratification and communication' (Welp and Soto 2020: 2). Suiter and Reuchamps (2016) even see 'the multiplicity of recent deliberative experiences in Europe' as a possible sign of 'a new wave of constitutional turn towards deliberative processes' (quoted after Welp and Soto 2020: 3).

The development of laws forms a crucial part of politics. Both politics and the law develop and change normative concepts and mutually influence each other regarding these normative foundations, as well as in their implementation. Put slightly differently, it is in the interaction between public spheres (on different levels, e.g., of the political elites, of non-governmental organizations (NGOs) and interest groups, of media and the citizens) and the performance of legal acts that justice is strived for.

In this vein, women have struggled for a long time to include gender-specific issues in constitutions. At the same time, other under-represented groups, such as ethnic and religious minorities, have claimed their place in constitutionalism (Baines and Rubio-Marin 2004). Still, it is a question of political contestation and negotiation who counts as a minority and whose rights, therefore, have to be recognized. Also, the importance of 'politics of presence' is politically contested as it can be argued that presence (or representation) of a social group is not necessary to represent its rights and interests.

4.5 Constitution-making and gender democracy

Empirical evidence and experiences show, however, that constitutional changes on gender-specific issues were mostly brought about by female agents. Besides this pragmatic claim for the inclusion of (structural) minorities as agents in political

decision-making and law-making, there is also the normative claim 'that all the citizens should be given a chance to express their views in order to influence and, if necessary, repeal existing laws or decisions. Furthermore, by making their voices heard, minorities remind the majority that theirs is just one possible and temporary majority' (Urbinati 2012: 69).

Thus, a feminist constitutional agenda must include contents as well as procedures of constitutionalism. Baines and Rubio-Marin (2004: 4) enumerate seven points for such an agenda: (i) constitutional agency; (ii) constitutional rights; (iii) constitutionally structured diversity; (iv) constitutional equality; (v) women's reproductive rights and sexual autonomy; (vi) women's rights within the family; and (vii) women's socioeconomic development and democratic rights. It is important to formulate the agenda in a gender-specific and intersectional form in order to make the inclusion of all women explicit as 'normatively and institutionally, democratic processes are deeply gendered' (Galligan 2012: 1).

Demands for constitutional amendments have been developed in women's and feminist movements, thus moving from a general claim for equality to the recognition of the position of women in society and to differentiations of the positions of different women due to intersectionality. The use of constitutional rights for individual and collective litigation has played a further important role for constitutional changes in books and, even more so, in action.

A crucial point here is the possibility for all women to participate in constitution-making, thus, the development of procedures adequate to an intersectional gender democracy. Gender democracy

> considers democracy to be grounded in a commitment to deliberation, and that deliberative processes rest on gendered foundations. […] Gender democracy, then, envisages a democratic process in which the voices, interests, perspectives, and representatives of women are fully integrated and accountable as equals in a deliberative decision-making process. [...] Thus, gender democracy is closely aligned with proceduralist conceptions of democracy
>
> (Galligan 2012: 2)

From an intersectional perspective, one should emphasize that this normative claim must include a plurality of social groups and their claims. As Urbinati (2012: 473) argues, politics of presence become more important the more diverse a society is, 'when pluralism of interests and identities [become] more fragmented and pronounced'.

An intersectional approach to gender democracy cannot be introduced in every understanding of democracy.

> A reading of democratic theory aided by feminist conceptions of democracy (Galligan and Clavero 2008: 5–6) revealed that the requisites for gender democracy were: a substantive conception of democracy, an expansive interpretation of the equality principle, and attention to the accountability dimension. The work of deliberative democratic theorists seems to offer

> a sympathetic framework for the elaboration of these gender democracy dimensions. At its core, deliberative democracy claims that legitimacy is accorded a decision when it is the outcome of a critical examination by "qualified and affected members of the community" (Habermas 1998). [...] In addition, it supposes rational debate, in which decisions are arrived at after a process of reason-giving, free of coercion, and in which the positions of all participants are justified and accepted. Thus, [...] a political decision is "democratic" if it fulfils the dimensions of inclusion [...], accountability, and recognition. For gender democracy, with its focus on both substantive and procedural politics, these dimensions are foundational
>
> (Galligan 2012: 3)

