

# **A constituted constituent process? Chile's failed attempt to replace Pinochet's constitution (2013-2019)**

## **Um processo constituinte constituído? A tentativa falhada de substituir a constituição de Pinochet (2013-2019)**

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### **Abstract**

Chile's 1980 constitution was forcibly imposed by a bloody dictatorship. Its original sin, however, was not the only democratic fault. The rules or constitutional locks were designed to have a protected democracy that limited the exercise of popular sovereignty. Until today, Chile is the only Latin American democracy that has not yet replaced the substantive normative grounds upon which the dictatorship cemented its power. The paper examines how the theory of constituted constituent power may have ambivalent results, by taking Chile's case study. In particular, it assesses the attempt of former President Bachelet to replace the Constitution under the current rules. Although such project initially had the potential to truly transform Chile's constitutional framework, it failed under the constraints of those amendment rules.

**Keywords:** Constituent power; Chilean Constitution; Constitutional amendment rules.

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## Resumo

A Constituição do Chile de 1980 foi imposta à força por uma ditadura sangrenta. O seu pecado original, porém, não foi a única falha democrática. As regras ou fechaduras constitucionais foram concebidas para ter uma democracia protegida que limitava o exercício da soberania popular. Até hoje, o Chile é a única democracia latino-americana que ainda não substituiu os fundamentos normativos substantivos sobre os quais a ditadura cimentou o seu poder. O documento examina como a teoria do poder constituinte constituído pode ter resultados ambivalentes, tomando o estudo de caso do Chile. Em particular, avalia a tentativa do ex-Presidente Bachelet de substituir a Constituição ao abrigo das regras actuais. Embora tal projecto tivesse inicialmente o potencial de transformar verdadeiramente o quadro constitucional do Chile, falhou sob as limitações dessas regras de emenda.

**Palavras-chave:** Poder constituinte; Constituição chilena; regras da emenda constitucional.

*For there to be genuine hope, the future must be anchored in the present.  
It cannot simply irrupt into it from some metaphysical outer space.*

Terry Eagleton, HOPE WITHOUT OPTIMISM

## Introduction: keeping the constituent flame alive

On October 25, 2019, more than a million citizens took over the streets of Santiago (and nearly half a million did the same in other cities throughout Chile) to manifest their discontent against what they claimed to be abusive living conditions. This protest — the largest protest in Chile, as it was aptly called — was inscribed in a swarm of massive protests that began taking place in Chile in October 2019 and that impelled the government to (literally) accept the exigency of protesters to open the constituent debate. After almost a month of massive protests and riots, which President Piñera sought to confront by declaring a state of emergency and resorting to fierce policing, the President addressed the nation reluctantly, departing from his (and right-wing constitutional scholars') initial proposal to introduce reforms to instead speak of adopting a new constitutional compact in lieu of the reforms.

This announcement triggered a political agreement among an ample specter of the political forces, called *Acuerdo por la Paz y la Nueva Constitución*. It defined the main aspects of a new itinerary that would lead to the replacement of Pinochet's Constitution. The agreement was followed by a constitutional amendment, expeditiously discussed and published on Christmas day of 2019. The amendment paved the way for our current constituent process. Most importantly, for the first time in Chile's 200+ years of independent existence, citizens will have the right to participate and democratically define the constitutional contours of collective existence.

But this paper critically examines the direct institutional antecedent, prior to the current constitutional process: former President Michelle Bachelet's attempt to replace the 1980 Constitution. We defend, from a theoretical viewpoint, the possibility a constituted constituent process, meaning that ruling institutions and procedures may well be used to trigger a constituent process. However, these conditions are demanding. As this paper argues, ruling institutions will trigger a constituent process if they are apt to unfold the political-constitutional agency of the people. On the contrary, if a constitutional itinerary resort to ruling institutions and regulations in order to suffocate the people's constituent power and their foundational potential, thus restricting their agency, then likely substantive outcomes would be limited and nothing more than a constitutional amendment can (or should) be expected. That is our take of what happened with Bachelet's failed attempt.

As we explain below, this theoretical approach allows us to show what features led to the failure of the constitutional change promoted under Bachelet's presidency. This process was one where the people's constituent power and their foundational potential was suffocated, and it is examined under the very own terms of the itinerary that President Michelle Bachelet announced in October 2015. We will offer our arguments as to why this itinerary eventually diluted what at first appeared to be a promissory constituent potential. The 2019's protests, triggered a process which appears to be resorting to current regulations not to dilute the constituent force, but to unfold, although inevitably channeling the political-constitutional agency of the people.

The paper begins by (1) introducing some of Chile's constitutional history. It will first (1.1) present and highlight Chile's constitutional exceptionalism. Different from other countries which transited from undemocratic or illiberal to democratic political regimes, Chile did so without a constituent moment. Worse still, it did so under the very constitutional frame imposed by the dictatorship in 1980. We will show (1.2) that, besides its *original sin*, this constitutional scheme was designed and implemented to neutralize — rather than enable — the political agency of the people. In a nutshell, as it will be developed below, “[t]he problem facing Chilean democracy today is not (...) an excess of majoritarianism to the detriment of institutions, but its opposite: the maintenance of dictatorship-tailored institutional dykes that make the political system immune to the will of the majority in certain areas” (Heiss, 2017).

