

**TRYING DEMOCRACY IN THE SHADOW OF AN
AUTHORITARIAN LEGALITY: CHILE'S TRANSITION TO
DEMOCRACY AND PINOCHET'S CONSTITUTION OF 1980**

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ABSTRACT

After reflecting on the nature of constitutions as a form of 'frozen politics,' which bring to the present the political decisions adopted by the framers, the article analyzes the case of Chile's Constitution of 1980, arguing that this authoritarian charter (introduced by General Pinochet with the explicit goal of 'protecting' his neo-conservative revolution from the inevitable return to democracy) has been unable to attain a minimum degree of legitimacy. In fact, it can be said that instead of uniting the nation, the Chilean constitution actually divides it. Furthermore, the article advances the hypothesis that, if the authoritarian features which the Constitution of 1980 still exhibit are not removed, a deep crisis of representation will ensue.

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I. CONSTITUTIONS AS THE HEAVY LEGACY OF 'FROZEN POLITICS'

Perhaps more than other social and political institutions, law is fundamentally linked with the past. If this is true about law in general, it is particularly so in the case of constitutional law, which – by virtue of the rigidity that characterizes most constitutions – brings past political decisions to the present. Thus, what was once merely the prevailing *political opinion* held by the winning faction in the constitution-making process, acquires with time the majesty of the constitution, an almost sacred text that politicians, judges, and the public at large take to be *above politics*.

This peculiar nature of constitutions is nowhere more apparent than in the United States, where a once highly contested document imposed by the winning faction (over two centuries ago)¹ continues to define the politics of one of the most dynamic countries of the world. The endurance of the American constitution means that the United States is still governed by a fundamental law adopted by a group of people who – one imagines – would have been shocked to realize that their political design still manages to rule a world beyond their comprehension.²

As the previous observations suggest, constitutions are profoundly connected with tradition.³ Given that they are meant to “constitute” – and then stabilize – the body politics, they are expected to last for long periods of time, something that can only be achieved if they are perceived to be above politics. This is why, when it comes to constitutions, many think that the older a charter the better.⁴ The inherently conservative nature of constitutions seems, however, to be at odds with an era (such as ours) in which innovation is highly valued.

I think it is important to reflect on the backward-looking nature of constitutions because over the last two decades there have been exaggerated expectations regarding the role constitutions can play in processes of democratic transition and consolidation.⁵ This tends to hide

¹ See GORDON WOOD, *THE CREATION OF THE AMERICAN REPUBLIC: 1776–1787* (1969).

² Of course, the many amendments that have been made to the Constitution of 1787 have helped the extraordinary endurance of it.

³ Steven G. Calabresi, *The Tradition of the Written Constitution: Text, Precedent, and Burke*, 57 *ALA. L. REV.* 635, 686–87 (2006).

⁴ See ZACHARY ELKINS ET AL., *THE ENDURANCE OF NATIONAL CONSTITUTIONS* (2009).

⁵ Indeed, in most of the literature on democratic transition and consolidation constitutional law is taken to provide an orderly framework which is thought to stabilize the typically agitated politics of transitional countries. See, e.g., *CONSTITUTIONALISM AND DEMOCRACY* (Jon Elster & Rune

an inevitable tension between constitutions and democratic self-rule.⁶ In this paper, I address this tension through the analysis of Chile, a country often regarded as a model of democratic consolidation. As discussed below, the undeniable progress experienced by this country over the last two decades was accomplished *in spite* of its flawed constitutional design, *not because of it*.

II. CHILE'S TRANSITION TO DEMOCRACY

Over the last ten to fifteen years, it has become commonplace to say that Chile's transition to democracy has been exemplary.⁷ Political scientists working on transitional studies frequently utter this statement, as do development economists and officials of economic multilateral organizations.⁸ Looking at the available data regarding Chile's recent trajectory, one finds that there are in fact many indicators (political stability, high economic growth,⁹ poverty reduction,¹⁰ and even the way it has dealt with past human rights violations) that tend to confirm the notion that this country has been doing rather well in terms of democratic self-rule. If one adds to this mix the fact that Chile ranks very high in

Slagstad, eds., 1993); GIOVANNI SARTORI, *COMPARATIVE CONSTITUTIONAL ENGINEERING: AN INQUIRY INTO STRUCTURES, INCENTIVES, AND OUTCOMES* (2d ed. 1997); *CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD* 46–47 (Douglas Greenberg et al. eds., 1993). A particularly conservative example of the stabilizing effect of constitutional law in transitional democracies is the one that submits that constitutionally guaranteeing private property rights and contracts can help transitional processes by providing a safe context that can bring about much needed foreign investment. See Cass Sunstein, *Constitutions and Democracies: an Epilogue*, in *CONSTITUTIONALISM AND DEMOCRACY* 327–356 (Jon Elster & Rune Slagstad eds., 1993). Another example of the approach we are describing is the claim that the existence of a rigid constitution can help persuade weak authoritarian rulers to quit from power with the certainty that they will be protected from their opponents once out of power. *Id.* In this essay, I want to show the limits of constitutions to democratic consolidation, by exploring the damaging impact of the constitutional charters imposed by authoritarian regimes.

⁶ See JEREMY WALDRON, *LAW AND DISAGREEMENT* 255 (1999).

⁷ See CHILE: POLÍTICA Y MODERNIZACIÓN DEMOCRÁTICA 39 (Manuel Alcántara Saéz & Leticia M. Ruiz Rodríguez eds., 2006); Paul W. Drake & Iván Jaksic, *Introducción*, in *EL MODELO CHILENO: DEMOCRACIA Y DESARROLLO EN LOS NOVENTA* (Paul W. Drake & Iván Jaksic, eds. 1999).

⁸ See Scott Mainwaring, *Latin America's Imperiled Progress: The Surprising Resilience of Elected Governments*, *J. DEM.*, July 1999, at 101, 110.

⁹ PETER DESHAZO, *POLICY PAPERS ON THE AMERICAS: CHILE'S ROAD TO DEVELOPMENT: LESSONS LEARNED 1995–2005* at 13–15 (2005), available at http://csis.org/files/media/isis/pubs/pp_0508deshazo.pdf.

¹⁰ David Hojman, *Poverty and Inequality in Chile: Are Democratic Politics and Neoliberal Economics Good For You?*, *J. INTER-AM. STUD. & WORLD AFF.*, Summer/Fall 1996, at 73.

terms of transparency and accountability of its public officials,¹¹ it is understandable why most observers take this country to be a poster-child for democratic transition in the Latin American region.¹²

After reviewing this admittedly impressive record exhibited by Chile in the last two decades, one has to come to terms with the fact that *these accomplishments were made in the shadow of an authoritarian constitutional framework*. Indeed, the Chilean Constitution was elaborated General Pinochet's most trusted constitutional adviser, Jaime Guzmán, a man notoriously ambiguous about democratic self-rule.¹³ One is thus confronted with a puzzle: how to account for the fact that Chile's apparent democratic success took place under an institutional framework (the Constitution of 1980) explicitly designed by the military regime to ensure that the fundamental features of its "conservative revolution" would be protected from the inevitable return to democracy?

