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### Case Study Chile

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**INTERNATIONAL IDEA  
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**THE CONSTITUTION-BUILDING PROCESS IN CHILE: THE  
AUTHORITARIAN ROOTS OF A STABLE DEMOCRACY**

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### **Introduction**

The Constitution-building process (CBP) in Chile has taken place along the last 25 years and it is still under way.<sup>1</sup> It has been a lengthy, highly-contested and complex process in which participation has evolved from non-existent until 1988, to closed door elite bargaining in 1989, to Congressional discussion and some public debate through the media since 1990. Academic discussion, particularly by constitutional lawyers, has been ongoing since the beginning of the CBP, but its influence has been minimal. Popular ratification through plebiscites existed in 1980 and 1989. The legitimacy of the Constitution has evolved according to the increase in participation and to the degree that the Constitution has allowed the return and subsequent consolidation of democratic politics in Chile. This paper will discuss the main aspects of the CBP in Chile, starting with the imposition of the 1980 Constitution, but focusing on the review processes that have taken place since 1989, and finishing with an analysis of constitutional amendments currently under way.

The CBP in Chile demonstrates that an authoritarian constitution, both in its origins and content, may allow for a transition to a stable democracy. An institutionalized party system, a tradition of rule of law and capable political leadership were able to circumvent the authoritarian constitution and put it to work for a democratic purpose. Strong built-in “authoritarian enclaves” (Garretón 1983, Valenzuela 1992, Siavelis 2000), designed to provide political and economic protection to the outgoing military and their supporters, have slowed but not impeded steady increases in inclusion rates and social, economic and political reform.

We do not encourage others to follow this painful road to democracy. However, we do encourage those struggling against authoritarian regimes to give a more hopeful thought to the institutional constraints that the rulers may auto-impose on their effort to perpetuate and legitimate their power. A minimum of democratic rights and institutions granted by the 1980 Constitution have been skillfully used by able democratic agents to foster political

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competition, to a level that most scholars never thought possible (Linz and Stepan 1996, Siavelis 2000, Squella 2000, Valenzuela 1992). Those scholars, drawing on neo-institutional frameworks, postulated that no consolidation of democracy could take place in Chile until the authoritarian norms in the Constitution are removed. The neo-institutionalist logic is that authoritarian institutions necessarily hamper the consolidation of democracy, and that only the elimination of those institutions would clear the way for democratic consolidation. These neo-institutionalist claims seem overstated. The CBP in Chile demonstrates that the rule of law is a dynamic process with feedback loops. Once it has started, it positively reinforces itself, and makes it harder and harder, for both creators and beneficiaries, to free themselves from the constraints, deadlines and legitimization procedures set up by the institutions, no matter how authoritarian, and without major institutional transformation.

The Chilean case also stresses the empirical relevance of a minimal definition of democracy (Schumpeter 1950, Dahl 1989, Collier and Levittsky 1997). The very authoritarian concept of democracy of the 1980 Constitution was instrumental for the construction of a stable democracy. In 1990, at the inauguration of the first elected government after the authoritarian interval, Chile did not even fulfill the requirements of a minimal definition of democracy. We could call the political system instituted by the 1980 Constitution a sub-minimal democracy. Nonetheless, norms that provided a dreadfully restricted base of political freedom and basic electoral rights, as they were effectively implemented and enforced, were the underpinnings for further democratization and a stronger rule of law. The Chilean CBP could help illuminate cases of slow, negotiated transition from authoritarian governments that have not suffered total military or political defeat, as may be the case with many Arab countries.

Another lesson from this case study is that pro-democracy constitutional reforms result more from changing political interests and depolarization of actors than from much cherished democratic principles or strong political will. We propose a systems view of institutional change, rather than a linear or mechanical approach more congenial to neo-institutionalism. Institutional change in Chile has been slow and complex, as much a consequence of political change as a cause of it. Actors and their interests and strategies are complex and changing rather than monolithic. Political agents have internal parts (Schwartz 1995) with their own histories, traumas, interests, agendas and resources. Institutional change in Chile is taking place as a result of thawing and depolarization of extreme positions that froze actors on the extremes of the authoritarian-democratic cleavage for two decades.

## **Democratic Breakdown and the Making of the Authoritarian Constitution**

In order to understand the kind of problems that the Chilean constitution presents for democracy, it is necessary to outline its complicated history.<sup>2</sup> That history shows that the 1980 Constitution was drafted and approved in an undemocratic way by a repressive

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<sup>2</sup> In English perhaps the most detailed history of the drafting of the Constitution and based on previously unavailable material is Robert Barro's *Constitutionalism and Dictatorship* (2002).

military dictatorship, representing the maximum institutional materialization of its authoritarian, anti-communist and neoliberal ideology. Paradoxically, it contained the minimal institutional checks that allowed for an ordered transition to democracy and later, to stable though minimal democracy.

Before 1973, Chile had a constitution adopted in 1925. That constitution followed the classical liberal and democratic lines shared by the pre-war constitutionalism (Silva, 1997, III: 90). Under the 1925 constitution, eight democratically elected Presidents governed Chile and 11 Congressional elections were held. In fact, Chile was reputed to be an example of constitutional and democratic stability (Gil 1966, Valenzuela 1978). That institutional continuity was brutally broken by the military coup of 1973. Despite the fact that the causes of the coup are complex and there has been much debate about them (Valenzuela 2003), the immediate constitutional consequence was the partial derogation of the 1925 constitution<sup>3</sup>. By law-decree 128 the military junta<sup>4</sup> assumed the exercise of all constitutional, legislative and executive powers. Then, just a few days after the coup, and in exercise of those self-attributed powers, the junta appointed a commission for the study of a new constitution. That commission was composed by eight lawyers, most of them professors of constitutional law. The commission, usually known as Ortúzar Commission by the name of its President, worked from September 1973 to August 1978. Its meetings were not open to the public or its content made known during the whole period. Finally, in August 1978, the commission emitted a complete draft of the Constitution. General Pinochet sent it for consultation to the second organ that participated in the drafting: the State Council.

The State Council was a consultative body created in 1976 by the military government, composed by the former Presidents of the Republic, a former head of the Supreme Court, former heads of the armed forces and the national police (*Carabineros*), and former high officials of the public administration and academics, plus one representative of the business sector, unions, women and youths, respectively. In total 18 members, all of which, other than the former Presidents of the Republic<sup>5</sup> --which were members *de jure*-- were appointed by Pinochet. Both its proceedings and opinions were confidential. The Council studied the Ortúzar Commission draft from November 1978 to July 1980. During that period the Council asked the public, without much publicity or any media debate, for opinions and suggestions about the draft project, which had been published at that stage.

<sup>3</sup> Partial because though the Constitutional, executive and legislative powers were assumed by the military junta other constitutional organs, such as the judicial power, continued to be ruled by the provisions of the 1925 constitution. For instance, the recourse of inapplicability, a very limited type of judicial review, was in continuous use throughout the period, between 1973 and 1980. The new 1980 Constitution kept it in its text.

<sup>4</sup> The junta was composed by the head of the armed forces, the Army, the Navy and the Air Force, and the *Carabineros*, the national police.

<sup>5</sup> Only two former Presidents of the Republic integrated the Council of State, Jorge Alessandri (1958-1964) and Gabriel González Videla (1952-1958). Former President Eduardo Frei M., (1964-1970) a Christian Democrat, refused to participate saying that the Council lacked any power to initiate debates, had only consultative functions, it was not mandatory to be consulted in any matter, and all its members, but the former Presidents of the Republic, were appointed by the military regime and could be removed at will.

Some 150 recommendations were submitted, but again participation was kept to a minimum. None of the main constitutional law professors from the opposition's parties, nor the parties<sup>6</sup>, themselves submitted any recommendation. On July 1980 the Council delivered its draft to General Pinochet, who sent it to the third and last organ that participated in its study: the Junta itself.

It is important to bear in mind that throughout the whole period of the study of the Constitution by these organs, i.e. from 1973 until 1980, the country was under some type of emergency state, political liberties were severely restricted, political parties banned, and there was a harsh repression carried out mainly by the secret police, the feared DINA.<sup>6</sup>

The Junta studied the State Council's draft project for a month behind closed doors. Then, on August of 1980, Pinochet announced to the country that the Junta had approved a new constitution and that there would be a plebiscite for its confirmation. The plebiscite was called for the 11th of September, barely one month after its announcement, on the same date of the military coup seven years before. Political life, previous to and during the plebiscite, was under complete control of the military regime by repressive means. All political parties were banned; there was no freedom of association. The press and other media, particularly television, were overwhelmingly in favour of the military regime and under censorship. The Chilean Conference of Catholic Bishops called for the establishment of minimal conditions for a valid vote<sup>7</sup>. However, the regime did not pay attention to those demands.

For the plebiscite, for which voting was mandatory for all citizens, there was no previous registration of voters. This meant that there was no clear knowledge of how many voters there were in any polling station, making the results vulnerable to a number of irregularities. All the officials involved in the preparation and running of the polling stations as well as in the vote count were appointed by the military regime. There was no independent supervision in any of these steps. Not surprisingly, the outcome of the plebiscite had 67% of voters approving the new constitution and 30% against it. Consequently, the new constitution entered in force in March 1981.

