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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

CHILE

OPINION

ON THE 2023 CONSTITUTIONAL REFORM

Adopted by the Venice Commission
at its 136th Plenary Session
(Venice, 6-7 October 2023)

On the basis of comments by

Mr Paolo CAROZZA (Member, United States of America)
Mr Josep Maria CASTELLÀ ANDREU
(Former member, Expert, Spain)
Ms Janine OTÁLORA MALASSIS (Substitute member, Mexico)
Ms Hanna SUCHOCKA
(Honorary President of the Venice Commission)
Mr Kaarlo TUORI (Honorary President of the Venice Commission)

Contents

I. Introduction

1. By letters of 9 August, 22 August, and 26 September 2023, Mr Juan Antonio Coloma Correa, President of the Senate of the Republic of Chile, requested an opinion on certain questions formulated by certain Senators related to the draft Constitution prepared by the Expert Commission ("the Expert Commission draft") (CDL-REF(2023)045) and the draft Constitution as adopted by the Constitutional Council ("the Constitutional Council draft") (CDL-REF(2023)049).

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 24 to 26 September 2023, a delegation composed of Mr Gianni Buquicchio, Special representative of the Venice Commission, Messrs Paolo Carozza, Josep Maria Castellà Andreu, Ms Simona Granata-Menghini, Director, Secretary of the Venice Commission as well as Mr Domenico Vallario from the Secretariat, travelled to Chile and met with the President of the Senate, the Committee on Legal, Constitutional and Legislative Affairs of the Senate, the President of the Chamber of Deputies, the President and Vice-President of the Constitutional Council and the delegates of the parties represented therein, the President, Vice-President and members of the Expert Commission, the President, Vice-President and members of the Technical Committee of Admissibility, the President and judges of the Constitutional Tribunal, the board of the Electoral Service, representatives from the majority and the opposition in the Constitutional Council, several law academics, the Secretariat of citizen participation in the Constitutional Process, and the international community. The Venice Commission is grateful to the Senate of Chile and its Chilean counterparts 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 24 to 26 September 2023. It was discussed at the joint meeting of the Sub-Commissions on Democratic Institutions and Latin America on 5 October 2023. Following an exchange of views with Mr Juan Antonio Coloma Correa, President of the Senate of Chile it was adopted by the Venice Commission at its 136th Plenary Session (Venice, 6-7 October 2023).

II. Background and scope of the opinion

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 70 times. 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 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 24 December 2019, after civil unrest which led to an agreement (*Acuerdo por la paz social y la nueva constitución*) amongst almost all political parties on the preparation of a new constitution, a constituent process was launched; a Constitutional convention, directly elected in May 2021, prepared the text of the new constitution, which was submitted to referendum (plebiscito de salida) on 4 September 2022. The new constitution was however rejected by the Chilean people in the referendum (62% against, 38% pro, with a turnout of 85,8%).

8. In March 2022, at the request of the Senate of Chile, the Venice Commission adopted an opinion on the aforementioned constitutional reform process ("the March 2022 Opinion).[1]

9. The request addressed to the Venice Commission by the Senate of the Republic of Chile on 22 August 2022 (senators Rincón González, Walker Prieto and Castro Prieto) included questions on the constitutional process, the hierarchy of international treaties, the *ex ante* review of constitutionality, gender parity in elected bodies, and a series of questions related to political fragmentation. On 26 September 2023 the President of the Senate forwarded two more letters to the Venice Commission, one by senator Rojo Edwards, and another by senators Rincón González and Walker Prieto. The first one included questions on the constitutional norms on political party regulation, the process for constitutional amendments, hierarchy of international treaties and the principle of subsidiarity within a social and democratic state. The second included questions on the constitutional process, the compatibility of the two drafts with Article 154 of the Constitution and international law, the compatibility of the amendments introduced by the Constitutional Council with international law, the concept of social and democratic state and the principle of "removal of obstacles", the possibility of defending citizens' rights through institutions such as the Ombudsman, and the level of entrenchment of the electoral system in the Constitution.

10. In the extremely limited time at its disposal, the Venice Commission cannot reply in detail to each of these questions; it will therefore only address the main and most controversial issues which were brought to the attention of the delegation of the Commission that travelled to Chile on 26-29 September 2023. It will do so by examining both the Expert Commission draft and the Constitutional Council draft, with the understanding that the draft constitution can still undergo substantive changes before being submitted to the Chilean people through the referendum of 17 December 2023.

III. Analysis

A. The constitution-making process

11. At the outset, the Senate has asked the Commission to issue its opinion on the constitutional process currently underway.

12. After the referendum, on 12 December 2022, almost every political party signed an agreement, the "*Acuerdo por Chile*", which laid down the rules for a new constitution-making process. These are in contrast with or as a reaction against the previous one. The agreement was incorporated into the current constitution by an amendment passed by the Congress.[2] The agreement contains 12 "bases", the fundamental principles to be respected by the drafters of the constitution (Article 154 of the Constitution). These fundamental principles are as follows: 1. Chile is a democratic Republic, whose sovereignty resides in the people; 2. The State of Chile is unitary and decentralised; 3. Sovereignty is bound by the dignity of the human person and the human rights recognised in the international treaties ratified by the State of Chile and which are in force. The Constitution shall enshrine that terrorism, in any of its forms, is in essence contrary to human rights; 4. The Constitution recognises indigenous peoples as part of the Chilean nation, which is one and indivisible. The State shall respect and promote their rights and cultures; 5. Chile is a social and democratic state governed by the rule of law, whose purpose is to promote the common good; which recognises fundamental rights and freedoms; and which promotes the progressive development of social rights, subject to the principle of fiscal responsibility; and through state and private institutions; 6. The national emblems of Chile are the flag, the coat of arms and the national anthem; 7. Chile has three separate and independent powers: a) Executive

[1] Venice Commission, CDL-AD(2022)004, *Chile – Opinion on the drafting and adoption of a new Constitution*" ("March 2022 Opinion").
[2] Constitutional law n. 21.533 of 13 January 2023 (available here, in Spanish only)

power, with a head of government with exclusive initiative in public spending; b) Judicial power, with judicial unity and with full respect for final and enforceable judicial sentences; and c) bicameral legislative power, composed of a Senate and a Chamber of Deputies, without prejudice to their particular powers and competences; 8. Chile constitutionally enshrines, among others, the following autonomous bodies: Central Bank, electoral justice, Public Ministry and Comptroller General of the Republic; 9. Chile protects and guarantees fundamental rights and freedoms such as the right to life; equality before the law; the right to privacy in its various manifestations; freedom of conscience and worship; the best interests of children and adolescents; freedom of expression; and the right to education and the preferential duty of families to choose their children's education, among others; 10. Chile constitutionally enshrines the existence of the Armed Forces, with subordination to civilian power; and the Law and Order and Security Forces, with express mention of the Carabineros de Chile and the Investigative Police; 11. The Constitution establishes four constitutional states of emergency: state of assembly, state of siege, state of catastrophe and state of emergency; 12. Chile is constitutionally committed to the care and conservation of nature and its biodiversity.

13. The agreement further establishes the procedure for the drafting of the constitution with the participation of three specific bodies (which all fully respect gender parity):

- the Expert Commission (*Comisión Experta*) composed of 24 persons of indisputable professional, technical and/or academic background, of equal standing, elected 12 by the Chamber of Deputies and 12 by the Senate, in proportion to the representation of the different political forces; it is in charge of drafting a preliminary draft constitution (*anteproyecto de constitución*), and to submit it to the Constitutional Council within three months of being set up, adopting each provision with a 3/5 majority of its members in office (Article 145 of the Constitution);
- the Constitutional Council (*Consejo Constitucional*) composed of 50 members elected by popular vote, and with a requirement of gender parity; it is empowered to approve, approve with amendments, or add new provisions to the preliminary draft constitution by a vote of 3/5 of its members, within four months (Article 144 of the Constitution);
- the Technical Committee on Admissibility (*Comité Técnico de Admisibilidad*), 14 jurists of outstanding professional and/or academic trajectory, elected by the Senate on the basis of a single proposal from the Chamber of Deputies; its task is to review the rules approved in the different instances submitted to the Expert Commission and/or the Constitutional Council to determine their inadmissibility when they are contrary to the 12 fundamental bases specified above (Article 146 of the Constitution).

14. After the adoption of the proposed new constitution by the Constitutional Council, which has until 7 October to finalise it,[3] the Expert Commission has an additional opportunity to propose improvements to it. The Constitutional Council may either accept these proposals (by a 3/5 majority) or reject them (by a 2/3 majority); in cases where neither threshold of vote is reached, the proposals are submitted to a Mixed Committee, made up of six members of the Constitutional Council and six members of the Expert Commission, which may adopt the proposals by a vote of three-fifths of its members. These proposals need to be ratified by the Constitutional Council by a 3/5 majority. If the Mixed Committee fails to reach an agreement within five days, the Expert Commission, within three days, and by three-fifths of its members, must submit a new proposal to the Constitutional Council, which votes by a 3/5 majority. The entire text must be approved by three-fifths of the members in office of the Council. The final say is given to the Chilean people in a referendum, in which voting is obligatory, to be held on 17 December 2023.

