

## **Bertoldo's Court: Constitutional Delegation in the Design of Judicial Institutions**

### **El tribunal de Bertoldo: Delegación constitucional en el diseño de instituciones judiciales**

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#### **Abstract**

The Chilean Constitutional Convention will have to design multiple novel and complex institutions, many of them having a judicial character. Within this process, this essay suggests that regarding these judicial institutions, the Convention should endeavor to design them in a very detailed way, to avoid excessive delays or manipulations from Parliamentary majorities. In the Italian Constitution of 1948, the vagueness on the regulation of the Constitutional Court led to delays in its implementation, dominated by capture attempts from the governing party. In the Argentinian constitutional reform of 1994, the deficient regulation of the Judiciary Council allowed that almost all governments attempted to or were able to change its composition to increase their political control over it. In the Chilean Constitution of 1925, the skimpy regulation of the administrative courts caused that, straightforwardly, they were never created.

Even though these defects in the constitutional regulation are not the only factor that explains the failure of these institutions, they nevertheless posed difficulties to the coordination among political participants, and they provided excuses to the ones who did not want to implement them.

**Keywords:** *Comparative constitutional law; constitutional design; constitutional assemblies; judicial institutions.*

#### **Resumen**

La Convención Constitucional chilena deberá diseñar una multiplicidad de novedosas y complejas instituciones, muchas de ellas de carácter judicial. Al hacerlo, este ensayo sugiere que respecto de estas últimas deberá procurar hacerlo con un alto grado de detalle para evitar que la implementación de estas instituciones judiciales no sea excesivamente retrasada ni manipulada por futuras mayorías parlamentarias. Para argumentar en este sentido, se recogen tres experiencias del derecho comparado. En la Constitución italiana de 1948, la vaguedad en la regulación de la Corte Constitucional llevó a demoras en su implementación cruzadas por intentos de captura por parte del partido gobernante. En la reforma constitucional argentina

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de 1994, la deficiente regulación del Consejo de la Magistratura permitió que casi todos los gobiernos hayan intentado o logrado reformar su composición para aumentar el control político sobre este. En la Constitución chilena de 1925, la raquíta regulación de los tribunales administrativos permitió, derechamente, que estos nunca fueran implementados.

Si bien los defectos en la regulación constitucional no son el único factor que explica el fracaso de estas instituciones, éstos dificultaron la coordinación entre sectores políticos y proveyeron de excusas a quienes no deseaban implementarlas.

**Palabras clave:** *Derecho constitucional comparado; diseño constitucional; asambleas constituyentes; instituciones judiciales.*

## INTRODUCTION

Those writing a constitution are frequently in the same situation as King Alboino. According to the tale from medieval Italy, the King, fed up with his counsellor Bertoldo's playful mischief, sentenced him to death. Bertoldo, however, managed to pull off one final trick: he said he wanted to choose the tree he was to be hanged from. The King, somewhat bewildered, accepts the request and orders his soldiers to hang him from that tree. Bertoldo is taken through all the forests, valleys, and mountains of the peninsula in search of the tree, without success. Here, the different versions of the tale vary: according to some, the exhausted royal guard decided to free Bertoldo as they were unable to fulfill the King's order; according to others, after the long journey Bertoldo is taken back to King Alboino's court where they explain they have been unable to find the tree. The King resists: how is it possible that no tree on the peninsula is good enough for him?! Bertoldo discloses that there is one tree he likes and that he only needs two more days to find and bring it to him. The King accepts once again, and within a few days Bertoldo returns with a small tree sprout saying: "You can hang me from this tree, when it is ready". Frustrated by the trick, Alboino decides to free clever Bertoldo.<sup>1</sup>

Constitutional assemblies often put constituted powers in the same situation as Bertoldo, as they are tasked with the difficult job of designing and implementing the institutions that will limit their own power. Presidents, ministers, and parliamentarians are mercilessly commissioned to create and set into motion courts, administrative control bodies and autonomous organisms whose sole purpose is to make their lives more difficult. Consider a parliament commissioned to create a Constitutional Court, that can invalidate laws that the parliament dictates immediately after being created.<sup>2</sup> Ultimately, the Constitution is asking parliament to choose the tree it will be hanged from.

In this exploratory essay we build on this idea and on constitutional delegation literature to suggest that Chile's Constitutional Convention (the "Convention") shall have to be especially careful when they create or reform judicial institutions. It must have special care

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<sup>1</sup> The first version of the tale of Bertoldo is the canon, compiled by Croce (1606). The second is taken from the 1984 film *Bertoldo, Bertoldino & Cacasenno*, directed by Mario Monicelli.

<sup>2</sup> We study this issue in Part III.I of this essay, referencing the Italian case.

when designing and regulating them with enough detail, to prevent their constitutional mandates from being thwarted by the potential indolence of future legislators or by their multiple incentives to not implement them. It is important to state that this care must be the fruit of a somehow contra-natural effort: given the composition of the Convention and the issues that will most probably be deemed as priorities by its members, their immediate incentives and interests will possibly be aligned in conceiving judicial constitutional matters in a somewhat minimalist way, with the purpose of potentially reaching agreements and thus tending to the issues considered priorities with more time and care.

This essay seeks to work on a double level. First, we intend to intervene in the constitutional debate that is currently taking place in Chile, bringing up comparative experiences of institutional design and reflecting on their limitations. Second, we take on comparative literature on constitutional design to point out the technical limitations of delegating certain matters to the legislator.

This piece is structured in the following way: in the second section we begin by suggesting that it is highly probable that the Convention will end up regulating judicial matters in a broad and general way, and we will assess this possibility considering recent literature regarding legislative delegation of the design of constitutional institutions. In the third, we look at three case studies in some detail: the Constitutional Court in the Italian Constitution of 1948, the Judiciary Council in the Argentinian Constitution that was reformed in 1994, and the administrative courts in the Chilean Constitution of 1925. In the fourth section we extract preliminary lessons from these cases: notwithstanding the predictable differences in such heterogenous processes, the three experiences share a fundamental feature: a vague or incomplete constitutional design of novel judicial institutions which led to delay, endanger or even thwart their implementation by the legislative power. Finally, in the fifth section we provide a conclusion to the ideas offered throughout the essay and provide the Convention with a few suggestions.

## **I. DECIDE TO NOT DECIDE (AND WHEN NOT TO DO SO)**

### **1.1 Delegating Constitutional Design**

The Convention will have a pressing challenge. Having been bequeathed citizens with high expectations<sup>3</sup> it must tackle – and endeavor to resolve – a practically unlimited number of significantly important issues. The conditions in which the Convention will be carried out heighten the demands of this challenge. Chile, like most contemporary democracies, has opened its political institutions to the diversity that exists in the current society in an unprecedented way. Thus, the Convention must provide answers to a rich array of social

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<sup>3</sup> See for example, CADEM (2021b), p. 23 (which places the Constitutional Convention as the most trusted state institution in the country).

demands that come from a wide range of groups.<sup>4</sup> Additionally, these demands occupy different places on the Convention members' agendas (bearing in mind that there is a significant number of people who have little or no link to the political parties that have dominated the public sphere since the return to democracy). As if this were not enough, it must be carried out in a relatively short period of time<sup>5</sup> and under pressure of not returning to the citizens empty-handed.<sup>6</sup> Finally, to be authorized, constitutional rules must have the approval of two thirds of the Convention members, in a highly fragmented and heterogenous assembly. Another set of unprecedented variables also come into play from a comparative perspective, such as the original equal composition of its members, the reserved seats for indigenous peoples or the pressure of immediacy caused by the influence of social media within the process.<sup>7</sup>

Keeping all these elements constant, the most probable adjustment variable will be the level of detail with which different constitutional matters will be regulated. A Convention that has limited time, resources, and energy, that is made to regulate aspects of social and political life with a high degree of consensus, will probably only be able to do so if a significant number of these aspects are treated in a highly generalized way.<sup>8</sup> As per the saying: do not bite off more than you can chew.

Generality in the drafting of the constitutional rules is, of course, not new or random. In recent times, many authors –we highlight Rosalind Dixon and Tom Ginsburg– have studied how constitutional assemblies frequently “*decide to not decide*” on many topics,<sup>9</sup> leaving important institutional decisions to the will of a future legislature. This ‘delegation’ in the created power can manifest in different ways: regulating aspects with high level of generality,<sup>10</sup> accumulating incompatible claims in hopes that future legislators will resolve the

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<sup>4</sup> GINSBURG (2010), p. 71 (explaining that with time constitutions have become longer); LAW & VERSTEEG (2011) p. 1194-98 (documenting the expansion of the catalog of rights to meet the ever-growing citizen demands).

<sup>5</sup> Article 137 of the Chilean Constitution states that the Convention must draft and approve the constitutional text in nine months' time, this term can be extended once for a period of three additional months.

<sup>6</sup> According to the second paragraph of article 135 of the constitution, if the Convention fails its endeavor, the constitution will remain in force. It is to be expected that the constituents will do everything in their power to prevent this from occurring. In addition to being a major squandering of resources, it would disillusion the citizens to whom they promised a new constitution as a privileged way to channel the demands that sparked the social outbreak of 2019.

<sup>7</sup> The immediacy of social media, while capable of opening communication channels between representatives and those represented, can also jeopardize the inevitable time required for democratic reflection and deliberation. There is more on this topic on MING-SUNG (2019). Social media can affect democratic deliberation in somewhat unexpected ways, and there is no experience regarding constitutional processes. For example, there is empirical evidence showing that watching presidential debates whilst simultaneously commenting and following social media reduces the viewer's knowledge on campaign matters (when compared to those watching the debate without using social media). See GOTTFRIED *et al.* (2017).

<sup>8</sup> GINSBURG (2010), p. 76 and following (develops the trade-off between the “scope” of the matters regulated by the constitution and their level of “detail”).

<sup>9</sup> The term belongs to DIXON & GINSBURG (2011a).

<sup>10</sup> GINSBURG and DIXON, for example, hold that constitutional vagueness acts as a substitute to express delegation by the constituent (DIXON & GINSBURG (2011a), p.652).

tensions that were not solved during the constitutional process,<sup>11</sup> or simply staying quiet on the matter,<sup>12</sup> or – with an ever increasing frequency – explicitly stating that the matter will be regulated “by law”,<sup>13</sup> and sometimes subject to special majorities.