For deliberative endeavours, this would mean concretely that two groups of conditions have to apply:

> those referring to the mechanism of deliberation (access to information, time given for it, actors included and opening of the debate) and to the method of processing the contents generated (if something like a method exists or not, if it has been previously communicated, if it is traceable and if it allows to connect – and how – the contents with the final text).
>
> (Welp and Soto 2020: 2)

Furthermore, it seems important to mention the preconditions for such a deliberative setting. 'In an ideal gender democracy, [all] women would be endowed with resources (economic, social, personal and political) equal to those of men so as to enable them to join with men as equals' (Clavero and Galligan 2012: 24).

From an intersectional perspective, one can critically assess the requirement of rationality for deliberative debates as, arguably, this is a Eurocentric claim for discussions coming out of enlightenment and excluding emotional approaches towards politics and forms of discourse used in the global South, such as narration (cf. Mokre 2021). When the 'issue of recognition' is seen as 'a touchstone for feminist politics' (Clavero and Galligan 2012: 24), from an intersectional perspective, we must ask which forms of recognition would be necessary for the inclusion of different political and cultural traditions. The claim for equality in 'epistemological authority' (Sanders, quoted after Clavero and Galligan 2012: 24), i.e., for acknowledgement of one's argument can also be applied here, perhaps, including acknowledgement of the form of one's argument.

4.6 Gender, intersectionality, and deliberation in the EU

Legally, the Treaties form the constitution of the EU as the introduction of a formal constitution failed in 2004. Gender equality policies were part of these Treaties from the outset. The principle of 'equal pay for equal work' can be first found in Article 119 of the Rome Treaty from 1957, at a time when 'it was common throughout Europe to have a "women's rate" and a "men's rate" of payment for

the same job'. (Hoskyns 1996: 52) The Article was subject to heated negotiations at the time, and the reason to include it was not so much gender equality as the French government's fear of losing competitiveness due to the earlier inclusion of this Article in French legislation. It was drafted in working groups consisting only of men. While equal pay for equal work was addressed, equal pay for work of equal value was not mentioned (Kantola 2010: 28). Due to three cases related to the question of equal pay in the 1960s, the European Court of Justice (ECJ) became involved in this question – the Belgian Herstal strike for equal pay in 1966 and two cases of Gabrielle Defrenne, which were brought to the ECJ during the latter part of the 1960s (Hoskyns 1996: 68–75). Thus, activism and legal activities by a women's movement and an individual woman led to clarifications of the Article, enshrined after the ECJ judgment in the Equal Pay Directive of 1975.

During the 1970s, gender equality policies were broadened to include other parts of women's working life, especially questions of pregnancy and parenthood. This development was due to the new feminist movement of the 1960s and 1970s (Borchorst and Mokre 2012). Hoskyns (1996: 78) argues that

> the external force of second-wave feminism acted to empower lone women (and some lone men) within the EC institutions and in national delegations that were then able to make use of the particular shape of Article 119 to achieve practical gains
>
> (Hoskyns 1996: 78)

Thus, the European directives on equal treatment for men and women at work and in social security were adopted between 1975 and 1978.

Hitherto, the evolution of EU gender policy developed in three phases: from equal opportunities to positive action and to gender mainstreaming (Rees 1998, quoted after Kantola 2009). Positive action (called at this stage 'appropriate measures') is first mentioned in the Equal Treatment Directive of 1978 – not as a recommendation but within a paragraph permitting such measures. In the following Social Security Directive, special treatment for women played a considerably more important role and included more areas of social life. These directives were also of paramount importance for feminist groups and women in trade unions. Positive action was, however, controversial and in 1995, the ECJ found that the principle of positive action contradicted the principle of anti-discrimination (Kantola 2010: 44).