At this point, one can point to many historical instances in which good outcomes have resulted from bad designs.¹⁴ Or, perhaps argue that Chile's recent success-story lies in its old democratic roots, which allowed the country to advance in the right direction in spite of a flawed constitutional framework. In what follows, I suggest that even though the latter explains part of the story, it is important to consider seriously the possibility that Chile's transitional "miracle" hides some alarming elements that could lead – in the not so distant future – to a severe democratic crisis. In fact, as it will be shown below, some of the key elements of the constitutional design introduced by the military regime represent a threat to Chile's democratic well-being, so much so that crucial constitutional reforms are in order.

III. CHILE'S CONSTITUTIONAL FRAMEWORK: "PROTECTING" DEMOCRACY FROM THE PEOPLE

¹¹ See JAVIER SANTISO, *LA ECONOMÍA POLÍTICA DE LO POSIBLE EN AMÉRICA LATINA* 83 (2006), available at <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=916976>.

¹² See CHILE: *POLÍTICA Y MODERNIZACIÓN DEMOCRÁTICA*, *supra* note 7; Drake & Jaksic, *supra* note 7.

¹³ See RENATO CRISTI, *EL PENSAMIENTO POLÍTICO DE JAIME GUZMÁN: AUTORIDAD Y LIBERTAD* 161 (2000).

¹⁴ See Peter Siavelis & Arturo Valenzuela, *Electoral Engineering and Democratic Stability: The Legacy of Authoritarian Rule in Chile*, in *INSTITUTIONAL DESIGN IN NEW DEMOCRACIES: EASTERN EUROPE AND LATIN AMERICA* 77–83 (Arend Lijphart & Carlos Waisman, eds. 1996).

The starting point of the constitution-making process pursued by Chile's military regime was *a deep distrust in democracy*.¹⁵ Skepticism of democratic self-rule came from the notion that the latter was a fertile ground for demagoguery,¹⁶ an idea fully embraced by Jaime Guzmán and other members of the commission set up by General Pinochet (in late 1973) to draft a new constitution.¹⁷ Guzmán arrived at this notion based on a very particular reading of Chile's political history during the twentieth century. According to Guzmán, under democratic rule Chile had experienced a slow but sustained decline, due to the inclination of democracy to degenerate into demagoguery.¹⁸

An ardent supporter of Spanish dictator Francisco Franco and a rabid anti-Communist, Guzmán not only credited Pinochet for having saved the country from becoming a pro-Soviet regime,¹⁹ but also for ending decades of flawed economic policies and general decay. In other words, Guzmán envisioned the military dictatorship as a welcome interval in which patriotic bureaucrats, backed by the heavy hand of military might, could display an a-political, technical rationality. From this perspective, the coup of September 11, 1973 represented both the defeat of the Communists and the chance to overcome decades of "irrational" policies undertaken by democratic politics with rational policies designed by technocratic politics.²⁰

As we can see, the starting point of Jaime Guzman's constitutional design was a highly pessimistic interpretation of Chile's democratic trajectory in the twentieth century, one in which an 'ignorant' citizenship was persuaded by corrupt politicians to implement populist economic policies. To this diagnosis, Guzmán added a forecast: eventually the military regime would have to go, and for precisely that reason it was crucial to have a mechanism that would ensure that all the advances made by Pinochet's government would not be dismantled once

¹⁵ See ROBERT BARROS, CONSTITUTIONALISM AND DICTATORSHIP: PINOCHET, THE JUNTA, AND THE 1980 CONSTITUTION 36–37 (2002); CARLOS HUNEEUS, THE PINOCHET REGIME 151–60 (2007).

¹⁶ "[T]he modern significance of the idea of demagogue lies in its pejorative sense, as the leader of a mob, with the implication that those who rouse the rabble always do so for ignoble purposes." ED IAIN MCLEAN & ALISTAIR MCMILLAN, THE CONCISE OXFORD DICTIONARY OF POLITICS (2009).

¹⁷ For an excellent analysis of this process, see HUNEEUS, *supra* note 15, at 151–54.

¹⁸ See Cristi, *supra* note 13, at 18.

¹⁹ *Id.* at 24–25, 118.

²⁰ See *id.*; RENATO CRISTI & PABLO RUIZ-TAGLE, TEORÍA Y PRÁCTICA DEL CONSTITUCIONALISMO REPUBLICANO 177–196 (2006).

the democratic rule returned.²¹ Given this danger, Guzmán's project was to constitutionally entrench what he called a "protected democracy," a system which, among other things would have the Armed Forces play the role of guarantors of the Constitution.²²

Complementing the constitutional role of the Armed Forces as guarantors of the Constitution, the 1980 charter included a number of openly anti-democratic features, such as non-elected senators; a 'binominal' electoral system designed to make it hard for any political group to attain a clear majority in Congress; and, most significantly, the introduction of the requirement of supermajorities (4/7 of the total members of the Chamber of Deputies and the Senate to get congressional approval to bills relating to crucial aspects of public life, such as education, health care and the like).²³ In addition to these mechanisms, it included a constitutionally autonomous Central Bank and a powerful Constitutional Court that advanced the objective of insulating policy-making from democratic control.²⁴

The goal of this constitutional design was to make it extremely hard for any political group to translate majoritarian popular support into the kind of congressional supremacy that would make possible the reform of the policies enshrined during the military regime.²⁵ Thus, even if a particularly successful political party were to get a solid majority of the popular vote, it would still need to gather almost 60 percent of congressional support to change important legislation.²⁶ If, against all odds, that were to happen, the new legislation would still need to confront the scrutiny of the Constitutional Court, which the 1980 charter requires to review all legislation with super-majoritarian requirements (that is, those that need a majority of 4/7 of Congress for their approval).²⁷

²¹ See HUNEEUS, *supra* note 15, at 154–55.

²² *Id.* at 216. Guzman stated "[e]ither the [military] Junta limits itself to be a mere historical parenthesis in the country's national life, restituting power to the same political parties that existed before September 11 1973 [. . .] or it assumes the mission of opening a new stage in the country's national history, so that it can project the Armed Forces' philosophy, spirit and style. . . ." *Id.*

²³ See CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [hereinafter C.P.] (1980).

²⁴ See C.P. chs. 7, 12 (1980).

²⁵ See MANUEL ANTONIO GARRETÓN, HACIA UNA NUEVA ERA POLÍTICA: ESTUDIOS SOBRE LAS DEMOCRATIZACIONES 92–93 (1995).

²⁶ Bills requiring a super-majority are known as 'leyes orgánicas constitucionales'. C.P. art. 63 (1980).

²⁷ See C.P. art. 117 (1980).