These different delegation techniques are tempting, and it is undeniable that there are often good reasons to use them. For example, Dixon and Ginsburg suggest deferring matters to the legislator when there is an asymmetry of information within a constitutional assembly, abstention incentives, or “constitutional passions” between the parties throughout the constitutional negotiations that could make the transaction costs needed to reach an agreement on constitutional matters disproportionately high. These negotiation problems make it especially advisable to use this delegation when, as with the case of Chile, the assemblies are limited by time constraints.<sup>14</sup> Furthermore, Dixon and Ginsburg argue that deferring matters to the legislator can also lower the costs of errors made by an assembly with imperfect information on future social, political, or technological developments. Under these circumstances, delegating the task to a future legislator, with better epistemic capabilities, could be an advisable strategy.<sup>15</sup>

Delegation to the legislator can, additionally, pose advantages for the construction of purpose in constitutional democracies that are increasingly more diverse. Leaving constitutional regulation of certain critical matters to political solutions may allow the blossoming of “overlapping consensus”<sup>16</sup> which, despite not being complete agreements theoretically satisfying, are better than the alternative (that is, no agreement whatsoever).<sup>17</sup> Additionally, minimal regulation can allow to channel political conflict in a way that allows different sectors to find a framework within the Constitution in which they can pursue their objectives. Hence, different political actors will strive to give the Constitution a sense and purpose according to their expectations and values, without ceasing to uphold the Constitution itself<sup>18</sup> – a process which the philosopher Chantal Mouffe calls *agonistic*.<sup>19</sup> Imagine, for instance, how different sectors in the United States argue over the sense of the constitutional clause on the Equal Protection Clause, in the 14th Amendment, holding opposing interpretations: while some hold that the Clause demands affirmative action that

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<sup>11</sup> For example, GARGARELLA (2016), pp. 47-60. A similar mention of this strategy in the South African context in DIXON & GINSBURG (2011b).

<sup>12</sup> GARGARELLA (2016), pp. 50-51.

<sup>13</sup> This delegation is usually done by what Ginsburg and Dixon call “‘by law’ clauses” by which the constituents’ clauses explicitly delegate matters in the next legislature (DIXON & GINSBURG (2011a), p 637).

<sup>14</sup> DIXON & GINSBURG (2011a), p. 638.

<sup>15</sup> DIXON & GINSBURG (2011a), pp. 643-646.

<sup>16</sup> To paraphrase the expression by John Rawls. The constitutionalist Cass SUNSTEIN mentions “*completely theorized agreements*” to describe these situations where there is an agreement about the rule that will be adopted by not regarding the reasons that motivate that decision. Although this has been thought fundamentally for the reasoning behind court rulings, Sunstein suggests that this type of agreements can enable sanctioning constitutions, which is impossible to do in any other scenario (see SUNSTEIN (2002), p. 56).

<sup>17</sup> This argument is fully explained in GARGARELLA (2016).

<sup>18</sup> This argument is fully analyzed in POST & SIEGEL (2013).

<sup>19</sup> See for example MOUFFE (2016).

privileges certain historically disadvantaged groups by allocating places for these groups at jobs and universities, others claim that it compels public authorities to be 'color blind', and thus disregard factors such as race or gender when allocating places or benefits.<sup>20</sup> Although this argument over the meaning of the Constitution is particularly agitated in the United States (where the constitutional argument has a quasi-religious nature and zeal),<sup>21</sup> we could aim for something similar in Chile: a successful constitution that allows all democratic political sectors to claim it as a source of its values and programs. However, our essay aims precisely to moderate the enthusiasm for these clauses on matters of judicial design. Although delegation clauses can indeed be beneficial for democratic governance, in some cases they can, in fact, entail some risks.

We begin by making an important distinction: the United States constitutionalist Sanford Levinson has differentiated between the *constitution of conversation* and the *constitution of settlement*.<sup>22</sup> The constitution of conversation, as in the previous examples, aims to provide an open framework that allows a permanent discussion over the *meaning* of the values of common life. This openness is precisely what allows the constitution to be a *living text* and for constitutional law to be understood as a dialogue between generations.<sup>23</sup> The constitution of settlement, on the other hand, aims to place some matters outside constitutional discussion. For example, in the Chilean case, the president must be at least thirty-five years old<sup>24</sup> and be elected in a second round if he or she does not have an absolute majority of the votes,<sup>25</sup> the term of representatives in Congress lasts four years and they cannot be reelected more than twice,<sup>26</sup> and so on.

Matters of the constitution of settlement cannot be discussed as to their meaning or interpretations about what a correct solution would be.<sup>27</sup> On the contrary, the fact that they have already been determined liberates us from having to discuss them every time, allowing us to direct our attention to substantive political deliberations.<sup>28</sup> Just as with the rules of chess, they allow us to establish a framework that effectively allows us to play *something*.<sup>29</sup> There is no advantage in ambiguity and delegation in the rules from the constitution of settlement: in

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<sup>20</sup> Compare, for instance, the majority and dissenting votes in *Parents Involved in Community Schools v. Seattle School District No. 1* (2007), particularly when they argue if the fourteenth amendment is 'colorblind' or not.

<sup>21</sup> The notion that the reading and interpretation of the United States Constitution is a phenomenon comparable to religion is longstanding, although its more detailed study can be found in LEVINSON (2011).

<sup>22</sup> LEVINSON (2012).

<sup>23</sup> See ACKERMAN (2018) ("... the dialogue between the generations that is constitutional law"); STRAUSS (2010).

<sup>24</sup> Article 25 of the Chilean Constitution.

<sup>25</sup> *Id.* Article 26.

<sup>26</sup> *Id.* Article 47.

<sup>27</sup> LEVINSON (2012), p. 17 (clarifying that, given that the meaning of these matters is clear to all, the conversation quickly veers towards their convenience or wisdom).

<sup>28</sup> On the idea that rigid constitutional regulations can be liberating by allowing substantive political debate instead of reevaluating the rule book, see HOLMES (1988) p. 231 ("When they enter the stalls, voters decide who will be President, not how many Presidents there will be").

<sup>29</sup> This example is also from HOLMES (1988), p. 227.

this case, it is best to be as exact and strict as possible, precisely to avoid discussions where there should not be any.<sup>30</sup>

## 1.2 Why Should We Focus on Judicial Institutions?

As mentioned above, we want to discuss precisely of delegating matters that on a central aspect of the constitution of settlement: the regulation of judicial institutions.<sup>31</sup> We argue that the Convention must make more than the expected effort to reach agreements that define the structural aspects of central judicial matters for constitutional democracy. Comparative experience –as well as the Chilean experience, as we will see further on– provides multiple examples where constitutional drafters, for a variety of reasons, designed judicial institutions without enough detail, leading to undesirable results such as delays in its creation,<sup>32</sup> its cooptation on behalf of partisan politics,<sup>33</sup> or simply never coming to exist.<sup>34</sup>

Everything seems to predict that, if there is no conscious effort against it, this minimalistic approach could become the fate of certain matters pertaining to the organization and functioning of the judiciary in the Chilean future Constitution. There are three forces that converge around this matter: i) it is an issue that citizens and Convention members have not paid any special attention to (at least up to this point in time), ii) despite its capital importance in contemporary constitutional democracies, and in which, iii) the Convention will be compelled to fill the gap caused by the “clean slate” upon which the new Constitution will be drafted.

First, judicial matters have not garnered enough attention from citizens or Convention members to lead us to assume that it will be treated as a priority in the Convention’s work.<sup>35</sup> Various facts allow us to sense that citizens have little interest in these matters. For example, one of the country’s main surveys reveals that only 5% of the people surveyed considers that judicial matters are one of the main topics to be treated by the Convention.<sup>36</sup>

A similar lack of interest can be sensed by reading the programs of Convention members presented to the *Servicio Electoral* (organ in charge of Chilean elections): more than half of the people elected to draft the future Constitution proposed little or nothing on this matter in

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<sup>30</sup> Dixon herself, who usually favors leaving matters open to future judicial construction, recognizes that “constitutional clauses designed to lay down the basic procedural rules of democracy [...] must be relatively specific and unequivocal in order to fulfill their role” (DIXON (2015)).

<sup>31</sup> In this essay we use the expression “judicial institutions” in a broad sense to refer to both courts and courts as such, and institutions that participate the government of the judiciary.

<sup>32</sup> See *infra* Part III. 1.

<sup>33</sup> See *infra* Part III. 2.

<sup>34</sup> See *infra* Part III. 3.

<sup>35</sup> In a coinciding opinion, SIERRA (2020), p. 22 (explaining that judicial matters have not garnered special attention in the constitutional debate). In similar terms, Soto includes these matters amongst the “*less intense ...but important debates*”. SOTO (2020).

<sup>36</sup> In particular, the answer refers to the Constitutional Court, which is eleventh on the list of priorities. See CADEM (2021a).

their programs. Among the remaining people, there are some very innovative proposals in terms of judicial design: close to a fifth -across the board- suggest the creation of a committee in charge of the administration and logistical aspects of the Judicial branch, in order to separate these tasks from jurisdictional responsibilities.<sup>37</sup> Similarly, many propose the creation of administrative courts, but under different arrangements.<sup>38</sup> However, in all these cases the proposals are excessively general and, almost all of them, lack the elements that allow us to envision how these ideas would be embodied in an institutional design.<sup>39</sup>

There is perhaps an important exception to this lack of attention on behalf of Convention members regarding judicial matters: the Constitutional Court. Many of them advocate for the introduction of deep reforms to this court, some even suggest replacing or eliminating it.<sup>40</sup> While some conservative Convention members believe it essential to maintain the preventive constitutional control of laws,<sup>41</sup> some who are more progressive push for the elimination of the Court.<sup>42</sup> This controversy around constitutional justice implies the opposite to the aforementioned situation, due to the fact that there is an interest in this matter on behalf of Convention members. However, it could lead to an identical result: facing the impossibility of reaching an agreement on such an important and controversial matter, it may be that this discussion is also postponed and simply delegated to the legislator.

Secondly, judicial institutions are gaining an increasing impact in the governance of contemporary democracies in a phenomenon sometimes called *juristocracy*.<sup>43</sup> Ignoring these issues when undergoing constitutional design is simply burying our heads in the sand: the lead role that courts have gained in the past decades will, sooner or later, place them at the center of public attention. This “judicialization” of politics across the world has extended the lead scope of courts not only on controversial issues on the adjudication of social rights or public policy, but also what Ran Hirschl has called ‘mega-politics’, that is, those matters of

<sup>37</sup> See, for example, the proposals made by the parties *La Lista del Pueblo* (The People's List), the Socialist Party (*Partido Socialista de Chile*), *Evolución Política* (Political Evolution), *Revolución Democrática* (Democratic Revolution and *Partido por la Democracia* (Party for Democracy).