15. The Venice Commission notes at the outset that Chile's choice as to how to prepare the new constitution falls within its sovereign rights. There are many different manners of adopting new

[3] The Expert Commission started to work on 6 March and finished its work on 30 May 2023. The Constitutional Council was constituted on 7 June 2023 and finalised its text on 4 October 2023.

constitutions, including *inter alia* by parliament through an ordinary legislative procedure, only with the approval of a qualified majority, by the combined two chambers of parliament, or through the setting up of a special, separate body whose sole purpose is to prepare and enact the new constitution. Establishing a separate constitutional body, or three separate and interconnected bodies as is the case in Chile, is not currently the most common way of preparing a constitution, but it is acceptable from the point of view of democratic standards. Ratification of the new constitution by popular referendum may be required.[4] This is not most common practice either, but is equally acceptable under democratic standards.[5]

16. While the choice of the way to prepare a new constitution is a sovereign decision of the state, in all cases some principles should be preserved. The specifically created body does not exist in a vacuum and thus should operate within the framework of the principles set out in the still existing constitution. Thus, the body having the mandate to prepare a new constitution is bound by the procedure of making a new constitution envisaged by the current constitution and operates in its framework. "The question of constitutional amendment lies at the heart of constitutional theory and practice";[6] therefore, the procedure for amending the constitution must be thought in terms of giving legitimacy to the constitution and the political system as a whole.[7] For this reason, several constitutions provide for a special reinforced procedure for a total revision of the constitution or for the adoption of a new one; with regard to the adoption of a new constitution, those provisions allow that constitutional continuity not to be broken.[8] In this respect, the fact that in Chile the composition and powers of the bodies that are in charge of the preparation of the new constitution have been included in the existing Constitution, on the basis of a very broad political agreement deserves a positive evaluation, since "[a] basic requirement of the Rule of Law is that the powers of the public authorities are defined by law".[9]

17. The Venice Commission has further expressed the view that "the process of introducing amendments to the Constitution should be marked by the highest levels of transparency and inclusiveness – in particular in cases where draft amendments, such as the current ones, propose extensive changes to key aspects of the Constitution."[10] Constitutional amendments should be the result of a "slow and incremental" process and should follow other procedures than those of everyday politics […].[11] Specifically in the March 2022 Opinion, the Venice Commission highlighted that "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", and that to this end the new constitution should:
"- 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."[12]

18. In the opinion of the Venice Commission, the very complex design of this constitutional process, approved by a wide consensus of the political forces, has to be assessed against the background of the experience of the previous Constitutional Convention: that directly elected

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[4] Venice Commission, CDL-AD(2010)001, *Report on Constitutional amendment*, §§ 46 ff.
[5] For an outline of the applicable standards, see: Venice Commission, CDL-AD(2022)015, *Revised Code of Good Practice on Referendums*.
[6] CDL-AD(2010)001, cited above, § 5.
[7] *Ibidem*, § 15.
[8] *Ibidem*, § 56.
[9] Venice Commission, CDL-AD(2016)007, *Rule of Law Checklist*, § 45.
[10] Venice Commission, CDL-AD(2022)031, *Opinion on the draft constitutional amendments concerning the electoral system of Mexico*, § 21.
[11] CDL-AD(2010)001, cited above, § 75.
[12] March 2022 Opinion, §§ 23 and 19.

body concentrated all the powers for the drafting of the new constitution, was disconnected from the Congress. The final referendum for the approval by the Chilean populace (*plebiscito de salida*) was the only and definitive supervisory power.

19. In contrast to the 2022 experience, the present process combines, on the one hand, the expertise and technical approach of the Expert Commission, appointed by members of the Congress from all the political parties represented in the ordinary legislative power, with, on the other hand, the democratic legitimacy of a specific elected, deliberative and representative body (the Constitutional Council), competent for the political discussion and approval of the new constitution. Congress is involved, through appointments to the constitution-making bodies. In addition, the Technical Committee on Admissibility and the Supreme Court may intervene, the latter with jurisdiction over possible appeals.[13] Citizens and civil society are invited to participate during the process with popular initiatives, with the coordination of a Citizen Participation Secretariat of the Constitutional Process, organized by both Universidad Católica de Chile and Universidad de Chile, with the scope of approaching citizens of the whole country to the process.[14] Finally, the Chilean people must approve the proposed new constitution in a binding referendum.

20. The (formal) democratic element in the process is thus rather strong, even though the timeframe for public debate is quite tight (however, public discussions on the content of the future constitution had already started as of 2019, under the previous process). The leeway of the popularly elected Constitutional Council has been restricted through the 12 "institutional" and "fundamental" principles, which are monitored by a new *ad hoc* body, the Technical Committee on Admissibility. However, a broad consensus among political parties was reached on the process and on those restricting principles. In addition, the principles as such are in accordance with the principles of a democratic Rechtsstaat and also meet the Venice Commission's recommendations based on good practices for constitutional amendment. Moreover, the new constitution will not exist in a historical, legal and political vacuum but instead will operate in the context of the broad legal culture and juridical traditions prevailing in Chile, which corresponds to a previous recommendation of the Venice Commission.

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[13] Article 156 of the current Constitution reads: "*A complaint may be lodged in respect of a breach of the rules of procedure applicable to the Constitutional Council and the Expert Commission, as set out in the Constitution and in the regulations and general agreements of these bodies.*
The complaint shall be heard by five justices of the Supreme Court, chosen by lot by the Court itself for each question raised.
The complaint must be signed by at least one-fifth of the current members of the Constitutional Council or two-fifths of the members of the Expert Commission and must be lodged with the Supreme Court within five days of the alleged defect becoming known.
The complaint must indicate the defect complained of, which must be essential, and the prejudice it causes.
The procedure for the hearing and resolution of complaints shall be established in procedural rules to be adopted by the Supreme Court, which may not be subject to the control established in Article 93, number 2, of the Constitution.
The judgment upholding the complaint may only annul the act. Such judgment shall be handed down within ten days of the lodging of the complaint.
No action or appeal shall be admissible against the decisions referred to in this Article."
One such complaint was lodged and decided by the Supreme Court, *see* here (in Spanish only).

[14] Article 99 of the Rules of Procedure of the Constitutional Council (RoP) provides for four different mechanisms of citizen participation in the work of the Constitutional Council: (a) Popular legislative initiative (Article 100 of the RoP); (b) Public hearings (Article 101 of the RoP); (c) Deliberative, representative or open citizens' dialogues (Article 102 of the RoP); (d) Citizen consultation (Article 103 of the RoP). The final report on the citizen participation in the 2023 Constitutional Process is available here (in Spanish only).

21. In conclusion, the Venice Commission is of the view that the whole current procedure of amendment of the constitution of Chile is in line with the general standards of democracy and the rule of law.

22. The Venice Commission also notes that the composition of the previous Constitutional Convention had 17 reserved seats divided among the 10 indigenous groups recognized in Chile: 7 seats to Mapuche people, 2 to Aymara people, and 1 for Rapa Nui, Quechua, Atacaman, Diaguita, Colla, Kawashkar, Yagan and Chango people. The electoral system for the Constitutional Council provided that if the votes for the indigenous list were above 1,5% of the total of national votes, the indigenous list would get one seat. If they were over 3,5%, two seats, and then it would get an additional seat for every two percentage points.[15] Indigenous voters had the choice to vote for indigenous or non-indigenous candidates. Out of the total indigenous voters (1.318.212), 368.355 votes were cast for indigenous candidates and 9.813.212 were cast for non-indigenous candidates; the indigenous list thus obtained 3,13% of the votes, obtaining one seat.

23. This process is not concluded yet, and its success will depend on the possibility of reaching a sufficiently broad consensus among the political forces and among the population. To facilitate achieving such broad consensus, the Venice Commission in its previous Opinion pointed out some characteristics, both procedural and substantive, for a sound new constitution: "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 […]'. 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. Otherwise, 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." (§ 20). And it concluded: "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; 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" (§ 22).

24. In Chile, as in numerous countries, there continue to exist deep cleavages, within the society and among politicians, on the content and interpretation of some rights and even of the proper functions of the state. In this context, the Venice Commission, while acknowledging that States enjoy a wide margin of appreciation in establishing the scope and level of detail of the constitutional provisions, finds it important to reiterate its conviction that a constitution should not be a political or legislative program for the political majority of the day, but should reflect an agreement on the basic constitutional principles and institutions which are to be valid both for the present and also for future generations and which are to be applied by different political majorities.

25. Maximalist solutions – that is, texts which seek to incorporate many specific and more contingent choices regarding social and economic policy - carry the risk of affecting the sense of constitutionalism as well as the sense of ownership, and ensuing accountability, which the Chilean people and political class should feel for the next Constitution of Chile. They are obviously

[15] Cfr. Article 144 of the current Constitution.

less likely to be conducive to broad agreement or to the establishment of a stable and enduring constitutional text.

26. Maximalist solutions thus jeopardise constitutional stability, hence social, economic and political stability, and "increase the risk, for the future adoption of eventually necessary reforms, of long-lasting political conflicts and undue pressure and costs for society."[16] At the same time, as outlined above, excessively detailed constitutions also deprive the legislators, and ultimately the people, of their rightful power to regulate social, political and economic issues as the society changes. Amending a constitution typically requires complex procedures and higher majorities than amending ordinary legislation. However, elections are meant to allow "the expression of the opinion of the people in the choice of the legislator".[17] The people of Chile should be given the power, through the democratic election of their representatives, to decide democratically on policy issues as they present themselves over time and when they are ripe for decision. "[P]arliaments should be able to act in a flexible manner in order to adapt to new framework conditions and face new challenges within society. The functionality of a democratic system is rooted in its permanent ability to change."[18]

27. It is the opinion of the Venice Commission that the formulation of the most controversial issues, if they are kept in the future constitutional text, should reflect an acceptable compromise, with all sides trusting that it will not prejudge the possibility for the legislature and the state institutions to adapt its interpretation and application to the needs of the society over time.

