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The Issue of the “Legitimacy” of the Latest Chilean Constitutions. A Legal and Historical Approach*

La cuestión de la “legitimidad” de las últimas constituciones chilenas. Un acercamiento histórico-jurídico

Abstract: In recent years there has been a tendency to make the 1980 Political Constitution a kind of pariah in our constitutional history; it would be an illegitimate constitution. That has been the argument used to justify the need to start a new constituent process. That way of arguing seems to forget that the same or even more legitimacy issues may be found in the constitutional texts of 1833 and 1925, even if—as has been the case with the current constitution—Chile has lived long periods of political and institutional stability.

Keywords: constitution; legitimacy; constituent process.

Resumen: En los últimos años se ha tendido a hacer de la Constitución Política de 1980 una especie de paria dentro de nuestra historia constitucional; se trataría de una constitución ilegítima. De esa forma se ha buscado justificar la necesidad que habría habido de iniciar un nuevo proceso constituyente. En esa argumentación parece olvidarse que iguales o aún mayores problemas de legitimidad pueden encontrarse en los textos constitucionales de 1833 y de 1925, pese a lo cual —como también ha ocurrido durante la vigencia del actual— bajo ellos Chile ha vivido largos períodos de estabilidad política e institucional.

Palabras clave: constitución; legitimidad; proceso constituyente.

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When visiting the section “History” on SERNAC’s web site (www.sernac.cl),¹ one can see that its creation dates back to 1932, when the General Commissariat for Supplies and Prices (Comisariato General de Subsistencias y Precios) started operating. A filiation relationship is established with this emblematic institution of the Socialist Republic and the body now in charge of protecting consumers.

Its origin was Decree-Law No. 520 (1932) passed during the exceptional administration headed by Carlos Dávila, and very wide powers were granted to it in terms of economy regulation and control, especially as to “basic necessities and mass consumer goods.” The origin of the Commissariat could not be more spurious, as the Socialist Republic had emerged after a *coup d’état* that overthrew the President of the Republic Juan Esteban Montero, elected after the fall of Carlos Ibáñez. His first strongman—starting on June 4, 1932—was Marmaduke Grove, who in turn was overthrown a couple of days later—on June 16—by other military units, and the government ended up being headed by the journalist, Ibañist politician, and former ambassador to the United States Carlos Dávila (Vial, 2001, p. 111). The first thing the coup perpetrators did was to close the National Congress, which explains that the Commissariat is created not by law, but by a Decree-Law... backed by two coups as if one were not enough, so its “legitimacy” could not be more doubtful (Brahm, 1999, p. 87).

With the election of Arturo Alessandri as President of the Republic by the end of 1932, constitutional normality returned, and it could have been expected that Decree-Law No. 520 and other decree laws adopted in such exceptional circumstances would be repealed, but that was not the case. On the contrary, as stated by Alessandri in his first presidential message on May 21, 1933:

Many of the complaints made against this body (the Commissariat) and much of the resistance opposed to it ... It’s only logic that affected interests react and there will certainly be cases in which the complaints are fair. But considering the rise in the cost of life, the lack of jobs, and the economic crisis affecting the country, my opinion is that it is essential for a body to exist

and be maintained that prevents price abuse in basic necessities. (Alessandri, 1933, p. 12)

From that moment on there would be a paradox which is that a rule as exceptional as questionable in terms of legitimacy would be used by all Chilean administrations until 1973. Even under Allende it would have the honor of becoming one of the most important “legal gaps” (Brahm, 1999, p. 228). In general, its origin has never been questioned. It was considered just another law which was amended many times under administrations of different signs, because there was a certain consensus among Chilean politicians to favor certain degrees of economic interventionism in the state. It is no chance that its author has been Dávila’s Minister of Labor, Juan Bautista Rossetti (Góngora, 1981, p. 106), a Radical politician, who had started his career working with Pablo Ramírez in the Ministry of Economy during Ibáñez’s first administration (Esponda, 2013, p. 132) and who would later be a minister in the Radical administrations and in Ibáñez’s second administration (Valencia, 1986, p. 607). Its lack of “legitimacy” did not prevent, for good or bad, the continuing and permanent use of Decree-Law No. 520 for more than 40 years. That the Decree-Law was passed by an administration which was the result of two successive “military coups” has not been an obstacle for the current SERNAC officers to recognize their filiation with that instrument which set the Commissariat in motion.

An analogous situation in a way is the one which has been experienced in Chile in the realm of constitutional law. In fact, the Chilean constitutions which have been in force for the longest time—something which, in addition, has also happened frequently in other jurisdictions—and under which Chile has enjoyed more political stability have emerged in the middle of circumstances in which the institutions in force had been interrupted violently. Moreover, new constitutional texts have been drafted and adopted without observing the rules for their amendment when amending or repealing parts of the constitutional texts. As a result of that, from a legalist perspective, it could be asserted that the political constitutions of 1833, 1925, and 1980 would have lacked “legitimacy,” even if all of them

¹ Servicio Nacional del Consumidor; National Consumer Service.

were applied for tens of years without any challenges on the merits and were amended many times without their legitimacy being cast into doubt.

It should also be considered that, even if those constitutions resulted from important political ruptures, if its content is reviewed one can see that there is a lot of continuity among them. As proven by Jaime Arancibia, after a very careful work of historical textual analysis, “the text in force (the Constitution of 1980) has a considerable historical substrate. Without prejudice to successes and failures, it is part of the list of centenary normative bodies. As stated by President Ricardo Lagos as to the Constitution in force, ‘this Constitution is linking us with a past we are proud of,’ that of O’Higgins, Portales, Alessandri, Neruda, and Mistral. Moreover, President Michelle Bachelet, in her bill for constitutional reform, stated that ‘there are rules which are typical of our constitutional culture and have remained without major change among the different constitutions’ (Arancibia Mattar, 2020, p. 14).

