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0521792185 - Constitutionalism and Dictatorship: Pinochet, the Junta, and the 1980
Constitution

Robert Barros

Excerpt

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Introduction

This book is about the military dictatorship that governed Chile for sixteen and a half years from September 11, 1973 through March 11, 1990. It is widely accepted that this was a dictatorship dominated by a single man, General Augusto Pinochet Ugarte, and that the centralization of power in his person explains the exceptional duration of military rule in Chile. This book is also about a central problem within modern political theory: the nature of absolute power and whether rulers who hold such power can effectively constrain themselves with institutions of their own making. Generally, it is believed that such autocratic self-binding is impossible. The reasoning is simple and long-standing: Dictators cannot subject themselves to rules because dictators can always change rules that restrict their power or else violate them without facing sanction. For this reason, effective constitutional limitation of authoritarian power is generally held to be impossible.

This book calls into question both of these established wisdoms. Contrary to the “personalization of power” view, it demonstrates that the course of the dictatorship in Chile was shaped by a collegial military junta. Shortly after the coup, this junta demanded rules to regulate power among the armed forces and later introduced and sustained a constitution which set into operation institutions that limited the dictatorship’s power and prevented it from unilaterally determining the outcome of the October 5, 1988 plebiscite which triggered the transition to democracy in 1990. Contrary to the established view that dictatorships stand above law and are structurally incapable of being subject to institutional constraints, the dictatorship in Chile is a case of an autocratic regime being bound by a constitution of its own making. This case suggests that when power is founded upon a plural body, institutional limits upon nondemocratic power can be viable, forcing us to rethink a long tradition in the analysis of political power.

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These findings are surprising and striking. The force of the standing view cannot be underestimated: The opposition between dictatorship and constitutionalism is perennial and undisputed. Dictatorships do not use constitutions to limit their own powers, nor do they allow themselves to be bound by the provisions of any constitution. Regardless of the many controversies – past and present – over the characterization, explanation, and comparability of various historical authoritarianisms, virtually all parties to these debates agree that rule free from legal or constitutional restraint is a hallmark of dictatorial power. Nondemocratic regimes are differentiated and classified along a number of dimensions, such as the character of their ruling apparatuses, the scope of their attempts to penetrate and administer social and economic activity, their mobilizational or exclusionary nature, as well as whether they emphasize ideology and/or racial politics.¹ Nevertheless, despite the plethora of denominations that follow – fascism, totalitarianism, nazism, authoritarianism, post-totalitarianism, bureaucratic authoritarianism, dictatorship, to name only some – and the recurrent disputes over the uniqueness of particular cases,² all of these regimes, as autocratic forms of state, are unified by their exercise of power beyond any limits of law or institutions.

Even beyond the comparative analysis of authoritarian regimes, the irreconcilability of authoritarianism and legal-constitutional constraints is a truism within the theoretical literature. As the following chapter shows, the origins of this perspective can be traced to the theories of sovereignty developed by Thomas Hobbes and Jean Bodin in the seventeenth century, and their views are echoed, though within a different conceptual apparatus, in much of the contemporary literature on institutions, particularly that focusing on credible commitments, self-binding, and constitutionalism. Autocrats cannot be subject to

¹ Many of the distinctions drawn with these dimensions are owed to Juan Linz's (1970, 1975) reconsideration of the totalitarian model in light of Franquist Spain.

² The "integration" of Nazi Germany into a comparative framework has been extremely troublesome, as the acrimonious *Historikerstreit* demonstrated during the late 1980s in West Germany. In dispute was whether the crimes of the Third Reich could be compared to the atrocities committed by other brutal dictatorships, in particular Stalin's terror, and whether such comparisons amounted to apologia by way of relativization. Maier (1988) reviews the ethical, political, and historiographical back-drop to this debate. For a recent entreaty calling for comparative analysis of Nazi Germany with other cases, particularly Fascist Italy, from a perspective distinct from that which sparked the Historian's Dispute, see Mason (1993). Stalin and Hitler have been set side by side in a recent comparative collection (Kershaw and Lewin 1997).