The next section (2) describes how the constituent claim reemerged in Chile with renewed force in 2011 (2.1). It examines Bachelet's itinerary for constitutional replacement, and it shall use this description (2.2) to highlight, from a theoretical viewpoint, how a replacement process may become constituent despite resting in current and ruling regulations.

In the first part of the last section (3.1), it will be claimed that the principal obstacle the itinerary imposed to the constituent agency of the people was to excessively rest in the regulations at that time. As it will be argued, ruling institutions were not only resorted to, but were actually deepened by the very same authorities that were claiming to be addressing the people's demands. It will then move to explain (3.2) how, despite that previous failure, massive protests put the constituent claim on the political table once again. But different from that of Bachelet, this time the process has avoided imposing the 1980 Constitution locks upon

the constituent agency of the people. It has rather (and to a certain extent, surprisingly) enabled an unprecedented participatory process.

## **A Constitution without constituent power**

### **(a) The original sin**

From a constitutional viewpoint, Chile stands as a salient exception in the region's transitional panorama. As history shows, countries in the region that transited from dictatorships<sup>3</sup> to democratic regimes began to mark that shift (or celebrated it) by enacting new constitutions (Uprimny, 2011). In a certain way, many of these countries conceived their constitution-making moments as “synergistic . . . yielding a situation in which a constitutional text can become a potent political symbol of national identity, not another bit of legalistic mumbo jumbo” (Ackerman, 1992: 46). In fact, as some have argued, this wave of democratization was accompanied by “an unprecedented concern for constitutionalism and the rule of law” (Couso, 2011: 1520). This concern resulted in a felt need to protect democracy's endurance with liberal constitutional forms (Couso, 2011: 1520).

This was not the case of Chile. Whereas the rest of the countries in the region started to walk the transitional terrain by agreeing to new constitutional channels — some resorting to more democratic means than others, some achieving more democratic results than others —, Chile's constitutional regime had been defined quite some time before the transition began. In fact, the Constitution was imposed in 1980, eight years before Pinochet was defeated in the 1988 plebiscite the dictator himself called, in which he expected himself to be ratified in power. Chile's 1980 Constitution was authoritarian: it was neither enacted during a transition to democracy nor in “a democratic year” (Negretto, 2014: 84).

As it is well known, barely a month after the coup Pinochet appointed a study commission to prepare a new Constitution (Ensalaco, 1995: 257). With changes in its composition and procedures (and eventually in its name), the commission operated from 1973 to 1978. Despite the fact that, as Barros has argued, (some of) its members were convinced that they were lawyers working as an advisory group independent from (although designated by) the Military Junta, and under the conviction that they were drafting a constitutional scheme for a democratic regime (Barros, 2002: 89-91), they did hold a certain legal profile: they did not dissent from the economic and constitutional postulates of the Junta, and all were closer to the right (there were no representatives of the left or the center-left). It was a commission certainly limited on its pluralism (Viera, 2011: 154-155). Besides their personal profiles, this commission proceeded in secrecy and without opening its work to citizens. Its final draft was later revised by the ‘Consejo de Estado’, and eventually by the ‘Junta Militar’ itself.

A decree law approved the text of the 1980 Constitution (Decree Law No. 3464). At the same time, even though the text of the Constitution had already been approved, it also

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<sup>3</sup> Colombia appears as an exception in this panorama. Colombia never experienced a military dictatorship as did the rest of the countries. However, Colombia had its own political difficulties their constitutional process aimed to tackle.

decreed the convocation of a plebiscite.<sup>4</sup> This plebiscite was a fraud (Fuentes, 2013). The Junta was still in power, which implied that, at the least, the public order forces were arranged at will and that channels of communications (there was little room for alternative media) were officially oriented (Fuentes, 2013: 73-4). The debates surrounding the constitutional text took place under heavy restriction of the press, strong limitations over the freedom of expression of citizens, and, of course, intimidation of those who opposed the new Constitution (Fuentes, 2013: 74-82). Most notably, the plebiscite was held “amidst a state of emergency, with all political parties outlawed, no alternative presented to voters, no statement of the juridical consequences of a defeat, and ... no voter registration rolls, and no independent electoral oversight or counting” (Barros, 2002: 172).

### **(b) The Constitution as a cheat**

Now, from a substantive viewpoint, the 1980 Constitution did not look forward to welcoming democracy; rather, it meant to protect the dictatorship’s legacy from it (Ginsburg, 2014: 12-6). The objective was thus petrifying and to shield it from future revisions. In fact, along with the ratification of the Constitution, the plebiscite also included the renewal of Pinochet in power for eight more years. In October 1988, after eight years of semantic constitutional ruling,<sup>5</sup> the Chilean people were summoned to vote whether Pinochet should remain in power (‘sí’) or not (‘no’); 55.99% of Chileans voted ‘no’.