In the early 1990s, the EU implemented gender mainstreaming (GM). GM generally means that a gender perspective is included in every step of every policy process. In some understandings, a transformative aim of achieving equality between women and men is also included. Principally, GM applies to both sexes and is not meant to replace specific measures for women (see e.g., European Commission 2006: 2).

The concept of GM first came up in development politics and stood at the centre of debates at the World Conference on Women in Nairobi in 1985. The participants criticized the ineffectiveness of specific women's programmes within a general context that was not adequate to the needs and claims of women. Thus, all

political programmes and activities should be legally obliged to take gender issues in consideration. In the 1990s, NGOs started to discuss the concept in a broader framework of gender equality when the concept was also taken up by the European Community (Pollack and Hafner-Burton 2000: 8). Equality of opportunities for men and women as well as GM were enshrined in primary law by inclusion in the Treaty of Amsterdam of 1997.

While, thus, the GM strategy came out of the activities of NGOs, it has also met harsh criticism from feminist organizations. As a top-down strategy, it is understood as part of power politics, disenabling and delegitimizing political activities of feminist organizations (Schunter-Kleemann 2003: 22–23). Its focus on the improvement of existing economic and political structures is seen to be opposed to the feminist claim to a fundamental critique of domination (Jegher 2003: 5). In this way, GM can be understood as a loss of critical public discourses on feminist issues. At the same time, due to this strategy, gender questions have found their way into broader public debates including men and non-feminist women.

4.7 A broader concept of equality policies and anti-discrimination

In the 1980s, a possible anti-racist engagement of the EC was already being discussed. In 1986, a joint declaration against racism and xenophobia was signed by the presidents of the Commission, the Parliament, and the Council (Hoskyns 1996: 178). However, this declaration did not lead to political measures. Among other reasons, this was due to different opinions on whether the EC was at all competent for this question. Still, the Treaty of Amsterdam included Article 13 claiming for EU-measures against discrimination 'based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation'. This success was due to the lobbying of civil society:

> The rise in extreme right parties and racist violence in Europe as well as emerging EU policies creating a "Fortress Europe" galvanized a cross-border EU lobby against racism (Bell 2002: 68, Hoskyns 1996: 175). The lobby was pivotal in changing the views in the Council for the enactment of the Article 13 in the Treaty of Amsterdam that provided a legal basis for action in the field of racial discrimination.
>
> (Kantola 2009: 19)

As some Member States were critical of this Article, Council decisions in this field had to be made unanimously with only consultation rights for the European Parliament.

In 2000, two directives regarding discrimination were issued:

- The Racial Equality Directive (2000/43) prohibits discrimination on grounds of racial or ethnic origin within the labour market as well as in other aspects of social life (housing, healthcare, education, social protection, and access to goods and services).

- The Employment Equality Directive (2000/78) prohibits discrimination on grounds of religion or belief, disability, age, and sexual orientation exclusively in employment and vocational training.

In an evaluation report from 2008 (European Commission 2008), implementation in most Member States is seen as satisfactory; however, the actual effects of anti-discrimination-legislation are less clear: the number of cases based on this legislation is limited – and this could indicate several obstacles for individuals to make use of it. Probably, awareness of personal rights in the case of discrimination is low, although in Article 10, the Directive requires the Member States to inform all potentially concerned persons of the contents of the Directive. Furthermore, victims of discrimination are probably afraid of further victimization when bringing a case to court; this might, above all, hold true for discrimination on the basis of sexual orientation (p. 8 of this report). This situation could be improved; for example, NGOs and other legal bodies were granted legal standing in anti-discrimination cases in some Member States (e.g., Belgium), but this was not foreseen in the Directive that grants this right only to individuals (Bell 2008: 17).

The two anti-discrimination directives have led to far-reaching public debates on the question of which forms of unequal treatment are unlawful and which can be legitimized. The European Network Against Racism (ENAR), among others, discusses the fact that discrimination due to national origin is not only not forbidden by EU law but in fact prescribed in its differentiation between third and second nationals. However, it may be difficult to differentiate between legal discrimination on the basis of nationality and illegal ethnic discrimination (Bell 2008: 10).

