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A 'Shared' Experience Of Constituent Power: The Legal Culture Of Some Legal Scholars And Constituents in the De facto Chilean Constitution

"The 1925 Constitution is dead in practice and, more importantly, in the minds of the Chilean people."

Jaime Guzmán Errázuriz[1]

ABSTRACT

'Constituent power' is usually associated with the exercise of some kind of force, whether legitimate or not, or to amending an existing text through established procedures. However, setting the constitutional machinery in motion sometimes requires more than a text to be accepted by society and legal operators. This is especially true when a new constitution results from an institutional breakdown. We will refer to this conjunction of necessities as 'shared' constituent power. With this idea in mind, this paper analyzes the impact, on chilean legal culture, of those who participated in the creation and teaching of the 1980 Constitution during its first years of its implementation. Using the concept of internal legal culture, the author seeks to show how the exercise of the de facto constituent power required the collaboration of a set of bodies in general, but specially of a group of academics to create, inform, and reinforce the ideas contained in the new constitution. They fulfilled a dual role: they were the architects of some of the foundations of the new

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1 Newspaper *El Mercurio,* Santiago, Chile*,* October 5th 1975. In the original could be read "La Constitución de 1925 está muerta en la realidad práctica, y lo que es aún más importante, en la mente del pueblo chileno" quoted in Becker, 1993, 229-250. This and all translations from spanish or italian into the language of the present work are strictly my responsibility.

constitutional text, and they taught the ideologies to model the beliefs about institutionality needed by those who broke it after the 1973 coup d'état.

KEYWORDS

Constituent power – legal culture – De facto constitution – Constitutional law – legal scholars

INTRODUCTION

In 1973 Chile experienced a dramatic change in its political and social life when a coup d'état broke the established constitutional institutions. In the name of the country's health[2], the Chilean army arrogated the legitimacy to seize power from socialist president Salvador Allende. From that moment on, a complex web of policies shaped the life of Chilean society based on official directives that responded to the ideological, economic, and political model of the coup perpetrators. In this historical framework, the idea of a new Constitution was the cornerstone needed to legitimize a new order. At the regime's request, a group of members of the internal legal culture - that is, those members of society with legal tasks - worked on a constitution draft in the early days of the Pinochet dictatorship[3].

This paper aims to analyse the ideological and – in retrospective – the didactic role of some of those who participated in the constitution drafting which was the result of *force over reason*[4]. The hypothesis that this paper seeks to uncover is that the didactic function - i.e. how legal content is taught and communicated - works as a general conditioner and how it influences the life and development of legal life in specific historical contexts - but can be traced back to present day. *Disclaimer*: this paper does not intend to enter the study of the classic categories that the doctrine attributes to the different types assumed by constituent power and, due to the facts referred to and the power that the military government arrogated to itself, both serves as a trigger for the exercise of a type of revolutionary constituent power.[5] This paper proposes the notion of 'shared constituent power'. This can be

2 According to the text of the first decree of Augusto Pinochet Ugarte's military dictatorship. Available at https://archivochile.com/Dictadura_militar/html/dic_militar_doc_junta.html

3 For a detailed and critical overview of the genesis of the 1980 Chilean constitution, see Viera-Álvarez, 2011.

4 Those are the words that appears in the Chilean national coat of arms motto: *"Por la razón o por la fuerza"*.

5 The military government in its declaration of principles arrogated to itself the use of an original constituent power. It can therefore be understood that the exercise of this power, together with the cultural change that was brought about by means of this exercise, fall into the usual category of revolutionary constituent power. For further discussion of the relationship between 'constituent power' and 'revolution', see Baquerizo Minuche, Jorge. "'Poder Constituyente' y

understood in - at least - two senses: in the sense of the intervening bodies; and in the sense of the interpretative burdens that a group of legal scholars carried out, both in their role as creators of part of the constitutional text, as well as when it came to teaching and legitimizing it.

The innovative aspect of this approach lies in its attempt to demonstrate the exercise of constituent power from a different perspective to the one usually proposed by the doctrine: from the beliefs about the constitutional text.

To achieve this objective, it would be necessary to make explicit the notions of 'internal legal culture' and 'ideology' that serve as a framework for the analysis of the proposed case. With this specification, at least two functions of the internal legal culture are proposed. Those tasks will be achieved in the first section. The second section considers the path of the facto constitution and the influence of some members of the Ortuzar Commission[6] on the teaching of constitutional law after the enforcement of the text. It thus explores the importance of the didactic function of this sector in Chile's internal legal culture with a focus on two practical examples. The last section offers some discussion and the conclusions of the paper.