For all of the above it is surprising that in recent years, among some intellectuals and politicians, there is a trend to discredit as “illegitimate” only the 1980 Constitution (without prejudice to the fact that the left has also tended to discredit any constitution which has not resulted from a Constituent Assembly to then justify a calling of a Constituent Assembly to put an end to the constitution in force), which would make its repeal almost mandatory, to be replaced by a new legitimate constitutional text. Naturally, the Chilean left has always been critical of the “Pinochet Constitution.” Beyond the fact that at its origin there may have been some kind of formal illegitimacy, the basic argument to discredit it is that it is the result of a “military dictatorship.” With more sophisticated arguments, Arturo Fontaine T. reaches a similar conclusion. In his opinion, while the Constitution of 1980 has suffered from “illegitimacy at origin,” it would have become “legitimate by means of its exercise. It has been in force for almost 30 years and in the country there have been order, democracy, and economic development” (Fontaine et al., 2017, p. 25). However, its true sin would be that it is not related to a personality around which Chileans can unite, as would have been the case in 1925

with the figure of Arturo Alessandri. The 1980 Constitution is related to Pinochet.

The human rights violations which occurred under the dictatorship stain his figure. His name does not unite; it separates. His shadow is long. This represents a formidable difficulty for the legitimation of the 1980 Constitution going forward ... the Constitution—he added—remains a symbol of a military dictatorship which interrupted the Chilean constitutional tradition and founded a constitutional order *ex nihilo*. The problem of legitimacy *sensu stricto* is not formulated at the legal and constitutional level, but at the symbolic level of the Constitution. (p. 39)

In Fontaine’s opinion, the 1980 Constitution is unfeasible not only because it is the result of and is associated with the military government, but also because it would also include the sin of having interrupted the Chilean constitutional tradition. Its illegitimacy would be given, Renato Cristi alleges along the same lines, by the fact that:

From the beginning, the intention of Guzmán and the military government was not to enact a constitutional reform (as would have been the case in 1833 and 1925), for which it would only have been necessary to activate and assume the derived constituent power, but it is about enacting a new constitution (Fontaine et al., 2017, p. 143).

This is an opinion also held by Juan Luis Ossa from his perspective as a historian. In his view, “the Chilean constitutional history contains a line of continuity between the Constitution of 1828 and 1925,” which would have come to an abrupt halt in 1980.

In fact, Pinochet and his close circle considered that the 1925 Constitution was “dead” and fully focused on preparing a new text (not in terms of its articles, but as a symbol), such as if they were working from scratch. (Ossa, 2020, p. 12)

Daniel Mansuy has moved along the same lines from the point of view of political philosophy. In studying the interpretation Jaime Guzmán would have had of the crisis

which ended on September 11, 1973, the conclusion is that for the unionist intellectual and politician, it was evident that the institutions did not know or could not answer to the Marxist aggression, and that demands creating a long-term project, which may provide protection against any future attempt to apply Socialism in Chile. In any event, such a scenario leads to an unequivocal conclusion: only refoundation can provide an answer to a tragedy of that dimension (Mansuy, 2016, pp. 26-27).

The *coup d'état* would provide “the opportunity to establish new regimes which put an end to the old ones once and for all” (p. 26). In this perspective, the 1980 Constitution would represent a radical break in the Chilean constitutional history, which would delegitimize it.

In turn, Fernando Atria, even if conceding that the 1980 Constitution is illegitimate at its origin —it would have been “born stained” and “this stain is indelible”—, claims that what is truly important is that it would not be a Constitution, but a “straitjacket”:

It is not a decision which can be understood by the people as their own, in terms of its form and mode of existence; it is a maze of provisions the most accurate

purpose of which is to deny the people’s constituent power. (Atria, 2013, p. 58)

From that he derived the need to call a Constituent Assembly: “not because the constitution is illegitimate, but because it is not a constitution in the opposite sense that it does not constitute the people, but instead denies the people, by rendering the people incapable of acting” (Atria, 2013, p. 63).

In any event, prestigious constitutional law scholars such as Alejandro Silva Bascuñán, in a more objective manner, would just question the democratic guarantees of the plebiscite process whereby the 1980 Constitution was ratified (Silva, 1997, p. 194), which would also be done by José Luis Cea (2015, p. 95).

Even if the legitimacy of the 1980 Constitution has also been defended with good arguments, especially in a historical perspective by comparing it with its predecessors (Bertelsen, 2020), there has been a tendency to render it a pariah in our constitutional history. This is a conclusion that does not seem accurate. These or more legitimacy issues may be found in the constitutional texts dating back to 1833 and 1925.

1. The Legitimacy Issues of the 1833 Constitution

Starting in 1810, Chile lived a period of great political instability in the midst of which constitutionalism started to be tested. Already during the *Patria Vieja* (“Old Motherland”), three very rudimentary constitutional regulations were adopted (Dougnac, 2000) which were only in force for an ephemeral period, and the task was continued by O’Higgins in 1818 (Valencia, 1978, p. 25). With the 1822 Political Constitution—O’Higgins’s second—important progress was made, at least formally. Prepared by a “Preparatory Convention” with representatives chosen by the provinces, elections in which the Supreme Director took an active part, based on a bill prepared by the minister and jurist José Antonio Rodríguez Aldea, it not only is the first Chilean constitutional text to be considered final and not “provisional” as the previous ones, but its structure and

content, modeled after the Spanish 1812 Cadiz Constitution was already close to what would end up being the great Chilean constitutions (Campos, 1983; Valencia, 1986). As stated by Gabriel Amunátegui,

its text, carefully drafted, is particularly interesting for us in terms of the study of our republican institutions. In fact, the 1822 Constitution was one of the sources consulted when drafting the 1833 Constitution, whose elements penetrated the current 1925 Constitution. (1950, p. 230)

With the fall of O’Higgins, his Constitution would be repealed and with Freire as Supreme Director, Juan Egaña would be the drafter of the new 1823 Constitution. But this

one—maybe the most original text in this era of tests—generated many antibodies which would result in its repeal by mid-1824. As stated by Diego Barros Arana on July 19,

from the early morning hours, a large number of people of all conditions gathered in Santiago's main square; and while they included many men of restless and turbulent spirit which had been notorious in other uprisings, there were also notable persons who, due to their social status or prior services, were respected by the public. While they praised Director Freire and asked that he be maintained as the supreme leader, they shouted "down with the Constitution!" (1932, p. 394)

Freire would submit to popular pressure, resulting in Mariano Egaña's indignation from London:

This last movement has been seen as the most scandalous which has taken place in the Americas, where for many years there had been no uprisings, and now it is being said that we are in a situation in which four people may get together to remove the administration and change the constitution. (*Cartas de don Mariano Egaña a su padre, 1824-1829*, 1948, p. 35)