Besides legal acts, the EU has also introduced a broad range of action plans, programmes, and projects on anti-discrimination. Many of these programmes are explicitly aimed at raising public awareness of the issues at stake (Borchorst and Mokre 2012).

4.8 The Charter of Fundamental Rights

In the Charter of Fundamental Rights of the EU of 2000, the civic, political, economic, and social rights of European citizens were condensed into one document for the first time in the history of European integration (Pollak 2006: 179). The Charter goes beyond the Treaty of Amsterdam regarding anti-discrimination, forbidding in its Article 21 ‘any discrimination on any grounds such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation’.

Article 23 prescribes equality between men and women and mentions the possibility of positive action. Family protection and gender equality, as well as the reconciliation of family/private life with work, form other important parts of the Charter. The Charter became part of primary EU law by its inclusion in the Lisbon Treaty of 2009 and, thus, gained legal status. It has been the most important stage of the development of EU anti-discrimination legislation as it enlarged its scope and gave it the status of fundamental rights.

4.9 Multiple discrimination and intersectionality

With the Amsterdam Treaty, from 1997, the term 'multiple discrimination' was introduced in EU primary law – stipulating that several dimensions of inequality such as gender, race/ethnicity, age, disability, sexual orientation, etc. should be considered. However, there was a tendency to treat the different dimensions of inequality separately and in a similar way as a 'one size fits all' (Verloo 2006). Later, a more integrated approach to inequality developed, focusing on intersections between different dimensions of inequality (Krizsan et al. 2012). There is a fear among academic scholars and feminist organizations that the adoption of a multiple approach to inequality will lead to a downsizing of gender equality policies and institutions (Verloo 2006; Kantola 2010).

However, the implementation of EU anti-discrimination legislation in the Member States has frequently led to a hierarchy of protection as EU concepts of equality and anti-discrimination have remained fragmented or even contradictory (Schiek 2009). Whereas anti-discrimination laws for the labour market include a broad range of possible discriminations, only gender and ethnicity are protected outside the labour market. The differences between the Anti-Racism-Directive and the Anti-Discrimination-Directive have rather absurd legal consequences.

> It would, for example, be unlawful to refuse to rent an apartment to a Muslim woman from North Africa because of her ethnic origin, but it would not be unlawful to make this refusal on grounds of her religion.
>
> (Bell 2008: 4)

In 2004, the Gender Goods and Services Directive was issued to warrant the principle of equal treatment between men and women in the access to and supply of goods and services. In 2006, the Gender Recast Directive replaced the directives on equal pay, equal treatment in employment, training, promotion and working conditions, social security schemes, and burden of proof. It uses equivalent legal definitions to the Race Equality Directive for direct and indirect discrimination, harassment, victimization, positive action, sharing of the burden of proof, the right to complain, and sanctions. Since 2019, the Work-Life Balance Directive regulates the right to parental leave and leave for caregivers. However, a Horizontal Directive, proposed by the European Commission in 2008, against discrimination based on age, disability, sexual orientation, and religion or belief beyond the workplace has still not been issued.

4.10 Deliberation in the EU

In European integration research, the EU has frequently been understood as a case in point for deliberative democracy as the success of EU politics depends to a high degree on negotiations in complex networks. Arguably, cooperation and consensus, above all by the Member States but also of the three power centres – the Commission, the Council, and the Parliament – play a more important role than in

less complex national governance structures. Furthermore, unofficial deliberative forums such as expert forums, consultative bodies, or lobbies play an important role in EU policy making (Bieling 2011: 113–115).

Also, in the case of gender and anti-discrimination policies, lobbies that originated in civil society play an important role, above all the European Women's Lobby and the ENAR. Both started their work in the 1990s and have influenced EU legislation since then (Bruell, Mokre, and Siim 2012).

However, political scientists have also pointed out that deliberation is not necessarily democratic, and that the EU forms a case in point for this assessment as the influence of citizens has been limited up to now, deliberative forums cannot replace formal political rights, and lobbyism sometimes fosters undue political influence rather than rational debate (Bieling 2011). Furthermore, lobbyism of single-issue organizations can hinder rather than further an intersectional approach towards discrimination by leading to a hierarchy of discriminations (Bruell, Mokre, and Siim 2012).