1. A FEW NOTES ON INTERNAL LEGAL CULTURE, IDEOLOGIES AND CONSTITUENT POWER

The notion of "legal culture" is generally used as "[…] one way of describing relatively stable patterns of legally oriented social behaviour and attitudes. The identifying elements of legal culture range from facts about institutions […] and, at the other extreme, more nebulous aspects of ideas. values, aspirations, and mentalities."[7]

'Legal culture' makes it possible to establish "[...] a dialogue between the legal sciences and the social sciences" and, as far as Chile is concerned, it has been used [...] mostly as a self-description of the unity of the legal system capable of establishing "[...] a unity comparable with other units"[8]. But how do these dialogues develop? As far as this work is concerned, it is Giovanni Tarello and Lawrence Friedman who have preliminary established

'Revolución': relación de dos conceptos en clave jurídica." In *Diritto e Questioni pubbliche, 2021, vol. 21, núm. 1, p. 175-195* (2021).

6 This is the name usually given to the '*Centro de Estudios para una Nueva Constitución*' or *'CENC'*, one of the bodies in charge of creating a preliminary draft constitutional text at the request of Augusto Pinochet's dictatorial regime.

7 Nelken, David. *Using the Concept of Legal Culture*, en Legal Theory and the Social Sciences, Routledge, 2010, p. 280

8 Cadenas, H. (2014). La cultura de la cultura jurídica: aportes desde la teoría de los sistemas sociales. *Sociología del Derecho en Chile. Ediciones U. Alberto Hurtado, Santiago* p.89-90

the relationship between its internal and external components. This makes it possible to reconstruct a series of dynamics around these elements.

Both agree that the cultural legal phenomenon has the two mentioned components: the internal one, normally constituted by the culture of "[...] legal technicians or specialists: law school professors, judges, administrative officials with legal professionalism, lawyers, notaries"[9]; and the external one, to which they do not devote too many lines. Friedman argues that external legal culture is "[...] the legal culture of the general population", while Tarello identifies it as the opinions about, or knowledge of, positive law[10]. However, the lack of development of this sector of legal culture could, a priori, be made up for using exclusion. In other words, members of the external legal culture can be understood as those subjects who do not belong to the internal legal culture. Considering the wide use of the Chilean legal doctrine[11] concerning the components of legal culture, this paper needs to clarify some issues as a way of improving the explanatory model.

From the sub-categories 'internal' and 'external' of the legal-cultural phenomenon in general, it can be presumed that both Tarello and Friedman coincide in stipulating their conceptual definitions based on at least two related criteria: first, that of belonging to a certain class or set, i.e. technical specialists or the general public for one or another dimension; and second, the functional one, in the sense that a certain role is identified as necessary for the identification of the general legal culture, i.e. the different 'legal tasks' of legal operators proposed by Friedman[12] and, on the other hand, the opinion of the rest. What is certain is that there is a gap that needs to be filled because neither of the two authors emphasized in detail the components that make up each category and the various functions they carry out.

1.1. Constitutive and didactic functions

Based on the above, this paper identifies at least two roles of the internal legal culture: the constitutive role, —i.e. in a broad sense, the creation of

9 Tarello, Giovanni (2003) Cultura jurídica y política del derecho, vol. 40, Biblioteca Comares de Ciencia Jurídica. Comares, 229.

10 Ídem, p. 227

11 Squella (1988 and 2009 among others) uses the division of the components without making greater distinctions than those proposed by Friedman. More recently, authors such as Aldo Valle (2001), Edmundo Fuenzalida (2003 among others) or Daniela Accatino (2019), have replicated the category of internal legal culture to refer to various areas of legal knowledge without further specifications than those already mentioned.