Even though in the last two decades of democratic transition the Constitution of 1980 was amended in order to get rid of the most openly anti-democratic elements (such as the non-elected senators or the military oversight on the President of the Republic),²⁸ Chile's constitutional order is still far from being completely democratic. The reason for this unsettling situation is that each of the constitutional amendments aimed at democratizing the Constitution of 1980 represented what the political heirs of the military regime were willing to concede to the parties that had been opponents of the latter, and they have been so far unwilling to give their support to the constitutional amendments needed to completely democratize Chile's constitution.²⁹

The persistence of authoritarian features in Chile's constitutional order explain the fact that in the 2010 election campaign, three out of four presidential candidates running for office, Eduardo Frei, Marco Enríquez-Ominami and Jorge Arrate, included on their electoral platforms the promise to introduce a new Constitution.³⁰ Regrettably, the only candidate who did not endorse such a measure, Sebastián Piñera, was eventually elected President.³¹ His position on the issue was no doubt influenced by the fact that a crucial part of his coalition, the Unión Demócrata Independiente (UDI), was founded by and remains completely loyal to the memory of Jaime Guzmán.³²

Chile's current constitutional plight has deep historical roots. Thus, what follows is a detailed analysis of troubling origins of the Constitution of 1980 and problematic consequences it has for democracy.

IV. CHILE'S CONSTITUTION-MAKING HISTORY AND THE CONSTITUTION OF 1980

²⁸ These amendments occurred during constitutional reforms that took place in 1989, 1998 and 2005.

²⁹ See Javier Couso & Alberto Coddou, *Las Asignaturas Pendientes de la Reforma Constitucional Chilena*, in EN EL NOMBRE DEL PUEBLO: DEBATE SOBRE EL CAMBIO CONSTITUCIONAL EN CHILE 191–213 (Claudio Fuentes ed., 2010), available at http://www.boell-latinoamerica.org/downloads/En_el_nombre_del_pueblo.pdf.

³⁰ See Claudio Fuentes, *Elites, Opinión Pública y Cambio Constitucional*, in EN EL NOMBRE DEL PUEBLO: DEBATE SOBRE EL CAMBIO CONSTITUCIONAL EN CHILE 45–84 (Claudio Fuentes ed., 2010).

³¹ See *Informe Grupo Tantauco: Piñera con el Acelerador a Fondo*, REVISTA ERCILLA, No. 3.370, April 20, 2009.

³² A radical left group assassinated Jaime Guzmán in 1991, at the beginning of the process of democratic transition. See ASCANIO CAVALLO, *LA HISTORIA OCULTA DE LA TRANSICIÓN: CHILE 1990–1998* (1998).

In the previous section, it was analyzed how Chile's transition to democracy unfolded in the shadow of an authoritarian constitution imposed on the Chilean people by the military regime. This already problematic aspect of the country's constitutional order acquires a completely new meaning when one takes into account that throughout the country's history, the winning side of a violent conflict has always imposed a new constitution.³³ In effect, both the Constitution of 1833 and the Constitution of 1925 (the previous charters before the 1980 one) were introduced by the winning side immediately after a civil war or a military coup.³⁴

The Constitution of 1833 was imposed by the conservatives (also known as "Pelucones") after they defeated the liberals (called the "Pipiolos") in the Civil War of 1829-1830.³⁵ In the case of the Constitution of 1925, the context was less bloody, but still one in which the prevailing force in a military conflict imposed its will over the defeated forces. In this case, the new charter came after a military coup executed by a left-leaning group who wanted to replace a quasi-parliamentary regime with a more presidentialist one.³⁶ This group of military men then backed former President Arturo Alessandri, who took complete control of the constitution-making process.³⁷

In what follows, we shall see that Chile's current charter, the Constitution of 1980, was also introduced by the winning faction after a violent conflict. This time, however, the content of the constitution was highly ideological and aimed at perpetuating the economic and social model designed by the military regime.

³³ See Verónica Valdivia Ortiz de Zárate, *Estabilidad y Constitucionalismo: Las Sombras de la Excepcionalidad Chilena*, in EN EL NOMBRE DEL PUEBLO: DEBATE SOBRE EL CAMBIO CONSTITUCIONAL EN CHILE 131–54 (Claudio Fuentes ed., 2010).

³⁴ See *id.* at 183; Javier Couso & Carolina Tohá, *El Sistema Político y sus Desafíos: Un Nuevo Arreglo Constitucional para el Bicentenario*, in EL CHILE QUE VIENE: DE DÓNDE VENIMOS, DÓNDE ESTAMOS Y A DÓNDE VAMOS (2009), available at <http://www.expansiva.cl/media/publicaciones/libros/pdf/9.pdf>.

³⁵ Letter from Diego Portales to Cea, *quoted in* ALFREDO JOCELYN-HOLT, 'EL PESO DE LA NOCHE:' NUESTRA FRÁGIL FORTALEZA HISTÓRICA 114–15 (1997).

³⁶ 3 GONZALO VIAL, HISTORIA DE CHILE 1891-1973, ARTURO ALESSANDRI Y LOS GOLPES MILITARES 546–51 (1993)

³⁷ Even though in 1925 there was at least a "Consultive Commission" charged with discussing a constitutional project (composed by fifty three members), in fact the control over the constitution-making process was under Arturo Alessandri, who had the support of the military group that had just made a coup. *Id.* at 546.

V. GENERAL PINOCHET'S REGIME AND THE NEOCONSERVATIVE REVOLUTION

As it was the case of the charters of 1833 and 1925, the Constitution of 1980 was the immediate consequence of a violent struggle in which the prevailing group imposed its design on the losing side. Indeed, on September 11, 1973, a military coup abruptly ended the constitutional regime Chile had for over half a century. This action, which inaugurated a 17 year dictatorship, was not ostensibly aimed at replacing the democratic system Chile had enjoyed for half a century, but (as the first declaration by the Military Junta stated) merely to “reestablish the broken institutional order.”³⁸ Thus, many Chileans thought that after a few months or so the military would call for general elections.³⁹ However, things did not turn out as expected.⁴⁰

Perhaps due to the fact that the Cold War gave some credibility to the notion that Salvador Allende's government (the one overthrown by the 1973 coup) represented a danger of turning Chile into the Communism block, the Military Junta began stressing the tasks and goals to be achieved instead of the timing for the new elections and the return to a democratic rule.⁴¹ Indeed, the new military discourse started to

³⁸ Such was the first statement issued by the Military Junta. See Law No. 1, Septiembre 18, 1973, DIARIO OFICIAL [D.O.] (Chile).

³⁹ The very first juridical decree by the Military Junta that overthrew Allende, the *Bando Número 1*, of September 11, 1973 stated the reasons and motives for the military coup. In the relevant passages it states: “[. . .] [c]onsidering that the Military forces represent the organizations that the State has created for the defense of the physical and moral integrity of the nation and of its historic and cultural identity [. . .] That Chile is in a process of systematic and integral destruction of the essential elements of its being due to the intervention of a dogmatic ideology [. . .] The armed forces have agreed to constitute a Government Junta and to take over the superior power of the nation with the patriotic commitment to restore the Chilean values, justice and the broken institutionality [. . .] The Junta will, in the exercise of its mission give full respect to the Judiciary and the Constitution and the laws of the Republic to the extent that current circumstances allow it.” Law No. 1, Septiembre 11, 1973, reprinted in CARLOS ANDRADE GEYWITZ, GÉNESIS DE LAS CONSTITUCIONES DE 1925 Y 1980 (1988) [quotation translated from original Spanish by Javier Couso].