28. The Venice Commission welcomes that the Expert Commission has been able to adopt many provisions of the preliminary draft constitution unanimously, despite significant differences of views. During the visit, the vast majority of the interlocutors expressed a positive assessment of the text prepared by the Expert Commission. The Venice Commission cannot but reiterate the absolute importance of reaching a broad agreement within the Constitutional Council, as the representative body of the Chilean people, as well, bearing in mind that there has been a wide political agreement to substantially change the Constitution in force in the first place. A spirit of genuine compromise, both by the political majority and by the minority opposition forces, should continue to guide the next steps, including possibly the phase before the Mixed Committee and the subsequent final vote by the Constitutional Council, for the sake of the common good and the will of the people of Chile as a whole.

B. The status of international treaties

29. The Senate has posed the following question to the Venice Commission: Having in mind the previous opinion, as well as the opinions and standards contained in CDL-AD(2010)001 and CDL-AD(2016)007, what is the Venice Commission's view of Art. 5 of the Expert Commission's preliminary draft? Does the Venice Commission consider that this standard is in line with the standards of a constitutional and democratic state under the rule of law? Do the standards of a constitutional and democratic state require that international treaties be given a certain hierarchy in domestic legal systems?

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[16] Venice Commission, CDL-AD(2011)016, *Opinion on the new Constitution of Hungary*, § 24.
[17] The right to free and fair elections, guaranteed under Article 25§2 of the ICCPR: "Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions […] (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors" and by Article 23 of the American Convention on Human Rights, is also guaranteed by Article 1 of Protocol 3 to the European Convention on Human Rights.
[18] Venice Commission, CDL-AD(2011)016, cited above, § 24.

30. Article 5 of the Expert Commission draft provides :*1. The exercise of sovereignty is limited by the dignity of the human person and the human rights recognised in this Constitution and in the international treaties ratified by the State of Chile and which are in force.*
2. The rules of domestic law shall be interpreted in a manner consistent with those treaties, favouring the widest protection of the individual.
3. The law shall determine the form and procedure in which the State shall comply with judgements rendered by international tribunals whose jurisdiction it has recognised.

31. This provision does not provide for a specific hierarchy/relationship of international treaties with the domestic legal order. In comparative law, there are different possibilities as to the hierarchy and effects of treaties, including international human rights treaties in relation with domestic law, particularly with the constitution. These include a *supra*-constitutional status of international treaties, a position equivalent to constitutional provisions, or an *infra*-constitutional status (either at the level of ordinary legislation or at a level that is intermediate between the constitution and ordinary legislation).[19] In parallel to these variations but independently of them, there are various legitimate ways of constitutionally regulating the judicial applicability of international treaties. In some constitutional systems treaties (all, or only specific ones) are directly applicable; in others, treaties (even when they might have the hierarchical rank of a constitutional provision) need to be legislatively incorporated into the domestic legal order before becoming directly applicable. All of these various options, both regarding the hierarchy of norms and regarding the question of direct effect, can be valid and legitimate methods of bringing international obligations into harmony with constitutional and other domestic law. In addition, in many constitutional systems international treaties can have an interpretative value for constitutional norms on fundamental rights, as well as for ordinary legislation that is relevant to the state's compliance with its international legal obligations. The choice made in the Expert Commission draft emphasizes the latter approach: rather than establishing a specific hierarchy within the Chilean legal order, Article 5 § 2 provides for an interpretative rule ("*rules of domestic law shall be interpreted in a manner consistent with…*") that applies to the Constitution and the whole legal order and supports the interpretation that is most favourable to persons and their rights. Supporters of such an approach argue that it strikes a fair balance between the importance of the respect for international law and the principle of sovereignty.

32. In its "Rule of Law Checklist", the Venice Commission noted that "[t]he 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. At any rate, full domestic implementation of international law is crucial. When international law is part of domestic law, it is binding law within the meaning of the previous paragraph relating to supremacy of law (II.A.2). This does not mean, however, that it should always have supremacy over the Constitution or ordinary legislation".[20] This means that whatever the choice of a State, what remains crucial is the respect for Articles 26 and 27 of the Vienna Convention of the Law of Treaties, i.e., respectively, the principle of *pacta sunt servanda*[21] and the principle according to which States may not invoke their domestic law as a justification for not complying with their obligations under international law.[22]

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[19] Venice Commission, CDL-AD(2014)036, *Report on the implementation of international human rights treaties in domestic law and the role of courts*, §§ 25-28.
[20] CDL-AD(2016)007, cited above, § 48.
[21] The Venice Commission notes that Article 61 § 8 of the Expert Commission draft (not amended by the Constitutional Council) provides that: "*The provisions of a treaty may be derogated from, modified or suspended only in the manner provided for in the treaties themselves or in accordance with the general rules of international law*".
[22] CDL-AD(2014)036, cited above, § 39 ; *see also* Venice Commission/ODIHR, CDL-AD(2016)025, *Kyrgyz Republic – Endorsed Joint Opinion on the draft law "on introduction of amendments and changes to the Constitution*, § 41.

33. The Expert Commission draft's wording is not a rarity in comparative law. Article 5 § 2 echoes other constitutions, including among others those of Spain (Article 10 § 2) and Mexico (Article 1 § 2). In such cases, ordinary and constitutional tribunals are entitled to integrate the content of fundamental rights with new faculties, subjects or contents of international law, as long as such additional contents do not introduce limitations or restrictions to the fundamental rights nor go against customary international law and ratified international treaties.[23] This system emphasises the key role of courts in ensuring the protection of fundamental rights and freedoms by making a dynamic use of the powers left to them by international human rights treaties and by exercising the review of the compatibility of domestic legislation with these treaties.[24] Such a choice also reflects the principles according to which international human rights treaties are intended to set out minimum standards and that they should not be necessarily be frozen into the primary (that is, constitutional) system for protection of fundamental rights. States are indeed permitted and even encouraged to provide more extensive rights in their constitutions, so long as these do not violate minimum international law obligations.[25]

34. Similar considerations apply also to Article 5 § 3: in the opinion of the Venice Commission, this language does not call into question the duty of the state to implement its international law obligations as such, including those resulting from the judgments of international tribunals with jurisdiction over Chile. Rather, it delegates to domestic legislation the procedure and manner in which this is to be done. As stated above, States may not invoke their domestic law as a justification for not complying with their obligations under international law. This does not mean, however, that it should always have supremacy over the Constitution or ordinary legislation, or direct effect in the domestic legal order. Moreover, this approach to compliance with the judgments of international tribunals would seem to be consistent with the Inter-American Court of Human Rights' doctrine of "conventionality control," which has held "that conventionality control must be exercised by judges 'evidently in the context of their respective spheres of competence and the corresponding procedural regulations,'"[26] and also that "the American Convention does not impose a specific model for the regulation of issues of constitutionality and control for conformity (*sic*) with the Convention."[27]

35. In light of the above, the Venice Commission finds that Article 5 of the Expert Commission draft is in line with international standards.

36. The Venice Commission notes that the Constitutional Council has slightly amended this Article, to read: "*1. The Constitution, as the supreme norm of the legal system, establishes as a limit to the exercise of sovereignty the respect for the essential rights that emanate from human nature, recognized by this Constitution, as well as by the international treaties ratified by Chile and that are in force. It is the duty of State bodies to respect, protect and guarantee such rights. 2. The rules of domestic law must be interpreted in a manner compatible with the Constitution, taking into account the provisions referring to rights and freedoms of the human rights treaties ratified by Chile and in force. The provisions of these treaties will be distinguished from other international instruments that may assist States in their understanding and application, but which are not legally binding. 3. The law will determine the form and procedure to comply with sentences issued by international courts whose jurisdiction Chile has recognized.*" Thus, the Constitutional Council draft puts a stronger accent on the supremacy of the Constitution (*the supreme norm of*

[23] *See also* March 2022 Opinion, § 103.
[24] *Ibidem*, § 113.
[25] CDL-AD(2010)001, cited above, §155.
[26] *Dismissed Congressional Employees (Aguado - Alfaro et al.) v. Peru*, Preliminary Objections, Merits, Reparations and Costs Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 158, (Nov. 24, 2006), § 128; *see also* Gelman v. *Uruguay*, Merits and Reparation Judgment, Inter-Am. Ct. H.R. (Feb. 24, 2011), in particular § 239: " [the] control of conformity with the Convention" […] is a function and task of *any public authority (emphasis added*) and not only the Judicial Branch."
[27] *Liakat Ali Alibux v. Suriname*, Preliminary Objections, Merits, Reparations and Costs Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 276 (Jan. 30, 2014), § 124.

the legal system) and aims at distinguishing human rights treaties from soft law instruments. As to the interpretative rule to be employed, the new draft provides that rules of domestic law must be interpreted in a manner compatible with the Constitution, *taking into account the provisions referring to rights and freedoms of the human rights treaties ratified by Chile* (*emphasis* added). The Venice Commission recalls that such wording is to be interpreted in line with the third "institutional basis" contained in Article 154 of the Constitution, which establishes that "*[s]overeignty is limited by the dignity of the human person and the human rights recognized in international treaties ratified by the State of Chile and that are in force*" and in light of the international law principles elucidated above. Applying the same analysis detailed above to the Constitutional Council's amended draft, the Venice Commission finds that the provisions continue to be in accord with international standards.