12 Friedman, Lawrence M. (1975) *The Legal System: A Social Science Perspective. Russell Sage Foundation*, p. 223

law, not only positive law,— and the didactic role, —i.e. in a broad sense, teaching, theorizing, and communicating about [13]

On the first notion, it is necessary to specify that due to the case under analysis, constitutivity is not presumed in the strict sense. Tipically, the legal notion of constitutivity refers to the ability to create or establish positive law. Here, the notion that arises refers to the role that a group of members of the internal legal culture had in proposing a constitutional text, and not strictly to the authorities that ended up approving it – or, as in the case under discussion here, the exercise of some kind of "revolutionary constituent power" with a few notes of particularity.[14]

The notion of constitutivity that this paper presents is very uncomplicated and, in fact, rather naive. It attempts to bring the notion back to the uses of standard language in a 'Searlean key'[15]. In this case, it relates to the uses generally in charge of the internal legal culture, which is prone to the construction of beliefs regarding a particular issue. For example, the Chilean *de facto* constitution. These beliefs are not limited to being directly related to the words contained in the constitutional text, they are also constructed through the expressions in the text, i.e. the meta-language used by the internal legal culture in general.

This notion is not a personal creation. Rather, it coincides with the postulates of legal realism, specifically Genoese version.[16] According to this tradition, legal scholars have the task of systematizing, theorizing and giving opinions about the law. Those opinions could be descriptive or, in some cases, also prescriptive. When a legal scholar speaks of an 'ought to be' about the law, the line between theory and ideology may have been crossed.[17] This situation

13 This enumeration of roles does not pretend to be exhaustive. On the contrary: more roles can be identified which will not be mentioned in this paper as they are the subject of ongoing doctoral research by the author. Reference is only made to the two roles mentioned above, which belong to the preliminary results of his research and serve as a starting point for this paper.

14 This paper argues that the 1973-1980 Chilean constitutional experience required a 'shared constituent power' which will be explained in the following sections.

15 This key is contented on the notions on speech acts in John Searle, "Speech acts", 1969, Cambridge University Press.

16 This tradition presupposes a core of theses consistent over time: analyticity as a method of approaching legal problems; a certain scepticism about language and its meanings; relatedly, a certain scepticism about interpretation; a belief in the influence of legal scholars on the evolution of existing law. For a more precise reconstruction of the central theses of the Genoese tradition, see footnote 52 in Calzetta, Alejandro Daniel: "An Analysis of Jeremy Bentham's Quasi-Realistic Model of Legal Competence." In *Legal Power and Legal Competence: Meaning, Normativity, Officials and Theories*, Springer International Publishing, 2023. 261-288.

17 An example of this 'border' could be visualized in the Tarello's work "Teorie e ideologie nel diritto sindacale: l'esperenza Italiana dopo la costituzione", Ed. Comunitá, Milano, 1967. There, Tarello describes the relationship between statutory laws on trade unions and legal doctrine on trade unions. He argues that, in some cases, jurists argue from their ideology about positive law, and, in these cases, they could be understood as creators of beliefs about law.

usually happens when the legal scholars exercise what we call "the didactic function" in this work.

The didactic function involves teaching, or transmitting opinions, traditions, information, or anything else deemed necessary to instruct someone about something. In our case, the 'thing' is law, -more precisely, the constitution and the constitutional law. Due to the context, the new constitution had to be taught and transmitted to both new generations of members of the internal and external legal culture. Let us think for a minute about the historical frame of the case: a new constitution, a new government, a new model. The new scenario required lawmakers willing to create it, but also legal scholars to transmit it. What happens when the one who creates the law also teaches it?

1.2. The ideology in constitutive and didactic functions

The notion of ideology is one of the most used in social sciences and by the different uses those social scientists gave to it, could be understood at least in two senses: ideology in the weak sense, -i.e. as the set of beliefs that has the purpose of guiding behaviours;- and in the strong sense, -i.e. as a false belief or mystification of a certain political belief.[18]

As mentioned, the line between theory and ideology is usually crossed by those who inform and teach law. By the nature of constitutions, -i.e. texts that condense a set of political values largely accepted by a ruling elite at a given time-, this barrier is even more blurred. This paper does not pretend to analyse the ideologies that traverse the constitutive function, since the facts that originated the new constitution in study are well known, and it is sufficient to mention that the text arises from the exercise of some kind of revolutionary constituent power.