⁴⁰ At the time most Chileans believed that the military would only govern for a short period and then call for new elections. After a few weeks in power, however, the military re-evaluated its original plans, and decided to continue governing in order to re-organize the nation's political system. For an excellent analysis of this process see GENARO ARRIAGADA, POR LA RAZÓN O LA FUERZA: CHILE BAJO PINOCHET (1998).

⁴¹ For an analysis of the military regime in Chile see MILITARY RULE IN CHILE: DICTATORSHIP AND OPPOSITIONS (J. Samuel Valenzuela & Arturo Valenzuela eds., 1986); PAMELA CONSTABLE & ARTURO VALENZUELA, A NATION OF ENEMIES: CHILE UNDER PINOCHET (1991); MANUEL ANTONIO GARRETÓN, THE CHILEAN POLITICAL PROCESS (1989); ASCANIO CAVALLO ET AL., LA HISTORIA OCULTA DEL RÉGIMEN MILITAR (1988).

highlight the need to transform Chile at its roots, in order to “extirpate the Marxist cancer.”⁴²

Having come to power through an action obviously barred by the Constitution of 1925, the new authorities eventually declared that they had assumed the “*constituent power*” of the nation, that is, the faculty to create constitutional law.⁴³ Accordingly, in the following months the Military Junta passed a series of “constitutional decrees” providing a constitutional basis for its acts.⁴⁴ Such a move signaled a truly revolutionary path, beginning with the dismantling of the entire institutional architecture of the previous regime. As Genaro Arriagada put it:

Soon after the military coup, Congress was dissolved; a State of Siege was declared, suspending individual guarantees; municipal authorities were deposed, being replaced by municipal authorities designated by the Military Junta. . . . Furthermore, the ‘Tribunal Constitucional’ was dissolved. . . . all public employees were declared to be interim . . . - with the exception of members of the judiciary and the ‘Contraloría General de la República’ . . . [T]he political parties declared to be Marxist were dissolved, while the rest were declared to be in recess . . . [T]he universities were intervened by the Military Junta . . . , the electoral register were declared void, and then incinerated. . . . The government passed a Law Decree authorizing the expulsion of individual from the national territory on political grounds. . . . elections within the unions were suspended, and the government adopted norms allowing it to deprive some political opponents of the Chilean nationality.⁴⁵

As this account makes clear, once the Junta decided to take a revolutionary path, it showed a willingness to go all the way, with little moderation in the destructive activity it started during the final months of 1973. As Robert Barros points out, the coup made a clear break with the preceding legal and constitutional norms and opened a period where

⁴² See Law No. 77, Octubre 8, 1973, reprinted in Arturo Valenzuela, *The Military in Power: The Consolidation of One-Man Rule*, in *THE STRUGGLE FOR DEMOCRACY IN CHILE* (Paul Drake & Iván Jaksic eds., 1991).

⁴³ See Law No. 128, Noviembre 16, 1973, which interprets Law No. 1 and states that “The Military Junta has assumed the constituent, legislative, and executive powers.”

⁴⁴ Through Law No. 527, General Pinochet, as the Commander in Chief of the Army (the largest and most powerful of the Chilean Armed Forces), had succeeded in being designated as President of the Military Junta. See Law No. 527, Junio 26, 1974, DIARIO OFICIAL [D.O.] (Chile).

⁴⁵ ARRIAGADA, *supra* note 40, at 38–39.

“[t]he validity of the dictatorship’s legal acts rested solely upon the force of the military’s coercive imposition [and] the claim that the circumstances provided no alternative but exceptional rule, not a prior positive grant of authority.”⁴⁶

Aside from concentrating all the political power it could (embracing the so-called “National Security Doctrine”),⁴⁷ the new regime focused on the economic transformation of the country.⁴⁸ This task was assisted by a highly cohesive and ideological group, the “Chicago Boys,”⁴⁹ a group of Chilean graduates from the University of Chicago’s Economics Department who held an almost religious adherence to the monetarist policies of Milton Friedman and other Chicago professors.

The influence of the Chicago Boys in Chile’s military dictatorship was a consequence of their anti-Communism and to the fact that in the midst of a severe economic crisis in 1974-75, they offered a coherent and systematic plan. This plan proved to be very successful,⁵⁰ something which gave them enormous legitimacy within the regime. After proving themselves in the management of economic crises, this group offered the military regime something more ambitious: *the complete reformation or modernization* of Chile’s economy, in order to overcome what they viewed as the chronic backwardness of the country’s economy.⁵¹ Given their critical assessment of Chile’s economic

⁴⁶ Robert Barros, *Dictatorship and the Rule of Law: Rules and Military Power in Pinochet’s Chile*, in *DEMOCRACY AND THE RULE OF LAW* 198 (José María Maravall & Adam Przeworski eds., 2003).

⁴⁷ The “National Security” doctrine, a peculiar fusion of military nationalism mixed with a the notion that the fundamental threat to independent states was Communism, was brought to Chile by Brazilian military advisors who had in turn been heavily influenced by American military advisors from the “School of the Americas.”

⁴⁸ See CARLOS HUNEEUS, *EL RÉGIMEN DE PINOCHET* 389–436 (2000).

⁴⁹ The “Chicago Boys” comprised over a hundred Chilean masters and doctoral economics students who studied at the University of Chicago between 1955–1975. These students were part of a technical cooperation program created by the US government to train Latin American economists and counter the hegemony of Marxism and dependence theory that existed among Latin American politicians and development scholars at the time. See JUAN GABRIEL VALDÉS, *LA ESCUELA DE CHICAGO: OPERACIÓN CHILE* (1989). The history of the link between the “Chicago Boys” and Chile’s military regime has been extensively documented. See, e.g., ARTURO FONTAINE ALDUNATE, *LOS ECONOMISTAS Y EL PRESEDENTE PINOCHET* (1988); PILAR VERGARA, *AUGE Y CAÍDA DEL NEOLIBERALISMO EN CHILE* (1985).

⁵⁰ Their policies helped reduce an annual inflation of more than 600% in 1973 to less than 10% in 1981. See PATRICIO MELLER, *UN SIGLO DE ECONOMÍA POLÍTICA CHILENA: 1890–1990*, at 187, 195 (1996).