C. The electoral system

37. During its visit in Santiago de Chile, the Venice Commission delegation was informed of a very widespread concern, across ideological lines, regarding the fragmentation of the political system and the phenomenon of "*transfuguismo*" (that is, "crossing the floor", switching from one political party or parliamentary group to another); several new proposals indeed aim at mitigating this problem. A group of questions posed by the Chilean Senate relates to the electoral system[28] and the regulation of political parties:

- Whether it is decisive and essential for a constitutional text to enshrine the details of the electoral rules of a legal order, or whether it should establish certain guiding principles to be developed by infra-constitutional rules; and whether it is preferable to distribute the representatives of the citizenry, specifically in the Chamber of Deputies, in proportion to the inhabitants of a given territory;
- Whether it is in accordance with the standards of a constitutional and democratic state governed by the rule of law that, in order to tackle the problems arising from political fragmentation, an electoral threshold should be set;
- Whether mechanisms to establish gender parity in the allocation of elected office are compatible with the standards of a constitutional and democratic rule of law, in particular with the democratic principle of equal suffrage;
- Whether the loss of a seat by a Member of Parliament who resigns or is expelled from his or her party in accordance with the standards of a constitutional and democratic state governed by the rule of law.

The Venice Commission cannot, under the present time constraints, provide thorough answers to each one of these questions; it will strive to provide some elements of reply which may usefully contribute to the discussions in Chile.

1. The choice of the electoral system

38. The Venice Commission has consistently expressed the view that the choice of an electoral system is a sovereign decision of a state through its political system. Any electoral system may thus be chosen as long as it is in conformity with standards guaranteeing, in particular, universal, equal, free and secret suffrage, and as long as it guarantees and gives effect to the free expression of the will of the voters. "There are two different interests at stake which have to be balanced: to honour as much as possible the principle of representation (which is enshrined in the principle of proportionality); or to favour the creation of majorities, letting the main political coalition govern. Both electoral principles, majoritarian and proportional, as well as their

[28] A general question also concerned the regulation on political parties in comparative analysis; the Venice Commission, however, cannot provide such a broad assessment of this complex matter in the very limited time of which it disposes; the Commission remains at the disposal of the authorities of Chile for assistance in the future elaboration of the relevant legislation.

combination in a mixed system are legitimate choices and it is up to the political class to make its choice."[29]

39. As concerns the distribution of seats among constituencies, the Venice Commission's Code of Good Practice in Electoral Matters stipulates that in order to guarantee equal voting power, the maximal departure from the distribution criterion should not be more than 10 per cent, and should certainly not exceed 15 per cent, except in special circumstances (e.g., the protection of a concentrated minority, or a sparsely populated administrative entity).[30]

2. The degree of constitutional entrenchment of an electoral system

40. The Venice Commission recalls that "[t]he choice of an electoral system as well as a method of seat allocation remain both a sensitive constitutional issue and have to be carefully considered, including their adoption by a large consensus among political parties. While it is a sovereign choice of any democracy to determine its appropriate electoral system, there is the assumption that the electoral system has to reflect the will of the people. In other words, people have to trust the chosen system and its implementation."[31]

41. The Venice Commission's Code of Good Practice in Electoral Matters states that "[a]part from rules on technical matters and detail – which may be included in regulations of the executive – rules of electoral law must have at least the rank of a statute" and that "[t]he fundamental elements of electoral law, in particular the electoral system proper, membership of electoral commissions and the drawing of constituency boundaries, should not be open to amendment less than one year before an election, or should be written in the constitution or at a level higher than ordinary law."[32] Furthermore, the Venice Commission has consistently held that any large-scale amendment of electoral legislation needs a thorough public debate and consultation not only among political parties represented in the Parliament, but also among other relevant actors outside the Parliament and civil society, leading to a broad consensus. Electoral reforms, especially of a fundamental nature, such as those entailing a change of electoral system, should be guided by the interests of voters and avoid any perception of favouring any political actor.[33]

42. In light of the above, it is the opinion of the Venice Commission that the fundamental features of the electoral system (including in principle the proportional system),[34] as well as the guarantees of independence of the electoral administration body and justice where applicable,[35] may be included in the Constitution, while the other issues and the development of such constitutional principles (including, in principle, electoral thresholds) can be better regulated through legislation, particularly in organic or qualified laws, in order to ensure that it reflects a broad agreement among the political forces.[36]

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[29] Venice Commission, CDL-AD(2013)021, *Opinion on the electoral legislation of Mexico*, § 17.
[30] Venice Commission, CDL-AD(2002)023rev2-cor, *Code of Good Practice in Electoral matters – Guidelines and explanatory report*, 2.2.
[31] Venice Commission/ODIHR, CDL-AD(2016)019, *Joint Opinion on the draft electoral code of Armenia as of 18 April 2016*, § 27
[32] CDL-AD(2003)023rev2-cor, cited above, II.2 a.
[33] Venice Commission/ODIHR, CDL-AD(2017)012, *Republic of Moldova - Joint opinion on the draft laws on amending and completing certain legislative acts (electoral system for the election of the Parliament)*, § 11
[34] The Constitutional Council has removed Article 58 § 1 (proportional system) from the draft constitution.
[35] CDL-AD(2022)031, cited above, § 65.
[36] Indeed, Article 81 of the Expert Commission draft and Article 80 § 2 of the Constitutional Council draft provide that the electoral law must be approved by a qualified majority of 4/7. Article 81 § 2 of both drafts provides that "*The legal norms to which the Constitution confers the character of electoral law or develop the public electoral system, or the electoral systems applicable to the offices of popular election,*

43. The Constitution should also contain the principle of gender equality and guarantees of the rights of indigenous peoples, so that any exceptions to the principle of equality of votes and measures of affirmative action in these areas have an explicit constitutional basis.

3. Electoral thresholds

44. Article 58 § 4 of the Expert Commission draft constitution and Article 57 § 4 of the Constitutional Council draft provide inter alia that only political parties that attain at least five per cent of the validly cast votes at the national level are entitled to participate in the allocation of seats in the Chamber of Deputies. A proposal is being discussed to allow pre-electoral and even post-electoral coalitions aimed at reaching the threshold.

45. The thresholds of representation – that is, the legally established minimum share of valid votes that parties must obtain in order to participate in the distribution of seats – aim principally to avoid party fragmentation and to enable stable governments by excluding minor parties when translating votes into seats. This is a legitimate aim. From the perspective of inclusiveness, however, high legal thresholds, especially at the national level, might be problematic.[37] In Europe, thresholds of 5% are most common. Furthermore, the effects of the threshold depend not only on the percentage, but also on the level and stage of application. Moreover, in proportional systems, depending on the size of the constituency there may exist natural thresholds which are higher than the electoral threshold.[38]

4. Gender equality

46. Article 4 § 2 of the Expert Commission draft provides: "*The law shall ensure equal access of women and men to electoral mandates and elective office and shall promote their equal participation in the different spheres of national life. The State shall guarantee the exercise of women's political participation.*" The terms of this provision are both mandatory (the law *"shall ensure equal access*", the State "*shall guarantee the exercise of political participation by women*") and programmatic ("*shall promote equal participation*") at the same time.[39]

47. Article 3 § 2 of the Constitutional Council draft provides: "*The law will promote equal access of women and men to electoral mandates and positions of popular election, as well as their participation under conditions of equality in the different areas of national life. The State shall guarantee the exercise of political participation by women*."

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shall require for their approval, modification or repeal of the assent vote of four-sevenths of the deputies and senators in office".

[37] The Parliamentary Assembly of the Council of Europe recommends that the threshold should not exceed 3%.

[38] See Venice Commission, CDL-AD(2020)023, *Report on electoral law and electoral administration in Europe - Synthesis study on recurrent challenges and problematic issues*, with references; for the concept of "natural threshold", i.e. the percentage of votes needed to get one seat at a district level, which is mainly dependent on the mean district magnitude, *see* CDL-AD(2008)037, *Comparative Report on thresholds and other features of electoral systems which bar parties from access to Parliament*, §§ 15 ff.

[39] In the Chilean tradition and at the moment electoral lists admit preferential voting. In both elections to the Convention and to the Constitutional Council, after the election some readjustment had to be done with the elected representatives in order to observe the rule regarding parity of outcomes (*paridad de salida*). Some of those readjustments resulted in setting aside the election of some candidates who had received a greater number of votes, in favour of other candidates of the opposite sex who had received fewer votes; most of the candidates disadvantaged by this requirement of parity of outcomes were women.