<sup>38</sup> See, for example, the proposals made by *Instituto Libertad* (adopted by some *Renovación Nacional* (National Renovation) Party Convention members), and the Socialist Party.

<sup>39</sup> In this sense, José Francisco García has raised the need to shift from generic to specific proposals on issues that have been deemed central to the constitutional discussion and that, therefore, could become critical knots. One of the issues the author mentions as central is precisely constitutional justice. GARCÍA (2021)

<sup>40</sup> See, for example, the proposal made by the Communist Party (*Partido Comunista de Chile*) (which suggests a complete replacement), or Ivanna Olivares (who proposes eliminating the Constitutional Court and transferring its attributions to the Supreme Court).

<sup>41</sup> The document by the *Unión Demócrata Independiente* (Independent Democrat Union) (2021) states that “without preventative control (which can only be elective control) it makes no sense to have a constitution, given that, by simple law, Congress could ‘bypass’ the Constitution”. (Point 6)

<sup>42</sup> The document by *Frente Amplio* (Broad Front Party), proposes “...ending the current Constitutional Court, establishing a new parity institutionalism that guarantees fundamental rights and the effective application of the new Constitution.” (Point. 3.a).

<sup>43</sup> HIRSCHL (2009). Furthermore, see Stone SWEET (2000); TATE & VALLINDER, (1997) In Latin America, see GONZÁLEZ-OCANTOS *et al.* (in the press).



absolute and utmost political importance that often define schisms and divide antagonistic groups that are the structure of a political community.<sup>44</sup>

Thus, in many of the world's most important democracies – be it due to their size, cultural influence, or tradition – courts have started to resolve matters of unusual political importance. For example, the United States Supreme Court determined the result of the 2000 presidential election when ruling on *Bush v. Gore*.<sup>45</sup> In Brazil, the Federal Supreme Court blocked the participation of the most popular candidate according to surveys in the presidential elections of 2018.<sup>46</sup> In *Miller II*, the British Supreme Court strongly criticized the Prime Minister for seeking to limit parliamentary debate in the run-up to the United Kingdom's withdrawal from the European Union.<sup>47</sup> More recently, in *Eldstein* the Israeli Supreme Court prevented a parliamentary group from legislating to limit the Prime Minister from standing again for general elections.<sup>48</sup> And thus, actions by superior courts around the world are benefitting from the tenuous line that separates constitutional law and politics are becoming ever more common, and irretrievably determine the course of the political cycle.

This phenomenon is certainly not foreign to Chilean reality. Although Chilean courts have historically proven to be indifferent to major political arguments and conflicts that occur in Chilean society, they presently have a more substantial role as political actors.<sup>49</sup> The increasingly common reprimands against the so-called *supremazos*<sup>50</sup> and the *third legislative chamber*<sup>51</sup> – a way to critically describe the Supreme Court's rulings and the actions of the Constitutional Courts – can be understood as a manifestation thereof. However, this rising importance of the judiciary in Chilean politics contrasts with the little – or non-existent – attention that has been given to the design of the judicial branch.<sup>52</sup>

Thirdly – and in a somewhat counterintuitive way –, these situations (the generalized lack of interest with differing proposals on a specific matter added to the weighted importance of the matter) cannot be translated into the simple conservation of the status quo, as can be expected in other circumstances. Although the constitutional rules that regulate judicial matters have, for the most part, endured the test of time (some can be traced back to 1823), one of the key axes of the agreement that started the constitutional process involves drafting a new Constitution on a *blank slate*. This means Convention members are obliged to decide *something*. Contrary to what would happen in a simple constitutional reform that is built on an

<sup>44</sup> HIRSCHL (2008) pp. 93-118.

<sup>45</sup> *Bush v. Gore* (2000). Also see BALKIN (2001); CHEMERINSKY (2000-2001).

<sup>46</sup> RESENDE & RIBAS (2018).

<sup>47</sup> *R (Miller) v The Prime Minister and Cherry v Advocate General for Scotland* (2019).

<sup>48</sup> WEILL (2021).

<sup>49</sup> COUSO & HILBINK, (2011).

<sup>50</sup> For a more in depth look at this phenomenon in the Judicial Branch, see GARCÍA & VERDUGO (2013), pp. 199-200.

<sup>51</sup> For example, see Fernando Atria & Constanza Salgado, *El TC como tercera Cámara* (serie de columnas), El Mostrador.

<sup>52</sup> ALDUNATE (2016) p 123 (“The general design of our judiciary has never been deliberately and consciously thought of and, although we initially found its flaws at the start of our independent life, it has remained unaltered in its foundation.”)

existing text, even maintaining the current norm would have to be a conscious decision made by the Convention.

Given these circumstances, it might be tempting to follow Dixon and Ginsburg's advice to delegate an important portion of these matters to the legislator. This route could save constitutional creators time and energy that they may want to channel into matters they, or the people they represent, are more interested in, leaving these issues to a future legislator that will have more resources and incentives to create an adequate regulation. In fact, judicial matters are those that Dixon and Ginsburg report as the most frequently delegated to the legislator, comparatively speaking.<sup>53</sup>

In this same line, some – such as Lucas Sierra – state that we must aim for a minimalist constitutional design for judicial matters, basing this on the convenience of “reducing the constitutional intensity of judicial regulation...” given the “... increasing detail of its regulation”.<sup>54</sup> The panel called by the Ministry of Justice in 2018 to assess the Judicial Branch reforms, had a similar stance albeit in a different context. One of the conclusions the panel reached was that “the current normative design is inadequate primarily because, on one hand, the Constitution seems excessively extended...” in some of its judicial designation mechanisms, “without being able to fully justify the use of the Constitution to regulate matters that are obviously under legislative discernment.”<sup>55</sup> One effective strategy to reach the aforementioned purpose in each case would be to hand over some judicial matters presently ruled in the Constitution to legislative regulation. However, the cases presented in the next section show warnings against this stance.

## II. LATE, POORLY, AND NEVER: ITALY, ARGENTINA, AND CHILE

Can the Convention learn about judicial design from other constitutional processes? We believe it can. We are offering the description of three processes with a common structure: an incomplete constitutional regulation that led to failure or endangered unprecedented judicial institutions that were created in these processes: the Constitutional Court in the Italian Constitution of 1948, the *Consejo de la Magistratura* (Judiciary Council) in Argentina's constitutional reform in 1994, and the *tribunales administrativos* (administrative courts) in the Chilean Constitution of 1925.

Our cases, however, differ in practically everything else. At first glance, we can see that they relate to different time periods and contexts. The constitutional processes in each case also differ: the Chilean Constitution of 1925 was drafted after an institutional breakdown where the Armed Forces and President Alessandri Palma promoted a constitutional process

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<sup>53</sup> DIXON & GINSBURG, (2011a), p. 660.

<sup>54</sup> SIERRA (2020), pp. 41-2.

<sup>55</sup> Final Report with the Conclusions and Recommendations of the Interinstitutional Panel on Judge Designation, January 10<sup>th</sup>, 2019, p. 11.

under the care of a committee that had few powers of internal deliberation;<sup>56</sup> the Italian Constitution of 1948 was the product of a constitutional assembly that had to reach an agreement between communists, socialists, and Christian democrats at a time of political effervescence following the fall of fascism;<sup>57</sup> the Argentinian constitutional reform, although the product of an elected convention, was not prompted by popular mobilization but by an agreement reached by political elites with the primary goal of allowing the reelection of the standing president.<sup>58</sup>

These differences are precisely what allow us to highlight the similarities between these processes.<sup>59</sup> As we shall see, these cases reveal a faulty design or regulation on a constitutional level which led to similar obstacles in its legislative performance that should, in as much as is possible, be avoided in the present constitutional process. In a somehow pessimistic vein, we shall call them ‘late’, ‘poorly’ and ‘never’.

## 2.1 Late: Italy 1947

Some aspects of the Italian Constitutional Assembly of 1947 are similar to those of the Chilean Convention of 2021. The Italian Assembly – a product of a referendum during a time of intense social mobilization – was formed by a mosaic of radically different parties that, at the same time, were pressured to provide a constitutional text to the people in a short time span.<sup>60</sup> Given these conditions, it is unsurprising that, as the deadline approached, the Assembly opted to leave some matters unsolved so as to ensure that Italy could start the year 1948 with a new Constitution.

One of the issues left to future legislation was the design of the Constitutional Court. The Court – which joined the Italian constitutional architecture after being harshly discussed at the core of the Assembly – was left to the final weeks of the debate.<sup>61</sup> Lacking time and possibly unable to reach agreements in the little time left, the Assembly simply drafted the general framework of the institution *in pencil*; the rest had to be *colored in* by Parliament by way of a special legislation.<sup>62</sup> Article 135 of the approved Constitution stated that the Constitutional Court would be formed by “fifteen judges, a third of them would be nominated by the President, another third by Parliament and another third by ordinary and administrative supreme magistrature.” Additionally, the article set down certain minimum

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<sup>56</sup> DONOSO (1976) p. 280 (“*In said Committee there was no voting, opinions were collected and melded together as long as they were compatible with the key idea of setting reasonable limits to parliamentary – and therefore partisan – intervention in the State administration.*”).

<sup>57</sup> See in general ACKERMANN (2019), pp. 131-156.

<sup>58</sup> See *infra* Part III.2.

<sup>59</sup> On the methodology of the ‘most different cases’, see HIRSCHL (2005), pp. 139-142.

<sup>60</sup> The Assembly originally had 8 months to draft the Constitution, this term was extended twice. In total it took just over a year and a half (see Luogotenenziale Legislative Decree of March 16<sup>th</sup>, 1946, n. 98, article 4 and its extensions by constitutional laws 1/1947 and 2/19467).

<sup>61</sup> BARSOTTI, *et al.* (2015), pp. 17-18.

<sup>62</sup> These expressions belong to CALAMANDREI, (1966), page 556.

professional qualifications needed to be eligible for the position, which would last twelve years (non-renewable) and whose president would be elected by the Court members.<sup>63</sup>

The constitutional regulation left multiple central aspects to legislative regulation, such as the effects a declaration of unconstitutionality could have, the relationship between the Court and ordinary judges and, essentially what matters here, the nomination mechanisms of its members. Parliament would soon realize that its task was not merely regulating or executing established constitutional rules, but – more dramatically – also “completing the missing pieces of the constitutional design”.<sup>64</sup>

The results of the delegation were not the ones expected. In 1955, the influential jurist and Assembly member Piero Calamandrei bitterly reported that his essay on “constitutional immobility” of the time should have been titled *How to Undo a Constitution*.<sup>65</sup> Ultimately, a law regulating the Court was only written in 1953, and the nomination of the first group of constitutional judges was done in 1956.