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rules because autocrats can always free themselves from rules that subject them. This book suggests otherwise.

Similarly, my characterization of the Chilean dictatorship is equally unconventional. Much more so than any other recent case of military rule in Latin America, dictatorship in Chile is identified with a single personage – General Pinochet – an association that has only been heightened by the October 1998 detention of Pinochet in London and the successive efforts to try the dictator. In the now standard and widely influential scholarly analyses of the “Pinochet regime,” the course of military rule in Chile reduces to a story of how Pinochet concentrates and wields power unchallenged. From this perspective, relatively shortly after deposing Allende and assuming state power alongside the commanders of the other branches of the armed forces and the national police in 1973, Pinochet gains control of the executive, relegates the other commanders to a subordinate position in a weak, rubber stamp legislative junta, and at the same time deftly manipulates promotions and retirements in the armed forces, thereby curtailing the careers of any potential rivals and consolidating power unlimited.³ Pinochet’s personalization of power then explains both the longevity of military rule in Chile and the constitution enacted in 1980, which from this angle is read solely as an instrument for perpetuating Pinochet in power and later imposing constraints upon democracy in the postmilitary period.⁴ In this manner, Pinochet emerges as the archetype of personalized, “one-man” dictatorial rule.

This characterization of the dictatorship has also figured in comparative theories that seek to explain how different subtypes of authoritarian rule affect the longevity of nondemocratic regimes. With different emphases, scholars have argued that regimes that concentrate power in a single person or party are likely to be more enduring than military regimes, as the latter are often beset by corrosive factionalism, intermilitary divisions, and subsequent military-institutional pressures to return to the barracks (Remmer 1989a; Geddes 1995; 1999). This book demonstrates that the Chilean

³ The initial impetus for the “personalization of power” approach was Arriagada’s (1985, 1986) analysis of Pinochet’s manipulation of legal norms regulating promotions and retirements in the army. Further extensions are found in Remmer 1989a; 1989b; and Valenzuela 1995.

⁴ Interpretations of the constitution from this perspective can be found in Linz 1992, 454; González Encinar et al. 1992; and Ensalaco 1994, 411–12. As a result of the continued force of the 1980 constitution, Linz and Stepan (1996, 205–19) view Chile as an “incomplete transition,” and Loveman (1991) characterizes it as a “tutelary democracy.”

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dictatorship should not be included among the cases claimed to support this argument.

The military dictatorship in Chile was not personalist. Regime cohesion and longevity did not rest upon the concentration of power in a single person or party, but upon a collegial organization of power that was institutionalized through rules and procedures which protected and reinforced the original plural foundation of military rule. This plural organization of the Chilean armed forces – the fact that historically the military had been structured as three separate, independent services – gave rise to an immediate need for rules and eventually provided a foundation for securing the constitution even when it constrained the dictatorship. In Chile, autocratic institutional self-limitation was possible because the collective organization of the dictatorship denied any single actor of the authority to shape rules at their discretion.

The development of this argument necessarily involves an extensive empirical reconstruction of the legal and constitutional practices of the Chilean military once in power. In the course of this book I present a wealth of new material documenting deliberations and decision making within the military junta. As a number of scholars have noted, despite all the attention focused on the last wave of military rule in Latin America, our knowledge of the political institutional structure of authoritarian regimes and their decision-making processes is relatively slim (Fontana 1987, 11, 19; Remmer 1989a; Huneus 1998, 72).⁵ Though on the basis of the apparent force of the personalization of power argument, some have claimed that Chile is an exception to this pattern (Pion-Berlin 1995, 149), as I progressed in my research I became increasingly aware of how little we actually knew about the internal workings of the dictatorship.

