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Constitutionalism and Dictatorship

Robert Barros

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Pinochet, the Junta, and
the 1980 Constitution

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Universidad de San Andrés



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Constitutionalism and Dictatorship

It is widely believed that autocratic regimes cannot limit their powers through institutions of their own making. This book presents a surprising challenge to this view. It demonstrates that the Chilean armed forces were constrained by institutions of their own design. Based on extensive documentation of military decision making, much of it long classified and previously unavailable, this book reconstructs the politics of institutions within the recent Chilean dictatorship (1973–1990). It examines the structuring of institutions at the apex of the military Junta, the relationship of military rule with the prior constitution, the intra-military conflicts that led to the promulgation of the 1980 constitution, the logic of institutions contained in the new constitution, and how the constitution constrained the military Junta after it went into force in 1981. This provocative account reveals the standard account of the dictatorship as a personalist regime with power concentrated in Pinochet to be grossly inaccurate.

Robert Barros teaches Political Science at the Universidad de San Andrés in Argentina.

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DEMOCRACY

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Foreword

Why a book about a dictatorship in a series on theories of democracy?

Constitutionalism and Dictatorship: Pinochet, the Junta, and the 1980 Constitution describes the process of legalization of a dictatorship. Since the story is full of drama, I will not reveal the plot. But the ending is known. A brutal military dictatorship, unadorned by any civilian institutions, handling opponents with arbitrary repression, departed from power according to the rules it set nine years earlier. Why dictators set these rules and why they obeyed them is the subject of Robert Barros's story. The puzzle this story raises, however, has deep consequences for understanding the rule of law under democracy.

In the classical liberal view, only a divided government can be a limited one. As Hampton (1994) and Kavka (1986) argued against Hobbes, this is the foundation of the rule of law. Moreover, a mere separation of powers is not enough, since separation of powers leaves unlimited latitude to the legislature, decisions of which must be implemented by all other branches of government. What is needed is a system of checks and balances that makes it impossible for any particular authority to undertake actions unilaterally, without the cooperation or consent of some other authorities.

The Madisonian view asserts that a government divided in this manner will be constrained to act according to rules. To quote Manin (1994, 57), "Each department, being authorized to exercise a part of the function primarily assigned to another, could inflict a partial loss of power to another if the latter did not remain in its proper place . . . each would be discouraged from encroaching upon the jurisdiction of another by the fear of retaliation . . . the initial distribution of power would hold: no relevant actor would want to deviate from it." As one

agency counters another, actions of the government as a whole become limited and predictable.

Institutional design obviously matters. The particular agencies must have the means and the incentives to check one another. In particular, if the government as a whole is to be limited, there must be no agencies that can check others without being subject to checks by them, no “unchecked checkers.” If the legislature can pass laws without the consent of the executive or a review by courts, “parliamentary supremacy” results. If the courts can dictate to other branches of the government and these branches cannot control the courts, the power of the judiciary is unchecked. If the executive is not supervised by the legislature, the outcome is policy without law. Moderation emerges in this conception only if every action of any branch requires cooperation of some other branch to be effective.

But what is the source of power of government agencies? Why would the legislature accept decisions of the courts? Why would the executive implement instructions of the legislature? It is sufficient to look at communist constitutions to see that a formal division of institutional powers is not sufficient to limit the government. Although some of these constitutions would satisfy any liberal, communist rulers used the single party to control all the institutional powers. Divided powers were just a façade.

The difference between democracies and dictatorships lies not simply in their respective institutions but in the relations of real powers supporting these institutions. The Italian judiciary became an effective check only when it was backed by big business and the media. In turn, the Venezuelan Congress and the Supreme Court found themselves powerless against the president when Hugo Chávez could muster overwhelming popular, as well as military, support.

The experience of the Chilean dictatorship is particularly eye-opening. It shows that a government may follow rules even if the divided powers that check one another are not institutional. It is sufficient that each has real power. In Chile, the four branches of the armed forces, which together formed the *Junta de Gobierno*, had a long tradition of autonomy and strong corporatist interests. None of the four military branches wanted another to dominate the government. Hence, from the beginning of the dictatorship, Junta decisions had to be taken by unanimity, so that each branch checked the others. The result was that even though the Junta as a whole had the capacity to act at will, internal differences led it to conform to the constitutional document it originated and even to decisions of the Constitutional Tribunal it

created. Hence, Barros argues, any division of power is sufficient to generate limited government as long as these powers are separate and real. Note that even though the Constitutional Tribunal was appointed by the military, it soon assumed autonomy and on various occasions ruled against the Junta. The opposition to the military regime thus found in the Tribunal an institution to constrain the Junta.

As Holmes (forthcoming, 42) observes, "Societies may approximate the rule of law if they consist of a large number of power-wielding groups, comprising a majority of the population, and if none of them is so strong as to be able thoroughly to dominate the others." By this criterion, law did not rule in Chile: The power of the Junta as a whole was unchecked and unconstrained. Its supporters were a distinct minority. Yet because the military was internally divided, the rules it promulgated ended up binding its actions.