Given the speed at which this Constitution was approved, this delay requires an explanation; two have been attempted.

The predominant explanation<sup>66</sup> was proposed, contemporarily, by Calamandrei, a key figure in the incorporation of the Court in the Constitution as a constitutional creator and in its regulation as a representative in the First Legislation. Calamandrei condemned the *majority obstructionism* of the governing Christian Democracy.<sup>67</sup> The governing party, which was the first minority in the Constitutional Assembly at a time of uncertainty regarding the next electoral results, had successfully promoted the creation of the Court despite the skepticism of socialists and communists, who saw it as a “*bizzarria*” created to invalidate any future political achievements of a working-class majority.<sup>68</sup> However, having secured a majority in Parliament, the Christian Democracy was in no rush to hang Damocles’ sword over its own head.<sup>69</sup> Thus, for many years, Christian Democrats let this legislative procedure to drag along in order to prevent the creation of the Court while they were in the government. When the pressure became unbearable, the majority of Christian Democrats attempted a final trick: they forced the interpretation of the Constitution, suggesting that the five members nominated by the President would come from a proposal made by the Ministry of Justice.<sup>70</sup>

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<sup>63</sup> Some of these aspects were modified later by constitutional law 2/1967.

<sup>64</sup> BARSOTTI *et al.*, p. 21.

<sup>65</sup> CALAMANDREI (1955) p. 211.

<sup>66</sup> According to Andrea Simoncini, who is against this version, the ideal of majority obstructionism was transformed into the “reading code” of most jurists regarding the delay in the activation of the Court. See SIMONCINI (2006).

<sup>67</sup> This was done in a series of articles published in his magazine *Il Ponte*, compiled later in CALAMANDREI (1966).

<sup>68</sup> The influential communist leader Palmiro Togliatti stated that the Court was a “*bizzarria*” created due to fear of a future leading working class. See TOGLIATTI (1947).

<sup>69</sup> Although the Constitution, in its transit clause VII, seemed to enable ordinary judges to declare unconstitutionality of laws, they quickly abdicated their right to exercise this power in any relevant way (see BARSOTTI *et al.* (2015), p. 26).

<sup>70</sup> In Italian republican design, the President is mostly a ceremonial figure, vested on a person with consensus and prestige, but in fact has few governing functions.

Additionally, they advised that the five members that had to be nominated by the Legislature should be chosen by simple majority. With this double trick, the Christian Democracy would ensure having ten of the fifteen members of the Court.

A major scandal was followed. President Luigi Einaudi – a liberal defender of constitutional control since before the March on Rome in 1922 – threatened to resign from office if the government did not take down its plan to control the Court. Finally, they acknowledged that the President could nominate his five members autonomously and required a majority of two thirds of the Legislature (which was reduced to three fifths after three unsuccessful voting rounds) to nominate the members chosen by Parliament. However, there was one last trick: a few months later, parliamentary elections would take place under the *legge truffa* (or ‘cheat law’), by which the party that gained more than half of the validly cast votes would have 65% of the seats in Parliament. If the Christian Democracy’s optimism was confirmed at the voting stalls, it would then have the necessary majority to name five judges for twelve years (and, according to Calamandrei’s speculation, to put pressure on President Einaudi when he nominated his five judges).<sup>71</sup> But this scenario never took place: the Christian Democracy obtained 49.8% of the votes and had to negotiate the nomination of judges with the opposition.<sup>72</sup> This design ultimately created a Court that has enjoyed broad legitimacy in Italy.<sup>73</sup>

However, recent studies discard the ‘majority obstructionism’ idea as an explanation and, instead, point out to the lack of focus and genuine disagreements surrounding the organization of the court. The Constitutional Court was a novelty in the Italian (and European) institutional regime, which tended to have a constitution that was flexible to the supremacy of Parliament. Believing Parliament would resolve this issue quickly as if it were a common legislative matter would underestimate the depth of the institutional discussion they were made to face.<sup>74</sup>

In any case, it is worth asking why – despite these initial difficulties – the Italian Constitutional Court was indeed put into operation and achieved stability and legitimacy during the following decades. Bruce Ackerman ascribes it to the statesmanship of some of the actors who were involved. Both President Einaudi and Prime Minister Alcide De Gasperi were men at the dusk of their political careers. They had both struggled against fascism from exile or prison and had understood and defended the importance of a Constitutional Court to prevent abuses from majorities. They were not going to pass up the chance to enshrine these constitutional ideals for short term political advantages.<sup>75</sup> Once set up, says Ackerman,

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<sup>71</sup> CALAMANDREI (1955), pp. 586-595.

<sup>72</sup> ACKERMAN (2019), p. 151.

<sup>73</sup> This can be seen in that, although there was firm opposition throughout the Constitutional Assembly; communists and socialists quickly began demanding the creation of the Constitutional Court and submitting claims to it.

<sup>74</sup> This is SIMONCINI’S stance (2006).

<sup>75</sup> See ACKERMAN (2019), esp. pp. 149-150.

the Court was able to represent the Italian “constitutional moment”, and thus protect itself from any attempts of being overthrown by successive circumstantial majorities.<sup>76</sup>

The Italian Constitutional Court achieved becoming a successful institution despite – and not due to – the frugality of its constitutional regulation. It is worth reflecting on whether, regardless of the circumstances that permitted its success, these would be present in the Chilean institutions that would have to implement the constitution that will be presented next year. To ponder on this better, it is perhaps worth looking at a less auspicious example, like the one we will analyze next.

## 2.2 **Poorly: Argentina 1994**

The Argentinian constitutional reform of 1994 was the offspring of an agreement between majority parties of the time: the governing *Partido Justicialista* (Justicialist Party) and the opposing *Unión Cívica Radical* (Radical Civic Union). The reform was born deprived of any epic. President Menem wished to reform the Constitution of 1983, which prevented him from being reelected. The opposition, headed by former president Raúl Alfonsín, decided to concede in hopes to prevent the risk of Menem stretching the interpretation of the constitutional reform clause and doing so himself. This is the way in which the ‘*Pacto de Olivos*’ (Olivos Pact) came to be, allowing the presidential reelection in exchange of the inclusion of a number of institutional reforms that would soften what was considered a hyper-presidential regime.<sup>77</sup>

Amongst the multiple reforms destined to reduce the president’s power, some dealt specifically with the Judicial Branch. There was a certain consensus that Menem’s government had seriously taken advantage of its constitutional faculties to interfere with the judiciary. In 1990, Congress increased the number of Supreme Court members from five to nine which – with the addition of a resignation as a symbol of protest – allowed Menem to authorize the nomination of five Supreme Court justices in a short seven-minute session.<sup>78</sup> These judges formed what was later called *mayoría automática menemista* (Menemist automatic majority). Not long after, Congress also passed a procedural reform that, amongst other things, doubled the number of federal instruction courts in Buenos Aires, which allowed it to name half a dozen judges, many of whom were highly questionable either due to their lack of technical qualifications or proximity to government. Finally, breaking an unwritten tradition, Menem designated the *Procurador General* (the head of the federal district attorneys) by simple decree, bypassing the submission to the Senate’s approval.<sup>79</sup>

This calamitous situation of the Judicial Branch was an issue of great importance for the Constitutional Convention that reformed the articles of the Constitution that ruled these

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<sup>76</sup> ACKERMAN (2019), p. 156.

<sup>77</sup> Raúl Alfonsín explains this process in *Democracia y Consenso*. ALFONSÍN (1996).

<sup>78</sup> A second resignation granted Menem a sixth designation soon after.

<sup>79</sup> All these maneuvers are described in VERBITSKY’s book (1993).

three matters. However, the reforms provided a defective or incomplete design of these judicial institutions, which placed them once again in a delicate situation. Currently, at the time of submission of this work, both the number of Court members and the majorities required to name the heads of the Public Ministry are still being discussed.<sup>80</sup> However, in this essay we will focus on the most innovative institution introduced by the reform of 1994 and the most problematic one: the Judiciary Council.

Under the regime of the 1853 Constitution, federal judges were nominated by the President with approval of a simple majority of the Senate.<sup>81</sup> This system granted the governing party ample scope of discretion when naming judges, which would later practically be entrenched in their positions (given that they could only be removed from office by a cumbersome political trial, which required two thirds of each chamber in Congress).<sup>82</sup> Additionally, the powers of superintendence, administration, and discipline over the Judicial Branch were concentrated in the Supreme Court (which, again, was perceived as inappropriately close to the government).

The 1994 Convention believed it was possible to remedy these issues with the creation of a *Consejo de la Magistratura* (Judiciary Council), inspired by European models and that were already being used in some of the country's provinces and in other countries in the region.<sup>83</sup> In the new constitutional draft, the Judiciary Council would be in charge of arranging competitive examinations and background checks in order to create a list of three people from which the Executive Branch would have to choose a candidate to occupy the position, again, with the Senate's approval. The Judiciary Council would also have disciplinary powers over judges and, in more serious cases, could formulate accusations in front of a novel Prosecution Jury that had the power to remove them from office. Finally, the Judiciary Council would have superintendence and administrative powers over the Judicial Branch.

The key question was: Who would the members of such a novel organ in the Argentinian institutional architecture be? According to the Constitution "the Judiciary Council shall be formed periodically to ensure balance between the representation of the political institutions that resulted from popular elections, the judges in all instances and the lawyers of the federal

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<sup>80</sup> President Alberto Fernández called a panel of experts, whose majority proposed lowering the majority (currently at two thirds) needed to approve the offices of the *Procurador* and the *Defensor General* in the Senate. A bill on this matter was passed by the Senate and has a favorable opinion in the relevant commissions in the House, where still has parliamentary status. Additionally, some of the members of the panel of experts have suggested raising the number of Supreme Court members, which has been the subject of multiple political rumors during 2020 and 2021. For a critique about the panel's work, see GUIDI & NIETO (2020).

<sup>81</sup> Article 86, paragraph 5, of the Constitution of 1853 (with the reform of 1860).

<sup>82</sup> *Id.* Article 45.