The comparative clout with which the Armed Forces faced the succession in power allowed them to get away with a constitutional framework in which they would tutelage the transition process (Agüero, 1998: 388-9). There are no doubts that the outcome of the 1988 plebiscite was important. In fact, considering the constitutional path Chile had been transiting so far, it might be right — as some have contended — to state that the 1988 plebiscite stands as the sole constitutional moment since the 1973 coup. However, as Joel Colón-Ríos has persuasively argued, these constitutional moments — at least in the theory of the author who popularized this idea (Ackerman, 1991) — could take place with neither the need of citizen participation nor the activation of the constituent power (Colón-Ríos, 2010).<sup>6</sup> The 1980 Constitution remained in place and would prove its binding force over Chilean politics in the years to come.

The transition that the 1988 plebiscite gave way to was of a very special kind. It was a transition that began under heavy tutelage of the Armed Forces, institutions to which the original 1980 Constitution assigned the role of being the final “guarantors of the nation’s permanent interests” (Loveman, 1994) — interests now supposedly embedded in the constitutional text. Not only was Pinochet himself still Commander-in-chief of the Army, but

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<sup>4</sup> A group of conservative law scholars issued a declaration stating that the constituent power was in the hands of the military junta. Being so the case, there was no need for the plebiscite. Gaete *et al.* (1980).

<sup>5</sup> Transitory provisions of the 1980 Constitution, as Barros put it, rendered its main body “largely nominal and declarative.” Indeed, besides perpetuating the military rule for eight more years, these provisions had the effect of “reconstitutionaliz[ing] the organizational constitution of military rule which had been codified during the first years of dictatorship ....” (Barros, 2002: 190-2).

<sup>6</sup> It rather needs, as Colón-Ríos contends, “ways in which government might be able to get the support of ‘We the People’ and speak in its name” through the very same institutions and procedures (Colón-Ríos, 2010).

also the Armed Forces were granted ample political and constitutional functions, most strikingly being the heads of the so-called National Security Council (COSENA, for its Spanish acronym) (Agüero, 1998: 388-9). While the Armed Forces have been taken back to their quarters and the COSENA was crucially amended in 2005, other institutional arrangements remained in place, critically shaping the turn of Chilean (constitutional) politics.

Professor Atria (2013) has termed this constitutional model as ‘Constitución tramposa’, that is, the Constitution as a cheat. According to Atria, a constitution defines the legal and juridical form of the State, on the one hand, and recognizes constitutional rights, on the other, rights that describe and prescribe the way we see one another. But constitutions do this for a reason: to allow the actualization or realization of the will of the people (Atria, 2013: 38-9). The 1980 Constitution did, and does, exactly the opposite. It is a device compounded of a cluster of locks that have prevented the people from appropriating a Constitution that was undemocratically imposed, therefore immunizing the dictatorship’s (as their supporters still call it) ‘œuvre’. In other words, and under the terms of a popular metaphor nowadays, the “engine room” of the Chilean Constitution was designed to neutralize the will of the people and to suppress democratic self-governance (Gargarella, 2013: 204-5).

Atria cites the words of one of the most important intellectuals of the dictatorship, Jaime Guzmán, to depict — as Guzmán himself did — the goal of the 1980 Constitution: to create a constitutional scheme so that, in case their political adversaries win future elections, “they will be constrained to make decisions [‘to follow a course of action,’ were his exact words] not so different to the ones we [those in power during the dictatorship] would make . . .” (Atria, 2013: 41).

This explicit aim resulted in three locks and a meta-lock. The first lock comprises a very specific type of law called Organic Constitutional Laws, which require a supermajority quorum in Congress to be approved. The Constitution prescribes that these laws can only be approved by four seventh (4/7) parts of Congress (article 66 of the Constitution). Such exigency dramatically shifts the power in favor of political minorities — in this case, the supporters of Pinochet’s legacy — and breaks the inherent political equality that justifies the democratic majority rule (Dahl, 1989: 139-141; Dahl, 2006: 15; Jiménez *et al.*, 2013: 362-3). In addition, any organic constitutional law — or its amendments — are subject to a preventive constitutional judicial review by the Constitutional Court (article 93 No.1 of the Constitution). The second lock is the binomial voting system. This voting system cannot be properly classified under the plurality/majoritarian or proportional representation electoral families. It had the aim of ensuring an “adequate representation to the main ‘minority’ of the country” (von Baer, 2007: 3). The system worked in the following way. In every legislative election, two seats must be filled. Political parties or political coalitions chose to run in each election with two candidates per list and the seats would go, first, to the candidate with the most votes and then, to the candidate with the most votes in the second finishing list. The only way for a list to get the two seats is by doubling in votes to the second list (Law No. 18.700, May 6, 1988, Art. 109 bis). By providing the same seats to the two first lists or political coalitions, the system overrepresented the right in Congress and gave it “a veto over the constitutional and legislative initiatives of the Concertación [the center-left political coalition]” (Pastor, 2004:

55). Despite the fact that this lock has been defused by the new electoral system partially inaugurated in 2017 — fully in the Chamber of Deputies but only in half of the Senate —, the effects of the binomial voting system in the operation of the political system may subsist in the dynamics of power, for example, in appointing authorities in autonomous state agencies such as the Constitutional Court or the Central Bank. The third lock is the preventive judicial review of legislation, a power granted by the Constitution to the Chilean Constitutional Court. Depending on the type of laws approved by Congress, the Constitutional Court may have to examine the compatibility of such law with the Constitution before being promulgated and published for its general application. This constitutional power was designed as the last frontier to protect the legacy of Pinochet’s Constitution. If a bill approved by Congress is an organic constitutional law, the preventive judicial review is mandatory. If it is a “simple” law, then the issue of its constitutionality might be brought before the Court by one fourth of the members of a chamber of Congress. Again, the idea is to establish a constitutional device to provide the right with a “last resort” mechanism in which political arguments may be won at a “third chamber”: the Constitutional Court (Atria; Salgado, 2016).