Institutions are effective only if there is some distinct external power behind them. This is not to say that institutions are purely epiphenomenal, that they merely implement underlying relations of brute power. The fact that under democracy political institutions separate governments, legislatures, and courts has autonomous consequences. Democratic institutions do not simply express – they tame – powers that stand behind them. But institutions do not function in a social, economic, or military vacuum. In this way, Barros's exemplary study of dictatorship provides a magnifying glass for inspecting democracies.

Adam Przeworski

Acknowledgments

Writing about a much-criticized dictatorship is not a good way to make friends. I was fortunate to have a few friends before I embarked on this project, I learned to suffer their ribbing about passing over to the other side, I and still managed to incur numerous intellectual and personal debts in the course of researching and writing this book. My interest in the relationship between law and dictatorship grew out of field research in Chile for a dissertation at the University of Chicago. As I advanced with the original project, I became increasingly taken by the legalism of the Chilean dictatorship and the manner in which every step in the 1988–1990 transition had a constitutional foundation. I must thank Adam Przeworski for spurring me to switch topics and to take on the question that really fascinated me – the peculiar relationship between constitutionalism and dictatorship in Chile.

This proved to be a wise decision. For although I never expected that I would enter so deeply into a regime whose operations were often secret, perseverance, determination, and a good bit of detective work opened doors and led me to unexpected sources. Persistent requests for interviews eventually allowed me to meet many of the key players in this drama. I owe many debts to the officers of the Chilean armed forces, legal advisors to the military government, and members of the Constituent Commission who generously gave of their time, endured my questioning, and took my research seriously. In particular, I must thank Guillermo Bruna, Senator Julio Canessa Robert, Juan de Dios Carmona, Gen. Sergio Covarrubias, Adm. Mario Duvauchelle Rodríguez, Enrique Evans de la Cuadra, Senator Sergio Fernández Fernández, Pablo Kangiser, Gen. Fernando Lyon, Mónica Madariaga, Alejandro Silva Bascuñán, Col. Julio Tapia Falk, Sergio Rillón Romani, Justice Eugenio Valenzuela Somarriva, Col. Arturo Varela, and Rear Adm. Rodolfo Vío Valdivieso.

Without their cooperation and leads I would have only scratched the surface of this history.

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I also owe innumerable debts to the many libraries and institutions that gave me free reign in their holdings and archives. My days of poring over documents and taking notes were made all the more enjoyable thanks to the cordial assistance and friendly conversation of the librarians and staff at these institutions. I thank the staff at the *Biblioteca de Derecho*, *Pontificia Universidad Católica*, Mariela Miranda and Ruby Trobok at the *Colegio de Abogados de Chile*, Marcela Achura at the *Fundación Jaime Guzmán*, Rafael Larraín and the staff of the *Tribunal Constitucional de Chile*, the staff of the *Sección de Referencias Legislativas* at the *Biblioteca del Congreso Nacional*, and María Inés Bravo at the library of the *Facultad Latinoamericana de Ciencias Sociales*.

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Abbreviations

AdCdE	<i>Actas del Consejo de Estado</i>
AdCP	<i>Anteproyecto de Constitución Política</i>
AHJG	<i>Actas de Sesiones de la Honorable Junta de Gobierno</i> (Minutes of the Sessions of the Honorable Government Junta)
AOCC	<i>Actas Oficiales de la Comisión Constituyente</i> (Official Minutes of the Constituent Commission)
CdJM	<i>Código de Justicia Militar</i> (Code of Military Justice)
C.L.	<i>Comisión Legislativa</i> (Legislative Commission)
COAJ	<i>Comité Asesor de la Junta</i>
DINA	<i>Dirección de Inteligencia Nacional</i> (National Directorate of Intelligence)
D.L.	<i>Decreto Ley</i> (Decree-Law)
D.O.	<i>Diario Oficial</i> (Official Daily)
D.T.	<i>Disposición Transitoria</i> (Transitory Disposition)
MIR	<i>Movimiento de Izquierda Revolucionario</i> (Movement of the Revolutionary Left)
PC	<i>Partido Comunista de Chile</i> (Communist Party of Chile)
PdNCP	<i>Proyecto de Nueva Constitución Política</i>
PDC	<i>Partido Demócrata Cristiano</i> (Christian Democratic Party)
PPD	<i>Partido por la Democracia</i> (Party for Democracy)
RN	<i>Renovación Nacional</i> (National Renovation)
SGdG	<i>Secretaría General de Gobierno</i>
Trans. y Antec.	<i>Secretaría de Legislación, Decretos Leyes</i>
– D.L.	<i>Dictados por la Honorable Junta de Gobierno, Transcripciones y Antecedentes</i> (Secretary of Legislation, Decree-Laws Decreed by the Honorable Government Junta, Transcripts and Records)

Trans. y Antec. – Leyes	<i>Secretaría de Legislación, Leyes Dictados por la Honorable Junta de Gobierno, Transcripciones y Antecedentes</i> (Secretary of Legislation, Laws Decreed by the Honorable Government Junta, Tran- scripts and Records)
TRICEL	<i>Tribunal Calificador de Elecciones</i>

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Introduction

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

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

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

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

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

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