It was evident that in Chile anarchy was reaching extremes. Any kind of legitimacy had been lost. One would have to wait four years for the adoption of a new Constitution. In that period, rulers—from the Supreme Director Ramón Freire until Francisco Antonio Pinto is elected President of the Republic, after the enactment of the 1828 Constitution—would exercise their power *de facto*, without any constitutional mandate, and the context would be a revolutionary atmosphere of utopian connotations. Maybe the extreme was reached during the "federal test." José Miguel Infante, its great defender, stated the following when the law making Chile a federal republic was passed: "I believe this is the day when tyrants start to tremble and free men start to feel consolation in hearing the word *federation*" (Campos, 1983, p. 350). For an important sector of the political class which advocated the adoption of federal laws in 1826, that regime was considered the "maximum of perfection in the representative system" (Collier, 1977, p. 293).

It was Francisco Antonio Pinto, who succeeded Ramón Freire as the head of the administration in 1827, who closed the federal Congress and repealed the laws the Congress had passed. This is how the drafting of a federal Constitution could not be completed either (Silva & Vargas, 2018, p. 409). Pinto's objective was to complete the progress made by liberalism in the 1820s by calling for elections for a Constituent Assembly which had to draft a new constitutional text. Even if now the idea would be to establish a more unitary regime, the refoundational utopianism typical of the liberalism of the period had not disappeared. In a proclamation published by the more prestigious leaders in January 1828 they stated that they had to "work to establish the Republic based on the ruins of the colony" (*Sesiones de los Cuerpos Legislativos*, 1887, p. 239). Everything had to start from scratch. That was validated in the preamble of the new constitutional text when it was stated that "the laws you will receive are not the result of just power; they result mainly from reason. The time has finished for us when luck condemned us to blind obedience to an unrestrained authority," to then add that the Constitution included "in itself the germ for indefinite perfection" (Valencia, 1986, p. 150).

The elections for the Constituent Assembly—as was a constant since 1811 and as it would continue to be in the following years—took place in the midst of an atmosphere marked by electoral interventionism, which altered to a large extent the expression of popular sovereignty, which would result in criticism by the losers, especially tobaccoists (*estanqueros*) and wigs (*pelucones*). It is likely that from that moment on Portales and his closest acquaintances started to think of the possibility of seizing power via a revolution (Silva & Vargas, 2018, p. 424).

The Political Constitution passed on August 8, 1828 was, from a legal and technical point of view, an important text, superior in that sense to all the previous ones. That does not mean that it has been the most appropriate for the circumstances of the time. To make a comparison, at its time the German Weimar Constitution of 1919 was also very praised, but it lost its prestige when during its effective period Adolf Hitler was appointed Chancellor of Germany. It was not in vain that in its drafting—within the

constituent assembly—a committee of highly regarded liberals had worked, and the bill had been reviewed and revised by the experienced Spanish intellectual José Joaquín de Mora. That is why it should not be a surprise that it has the classic structure set by the French texts of 1791 and 1795 and the Spanish text of 1812, without prejudice to also incorporating elements from the emerging Chilean constitutional tradition. Beyond its technical quality and the challenged legitimacy at origin, the *pipiola* Constitution suffered from a series of weaknesses, especially from the perspective of those who opposed the dominant liberalism. Even if Pinto’s administration had repealed federal laws, the Constitution gave extensive autonomy to the provinces, and provincial assemblies maintained a large share of power, including their participation in the appointment of mayors (art. 113). That debilitated the central power that was in the hands of the President of the Republic, who would be seconded by a Vice President. This Vice President, according to the electoral system established in the Constitution, almost necessarily had to represent a party opposing the Executive incumbent (arts. 60 *et seq.*). In addition, the Vice President had a right to veto which was very weak and left him at the mercy of the Legislature’s majority (arts. 49 *et seq.*). Moreover, it contained at least some regulations, which were essentially liberal, which would greatly unsettle the wigs. It was the fourth article, which seemed to relativize state confessionality in stating that “nobody would be persecuted for their private opinions” and the one abolishing primogeniture (art. 126).

Article 7 was also subject to criticism as it established the requirements to enjoy active citizenship with a right to vote, in granting citizenship to those who “would serve in the militia” —who were mostly illiterates—, which paved the way for wide electoral intervention in the administration by means of mayors. This became evident in the elections which took place during 1829, both presidential and parliamentary elections. As to parliamentary elections, the liberal victory was overwhelming, which led tobaccoists and wigs to conclude that such a feat could have only been possible by means of substantial fraud. This would end up disqualifying the electoral way to reach power. The above would be confirmed with the results of the presidential

election. In fact, while the victory of Francisco Antonio Pinto was clear and compelling, the election of the Vice President would cause more trouble from the moment the majorities following Pinto were not liberal candidates. In an indirect electoral system, by means of electors, the recently-elected Congress, dominated by liberals, discarding those who had obtained the highest number of votes, ended up nominating their fellow Joaquín Vicuña for that position, sparking indignation in the opposition. That was even more unexplainable when considering that rumor had it that Pinto would resign as President, so Vicuña would become the President. Revolution seemed inevitable (Brahm, 2007, p. 87). Wigs, tobaccoists, and O’Higgins supporters believed that the time had come to put an end to anarchy and the lack of authority with which Chileans had been living for many years and do something about the desires for order which were increasingly stronger (Eyzaguirre, 1977, p. 471). Everything was defined in a civil war which ended with the bloody defeat of the liberal army at the Lircay battle on April 17, 1830 (Silva & Vargas, 2018, p. 548). That was the end of the times of testing and order was established as associated with the figure of Diego Portales. “Portales and his friends,” Simon Collier concluded, “with an initial act of illegality and violence in response to a minor constitutional irregularity, introduced a new phase in Chilean history.” (1977, p. 332).