Leaving aside the many factors that may motivate scholars to avoid the study of autocratic regimes, the gaps in our knowledge result largely from the information constraints that autocratic regimes deliberately set to shroud their internal processes from public view. The dictatorship in Chile was no exception. From the first days of military rule, the regime shrouded its internal practices behind a veil of secrecy and mystery. The meetings of the Junta were secret, and within the government, tasks and access to information were often compartmentalized

⁵ As Remmer (1989a, 24) correctly notes, “Scholars moved from the study of democratic breakdowns to the study of democratic institutions without pausing to analyze the authoritarian phase that came in between.”

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to prevent all but a handful of top officers from attaining a sense of the overall situation, intentions, and stratagems at play within the government. These deliberate information constraints provided obvious strategic advantages to the military government, as they increased the regime's capacity for surprise and unpredictability and forced domestic and international actors to elaborate their responses on the basis of only minimal information about positions and evolving correlations within the government. Similarly, this nonpublic style of rule forced analysts to impute decision-making processes from the artifacts of results and the public by-products of decisions – events and crises, public declarations, policies, decree-laws and administrative decrees, journalistic accounts, and, often, rumors – rather than actual documentation of how the military structured its rule and made decisions.

Unlike most earlier studies, this account of the dictatorship relies primarily on documents generated by the everyday operation of the junta and its advisory bodies. Diligent detective work during field research in 1992 and 1993 led me to discover archive after archive of untapped primary material pertinent to reconstructing the legal and constitutional organization and practices of the military regime. Many of these sources had been classified long ago and were becoming available as part of the transition; some had been neglected by social scientists, others were shown to me by retired officers who took an interest in my research, and still another set of documents became available after the 1991 assassination of an important civilian advisor to the regime. These documents provide a fascinating entrée into some of the most restricted chambers of the dictatorship and led me to gradually rethink my conception of power relations within the regime, which initially followed the personalization approach. These materials include: the massive legislative archive organized by the *Secretaría de Legislación* of the Junta; the long mythical *Actas de Sesiones de la Honorable Junta de Gobierno*, actual verbatim transcriptions of the Junta's sessions from 1973–1990; the voluminous minutes of the Constituent Commission, the civilian advisory committee that provided the Junta counsel on constitutional problems during the first years after the coup and penned the first draft of the 1980 constitution; the more concise minutes of the Council of State, a second advisory body that reviewed the Commission's draft; and the personal archive of Jaime Guzmán, a central figure in the story that follows and the chief constitutional advisor and public ideologue of the military regime through the early 1980s. Guzmán was gunned down by an assassin's bullet on

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April 1, 1991 as he made his way out of the Catholic University, where he taught constitutional law.

I should say something about the Junta's legislative archive and minutes, as these are key sources for my narrative. The legislative archive consists of over three hundred bound volumes that compile individual legislative histories for most, though not all, of the decree-laws and laws enacted by the dictatorship. These histories gather together the paperwork generated as bills circulated through the Junta's legislative system. As these documents consist of legal analyses, amendments proposed by the different commanders in chief, and reports on the range of agreement and disagreement on a bill at a given moment, this archive makes it possible to reconstruct the evolution of positions within the military junta on a range of matters, including many issues not studied in this volume. Although by the military's own decree-law the public was to be allowed access to the legislative histories (with the exception of laws pertaining to national defense or designated as secret), prior to 1990 use of these materials was apparently limited to law students preparing theses on narrowly defined legal issues.⁶ As part of the 1990 transition, this archive was transferred to the *Biblioteca del Congreso Nacional de Chile* in Santiago, where it is housed today.