<sup>83</sup> The enforcement of this kind of committee was in vogue in Latin America during the 90's, promoted by institutions such as the World Bank. See for example Dakolias, (1997), pp. 12-13.

bar. It shall equally be formed by other people from academic and scientific backgrounds, according to the law".<sup>84</sup>

At the assembly's core, many constitutional drafters noted that leaving the design of the Judiciary Council open to future organic law – even though it would need to be approved by a special majority<sup>85</sup> – would leave its composition open to the will of the majorities of each political contingency. The leader of the progressive opposition *Frente Grande* (Large Front), Carlos 'Cacho' Álvarez, observed that due to this defect "...the Constitution will become flexible".<sup>86</sup> Some minorities suggested specific compositions, generally recommending that the Judiciary Council be composed mostly by judges.<sup>87</sup> However, the agreement of the *Pacto de Olivos* ignored these warnings, perhaps because they wanted to reach a feasible text.

The minority's prediction was more than fulfilled. First, the Judiciary Council's first law would take four years to be passed, specifically due to the differences surrounding its composition, which finally had twenty members: four deputies and four senators (in each case, two from the majority legislative front, and one from each of the ones that followed), one representative of the Executive Branch, five judges (including the Supreme Court president), four lawyers and two academics.<sup>88</sup> However, it was not long before this arrangement was questioned. Between 2004 and 2006, Néstor Kirchner's government argued that a twenty member Judiciary Council was "elephantastic", and sponsored a reform that would reduce its members from twenty to thirteen (thus eliminating the legislator of the third front of each chamber and reducing the representation of the remaining tiers).<sup>89</sup> Many claimed that the new formation had the peculiarity that it automatically granted the ruling party five over thirteen members, creating a *blocking minority* against the Judiciary Council's important decisions that had to be made with two thirds of the votes. Much later, this reform was declared unconstitutional in first and second instance, in a ruling that – at the time this essay is being submitted – is being studied by the Supreme Court.<sup>90</sup>

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<sup>84</sup> Article 114 Argentinian National Constitution.

<sup>85</sup> *Id.*

<sup>86</sup> National Constitutional Convention, 21<sup>st</sup> Meeting – 3<sup>rd</sup> Ordinary Session (Continuation), August 1<sup>st</sup>, 1994, page 2629. The constitutional creator for the right-wing party *Unión de Centro Democrático* (Democratic Center Union), Iván Cullen, warned about the inconvenience of not determining the formation of the Judiciary Council in the Constitution (*id.* Page 2762).

<sup>87</sup> See for example the proposal of the constituent of the Socialist Party Guillermo Estevez Boero, in *id.* page 2559.

<sup>88</sup> Law 24.937 passed on December 10<sup>th</sup>, 1997, created a 19-member Judiciary Council that only included one academic. The law was modified before it came into force by law 24.939, which – amongst other reforms – added a second academic.

<sup>89</sup> See the Senate debate regarding this reform in Senate Chamber, 42<sup>nd</sup> Meeting, 2<sup>nd</sup> Extraordinary Session, December 21<sup>st</sup> and 22<sup>nd</sup>, 2005, and see the Committee being called "elephantastic" in Senator Cristina Fernández de Kirchner's intervention, p. 170 of the provisional shorthand version.

<sup>90</sup> A story of the following laws that regulated the Judiciary Council and the various rulings that have dealt with this can be read in Nicolás Dassen & Sebastián Guidi, 'Comentario al artículo 114', in GARGARELLA & GUIDI (2019).



The story did not end there. Even though when she was a Senator she promoted this reform, when Cristina Fernández de Kirchner was President she promoted a new modification to the law which changed the number to nineteen.<sup>91</sup> On this occasion it would not only be the number of representatives nominated to each tier that would change, but also how they would be elected: academics, lawyers and judges would not be chosen by their peers, but rather by popular election that would take place every four years alongside the presidential elections.<sup>92</sup> This reform was immediately questioned judicially, and, with the first elections that would choose Judiciary Council members just around the corner, it was quickly declared unconstitutional by the Supreme Court six votes to one.<sup>93</sup>

Eugenio Raúl Zaffaroni's dissenting vote, the only deeming that the reform was constitutional, is particularly interesting. Zaffaroni had been a member of the Constitutional Convention for the *Frente Grande* and, in this capacity, had specifically reported that the regulation "said nothing about the allocation proportions [for each new organ created by the Constitution, such as the Judiciary Council], nor about how the election would be carried out" and that "every time in history that this has happened, a partisan struggle comes along arguing the composition of the Judiciary Council."<sup>94</sup> As a judge, he went back to his critique, which reminds us of Calamandrei's, and which is worth quoting *in extenso*:

The main feature of the constitutional reform was that it framed institutions without finishing their structure. On occasions we had the impression that it simply made a few broad strokes, which merely outlined the organs and competences, without the precision required to outline its institutional construction [...] At the very core of the Santa Fe Assembly we warned about the risks of this novel constitutional form, as it is inevitable that circumstantial politics fill the structural gaps unaddressed by the constitutional text, with the solutions dictated by the circumstances of power of each moment, not by corruption or even for unethical reasons, but by the essential competitive dynamics of political activity, which irrevocably leads to fill each space of power that is offered at any given moment.<sup>95</sup>

Although Zaffaroni was criticized for validating as a judge what he had criticized as a constitutional drafter,<sup>96</sup> the very fact that he had to adjudicate *Rizzo* proves him right. He argued that the 2013 reform "...did not filter through the text's loopholes but penetrated through the massive chasms left by the infra-constitutional law."<sup>97</sup> He adds that "...we can

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<sup>91</sup> Law No. 26.885, of 2013.

<sup>92</sup> *Id.* Art. 4.

<sup>93</sup> *Rizzo con Estado Nacional* (2013). The main argument of this ruling is that article 114 of the Constitution mentions judge and lawyer "representatives" to form part of the Judiciary Council, which was why they should be elected by them. A critical analysis of this ruling can be found in GUIDI and DASSEN (2019).

<sup>94</sup> Cited by Argibay and Petracchi's vote in *Rizzo con Estado Nacional* (2013), cons. 7.

<sup>95</sup> Judge Zaffaroni's dissenting vote in *Rizzo con Estado Nacional* (2013), cons. 4°.

<sup>96</sup> This is suggested by the opinions of judges Petracchi and Argibay in *Rizzo con Estado Nacional* (2013), cons. 8.

<sup>97</sup> Judge Zaffaroni's dissenting vote in *Rizzo con Estado Nacional* (2013), cons. 11.

blame ourselves to tears...<sup>98</sup> but the damage has already been done. Only a constitutional reform that designs the text precisely can prevent the Judiciary Council from being subjected to political bickering.<sup>99</sup>

The composition of the Judiciary Council experiences all the fluctuations of this type of institutional design. The enactment of the legal rule took almost half a decade, and was still reformed before it came into force, only to be reformed later twice by the same government in search of increasing degrees of interference – reforms that were declared unconstitutional at the time. Later, both former president Mauricio Macri and current president Alberto Fernández announced that they would seek to reform it once again.<sup>100</sup> Since the enactment of the constitutional reform over 25 years ago, there has not been a single president who has been deprived of reforming the Committee's composition, or at least attempted to do so. There is no indication that this will stop being the case as long as the constitutional regulation of the Judiciary Council maintains its pithiness.

The lesson provided by the Argentinian case is of unusual relevance for the Chilean constitutional discussion. Not only do several constitutional drafters propose the design of a council that is similar to the Argentinian, President Piñera's government is also pushing for a similar organ in Congress. For this final initiative, the experience of the Argentinian Judiciary Council may be especially important: the Chilean Supreme Court has suggested the division of its jurisdictional powers from its administrative and management powers for several years, leaving these powers to an independent and separate organ.<sup>101</sup> In its initiative, the Chilean Executive Branch seems to make the same mistake that can be extracted from the Argentinian case: leaving the composition and nomination of the members of the Judiciary Council to legislative majorities.<sup>102</sup> More importantly, however, there is nothing that allows us to infer that this will not be the route taken by the Convention.

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<sup>98</sup> *Id.* cons. 12.

<sup>99</sup> *Id.*

<sup>100</sup> Mauricio Macri's government plans can be consulted in Misculin (2017), President Alberto Fernández, for his part, requested the opinion of an Advisory Council regarding the convenience of modifying the composition of the Judiciary Council. When an affirmative answer was given by the Council, he announced that he would send a bill of law on this issue to the National Congress, although it has not been done to date (see, President Alberto Fernández opening speech of the 139<sup>th</sup> period of ordinary session of the Honorable Congress of the Argentinian Nation, 2021). For a critique of the recommendations of the Advisory Council, see GUIDI and NIETO (2021).

<sup>101</sup> See for example Act No. 187-2014 (2014), that contains the XVII Declaration of the Supreme Court Reflection Sessions (pp. 8-9).

<sup>102</sup> See the Bill Bulletin No.14192-07 (2021) that proposes the creation of the National Committee for Judicial Nomination.

### 2.3 Never: Chile 1925

The lack of administrative courts in Chile is usually considered one of the largest debts of Chilean public law.<sup>103</sup> This debt is also heightened by the fact that its creation has been a constitutional promise for decades, given that article 87 of the 1925 Constitution stated that:

There shall be Administrative Courts, composed by permanent members, to solve the complaints lodged against arbitrary acts or provisions of political or administrative authorities and whose knowledge is not given to other Courts by the Constitution or the law. Its organization and powers are a matter of law.

This constitutional provision can be explained in the historical and political context that underlies the discussion of the constitutional text of the 1925 Constitution. One of the main purposes sought by President Alessandri Palma with this constitutional process was the restoration of a strong presidential regime.<sup>104</sup> Both he and the Armed Forces that supported him held that this was a good alternative to the political excesses brought by de facto parliamentarism that had prevailed in the country for decades. Among threats, general Mariano Navarrete pointed out the following to the Constitutional Commission: "... the country is sick of petty politicking and wants a strong government once and for all...".<sup>105</sup>

Thus, the creation of administrative courts can be explained as a way to smooth the criticism of political parties regarding Alessandri' and the Armed Forces' presidential project. This would explain many references to the role that these courts would play to limit presidential authority, as well as protecting from potential abuses from administrative institutions. For example, in the subcommittee discussions in charge of deliberating over article 87, President Alessandri acknowledged that many of these reforms would involve "... letting go of a series of powers..." which would cause that "... these Courts would be able to protect employees against potential abuses performed by the heads of public offices or services. Otherwise, they would end up with no control whatsoever".<sup>106</sup> In the second and final session where this issue was discussed, President Alessandri once again claimed that "... they proposed to limit the President's powers" with the creation of these courts.<sup>107</sup>

Fernando Alessandri Rodríguez, who acted as secretary of the subcommittee during that second session, argued in identical terms. In his intervention, Alessandri Rodríguez – who was the President's son, private secretary and a prominent jurist – identified publicly as a

<sup>103</sup> For example, PANTOJA (2001), p.13.