### **Why did the Military Need a Constitution?**

What led the military government in 1980 to run the risk and commit their efforts in writing a new constitution at a time when they had absolute political control of the country and no

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<sup>6</sup> According to the Rettig report, during that period close to 3000 people were murdered by the military, including close to 1000 cases of disappearances. The report was produced by the Commission on Truth and Reconciliation, or Rettig commission, a the body created by the first democratic government to study human rights violations under the dictatorship. There is an English version published by the University of Notre Dame and an internet version at the site of the Notre Dame Center for Civil and Human Rights <http://www.nd.edu/~cchr/publications/index.html>.

<sup>7</sup> The Chilean Catholic Church had a decisive roll in defending human rights throughout the Pinochet regime, being at some periods the only national institution that could provide shelter and help to the persecuted by the regime. Key in its action was the Vicariate of Solidarity, an institution created by the Cardinal Silva Henríquez, Santiago's Archbishop, that gave legal defence to victims of human rights violations and created the most comprehensive archive of their infringement under the military government.

military, social or economic crisis was in course? It seems that from a pure power perspective there was no reason for the military government to invest in a potentially risky constitutional endeavor at that particular prosperous and calm moment. However, there were other reasons to embrace a deep transformation of the Constitution. First, the Chilean military and their civilian supporters were convinced that they had a mission to fulfill. They had to save and shield the country from Marxism and to guarantee an unassailable protection of private property rights that had been severely thwarted during the Frei and Allende administrations. That was called the “foundational character” of the military regime (Allamand 1999, Arriagada 1988, Garretón 1983, Hunneus 2000). If they were to endure, those objectives required strong institutional bases. Unchallenged force was not enough to guarantee against leftist parties and doctrines which could reemerge at any time. Deep economic and constitutional transformation was deemed necessary. Systematic and profound change on the economic model was implemented since the mid seventies. It included fiscal policy reform, privatization of almost all publicly owned companies, banking and commercial liberalization, labor market, educational and health system reform, and privatization of the pension system (French-Davis and Stallings, 2001). An equally radical process of change should take place in reforming the political and constitutional structure of the country.

A second reason was the growing need of legitimacy that affected the government and the opportunity to secure a longer period of military rule. Force, direct control, decent economic results, and even order and stability were not enough to legitimize the government in the long run. Some sort of formally-expressed popular support and constitutional underpinning was necessary if the authoritarian system was going to endure harder economic and political periods. An easy-to-win plebiscite on a tailored constitution was an attractive alternative. A majority vote for the Constitution could be easily interpreted as support for the government. The new constitution would provide a legal base for the de facto authorities. The dictator would become the President, the military junta would become the legislative power, and decrees would become regular laws. Extremely long Presidential periods (16 years was Pinochet’s original proposal) with a non-democratic ratification system would secure a long life for the dictatorship. The economic and political moment in 1980 to conduct the plebiscite was auspicious. Opposition groups and parties had been effectively neutralized after five years of harsh repression (Comisión Valech 2005), the media was under total control, and economic performance was on the rise.

A third factor was the legalistic culture that had permeated Chile since the mid-nineteenth century (Hunneus 2000: 228). Chile had a long history of political competition and rule of law with growing levels of participation and opposition (Gil 1966, Valenzuela 1978). Only two constitutions (and the second was an irregular amendment of the first) ruled the country for over 140 years. Chilean politics were highly institutionalized and deeply rooted in society. Respect for the institutions and rules that organized political and economic life was a Chilean pride. It was enforced by professional and uncorrupt judges, policemen and a web of specialized offices, chief among them the *Contraloría General de la República*, a well staffed independent office that controlled the legality of executive decrees and the Constitutionality of laws, and audited all public accounts. The Chilean Congress was a respected and powerful legislative body (Valenzuela 1977, 1978). The military had a tradition of professionalism and democratic subordination (García and Montes 1994). After

the coup, the military abolished Congress and all representative institutions, but left a submissive judiciary intact (García 1990, Skaar 2001, Comisión Valech 2005). However, a society accustomed to running businesses and political life according to laws does not work smoothly without them. The courts and law enforcement offices required some legal ground to protect the interests of the regime against an incipient but increasingly assertive group of human rights lawyers as well as church and social leaders that adopted the strategy of denouncing the illegality of the regime and its acts in the courts (Comisión Valech 2005, Zalaquett 1999, Loveman and Lira 2000). There was a growing demand, even from within the supporters of the regime, to “constitutionalize” the de facto government.

Finally, human rights abuses, particularly those committed abroad, like the assassination of Orlando Letelier, former foreign minister and ambassador to the United States for Allende, whose car was blown by DINA agents (Pinochet’s political police) in Washington, D.C., as well as crimes committed in Europe and Latin America caught the attention of international observers and organizations. Strong pressure to stop human rights abuses and to restore democracy started to flow from the international community (Barros 2002: 212, Sigmund 1993, Portales 1995). A plebiscite on a constitution that would establish the façade of democracy could help in the international front.

### **The Dual Constitution**

The Constitution was the result of the diverse and contradictory ideologies and forces that shaped the military regime (Hunneus, 2000). In fact, there were two constitutions in one: the permanent and the transitional.<sup>8</sup> The permanent constitution was supposed to operate in full at the reestablishment of civilian rule, which according to the schedule set in the transitional period would be in March 1990. From 1981 to 1990 there would be a transitional period of military rule, with Pinochet as President and the Junta holding the constituent and legislative power. Thus, in essence, the provisional clauses gave a constitutional framework to the actual working of the military government (Barros 2002:169-170). In that sense, there was no real change and for that reason they were strongly criticized by the democratic opposition (Allamand 1999: 177). On the other hand, they limited the regime’s freedom of manoeuvre, and that was one of the factors that explained the change to civilian rule in 1990.

However, the most important part of the Constitution is its permanent structure because it was and still is the main institutional legacy of the military government. According to Barros (2002: 226) the vast majority of the modifications brought by the new constitution were designed looking backwards, i.e. to the Allende’s government and 40 previous years of interventionist economic policies. The original 1980 Constitution, i.e. previous to the 1989 and later reforms, had the following main features.

- a. Strong presidency.

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<sup>8</sup> Barros calls this the dual constitution (2002: 249).

It created a presidency with super-powers, even for the already strong presidency of the Chilean constitutions. Among these powers, one that is considered exclusive of parliamentary regimes, is the power to dissolve parliament. The Presidential term was 8 years, the President was the head of the state and of the government, elected by majority vote in direct elections, appointed ministers and a number of other important public officials, had the sole legislative initiative in all matters related to the budget<sup>9</sup> and administrative organization, taxes and social welfare.<sup>10</sup>

b. Limited representation.

The National Congress had two chambers, a chamber of deputies, with 120 members, directly elected and a Senate. In the Senate we found one of the strongest “authoritarian enclaves” because in addition to the original 26 elected senators (two for each of the 13 regions of the country)<sup>11</sup> the Constitution contemplated 9 additional appointed senators: two former members of the Supreme Court appointed by the same body, a former Comptroller General also appointed by the Supreme Court; a former Commander in Chief of every branch of the Armed Forces (Army, Navy and Air Force) and Carabineros<sup>12</sup> appointed by the National Security Council; a former rector of an university and a former minister of state, both appointed by the President. Currently, they represent close to 20 % of the total number of senators (49), but in the original text (pre 1989 reforms) they represented more than one quarter of the whole Senate.

c. Military power.

The political role of the military is one of the most relevant features of the 1980 Constitution. In fact, the original constitution created a National Security Council, headed by the President, and composed by the head of each branch of the armed forces and Carabineros, plus the President of the Senate and the President of the Supreme Court. Thus, it was an organ with military majority. Among its powers it was to convey<sup>13</sup> to any organ of

<sup>9</sup> The budget powers allow us to appreciate the relevance of the presidency in Chilean political life, particularly vis a vis the Congress. The Constitution states that the executive drafts the budget. Congress can only diminish expenses, approve or reject them. If Congress does not reach an agreement within certain deadline the whole budget sent by the executive is automatically authorized.

<sup>10</sup> That means that Congress can not legislate unless the President sends a bill. Congress can only approve or reject. Despite these limited powers the high quorums that the Constitutions impose for the approval of a number of important bills forces the President to constantly negotiate with the opposition.

<sup>11</sup> This territorial distribution created a great disproportion in representation in favour of a more rural and supposedly conservative oriented electorate given the fact that 40% of the Chilean population live in the metropolitan region (more than 6 millions inhabitants in the last 2002 census), that originally elected two senators, vis a vis more uninhabited regions, like the XI region, with a population of just 120.000, that also elects two senators.

<sup>12</sup> The “military” must include the Carabineros, or national police. First, because institutionally they are a national organized force, hierarchical and under military discipline, possessing the monopoly of the use of force in relation to public order, and since Pinochet, depending from the Defense Ministry. Politically, because they were part of the military government sharing their aims and policies.