⁵¹ Juan Gabriel Valdés summarized the core ideas of the Chicago Boys as the following: a) The market is the fundamental and most ‘natural’ organizing principle of social life. It is the paradigm of liberty itself. Without free markets democracy is not possible; b) Methodological

performance, this group proposed a radical departure from what had been the defining characteristic of Chile's economic policies: the interventionist role played by the State.⁵²

The Chicago Boys were technocratic. They generally despised politics as 'demagoguery,' and were frustrated by the lack of a more scientific economic debate in Chile.⁵³ This alienation from democratic politics was akin to General Pinochet's approach to government.⁵⁴ As Chilean scholar Patricio Meller has argued, both the military and the Chicago Boys shared a sense of mission of rescuing the country from Communism and economic stagnation, through a technocratic political regime that would avoid demagoguery.⁵⁵ Indeed, while the military congratulated themselves as having saved Chile from Communism, the former offered prescriptions aimed at transforming the country into a highly developed nation, where, they argued, Communism would not constitute a threat anymore.⁵⁶

After the Chicago Boys gained total control of the management of the economy,⁵⁷ they presented a very detailed program of structural reforms to Pinochet. The program consisted of a new labor code

individualism. All there is in society are self-interested individuals. Social classes are just intellectual constructs; c) The state is an intrinsic enemy of liberty. Interest groups always obtain unjustified and economically inefficient rents from the Government; therefore, the smaller the role of the state, the better; d) Monetarism: For the Chicago Boys, inflation is always a monetary phenomenon. Thus, they argued for the necessity to establish independent central banks completely autonomous from the pressures of politics. See Valdés, *supra* note 49, at 84–102.

⁵² In fact, the role of the state was so important for Chile's economy that the eminent Bolivian sociologist René Zavaleta once described Chile as the '*Patria del Estado*' ("the forefather of the State"). *Id.* at 133.

⁵³ A good example of the technocratic and anti-political discourse of the Chicago Boys is the following statement by Sergio de Castro, a key Chicago Boy, and a Minister of Finance in the military regime: "The fundamental solution to our social problems [lies] in freeing Chile from being a breeding ground for totalitarian socializing ideologies." HUNEEUS, *supra* note 15, at 280.

⁵⁴ Pinochet had this to say about democratic rule: "[T]he Armed Forces will re-establish democracy, but one that is purified from the vices and bad habits that contributed to the demise of it. A new Constitution will allow a dynamic evolution [. . .] that will prevent partisanship, demagoguery and sectarian positions from our national life." HUNEEUS, *supra* note 48, at 217.

⁵⁵ In other words, as Patricio Meller points out, both the military and the Chicago Boys considered themselves 'technocrats' who knew, scientifically, what was best for the country. See MELLER, *supra* note 50, at 194.

⁵⁶ *Id.*

⁵⁷ To implement their radical program of economic and social reform, the Chicago Boys were placed in key government positions and began to implement these modernizations. The recession that affected Chile in 1983–1984 delayed the process of privatization and of de-regulation. Soon after the crisis was over, the reforms were continued, literally, until the last day of Pinochet's administration. For a good analysis of the Chicago Boys' ascendance within the military regime see HUNEEUS, *supra* note 48.

diminishing state regulation of the labor market, a new social security program, a privatized health care system, the de-centralization of government administration, privatization of retirement benefits, and “modernization” of the judiciary.⁵⁸ These programs of reform, which eventually occasioned serious social unrest,⁵⁹ could be implemented only under the context of a dictatorship in which the most fundamental liberties were severely curtailed.

Parallel to implementing the sweeping program of social, economic, and administrative reform, Pinochet and his economic team started planning a strategy to make sure the revolutionary changes introduced would survive the eventual return of democratic rule to Chile. Their shared distrust for democratic politics led them to turn with special interest to constitutional matters, which had been entrusted to Jaime Guzmán and other jurists since 1973.⁶⁰ Evidencing a long-term perspective rare among Latin American politicians, General Pinochet was persuaded by Guzmán of the need to project the values embodied by his rule beyond his personal hold on power.⁶¹

VI. THE CONSTITUTION OF 1980 AND THE QUEST FOR TECHNOCRATIC RULE

Just days after the 1973 military coup, General Pinochet organized a small commission entrusted with drafting a new constitution, the so-called “*Comisión de Estudios de la Nueva Constitución Política*”

⁵⁸ For an analysis of Chile’s economic transformations under Pinochet’s rule see SEBASTIAN EDWARDS & ALEJANDRA COX EDWARDS, *MONETARISM AND LIBERALIZATION: THE CHILEAN EXPERIMENT* (1987); Eduardo Silva, *The Political Economy of Chile’s Regime Transition: From Radical to “Pragmatic” Neo-Liberal Policies*, in *THE STRUGGLE FOR DEMOCRACY IN CHILE* 98 (Paul Drake & Iván Jaksic eds., rev. ed. 1995); EUGENIO TIRONI, *LOS SILENCIOS DE LA REVOLUCIÓN CHILE: LA OTRA CARA DE LA MODERNIZACIÓN* (1988); Jaime Ruiz Tagle, *El Sindicalismo Chileno Después del Plan Laboral* (Santiago, Chile, 1985). JAIME RUIZ TAGLE, *EL SINDICALISMO CHILENO DESPUÉS DEL PLAN LABORAL* (1985). The last of the “modernizations”, the modernization of the judiciary, was never implemented due to the rejection by the Supreme Court. The Court generally acquiesced to the authoritarian regime, but occasionally engaged in pushback.

⁵⁹ The economic policies carried on by the Chicago Boys, for all their successes, caused an unprecedented average unemployment rate of 17.3% during the period 1973–1989.

⁶⁰ The commission of jurists started working on a new Constitution as early as September 24th, 1973. See HUNEEUS, *supra* note 48, at 230.

⁶¹ Jaime Guzmán persuaded General Pinochet that “great” leaders, such as General de Gaulle in France or Diego Portales in nineteenth century Chile, were able to institutionalize their political projects. See *id.* at 368.

*del Estado.*⁶² The group was composed of eight law professors and former congressmen sympathetic to the military coup.⁶³ These scholars considered themselves democrats helping to improve Chile's republican institutions in order to prevent future violations of the rule of law, such as the ones done by Allende's government.⁶⁴ Most of them were also convinced that the military would only temporarily remain in power, and then smoothly transition to a republican form of government, as soon as the country returned to normal.⁶⁵

The commissioners understood their mission as the drafting of a constitutional charter that would prevent the re-occurrence of what they regarded as the weakening of constitutionalism, particularly with respect to property rights guarantees, under the Socialist regime of Allende.⁶⁶ Therefore, in its first months of operation, the Commission devoted most of its time to studying ways of making the right to private property more secure.⁶⁷ As the transcriptions of the sessions of this period make clear,⁶⁸ the commissioners thought that, in addition to a firm declaration of the constitutional relevance of property rights, a more effective system of enforcing the constitution was required.⁶⁹ It is within this context that Sergio Diez – a former senator from the right wing “Partido Nacional” and a constitutional law professor acquainted with the American legal system – proposed the introduction of a constitutional injunction for the

⁶² Decree No. 1064, of September of 1973, set-up the commission, which stated that “[T]here is a need for a new Constitution in order to reconstruct, renew, and improve the fundamental institutional order of the Republic.” *Id.* at 231.