The final constitutional entrenchment is found in the Constitution’s rigidity. To change the system there is a special quorum for constitutional amendments. Under the Chilean Constitution, most of its parts can be changed with a vote of three fifths of the deputies and senators, while some special chapters — such as the one establishing constitutional rights, the Armed Forces and the Constitutional Court, or the very same Amendment chapter — requires two thirds of the members of Congress (article 127 of the Constitution).

The three locks and the meta-lock of the Chilean Constitution have resulted — as recent events have showed — in a neutralization of the people’s political agency (Atria, 2013: 45).<sup>7</sup>

After this historical survey, it should not come as a surprise why many regard the 1980 Constitution as Pinochet’s legacy, a constitutional inheritance that the Chilean people have not been able to reject.<sup>8</sup> Not just because of (what has been called) the original sin of Chile’s current Constitution, but because of the political practice it permitted and eventually created.<sup>9</sup> Chile’s transition to democracy was not accompanied by a constitutional enactment, let alone with a democratic exercise of constituent power. Quite the opposite: the constitutionalization that took place before the transition was meant to, and it has been successful in, locking the political agency of the people.

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<sup>7</sup> Three of the most important legislative decisions of late that aimed, in a sense, to alter the political model inherited from the dictatorship ended up in the Constitutional Court: two legislative amendments on the educational system (answering demands students posed through massive social protests), the reform of the electoral system, and the reform of the labor plan. Some of these decisions were declared unconstitutional — such as the bill proposing unions to be granted the exclusive power to collective bargaining —, while others passed the test. However, these are all decisions that have been possible despite the 1980 Constitution and its locks — and not thanks to it. *See in general* Atria *et al.* (2017: 51-72).

<sup>8</sup> It is true, as many claims today, that the Constitution has been amended many times—in fact, the 1980 Constitution has been amended several times. However, these reforms have not touched upon critical aspects of the model inherited in 1980 and were conducted through the very same procedures and rules then laid down — which has resulted in an elite-driven practice (Fuentes, 2011).

<sup>9</sup> We believe that the original sin argument cannot be trivialized. Professor Muñoz has convincingly argued that what best characterizes the imposition of the 1980 Constitution is the persecution, disappearance, and elimination of the opposition by means of institutionalized terror (Muñoz, 2016: 81ff).

## A constituted constituent power?

### (a) From marking votes to a presidential address

In the presidential election of 2013, citizens and social movements decided to massively mark their ballots with two letters: “AC”. The mark was the abbreviation for “Asamblea Constituyente” (constituent assembly). This call was known as the ‘Marca tu Voto’ (Mark your Ballot) campaign. First a protest, this disruptive electoral move ignited a social desire to deliberate and participate in the design and adoption of new constitutional rules (Coddou; Contreras, 2014: 123). Marking ballots is legal under the current electoral legislation, and it proved to be an adequate platform to bend the narrow scheme of popular participation under the current legal system. The marks were not legally binding (or anything close to that). They did, however, generate enough social agency which made room for a public discussion on whether the Chilean society required a new Constitution and, if so, what political proceeding should be used. It was a protest, a demand for new constitutional rules, but conducted in the act of voting, of democratic electoral participation. As such, the ‘Marca tu Voto’ campaign aimed to set a first step in an *iter constitutionalis* aimed to enact a new Constitution in Chile (Coddou; Contreras, 2014: 136-9).

Politicians reluctantly reacted to this demand. On October 13, 2015, President Michelle Bachelet announced what has been called the itinerary of the constituent process. In general terms, the itinerary was as follows.<sup>10</sup> It began with a preliminary stage of civic and constitutional pedagogy that took place between the months of November 2015 and March 2016. This first stage, stated the President, would serve as a means to provide the citizenry with the required information (“every necessary tool,” states government information) and then to later intervene, with the necessary level of knowledge, in the second stage of the process: the denominated public dialogue stage. The participative dialogues were not only aimed at capacitating the citizenry. Instead, they were aimed at opening a system of community consultation — at communal and provincial levels, to later move on to the regional level and finish with a final “national wide synthesis” — that would consider “every voice” (Chilean Government Itinerary, 2015).

How would they ensure that these stages would allow, as promised, the realization of a “participative process that is free, transparent, with no distortion or pressure of any kind” (Chilean Government Itinerary, 2015)? The itinerary’s answer was the creation of a Citizen Council that monitored the transparency and equity of educative and participative instances, respectively. The council was appointed by the government with the deliberate intention of securing a decent representation for the right. The itinerary called the outcome of these two first stages of education and dialogue the Citizen Foundations for the New Constitution.