Even if the 1828 Constitution would remain in force for a couple years, it was evident that in Chile there had been a revolution which put an end to the liberal domination which was typical of the 1820s. In the opinion of Simon Collier, Conservative forces “destroyed the revolution,” to then add that

the establishment of the Conservative Republic should be interpreted as a great tragedy, and also as the source of a new order whose success, in terms of immobility, was so spectacular. Because the advent of Diego Portales marked the end of the revolution; and it had been a revolution with big hopes and noble affections. (1977, p. 334)

Those who came to power in 1830 had done so to put an end to the disorder they attributed to a large extent to the excesses of liberalism which had dominated the country and whose principles they believed were included in the Constitution in force. That is why there should be no surprise in how quickly they amended it, even if they had to go over the literal meaning of the text. Under article 133, the Constitution could only be amended by a Great Convention which had to be called by Congress. Both Manuel José Gandarillas from the pages of *El Araucano* as well as the *Cabildo de Santiago* exerted pressure on the new administration to accelerate the amendment procedure. Finally, Gandarillas, in his capacity as Senator, presented a bill to structure the Great Convention mentioned, which was enacted on October 1, 1831, which started working immediately, with Gandarillas and Mariano Egaña as the most noted members (Brahm, 2007, p. 89). That was not a way of observing the Constitution in force. This was a new revolutionary act which followed that which had put an end with arms to the liberal government.

Moreover, as explained by Diego Barros Arana,

from the first sessions of the committee in charge of preparing the bill to amend the constitution, different opinions between Egaña and Gandarillas emerged. These had to do mainly with a basic matter with respect to the scope that had to be given this task. Egaña believed that the law of Congress which had authorized to call for the Constituent Assembly empowered the Assembly to make a complete reform in constitutional terms and also held that turmoil and riots experienced by Chile in the last eight years made it necessary to give the nation a different organization. That organization, while maintaining the form of representative republican government, would secure more solid bases for existence, resulting not from the unaware vote of the masses, but from the healthiest elements of the society, and giving it sufficient power to repress any anarchical attempt. Gandarillas, in turn, fearing, as explained, that the opinion that the ruling party had against too liberal institutions may turn the reform into a strong reaction in favor of an anti-liberal and anti-democratic organization, believed that the

Constituent Assembly only had to cure the defects and clarify the gaps and instances of vagueness in the 1828 Constitution, but observing its spirit and the general organization established in it. (1932, p. 307)

The comment by the great liberal historian was so true that when the Committee which was working on the draft within the Great Convention presented its work in April 1832, Mariano Egaña expressed his discontent with it presenting his own and very different draft, which became known in history as his “Separate opinion” (*Sesiones de los Cuerpos Legislativos*, 1887, p. 84). Ultimately, the Great Convention discussed the two drafts. Without prejudice to the fact that in it some of Egaña’s most extreme ideas ended up being discarded, there is no doubt that the content of the 1833 Political Constitution comes from Egaña’s groundbreaking “Separate opinion” (Welsch Crespo, 1977; Brahm, 2007).

As had been traditional in Chile when the country started to walk along the path of constitutionalism, the new Constitution was born with an illegitimacy burden at its origin. To adopt the Constitution, the liberal government had to be put to an end by means of a civil war, violating the rules for the amendment of the Constitution established in 1828. An addition now was that there was a radical change in the form of government and some of the main institutions regulated in its articles. That was true without prejudice to the fact that the general structure remained that which had been fixed with the first French constitutions and the Spanish Constitution of 1812, in addition to elements taken from the Chilean constitutional history which had reached its peak in 1828. However, there had also been important contributions from the constitutions of 1822—O’Higgins’s second—and that of 1823, by Juan Egaña, father of Mariano. In any case, some of the most salient institutions in the new constitution, stemming from the “separate opinion,” were taken from the constitutional texts with which Napoleon Bonaparte had ruled, and those from the French restoration (Brahm, 2007, p. 100). For the defeated liberals there was no doubt that the 1833 Constitution was illegitimate. As written in a letter of 1834 by Joaquín Campino,

the current order of things results from violence. It is a truth held by the two most respectable classes of every society: property and priesthood, which are the ones that have always ruled in times of order and peace; but we cannot dissimulate that we are in times of revolution and that the numbers are against us. (Collier, 1977, p. 333)

The liberals would never feel satisfied with the interruption of the constitutional order. And the liberal resistance can be explained because the 1833 Political Constitution was different in important aspects from the 1828 Constitution. For example, suffrage was strictly based on a census that limited political participation to a relatively small group of landowners (art. 8). Primogeniture was reestablished, though limited to values (art. 162) and the fourth article of the previous Constitution was removed, which seemed to have made way for religious tolerance. A unitary and centralized system was established (art. 3) with the President of the Republic at its head and from whom province mayors depended, who were the President's natural and immediate agents (art.116). Other than that, even if from a formal point of view separation of powers was established, in practice it was fairly limited to the benefit of the head of the executive. In fact, the head of the executive exercised strong control of the legislature as the head of the executive had to extend their sessions and call them to extraordinary sessions and could neutralize their power by way of a veto (art. 82(4) and (5)). A bill vetoed by the President could not be resubmitted until after a year, and if Congress wanted to insist it had to gather a two-third majority (ar. 40). The independence of the judiciary is also relativized as judges and justices were appointed by the President of the Republic based on a proposal by the Council of State, a fully trusted advisory body (art.104(2)) and which also had to “look after the quick and effective administration of justice and the professional conduct of judges” (art. 82(3)). Also, the head of the executive could relatively easily declare the state of siege, whose radical effect was to suspend the effects of the Constitution in the territory included within the declaration (arts. 162 and 82(20)), so the result was basically that the head became a dictator (Brahm, 2007, p. 101). All of the above does not

negate that the Congress also had powerful resources to face the President of the Republic, such as periodical laws (art. 37 (1)-(3)), but they could only be effective when the head of the executive lost control of the elections.

This brief summary of the content of the Constitution is enough to understand the disaffection with which the Constitution was seen by the liberal sectors, especially when the Constitution had been a result of having been defeated in a civil war and they would have to suffer in their own flesh the authoritarian way in which the Constitution was interpreted and applied in the Conservative decades. As stated by Simon Collier,

The creation of an especially strong president together with the systematic manipulation of the elections by the government required justification by the Conservatives (who obviously felt a need for justification) and intensified in their determination against the opposition, which sought to reduce the overwhelming power of the executive ... in terms of political behavior the defense of the order led the government to act sometimes in an authoritarian manner, while the opposition (the liberals, and after 1857-1858, the Liberal-Conservative merger) was tempted twice to follow the path of armed rebellion. (2005, p. 57)

While to uphold its challenged legitimacy the conservative administration had to resort to repression measures of different kinds, including the repeated use of the state of siege, liberals and provincial sectors opposed to centralism, jumping into the electoral and constitutional path they questioned, resorted to violence to try to destroy a system they believed was to be imposed also by force. They ended up being defeated by the troops of Manuel Montt's administration both in the 1851 Civil War as well as in the 1859 war (Fernández Avara, 2017; Collier, 2005).