<sup>104</sup> CORREA (2015), p. 58; DONOSO (1976).

<sup>105</sup> Official Proceedings, p. 455. It is important to bear in mind that practically all the political elite was in favor of maintaining the de facto parliamentarism that had preceded the institutional breach, as is shown in the declarations of the Communist and Conservative parties in the newspaper *La Nación* in late July 1925. DONOSO (1976) p. 282-3.

<sup>106</sup> Proceedings, Twenty-Eighth Session of the Constitutional Reform Subcommittee (1925a), p. 368.

<sup>107</sup> Proceedings, Thirty-Third Session of the Constitutional Reform Subcommittee (1025b), p. 519.

supporter of the creation of administrative courts because "...every day the powers of the State are being increased, and also the issues that must be resolved by authorities in only one instance ...". Accordingly, "what we hope to achieve is that administrative acts that ought to be performed according to the law and not subject to the revision of ordinary courts, are ruled out by these Administrative Courts."<sup>108</sup>

The political parties' fear of Alessandri and his party, on the other hand, was not unwarranted: when returning to the head of the government, Alessandri carried out presidential leadership with all-embracing power, without a parliamentary counterweight, as he shut down Congress with the help of the Armed Forces after the coup of 1924.<sup>109</sup> Political parties, whose supremacy over the Executive Branch had been performed for decades from Congress, had more than enough reasons to be fearful. It is enough to remember the incendiary rhetoric against Congress that branded Alessandri's term, especially on his tours through headquarters of the Armed Forces.<sup>110</sup>

It is in this scenario that the subcommittee in charge of drafting the constitutional text decided to create specialized courts that were independent from the Judicial Branch. The choice of this mode of administrative control answers, on one part, to a deep constitutional conception that reigned at the time – and during most of the time that the Constitution of 1925 was in force – according to which courts that were part of the Judicial Branch were barred from revising the actions of the State's political powers, given that this would involve a breach of the principle of separation of powers by interfering in the actions of the Executive Branch.<sup>111</sup> It is expressly stated as such in the committee discussions that were in charge of drafting article 87, justifying the need of these courts.<sup>112</sup>

On the other hand, we must also remember the profound distrust caused by the Judicial Branch between the Armed Forces who instigated the 1924 institutional crisis and entrusted Alessandri Palma the drafting of a new Constitution. This distrust can mostly be explained because during practically all the parliamentary republic (1891-1924), political parties influenced judicial nominations to the extent that the composition of the Judicial Branch

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<sup>108</sup> Proceedings, Thirty-Third Session of the Constitutional Reform Subcommittee (1025b), p. 519.

<sup>109</sup> EYZAGUIRRE (1979).

<sup>110</sup> CORREA (2015), p. 58.

<sup>111</sup> See, for example, the reference to the texts of José Victorino Lastarria in the *Junta de Gobierno* (1982). There were a few minority opinions that held that the issues between private people and public powers should be dealt with by ordinary courts. For example, HUNEEUS (1891).

Finally, there were those who did not share the need for administrative courts on account of the separation of powers but wanted them for pragmatic reasons. In this sense, Santiago Vivanco noted that if all issues were handed to ordinary courts, this would translate into a 'real refusal of justice' because, given the significant workload of the courts on private law matters, they would barely be able to see to administrative issues that were unknown to them. VIVANCO (1917), pp. 37-38.

<sup>112</sup> Minutas, THIRD-THIRD SESSION OF THE CONSTITUTIONAL REFORM SUBCOMMITTEE (1925b), pp. 518-519 (particularly the interventions of Luis Barros Borgoño and Fernando Alessandri Rodríguez. The latter, answering the question made by one of the committee members, answered on the competences of an ordinary court to hear contentious-administrative cases: "... they cannot do so because it is and shall declare itself incompetent to hear these matters and the private individual will be flouted, unless he resorts to administrative agents so that they can seek justice with the corresponding Minister...".

reflected the dominating groups inside Congress.<sup>113</sup> It is unsurprising that the Executive Branch had avoided relinquishing its judicial powers to courts that were evidently complicit with Congress.

Article 87 reveals a clear lack of guidelines for the legislator regarding the design of these courts. This inadequate legislation regarding the framework in which this legislative delegation operated can be explained, first, by the almost inexistent attention that was given to the matter. The creation of administrative courts was a subject of discussion partially in two of the subcommittee's drafting work sessions, nearing the end of its operation, recalling its text only days before the referendum that was called to ratify the new Constitution.<sup>114</sup>

More importantly, there did not seem to be any clarity about the role they were hoping to allocate to these courts. As stated by Rolando Pantoja, when the President defended the creation of these courts "... he was unable to clearly sketch [...] the key profiles that would be manifested in the administrative courts, omitting a view that contradicted the spirit of the provision that was being analyzed".<sup>115</sup> This statement was made on the grounds that President Alessandri apparently during the two sessions where the creation of these courts was being discussed contradicted himself regarding their scope of competence.<sup>116</sup> Furthermore, Alessandri also urged the subcommittee members to deny the specification proposed by Ezequías Allende that intended to limit the competence of these courts exclusively to public employment matters, despite his agreement with this idea during the previous session.<sup>117</sup>

When this statement was denied and given the haste for a new Constitution (Alessandri was ending his term in only a few more months), it became clear that the solution taken by those involved was to defer certain substantive aspects of the organization, competence, and operation of these courts to a later legislative instance. This can be seen by the intervention of Luis Barros Borgoño, who "... is of the opinion of leaving the article as it stands and let the law mentioned in that same article organize these courts, specifying their powers".<sup>118</sup>

This delegation came at a high price: although various legislative efforts were attempted, these courts never came to exist. These courts – and the administrative jurisdiction in general – were never more than a *ghostly presence* during the reign of the Constitution of 1925<sup>119</sup> and,

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<sup>113</sup> FAÚNDEZ (2011). One of the main goals of the military movement, that had the purpose of ending the parliamentary republic of 1924, was purging the Judicial Branch, and propelling a deep reform within it.

<sup>114</sup> Article 87's (originally 89) text was discussed during the 28<sup>th</sup> and 33<sup>rd</sup> subcommittee's sessions on July 9<sup>th</sup> and August 3<sup>rd</sup>, and the referendum was held on August 30<sup>th</sup>, 1925.

<sup>115</sup> PANTOJA (1963), p. 16. The author also notes that Alessandri Palma "... did not have a clear idea of the role these administrative courts represented on a national level", even though he supported their creation (p. 17).

<sup>116</sup> See 28<sup>th</sup> and 33<sup>rd</sup> subcommittee sessions in charge of drafting the constitutional text of July and August 1925.

<sup>117</sup> Proceedings, Thirty-Third Session of the Constitutional Reform Subcommittee, 3/8/1925, pp. 518-520.

<sup>118</sup> Proceedings, Thirty-Third Session of the Constitutional Reform Subcommittee, 3/8/1925, p. 520.

<sup>119</sup> PIERRY (2000), p. 97

therefore, the various legislative proposals that attempted to take on this matter wandered the legislative halls for years in search of political support that had never really existed.<sup>120</sup>

It is precisely this lack of support that suggests that the failure to create these courts was due to mere chance. During the validity of this constitutional regulation, five bills with proposals were submitted, ranging from the fundamental aspects of the organization and composition of the administrative courts to their specific location within the State's constitutional architecture to trifles such as their physical location of these courts in the national territory or the ways in which they would be funded.<sup>121</sup> Such differences led to discussions and controversies within academic circles, all perfectly legitimate, but they seemed to be used as a delaying strategy on behalf of the political elite. Julio Fernández points out that politicians from all political parties enthusiastically entered into the most varied doctrinal arguments in order to delay or hinder the legislative process of these bills in Congress.<sup>122</sup> Additionally, this attitude is a reaction to a constant issue in constitutional politics in the XIX century and most of the XX century: a collaborative effort of the political elite to exclude the judiciary from key aspects of state governance.<sup>123</sup> It is therefore unsurprising that these administrative courts had staunch enemies even before they came into existence: this can be inferred from the words of Senator Eliodoro Yáñez, president of the Senate that had just been shutdown, who during the subcommittee debates argued "... that the creation of these Administrative Courts... will create useless and dangerous movement".<sup>124</sup>

Therefore, during the entire time the Constitution of 1925 was in force and faced with the impossibility of reaching a legislative agreement regarding the design of administrative courts –either due to the political elite's effort to prevent it or due to legitimate differences about the adequate design of these courts–, the political elite developed alternative methods to fulfill the supervisory purposes sought with the creation of such courts, as was, for example, the strengthening of the General Comptroller of the Republic.<sup>125</sup>

Once again, this is due to the fact that the political elite shared the idea that there was no need for judiciary control over the administrative process, and it was therefore preferable that the restrictions to the Executive Branch stemmed from the political process.<sup>126</sup> This Chilean episode shows a peculiar result that was deciding to not decide: an "obstructionist delay" that was not the result of discrepancies around the design of the courts and its fundamental aspects, but rather, probably originated from a strategy to specifically avoid its existence.

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<sup>120</sup> FOUNDATION OF THE LAW FACULTY OF UNIVERSIDAD DE CHILE (2001), p. 8.

<sup>121</sup> These can be consulted in *Junta de Gobierno* (1982).

<sup>122</sup> FAÚNDEZ (2011), p.164.

<sup>123</sup> FAÚNDEZ (2010), p. 35 ("*In order to facilitate the functioning of this executive-driven regime, the elite made every effort to exclude the judiciary from key areas of public policy*").

<sup>124</sup> Proceedings, Twenty-Eighth Session of the Constitutional Reform Subcommittee, 9/7/1925, p. 368.

<sup>125</sup> In this line, see FAÚNDEZ (2007).

<sup>126</sup> FAÚNDEZ (2011), p.164.

### III. EXCUSES, INTERESTS, AND PRINCIPLES

The three case studies we have analyzed have one thing in common. In all of them the scarce constitutional regulation of fundamental judicial institutions led that these be rolled out late (as was the case in Italy and Argentina), poorly (as was the case in Argentina and the Italian Christian Democracy's first attempts to regulate the Constitutional Court), or, simply, never (as was the case with the Chilean administrative courts). Although bound by the limitations inherent to a comparative study of few cases, we shall dare to extract a few preliminary lessons from these different processes.