<sup>13</sup> In Spanish the term originally employed by the Constitution was *representar* which in Chilean administrative law means to deny legal effect. It is the term that the Constitution used for describing the

the state its opinion on any act, event or matter that gravely attempted against the bases of the institutionality (chapter I of the Constitution) or that jeopardized national security. It seems clear, as Silva Bascuñán points out (2003: 339), that the political effects of such declaration, that so far has never been done, could be devastating.

The 1980 Constitution also included for the first time in Chilean constitutional history a whole chapter on the armed and national police forces. Among other things, that chapter provided that they guarantee the institutional order of the republic. According to numerous critics (Cumplido 1988; Godoy, 1996; Silva 2003, IX, 266), this last duty clearly goes beyond what any democratic constitution can withstand because it has the effect of giving the armed forces the final and definitive verdict on what is the “institutional order of the republic”. In fact, this clause placed the military over and beyond that same institutional order.

However, the clause that has been the source of the greatest dispute and the target of almost all Presidential attempts of amendment is the clause that deals with the status of the commanders-in-chief. According to article 93, the President, in order to dismiss the commander-in-chief of each branch and the General Director of Carabineros, needs the agreement of the National Security Council.<sup>14</sup> The rules of the Council state that that agreement requires the vote of the majority of its members. Given the fact that the current composition (after the 1980 Constitutional reforms) of the Council includes four civilian members (the President of the republic, the Presidents of the Senate and the Supreme Court, and the Comptroller General), and the four military leaders, a vote in favour of removal would require the approval of at least one of the other commanders, thus dividing the armed forces on the issue. The practical consequence is that the commanders-in-chief are practically irremovable.

#### d. Ideological exclusion.

One of the aims of the Constitution was to eliminate Marxist ideologies and parties, thus, prevent the assumption of a new socialist government in Chile, such as Allende's in 1970. For the military, western democracy was weak and incapable of defending itself against its enemies, particularly international communism (Allamand 1999: 172). Thus, article 8 outlawed parties and persons that attacked the family, or advocated a totalitarian conception of the society or the state or based on class warfare. The Constitutional Tribunal was the organ in charge of declaring that prohibition.<sup>15</sup>

powers of the Comptroller General of revising administrative acts and rejecting them, communicating to the administration their illegality. Thus, in effect, it meant that the military had a veto power on any act of the government.

<sup>14</sup> Throughout all Chilean constitutional history the Presidents had the unqualified prerogative of sacking high ranking officials at will. Therefore, at this respects the 1980 Constitution represented a great change.

<sup>15</sup> The norm had a direct precedent in article 21(2) of the German Fundamental Law, that states that parties which, by reason of their aims or the behaviour of their adherents, seek to impair or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany are unconstitutional. In Chile supporters of article 8 always argued quoting the German example.

e. Constitutional rigidity.

The 1925 constitution provided for its reform by the majority of the members of both chambers of Congress. The 1980 Constitution introduced a much more complex and rigid system of amendment. The general rule was the agreement of 3/5 of the members of both houses. Then, some chapters, basically relating to Presidential powers, required 2/3. However, the most polemical requirement was that in addition to that high quorum, for the modification of the bases of institutionality (where article 8 was)--the Constitutional Tribunal, armed forces and the National Security Council-- two successive Congresses were needed. Surprisingly, those requirements were not applied to the chapter on constitutional reform, something that came out on the course of the negotiation for constitutional reform.

### **Transition to Democracy and the 1989 Constitutional Reforms**

Between 1981 and 1990 the new constitution provided for a transitional period. During that time the military kept absolute power. However, some of the permanent institutions of the Constitution entered into force, most prominent among them the Constitutional Tribunal, an organ that had an important role in the transition to democracy. Civil and political rights throughout the transitional period were severely restricted by the transitional clauses. They provided the executive with the power to detain without trial, and in places that were not official detention centres,<sup>16</sup> to exile and to limit the freedoms of association and expression. Additionally, most of the time various states of emergency were in place, which provided further repressive powers to the government.

Though at the start of this new constitutional period the government was in almost complete control of the political game, without a real opposition, and enjoying good economic results, soon a number of events changed that secure political landscape. First, a deep economic crisis in 1981-82 produced high levels of unemployment, around 30%. That was a decisive factor in the reactivation of social conflict and its translation into political crisis. At the same time the more moderate opposition reached an agreement and called for resistance and massive demonstrations against the regime. That was the tone between 1983 and 1986, when the military government was under strong social and political pressure. It reacted with a shrewd mixture of repression and political manoeuvring that ultimately paid off. In 1986 it was relatively clear that the regime could not be overthrown by popular revolt or guerrilla warfare. Therefore, a new political strategy for the opposition was needed. In the near future the Constitution provided for an event that offered a new way of opposing the military regime. According to the transitional constitution, in 1988 the junta had to appoint a Presidential "candidate" for the next eight years (1989-1997) that had to be approved by a plebiscite. That provision was obviously tailored for Pinochet.

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<sup>16</sup> These were the secret stations of the political police, the CNI, the national agency of information (Central Nacional de Informaciones). The CNI replaced the DINA in late 1977 when under pressure from the United States after the assassination of Letelier in Washington D.C., Pinochet had to dissolve the DINA.

Thus, the opposition was confronted with a classic political dilemma (Geddes 1994). Either to enter into the system and to campaign against the junta candidate, predictably Pinochet, and hope for good results in the long run, or to step-up the strategy of popular resistance expecting the fall of the regime as soon as possible. Most political parties, which at that time were operating in semi-clandestine way, decided with at times heated internal discussions, to fight within the rules set by the system. The one exception was the Communist Party, which insisted on popular rebellion, but finally joined the system strategy at the very last moment.

Thus, in early 1987 a coalition of seventeen political parties ranging from the Christian Democrats to the Socialists created the *Concertación por el No* (Agreement for No)<sup>17</sup>. Their first task was to campaign for a massive registration of voters in the newly opened electoral registrar.

At the same time the regime was forced to set the minimal institutions that the Constitution provided for the plebiscite and the parliamentary elections the following year (1989). For that reason the laws that created an electoral system, organized political parties, and set an electoral tribunal<sup>18</sup> were enacted between the end of 1985 and early 1988.

All those laws were envisioned in the Constitution and were necessary for any electoral process. However, the Constitution did not set a time frame for their enactment. Why the regime chose to pass these laws is explained by a combination of internal and external pressures.

In 1988, as it was foreseen, the junta candidate was Pinochet. However, at the time of the plebiscite, a fair degree of political openness was achieved, with legally-organized political parties and relatively free press. There was also clear support for the plebiscite from the international community. Furthermore, there was a general consensus, even among the branches of the armed forces, that the plebiscite had to be carried out according to the rules and that its outcome had to be respected. The polarization around the dictatorship-democracy cleavage proved fatal for Pinochet. The organizational, creative and communication capacities of the opposition were unexpectedly outstanding. The NO campaign was a huge success and oversight at the polling tables, together with a parallel computational system to verify the vote, impeded massive fraud by the authorities.

<sup>17</sup> There is no good English translation for Concertación. It is more than an agreement or political pact or coalition. For a history of the origins of the Concertación see Ortega 1992.

<sup>18</sup> In the case of the law of the electoral tribunal the Constitution Tribunal played an important role. According to the transitional text of the Constitution the electoral tribunal had to be operating for the parliamentary elections, but not necessarily for the plebiscite. The Junta sent the bill providing for that. Therefore, for the plebiscite the electoral tribunal would not be functioning. That, naturally, raised doubts about the degree of fairness in which the military government was planning to carryout the plebiscite. Surprisingly, and contrary to the explicit letter of the Constitution, the Constitutional Tribunal ruled that that was an unconstitutional interpretation and that the importance of the plebiscite required the application of all the guarantees set in the permanent text of the Constitution. It meant that the electoral tribunal had to be operating for the plebiscite. The junta had to send a new bill. It is clear that this decision, made by a tribunal entirely appointed by the military regime, was an important factor in the creation of the necessary conditions for a legitimate plebiscite (Barros 2002: 257; Valenzuela 1997: 16).

All of this contributed to the defeat of Pinochet by 55% of the no vote in the October plebiscite.<sup>19</sup> According to the Constitution, the defeat of the official “candidate” opened the door to Presidential and parliamentary elections in December of 1989.

### **Why did Pinochet Abide by the Constitution?**

If there was a risk of losing the plebiscite, why did Pinochet allow it to take place? Why did the government respect the transition plan prescribed by the Constitution, more so if the initial idea behind it was to perpetuate Pinochet in power? Once the authoritarian government committed to certain rules and institutions, and they argued over and over since 1980 that they would respect the Constitution, it became very costly in terms of credibility and legitimacy to violate those same norms (Hunneus 2000: 600). Even a dictatorship like Pinochet’s needs minimum levels of legitimacy. The courts, no matter how subordinate to the regime, still had to apply the law, at least in a formal way. The Constitution and the decrees given by the military were the framework that judges used to respond to demands for justice on all fronts: economic, private, social, criminal, but also to protect the military from accusations of human rights abuses (their Achilles heel). In addition, a free market model, like the one imposed by the neoliberal Chilean economists, needed a working legal system to protect property rights, economic transactions and investment. That was the main demand from the civilian supporters of the regime. For the courts, it was difficult to escape from applying those same legal norms used to protect the military and the economic powers in the political realm, even if in this case they would benefit the opposition.