⁶³ The group included prestigious jurists from the right wing Partido Nacional and the centrist Christian Democratic Party. They included: law professor Enrique Ortúzar, former senator and law professor Sergio Diez, law professor Jaime Guzmán, law professor Jorge Ovalle, constitutional scholar Alejandro Silva Bascuñán, law professor Enrique Evans, former congressman Gustavo Lorca, and lawyer Alicia Romo. *See id.*

⁶⁴ *See Actas Oficiales De La Nueva Constitución Política De La República (Santiago, Comisión De Estudio De La Nueva Constitución 1980)* [hereinafter *Actas Oficiales*].

⁶⁵ Indeed, the prompt invitation of the government to study a new constitution was regarded by them as a sign of the republican beliefs of the military. Once it became clear that the military was in for a long period, the Christian Democratic members of the Commission, Alejandro Silva Bascuñán and Enrique Evans resigned to it in 1977. *See HUNEEUS, supra* note 48, at 233.

⁶⁶ *See* Javier Couso, *The Politics of Judicial Control of the Constitution in Latin America: Chile in Comparative Perspective* (2002) (unpublished Ph.D. dissertation, University of California-Berkeley) (on file with the author).

⁶⁷ *Id.*

⁶⁸ *See Actas Oficiales, supra* note 64, session 109.

⁶⁹ *Id.* at session 145.

protection of the fundamental rights of individuals.⁷⁰ This special constitutional writ, eventually labeled “*Recurso de Protección*,” would be filed directly in the appellate court where the act or omission violating constitutional rights took place. The speedy and informal nature of the injunction, as well as the few standing rules established, were expected to make the “*Recurso de Protección*” an easy and expedient mechanism for the judicial protection of constitutional rights, and private property rights in particular.

With regard to the strengthening of the constitutional clauses protecting the right to private property the Commission, after a thorough study of the issue by a subcommittee charged with analyzing all possible dangers to property rights posed by legal and administrative action, adopted a very detailed set of constitutional clauses providing for one of the most extreme protections to private property rights in existence.⁷¹

After 1977, once the wording of the constitutional clauses guaranteeing private property rights were finished, the Commission started to broaden the scope of its economic rights proposals.⁷² This was suggested by the economic team of the Chicago Boys. Thus, in Session No. 384 (June 1978), the commissioners listened to this group present a systematic account of the ideal content that the new constitutional charter should have in order to prevent regression to the ‘populist’ economic policies of the past.⁷³

Although the idea of including the central features of the economic model in Chile’s constitution originated with the economists implementing the process of economic reform, conservative constitutional scholars soon accepted this as an important innovation to the fundamental law of the country. Thus, one of Chile’s foremost constitutional scholars, Professor José Luis Cea, defending the proposal which introduced what amounted to an “economic constitution” in the

⁷⁰ Other scholars mention Jaime Guzmán, another member of the drafting commission, as the proponent of the writ of ‘protección.’ See Carl Bauer, *The Contradictory Role of the Judiciary in Chile’s Neoliberal Economic Model*, (paper submitted at the 1st Congress of the Latin American and Caribbean Association of Law and Economics in Mexico City, Feb. 2–3, 1995). The writ of ‘protección’ was inspired on an array of foreign sources, including the French “*refere*,” a constitutional mechanism of Brazil, Mexico and Venezuela known as the “*amparo*,” and the American “*injunction*.” See ANDRÉS JANA LINETZKY & JUAN CARLOS MARÍN GONZALEZ, *RECURSO DE PROTECCIÓN Y CONTRATOS*, 86–87 (1996).

⁷¹ The clauses of the Constitution of 1980 strengthening private property rights are arts. 19, 23, 24 and 25. See Couso, *supra* note 66, at 190.

⁷² See *id.* at 191–93.

⁷³ See Bauer, *supra* note 70.

project for a new charter, devoted considerable writings to highlight the importance of such an unprecedented step in Chile's constitutional history. Indeed, according to Cea, the fact that the new constitutional charter would include not just political aspects, but also social and economic ones, would make it the first "*Full Constitution*" ("*Constitución Plena*") Chile ever had. After all, every previous constitution had been "*only political*."⁷⁴ The fact that the new fundamental law would be "complete," Cea argued, represented a crucial improvement in Chile's constitutional doctrine and practice, one that reflected the understanding by the framers of Chile's constitution of the fact that social and economic aspects are intrinsically linked to the political and juridical ones. In his own words:

*Nobody doubts that the Constitution has to contain the rules of the game of politics. If this is so, and the [Constitution] has to include the essential elements of a social order, why then forget economic and social rules that are so intimately connected with the political aspects?*⁷⁵

In a world in which most of human activity is economic, continued Cea, it was troubling for the fundamental charter of the country to remain "neutral" concerning that sphere. It is not a question of constitutionalizing a specific economic model, he argued, but of giving constitutional protection to the 'basic elements' of what he called the "*Economic Public Order*."⁷⁶ In Cea's words:

*What we argue for is that the characteristic principles of such [economic] models be included explicitly and unequivocally in the Fundamental Law. . . . What is the economic model and its social counterpart? The framers of the constitution have to answer these questions and not take the easy but ultimately dangerous path of value-system neutrality.*⁷⁷

In addition to these theoretical justifications for a "total constitution," Cea gave a more politically charged argument to defend the constitutionalization of economic rights, linking the need of a full

⁷⁴ See José Luis Cea Egaña, *La Constitución Plena*, VIGILIA, July 1978, at 46–52.

⁷⁵ JOSÉ LUIS CEA EGAÑA, TRATADO DE LA CONSTITUCIÓN DE 1980 16 (1988) (emphasis added) (Couso translation).

⁷⁶ By the notion of "Economic Public Order", Cea refers to: "*the basic principles and juridical rules that organize the economy of a country and that give the State powers to regulate it in accord with the values expressed in the Constitution.*" *Id.* at 158.

⁷⁷ *Id.* at 16 (emphasis added).

constitution to the prevention of future episodes like Allende's "legal loopholes."⁷⁸ He said:

*If [the constitutionalization of the economic model] is not done, the solidity of the economic and social components will be, in a short period, under the threat of legal loopholes and extra-constitutional practice.*⁷⁹

Given the general impression in Chile's legal community of Allende's era as rather chaotic one, Cea's statement could be understood as pointing to what he saw as the consequences of the economic "neutrality" of the constitution. The use of this historically charged example helped Cea to make his case to his fellow Chileans for the need to adopt a clear and precise economic constitution as an antidote to such situations in the future. Thus, the introduction of an "economic constitution" reveals the intention of the drafters of the Constitution of 1980 to end political debate on economic matters, taking this discussion out of the realm of politics and into the realm of constitutionalism. This aspiration was consistent with the general political philosophy of the framers the Chilean constitution, who were suspicious of politics and aspired to have the economic science organized in a rational way.