48. The Venice Commission notes that equality of chances is guaranteed in Chile under Article 4 § 5 of Organic Law nº 18.700, on popular votes and scrutinies,[40] which provides that of the total number of declarations of candidatures for deputies or senators declared by the political parties, whether or not they have made an agreement, neither the male candidates nor the female candidates may exceed sixty percent of the respective total. However, no "zipper" system is provided for. In 2021, 55 women were elected to the Chamber of Deputies (out of 155, totalling 35.5%). 12 women (out of 50, totalling 24%) were elected to the Senate.[41]

49. According to international human rights standards (including the International Covenant on Civil and Political Rights and the Convention on the Elimination of all Forms of Discrimination against Women) there is a state obligation to ensure the equal participation of women and men in political and public decision-making. In the Beijing Declaration and Platform of Action (1995), States agreed to adopt measures that enable "*establishing the goal of gender balance in governmental bodies and committees, as well as in public administrative entities, and in the judiciary*".[42] Additionally, the General Assembly of the Latin-American Parliament has concluded that one of the mechanisms that guarantees equality between men and women is the establishment of laws that recognize the relevance of gender parity, as a democratic principle, that allows it to be executed in all the powers (executive, legislative and judicial) and in the whole state structure.[43]

50. There are no detailed international standards on how to ensure gender parity. The Venice Commission's Code of Good Practice in Electoral Matters provides that "[l]egal rules requiring a minimum percentage of persons of each gender among candidates should not be considered as contrary to the principle of equal suffrage if they have a constitutional basis."[44] And in the Explanatory Report, the Venice Commission develops the idea: "10. Equality in electoral matters comprises a variety of aspects. Some concern equality of suffrage, a value shared by the whole [European] continent, while others go beyond this concept and cannot be deemed to reflect any common standard. The principles to be respected in all cases are numerical vote equality, equality in terms of electoral strength and equality of chances. On the other hand, equality of outcome achieved, for instance, by means of proportional representation of the parties or the sexes, cannot be imposed." And later it adds: "24. If there is a specific constitutional basis, rules could be adopted guaranteeing some degree of balance between the two sexes in elected bodies, or even parity. In the absence of such a constitutional basis, such provisions could be considered contrary to the principle of equality and freedom of association. 25. Moreover, the scope of these rules depends on the electoral system. In a fixed party list system, parity is imposed if the number of men and women who are eligible is the same. However, if preferential voting or cross-voting is possible, voters will not necessarily choose candidates from both sexes, and this may result in an unbalanced composition of the elected body, chosen by voters."

51. More recently, the second edition of the Venice Commission's Guidelines on political party regulation[45] refers also to the candidatures and candidates: "[…][m]andatory electoral quotas vary according to the electoral system in question, ranging from 15 per cent to 50 per cent. Some countries provide for percentages for the less represented gender or specific places within the order of party lists" (§ 168). And it includes rules to avoid a misinterpretation of the rule, against

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[40] Available here (in Spanish only).
[41] IPU Parline, *Monthly ranking of women in national parliaments*, available here.
[42] 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., § 190.a.
[43] *Resolución sobre la participación política de las mujeres dictada en la XXIX Asamblea General del Parlamento Latinoamericano* (2013) y *Norma Marco para consolidar la Democracia Paritaria* (2014) (in Spanish only).
[44] CDL-AD(2003)023rev2-cor, cited above, I.2.5. *See also*, CDL-AD(2006)020, *Declaration on women's participation of in elections*.
[45] Venice Commission/ODIHR, CDL-AD(2020)032, *Guidelines on political party regulation – second edition*.

parity: “Legislation on political parties may be adopted to promote the objective that women and men actually have an equal chance to be candidates and to be elected. Countries with an electoral system based on proportional representation and party lists may introduce temporary special measures that would promote not only a high proportion of women candidates, but also a rank-order rule, such as a "zipper" system, where male and female candidates alternate, or where one of every three candidates through the list is from the less represented gender. Rank-order rules of this type remove the risk that women will be placed too low on party lists to have a genuine chance of being elected. It is also advisable to ensure that if a female candidate withdraws her candidature, she is replaced with another woman.” (§ 188).

52. The Venice Commission has argued that “the most demanding requirements on the selection of candidates by political parties are those aimed to ensure equal gender representation”,[46] for instance, the introduction of quotas may offer a viable alternative to increase female representation.[47]

53. How to ensure such equality is a sovereign decision of the state. The Venice Commission has stressed that there are a wide variety of socio-economic, cultural, and political factors that can hamper or facilitate women’s access to parliament. Among the institutional factors of politics, both the electoral system and gender quotas can strongly influence women’s parliamentary representation. Compared with many structural and cultural obstacles of women’s representation, the electoral system can be changed more easily, and quota rules can be adopted if politically desired. Electoral reforms, thus, offer a viable option for increasing women’s representation.

54. It is difficult to make general recommendations on how to achieve gender parity. Proportional representation systems tend to be more conducive to a higher proportion of women in their parliaments than those with majority or plurality systems. The larger the districts and party magnitudes, the greater the likelihood of women being nominated and elected. In proportional systems with closed lists, as the political parties determine the order in which the candidates appear, they can place women candidates in sufficiently high positions as to guarantee their election, while in open lists systems the electors determine the position of each candidate on the list which they compose.

55. In the Venice Commission’s opinion, a distinction should be made between gender parity among candidates and redistribution of parliamentary seats. While provisions which require a certain gender parity among candidates nominated by the parties are perfectly acceptable, a more restrictive approach should be adopted in respect of redistributing parliamentary seats, as its effect could be the alteration of the will of the electoral body and then of the democratic principle.[48]

5. Floor-crossing and loss of mandates

56. The Expert Commission draft provides (Article 72 §§ 10 and 11) that a senator or a deputy who resigns from his or her political party or is sanctioned with the expulsion of the party that has presented his or her candidature, ceases to hold office. The Constitutional Council draft provides (Article 70 § 10) that a senator or deputy who resigns from the political party that had declared his or her candidature ceases to hold office. The replacement for the seat would be proposed by

[46] CDL-AD(2015)020, *Report on the method of nomination of candidates within political parties*, § 43.
[47] *Ibidem*, § 44.
[48] For instance, in the case of Spain (Article 44 bis LOREG): Congress and every Assembly shall have a “*composición equilibrada de mujeres y hombres*”. This means a minimum 40% of each gender in the whole list and in each section of 5 candidates. For the Senate (open list): each list must have also a balanced composition.

the political party itself. These measures are designed to address the already mentioned general concern in Chile about political fragmentation in Congress and *transfuguismo*.

57. The Venice Commission favours the free and independent mandate of elected representatives,[49] which means that "the deputy may change party allegiance (or 'cross the floor') or become independent without the risk of losing the mandate. Free mandate also implies that there is space for a dissenting vote, without definitive floor crossing."[50] The Venice Commission has thus consistently held that "losing the status as a member of parliament due to 'crossing the floor' or switching party is contrary to the principle of a free and independent mandate",[51] as "Members of Parliament are supposed to represent the people and not their parties".[52] Additionally, it has considered that "[d]epriving lawfully elected representatives of their mandate to serve in the parliament due to a representative's political affiliation, which includes the choice of rejecting membership in parties or political factions, is an interference with the people's choice of legislature".[53]

58. However, the Venice Commission has recognized that "frequent and sudden changes of affiliation to political parties by members of parliament may be problematic for political stability, and that States may adopt certain legal measures to prevent floor crossing or breach of party discipline. The Commission has nonetheless stated that such measures must be proportionate and has consistently warned against the termination of mandate due to floor crossing".[54] For the Venice Commission, "Serious breaches of party discipline may entail exclusion from the parliamentary group and/or the political party, with the loss of special positions and privileges associated with the membership in this group/party but should not result in the loss of mandate. However, where cross-party defections are common, the will of the voters is thwarted, so it is legitimate to introduce counter-measures […]."[55] Such counter-measures could include: stricter rules for the establishment of political parties; the prohibition during the period in which a legislature is in session for an MP to change group or *bancada* or to be admitted to a group; providing for membership of the mixed group by default in case of defection; a reduction in public financing; or political agreements among parties.

59. Article 72 §§ 10 and 11 of the Expert Commission draft and Article 70 § 10 of the Constitutional Council draft are therefore, in the Commission's view, not in line with the standards of a constitutional and democratic state governed by the rule of law.

D. Ex ante control of constitutionality

60. The Senate has further posed the following question: Is it contrary to the standards of a constitutional and democratic state to have a model of ex ante control of constitutionality? If it is not, what limitations should be considered in its design?

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[49] For an analysis of imperative mandate see: Venice Commission, CDL-AD(2009)027, *Report on the imperative mandate and similar practices*.
[50] Venice Commission, CDL-AD(2019)015, *Parameters on the Relationship between the parliamentary majority and the Opposition in a democracy: a Checklist*, § 51.
[51] Venice Commission, CDL-AD(2017)026, *Ukraine - Opinion on the amendments to the Rules of Procedure of the Verkhovna Rada of Ukraine*, § 32; CDL-AD(2019)029, *Ukraine - Amicus Curiae Brief for the Constitutional Court of Ukraine on draft law 10257 on the early termination of a Deputy's mandate*, § 24.
[52] Venice Commission, CDL-AD(2005)015, *Opinion on the amendments to the Constitution of Ukraine adopted on 8.12.2004*, § 12.
[53] CDL-AD(2019)029, cited above, § 26.
[54] *Ibidem*, § 27.
[55] CDL-AD(2019)015, cited above, § 52.