Regarding the ideologies of those who played the role of teaching the 'new constitution' in its early years, some caution should be exercised. First, it is impossible to lump all teachers of constitutional law under the same label. Second, since this paper aims to analyse the teaching role of only those who participated in the creation of the 'new text', it is worth mentioning that it would be a mistake to group them as belonging to the same ideological current. It is only worth mentioning that many of the commissioners were trained as lawyers and took their first steps in teaching in the same traditional university and that this place, which sheltered this tradition, was treated differently by the authorities compared to other educational institutions.[19]

18 Bobbio, 1957 and 1968; for a summary of both meanings of the term ideology, see Stoppino, 2015, pp. 755-769.

19 To analyse in general the set of beliefs of the members of the Commission, the data of its members can be cross-referenced with the work of José Francisco García "*La tradición constitucional de la Pontificia Universidad Católica de Chile*", specially the second volume (Ediciones UC, Santiago, Chile, 2020), which compiles much of the tradition of the teaching of

1.3. The idea of constituent power in Chilean internal legal culture

This section briefly explains the concept of 'constituent power'. It refers to the original capacity of a people or a nation to create a new constitution, to modify the existing one, or to transform the legal-political framework of a state. It is this power that establishes the basis of legitimacy, and the foundation of the constitutional order. It is considered a sovereign and, in theory, unlimited power, since its function is to create the fundamental norm of a state, the constitution, from which all other legal norms derive.[20]

One of the authors who introduced this notion is Emmanuel Sieyès, who in his work 'What is the Third Estate?' (1789) states that the constituent power resides in the nation and is prior and superior to any constituted power. Sieyès states that Constituent power is, by its very nature, unlimited. No limit can be imposed on it, since its function is to create the very framework of limitations and regulations.

Carl Schmitt also addresses the issue in his 'Theory of the Constitution'[21], where he clearly differentiates constituent power, as an expression of the sovereign power of the people, from constituted powers (i.e. those that operate under the rules already established by the constitution). Schmitt argues that constituent power is the political will that creates the constitution as a free and sovereign act. It is the supreme manifestation of the will of the people, which stands above any pre-existing legal norm.

In contemporary theory, Antonio Negri in his work 'Constituent Power: Essay on the Alternatives of Modernity'[22], discusses the radical nature of constituent power as a constantly evolving process, which is not limited to the founding moments of a state, but is present in social movements and political struggles to redefine the social order.

It can be noted that these authors attach a common issue to a certain kind of will, be it popular or political, and it could be understood that this will is free and sovereign. But this idea could turn out to be 'romantic', as it starts from ideological assumptions to build the theoretical assumptions on which the concept is based. We could ask ourselves what about those constitutions which do not commence from this free exercise of a free popular will? There are several answers, but two will be explored in this paper: either we leave

constitutional law in that law school. There you can find most of those who carried out the task of submitting the draft constitution to the de facto government.

20 For an in-depth look at the meaning and implications of the concept of constituent power in constitutional thought, see Loughlin, 2014, 218-237; or Colon-Ríos, 2014.

21 Schmitt, C. (2008). *Constitutional Theory*. Duke University Press Books.

22 Negri, A. (2015). El poder constituyente. Ensayo sobre las alternativas de la modernidad. Traficantes de sueños, Madrid.

them outside the result of the exercise of constituent power; or, we try to explain them by the same theory, with some nuances.

Due to the historical issues of the case under analysis, the second answer is chosen for its usefulness as an explanatory model of the Chilean experience. It is argued that the Chilean experience is characterized by a lack of democratic participation in the exercise of constituent power that not only encompasses the de facto 1980 constitution,[23] but can be extended to other constitutional essays. This 'lack of democratic legitimacy' in the exercise of constituent power could justify the models used in recent years: from the communication addressed to the Senate by former President Michelle Bachelet, to the agreements on which the two failed processes, of 2022 and 2023, are based; the question of the democratic legitimacy of the exercise of constituent power is a recurrent feature. [24]

But these are not the cases under our analysis. On the contrary, the characteristics of the case under analysis are known to be at odds with these notions. This is why, in this paper, the notion of 'shared constituent power' is put forward. Here it is argued that the historical context required a few "necessities" of some influential exponents of the internal legal culture. These needs cover several issues: i) the exercise of authority -or the power to impose legislation -; ii) the expertise to write a constitutional text, as well as to inform and persuade the general population of its content, its necessity in the face of an obsolete text , which is how the 1925 text was presented; and iii) the need to teach it to the legal technicians who made up the domestic legal culture in those days.

This can be identified in several examples but let us first examine how the design of the text was carried out before analysing how it became part of the Chilean legal culture.