They would have no option other than legitimizing in their exercise the Constitution in force by incorporating into the system to then change it from within. That would first take place by introducing a series of “parliamentary practices” which tended to complicate presidential actions

and then trying to introduce a series of amendments to the constitutional text in force. But in 1865 when these amendments started to be discussed, the type of arguments revealed that liberalism continued rejecting that the constitutional text was legitimate. For example, Pedro Felix Vicuña, an old-time *pipiolo*, believed that it consecrated “a dictatorship with only republican forms” (*Sesiones de la Cámara de Diputados*, 07/11/1865, p. 104).

Even more drastic was José Victorino Lastarria, for whom the Portalean regime would have forced the Chileans to “live 34 years between absolute power and conspiracies, between despotism and bloody revolutions. Thirteen years, minus 45 days, of dictatorship authorized by the Constitution itself; the remaining twenty-one years were between power’s arbitrariness and public law’s uncertainty” (*Sesiones de la Cámara de Diputados*, 13/08/1867, p. 275).

2. The Illegitimacy of a New Government Regime Without a New Constitution

In light of the extreme criticism of liberal advocates, the conservative sectors would maintain until the end a positive view of the 1833 Constitution which they considered a work of their own and which had been key to put an end to anarchy and consolidate order and political stability in Chile, something rather exceptional in the Spanish-American context. In 1867, in the midst of a reformist effervescence, and in light of the liberals’ extreme criticism against the Constitution in force, conservative Representative Abdón Cifuentes defended it with arguments based on the comparison of the constitutional evolution in Great Britain and France: “There you have England, he stated. It still preserves as a venerated relic, with the respect that fundamental institutions deserve, the letter, rough and crude as its time, of the tyrant John the Landless, the one who swore by the teeth of God.” Then he asked: “How would England perform the reforms of this kind? After years, after centuries of discussion. It waits with patience for the opinion to form, discusses patiently its desires and does not satisfy them, only when it is certain that that is the national will.” In the view of the Conservative parliamentarian, France’s case was very different: “From 89 until now, it has had more than ten constitutions. What happened to them? Those which did not die when born died in their infancy . . . Their constitutions died piled one on top of the other. And their freedoms? Compare them with those of the English people and make a decision” (*Sesiones de la Cámara de Diputados*, 07/20/1867, p. 51).

Based on these arguments, he then praised the 1833 Political Constitution. “This Constitution is the only one, Abdón Cifuentes said, in these republics, which came of age a long time ago. Its duration demonstrates how good it is. In its shadow, the last of the Spanish colonies in this continent has positioned itself as the first of their sisters; in its shadow there has been immense progress in terms of illustration, industry, public and private wealth; in its shadow national credit has gone way up high; in its shadow anarchy has died and observance of the law has solidified, which is the basis for the republican building; in its shadow, ultimately, we have found a very honorable solution to the problem of conciliating freedom, practical, real freedom, not freedom on paper; with order, true order, deep peace, resulting from conviction and not from repression having reached days which are so nice that, so far, dictatorship is impossible” (*Sesiones de la Cámara de Diputados*, 07/18/1867, p. 53).

But, beyond the defense made by the Conservatives of the Constitution in force, it is evident that mid-century a certain consensus had formed in the political class—also including the Conservatives—, to the effect that order was already consolidated, so it was necessary to make progress toward higher degrees of freedom (Brahm, 1992, 2009). That entailed putting an end to presidential authoritarianism and making progress toward parliamentary liberal forms such as those that prevailed in the European nations which were our models. What made the union

of liberals and conservatives easier was that it was not considered essential to amend the Constitution; instead, parliamentarianism could be attained by interpreting the text in force, as happened in France during the Third Republic (Waechter, 2019, p. 34). Without prejudice to the fact that even Liberal presidents such as Domingo Santa María would continue defending presidential prerogatives, by the end of the century a majority is formed which exercises more pressure on the head of the executive so that the head of the executive recognizes his subordination to the parliament (Heise, 1974; Bravo Lira, 1986). As is known, this conflict would come to an end with the 1891 Civil War, during the administration of José Manuel Balmaceda (San Francisco, 2010 and 2013).

Only in a nation as legalist as Chile could there be the case in which there was an armed conflict to determine the correct interpretation of the Constitution. While President José Manuel Balmaceda defended presidential prerogatives and the supremacy of the head of the executive in the power games, a growing number of parliamentarians and party leaders believed that the Constitution was giving supremacy to the Congress. Already in 1891 Balmaceda had lost the majority it had in both houses. From that moment on, growing pressure was exerted on him by means of the main power of the Legislative under the Constitution in force: not passing periodic laws. The press would be a sounding board of this fight, which would adopt increasingly extreme and violent forms (Vial, 2009, p. 954). While the opposition was trying to toll ministries pressing the government by not passing periodic laws —which they succeeded in often—, and planned to accuse all the ministers and even the head of State, Balmaceda would contact the high military commands to stage a *coup d'état* (San Francisco, 2013, p. 227).

In organizing his last ministry —presided over by Claudio Vicuña— Balmaceda closed the Congress sessions without passing the periodic budget law. Starting at that time, the clash was inevitable and the opposing forces were moving to obtain support from the armed forces. There was no

mood to negotiate or to compromise. On January 1, 1891 Balmaceda made available a Manifest to the Nation vindicating his powers, declaring that he would ignore that the pending periodic laws were not passed and criticized the action by Congress as abusive, and on January 5 he declared via a decree that the budget for the prior year was in force. As all that violated the Constitution, the opposition accused him of having become a dictator. The truth is that the opposition had prepared an Act of Deposition for President Balmaceda long before —drafted by Conservative parliamentarian Abdón Cifuentes— which was made public on January 1, accusing him of having led the country to misgovernance and “legal and social ruin to the extent of using public resources and maintaining the sea and land forces without any authorization from Congress, openly and scandalously encroaching upon the exclusive powers of the Nation’s Legislative Branch.” It was concluded that the president “is absolutely precluded from continuing in the exercise of his position and, therefore, he ceases in the position since that day” (San Francisco, 2010, p. 32). The constitutional break was absolute. Collier and Sater rightly state that “neither the Balmaceda decree nor the ‘Deposition Act’ by Congress were constitutional at all” (Collier and Sater, 1998, p. 145).