Secondly, Pinochet and his advisors never believed that they would loose the plebiscite. Freedom of the press was limited and the right controlled most mass media, the government had appointed all mayors and local officials which constituted an army of fervent Pinochet agents, the economy was in full recovery since 1985 with historic growth rates, and a generous populist program of last minute solutions to social problems (housing, education, health, urban improvement) had taken place. Moreover, the plebiscite was going to be controlled by institutions created and staffed by Pinochet.

Third, international pressure was crucial in the supervision of the plebiscite, and even more important for supporting the democratic process. By the mid-eighties the United States had moved to openly favor the exit of Pinochet and provided economic support for the No campaign (National Democratic Institute 1988, Sigmund 1993, Portales 1995, Otano 1995). The end of the cold war taking place during the late 1980’s and the universal legitimization of democracy played an important role in blocking a regression to authoritarianism as well as empowering opposition parties and moderating leftist groups. Exile of over 30,000 political leaders and activists mainly to Western Europe, where they interacted with a pro-democracy left, also contributed to de-radicalize the Chilean Socialist Party (Walker 1990).

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<sup>19</sup> He got 43 % of the votes. Though the plebiscite was carried under reasonable fair conditions and the result is not disputed, the deep fears of 15 years of dictatorship surely explain some of the votes in favour of General Pinochet. However, more important, as it was proved in later democratic elections, the main explanation is the constant existance of an important conservative section of society that supports authoritarian formulas. On this see Huneeus (2003).

Furthermore, Chile had opted for an economic model that depended largely on international commerce, finance and investment. Pinochet was not in a position to afford serious economic sanctions from the international community. Human rights abuses, political repression and limitations on basic rights and liberties had attracted enough negative attention on the regime, but it was able to dodge the pressure by asserting principles of sovereignty. The export-oriented, low-barrier economy had no recourse to those same arguments, and Pinochet had experienced the difficulties of governing under severe economic problems. Alienating international economic support was not a choice.

### **The 1989 Constitutional Reforms**

The Pinochet defeat in the 1988 plebiscite created a new political scenario that opened the door to constitutional reforms (Allamand 1999: 177). Thus, between October 1988 and the 1989 Presidential election, there were intense negotiations<sup>20</sup> that ended in the July 1989 constitutional reforms plebiscite. Three main actors participated in this negotiation process, the democratic opposition organized and represented by centre and left parties (PDC and PS), the government and the political parties that supported the military government (RN or National Renovation, and UDI, or Independent Democratic Union).

A feature of this process is that the negotiations were carried out by a small group without public discussion. That group was composed of some constitutional experts appointed by the government and the opposition, by a few party leaders, and governmental authorities. No more than 30 people took active part on the design of the reforms. The reforms were possible because of the strong credibility and legitimacy enjoyed by the opposition parties and their leaders that actively called to support the amendments and vote for their approval in the plebiscite. Had this not being the case, civil society probably would have torpedoed the process and the vote on the plebiscite would have been very polarized. Strong parties and credible leaders were the key. They constituted the glue that held together the myriad of social and political institutions that opposed Pinochet and his 1980 Constitution. The 1989 reforms were clearly insufficient to remedy the sub-minimal, protected democracy established in the Constitution. Just because people trusted their leaders and parties, rather than because they thought that the reforms were substantial, the amendments were approved.

Barely ten days after the 1988 October plebiscite the Concertación called for constitutional reforms to be agreed upon with the government. The key points demanded were greater flexibility on the mechanisms of constitutional reform, a fully elected parliament, the elimination of art. 8º that banned Marxist parties and doctrines, the introduction of more civilians into the National Security Council, and ability to remove the commanders of the armed forces. These were the main issues that set the agenda for the whole process of constitutional negotiation.

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<sup>20</sup> A detailed and well documented account of the discussions between the opposition and the military government is provided by Carlos Andrade Geywitz (2002).

The Government answered with a warning against any attempt to destroy (“dismantling” was the term employed) the Constitution, but at the same time opened the door to “improvements” in the text of the Constitution. At the end of November RN proposed a long list of reforms that dealt with all the matters proposed by the Concertación in its October demands, in a way that was not far from their concerns. That led to the creation, in January 1989, of a joint commission of 10 constitutional experts appointed by the Concertación and RN, all of them men. This commission was key to building bridges between the “opposition world” and the more moderated supporters of the military regime. The commission worked without publicity for two months, elaborating a common program of constitutional reforms. In fact, the commissioners prided themselves on the secrecy of their discussions, changing meeting places in order to escape from the press. As one of the members stated, “[T]hat was a good method, we worked without pressures, and public declarations, with tranquillity, in a responsible form, guided only by the interest to reach agreements in order to improve the 1980 Constitution” (Andrade, 2002: 71).

Meanwhile, the government tried to seize the initiative and in March 11, 1989, the eighth anniversary of the 1980 Constitution, Pinochet announced that the Interior Minister was in charge of seeking agreement with the political parties on the subject of constitutional reform. On that occasion, he suggested modifications to article 8°, the mechanism of constitutional amendment, and the composition of the National Security Council. At the end of March, there was the first meeting of the Concertación experts with a Government commission.

In early April the joint commission Concertación-RN published a consensual report. It proposed a new wording of article 8 that secured political pluralism, the elimination of appointed senators (with the exception of the former Presidents of the republic), stated that the parliamentarians had to be elected by a proportional system, increased the number of civilians into the National Security Council, making them a majority, and modified its powers. In terms of constitutional amendment, it made the rules more flexible by eliminating the requirement of two successive Congresses. Both the Concertación and RN endorsed this report. Also, it received the support of the main civil society organization for free elections, the *Comité para las Elecciones Libres*.

At the end of April the Minister of the Interior<sup>21</sup> presented a list of 19 “improvements” to the Constitution to be agreed upon. It contained a number of points of agreement with the report of the Concertación-RN commission. However, it kept the requirement of two successive Congresses for constitutional reforms in some essential chapters and, more relevant, did not touch the composition of the Senate. These two matters were the reason behind its rejection by the Concertación, as stated publicly by his speaker and then Presidential candidate, Patricio Aylwin (Andrade, 2002: 128). On the other hand, RN cautiously approved the government proposals, expressing its hope that there would be further agreement between the government and the opposition. The Concertación’s rejection provided the government with an excuse to close all constitutional negotiations in

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<sup>21</sup> Before that, the whole cabinet resigned, apparently due to the differences on these matters between Pinochet and his interior minister. According to Andrade, Pinochet thought that some of the modifications proposed “dismantled” the Constitution (2002: 106).

early May, stating that now the electorate had to prepare for voting in the upcoming Presidential and parliamentary elections for candidates that supported the Constitution against its enemies.

This stalemate was broken on May 10 by a proposal of RN on the composition of the Senate, increasing the number of elected senators to mitigate the influence of the appointed senators, and eliminating the requirement of two successive Congresses for constitutional amendment, but increasing the quorum for some important chapters of the Constitution from 3/5 to 2/3s. Two days later the Minister of Interior declared that the government was prepared to continue the discussions. The Concertación agreed to resume the negotiations, under the condition that the government accepted the modifications agreed by the Concertación and RN about the mechanism of constitutional reform, composition and powers of the National Security Council and the composition and generation of parliament. On May 17 Aylwin met with the Interior Minister. Almost simultaneously, the Concertación-RN commission met and elaborated a second consensual report that was delivered to the head of RN and Aylwin. That report, made public later, proposed that the rule for constitutional reforms should be 3/5, with some chapters 2/3, thus eliminating the two Congress mechanism.

The 24th of May, the leaders of the Concertación parties met with their constitutional advisers to study the government's proposal. On May 30, the Concertación's parties approved the reforms proposed by the government. That night Pinochet, in a televised speech, announced that there was an agreement on constitutional reforms. The agreed reforms eliminated article 8°, introducing the principle of political pluralism in the Constitution, increased the number of elected senators, thus keeping the appointed senators albeit with a lesser impact in the Senate, introduced a new civilian to the National Security Council, the Comptroller General of the Republic, thus creating a tie between military and civilian members, modified the Constitutional amendment mechanism, in the same way that the later Concertación-RN second report did, i.e. increasing the quorum of same key chapters but eliminating the two Congress requirement. On the other hand, the military achieved the undemocratic rules on promotion and professional career designed by the military government were set by an organic constitutional law, which requires 4/7 of the members of each house for its modification, thus obligating an ample consensus for its amendment. The junta, which according to the provisional clauses of the Constitution had the Constitutional making powers, approved the reforms, with some minor changes that were discussed with the opposition.

The agreement between the government and the opposition quickly received ample support from other social and political actors. The Catholic Church, in the authoritative voice of its Episcopal Conference, stated that the agreement was a step towards democracy and tolerance. The main workers union, the CUT, called its members to vote in favour of the reforms. Perhaps the only relevant political force that expressed its opposition was the Communist Party, which stated that to support the agreement would confer legitimacy on the Constitution, and called to invalidate the vote in the plebiscite.