In July 1978, the Commission finished the draft of the new Constitution and presented it to General Pinochet. He referred it to the "*Counsel of State*," an otherwise irrelevant advisory body that the military had introduced following the example of the one that existed during the first decades of the nineteenth century.⁸⁰ After a year and a half (in fifty-seven sessions), the Council of State finished its work.⁸¹ The finished work included a number of changes moderating some of the proposals of the Commission, dealing mostly with the political aspects of the constitutional project.⁸² Upon receipt of the Council of State project, Pinochet and the Military Junta did not like the changes introduced, and ordered the modification of it by a small group of lawyers directly

⁷⁸ Cea was implying that one of the causes of the coup d'état of September 11 of 1973 was the use of legal loopholes. Such loopholes were used to attack private property rights under Allende's regime, which were possible thanks to the fact that the fundamental law of the time, the Constitution of 1925, was 'neutral' regarding the economic realm.

⁷⁹ *Id.* at 15 (emphasis added).

⁸⁰ It is worth mentioning that two former Presidents of the Republic, Jorge Alessandri and Gabriel González Videla, were members of this body at the time.

⁸¹ See ACTAS DEL CONSEJO DE ESTADO EN CHILE (1976-1990) VOL. 1 (Jaime Arancibia, Enrique Brahm & Andrés Irarrázaval, eds., 2008).

⁸² The Council of State began its work on November of 1978, presenting a revised constitutional proposal in July 8, 1980.

assisting the Junta on legal matters.⁸³ After this group finished its work, the constitutional project was ready for public ratification.⁸⁴

A plebiscite ratified the constitutional project on September 11, 1980, with the approval of 67 percent of the voters, amidst widespread accusations of electoral fraud.⁸⁵ After its promulgation on March 11, 1981, the new constitution was not completely in force, because a number of its articles delayed the actual applicability of some of its permanent clauses until 1990.⁸⁶ As a result of these transitory clauses, the country continued living under a dictatorial regime for an additional eight years.⁸⁷

Taking stock of the core of the constitutional order projected into the Chilean future by the military regime, the Constitution of 1980 established a “*Nueva Institucionalidad*” or “New Institutional Order,” that was meant to be the formal expression of

⁸³ According to Huneus, the small legal team that made the final touches to the constitutional project included Minister of Justice Mónica Madariaga, Interior Minister Sergio Fernández, General Santiago Sinclair, Fernando Lyon, Aldo Montagna, Enrique Montero, Harry Gruenewald, and Mario Duvachelle. In addition to this group, economists Miguel Kast, José Piñera, and Pablo Barahona also helped in some specific issues. See HUNEUS, *supra* note 15, at 262.

⁸⁴ See BARROS, *supra* note 15, at 225–26.

⁸⁵ The plebiscite was done without an electoral registry, with political parties still banned, and without access to the “No” option to the media. For detailed descriptions of the formal bodies engaged in the elaboration of the Constitution of 1980 and the circumstances of its approval see CARLOS ANDRADE GEYWITZ, GÉNESIS DE LAS CONSTITUCIONES DE 1925 Y 1980 (1988); SERGIO CARRASCO DELGADO, GÉNESIS Y VIGENCIA DE LOS TEXTOS CONSTITUCIONALES CHILENOS (1980). Robert Barros agrees, arguing that the Constitution was “ratified [. . .] in a plebiscite held amidst a state of emergency, with all political parties outlawed, no alternatives presented to voters, no electoral registries, and no independent electoral oversight.” See also BARROS, *supra* note 15, at 17.

⁸⁶ Commenting on this, Barros argues that “while the front end, the permanent text, some 14 chapters and 120 articles, structured an essentially republican representative regime, albeit a controverted one, a set of 29 transitory dispositions [. . .] tacked onto the back end, through a process of subtraction, suspended this alternative institutional order and reinstated the status quo of dictatorship by constitutionalizing the rules governing the junta and the executive, granting the president new discretionary repressive powers, and prolonging military rule for one eight-year presidential term, with provisions for a second-term for the Junta's nominee, subject to plebiscitary ratification.” BARROS, *supra* note 15, at 17.

⁸⁷ The crucial moment of this “transitional period” would be the plebiscite scheduled for 1988, in which the country would be confronted with the question of whether or not to elect General Pinochet for an additional presidential term of eight years. As a result of the unexpected defeat of General Pinochet in the plebiscite, the Constitution of 1980 was slightly reformed in 1989. Both the military regime and the “Concertación de Partidos Por la Democracia” (Coalition of Political Parties for Democracy, a coalition that represented the non-violent opposition to Pinochet) agreed to this reform. The most important reforms reduced the presidential mandate from eight to four years and made amendments to the constitution slightly easier.

the foundational project in which Pinochet's regime had been engaged since 1973. The new charter aimed at ensuring that Chile would not return in the future to the rule of the political parties, to what Pinochet dismissively called "*partidocracia*," meaning the demagogic capture of the state by the elites of political parties. As Carl Bauer puts it, "The Constitution of 1980 thus embodied the ideals of a-politicism, technocratic efficiency, anti-communism and laissez-faire economics that the military regime of Pinochet had already been implementing."⁸⁸ The idea was to ensure the continuity of this project while giving the regime a certain degree of legitimacy.⁸⁹

Among the political aspects of the Constitution of 1980, it is worth mentioning the following: a) a fortified executive branch, b) the inclusion of the military as the guarantors of the "institutionality" – a rather vague concept that in practice aimed to legitimize the political role given the armed forces in the "*Consejo de Seguridad Nacional*" (CSN). The CSN was a constitutional entity composed of a majority of non-civilians with the power of 'representing' to the rest of the branches of the state any action that, in the opinion of the CSN, threatens the institutions of the country, c) the incorporation of designated senators in the upper house, in order to incorporate non-political actors into the legislative process, and d) a variety of constitutional norms aimed at achieving a "*democracia protegida*" (protected democracy), another rather vague notion that reflects profound suspicion of democratic politics on the part of the framers of the constitution.

With regard to the economic aspects of the constitutional project, the text finally approved by the Military Junta and then promulgated in 1980 represented a somewhat watered-down version of the more ambitious economic constitution proposed by the Chicago Boys. Instead, the Constitution of 1980 adopted what the Chilean legal doctrine calls "*Economic Public Order*," setting the basic principles and rules that define the role of state and individuals concerning economic matters.⁹⁰

⁸⁸ See BAUER, *supra* note 70, at 9.

⁸⁹ It may seem rather absurd that a regime that came to power by means of violence would give so much attention to the Constitution when faced with the problem of assuring continuity for its program. A possible reason for this apparent paradox is that by giving the military a formal constitutional role (that of protecting the constitution), Pinochet expected to give the Constitution of 1980 an invulnerability that previous constitutional charters did not have in Chile.

⁹⁰ The concept of "economic public order" is not explicitly stated in the Constitution, but Chilean scholars refer with this label to the institutions and economic principles that structure the functions of the market.