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<sup>10</sup> For the purpose of this description, we rely upon the President’s speech and the information that the Chilean Government has provided for the citizenry. Hereinafter, we will cite them as the “Chilean Government Itinerary” (Chilean Government Itinerary, 2015).



Theoretically, these Citizen Foundations were meant to be the material upon which the constituent discussion would take place and to shape the New Constitution draft. But precisely because these Foundations were not the actual draft, they did not constitute the touchstone of the constituent process. The very same itinerary stated in a clear fashion that the Citizen Foundations were supposed to be (“will be transformed,” say the quoted documents) in accordance with “the best of the Chilean constitutional tradition, that is consistent with the legal obligations that Chile has acquired with the world” (Chilean Government Itinerary, 2015). Therefore, the Citizen Foundations were not equivalent to the New Constitution bill.

President Bachelet accurately affirmed that the 1980 Constitution did “not contemplate mechanisms for elaborating a new Constitution”. This is why she proposed a constitutional reform with a constitutional replacement mechanism. The content of that reform was quite specific: it was supposed to allow Congress at that time to enable the next parliament, so they could decide on the constituent mechanism. Such reform was meant to open the institutional channel of the process. But to get there, President Bachelet needed to successfully gather two thirds of the Congress members in office to approve the mechanism.

If that quorum was reached, then the next parliament would be tasked to decide what mechanism (constituent mechanism would be more accurate) should be used to elaborate the new Constitution. Originally, the project contemplated four possibilities: i) a constituent assembly; ii) a constituent congress; iii) a Joint Committee, composed of citizens and members of parliament; and, finally, iv) a plebiscite, so the citizenry could decide what the mechanism would be. As we note below, President Bachelet betrayed this promise and created a new mechanism in her draft submitted to Congress, which was not under the original four alternatives. The Constitutional Convention — without further details — was the mechanism selected by her presidency.

## **(b) Constituent potentiality (the theory)**

As it can be appreciated from the itinerary depicted above, Bachelet’s process towards constitutional replacement relied heavily on current constitutional regulations (including participant institutions, procedures and quorums). It did so despite the most prominent and extended version of constituent power in the region (Colón-Ríos, 2011), which claims that constituent power’s foundational violence can only be triggered absent any restriction current constitutional regulations might impose.

As it is well known, it was Carl Schmitt who explained that the political subject who decides the political and juridical form of the community exercises the constitution-making power (Schmitt, 2008: 125). This power is unbound, unlimited and ever present, which signals a political break with the anterior political form (a previous constitution) (Schmitt, 2008: 125-8). Hence, this power of political decisiveness and violence (in the sense of breaking with the past and giving place to a new order) does not need to be regulated — although a certain procedure will be necessary to channel its political creativity (Schmitt,

2008: 127-8, 130-2). It is a power that positively constitutes but is not constituted, let alone constrained, channeled or limited by previous rules (Schmitt, 2008: 136-42, 145-6).

Constituent power, therefore, enters the scene every time unusual means are resorted to — where the notion of unusual means is determined on a qualitative basis and not by its formal manifestations. Indeed, what signals that unusual means are being resorted to is found in the fact that these means are not governed — neither commanded nor authorized — by previous rules.<sup>11</sup> As Landau notes quoting Kelsen, in a revolution “the constitution is altered or replaced by some process other than the one contemplated in the text” (Landau, 2012: 616). Antonio Negri makes a similar claim: from a juridical viewpoint the constituent power, an “all-embracing power [which] is in fact the revolution itself” shows the paradox of being “a power rising from nowhere organiz[ing] law” (Negri, 1999: 1).

We maintain here, however, — and without the aim of rebutting the theory of constituent power aforementioned, but rather to grasp its full potentiality —, that processes aimed at replacing constitutions, although relying on current and ruling constitutional regulations, can actually have a constituent turn.<sup>12</sup> As Abat i Ninet and Tushnet (2015) have recently claimed, the history of late twentieth century shows examples from South Africa and some European and Latin American experiences where constitutional replacements have been carried out in a negotiated fashion not (at least not totally) realized outside existing constitutional rules. They are right. If we pay attention to the Colombian experience, to name one, we will learn that the constituent assembly that ended up drafting the 1991 Constitution did so after being convened by a presidential decree — hardly an unregulated means.<sup>13</sup> This allows us to clarify that when we talk about institutional procedures governing constitutional replacement we are not necessarily thinking in amendment procedures, but rather in any constituted procedure or institution resorted to in order to achieve constitutional replacement.

Is there any theoretical foundation for accepting this non-totally-revolutionary version of constituent power? (Colón-Ríos, 2014). We believe there is. First, the very act of constitutional foundation establishes a system of non-institutional/institutional functioning (Loughlin, 2010: 221). The state of exception, where the true political force of the sovereign is manifested, needs the law (and its institutional form) for its own validity; the law, in turn, is the product and the reaffirmation of the exceptional moment of decision (Agamben, 1998: 15-25). Just as a constitution, along with the legal system that is erected under its auspices, is “the inner truth of the revolution ... the revolutionary exception is the inner truth of constitution,” as Kahn observed (2011: 47). This is a clear indicator that “[t]he decision concerns neither a

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<sup>11</sup> However, and precisely because constituent power is a powerful manifestation of sovereignty and thus not subjected to prior rules, it can anyway decide to manifest through current procedures and institutions. We owe Fernando Atria this idea.