According to the provisional rules of the Constitution, a plebiscite was required in order to approve any constitutional reform. Free television time was allocated to the government

and the legalized parties broadcasting propaganda in relation to the reforms, though its format, decided by the National Council of Television, was inadequate and criticized by the opposition. The plebiscite was carried out by the end of July in a climate of tranquillity with almost a 90% turnout. The results were 85% for the reforms, and 8.2% against.

In December 1989 there were Presidential and parliamentary elections. Those were the first democratic elections since 1973. The Concertación candidate, Patricio Aylwin, won with 55.5% of the vote. The government's candidate, a former minister of the treasury, got 30% and another right wing populist candidate another 15%. The 11<sup>th</sup> of March 1990, in a solemn and emotionally charged atmosphere that took place in the new building of the national Congress, Pinochet transferred the Presidential sash to Aylwin.

### **The Political Logic for the 1989 Amendments**

The 1989 constitutional amendments were the fruit of an agreement between the military government, the political right and the Concertación leaders, but they did not amount to a full political pact for the transition to democracy. The amendments were not very significant and they did not influence substantially the transition to democracy that had begun with the defeat of the YES option. It was the first step of a constitutional process, negotiated by elites, by incremental amendment. What was important about the 1989 constitutional process is that it represented an agreement between opposing sides in a highly traumatized society. It was an initial and timid move towards depolarization, but it marked the beginning of a dramatic change on the way to resolve political problems. Moreover, the representativeness of the political parties that negotiated the 1989 amendments rendered that agreement legitimate in the eyes of the general population.

Why did both the government and the opposition come to the Constitutional agreement so easily? Why did nobody, except for the Communists, demand a much larger review process, a constitutional assembly and real participation on the amendment process? Stakeholders, their interests and resources, changed significantly since 1980. New actors emerged, others disappeared and the political position and strategies of the different parts evolved. One of the crucial lessons from the Chilean CBP is to realize how difficult it was, even for the actors themselves, to predict their future interests, or still harder, the long term effects of institutions. Institutions, if they are minimally effective, claim a life for themselves. Institutions carefully designed to protect one group's interests may in a few years' time turn into that same group's worst nightmare. Majorities turn into minorities, opposition becomes government, and persecutors become persecuted. Power is more fluid than the stringent atmosphere of a dictatorship may lead us to believe. All that happened in Chile between 1980 and 1989, or a few years later. The lesson that we should take is not only to design institutions to protect our particular interests, but to engineer them in order to guarantee fair rules for reiterated competition and problem solving where results are essentially uncertain. After all this is at the core of the democratic procedure.

Pinochet never believed until the very end that he was going to be defeated in the 1988 plebiscite. After the crushing defeat, his initial obsession was that no reform to the Constitution would take place during the seventeen months that he still had in office until the new government would take power (Otano 1995: 73). Pinochet was well aware that his

men, especially the ones that had been directly involved in human rights violations, needed strong protection from the prosecutions that will surely come under the new democracy. Paramount to achieving this protection were: the immobility of his own position as commander-in-chief of the army as well as the ones from the navy, air force and Carabineros, the impossibility for the President to retire any military officer, the tutelary power of the armed forces through the National Security Council, the 1978 Amnesty Law, and a loyal Supreme Court. Discipline in the army was tightly controlled so that no voice would contradict Pinochet. Most senior military from the other branches and the UDI also endorsed Pinochet's strategy. Their involvement and identity with the government had been so deep that it was not possible at this stage to change allegiances.

Nevertheless, political agents have their own interests, their own traumas, fears and strengths, and make their own calculations for the future. The military started to show that they were not the monolithic actor they pretended to be. Two members of the Junta, Matthei and Strange, expressed openness to discussing reforms (Valenzuela 1997: 26) immediately after the defeat in the Presidential plebiscite. Their interest was more in securing a good position for themselves and their institutions in the coming democracy than in protecting Pinochet and his men from falling into discredit or jail. They had arrived to the government after the hardest repressive era and had less pressure from their fellow officers because political violence had been mainly in the hands of the army and the secret police. Their personal commitment to Pinochet was not absolute and they had showed it months earlier by postponing his nomination to be the YES Presidential candidate. The political right also started to show internal divisions. Prominent younger leaders of RN (moderate right) had actively promoted the idea of significant constitutional reform (Otano 1995: 73). They realized that the dictatorship-democracy cleavage was too strong to overcome and would be too onerous for the right in future elections (Barros 2002: 309). After all, the hard liners had been recently defeated under their own rules consecrated in the 1980 Constitution. Now it would be their turn to defend the interests of conservative sectors and they would have to do it through Congress, elections and discussion. Violence, fear, exclusion and total control of the state and media would no longer be at their disposal. Young RN leaders were convinced that an extremely authoritarian constitution would make their task protecting the right, economic freedom and conservative values harder.

The division in the right, some openness among the junta members and the prospects of even a stronger electoral defeat in the coming Presidential and parliamentary elections tilted the balance in favor of limited constitutional amendments. On the other side, the more moderate center and left parties on the threshold of taking power distanced themselves from the intransigent position of the Communists. That move undermined the credibility of the threats of pre-1973 style chaos that, according to the regime, would accompany a Concertación government. Internal parts of each side (pro or anti-Pinochet), with their own less polarized interests and agendas, started to appear and thus facilitated negotiation and consensus building. Some degree of depolarization was mandatory to reach agreements.

Moreover, the political momentum was overwhelmingly in favor of some constitutional reform. The Catholic Church, through a public statement of the Permanent Committee of the Episcopate, supported reforms to the Constitution immediately after the NO victory (Otano 1995: 72). The more radical elements of the opposition had been demanding a

totally new constitution, and all Concertación leaders agreed that at least some extremely authoritarian clauses had to be removed from the Constitution if it was going to be a minimally acceptable document. And they needed a minimally legitimate constitution if they were going to be the next government. Additionally, some important clauses of the Constitution required two successive Congresses for its amendment, thus making it very difficult for a future Concertación government to modify them. It was better to negotiate those changes beforehand.

The reforms to the 1980 Constitution were an inevitable price that the out-going administration had to pay if they wanted to have any chance of performing decently in the coming Presidential and parliamentary elections, and, for that matter, if they wanted to have any political viability in the future. Furthermore, for Pinochet it was better to negotiate reforms under his own terms than to wait for a future Concertación government to propose reforms, putting him in a much weaker bargaining position (Hunneus 2000: 605).

Under any considerations, the price was certainly low. The negotiations were conducted by a small elite, behind closed doors, with no participation or public discussion whatsoever. Why was it like that? Why did the Concertación lose the opportunity to open a debate and probably achieve a much deeper and needed constitutional reform at a moment when they had strong popular support and probably little to lose? Fear and shifting power and interests is the short answer. Recovery from violent trauma is a slow and difficult process (Herman 1992). Years of secret police action with the results of torture, deaths and exile, followed by years of massive street repression are not easy to overcome. Pinochet had the monopoly of military power and would continue to have it until 1997. He had promised to kick the democratic table if even one of his men would be touched. The threat was credible. A serious authoritarian regression was a horrible alternative for the Concertación. Fear lead Concertación leaders to be overcautious and miss a unique opportunity to democratize the Constitution. Was fear a good advisor? Did Pinochet have a real capacity to halt the democratic process? Probably not, because he had neither strong internal nor international support, but nobody could tell for sure. After all, Pinochet himself was, for the first time, starting to act on the defensive, also motivated by fear. Pinochet started to show that some of his internal parts felt threatened and insecure, while others had to come out with an aggressive protective stance. Given that the next government would be controlled by the Concertación, but a scared Pinochet would maintain military power, it seemed wiser to the Concertación leaders to make every effort to keep the military in the barracks. The price was not only minimal constitutional reforms, but no significant justice on human rights violations either. The 1978 amnesty law and a pro-military Supreme Court would continue to shield the military. The repeal or amendment of the law and reform of the Court, a cherished demand of the center-left coalition, would have to wait.

Fear, however, was not the only motivating factor. The Concertación knew that they would win the coming Presidential elections and their most demanding challenge was to have governability. They had to lead a good government, economically, socially and politically. To keep the historic economic growth trend started under the military, they needed the collaboration of the entrepreneurs, sustained foreign investment, and low pressure from unions and other organized social actors. For these purposes, the 1980 Constitution and the rest of economic legislation passed by the military were suitable instruments. The

appointed senators and a right-wing dominated Senate would be able to stop social demands, or what used to be called the “social debt”, accumulated over the harsh and costly years of neoliberal reforms. Its was simply impossible to raise salaries, reconstitute the welfare state, jail human rights abusers, and grant substantive union rights and bargaining power, while at the same time keep inflation low, investment high, peace on the streets, the military in the barracks and public spending under control. Having an undemocratic opposition Senate to blame for everything that would have to wait was not so bad. The Concertación’s economic experts and political leaders became convinced that in order to have governability, the neoliberal reforms and most authoritarian enclaves had to be maintained with only minor and gradual transformations until a more favorable political environment could allow further institutional reforms. A center-left majority of both chambers would have meant an invitation to uncontrollable socio-economic demands and an excuse for military revolt.