2. CONSTITUTIONAL *DE FACTO* LEGAL CULTURE: A '*SHARED*' EXPERIENCE OF CONSTITUENT POWER

When the perpetrators of the coup seized power, not only was Chile's institutionality broken: the new authorities suspended the validity of the constitution

23 Grez Toso, S. La ausencia de un poder constituyente democrático en la historia de Chile. Izquierdas, 3, 5, Chile, 2009. Available in https://repositorio.uchile.cl/handle/2250/123041

24 For example, see 'Mensaje 407-365 sobre reforma constitucional' (Message 407-365 on constitutional reform) where, in Point I of the background of this communication, it argued the need for constitutional replacement as "an imperative of the democratic forces since the generation and entry into force of the 1980 Constitution and has positioned itself as one of the central issues of Chilean society in recent years". Available on the website of the Library of the National Congress. www.bcn.cl/obtienearchivo?id=documentos/10221.1/76296/1/Mensaje%20Pdta.Bachelet.pdf, visited on October 3, 2024.

and arrogated to themselves the constituent power.[25] Nevertheless, the idea of modifying the constitution that had been in force since 1925 was already in the minds of some constitutionalists of those days.[26]

While 'La Moneda' was still smouldering that Thursday the 13th of September 1973, 'la Junta'[27] commissioned the study of a new constitution. Days later, a decree appointed Jaime Guzmán, Enrique Ortúzar, Sergio Diez, and Jorge Ovalle to carry out the task: all were legal scholars and at least three were professors of subjects related to constitutional law[28]. On September 24th, the first meeting of the commission of jurists took place and three days later, they submitted to the government a memorandum on the necessary basis for a new constitution.[29]

Over time, the commission expanded to include other members[30]. Since several historiographical works have been devoted to this subject, it will not be expanded here[31].

The Study Commission met between 24 September 1973 and 5 October 1978, completing 417 working sessions. As a result, it submitted to General Augusto Pinochet a drafted constitutional bill consisting of 123 permanent and 11 transitory provisions. Subsequently, it was dissolved, and its minutes were passed on to a second body for study.

This instance is the work carried by the Council of State (*Consejo de Estado*), an advisory body to the President of the Republic on matters of government and civil administration and made up of former Presidents of

25 "The Government Junta has assumed the exercise of Constituent, Legislative and Executive Powers since 11 September 1973", Decreto-Ley 128, November 12, 1973. In the original: "Artículo 1°. - La Junta de Gobierno ha asumido desde el 11 de Septiembre de 1973 el ejercicio de los Poderes Constituyente, Legislativo y Ejecutivo."

26 An example is the work "*Chile, hacia una constitución contemporánea: tres reformas constitucionales*. EJC, 1973) wrote by the former commissioner Enrique Evans de la Cuadra.

27 Junta' is the word commonly used in Spanish to refer to a group of people (usually military, but not only) that replaces the authorities in revolutionary times: first "junta" of government, to refer to the first local authority distinct from another, as in the case of the Spanish colonies in America; or military "junta" to indicate when the army deposed the legitimate authorities.

28 For the four originals members, Ovalle was professor of constitutional law in "Universidad de Chile"; Diez and Guzmán were professors of constitutional law too but in "Universidad Católica"; and Ortúzar teaches civil law.

29 In Cristi, Renato (1998) "La génesis de la constitución de 1980: una lectura de las actas de la honorable junta de gobierno", *Revista de Ciencia Política*, *19* (2), Chile, pp. 208-228.

30 The Commission was chaired by Enrique Ortúzar Escobar, hence its usual name, and was composed of Jaime Guzmán Errázuriz, Sergio Diez Urzúa, Jorge Ovalle Quiroz. Later Enrique Evans de la Cuadra, Gustavo Lorca Rojas, Alejandro Silva Bascuñán and Alicia Romo Román joined the group. Between March and May 1977, Silva, Evans and Ovalle left the Commission, being replaced by Luz Bulnes, Raúl Bertelsen, Juan de Dios Carmona and Rafael Eyzaguirre, who acted as secretary throughout the period.

31 For more information on the history of the commission, see Cortés, 2016; Thiess Toro, 2019; or Quevedo, 2025.

the Republic and other people appointed by Pinochet himself[32]. This Council drew up a new constitutional project, an alternative to that of the Ortúzar Commission, between 14 November 1978 and 1 July 1980, based on a total of 57 working sessions. On July 8, 1980, the Council handed over its draft to the "Junta", which continued with its usual functions until March 1990.