The official minutes of the Junta's sessions, the *Actas de Sesiones de la Honorable Junta de Gobierno* (hereafter AHJG), complement the legislative histories by providing transcripts of the Junta's regular meetings, thereby making it possible to fill the verbal gaps in the documentary record. As the minutes reveal, the sessions were recorded, thereby preserving an exceptional source of access to deliberations within the regime.⁷

During my research, I never expected to view these papers. Still, I always ended my interviews by asking for the whereabouts of these minutes, which in the lore of the dictatorship had attained mythical status. Usually I received elusive answers, doubts about their existence, or claims that if they existed only Pinochet had them. One day, however, I was told that just before the transfer of power the members of the Junta agreed to transfer a copy of the minutes to the *Biblioteca del Congreso Nacional de Chile*. Throughout 1992 and early 1993, I repeat-

⁶ The Junta's minutes contain evidence that opposition politicians and lawyers faced obstacles when they sought access to these antecedents.

⁷ Occasionally, one comes across parenthetical notes in the minutes stating that a few words were lost because of a change in tapes.

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edly asked at the library for the minutes and consistently an otherwise extremely helpful librarian denied any knowledge of them. At the end of a second interview late in my research, a retired official invited me to his home to have lunch and take a look at his papers. Upon entering his study, he asked me, "What do you think?" I turned, looked at the wall, and to my shock saw a bookshelf covering a wall from floor to ceiling with black, leather-bound volumes marked *Actas de la HJG* (HJG being an abbreviation for *Honorable Junta de Gobierno*). At the time, I had figured out that I could have access to important snippets of the minutes at the *Tribunal Constitucional de Chile* and was working with these extracts. I immediately checked the minutes that I was familiar with and they were identical. Negotiations ensued, and after agreeing that I would never reveal this person's identity, I left that afternoon with four volumes containing the minutes for the first year of military rule in my bag. For the following three months, once every few days I met this person at the entrance to a parking lot in downtown Santiago. Each time we went to his car, he opened the trunk, and I emptied my bag and refilled it with the volumes for the following year. Without this retired officer's cooperation, on the basis of my prior research I probably would have made the same argument that I present here, but certainly my support for it would have been considerably weaker. Despite my immense gratitude, I must respect our agreement not to reveal his identity.

As I was concluding my work with these minutes, I discovered that the Library of Congress was actually in possession of the minutes. In early March 1993, one of the employees insisted that she show me a new acquisition being held in the director's office. Though I already was familiar with the specific item, I went along as it was easier than objecting. Upon turning to leave the office, I faced a wall full of bound volumes whose markings I by then recognized and whose contents I was already familiar with. Subsequently, scholars have been given access to these materials at the library.

My account of institutional politics within the Chilean dictatorship proceeds as follows. Chapter 1 examines the theoretical dimensions of the problem of autocratic self-limitation and suggests conditions under which nondemocratic regimes might subject themselves to limiting rules. The rest of the book, which essentially consists of two parts, analyzes the institutional practices and evolution of the military junta. Chapters 2–4 study the preconstitutional organization of the dictatorship, while Chapters 5–7 detail the making, content, and effects of the 1980 constitution.

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Chapter 2 reconstructs the conflictive process whereby the Junta in 1974 and 1975 instituted rules to regulate the exercise of executive and legislative powers within the regime. Although General Pinochet gained control of the presidency at this point, this chapter demonstrates that Pinochet never attained the absolute dominance commonly attributed to him. Rather, a partial separation of powers and the adoption of decision by unanimity set fundamental constraints preventing any Junta member from dominating the legal system. The distinctiveness of this collegial foundation for military rule is highlighted in a comparative section at the end of the chapter.

Although this initial organization set limits within the Junta, as a body the Junta was unchecked during the period prior to the constitution. Chapters 3 and 4 demonstrate that despite the continued operation of institutions empowered to uphold the law and the constitution, when the Junta was in agreement its authority was free from any institutional constraint. This point is developed in Chapter 3 in reference to the status of the 1925 constitution and the Supreme Court's power of judicial review. The chapter also examines the *Contraloría General de la República's* (Comptroller General of the Republic) power to review the legality and constitutionality of executive decrees. Chapter 4 further demonstrates the absence of legal constraints upon the regime by focusing on the inability of the judiciary to protect individual rights before the massive repression that followed the coup. Two dimensions are studied: the relationship between the Supreme Court and the military tribunals in time of war, and the limitations of the *recurso de amparo*, a legal writ similar to *habeas corpus*, before extralegal methods of repression. This chapter also examines how the Junta deliberately manipulated the law in an attempt to deflect international pressure concerning human rights abuses. These moves provide the backdrop to some of the internal conflicts that led to the decision to enact a new constitution.