However, why there was so little social pressure for deeper constitutional reform? A factor for explaining the successful transition to democracy without major constitutional, social, military and economic transformation is the institutionalization and legitimacy of political parties and the credibility of leaders. Before 1973 Chile had a long history of political competition, a highly institutionalized party system, and fairly uncorrupt politicians. Banned and persecuted parties had disbanded from 1974 to 1980. Nonetheless, starting with the 1980 Constitutional plebiscite, and especially as a response to the 1982 economic crisis, parties started to reemerge. Through electoral competition in the labor unions and student councils, many times protected and supported by the Catholic Church, and directly on the voice of some brave leaders, parties reappeared on the political landscape. These were the same old parties that had sustained democracy for decades and later polarized the political system until it broke down. Chilean parties before the coup had stable roots in society, were used to respecting electoral rules and interparty competition, held consistent ideological positions, and had developed strong and territorially comprehensive party organizations (Scully 1992, 1995). In the words of Mainwaring and Scully (1995), they constituted an institutionalized party system. Sixteen years of dictatorship that used violence and institutions to destroy them simply failed. Basically the same parties and political leaders that existed in 1973 took charge of the re-democratization process. The dictatorship had contributed to move center and left parties closer together in the fight for democracy. This process increased the legitimacy of the parties, which, in turn, permitted an ordered transition to democracy even with an authoritarian constitution. People and civil society trusted that Aylwin (called the “just and good” by his fellow politicians) and the rest of the Concertación leaders would do the best possible to reconstruct democracy, maintain economic growth and achieve social peace and justice. People didn’t know or care much about constitutional technicalities, but were very clear on their demand for freedom, democracy and peace. They believed that their leaders could provide that, with or without a new or amended constitution. After all, both the 1833 and the 1925 constitutions had been originally established under military surveillance.

#### **Democracy and its Limits: Constitutional Reforms under Concertación’s Governments (1990-2005)**

Since 1989, the 1980 Constitution has been reformed 17 times. In fact, among Chilean constitutions, the current constitution is the one that has had the greatest number of reforms in total numbers, and also in the shortest period of time. That says that its legitimacy and degree of consistency with democracy cannot be taken for granted. For instance, Huneeus (2003: 265) quotes a 2003 poll where people were asked about the ideas that are predominant in the Constitution, only 12% said that the Constitution contains ideas that belong to “all Chileans” and 18% answered that the ideas prevalent represents the majority. 23% said that the predominant ideas were from the right and a 16 % from the military. 26% said that they did not know.

Since the Aylwin government (1990-1994) there has been a number of relevant changes to the Constitution that are worth considering. First, in 1991, there was a constitutional reform that allowed the direct election of municipal councils, thus greatly expanding the opportunities for political participation.<sup>22</sup> Then in 1997, under the Frei administration (1994-2000), a substantive reform of the Supreme Court was passed that increased the number of judges and changed their nomination procedure to make it more participatory. Also the criminal justice system was modified, creating the office of the prosecutor and replacing the old inquisitorial model for an adversarial one, introducing a whole new code of criminal procedure. In 1999, a provision ensuring equal rights among men and women was also introduced. Finally, in 2001, under the current Lagos government (2000-2006) cinema censorship was eliminated from the Constitution.

However, throughout all these years Concertación governments tried, unsuccessfully, to eliminate authoritarian enclaves from the Constitution. There were at least four attempts to introduce constitutional reforms on those matters during the Aylwin and Frei administrations. All of them, in one point or the other lacked the agreement of the right wing parties, particularly the UDI, and thus, did not get the necessary votes for their approval (Drake 1999: 18, Allamand 1999: 180).

After all the failed attempts, the current process of constitutional reform looks more promising. In July 2000, a bill of constitutional reform was introduced in the Senate by a number of prominent senators of the two right wing opposition parties, RN and UDI. This bill eliminated the appointed senators, leaving a fully elected Senate of 38 members and modified the composition of the Constitutional Tribunal, eliminating the members appointed by the National Security Council. On the other hand, it increased the control powers of the parliament vis a vis the executive. For instance, they introduced the parliamentary investigatory commission and allowed the chamber of deputies to call a minister to answer questions before the house. Their sponsors argued that the proposed reforms closed the transition to democracy and were aimed at improving the balance among the branches of government. At the Senate constitutional commission that bill was merged with one proposed by the Concertación senators, that, among other important matters, such as the Constitutional recognition of indigenous peoples, also eliminated appointed senators, but added the Presidential power of dismissing the commanders-in-chief at will and transformed the National Security Council into a mere advisory body to the President.

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<sup>22</sup> Previously the executive appointed the mayors. Municipalities have important social welfare functions, providing primary health services and administrating public schools.

The reforms were under complex negotiation among the opposition parties, the government and the Concertación parties in the Senate, adding a number of substantive matters to the original proposition. After four years of parliamentary discussion, in November 2004 they were finally approved by the Senate and sent to the chamber of deputies. In May 2005 they were approved there. After this the reforms need only the agreement of the Senate to the small modifications made in the lower chamber in order to be finally approved.

These reforms will be by far the most extensive and substantive constitutional reforms made to the 1980 Constitution. In terms of the authoritarian enclaves they eliminate appointed senators, give the President the power to dismiss the heads of the armed forces and Carabineros, and remove the functions that the Constitution provided for the National Security Council, transforming it into a body that only provides advice to the President and which can be called only by him or the Presidents of the Senate or the Supreme Court. Thus, the main clauses that ensured the autonomy and influence of the military in the Constitution are finally eliminated.

### **Explaining Current Changes**

The fifteen years between 1990 and 2005 have been marked by the constant refusal by the right to review the Constitution and by their capacity to veto any reform proposal. Liberal sectors of RN have supported limited reforms and a few relevant amendments have taken place, but, overall, the opposition has been successful in vetoing the numerous initiatives for constitutional reform introduced by the three consecutive Concertación governments. However, this situation began to change in 2004. Most likely a substantive review of the 1980 Constitution will take place this year with the support of the right. What explains the interest and capacity of the right to block institutional reform for a decade and a half? What have been the effects of the lack of ostensibly needed constitutional reforms for democratic consolidation? How can we understand the sudden change in the right towards amending the 1980 Constitution? What will be the effects of reforms under consideration for democratic stability, governability and for the Alianza-Concertación<sup>23</sup> political dynamic?

Chile has been a stable democracy at least since the Frei government took office in 1994. After the end of the Pinochet era in the army, and we believe even earlier than that, there has been no fear of authoritarian regression. Since 1989, three Presidential, four parliamentary and three municipal elections have taken place, where the same two political coalitions plus the extra-parliamentary left have competed on heated but clean grounds. Electoral volatility has decreased since 1989 and the same party labels have kept their left-right positions. Party switching is almost unknown and Presidents have ended their periods with high popular support. Governability and coalition stability since 1990 have been the highest in Chilean history. Corruption is low and the growth rate during the last 20 years has no parallel during the last century.<sup>24</sup> All this occurred without major reforms to the

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<sup>23</sup> Alianza is the current name of the opposition coalition formed by RN and the UDI.

<sup>24</sup> For instance, the 2004 Transparency International Corruption Perception Index put Chile in the 20 position among 145 countries studied.

authoritarian 1980 Constitution, which until now has kept its authoritarian enclaves practically intact. This result runs against the predictions of the neo-institutional approach, which claimed that no consolidation of democracy could take place in Chile prior to the elimination of the authoritarian enclaves.

Several crucial changes have taken place in Chilean politics since the mid- 1990s that have transformed the interests of all political actors and the incentives, protection or threats they receive from the 1980 Constitution. Those changes, together with good leadership, contribute to explain democratic stability and governability in Chile despite the lack of democratic reforms to the central institutions. Pinochet finished his period as commander in chief of the army in 1997, and, after taking his life-time seat in the Senate, was detained for over a year in London. With the support of the Frei government, he returned to Chile and was prevented from going to jail. However, he became politically dead. Several human rights judicial cases against him are still under investigation. Recent discovery in the United States of over a hundred secret bank accounts using false passports and cover names for more than 15 million dollars came to confirm the ill fate of his political legacy. He lost all power, symbolic and real. General Contreras, Pinochet's right arm on political persecution and former DINA director, together with over 60 officers, have been convicted and sentenced for political crimes since 1996. Contreras and many of his close associates are currently in jail. Most high ranking officers from the time of Pinochet have retired. Changes in the composition of Supreme Court in 1997 led to legal interpretations favorable to prosecuting human rights cases, bypassing the amnesty law and prescription clauses that impeded prosecution after a number of years since the crimes. The reports by the Rettig Commission in 1991 on political murder, the Mesa de Diálogo (Dialogue Table) on political-military relations during 1999 that favored political-military dialogue and condemnation of atrocities, and the report of the Valech Commission in 2005 on torture, have contributed to a drastic change on the discourse and public perception about the military regime. Nobody ventures to deny the crimes of that period. General Izurieta, who took over as commander in chief of the army after Pinochet, initiated a strategy of professionalization and de-politization of the army. The new military generation needs to recover the honor and legitimacy of the armed forces, lost during the dictatorship. Their careers, promotions, international positions, salaries and equipment depend on the government. General Cheyre, who succeeded Izurieta, further accentuated the same policies. Lavín, the promising leader of the Alianza that almost beat Lagos in the last Presidential race (2000), conveniently distanced itself from the military regime. The political right learned that association with the military regime was a risky electoral strategy. The military-right alliance that for many years looked rock solid started to show different internal factions, many times at odds with each other. All these changes led to rapid depolarization in the political-military relations and to the loss of interest on the part of the armed forces and the Alianza in maintaining the authoritarian enclaves of the Constitution, designed to give a tutelary role to the armed forces (Montes and García 2004).