<sup>12</sup> There is a myriad of reasons that explains why some countries resort to institutional means for constitutional change, including political cost-benefit analysis, the profile of constitutional amendments already made and other strategic reasons. However, institutional means for constitutional change cannot be immediately equated with constitutional replacement, for the former procedures, at least when strictly complied to, cannot affect the basic structure of the State that a constitution embodies (Negretto, 2012: 757-9). That amendment procedures cannot touch upon certain core provisions has been declared both based on written as well as unwritten limits on formal amending power (Albert, 2015-2016).

<sup>13</sup> A proof of this is that, precisely because this was a constituent process that started from a valid, although highly questioned, constitutional scheme, the Colombia Supreme Court constitutionally assessed crucial aspects of its stages (Cajas, 2008: 90-3).

*quaestio iuris* nor a *quaestio facti*, but rather the very relation between law and fact,” as Agamben put it (1998: 26).

This paradox of sovereignty, the very fact that constituent power as a manifestation of sovereignty is “at the same time, outside and inside the juridical order” (Agamben, 1998: 15) projects itself along the regular moments of the constitutional State. As Loughlin argues, the State itself can only be understood once we consider “both its juristic and sociological sides” (2010: 221). Arguing exclusively in favor of one of these sides, say rejecting the role of institutions or that of political outbursts, blurs the fact that constituent power is both political and legally constituted. In addition, it also overlooks the reflexive relation of collective self-determination in which these components remain throughout governmental times (Lindahl, 2008: 9).

Every constitutional (constituted) order, therefore, carries the seed of becoming at the same time constituent. However, to fully develop its constituent potentiality we must abandon the idea that constituted institutions absorb constituent power (Goldoni, 2014: 398-403). What we maintain is that a constituent process is marked by heightened popular participation and manifestation that are different from ordinary politics. In other words, a constituent process is evidenced by its independence from ruling institutions and for being a moment where the Constitution ceases to be *for* the people to become the people’s decision — a Constitution *by* the people (Goldoni, 2014: 400).

Put differently, institutional means carry only a potentiality of becoming truly constituent. To become constituent channels the institutional means thus resorted to must satisfy a critical condition: they must be utilized to create a transition from an old constitutional regimen that it is sought to be left behind in order to enable and recognize the politico-constituent agency of the people, not with the aim of blocking it (similarly to what Colón-Ríos, 2012, has argued). On the contrary, when these procedures are appealed to in order to hold, when not deliberately suffocate, that very same agency, and when current regulations completely govern (let us put it in these terms) transitional procedures, their constituent potentiality is lost into the mud of constituted forms and unable to produce a new constitutional decision.

In this section we have described Chile’s constitutional itinerary and then limited ourselves to defending the constituent potentiality of processes of constitutional change that — such as the Chilean one — begin considering the rules and procedures that are in place. We have contended that a political process aimed at replacing (rather than merely amending) constitutions could become an exercise of constituent power, no matter if it had begun under the auspices of current rules and procedures. For doing so, these kinds of processes must satisfy the following critical conditions: (i) ruling procedures must be resorted to only to channel the constituent agency of the people, (ii) which means these procedures are employed, but are deprived of legal (in the juridical sense) bindingness. We now turn to examine Bachelet’s constitutional itinerary in light of these reflections.

## Chile's constituent process: the practice, the neutralization, the awakening

### (a) Bachelet's failed attempt

In a speech in October 2015, President Bachelet outlined the four stages of the so-called "constituent process": (i) a civic education phase, (ii) a participation phase through individual surveys and citizen dialogues, (iii) a phase of systematization of the Citizen Foundations for the New Constitution ('Bases Ciudadanas'), and (iv) an institutional phase, which included sending a project to reform the Constitution so as to generate a constitutional replacement mechanism and also a project for a new Constitution, based on the Citizen Foundations. The process would culminate in a referendum in which the text of the new Constitution would be ratified (Chilean Government Itinerary, 2015).

The civic education stage was reduced to a meager battery of pamphlets with 37 constitutional concepts — called the *Constitucionario* — and about a total of 2:30 minutes of video explanations about the Constitution. The Minister Secretary General of Government, Marcelo Díaz, admitted that this phase had "less impact" than expected. In truth, the 15-year gap of real lack of citizen training in schools could not be overcome with such rudimentary tools as those described (Contreras, 2016).