Chapter 5 reconstructs the internal political dynamics that culminated in the enactment of the 1980 constitution. Contrary to the personalization of power approach, I show the constitution to be a compromise that brought to a close renewed conflicts over the institutional structure of the Junta. Before attempts by Pinochet to concentrate executive and legislative powers, the commanders of the navy and the air force successfully defended the original collegial character of the dictatorship. This defense of the junta as an institution explains why the constitution effected no changes to the organization of the dictatorship and, consequently, appeared only to prolong Pinochet's personal power.

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Chapter 6 examines the institutional logic contained in the main text of the 1980 constitution. It reveals that the constitution was designed to contain future civilian political actors within a strongly constitutional framework, not assure continued political power for General Pinochet. This point is developed by examining the conception of institutions that informs the constitution's more controversial innovations, such as the National Security Council, nonelected senators, and limits upon the president's authority to remove military commanders.

Chapter 7 studies how the constitution effected military rule during the last nine years of the dictatorship. I show that the constitution restricted the Junta's prior authority to unilaterally modify the constitution and activated a constitutional court with full powers to uphold the constitution, even against the dictatorship. This analysis reveals how the constitution immediately constrained the Junta and how the Junta's capacity to freely define the further implementation of the constitution was checked by the constitutional court's mandatory review of the organic constitutional laws that filled out the constitution. In this manner, the 1980 constitution began to grow apart from its makers and limited them, with fundamental consequences for the 1988 plebiscite on the Junta's candidate for the second presidential term under the constitution. This chapter shows that during the final years of military rule the Junta was subject to institutional limits of its own creation.

Chapter 8 returns to the theoretical implications of institutional limitation in the context of dictatorship. Drawing from the Chilean case, it speculates about the conditions under which actors bearing discretionary authority may seek to restrict their unlimited power, the motivations that may drive such practices, the sources of stability for institutional limits once in place, and the effects of constraints. I conclude by insisting that pluralism within a ruling bloc is the fundamental condition under which government may be limited by institutions, even in a nondemocratic context.

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Chapter One

Dictatorship, Legality, and Institutional Constraints

The opposition between constitutionalism and dictatorship pervades the contemporary social sciences and reflects a long-standing theoretical conception of absolute power. This chapter explores the theoretical dimensions of the relationship between institutional constraints and dictatorship. After noting the prevalence of conceptions that view authoritarian power as unlimited, I explore at length the many aspects of the standard argument against autocratic self-limitation. To do this, I set out a conception of institutional limits, discuss the theory of sovereignty as an explanation of why rulers bearing absolute power cannot limit themselves, caution against conceptual confusions that might suggest facile – though inadequate – responses to the traditional theory, and conclude by presenting an account of the conditions under which institutional constraints might be effectively introduced under an authoritarian regime.

Dictatorship and Unbound Power

Since the beginning of the twentieth century the opposition of democracy and dictatorship has increasingly dominated political discourse on forms of government. In contrast to earlier classifications which elaborated variations on the classical trichotomy of monarchy, aristocracy, and democracy, the contemporary discussion of political regimes is largely exhausted in the dualism of dictatorship and democracy. Although scholars use a range of terms to refer to authoritarian regimes and have elaborated a number of subtypes, the principal criterion for differentiating dictatorship and democracy is the manner whereby laws binding upon a territory's inhabitants are created: In dictatorships laws are imposed from above, whereas through the mediation of elections and representation, laws emerge in democra-