The 1991 and 1997 constitutional amendments were the product of changing political interests. If no amendment had been introduced to the appointment of mayors by the President, the Concertación would have been obliged to appoint over 300 mayors, with significant economic, social and political power. Mayors are key political operators at

election times. It was mainly in the Alianza's interest to reform the Constitution to eliminate the nomination of mayors by the President. The same happened with the reform of the Supreme Court. Before the reform, the nomination of Supreme Court judges was in the hands of the President. The reform gave the Senate (controlled by the right wing minority due to appointed senators) veto power over those appointments because it required the agreement of 2/3 of all senators for each nomination.

In 2005, Chile is at a point in which the authoritarian constitution will soon start to do more harm than good to the right and former Pinochet supporters. If no reform is passed, it will become a powerful authoritarian instrument entirely at the disposal of the Concertación governments (Allamand 1999: 182). The longer the Concertación stays in power, especially if uninterrupted, the more such a constitution can be used to its advantage. After 15 consecutive years in the government and after a quarter century since the installment of the Constitution, all the powers that Pinochet devised for himself are finally becoming available to the center-left coalition. Life-time Senate seats for former Presidents (so far only President Frei, but soon Lagos should be added) belong to the Concertación. Appointed senators are increasingly controlled by the governing coalition because it can appoint two of them directly, but they also influence the appointment of the rest through nominations on the Supreme Court, military commanders, Constitutional Tribunal and Contraloría. As time passes, there are more military leaders and judges that owe their positions and career promotions to the various Concertación governments. Whoever controls the appointed and lifetime senators, controls the Senate.

According to recent opinion polls, the next Presidential election in December 2005 will most likely bring a Concertación woman to power. If no amendments to the time period for Presidential terms are passed, a Concertación Presidential victory would mean 22 consecutive years of Concertación government that would further increase its control of the Senate, through appointed and life-time senators, leaving the Alianza in hopeless minority status. The chamber has been, and most probably will continue to be, dominated by the Concertación. The binominal electoral system, that over represents the right, also forces the Concertación to stick together, making it very hard for the right to beat them at a Presidential race. The right would be left with a significant but minority representation in the lower chamber as its only protection. Constitutional Tribunal, National Security Council and the Supreme Court would also tend to become dominated by pro-Concertación members. The norms engineered to secure a long authoritarian government, are helping the Concertación to perpetuate and increase its power. At this point, paradoxically, it is the political right which is most interested in eliminating the authoritarian enclaves, so carefully designed and introduced to the Constitution by themselves in 1980, as their greatest institutional protection.

The coming constitutional reforms, if finally approved after 15 years of failed attempts, will be the result of democratic stability, civil-military depolarization, good economic performance and changing political interests and strategies that have taken place during this period. The reforms are needed to prevent future political crisis when those factors could run short. Other institutional reforms like a stronger parliament with more legislation initiative and stronger fiscal, planning and investigative powers, and better representation mechanisms that would allow extra-Concertación parties a place in Congress will also

remain on the agenda. Chile has one of the worst income distributions in the world (Morley 2000), very low female job participation rates and significant discrimination based on class and ethnicity. Improvement in all these areas, that most probably will take many years, requires political stability. In any future political or economic crisis, respect for the rules of the game and a legitimate institutional framework will be much stronger with the approval of the amendments under discussion. That Chile has been able to consolidate a democratic system despite its authoritarian institutions constitutes no guarantee that in the future Chile will not need a more democratic framework. Better constitutional design is definitely needed.

### **Actors, Design and Inclusion**

The 1989 process of constitutional reforms was the outcome of the interplay between opposition parties, the right wing parties and the government. Each of these actors, in turn, has internal elements with their own interests, logic, history, strategy and resources that continuously change. The complex interaction among the actors and their internal parts has allowed the democratic process to slowly but permanently evolve in Chile. Divisions among the traditional political sectors (right, center and left) and within each party, as well as internal differences in the armed forces and in other political actors have permitted political negotiation and compromise since the mid 1980s, even if little has been translated into formal institutions. There has been neither a set time table nor a designed process for reforms. The only political limit was the event of the 1989 Presidential and parliamentary elections. Constitutional reforms, on the other hand, have followed the rituals and procedures set in the Constitution. Thus, apart from the particular motivations of each sector intervening, the whole process is governed by constitutional rules, but has no time limits.

In terms of the actors involved, both the 1989 and the reforms currently under way are elite negotiated processes. They have been the work of politicians, government ministers, parliamentarians, and constitutional experts. In fact, the actors of the reform process have taken care not to expand the universe of discussion beyond those strictly necessary for decision-making. This happened even in the case of the reforms carried in democracy, where the Senate constitutional commission played a decisive role in negotiating the terms of the reforms, practically imposing its agreements on the rest of the Senate. Moreover, none of the main participants in the Constitutional process, neither other political nor social agents, have supported the view that constitutional reforms should be the matter of wider or popular participatory process. On the contrary, the perception seems to be that expanding the discussion, or even making it more transparent, would endanger the possibilities of reaching successful agreements.

In the Chilean CBP since 1989 party leaders have been the decisive actors. For instance, in 1989 the role of Patricio Aylwin as negotiator was prominent. Aylwin was at that time the leader of the Christian Democratic party, the main political party in Chile for the last 40 years, the speaker of the Concertación and possible Presidential candidate. In addition, he was a distinguish professor of public law. In a seminar in July of 1984 he was the first opposition leader that proposed to bypass the discussion on the legitimacy of the Constitution, an issue that was critical for the democratic opposition. Instead, he proposed

to accept the 1980 Constitution as a fact, liberating energy to focus on the campaign against Pinochet in the 1988 plebiscite. Thus, he led the opposition to play according the regime rules while not compromising its judgment about the origin of the Constitution. High quality leadership by the three Presidents since 1990 and their teams of skilful technocrats and politicians like Foxley, Boeninger, Correa, Insulza, or Alvear have been paramount to the successful transition and consolidation of democracy, that in turn is finally leading to auspicious prospects for constitutional reform. Recent corruption scandals have not undermined this general view of administration leaders.

However, the fact that both processes have been the result of negotiating among elite, these elites were and are representative of the main sectors of Chilean society. In 1989, certainly there were no elected representatives in the negotiations, but both the opposition and the government had strong support among the population. That is one of the explanations for the support that the reforms enjoyed in the 1989 July plebiscite. On the other hand the current negotiations are carried out by elected parliamentarians, from both collations and representatives of an elected government, who also have the backing of the great majority of the population.

The reforms carried out in 1989 established a consultative process in the form of a plebiscite. That plebiscite was carried out under the conditions that ensured a free expression of popular will. No sector has contested its validity. However, in terms of education and information, it was poor. Some educational work was carried on, basically throughout television and the press. However, the short time between the agreement and the plebiscite, less than two months, made an extensive campaign impossible. Furthermore, political parties were engaged in the parliamentary and Presidential elections set for barely four months after the plebiscite. That made the approval more a vote of confidence on what the elite negotiated than a true constitutional decision. The current process does not contemplate consultation. According to the current rules for the amendment of the Constitution, as a general rule reforms must be approved by Congress and the Executive. Plebiscite is only considered when Congress insists in its reforms, the President rejects them and calls for a plebiscite. That certainly is not the case in the present reforms.

The Chilean CBP, both under the dictatorship and under democracy, has been carried almost exclusively by men. No attempt has ever been made at introducing a gender element to the negotiation process or to the Constitutional norms. The same can be said about the inclusion of native Chileans organizations, despite the increasing pressure from the Mapuche leaders to add an explicit recognition of their culture and rights in the Constitution (Aylwin 2002).

In 1989, given the stakeholders' interests vested in the Constitution and the political situation, while still under an authoritarian government that had significant popular support, it is difficult to imagine that a wider and more participatory CBP process would have been possible. In fact, it is arguable that, together with the demand for democracy of an important part of the population, there was an equally important need for agreement and stability. In the back of every actor's mind was the trauma of the 1973 crisis. Fear of conflict and chaos explains in part the surprising support of Pinochet in the 1988 plebiscite and of the right wing candidates in the 1989 elections. That fear made unthinkable a wider

and more democratic discussion process. In that sense, the limitation of participation was perhaps necessary under the circumstances, and accepted by the population. That acceptance explains also the very high degree of participation in the 1989 plebiscite on constitutional reforms.