61. The Expert Commission draft provides for two types of (procedural) *ex ante* review.[56] The first applies to procedural or competence violations that might occur during the elaboration of bills, constitutional reforms and international treaties (Article 169(a) of the Expert Commission draft). In this case, if the question is upheld by the Constitutional Tribunal (by a 2/3 majority of the members present), the Constitutional Tribunal shall refer the matter to the Chamber concerned for the purpose of rectifying the defect. If the bill has already been dispatched, a joint committee shall be set up to propose the form and manner of remedying it, in accordance with the procedure set out in Article 85 § 1.[57] The request to the Constitutional Tribunal shall not suspend the processing of the bill, but the contested part of the bill may not be promulgated until the defect has been rectified, except in the case of the draft Budget Law or the bill relating to the declaration of war proposed by the President of the Republic.

62. The second case refers to conflicts of jurisdiction for those bills that fall within the exclusive initiative of the President of the Republic (Article 169(b) of the Expert Commission draft). The draft further provides for a non-binding advisory opinion on substantive constitutional issues that arise during the process of approval of bills and international treaties by Congress, at the request of the President of the Republic, of either of the two Chambers, or of 1/3 of the members of the two Chambers as a whole (Article 169(c)). The Venice Commission was informed that the elimination of the mandatory and optional *ex ante* control currently provided for in the Constitution was intended to address the concerns expressed by a great part of the civic and political spectrum about the politicisation of the Constitutional Tribunal.

63. The Constitutional Council draft has replaced the advisory opinion provided for in Article 169(c) with (in practice, reintroducing) a third case of binding *ex ante* (substantive) optional review (revised Article 173(a)), on constitutional issues that arise during the adoption of bills and international treaties by Congress. A judgment of unconstitutionality in such cases requires a majority of three-fifths of the members present of the Constitutional Tribunal. Such a review may be requested by the President of the Republic or by the majority of the members present of either of the two Chambers (or 1/3 of the entire membership of the two Chambers as a whole). It may only be formulated within ten days following the submission of the bill, and even when it has already been published. In the event that the President of the Republic presents observations in accordance with Article 87 of the Constitution,[58] the examination of the request by the Constitutional Tribunal will be suspended.

64. The amendments adopted by the Constitutional Council also provide that the other (procedural) *ex ante* types of review for bills, international treaties and constitutional amendments will be decided by a simple majority of the members of the Tribunal in office. The procedure described in paragraph 61 above (referral of the matter by the Constitutional Tribunal to the

[56] The Constitution *currently* in force provides for two types of (substantive) *ex ante* review: the first, mandatory, over the constitutionality of laws that interpret any provision of the Constitution, constitutional organic laws and the rules of a treaty that deal with matters specific to the latter, before their promulgation (Article 93 § 1); the second, optional, on constitutionality issues that arise during the processing of bills or constitutional reforms and treaties submitted to Congress for approval (Article 93 § 3).

[57] Article 85 § 1 of the Expert Commission draft reads: "A bill which is rejected in its entirety by the revising Chamber shall be considered by a joint committee of an equal number of Deputies and Senators, which shall propose the form and manner of resolving the difficulties. The draft of the joint committee shall return to the Chamber of origin, and a majority of the members present in both the latter and the revising Chamber shall be required for its approval."

[58] Article 87 provides, *inter alia*, that should the President of the Republic disapprove a draft law voted by the Parliament, s/he shall return it to the House of origin with the appropriate observations within thirty days. The Houses shall approve the observations and, if they do so, the bill shall have the force of law and shall be returned to the President of the Republic for promulgation. If the two Houses reject all or some of the observations and insist by two-thirds of their members present on all or part of the bill approved by them, it shall be returned to the President of the Republic for promulgation.

Chamber concerned to rectify the procedural/competence defect and possible establishment of a joint committee) is maintained in the Constitutional Council's draft.

65. In its March 2022 Opinion, the Venice Commission stated that, while the paradigmatic form of judicial review is *ex posteriori*, there are nevertheless at least some *a priori* mechanisms of control in many systems. It is for the States to decide, in accordance with 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.[59]

66. However, States must be cautious. There is indeed a risk of overstepping the separation of powers barriers when applying *ex ante* constitutional review (unless *ex ante* review is exercised by a parliamentary committee). The body responsible for such constitutional review works in fact in close proximity to the legislative process, and the outcome of the review may have considerable political effects.

67. The Venice Commission is of the view that a distinction should be made between ex ante constitutional control of a) international treaties b) constitutional amendments (especially when the constitution includes a provision of unamendable provisions or principles or diverse amendment procedures) and c) ordinary laws. Judicial substantive control of c) is problematic and should be allowed, if at all, only after the parliament has approved the bill. In light of the above, the Venice Commission considers that it is a legitimate choice for Chile to maintain an optional (substantive) *ex ante* control of constitutionality on international treaties. Indeed, in light of the considerations made above with regard to the place international treaties have in the Chilean legal order, the Commission considers that reintroducing a substantive *ex ante* control of their constitutionality is of fundamental importance: as stated above, one of the main aims of the *ex ante* review is to prevent the incompatibility between the Constitution and international treaties. Where the Constitutional Tribunal finds a contradiction between a constitutional right and an international human rights treaty, the State would have to choose between reforming the constitution to ratify and comply with the treaty, or not to ratify the treaty at all.

68. Insofar as possible risks of politicisation of the work of the Constitutional Tribunal are concerned, the Venice Commission finds that the *ex ante* review provided for in the Constitutional Council draft sufficiently addresses such a risk by: (i) providing that the *ex ante* review only takes place after the final approval of the law and/or the sending of the communication informing of the approval of the treaty by the National Congress; (ii) providing a restricted pool of initiators; (iii) giving the possibility to a minority group in Parliament to trigger such a review;[60] (iv) providing a higher quorum for the (substantive) *ex ante* review constitutional review. In that last regard, the two thirds majority provided in the Expert Commission draft for applying for the review seems excessive. In the Commission's view, a majority of three fifths (for both substantive and formal review) is a reasonable one.

69. The merits and risks associated with ex ante constitutional review are also closely linked to the composition and the manner of election of the members of the Constitutional Tribunal.[61] The Expert Commission draft proposes to lower the number of members from the current 10 to 9. The Constitutional Council draft has raised the number to 11, with a division into two Chambers.[62]

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[59] March 2022 Opinion, § 56.

[60] CDL-AD(2019)015, cited above, § 117 ("*Availability of the review of constitutionality of laws and bills is a matter of political choice, but where this choice is made, there are good reasons to give the power to trigger such a review also to a minority group in Parliament (CDL-AD(2002)16, § 46, PACE Resolution 1601 (2008), § 2.7.1-2:)*"). *See also* CDL-AD(2003)14, *Opinion on the draft law on the National Assembly of the Republic of Belarus*, § 29 ("*Steps must be taken to enable applications to be made to the Constitutional Court at the request of, say, one third or one quarter of the members*").

[61] Constitutional "Court" in the proposal of the Expert Commission.

[62] Article 170 of the Constitutional Council draft.

The Venice Commission welcomes the *odd* number of judges. This will allow the President to concentrate on his/her administrative tasks and prevent the problem of a tie and a controversial casting vote by the President.[63] Moreover, it will allow the Chambers to function with a minimum of 5 judges, which gives enough legitimacy to decisions taken by a majority. However, with two chambers there is an increased risk of jurisprudential contradictions and inconsistencies. In such a structure, therefore, it would be preferable also to have the possibility of certain decisions being made by the plenary Tribunal, where a harmonization of jurisprudence may be necessary.

70. Both the Expert Commission draft and the Constitutional Council draft replace the current "distributive" system of appointment/election of the members[64] with a "successive" one. This system, devised in Article 166 of the Expert Commission draft, provides for the following steps: (a) the Supreme Court, after a public competition, shall draw up a duly substantiated list, in a session specially convened for this purpose and in a single ballot; (b) The President of the Republic shall draw up a list of two candidates, from the list proposed by the Supreme Court, to be submitted to the Senate; (c) The Senate, after a public vetting hearing, shall choose a candidate from the proposed pair by a three-fifths majority of its members in office; (d) In the event that none of the candidates in the Senate meets the quorum, the Supreme Court will have to complete the list with two new names, starting a new process; (e) If for the second time no candidate meets the quorum in the Senate, the Supreme Court shall proceed to draw lots among the four candidates who have been proposed in pairs by the President of the Republic. The appointment process must be initiated ninety days before the incumbent to be replaced leaves office.