It is even more serious that, from a very long time before, both sectors had moved to get support from the armed forces (San Francisco, 2013). This way, after the break takes place, most of the Navy, headed by Admiral Jorge Montt, made themselves available for those who defended the parliamentary regime, while the Chilean professional army, except for some officers, stayed with Balmaceda defending presidentialism. With that, civil war became inevitable; there was a lot of hate accumulated and none of the parties was willing to give in.

The final armed conflict only took place in August, once the forces of Congress could direct and equip an army in the north and make it disembark near Valparaíso, taking advantage of the fact that they controlled the seas. The conflict finished by the end of that month in two very bloody

battles —Concon and Placilla— in which thousands of soldiers lost their lives (San Francisco, 2010, p. 207). Then, “a hell of looting, fires, and vengeance followed suit for several days,” (Vial, 2009, p. 970) especially in Santiago and Valparaiso. Everything would come to an end with the suicide of President Balmaceda on September 19, 1891, barely after the five-year period for which he had been elected, in the Argentine legation where he was a refugee.

The consequence of this entire process marked by hate and violence would be the establishment in Chile of a new government regime: parliamentarianism. In essence, this meant that starting in 1891 it would be undisputed that for ministers to remain in their positions they should have the support of a parliamentary majority. Secretaries of state no longer were persons who were chosen and trusted by the President of the Republic only, which was accepted by them. As stated by Jorge Montt, the first of the presidents of the new regime, to the representative of the British government in Chile,

their intention was to give ministers a lot of independence to act in their ministries, refraining from interfering with legislative bodies and limiting mayors and governors of the provinces to their administrative duties, prohibiting any influence in political matters and, especially, in the elections. (Bethell, 2009, p. 75)

It must be stated that the new regime started operating without the need for adopting a new constitutional text and no substantial amendments were made in the current text. In the following months only minor amendments were passed (Valencia, 1986, p. 208). One thing that is also surprising is how quick political divisions were overcome, which had been marked by deep hate and extreme violence. Year 1891 had not finished yet when in Congress a first law of amnesty was being debated in favor of the Balmaceda supporters who were being persecuted (*Sesiones de la Cámara de Diputados*, 12/24/1891, p. 402) and in 1894 a full amnesty was completed. This in turn would enable that

the same people who had been defeated integrated and ended up accepting the new parliamentary regime they had fought against so hard when creating the Democratic Liberal Party (San Francisco, 2003, p. 333).

After overcoming the 1891 Radical crisis and still while the 1833 Political Constitution was effective, a new government system started to operate which would give Chile a solid political stability until 1924. Nobody challenged its violent and illegitimate origin and that entailed the return of periodical elections of Representatives and Senators and the periodic succession of presidents. There was a relative domestic peace, especially at the political level, which made it unnecessary to resort to states of emergency, because there was no violent challenge of the regime in force (Bravo Lira, 1986, p. 218). The benefits of the new regime —even if for him parliamentarianism would have started in 1891— and its legitimacy would have been highlighted especially by Julio Heise, for whom it would have been the “civic school of the Chilean people”:

Parliamentarianism, he alleges, strengthened the legitimizing feeling of continuity in the legal order which, since 1833, was the basis of our political structure. All social groups showed some spiritual superior disposition, which translated into an unwavering and almost sacred observance of the law and the basic political institutions of the nation. All of Chile lived and felt that legal regularity. We were a model of political democracy, which was even recognized by European countries. The parliamentary period was not affected by states of siege, abuse of power, or emergency zones. There would be in our history a stage characterized by “political peace and social tranquility.” (Heise, 1974, p. 272)

In general, during the 1891-1924 period, complaints against the parliamentary regime were always focused on its functioning and never on its bloody origins; its legitimacy has never been questioned.

3. The Adoption of the 1925 Political Constitution in the Midst of Revolutionary Times

Against the opinion held by Heise, there has also been a historiography more critical of the parliamentary regime, which is qualified as a period of stagnation, of relative inertia, which would underlie political stability. Alberto Edwards characterized it as a “soft salon anarchy, in which politics had become another sport to make life more fun and distract a few opulent tycoons,” as there were no substantial differences among their main actors, the traditional leading sectors (Edwards, 1945; Góngora, 1981). Also among its same actors there was some deception, as the expectations they had when the forces of Congress won in the civil war of 1891 had not been met. In the words of conservative Representative Julio Subercaseaux in August 1896, there would have been, “a kind of latent and chronic anarchy which has resulted in the loss of respect and prestige around the action of authority. The purpose was to put the country on track again within normality and the only result was the relaxation of all principles of order and government” (*Sesiones de la Cámara de Diputados*, 08/6/1896, p. 339).

In the course of the new century, the “social matter” started to appear, which entailed the deepening of a series of social and economic problems affecting popular sectors and the middle classes, which often resulted in strikes and demonstrations, which were violently repressed by the authorities (Collier and Sater, 1998, p. 157). Moreover, the impression was that parliamentarianism was not putting the means to resolve these matters, much less to open spaces for the people’s political participation. A parliamentarian asserted, for example, when discussing a formal employment bill: “I see that with this bill we are inventing a problem, the worker problem, which does not exist in Chile” (*Sesiones de la Cámara de Diputados*, 01/31/1911, p. 1947). This situation started to be noted by the army’s young officers—that one influenced by Prussianization—who also suffered the consequences and would push little by little toward deliberation (Brahm,

2019, 2002). That made it foreseeable that there could be a violent interruption of the constitutional regime. According to Manuel Rivas Vicuña, in 1914 Alberto Edwards would have declined the possibility of joining a ministry alleging that “he did not want to hear about politics. He had left the House with disgust. He claimed that the day was near when the Parliament would be dissolved after a fight and that he wanted to be among the attackers and not the attacked” (Rivas, 1964, p. 485).