Although we have shown that the lack of constitutional regulation led, in all three cases, to delays or flaws in the deployment of the analyzed institutions, we have not said much about which were the mechanisms that could have been at play. In this chapter we aim to interpret the three cases considering three possible mechanisms that explain how the scarce regulation can lead to these results. We shall call them *providing excuses*, *lack of coordination* and *disagreement of principles*. In the first case, legislators took advantage of the scarce constitutional regulation and multiple interpretations as an excuse to not carry out what they wished would not exist. In the second case, on the other hand, legislators may genuinely have wanted to create the institution outlined in the Constitution, but they lacked a common guide that enabled them to do so without giving up more than what they deemed essential in the inevitable negotiations that would take place. The third case is slightly different: it is not the lack of constitutional regulation that directly causes the problems in its deployment; it is that both are caused by a rather fundamental disagreement of principles. Each of these mechanisms provides an objection to our argument, and we answer them in the following section.

#### 3.1 Providing Excuses

A broader constitutional regulation provides future legislators with a perfect excuse to not carry out instructions or deploy institutions that they wish would not exist. And it is to be expected: the organs created by the constitutional drafters restrict, almost by default, the powers that were previously carried out by other organs. Additionally, by entering the institutional framework of checks and balances, they threaten to control or restrict the use of power of existing organs. In these circumstances, it is not surprising that the bodies in charge of their creation and execution are reluctant to do so or attempt to do so in a way that reduces or limits their powers. As Piero Calamandrei stated on account of the Italian Parliament's task to complete the Constitutional Court, it is like asking wolves to put locks on the sheep pen<sup>127</sup> (or, again, like Bertoldo looking for his tree).

It is unsurprising that the constituted powers “drag their feet” when it is time to carry out the institutional promises of the organ that created the Constitution. In fact, we can see this dynamic occurring in all the cases we studied in the previous chapter. In Argentina,

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<sup>127</sup> CALAMANDREI (1966), p. 233.

Congress, dominated by the President's party took four years to create the Judiciary Council that would take away their power to nominate and remove all the federal judges in the country. In Italy, Parliament – whose majority was the Christian Democracy – took five years to create the Constitutional Court that would have the power to invalidate the laws it dictated (and another three years to nominate the relevant judges). In Chile, politicians openly ignored the instruction and never created the administrative courts whose purpose was specifically to control the greatest prize that their coalitions could aim for: the Executive Branch. In the first two cases, the bulk of negotiations, which lasted for years, dealt with the essential matters of composition and nomination of the members of the institutions being created, that the constitutional text itself could have determined. In the third case, a more precise constitutional text could have avoided unproductive discussions and eased the occasional efforts of reform.

This dynamic is so common that Jodi Finkel has suggested that judicial reforms, although legislatively promised or enacted, are only executed when a government with actual power to do so perceives that their authority is at stake and, thus, would claim the merits of the judicial reform whilst its successor would be the one paying the costs of heavier control.<sup>128</sup> This dynamic was also present, with a few caveats, in the three cases previously described. In Argentina, the leading majority in Congress passed the creation of the Judiciary Council only after they lost the mid-term elections of 1997, which buried any hope of reelection for President Menem.<sup>129</sup> In Italy, the Christian Democracy delayed the creation of the Constitutional Court while it had a majority in Parliament and only decided to go forward with it when they believed they could control it beyond their guaranteed time in control of Parliament.<sup>130</sup> In Chile, although there was an apparent overall consensus within the political elite to boycott the creation of the administrative courts, there are episodes that also suggest what Finkel describes. For example, the government of President Carlos Ibáñez del Campo presented a proposal of administrative courts less than two months before the presidential elections in which Jorge Alessandri Rodríguez was elected.<sup>131</sup>

This phenomenon might pose an objection to our argument: if the execution of judicial reforms depends on the loss of power of the governing party, perhaps the regulation's frugality is innocent of our charge (and, symmetrically, a more detailed regulation would not have the power to circumvent it). One version of this objection could go even further, stating that the excuses are irrelevant for real political action and that, if politicians who are reluctant to enforce reforms cannot base this on constitutional parsimony, they would quickly resort to others.

It is important to recognize from the start that the density of regulation is certainly not the only factor that conditions the success or failure of the institutions created by the

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<sup>128</sup> FINKEL (2008).

<sup>129</sup> This is Finkel's example, FINKEL (2008), pp. 57-58.

<sup>130</sup> See *supra* Part III.1, esp. notes 71-73. Mary Volcansek explicitly frames the creation and execution of the Italian Constitutional Court in the insurance dynamics posed by Finkel, see VOLCANSEK (2010).

<sup>131</sup> See the *Proyecto Zúñiga* of July 21<sup>st</sup>, 1958, in Junta de Gobierno (1982).



Constitution. But despite not being able to prevent future legislators from tending towards a “majority obstructionism”, it can take away its excuses to do so. Congress opposing a constitutional order due to mere fancy is not the same as opposing it due to rifts presented to the people as legitimate technical disagreements. As Faúndez reminds us in the Chilean case, a vague text allows discussion and doctrine to flourish in various ways, so long as it delays the execution of what they are hoping to avoid executing.<sup>132</sup> Additionally, a precise text enables the opposition and civilian society to put pressure on concrete execution, rather than put them in the awkward position of advocating for a distinctive institutional design or waiting for an improbable consensus from the political leadership.<sup>133</sup>

### 3.2 Lack of Coordination

Even if we think in political actors with genuine intentions to execute the reforms promised in the Constitution, the lack of constitutional determination can lead to political arguments on the issue of who oversees what. Every influential actor can agree things would be better off if this institution existed, but no one is immediately willing to give up the places they could gain in it. It is not difficult to see this dynamic at play in the Italian case and, especially, in the Argentinian case. As judge Zaffaroni stated, “the simple essentially competitive dynamic of political activity [...] irrevocably moves people to occupy all the positions of power that are offered on each occasion.”<sup>134</sup>

Getting angry about this process is equivalent to getting angry about the law of gravity. Constitutional drafters should not expect future legislators to willingly give up power, they should, as proposed by the authors of *The Federalist*, “economize in terms of virtue”.<sup>135</sup> In these circumstances, constitutional drafters can anticipate the enormous negotiation costs involved in the execution of these organs and directly decide the key aspects themselves. This would imply a smaller loss for this or that party but would be compensated by the fact that it manages to avoid keeping the matter of institutional design perpetually open.

Additionally, constitutional drafters usually have the advantage of not being able to foresee, with acceptable precision, who will be in power a few years after their work is done. Legislators, on the other hand, are constantly creating laws for a congressional composition that exists, without ever being insured against the excesses of a future majority.<sup>136</sup> As the

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<sup>132</sup> See FAÚNDEZ (2011), p. 164.

<sup>133</sup> The issue of the specificity of regulations and the consequences regarding their legitimacy and execution has been dealt with extensively in the international relations theory. Although this is a different field and its conclusions cannot necessarily be directly transferred to constitutional design, Franck’s observation in his classic *The Power of Legitimacy Among Nations* (1991) is interesting: “the more determined the standard, the harder it is to justify the lack of execution” (page 54). For the full development of this argument, see Franck’s cited work (pp. 50-66) and LEGRO (1997).

<sup>134</sup> *Rizzo con Estado Nacional* (2013), cons. 4°.

<sup>135</sup> According to ACKERMAN’s reading (1984).

<sup>136</sup> Jon ELSTER suggests that if “all institutions were at hand all the time, those in power would be tempted to make the post of their offices for private purposes, and those out of power would have doubts about being part

United States Supreme Court Justice, Louis Brandeis, stated in another context, in cases like these it is not so important that these matters are settled correctly, as long as they are settled in some way.<sup>137</sup>

It can be argued that constitutional drafters could use less intrusive tools to encourage the legislator to break institutional inertia, such as fixing strict deadlines with default rules if it does not comply. Additionally, these mechanisms could provide a 'focal point' that helps resolve the coordination problems of ordinary politics.<sup>138</sup> These tools can, undoubtedly, be useful on certain occasions. Without going any further, the extremely complex South African constitutional transition was possible, partially, due to an interim constitutional agreement that would later be replaced by the definitive Constitution.<sup>139</sup>

However, we must not overestimate its power or underestimate its difficulty. First, a default rule can perhaps remedy legislative inertia, but not future captures that the institution might be subjected to due to circumstantial majorities.<sup>140</sup> Consider the Argentinian case studied in this article: the Constitution ordered a transit clause requiring Congress to execute the law of the Judiciary Council in a one-year deadline, under penalty of not being able to nominate more judges from the date that such deadline expires.<sup>141</sup> The Council Law took an additional two years beyond this deadline and, during the time in between, there was a huge political bid where the President continually threatened to nominate judges by decree.<sup>142</sup> The leftover of this transit clause is therefore ambiguous: perhaps it was useful to speed up the execution of the law,<sup>143</sup> but it was not enough to prevent subsequent manipulation.

Secondly, certain default rules can be theoretically attractive but are difficult to enforce in practice. This happens particularly when there is an especially disruptive deterring rule, causing it to be unacceptable by the existing institutions. Consider, for instance, the default rule in the Italian Constitution, which established that until the Constitutional Court was created ordinary courts would exercise constitutional control. This was not the result expected (pressuring the legislator to create the Court to avoid that any judge could invalidate its actions), but rather the opposite (since ordinary judges decided to renounce the exercise of

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of projects that take time to reap their fruits. Additionally, if nothing can ever be deemed as resolved, there would be huge losses due to fruitless negotiations and factionalism" (ELSTER & SLAGSTAD, (1988), p. 9).

<sup>137</sup> Brunet. *Coronado Oil & Gas Co* (1932) ("Stare decisis is usually the wise policy, because, in most matters, it is more important that the applicable rule of law be settled than that it be settled right").

<sup>138</sup> Dixon studies this possibility (DIXON (2019) pp. 179-182).

<sup>139</sup> See, for example, ACKERMAN (2019), ch. 3.

<sup>140</sup> As was, for example, the Italian and Argentinian cases studied in this work.

<sup>141</sup> The thirteenth transit clause stated that "after the first three hundred and sixty days after this reform has entered into force, lower-rank judges can only be nominated by the procedure provided in the current Constitution. Until that date, the previous system in force shall apply".

<sup>142</sup> See, for example, BIELSA & GRAÑA (1996), pp. 561-563 (which narrates, from a contemporary perspective, a part of the political argument around the Committee law).