71. The Venice Commission notes that such a complex system formally provides for the involvement of all three branches of power in the selection of constitutional judges. Moreover, by providing that the appointment process commences 90 days before the incumbent ends his/her office, and by envisaging (in the Constitutional Council draft) a 30-day period for each actor to complete its constitutional tasks, the drafters clearly aimed at avoiding indefinite stalemates. This notwithstanding, and despite the provision of a sufficiently high qualified majority in the Senate, the Venice Commission considers that in a presidential system like Chile it would be preferable, and would ensure more democratic legitimacy,[65] to maintain the distributive system, like the one currently in place, which distributes elective or appointment powers among the three main branches of power. Indeed, there is the risk that by concentrating substantive powers in the hands of the President (who submits to the Senate a list of two members from a list of five), judges will be seen as a strong expression of political will, especially in case where the President and the Senate are of the same political leanings. The Commission has indeed stated that appointment of the constitutional judges by different state institutions has the advantage of shielding the appointment of a part of the members from political actors.[66] Moreover, the Commission considers that the distributive system is a simpler and faster one, whereby each branch of power carries its own responsibility for the appointment/election of judges. In order to address the deadlocks[67] that might stem from the high qualified majority requested for the election of judges by the Congress (2/3 in the current system), the Venice Commission considers that it is essential

[63] Venice Commission, CDL-STD(1997)020, *The composition of Constitutional Courts*, p. 20. *See also, mutatis mutandis*, CDL-AD(2018)011, *Serbia – Opinion on the draft amendments to the constitutional provisions on the judiciary*, § 59.
[64] Article 92 of the Constitution: (a) three members appointed by the President of the Republic; (b) four members voted by the Congress (two by the Senate and two submitted by the Chamber of Deputies for a vote of the Senate, with a quorum of 2/3, both in the Chamber and in the Senate); (c) three members appointed by the Supreme Court by secret ballot.
[65] Venice Commission, CDL-AD(2004)024, *Türkiye - Opinion on the Draft Constitutional Amendments with regard to the Constitutional Court*, § 19.
[66] Venice Commission, CDL-AD(2022)035, *Belarus – Final opinion on the Constitutional reform*, § 73.
[67] Currently, two judges of the Constitutional Tribunal have not been replaced since 18 March 2022 - the Tribunal is operating with 8 judges out of 10. Both must be elected by the Congress. Another one replacing a judge elected by the Supreme Court has been appointed in time on 30 August 2023.

to introduce in the new constitution of Chile an appropriate and suitable anti-deadlock mechanism.[68] While there is no single model, the Venice Commission has previously recommended options such as the *prorogatio* of the term of office of the judges whose mandate came to an end and who were not replaced, as a tool to preserve the full and effective functioning of the democratic institutions of the state.[69]

E. Rules on constitutional amendment

72. The Senate has further asked the Venice Commission "to issue its considerations regarding the amendments presented to modify the quorums or majorities required for constitutional reform."

73. The Expert Commission draft (not amended by the Constitutional Council) provides for two different procedures, one for constitutional amendment (Articles 208-210) and another for constitutional replacement (Article 211). Before the constitutional reform started in 2019, the current Constitution required the consent of three-fifths (3/5) of the deputies and senators in office, but required a higher majority (2/3) for reforms having an impact on Chapters I, III, VIII, XI, XII, or XV (Institutional foundations, nationality and citizenship, constitutional tribunal; armed forces, forces of order and public security, National Security Council and reform of the constitution). The nature of the specially protected provisions under the current constitution is different, with only some of them relating to fundamental issues and most of them relating to specific state institutions. Prior to the recent amendments (2020, 2023), the Constitution did not contain any provision on the adoption of an entirely new constitution.

74. A distinction between different sets of constitutional provisions, making some harder to change than others, through special procedures, exists in other states.[70] Such procedures may require at least some of the following: an increased qualified majority in parliament, a referendum, the dissolution of parliament or the convening of a special body (assembly) to adopt the amendment. Depending on the strictness of the special procedures, this may in some cases in effect be almost equivalent to making the provisions unamendable (unamendable provisions typically refer to issues such as territorial integrity, fundamental rights, the fundamental form of government, or federalism). A higher number of members of parliament may be required if the amendment proposal relates to the most important constitutional provisions. Thus, for example, the Constitution of Ukraine requires a two-thirds majority of the deputies for initiating amendments to the provisions on general principles, elections, referendum and the amendment procedure itself. In Switzerland, a total revision of the Federal Constitution may be proposed by the People or by one of the Chambers, or may be decreed by the Federal Parliament. In Spain, a total revision of the Constitution or a partial revision of the fundamental principles, fundamental rights or the Crown requires a decision of principle by two-thirds majority of each House, the dissolution of parliament, adoption by two-thirds by the new Cortes Generales and ratification by referendum.

75. The reasons for providing more rigidity to some provisions depends, amongst others, on the nature of the provisions and their relationship to the distinctive features of the political community that the constitution is meant to govern, on the level of detail of the constitution, and on the

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[68] Venice Commission, CDL-AD(2022)054, *Opinion on the draft law "on amending some legislative acts of Ukraine regarding improving procedure for selecting candidate judges of the Constitutional Court of Ukraine on a competitive basis"*, § 59.

[69] *Mutatis mutandis*, Venice Commission, CDL-AD(2018)015, *Opinion on the draft law on amendments to the Law on the Judicial Council and Judges of Montenegro*, § 25.

[70] In 2010 the Venice Commission found that this was the case in the constitutions of Austria, Belgium, Bulgaria, Canada, the Czech Republic, Estonia, Greece, Israel, Kazakhstan, Latvia, Lithuania, Moldova, Montenegro, Poland, Russia, Serbia, South Africa, Spain, Switzerland (this only concerning the mandatory provisions of international law), Ukraine and the "former Yugoslav Republic of Macedonia", *see* CDL-AD(2010)001, cited above, §§ 53 ff.

general rules on constitutional amendment. The Venice Commission has observed for example that in many cases institutional provisions are clearer and more inflexible than those on constitutional rights, which are normally formulated as broad and very general legal standards open to interpretation and legal evolution. Compared to provisions on rights, it is more difficult to introduce change in institutional arrangements by way of judicial interpretation, as these rules tend to be more specific and less open-ended in meaning.

76. Removing the increased qualified majority or increasing the qualified majority for the amendment of certain constitutional provisions does not raise any issue in terms of international standards.

77. As concerns the special procedure for the adoption of an entirely new constitution, it is not the rule for a constitution to provide for the same amendment procedure regardless of whether the amendment only relates to a single provision, or to large parts of the constitutional text, or even the whole constitution. This in part may reflect the difficulty of judging at what point a collection of "partial" amendments together constitutes an effective revision of the whole. A number of constitutions, in fact, expressly provide for a special, reinforced procedure for a total revision of the constitution or for the adoption of a new constitution (*see* paragraph 74 above). With regard to the latter, it is to be stressed that it is not intended to mean a break in the constitutional continuity.[71] There is therefore no requirement under democratic standards to provide for a special procedure of adoption of a new constitution; what matters is that any new constitution should be adopted following the prescribed amendment procedures in force, to ensure the stability, legality and legitimacy of the new system; when different procedures are provided, the purpose of the procedure (amendment or replacement) should be clearly set out. The absence of provisions on a special procedure for adopting a new constitution should in no case be interpreted as opening the door for ad hoc procedures, such as an extra-constitutional referendum called by the president. In the Venice Commission's view, if a special procedure is included in the Constitution, it is preferable to do so in a general clause (as in the Expert Commission draft) rather than through an *ad hoc* one.

78. As concerns the lowering of the qualified majority required for constitutional amendment, the Venice Commission has never indicated an "ideal" majority. Its calculation depends on the specific constitutional tradition and overall constitutional setup of each country. A qualified majority of 2/3 is the most common in Europe. The level of rigidity of a constitution also depends on the level of detail of its provisions. The more detailed the constitutional provisions, or the more they reflect policy choices on social or economic issues, the greater will be the perceived need for periodic or even continuous reform. But the Venice Commission has warned against the risks of instability on the one hand, and undue limitation of the power of the people to influence the content of the provisions on the other.

79. The Venice Commission reiterates that there are good reasons both why constitutions should be relatively rigid and why there should be possibilities for amendment. The challenge is to balance these two sets of requirements, in a way that allows necessary reforms to be passed (i.e., not making the adoption of a constitutional amendment too difficult to achieve or practically impossible), without undermining the overall stability, predictability and protection offered by the constitution. The final balancing act can only be found within each constitutional system, depending on its specific characteristics.

[71] *Ibidem*, § 56.

F. Social state and removal of hurdles to the realisation of human rights, freedom and equality

80. The Senate has further posed different questions to the Venice Commission, regarding: (a) the compatibility of the "*Estado social y democrático de Derecho*" with the principle of subsidiarity; and (b) the differences between the respective drafts' versions of Article 2, and in particular the Expert Commission's reference to the State's obligation to "remove obstacles" that impede or make more difficult the realization of the liberty, rights, and equality of persons, which was eliminated from the Constitutional Council draft.

81. Article 2 § 1 of the Constitutional Council draft provides that: "*El Estado de Chile es social y democrático de derecho, que reconoce derechos y libertades fundamentales, deberes constitucionales, y promueve el desarrollo progresivo de los derechos sociales, con sujeción al principio de responsabilidad fiscal y a través de instituciones estatales y privadas*." This is an almost exact repetition of Article 1 § 2 the Expert Commission draft. In addition, the Constitutional Council draft has removed Article 2 § 2 of the Expert Commission draft, which had specified that "*El Estado promoverá las condiciones de justicia y solidaridad para que la libertad, derechos e igualdad de las personas se realicen, removiendo los obstáculos que lo impidan o dificulten*."

82. Regarding the first of these questions, the Commission observes that there is in principle no incompatibility whatsoever between the principle of subsidiarity, as incorporated expressly or implicitly in a variety of different constitutional systems, and the aim of establishing an *"Estado social y democrático de derecho*." The latter is primarily an affirmation of the outcomes sought, while subsidiarity is primarily an expression of the means to be employed. The principle of the social state (different from the socialist one) is to be read in harmony with the other two principles: the rule of law and the democratic state, and each principle limits a possible maximalist interpretation of the other. As is implied in both drafts' reference to "*a través de instituciones estatales y privadas*", subsidiarity can be a legitimate and effective tool for realizing the broader social goals while still respecting the rights, liberties, and duties referred to in the text. Conversely, an "*estado social y democrático de derecho*" does not necessarily imply that actions directed toward broad social goals will always be taken directly by the institutions of the State at the expense of intermediate forms of social organization, and thus does not in principle contradict the principle of subsidiarity. This understanding of the compatibility in principle between the two constitutional ideas is confirmed in the practice of states that can reasonably be characterized as seeking a social, democratic system under the law, and that have also explicitly constitutionalized the principle of subsidiarity as a dimension of social policy (like Italy), or implicitly given effect to subsidiarity in its constitutional structure and social policy (like Germany).