These trends received crucial support with the First World War and its sequels (Leonhard, 2018). Based on it, a new conception of the state would gain momentum which sought to leave behind traditional liberalism—as the one lived in Chile during the parliamentary regime—which tried to face with the power of the government the serious social and economic problems affecting the society. For example, Radical Representative Pablo Ramírez, who after some years would become Carlos Ibáñez’s minister of Finance, asserted in November 1918 that, as a consequence of the worldwide conflict, the state no longer was “the old formula represented by the police to take care of internal order and by the military to take care of the defense of the nation in the event of war.” From that moment on, the “modern state” would have become “the organ of collective interests; it lives; it lives intimately tied to the needs of the people, and is interpenetrated and confused with the interests and feelings of the national soul.” That is why state interventionism would end up imposing itself (*Sesiones de la Cámara de Diputados*, 11/7/1918, p. 335). At the same time, criticism had started against the aristocratic nature of the parliamentary regime in force. Defending popular and middle-class sectors, Radical Representative Antonio Pinto Durán felt called to “devote all my efforts to contribute to press in Chile for the time of the fall of the ruling oligarchy and the advent of a true democracy” (*Sesiones de la Cámara de Diputados*, 12/12/1918, p. 1181).

Those trends were very well captured by Arturo Alessandri Palma, elected as President of the Republic in 1920, who echoed this discourse (Millar, 1981). The problem is that it raised great illusions—also among young army officers—which could not be met (Sáez, 1933, p. 69). As a result thereof, there was growing discontent against the system.

The beginning of the end of the parliamentary regime and the effectiveness of the 1833 Political Constitution started with the “saber rattling” the first days of September 1924 (Vial, 1987, p. 365). The presence of several dozens of young officers from the Santiago garrison in the Senate galleries while the “parliamentary allowance” was being discussed—a kind of salary for congressmen, who so far had worked *pro bono*—was a clear manifestation of deliberation which put at stake the then current institutional framework. Alessandri tried to handle the military movement in his favor, seeking the approval of a series of reforms which were part of his program—and with which the young military officers agreed—with the strength that they represented. The request they were asked to prepare included, other than military matters, more substantial social and economic requirements, such as the progressive nature of the income tax and the enactment of a Labor Code and other social laws (Monreal, 1929, p. 64). Part of this request is that which the Congress will pass almost without debate on September 8, 1924 when presented as bills by the new ministry appointed by Alessandri and presided over by General Altamirano (Bennett, 1926, p. 46). Little by little the constitutional order would start to go adrift. If Alessandri was expecting that the military would go back to the barracks with that gesture, he was wrong. Another sign that the validity of the 1833 Constitution was coming to its end by ways not contemplated therein is that young military officers, organized in a Military Junta, had made a statement to the effect that their movement would not cease until the “political and administrative corruption” that was destroying the nation came to an end (Rodríguez, 1938, p. 264). As a consequence, on the 8th, the President of the Republic presented his resignation, which ended up being rejected by the Congress, which instead gave him

a 6-month leave and authorization to leave the country (Monreal, 1929, p. 73). The climax would be reached on September 11, 1924 when a Government Junta was created to replace Alessandri which had been created by the same military ministers that he had appointed days before—Generals Altamirano and Bennett and Admiral Nef—and the National Congress was dissolved (Bennett, 1926, p. 76, 90). The Junta would legislate by means of Decrees-Laws.

Without prejudice to the fact that power—in this exceptional regime—was in the hands of officers of the highest rank, the revolutionary momentum that ended up putting an end to the parliamentary regime stemmed from young Army officers—who had been trained after German models (Brahm, 2002; Arancibia Clavel, 2007)—organized in the Military Junta, in which Carlos Ibáñez started to be the key figure (Brahm, 2019, p. 200). On September 11 the Junta made available a Manifest stating that one of the purposes was “to call a free Constituent Assembly, resulting in a Constitution that is consistent with national aspirations” (Escobar & Iluvic, 1984, p. 138).

In the following months, there was an increasingly harder clash between the Government Junta—which was accused of maintaining traditional politics—and the reformist forces of the Military Junta. Although the Military Junta ended up being dissolved, pressed by the Government Junta, that dissolution only gave more momentum to Ibáñez’s conspiracy activities and the young officers who contacted Alessandri’s supporters (Brahm, 2019, p. 203). All this came to an end with the coup of January 23, 1925 whereby young military officers, headed by Carlos Ibáñez and Marmaduke Grove, overthrew the Government Junta. The constitutional crisis deepened.

While the military immediately contacted Alessandri so that Alessandri would come back to finish his constitutional period, which could be interpreted as a sign of normality, the truth is that that was an illusion, because he would now be subject to the control of the armed forces. In a confidential circular that the Santiago officers sent to the entire Army, it was stated:

(2) Mr. Alessandri is returning to the country under the following conditions: (a) Away from the execrable clique that, by his own admission, was the main factor in his downfall; (b) With a solemn commitment to observe the September 11 manifest, which is considered the main point in the briefer call to a Free Constituent Assembly. (Monreal, 1929, p. 191)

Alessandri was back in Chile—he had left the country after his resignation, to go to Europe—on March 20, 1925, and power was transferred to him by the Government Junta headed by Emilio Bello Codecido, in which Ibáñez was the minister of War, who had provisionally ruled the country since the January 23 coup. But he would not rule in the same conditions in which he had ruled until September 8, 1924. As remarked by the Spain representative in Chile “the withdrawal of the military government from this Republic is but a statement with political aims by the elements of Government, but deprived of any reality, as the President of the Republic himself is, since he returned to the country, his prisoner” (Letter of May 25, 1925, Spain’s Ministry of Foreign Affairs, Spain Branch in Santiago de Chile, No. 116, Section 2, Politics, General Spain’s Archive). Carlos Ibáñez himself would remain as Minister of War. Congress did not resume operations either. It was a fact that institutions had stopped working as established in the constitutional text.