The core conception underlying the economic clauses introduced in the Constitution of 1980 can be summarized by a single core idea, the “*principle of subsidiarity*.”⁹¹ This notion entails the idea that the state cannot intervene in the economy unless the private sector is unable to fulfill an economic function. Thus, the general rule is free markets, and state intervention is only the exception. In this approach, the state provides only the background to the real engine of economic activity, the market. The principle of subsidiarity is the foundation of specific economic precepts of the constitution. Among this specific set of norms can be mentioned: article 19 number 21, which guarantees the right to private entrepreneurial freedom (while requiring a super-majority legislative approval for the creation of state owned companies); article 19, number 24, which fortifies the protection of existing private property rights, requiring that the state give up-front cash to any individual being expropriated; and article 19 number 23 which for the first time in Chile’s history guarantees the right to *acquire* private property of all classes of goods, subject to some exceptions.

The economic rights and liberties were further fortified by the following expedient. After enumerating constitutional rights and liberties, article 19 number 26 establishes that the constitution guarantees that any law or administrative decision implementing or regulating the liberties guaranteed by the constitutional charter shall not affect the “essence” of those rights, nor “limit the free exercise” of those by the people.⁹² This precept was explicitly aimed at preventing Congress and/or the President from abusing their powers of implementation of

⁹¹ The “principle of subsidiarity” was a blend of neo-thomistic notions brought to the commission studying the new constitution by the “*gremialistas*,” a group of anti-democratic Catholics led by Jaime Guzman, and the anti-statist ideas of the neo-liberal Chicago Boys. The principle of subsidiarity represents the point of confluence between these two groups, otherwise with very different philosophical backgrounds. For an analysis of the process of convergence between these two groups on the principle of subsidiarity, see RENATO CRISTI & CARLOS RUIZ, *HISTORIA DEL PENSAMIENTO CONSERVADOR EN CHILE* (1992).

⁹² Article 19, number 26 reads “[the Constitution provides to all persons] the certainty that the laws regulating or implementing the guarantees that the Constitution establishes, or that otherwise limit these liberties in the cases authorized by it, shall not affect the essence of those rights, nor impose conditions, taxes or requirements which prevent their free exercise.” C.P. art. 19 cl. 26 (1980) (Couso translation). As we shall see later in this paper, the Constitutional Court has already ruled unconstitutional a number of regulations on the ground that they affected the “essence” of constitutionally protected rights.

constitutional rights by distorting the true nature of the rights and liberties guaranteed by the constitution.⁹³

In addition to the enumeration of economic rights and liberties and the article preventing the fraudulent interpretation of the Constitution of 1980, the framers created a number of entities, mechanisms, and institutional devices that ensure that the economic principles established by the constitution are upheld. Thus, article 97 created the “*Banco Central*” or “Central Bank,” the Chilean equivalent to the U.S. Federal Reserve Board, as an autonomous institution in charge of fixing the exchange rate and establishing monetary policies. This institution, inspired on the American model, deprived the Chilean government of the control of monetary and exchange rate policies for the first time in its history. Another feature of the economic constitution is the restriction imposed on Congress from proposing legislation that raises or reduces taxes without the approval of the executive power. Indeed, according to article 62 of the Constitution, only the President of the Republic can propose such legislation.

VII. THE CONSTITUTION OF 1980 IN THE TRANSITION TO DEMOCRACY

Chile represents a peculiar transitional case in that the dictatorship was defeated in a plebiscite aimed at legitimizing its rule, not as a way of opening a transition to democracy.⁹⁴ At any rate, the defeat in the plebiscite in fact opened the door for a gradual regime change severely conditioned by the constitutional order introduced by the authoritarian regimen itself. Thus, even though Pinochet had to leave power, the constitutional charter so carefully drafted to ensure the perpetuation of the authoritarian project, survived.

The defeat of the dictatorship in the 1988 plebiscite started a process of negotiation between the military and the opposition parties, a bargain that eventually led to the first amendment to the Constitution of 1980.⁹⁵ The amendments were approved by the population in yet another plebiscite in July 1989.⁹⁶ A few months later, the first democratically elected president in 20 years was sworn into the presidency. Later, in

⁹³ As with the case of other innovations introduced by the framers of the Constitution, it is clear that this clause was directly aimed at preventing the repetition of the experience of the abuse of “legal loopholes” by Allende’s regime.

⁹⁴ See HUNEEUS, *supra* note 15, at 552.

⁹⁵ See CAVALLO, *supra* note 32.

⁹⁶ *Id.*

1998, a new important set of constitutional amendments were approved, this time in order to reform the Supreme Court, give constitutional status to the new institutions of the criminal procedure reforms, and to eliminate the death penalty. The more important reform, however, would come only 15 years after the end of the military regime, in 2005. That year President Ricardo Lagos was able to persuade the right-wing parties (the political heirs of the military regime) to eliminate the most ominous anti-democratic features of the Constitution of 1980: the un-elected senators and the inability to the President of the republic to control the Commanders of the Armed Forces.⁹⁷

Even though the constitutional amendment of 2005 did much to eliminate the anti-democratic aspects of the Constitution of 1980 that the previous amendments had not eradicated, it had the perverse effect of creating the illusion that Chile had (at last!) managed to have a truly democratic constitution.⁹⁸ Indeed, even one of the country's most accomplished democratic politicians, former President Ricardo Lagos, believed at the time that with the constitutional amendment of 2005, the goal of ending with the dictatorial design of "protected democracy" had been achieved, while the super-majority requirement and the binominal electoral system were still in place.⁹⁹

CONCLUSION

Coinciding with the Bicentennial of Chile's declaration of independence from Spanish colonial rule (2010), the country's constitutional order became a matter of political dispute between the leading candidates for the presidency. Thus, instead of uniting the nation, the Constitution actually divides Chileans. The reason behind this – as we have seen in this piece — lies in the fact that the Constitution of 1980 still includes a number of anti-democratic features devised by the dictatorship as a way to prevent the people from effectively governing themselves.

Given the historical background of Chile's constitution-making processes, one has to admit that the unilateral way in which the Constitution of 1980 was introduced represents something of a tradition. This, however, should not be a source of consolation because, in tandem

⁹⁷ See FRANCISCO ZÚÑIGA URBINA, *REFORMA CONSTITUCIONAL* (2005).

⁹⁸ See Couso & Coddou, *supra* note 29.

⁹⁹ Lagos would later reconsider his previous assessment, declaring that the 2005 amendment was not enough to democratize the Constitution. ZÚÑIGA, *supra* note 97.

with the pattern just noted –the fact that Chile has never have a constitution freely adopted by its people, after a deliberative process—as there is another one: every generation or so the country experiences a strong political earthquake that completely erases the previous constitutional order. In light of this sad historical dynamic, it cannot be ruled out that, if the authoritarian features of the Constitution of 1980 are not removed sometime soon, the crisis of representation engendered by the latter could end in another violent struggle.