Though the reforms under way are extensive and substantive, and improve the mechanism for participation, there are important matters left out. Chiefly among them is the electoral system. Throughout their parliamentary discussion several attempts were made by the Concertación governments and their supporters to introduce changes to the system in order to make it more representative, basically by trying to include the important minority of the extra-concertacion left, but the right wing parties rejected those attempts. The binominal system benefits the second largest political coalition, i.e. the Alianza, at the expense of other minorities. The extra-Concertación left includes the Communist Party and the Humanist-Green Party, which in the 2005 Municipal elections ran together in a coalition that obtained 9% of the vote. In parliamentary elections since 1989 the extra-Concertación left has failed to get any seats due to the binominal system. Even if the Concertación has consistently defended and presented amendment proposals for a proportional electoral system, it has no clear incentives to pass it, because it would increase intra-Concertación conflicts and would mean less seats for their candidates. On the other side, the UDI has strongly opposed changes to the binominal electoral system because they directly benefit from it. That is probably why for the 2005 round of negotiations the electoral systems has been left out of the table, opening the door for the Alianza to support the rest of the Constitutional reforms. The Concertación, however, needs the Communist vote to win the Presidential elections, giving the Communists some bargaining power. Electoral system reform, then, will probably be the next subject of negotiation.

### **Role of International Assistance**

There was no direct role played by international assistance in the 1989 CBP. However, the explicit concern of the international community on the transition process to democracy and specifically on the respect of the Constitutional schedule, particularly given the risk of authoritarian involution by the continuous presence of Pinochet, was an important factor for the respect of the rules by all participants. For instance, the US government was very explicit in stating that the 1988 plebiscite had to be carried under conditions of legitimacy (Valenzuela 1997: 15, Sigmund 1993, Portales 1995). Human rights organizations and foreign courts have been constant factors in Chilean CBP. The ruling by Judge Garzón from Spain and the detention of Pinochet in London were crucial to preventing Pinochet from holding his life-time Senate seat and also helped to de-legitimize the entire system of appointed and life-time senators. It also contributed to the change in attitude of the armed forces and the Alianza regarding past human rights abuses. After the detention in London and all the international attention it got, it was very hard for former supporters of Pinochet, civilian or military, to plainly deny all the atrocities and continue to support a tutelary role for the armed forces.

The current CBP is clearly domestically driven. However, in some aspects of the Constitutional reforms of the last 15 years international concern has been a factor in raising issues and forcing the executive and Congress to change positions. For instance, the 2001

constitutional reform that eliminated cinema censorship was a direct consequence of a Inter-American Court of Human Rights decision against Chile (*Ultima Tentación case*<sup>25</sup>). The Constitutional provision that authorized cinema censorship and a number of other legal provisions that limit freedom of expression has been criticised by human rights organizations.

In the same vein, the current reforms include a new article 8 that states the publicity of all the acts of the state. The secrecy of the Administration, even after the enactment of a legal right of access to administrative acts has been the object of concern of some organizations such as Transparency International.<sup>26</sup> International treaties and agreements signed by Chile also exercise influence on domestic CBP and legislation, like changes on smoking limitations under study that have constitutional implications.

### Sustainability and the Impact on Democracy

As it is apparent, the Chilean CBP has never been one defined by ample participation. On the other hand, the process and the resulting text (assuming the approval of the amendments currently under discussion) clearly express the combined interest and relative influence of most of the political actors. That has ensured its permanence and stability, as shown by the regularity of elections in the last 15 years. Today, almost every main political actor, with the exception of the extra-Concertación left, has powerful vested interests in the permanence of the Constitution. For instance, for the Concertación it has meant the possibility of staying in the government for 15 years, with the real possibility of having at least four more coming. For the opposition, the inheritors of the military regime, the Constitution ensures them a significant share of political power and a set of institutions and rules than protect the free market economic model. The Constitution contains strong protection of private property rights and of free entrepreneurial initiative, a limited role for the state in the production of goods and services, and high quorums required for legal reform of privatised social security, educational and health systems. Even most sectors within the Concertación defend the neoliberal economic model. Thus, today in Chile, no main political force asks for a new constitution. The current debate concentrates on the reforms necessary for eliminating the authoritarian enclaves.

Democracy is composed of a set of values, rules and practices. The slow CBP in Chile has affected all of these elements in a minor but positive way. However, before assessing its impact, it is necessary to bear in mind that the Chilean case is one of constitutional reform rather than of constitution making, i.e. one of creating a whole new structure of government. This is true in two important ways. First, Chile had a long constitutional tradition, going back to the XIX century. That constitutional tradition implied a republican government, a unitary state, the separation of powers (reflected in a directly-elected President of the republic, a bicameral Congress, and an independent judiciary), the rule of law, and a set of basic political rights. The 1980 Constitution introduced important

<sup>25</sup> See Inter American Court site at [http://www.corteidh.or.cr/seriec/index\\_c.html](http://www.corteidh.or.cr/seriec/index_c.html)

<sup>26</sup> See website of the Chilean chapter of Transparency international at <http://www.chiletransparente.cl>

modifications to that scheme, basically limiting the scope of democratic government and introducing military tutelage. However, it did not radically alter the structure of the state, nor did it change the Presidential system of government. In its permanent text, the Constitution outlined a limited democracy with military outposts, but it did not create a military dictatorship.<sup>27</sup>

Therefore, for most of the political forces that were critical of the Constitution the Constitutional task was not to radically reform the Constitution with the aim of creating a new constitutional order. It was, instead, fundamentally to eliminate the authoritarian structures introduced into the historic constitution. These structures limited Chilean democracy, but they did not define its permanent features, which owe much more to history, culture and political tradition.

These considerations limit the impact of the Chilean CBP on democracy. The 1989 CBP consisted of a series of negotiations and agreements, in which the objective was reaching a consensus on constitutional matters. They were basically an exercise of consensus-making. In 1989 that exercise was essential for the beginning of democracy, after 20 years of bitter political conflict including 16 years of dictatorship. All sectors had their own fears and traumas. Thus, learning to trust the other sector and to reach agreement was an essential component of the building democracy process.

Second, the CPB since 1989 has provided legitimacy to the Constitution. This was particularly true in 1989. The Constitution was the *opera prima* of the dictatorship. Therefore, it was essential for the opposition to the military regime to modify it in order to appropriate it, thus providing the Constitution with the minimal degree of legitimacy necessary for the transition to democracy and running the new government. Notwithstanding the fact that the 1989 reforms did provide that minimal legitimacy, they were insufficient, and that is why the three successor governments tried to reform the Constitution. This also explains the importance of the current reforms. Though the Constitution still bears the marks of being the master work of the dictatorship, it is more and more the result of negotiations and democracy. With the current reforms that modify important organs of the state, the main institutions of the authoritarian heritage will be definitively erased.

However, the 1989 reforms also had a positive, though limited, impact in the institutions of Chilean democracy. Among those reforms, the most relevant changes were the derogation of article 8, thus, eliminating the prohibition of Marxist parties from the Constitution, the “softening” of the influence of the appointed senators by way of increasing the number of elected senators, and the creation of a tight link between civilians and military in the National Security Council. The later two amendments were important because although they did not eliminate the military presence from the Constitution nor achieved a fully

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<sup>27</sup> Without doubt this assessment would be very different if Pinochet had won the 1988 plebiscite and governed for 8 year with the powers that the original constitution bestowed into the presidency. That would had been a truly authoritarian presidency, Suharto-style.

elected Congress, they facilitated the establishment of the newly elected democratic government. For instance, it is not difficult to image what would have happened if the National Security Council had maintained its original military majority. Certainly, Pinochet would have been much more tempted to use it in that case. It was the introduction of an additional civilian which made that organ a powerless body, at least for the purposes that was created.

The current CBP should leave behind a fully elected Senate, as it always had been in Chilean constitutional history. Civilian control of the military certainly is one of the critical conditions of democratic government. The current process advances decisively in that aim, eliminating from the Constitution the tutelary role of the armed forces. All this does not mean that Chilean democracy lacks challenges. Basic among them is the inclusion of the extra-Concertación left into parliament. That requires a modification of the electoral law, and probably, of the Constitution. Democracy, though, is more than constitutional rules. Chilean citizens shows a degree of increasing lack of interest in participating in governance/politics. Participation could be encouraged by proactive initiatives to include women, the youth, ethnic and religious minorities and an electoral system that in practice ensures that each coalition would elect a proportion of representatives, thus, making competition an issue internal to each coalition rather than among coalitions,.

If the current reforms are approved, and everything indicates that they will be, the Chilean constitution will contain the structure for a political system that, at least on paper, does not differ from an acceptable democratic model: a fully elected parliament, armed forces subordinate to the Constitution and under civilian control, constitutional justice similar in its composition to the European model, a presidency balanced with a strengthened parliament. Thus, after 15 years of attempts, the Constitution will finally eliminate the most prominent authoritarian enclaves. Institutions will finally catch up with the democratic process.

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