Still, in summary, it can be said that EU legislation led to significant progress regarding anti-discrimination measures in the EU Member States. This progress has been shaped by EU institutions as well as feminist movements and organizations and has partly been the result of deliberative procedures inside and outside of the EU institutional framework. However, up to now, truly intersectional legislation has not been developed.

4.11 Gender and constitution-making in Chile

In the context of the deliberative turn described above, the Chilean constitution-making process triggered by the social uprising of 2019 sought to broaden the scope of political actors through affirmative action. In addition to opening electoral competition to non-party lists, the Chilean Constitutional Convention established, for the first time, reserved seats for indigenous peoples (17) and a historic gender-parity rule, which makes this the first process in the world to include an equal number of men and women in drafting a national constitution.

The constitution-making process was the outcome of intense social mobilization starting on 18 October 2019, including clashes between protesters and the police that resulted in serious human rights violations (OHCHR 2019). Demands focused on access to social rights and expressed anger at elites and political parties from the entire ideological spectrum.

On 15 November 2019, political parties agreed to carry out a plebiscite to allow for the replacement of the 1980 constitution, inherited from the military dictatorship (1973–1990). Constitutional replacement proposals had been discussed for decades, but were rejected by the right, gathered only a tepid support from the centre-left, and faced the difficulties of a legal system that was well rigged to impede the expression of majoritarian preferences (Busch 2012; Atria 2013; Heiss 2017). This time, social pressure, and the attempt by political actors to reduce uncertainty in order to maintain as much control as possible of events deemed inevitable, opened the way for constitution-making (Escudero 2021).

The 15th November agreement called for a plebiscite where citizens would be asked *if* they wanted to replace the constitution, and *through which type of assembly*: an elected Constitutional Convention or a Mixed Constitutional Convention, half elected and half composed of legislators already in office. The agreement also established that rules for the new constitution would be approved by two-thirds of the Convention, and that in the absence of agreement, no rule would apply by default. The Constitutional Convention would be chosen through an electoral system like the one used for the Chamber of Deputies. That system had been reformed in 2012, going from mandatory to voluntary vote. Later, in 2015, the binomial system (two seats per district) was replaced by a proportional system with a 40% gender quota of candidates at the national level. The quota increased the presence of women from 16% in the legislature of 2014–2017 to 23% for 2018–2021 and 30% for 2022–2025 (Comunidad Mujer 2022).

4.12 Gender parity at the Constitutional Convention

Since the return of democracy in 1990, several studies had shown concern for the low presence of women in positions of power in Chile, compared both with high-income countries and with other countries in Latin America (PNUD 2020; Ríos 2008; Valdés and Férnandez 2006; Miranda and Suárez 2018). Despite an initial moderate effect, the gender quota introduced in 2015 and applied for the first time in 2017 was a relevant achievement in a context where affirmative action had been resisted by the political establishment (Arce 2018: 80). With this precedent, Congress decided to introduce new reforms for the election of the Constitutional Convention to increase its legitimacy (Suárez-Cao 2021).

Non-party members or 'independents', women, indigenous peoples, and persons with disabilities were granted special rules to increase their eligibility. Law 21,216 allowed independent electoral pacts to compete and guaranteed gender parity. This norm established a 50% gender quota at the district level, and most importantly, gender parity in the allocation of seats through a correction mechanism after the election. The rule was promoted by civil society organizations such as the network of women political scientists *Red de Politólogas*, the network of feminist lawyers *Abofem,* PNUD Chile, *Chile Mujeres* Foundation, *Humanas* Corporation, and others. It had broad citizen support and gathered across-the-aisle political adherence (Freidenberg and Suárez-Cao 2021).

The plebiscite of 25 October 2020 resulted in over 78% support both for drafting a new constitution and for a completely elected Convention. In December 2020, Congress passed a reform setting 17 reserved seats for indigenous peoples and a small quota of candidates with disabilities (Law 21,298). It is worth noting that negotiations to guarantee these reserved seats were much more difficult and took nine more months than gender parity. The proposal to have one reserved seat for the Afro-descendant community was rejected.