83. Regarding the second question, the reference to the State's responsibility to "*remover los obstáculos*" to persons' liberty, rights, and equality – whether phrased in that specific language or in some other comparable form, such as an obligation to *"apartar las dificultades*" – can certainly express a legitimate political choice by a constituent power. While the phrase is not common in many other constitutional systems, it does have some precedents, particularly in Article 3 § 2 of the Constitution of Italy and in Article 9 § 2 of the Constitution of Spain. It also bears some similarity to the specification of affirmative State obligations under international human rights law, especially the International Covenant on Economic, Social, and Cultural Rights.[72] It is thus to be seen as a valid and reasonable political option. At the same time, it cannot be said, based on comparative constitutional texts and practice or international human rights law, to be a mandatory specification of State responsibilities. If the Chilean constitutional process does result in restoring the provision proposed by the Expert Commission, the Venice Commission considers it to be notable that that language refers to the State's responsibilities to remove

[72] *See, for example*, UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 3: The Nature of States Parties' Obligations (Art. 2 § 1 of the Covenant), 14 December 1990, E/1991/23.

impediments to the enjoyment of rights *and* liberties, as well as equality, thus acknowledging the need to balance the affirmative actions of the State also with the liberties of the people, which again would make it in general terms harmonious with the principle of subsidiarity as well.

84. The Venice Commission notes on the other hand that the text of the Constitutional Council contains the express commitment of the Chilean state to "respect and promote the […] individual and collective rights [of the indigenous peoples] (Article 6), and the express possibility for the state to establish mechanisms to promote social and economic policies in favor of indigenous peoples and the political participation of indigenous peoples in the National Congress (Article 52) as well as in the regions and municipalities, especially where there is a significant indigenous population present (Article 130). It also contains the express commitment of the Chilean state to promote equal access of women to electoral mandates and positions and to guarantee the exercise of political participation by women (Article 3).

G. Institution of the Ombudsman

85. The Senate has further asked the Venice Commission "to express its considerations regarding a preferable constitutional technique in the aspect of protecting certain legal interests of citizens through isolated bodies such as "Defensorías" or to create a broader structure, which, without prejudice to having specificities in the execution of its purposes, has a unity of action aimed at protection in its broadest sense, similar to the figure of the Ombudsman."

86. Article 16 § 6 (4) of the Constitutional Council draft creates a newly National Access to Justice and Victims' Advocacy Service (*Defensoría de las victimas*), in response to the current social situation on Chile.[73,74] Article 184-*ter* specifies in detail the competencies of such a body, which are, among others, to: (a) provide guidance, advice and legal representation to victims of crime, especially in relation to the criminal prosecution of offences and in the filing of actions aimed at obtaining reparation for the harm caused; (b) provide guidance, counselling and psychological and social accompaniment; (c) provide specialised and comprehensive care, avoiding re-victimisation; and (d) develop plans, policies and programmes aimed at ensuring the timely and adequate exercise of the rights and guarantees of victims. Further competencies, as well as the conditions under which advice, guidance and representation shall be provided, are to be regulated by an institutional law, to be adopted, pursuant to the draft's 47th transitional provision, within one year of the entry into force of the Constitution.[75]

87. In Chile there already exists a specialised ombudsman, the *Defensoría de los derechos de la niñez* ("Children's Ombudsman"), established in 2018,[76] whose tasks are the promotion and protection of the rights of the children. The Children's Ombudsman is appointed by the Senate, by a two thirds majority, on the uninominal proposal of the Commission on Human Rights,

[73] Article 16 § 6 (4) reads: *The law shall indicate the cases in which and the manner in which natural persons who are victims of crimes shall be provided with free legal advice and defence, for the purpose of bringing criminal action when appropriate, especially in cases of terrorism, drug trafficking, corruption, organised crime and human trafficking. In order to comply with this obligation, the State will have a Victims' Ombudsman's Office*.

[74] Article 175 § 1 of the Constitutional Council reads: "*The National Access to Justice and Victims' Advocacy Service is a body endowed with legal personality, functionally and territorially decentralised. It will relate to the President of the Republic through the ministry in charge of relations with the Judiciary*".

[75] The Venice Commission notes that the current Constitution, at its Article 19 (3) § 3, already tasks the legislator with establishing "*the manner in which natural persons who are victims of offences shall be provided with free legal advice and defence in order to exercise the criminal action recognised by this Constitution and the law*." However, according to the information received by the Venice Commission, such law has never been adopted.

[76] Law 21.067, available here (in Spanish only).

Nationality and Citizenship; s/he is appointed for five years and s/he may not be appointed for a further term.

88. The Senate raises the question whether it is preferable, for the effective protection of the legal interests of the citizens, to have separate specialised bodies (like the proposed National Access to Justice and Victims' Advocacy Service) rather than a unitary one with a broader mandate.

89. The Venice Commission recalls in this respect that the UN General Assembly has recognised the important role that ombudsman and mediator institutions can play, in accordance with their mandate, in the promotion and protection of protection of human rights and fundamental freedoms.[77] In its Principles on the Protection and Promotion of the Ombudsman Institution (hereinafter the "Venice Principles"), the Venice Commission has emphasised the role of the Ombudsman an important element in a State based on democracy, the rule of law, the respect for human rights and fundamental freedoms and good administration.[78]

90. The main functions of the Ombudsman institution consist in taking action independently against maladministration and alleged violations of human rights and fundamental freedoms affecting individuals or legal persons.[79] This is particularly relevant as an institution to guarantee respect for social and economic rights. In that regard, it is important to underline again the importance of autonomy and independence from the executive or judicial branches of Government of Ombudsman institutions, in order to enable them to consider all issues related to their fields of competence, without real or perceived threat to their procedural ability or efficiency and without fear of reprisal, intimidation or recrimination in any form that may threaten their functioning.[80] The Ombudsman shall not be given nor follow any instruction from any authorities.[81]

91. States have a wide discretion in choosing whether to set up a single ombudsman institution or several specialised ones, depending on the State organisation, its particularities and needs.[82] In all cases, however, the Venice Commission urges States to adopt models that fully comport with the Venice Principles, strengthen the institution and enhance the level of protection and promotion of human rights and fundamental freedoms in the country.[83]

92. In light of the above, the Venice Commission considers that it is within the discretion of the Chilean constituent power to decide whether to establish a single ombudsman institution, having general competence, or several specialised ones, or a single institution with internal specialised divisions for the most sensitive issues as the aforementioned. However, in all cases, the constitution should contain appropriate guarantees of independence of these institutions from the other branches of government, as set out in the Venice Principles. If several specialised ombudsman institutions are envisaged, they should either all be provided for in the constitution

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[77] United Nations, General Assembly, A/RES/75/186, *The role of Ombudsman and mediator institutions in the promotion and protection of human rights, good governance and the rule of law*, 16 December 2020, preamble.

[78] Venice Commission, CDL-AD(2019)005, *Principles on the Protection and Promotion of the Ombudsman Institution ("The Venice Principles")*, preambule. The Venice Principles were endorsed by the Committee of Ministers of the Council of Europe at the 1345th Meeting of the Ministers' Deputies, on 2 May 2019; by the Parliamentary Assembly of the Council of Europe, Resolution 2301(2019), on 2 October 2019; by the Congress of Local and Regional Authorities of the Council of Europe, Resolution 451(2019) on 29-31 October 2019.

[79] CDL-AD(2019)005, cited above, preamble.

[80] A/RES/75/186, cited above, preamble. *See also* CDL-AD(2019)005, cited above, preamble and CDL-AD(2021)017, *Republic of Moldova - Opinion on the draft Law amending some normative acts relating to the People's Advocate*, § 52.

[81] CDL-AD(2019)005, cited above, Principle no. 14.

[82] CDL-AD(2019)005, cited above, Principle no. 4.

[83] CDL-AD(2019)005, cited above, Principle no. 5.

or else the constitution should provide for all of them to be created and regulated by subsequent legislation.

IV. Conclusion

93. 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 proposed new Constitution of Chile. These questions have been updated and expanded as the process has progressed, and cover a very broad range of issues. At the time of the preparation of this opinion, there still does not exist a finalised text of the proposed new constitution of Chile. Under these circumstances, the Commission's replies to the Senate's questions cannot but be rather general and limited in scope. The Commission nonetheless hopes to provide a concrete contribution to the successful work of the bodies which are in charge of preparing the new Constitution.

94. This constitutional reform process is not concluded yet, and its success will depend on the possibility of reaching a broad consensus among the political forces and among the population. The Venice Commission welcomes the consensual approval of the preliminary draft constitution by the Expert Commission and stresses the absolute importance of reaching a broad agreement also within the Constitutional Council, as the representative body of the Chilean people. A spirit of genuine compromise, both by the political majority and the minority opposition forces, should continue to guide the next steps, for the sake of the common good and the will of the people of Chile as a whole.

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