The third instance is the Government 'Junta' itself, which worked based on the texts of the Commission of Studies and the Council of State, for which it appointed a Working Group composed of the Minister of the Interior, Sergio Fernández, the Minister of Justice, Mónica Madariaga, plus the auditors of the Army. This team was formed to analyse and draft the final constitution. The "Junta" and the "Grupo de Trabajo" met from 8 July to 8 August 1980, date when the final text was approved.

This allows us to consider that the exercise of constituent power in the de facto Chilean experience was *'shared'* in two ways: first, because more than one body designed and redesigned the constitution; second, becauseconstitutivity was required as a driving force for establishing a set of beliefs around the constitution, beyond the mere sanctioning power of the authority that promulgated the constitution. This is due to the circumstances under which the new constitution was granted: during a revolutionary rupture to change the socio-legal paradigm in a relatively short period. Without this conjunction of factors, a change in the text would have ocurred, but a change in the constitution would not have been possible.[33]

However, a text alone was not enough: it had to become part of the Chilean legal culture.

2.1. When necessity has a heretic face, beliefs are learned by fire.

As this work shows, the first constitutional design was 'cropped' twice. This cutback was accompanied by a set of measures to protect the model intended by the Pinochet regime. This implies that, from the first model to the one that was put into effect in 1980, the changes reflect the needs that the political context demanded.[34]

32 Its members include Jorge Alessandri Rodríguez (president) and Gabriel González Videla, Carlos Cáceres, Juan de Dios Carmona, Juan Antonio Coloma, Juvenal Hernández, Vicente Huerta, Renato García, Diego Barros, Pedro Ibáñez, Oscar Izurieta, Hernán Figueroa, Mercedes Ezquerra, Héctor Humeres, Julio Philippi, William Thayer, Guillermo Medina, Enrique Bahamonde and Enrique Urrutia Manzano, among other civilian and military members.

33 Reference is made here to distinguishing between the constitution as text in a descriptive sense and the constitution as norm in an axiological sense. For more on these distinctions, see Paolo Comanducci's "Modelos e interpretación de la constitución" in *Constitución y Teoría del Derecho*, Fontamara, México, 2006.

34 For more on the 'armour plating' stages (in Spanish 'blindajes') of the constitutional text see Francisco Zuñiga Urbina *"Constitucionalismo: pasado, presente y futuro"*, Thomson Reuters, Santiago de Chile, 2024, pp. 6-90.

But, how to achieve adherence to a text that could be called 'spurious' amid such a delicate context for Chilean society? It would be impossible to reconstruct all the ways that were put in place to achieve this goal. We will therefore take a few examples that, although they have been studied in other works, are intended to illustrate the hypothesis of this paper.

2.1.1. Jaime Guzmán's influence on the new constitutional order[35]

Born into a politically connected family, Jaime Guzmán was educated at the 'Sagrados Corazones College' and later graduated with distinction in law from the "Pontificia Universidad Católica de Chile" in 1968.

Throughout his career, Guzmán was an active opponent of Salvador Allende's government and an intellectual leader of the 1973 military coup. As shown here, he became a key advisor to Pinochet and played an important role in the drafting of the 1980 Constitution, which laid the foundations for Chile's authoritarian regime. His political thought was associated with the political movement called *'gremialismo'*[36]. He emphasized the autonomy of intermediate institutions and the restructuring of the Chilean right, criticizing traditional ways of Chilean politics. Guzmán also co-founded the Independent Democratic Union (UDI)[37], a political party closely linked to the political agenda of the military regime that currently exists.

As an ideologist, Guzmán was maybe the most influential thinker and defender of the regime. It is argued that the dictatorial government initially intended to maintain the 1925 Constitution[38] and that it was he who persuaded

35 This section aims to summarise Guzmán's main contributions to the constitutional process. For a detailed analysis, see Cristi, 2000, which is perhaps the most important work ever written on Guzmán's political view.

36 Emerging in the 1960s, Chilean "Gremialismo" was heavily influenced by Spanish Franquismo. It was fiercely opposed to the university reform movements close to Christian democracy. For Guzmán, Chilean Christian democracy at the time had similarities with Marxism. In a corporatist sense, the gremialistas believed in political authoritarianism and liberal economics, but were essentially advocates of a hierarchical, culturally conservative society. These views contributed to their reputation as the best interpreters of Opus Dei. In the 1970s, this movement was in full swing, because, in addition to being fundamental to the Franco government, it was beginning to work with the aim of establishing itself in Latin America. The starting point for penetrating the region was Chile, especially after the visit of Escrivá de Balaguer at the beginning of the military dictatorship.