The participatory phase promised greater success. After the 2013 presidential elections, where the Constitution was part of the central political debates, people intended to participate in defining constitutional content. According to the government's plan, this stage sought to generate "basic agreements among people on constitutional matters, through spaces for public deliberation by means of dialogues that, through deliberative convergence, allowed for the identification of their agreements, partial agreements and disagreements," which, in turn, would confer "social legitimacy" (Jordán & Figueroa, 2017: 63). The participatory stage included an individual online survey and three collective participation mechanisms: self-organized local meetings of 10 to 20 citizens, provincial town halls and regional town halls (the latter two organized by the government). In each mechanism, questions were asked about constitutional values, rights, duties, and institutions, and in the collective exercises, agreements, partial agreements, and disagreements on the content discussed had to be recorded. According to official figures, the total number of participants exceeded 200,000 people (Jordán; Figueroa, 2017: 63). While some suggested that this stage could produce a "deliberative turn" for Chile, these same authors cautioned that only "time will tell if this participatory process produces" such a turn "or is one more experience ignored or instrumentalized by the elite" (Soto & Welp, 2017: 193).

Considering the outcome of the constituent process, we can agree with Atria *et al.* (2020: 64), Verdugo & Contesse (2018: 143-5), and Muñoz (2018: 150) that the participatory stage was a failure. After staging public participation, the systematization of the Citizen Foundations consolidated a document that had no correlation in the project of the new Constitution that former President Bachelet submitted on March 6, 2018, barely five days before leaving power

(Bulletin No. 11,617-07). The constitutional reform project was drafted “behind closed doors, without the direct participation of citizens in its preparation” (Zúñiga, 2018: 189). As Francisco Zúñiga emphasizes, “in the drafting of the text there is no expert and deliberative reasoning to determine the reason for the divorce of the constitutional reform project with the Citizen Foundations” (2018: 189).

The discrepancies between the Citizen Foundations and the project are of diverse entity and lack justification. For example, one of the priorities in terms of institutions was the creation of an Ombudsperson (Comité de sistematización, 2016: 32, 35), which the draft of the new Constitution lacks. In terms of plebiscites, referendums and consultations, the systematization shows clear support for mechanisms of citizen participation and its conceptualization as a right to participate in a binding way (Comité de sistematización, 2016: 33), almost anticipating the null incidence of the Citizen Foundations in the institutional concretion of the reform projects. However, once again, the project of the new Constitution did not innovate in this matter, with respect to the Constitution of 1980 (except for the plebiscite that is created in article 130 of the project). Regarding the structure of the National Congress, the systematized opinion of the participants favored a unicameral Congress (Comité de sistematización, 2016: 34), but the project of the new Constitution maintained the two traditional chambers.

More complex issues arise at the level of other content, such as Salvador Millaleo’s (2017) criticism of the recognition of indigenous peoples in Bachelet’s project. The draft recognizes indigenous peoples “as part of the Chilean nation,” establishing an obligation to promote and respect indigenous rights and culture and establishing parliamentary representation for these peoples along with recognition of cultural and linguistic rights (art. 4 of the draft). As Millaleo points out, this text “ignored the agreement signed by the Government [...] in the indigenous consultation, which would have accepted to recognize self-determination” (2017: 258).

Beyond content divorce (as we shall term it), the process was also designed to marginalize critical discussion about the replacement procedure. In fact, before the participatory phase began, the then Minister of the Interior and Public Security boasted of having blocked the *Plebiscite Now* initiative, a proposal by university professors that was transformed into a parliamentary motion (supported by more than 53 deputies) calling for a plebiscite to decide on the mechanism for replacing the 1980 Constitution (Contreras, 2015). Nevertheless, the itinerary communicated by the government in October 2015 contained four replacement mechanisms: (i) a bicameral commission of deputies and senators, (ii) joint constituent convention of deputies and citizens, (iii) constituent assembly, and (iv) plebiscite to choose among the alternatives (Chilean Government Itinerary, 2015).

However, in an unjustified turn of events (as we referred above), the draft submitted to Congress contained only one mechanism: a constitutional convention, which could be convened by two thirds of the members of the parliament in office (Bulletin No. 11.173-07). It should be pointed out that the reform was not self-sufficient and transferred the definition of its convocation, integration, system of appointment, and election of its members, functions and other matters to the subsequent decision of the National Congress through a regulation

via an organic constitutional law. In other words, the constitutional reform did not even configure the basic or essential aspects of the chosen mechanism.

This could perhaps be explained by the fact that its design was affected by a lower quorum — four sevenths of the deputies and senators in office, except in matters of integration and election, which required three fifths of the deputies and senators in office — and by the great uncertainty that would be generated by the mandatory preventive control of the Constitutional Court. As an anecdote — and for the purpose of recording how this institutional phase ended up being disassociated from citizen participation —, the Chamber of Deputies made available to the public a website “so that all those who wish to give their opinion on this project of constitutional reform may do so, by sending their communications” (Cámara de Diputados, 2017). The Chamber did not receive any opinions within the stipulated time (Riffo, 2017).

The discrepancies between the Citizen Foundations and the project of the new Constitution fractured the deliberative pretension of the process. The lack of responsiveness from the institutional policy to the participatory content generated by the citizens only aggravated popular dissatisfaction. If Soto and Welp proposed the deliberative turn as a hypothesis, then we (of course with the advantage of time) would have to respond negatively: Chile was not up to the supposed deliberative turn, because citizen participation was — using Soto and Welp's words — “one more experience ignored” by the government. Political disappointment led the people to resilience, then to dissatisfaction, and then ultimately to social upheaval.