In May 2021, 78 men and 77 women were elected to the Constitutional Convention. Women obtained more votes than men. The fact that female candidates were required by law not only to compete for but to enter the Convention seems to have

made parties and lists support women in a much more substantive way than the congressional quota. If the final correction of the parity rule had not been applied, the Convention would have been made up of 84 women and 71 men, as several women had to give up their seats to male colleagues on their lists.

4.13 Catching up with gender equality

The historic achievement of gender parity in the Constitutional Convention was not an isolated event. As analysts have observed, the presence and articulation of women in the political sphere is expected to favour other women in legislation and the formulation of public policies (PNUD 2020; Reyes-Housholder 2018). While demands for political inclusion by other under-represented groups exist in Chile, the feminist movement has been the most successful in recent years in producing institutional change. After approval of the candidates' quota for legislative elections in 2015, other legal changes promoted the presence of women in political parties' internal governance and as candidates (Hafemann 2020: 78).

Women voters were key to grant the electoral victory to the leftist candidate Gabriel Boric and his coalition 'Apruebo Dignidad' in the November 2021 presidential election, against a candidate of the extreme right with an anti-feminist agenda. The first cabinet appointed by Boric was composed of 14 women and 10 men, with the first-ever female Home Affairs minister and other important positions given to women, such as Defence and Foreign Affairs. This historic cabinet with a majority of women follows the precedent of the half men/half women first cabinet of President Michelle Bachelet in 2006. In the November 2021 elections, the participation of women in the Chamber of Deputies increased from 22.5% to 35.5% (the Senate rose only by 0.5%) (Comunidad Mujer 2022; Hafemann 2020). The number of women candidates to the Chamber of Deputies increased from 395 (41.1%) in 2017 to 561 (44.7%) in 2021; in the Senate, it went from 53 (40.2%) to 83 (48%). The political change expressed by the Constitutional Convention, as well as the 2022 Chamber of Deputies and Cabinet, echoes important social developments against conservative gender roles implicit in the constitutional design of the dictatorship. Intense social mobilization within and outside political parties took place in recent decades, most notably the feminist student movement of 2018.

Catholic conservative moral views informed the political project of the military dictatorship led by Augusto Pinochet as much as economic neoliberalism and a cold-war anti-communist and nationalistic ideology. This project was insulated, as far as its designers could, from future democratic reform by institutional 'enclaves' (Garretón 2003), provisions demanding high supermajorities and protected from reform by the constitutional court. On issues of 'moral politics' – those that lie at the core of religious and ethical worldviews, and to which the role of women is key (Blofield 2006: 1) – Chile stood out for its conservatism after the return of democracy in 1990, deeply affecting women's rights. Divorce was only legalized in 2004, while a very limited permission of abortion was approved in 2017. Abortion was then allowed on three grounds: to save the life of the mother, fetal infeasibility, or rape.

The inability to modify the strict prohibition of abortion after the Chilean transition to democracy contrasts, for example, with Spain, where the end of the Franco dictatorship meant radical institutional change, including a new democratic constitution approved in 1978 and the liberalization of abortion laws. In Chile and Argentina, abortion remained illegal for decades, coupled with high rates of its clandestine practice (Blofield 2006). The crisis of legitimacy of the Catholic Church, partly due to sexual abuse scandals, contributed to a change of relative power between the Church and feminist social movements. Argentina legalized abortion in 2020, and the 'green tide' that accompanied the process was a precedent for feminist struggles in Chile.

Access to legal divorce was another demand of feminist movements opposed by the Catholic Church and conservative parties. The inexistence of this option in Chile led to unregulated separations and a decrease in the rate of marriages. Lack of access to legal divorce hurts the most vulnerable members of a broken family, mainly women and children. It can complicate inheritance rights and leave family members abandoned, as well as new families unprotected. Spain and Argentina legalized divorce within five years of democratization (in 1981 and 1987, respectively) while Chile only passed a conservative divorce law in 2004, after 14 years of civilian rule (Blofield 2006: 8).