37 For more, see Insulza Merlet, Javier. "El nacimiento de la UDI: el partido que se creó al alero de la dictadura de Pinochet." *Revista Intervención* 12.2 (2022): 103-111.

38 The "Decreto-Ley" number one sentenced "[…] la Junta, en el ejército de su misión, garantizará la plena eficacia de las atribuciones del Poder Judicial y *respetará la Constitución y las leyes de la República*, en la medida en que la actual situación del país lo permitan para el mejor cumplimiento de los postulados que ella se propone". But in a explanatory 'decreto-ley' (N° 128' on 12 November 1973) the idea of respect for the 1925 Constitution changed, possibly under Guzmán's influence: "Artículo 1°.- La Junta de Gobierno ha asumido desde el 11

the 'Junta' and, especially, General Pinochet of the need for a new institutional framework defined by a new constitution[39]

But his influence was not only limited to the political sphere. It can also be traced in some public policies outside these spheres, like in the reform of the educational plan on the subject 'civic education' in 1982[40]. He taught the subjects 'constitutional law' and 'politic law'[41] at the Law School from the 'Universidad Catolicaduring the early years of the coup, and, consequently, during the early years of the implementation of the constitution.

But not only that, Guzmán can be considered a 'tribune' insofar as a large part of his writings were disseminated by organs of the Chilean press in the context analysed here. This role places Guzmán in a privileged position as a spokesman for the regime's ideologies facing the people in crisis, and during a reality where listening to different discourses was impossible under the assumption of some kind of legality.

In perspective and concerning the theoretical framework chosen for this paper, Guzmán stands as a clear exponent of Chile's internal legal culture from a place of privilege associated with the power of the regime. Let us think, for a moment, about the constitutive function in the sense set out above: The capacity to influence the internal sphere as much as that of transmitting to the external one, shows that the role exercised by Guzmán operates as a creative and driving force for the constitutivity of the new beliefs about institutionality, or in other words, on the beliefs about the new *de facto* constitution.

But, could he have done it alone?

2.1.2. We have a text, now we need legitimacy: the case of '*La declaración*'[42]

It would be absurd to think that a coup needs legitimacy to act. It would also be absurd to think that the preponderant figure of Guzmán alone would have been enough to cover all the needs the regime required to put its plans into action. Nevertheless, the intentions of the Pinochet regime were always

de Septiembre de 1973 el ejercicio de los Poderes Constituyente, Legislativo y Ejécutivo", that signifies the atribution of the constituent power by the regime

39 Valdivia, V. "Lecciones de una Revolución: Jaime Guzmán y los gremialistas, 1973-1980" en Valdivia et al *Su Revolución contra nuestra revolución: Izquierdas y derechas en el Chile de Pinochet (1973-1981)*, Santiago, Lom Ediciones, 2006, p.50

40 Pérez Godoy, Fernando, and Loreto Valencia Narbona. "El pensamiento político de Jaime Guzmán en la formación cívica de los chilenos en dictadura." *Cuadernos de historia (Santiago)* 54 (2021): 119-145.

41 The label 'Political Law' refer to the legal subject composed of the principles of what is usually referred to as the general theory of the state.

42 Document subscribed for a set of 55 professors at the Law School of "Pontificia Universidad Católica de Chile" about the call to the plebiscite to ratify the new constitution, published by the newspaper *El Mercurio*, august 24th, 1980.

cloaked - though more than a cloak, a mask - in the presumed legality that legitimized the running of the dictatorship. Remember the "decreto-ley" 128, where the regime presumes the legitimacy of an original constituent power.[43] This led to the fact that its constituent intention required it to operate in the same key as the aforementioned 'mask of legitimacy'.

For this, the plebiscite tool was the mechanism chosen to 'listen' to the Chilean people on the need to modify the constitution[44]. Part of the cynicism of this 'pas de ballet' can be seen here: the plebiscite was held under dubious conditions of transparency, but also after years of institutional design and with a ready-made constitution. In other words, the outcome of the plebiscite was clear even before it was held[45].