### **(b) Enter the people: the constituent protests of 2019**

There is a clear relationship between social protest and the definition of what is constitutional: protest allows citizens to offer in a bottom-up fashion their own constitutional readings of common agreements (Lovera, 2013: 146-8). Protest, in this way, allows popular readings of the Constitution (even if this is something that happens unconsciously) to be put on the table — as Balkin tells, social movements exert social pressure on institutional politics thus moving once off-the-wall constitutional reasonings into the accepted or, as he writes, on-the-wall field (2005: 27). This is what students in Chile did in 2006 and 2011 (Ruiz, 2020: 37-9). Through popular mobilizations they offered their alternative readings of what should be the proper relationship between the right to education and freedom of teaching and were thus able to challenge what, by then, was bedrock constitutional understanding: that educational establishments could be managed like a regular business. It was not lawyers who dared to offer this new paradigm. This new relationship was not locked up in some courtroom; the actors who defined this new constitutional understanding were not wearing dark suits and ties. This new constitutional understanding originated in the streets; it was advanced by students wearing sneakers and jeans and by means of popular language, songs and choreographies.

To work, however, this off-the-wall to on-the-wall transit needs constitutional schemes open to welcome new constitutional narratives. Let us recall the words of Robert Cover

(1983: 10): “To live in a legal world requires that one know not only the precepts, but also their connections to possible and plausible states of affairs. It requires that one integrate not only the ‘is’ and the ‘ought,’ but the ‘is,’ the ‘ought,’ and the ‘what might be’”. Only a constitution open to welcoming new constitutional narratives would be able to stand legitimacy challenges. This is why constitutional schemes that appear to be impermeable to new interpretations, let alone those that deliberately block any alternate reading, take protesters to no longer seek changes within the rules of the game, but outside the legal world to design those very rules anew.

This is what has been happening in Chile since October 2019. Instead of continuing to offer alternative readings of the Constitution imposed during the dictatorship (alternatives either blocked or deemed not suitable to become on-the-wall constitutional understandings), the people have decided to move beyond the rules of the game to replace the Constitution. Literally hundreds of thousands of Chileans have been taking to the streets of different cities throughout Chile to complain against rising living costs (among many other challenges). Not in vain the protests were triggered, although of course not solely explained by, a fare hike that had been announced for the public transit.

These massive popular protests took the political class by surprise and pushed them to offer a comprehensive (instead of piecemeal) solution: to trigger a constituent process to replace the 1980 Constitution and thus discuss a new social pact for Chile (Lovera, 2020: 97). With the frustrating experience of Bachelet’s proposal and increasing violence on the streets, time was running against politicians. How did they respond? Most of the political specter, except for a few sectors that excluded themselves from the instance, discussed, negotiated and offered the people what was termed the Agreement for Social Peace and a New Constitution. This political agreement was then taken on by a committee of experts whose members were directly chosen by the very same political parties that had signed the agreement. They also debated, discussed and agreed on the text of a constitutional reform aimed at making the total replacement of the constitutional text possible (Heiss, 2020: 99-119).

The episodes of protests that began in October 2019 represent those widespread, and no less tense, activations that constitutional literature agrees to call constituent moments (Bassa, 2020: 29-37). The institutions, for their part, being called into severe question by the people, have reacted by modifying the 1980 constitutional text. It is not simply another reform of the many that this text has known. On the contrary, it is one that, at the request of the people, paves the way for its own replacement. The Law of Constitutional Reform was published on December 24, 2019, offering a constituent process that starts from the regulations in force, but not to subject it — as Bachelet did — until exhaustion to current regulations (Constitutional Reform Act No. 21.200).

## Conclusions

The 1980 Constitution was forcibly imposed by a bloody dictatorship. Its original sin, however, was not the only democratic fault. The rules or constitutional locks were designed to

have a protected democracy that limited the exercise of popular sovereignty. In its operation, the Constitution prevented having a democracy that responded to the needs of the citizenry, but rather sought to consolidate and prolong the political, economic and social model of the dictatorship.

The replacement of the 1980 Constitution was a discussion postponed far beyond the return to democracy in the 1990s. Democratic governments promoted reforms but avoided the path of replacing the dictatorial text, unlike the strategy of other Latin American countries that had similar experiences (Contreras & Lovera, 2018: 125-30). Although the reforms of 1989 and 2005 suppressed part of the original locks of the Constitution, the transactions and consensus were digitized from the concessions of the civilians who defended the legacy of the dictatorship and prevented a democratic appropriation of the common rules.

The change of the 1980 Constitution will only be possible because of the eruption of the social protests. The student movement of 2011, questioning the foundations of the current educational system, expanded the imaginable boundaries of a different social pact. President Bachelet, during her term of office, attempted to raise a constitutional change within the existing rules. However, the itinerary designed to carry out the replacement of the 1980 Constitution failed to empower the people's constituent agency. It was only with the protests that began on October 18, 2019 that the framework of what was possible was reopened to a political agreement which, within the rules of the institutionality in force, could open a channel for the exercise of the constituent power of the people.

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