As conservative Catholic views contrary to gender equality weakened, public opinion increasingly supported feminist demands. Transnational movements against sexual violence like 'Me Too' and 'Not One Less' (*Ni Una Menos*) increased awareness about violence against women, which became legally recognized in 2005 with a law against domestic violence (Law 20,066). Later, in 2010, the crime of 'femicide' was typified in the Chilean criminal code (Law 20,480). In 2012, a law was approved to prevent discrimination based on

> race or ethnicity, nationality, socioeconomic status, language, ideology or political opinion, religion or belief, union membership or participation in trade union organizations or lack thereof, gender, motherhood, breastfeeding, sexual orientation, gender identity and expression, marital status, age, affiliation, personal appearance, and illness or disability
>
> (Law 20,609)

Known as 'Zamudio Law' in tribute to a young homosexual man murdered by Neo-Nazis, this norm has, however, been criticized for shortcomings in establishing specific deadlines and responsibilities, as well as not including preventive measures.

As the 'Las Tesis' collective saw their performance 'A Rapist in Your Path' go viral all over the world at the time of the social outburst of 2019, discrimination at work and the difference in salaries became more and more politicized, as well as the notorious under-representation of women in spaces of power such as Congress, ministries, higher courts, and corporate boards.

The Constitutional Convention has declared its will to challenge classical divisions between public and private spheres by putting stress on mechanisms of political inclusion as well as substantive rights to care as a social responsibility, sexual

and reproductive rights, protection against gender violence, labour rights and equal pay, and others. Effective political rights were thus presented as a precondition for the fulfilment of other rights on grounds of equal citizenship (Zúñiga 2019; Sepúlveda and Pinto 2021).

4.14 Conclusion

While democracy has always been defined as a universal principle of general inclusion, it has also always been exclusionary of people and of claims. Every enlargement of democratic rights had to be won in struggles of movements and interest groups. The inclusion of women, their experiences, and interests has been fought for since the beginnings of democracy; struggles against other forms of discrimination started later but have also been going on for many decades now.

In the two cases addressed in this chapter, gender issues and the participation of women have played a paramount role in constitution-making. The EU Treaties have a long history of gradually advancing gender rights, dating back 70 years. Chile, on the other hand, stands out for its delay in catching up with gender rights after the recoil caused by the military dictatorship, with new rules on divorce (2004), gender violence (2005, 2010), gender quotas (2015), anti-discrimination (2012), and abortion (2017), among others.

The Chilean feminist social movement reached a high point with student protests in 2018, contributing to the gender-parity rule at the Constitutional Convention of 2021. While these are promising developments, Chilean laws still limit the economic autonomy of women, preventing them from managing their assets when they are married, or making them solely responsible for childcare. These issues were addressed by the EU as early as the 1950s and, particularly, in the reforms of the 1970s. The idea of GM, adopted by the EU in the 1990s, has been set as a goal at the Chilean Constitutional Convention, but so far it is not present in the country's legislation or public policy. Specific anti-discrimination provisions, adopted by the Amsterdam Treaty of 1997 and included in the Lisbon Treaty of 2009, have a pale equivalent in Chile in the Zamudio Law of 2012, which needs to be strengthened.

Political struggles need to penetrate and change institutional structures in order to succeed. For this, they make use of democratic procedures – and, arguably, forms of deliberative democracy are more apt to include different political claims than other democratic procedures due to their relative openness to different actors and their commitment to a substantive understanding of democracy. An important part of the institutionalization of different claims leads to their inclusion in legislation and in the constitution.

The two case studies of this chapter show two very different ways towards a more inclusive democracy mirrored in constitutional change, based on an intersectional understanding of societal exclusions and remedies for them. Although not comparable in many regards, these examples can shed light on the ways in which democracy develops towards more inclusiveness by deliberative procedures – as well as on the many pitfalls of this development.

Note

1 At the time, the European Union was called the European Community (EC).

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