The rules for its amendment would not be observed either. In fact, if the military had called Alessandri again, the reason was that he was an experienced jurist and politician to lead the process which, by the election of a Constituent Assembly—and not of Congress as established by the 1833 Constitution—had to enact a new constitutional text. This meant that, as stated in *El Diario Ilustrado*, “the country may finally learn that the national Constitution that has governed us since 1833 has died” (*El Diario Ilustrado*, 04/05/1925, p. 7). The Constituent Assembly regarded itself as a “revolutionary” means (*El Diario Ilustrado*, 04/18/1925, p. 9).

In the end, as is known, there was no such assembly which should have provided democratic legitimacy to the new constitution. Alessandri had concluded, after being

warned by Vicente Fidel López with whom he talked while cruising from Montevideo to Buenos Aires in his trip back to Chile, that its operation was very slow and complex. There was the risk that the Constituent Assembly would not finish its job by December 23, when the presidential term of the head of the executive finished. Alessandri feared that if he lost control of the assembly there would not be a reform of the government system toward a presidential system, which was what he and the military were advocating (Alessandri, 1967, p. 125). Instead, he picked a committee including party representatives, independent and military figures who had to work in the reform of the constitution in force. This immediately faced Alessandri with a new problem: parties—from the Conservative to the Communist Party—were willing to correct the vices of the parliamentary regime, but not to replace it with a presidential regime (*Actas oficiales de las sesiones celebradas por la Comisión y Subcomisiones encargadas del estudio del Proyecto de Nueva Constitución Política de la República*, 1926, p. 15). *La Unión*, a Valparaíso conservative newspaper put it in an extreme manner, when stating that the new regime that Alessandri wanted to impose was “unique and unprecedented: it is presidential autocracy with a consultative House: it’s the Russia’s Czar’s absolutism... Is this conception of absolute power military or Soviet? The answer seems useless. Democracy cannot accept a *coup de grâce*, even if shot by its idol” (*La Unión*, 05/15/1925, p. 3).

The opposition of parties’ representatives was so strong that a new military intervention was necessary to move it forward. In the session of July 23, 1925 General Mariano Navarrete would hold the floor to state, in a threatening way that, if the reforms were not passed that the country and young officers were demanding since the “saber rattle” of September 1924, those reforms would have to be made “under the pressure of force” (Minutes, 1926, p. 455). They were not willing to accept the return to parliamentarianism. The parties’ representatives had no alternative but to submit. This is how a new government regime was imposed instead of the parliamentary system—after the enactment of the text proposed by Alessandri and the military. Ministers were again exclusively trusted by the President of the Republic,

periodic laws were eliminated (except for the budget law, whose debate had to necessarily finish the last day of the year, as—otherwise—the bill submitted by the executive would be applicable without any further consideration), “urgencies” would be introduced and, according to the regulation of the veto, for the President it was enough to have the support of more than a third of each of the houses to block Congress’s legislative action (Brahm, 2019, p. 266). There was a return—in accordance with the text of what would be the text of the new constitution—to a more marked presidentialism than the one regulated in the original text of the 1833 Constitution.

As there was no Constituent Assembly, the bill for constitutional reform would be submitted to a plebiscite. But many believed that the democratic legitimacy of this act would be vitiated, because it would take place in circumstances which were not of constitutional normality. For example, the intervention of General Navarrete of July 23 was considered evident proof that the revolutionary period had not finished (*El Diario Ilustrado*, 07/24/1925, p. 3). There was also no full freedom of speech. As late as June 1925, for example, military authorities would have communicated to the editors of *El Diario Ilustrado* that, if they insisted “on launching articles which offended the dignity and prestige of the Army and its members, law enforcement authorities would shut it down without further ado” (*El Diario Ilustrado*, 6/8/1925, p. 3). As a result, the main parties called for abstention. The Conservative Party

would base its position on a statement to the effect that “the 1833 Constitution is in force from a legal point of view and cannot be reformed unless the procedures established in it are followed, and considering also that a plebiscite does not allow citizens to express their opinions on the key issue and that there are no guarantees for freedom and correction in the popular referendum popular, states: That Conservatives refrain from attending the August 30 plebiscite” (*El Diario Ilustrado*, 08/17/1925, p. 11).

On the date stated, only 135,783 citizens went to the polls of the 302,304 registered voters who approved the new constitutional text (Vial, 1987, p. 548). Abstention won—which reached 55%—as promoted by the parties. Even if in the electoral acts of the period abstention was always relatively high, abstention in the plebiscite was way higher than the normal share. For example, in the closest election, the presidential elections of 1925, which were not even very competitive because Emiliano Figueroa was a candidate for all parties, the elections only reached 13.65% (Brahm, 2005, p. 72), with a similar figure for the plebiscite, Figueroa then got 186,187 votes and his surprising contender José Santos Salas, 74,091. The democratic legitimacy of the 1925 Political Constitution, which became in force on September 18 that year, would not be very evident (Valencia, 1986, p. 214).

4. Conclusion

There are no historical reasons to support the characterization made of the 1980 Political Constitution to justify the absolute need to repeal it and start a new constituent process. Legitimacy credentials have been demanded from it which have not been required from the preceding constitutions. While from a formal point of view valid arguments may be used to question the legitimacy at origin of that constitutional text, that would even be more evident in the cases of 1833 and 1925. The 1833

Constitution resulted from a bloody civil war after which the winners were not willing to observe the provisions in the constitution in force (that of 1828) and gave shape to a convention in which the leading voice was that of Mariano Egaña in a new constitutional text which put an end to a liberal decade, featured by the fear of strong executives, to give shape to a government regime profoundly presidential and authoritarian in nature. The new parliamentary interpretation given to that Constitution in 1891 was the

result of an even more violent conflict which was defined with the defeat of pro-Balmaceda forces in the battlefields. The lack of legitimacy of the 1925 Political Constitution is even more evident as a result of a revolutionary period which started with the saber rattling of September 1924. Though usually and rightly associated with Arturo Alessandri, its main promoter and key participant of the committee that drafted it, it is often forgotten that the constitution could have never been enacted without the support given by the rebellious officers. They were the key actors in the turbulent period

from 1924 to 1932. Without the revolutionary intervention of the Army’s young officers, at the head of which was Carlos Ibáñez, it would not have been possible to impose the new government regime which was opposed to by all ruling sectors. In fact, it would only start operating fully as from 1932, once the military were back in the barracks.

Chile has had its longest periods of stability under the validity of constitutions whose constitutionality at origin may be questioned.

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