<sup>143</sup> Other laws ordered by the Constitution without a similar transitory provision took over a decade in being executed, as was for example the law to control presidential decrees, which was only passed in 2006.

this power, in practice).<sup>144</sup> Something similar took place in the previously studied Chilean case: faced with the absence of administrative courts, ordinary courts refused to hear cases against the Administration by stating their incompetence regarding these matters,<sup>145</sup> to the point that when a court exceptionally accepted the competence to do so it unleashed a political conflict that even involved the President.<sup>146</sup>

Finally, sometimes designing a constitutional default rule in order to fill in future legislative inaction can require a considerable amount of effort, akin to drafting a definitive rule. Indeed, if the rule is destined to last while it is not modified by legislators, those groups who benefit from the default will be encouraged to keep constitutional inertia. If this is the case, constitutional drafters must be wary of distributing veto power too lavishly. If constitutional drafters are unable to do so, they will have reasons to believe that the provisional rule will become the definitive rule, which takes us back to square one.

### 3.3 Disagreement of Principles

Finally, it may occur that disagreements do not stem from a competition for places in power but simply from differences of opinion on matters of principles. If this is the case, we are no longer talking about a lack of constitutional regulation as the cause of the problems within the constitutional design (as it is with the other cases), but rather that in any case it is the disagreement of principles that causes the minimal constitutional regulation as well as the problems of a subsequent design. However, it is worth considering the first as a “cause” of the second in the sense that it is usually easier and more convenient to settle these disagreements during the constitutional design phase than in a subsequent legislative phase.

There is an understandable objection against reaching detailed agreements in the drafting of the Constitution regarding the disagreement of principles. On one hand, as we expanded on previously, in key aspects of the ‘constitution of conversation’ open clauses allow the coexistence of different groups within the political community claiming constitutional protection for themselves. Constitutionalizing the relationship between the State and religion in detail, for example, would only suffocate legitimate political stances, which in the long run could undermine the Constitution’s legitimacy.<sup>147</sup> On the other hand, we mentioned that in certain matters pertaining to the ‘constitution of settlement’ details are desirable as they prevent disputes where there should not be any. However, matters of principles are part of

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<sup>144</sup> See *supra* Part II.1.

<sup>145</sup> Given that there was a constitutional provision that stated the existence of administrative courts, ordinary justice systematically declared its incompetence to hear contentious-administrative disputes on the grounds set forth by article 4 of the *Código Orgánico de Tribunales* (Organic Code of Courts) of 1943 and its previous law *Ley de Organización y Atribuciones de los Tribunales de Chile* (Court Organization and Powers Law) of 1875 barred the Judicial Branch from interfering in powers of other public organs and carrying out other functions that those granted.

<sup>146</sup> *Socotransco con Fisco* (1946)

<sup>147</sup> *Supra* Part II.1.

the underpinning of the constitutional design.<sup>148</sup> Consider for instance how different institutional designs reveal different visions on the desirable degree of judicial independence, or subordination of the will of the majority to individual rights. An example of our case studies is the inflamed democratic rhetoric that went alongside the Argentinian Judiciary Council of 2013 to allow the popular election of its members: the government at the time managed to make the discussion revolve around the “democratization of justice”.<sup>149</sup> Settling matters as ideologically dense in the Constitutions could preclude any future democratic debates.

There are still some observations on this matter. First, even when ideological arguments are invoked, it is not at all obvious that they really are what causes the constitutional bottleneck. Dixon and Ginsburg note that the causes that lead constitutional drafters to “decide to not decide” tend to be more prosaic issues as is the workload of the constitutional creators and the large amount of matters they must settle. Before making the diagnosis of whether a disagreement is “ideological” or not, it is worth examining if the possibility of reaching “overlapping consensus” has been taken to its limit.

However, even if we conclude that what prevents constitutional drafters from reaching an agreement regarding the regulation of judicial institutions are the fundamentally different ideologies, it would still be advantageous that the efforts to resolve them are fully executed rather than delegating them to the next legislature (where they would necessarily have to be resolved!). As Dixon observes, ‘constitutional politics’ are usually geared by a public spirit that allows agreements that are usually not present in ‘ordinary politics’.<sup>150</sup> Once the process ends, the maelstrom of daily political discussion and the multiple citizen demands that weigh on legislators make it likely that they will not place institutional design as a first priority. The Chilean experience is revealing in this sense: legislative inaction has led that the regulation of multiple judicial matters of great importance are decided by Supreme Court agreements that range from the processing of the *acción de protección* (Chilean legal action to protect fundamental rights) to the substitutions of judges in higher courts.<sup>151</sup>

Finally, the advantage constitutional drafters have over the regular legislator is not merely a psychological one. The Convention is in the privileged position of having a vision of the system as its members outline the constitutional architecture, considering institutions as a whole and managing the balance of power between them. Therefore, designing judicial institutions in legislative instances involves accepting a series of institutional limitations and constraints set by the remaining cogs of the ‘engine room’, that will not affect those who are designing institutions in constitutional processes. In addition to this lower degree of freedom,

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<sup>148</sup> On how the design of judicial institutions can show constitutional principles even in the absence of a written constitution, such as the British constitution, consult DELANEY (2016).

<sup>149</sup> See for example President Cristina Fernández’s speech (FERNÁNDEZ (2013)).

<sup>150</sup> DIXON (2019) p. 76 (“Constitutional processes, as noted by Bruce Ackerman, frequently take place in a “moment” of highly elevated public deliberation and commitment to change, and thus an openness to political agreements. As this moment reaches its end, and the regular political dynamics come in to play, it is much more difficult for the political elite to gain the level of majority support for the necessary change”).

<sup>151</sup> In this sense, SIERRA (2020).

it is not uncommon to see negotiations between unrelated matters in legislative politics.<sup>152</sup> It is not difficult to see why we would want the number of members of a constitutional court or a judiciary committee not to be on the same negotiation table as an infrastructure project in some district.

## CONCLUSION

Throughout the previous chapter we have shown the mechanisms that cause minimal regulation to be a factor that leads to the downfall of judicial institutions created with the aim of limiting existing constituted powers. The delays and faults we have described are not exclusively due to the poor constitutional regulation, but it certainly makes up a significant part of them. Considering this factor, then, does not resolve the issue, but it is essential to be able to do so.

Defining what elements must be solved on a constitutional level and which ones must not is a complex task we cannot answer with certainty on this exploratory essay. Excessive regulation in constitutional design is, of course, far from convenient and, in fact, there are judicial matters in which delegation would seem advisable. Dixon and Ginsburg mention cases in Australia and the United States regarding judicial matters where it was preferable to resort to delegation: the definition and powers of inferior courts, given the federal organization of these two countries.<sup>153</sup>

To sum up, we wish to speculate on certain specific judicial matters in which delegation is not convenient. In doing so, we are completely aware of the limitations of our study: we definitely require a larger number of case studies to reach more specific generalizations. But given the urgency of the Convention's task, we dare to venture that the key aspects of the compositions, nomination, and removal system of the members of judicial institutions cannot be left to future legislative regulation.

Leaving these matters open to future regulation is not uncommon. In two of the three case studies (the Italian case and the Argentinian case) the nomination of its members was at the core of the political argument, although constitutional drafters made a shy – and insufficient – attempt to delineate it. There are other cases we have not touched on in this essay which seem to support the preliminary recommendation that the lack of specification of these elements in the constitutional text brings inertia and instability during the execution phase: consider the case of the Supreme Court and Public Ministry in Argentina<sup>154</sup> or the General Committee of the Judicial Branch in Spain.<sup>155</sup>

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<sup>152</sup> On the practice of miscellaneous laws (“logrolling”), see in general GIMÉNEZ (2008).

<sup>153</sup> DIXON & GINSBURG (2011a), p.646. See article 71 of the Australian Constitution and article 3 section 1 of the Constitution of the United States.

<sup>154</sup> See *supra* Part III.2.

<sup>155</sup> On the legislative modification carried out in 1985 which allows more political control over the Committee, and other persistent discussions related to their composition, see SIERRA (2013).

Without going any further, not even the oldest constitution in the world is free of vicissitudes. Sanford Levinson used the number of members of the United States Supreme Court justices as an atypical case in which the rule that they have to be nine is kept as an unshakable tradition in spite of it not actually being in the Constitution's written text.<sup>156</sup> In 2012 he wrote that the failure of Franklin Delano Roosevelt to increase the Supreme Court showed that the number of nine justices had become part of the "unwritten constitution" and that explained why no one even suggested that Barack Obama should increase the number to avoid facing a hostile Court.<sup>157</sup> Nine years later, however, a new government put the issue of the number of members into question once again when facing a hostile Court, with the support of a group of eminent academics.<sup>158</sup> We can go a bit further back: the previous government had forced the unwritten rule about nominating the Supreme Court justices to ensure control over the Court.<sup>159</sup> Regardless on our opinions on the wisdom of each of these decisions, it is clear that the lack of constitutional rules on these issues brought along serious inconveniences.

The Convention faces a huge challenge on several fronts, in a conflicted but hopeful society. Faced with the monumental task of forging a new social pact, prosaic matters such as the composition of judicial organs and the mechanisms needed to nominate its members run the risk of being postponed to the end of the discussion. This would be a mistake: considering the pervasiveness of the "juristocracy" phenomenon, judicial nominations today could well be the fundamental rights of tomorrow. Refusing to give this matter attention is like claiming the start of a new healthy lifestyle next Monday: it is perhaps understandable and comforting, but most definitely deceptive.

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<sup>156</sup> LEVINSON (2012), p. 252. He is, however, not the only one arguing this. See for example the works of EPPS & SITARAMAN (2019).

<sup>157</sup> LEVINSON (2012), p. 252 (adding that "as long as one believes that keeping the Supreme Court as a body with nine members is a good thing, perhaps a flaw of the 1987 Constitution to not have specified the size of the Court".)

<sup>158</sup> On the committee created by President Biden to study the functioning of the Supreme Court, including the number of its member, consult Osnos (2021). A review of the recent academic debate on the matter can be consulted in EPPS & SITARAMAN (2019) pp. 175-177 whom also propose a system to name members by draw between the circuit judges (*id.* pp. 181 and following).

<sup>159</sup> Donald Trump nominated three members of the Supreme Court, two of them in a way that was questioned by the Democrat opposition. When nominating the first of them, Neil Gorsuch, he had to eliminate the filibuster tradition (the power senators have to speak for an unlimited amount of time, preventing the organ's ability to vote) in the sessions of judge appointment. When nominating Amy Coney Barrett, the majority of the Republican Senate had to distance itself from the recently set precedent created by Barrett to block President Barack Obama's nomination of Merrick Garland, which consisted in not passing nominations carried out by judges in the last year of their term. On the first case, see FLEGENHEIMER (2017). On the second, FANDOS (2020).

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