In the plebiscite of September 11, 1980, 65.71% of voters voted in favour of the new Constitution. However, the absence of electoral registers and the restriction of public freedoms prevailing at the time, question the legitimacy of the results. The Constitution came into force on March 11, 1981.

Towards the plebiscite, public opinion points to the lack of legitimacy of the constituent process. In this context, a group of 55 law professors signed a statement that sought to fulfil a dual function: i) to establish the supposed legitimacy of the process and of the Constitution itself; and ii) to downplay any negative outcome if the plebiscite did not go in line with the Junta's intentions.[46]

Historically, Chile has shown the preponderance of two university institutions, i.e. Universidad de Chile and Pontificia Universidad Católica de Chile. The former was understood by the regime as one of the main cores of cultural Marxism to be combated in pursuit of the restoration of broken Chilean's tradition, justice and institutionality[47]. However, both were intervened by the military authorities and new deputy rectors were appointed who were part of the army.[48] These universities for reasons of conjuncture, constituted - in the sense of informing and contributing to beliefs about positive law - a large part of the Chilean internal legal culture.

43 "Decreto-Ley" 128, available in https://archivochile.com/Dictadura_militar/, visited on October 3, 2024.

44 The details of the discussion on the need to call a plebiscite can be found in Barros, 2002, 172-173; 207-209

45 This situation is so obvious that the referendum has even been described as a 'fraud'. See Saavedra, 2023.

46 For further information, see Viera-Álvarez, 2011, 163.

47 The regime's "decreto-ley" number 1 proclaimed "la restauración de la chilenidad, la justicia y la institucionalidad quebrantadas", in https://archivochile.com/Dictadura_militar/, visited on October 3, 2024.

48 The regime intervened in all national universities, without distinction between public and private. However, some had more freedom than others, which suffered major purges in their academic departments based on ideological issues. For more information on the military interventions on universities, see Errázuriz-Tagle, 2017.

But the intervention in the universities was not equal: in comparative terms, "the Universidad de Chile" suffered more interventions and, among other things, academics' exile compared to the "Católica University". This brought many members of the latter closer to the circles of power, including the public administration and other public services: several of the most influential members of the Ortuzar Commission and those 55 professors who signed the declaration were teaching in the second of these institutions. In retospective, what would public opinion say if such a large group of academics belonging to one of the most important and long-established universities in the country was trying to legitimize the events that would trigger the adoption of a new constitution? There are at least two possible answers: to believe in legitimacy, or not to do so.

This binding element might be minor. But, in hindsight , it provides the little-explored line of analysis that this paper seeks to highlight: If the drafting of a constitution was necessary for the regime, it had to ensure that its drafters and its "transmitters" came from a tradition that was close to some of the values it was trying to restore. Or, to maintain the notions introduced in the theoretical framework, this is part of the predominant internal legal culture in Chile at the time, although it is part of a pluralism conditioned and strongly crossed by conservative ideologies, due to the issues that have already been exposed

2.2. Explaining the constitution: to believe or not to believe?

The influence of legal scholars close to the regime on the beliefs of the internal legal culture can be sought, for example, by looking at how some of the central themes of 'constitutional law' were taught in those years. It could be thought that, given the lack of application/interpretation of the new constitution, added to the state of exception that implied a relative application of the same and the novelty of several of its institutes for Chilean legal culture, academics needed to resort to some series of sources that allowed them to teach the new constitutional law.

As evidence of this, two related examples are shown here: the first one with a focus on historical sources and their relationship with the teaching of fundamental rights; and the second, with an emphasis on the interpretation of the regulatory power and legal reserve. Both demonstrate the influence of the Commission during its tenure, but also after the cuts made by the Council of State and the 'Junta': some ways of understanding the meaning of the constitution were particularly associated with the minutes of the Commission.

2.2.1. The 'strange' case of the fundamental rights: from the Commission to the present day

During the preparatory work carried out by the Ortuzar Commission, the issue of fundamental rights was not a 'priority concern'[49]. This can be seen in the fact that, of the seven commissions that studied the new constitutional text, only three were linked to the topic, although the discussion on rights covered a range of issues and lasted for a considerable period. Some of the debates revolved around the phraseology and nomenclature used to refer to rights, the sources of rights, the possible existence of hierarchies between rights and their limitation, among other issues.[50]

But once the preliminary draft was sent to the executive, it was submitted to the Council of State, which, in comparison with the time devoted by its predecessors to the issue, devoted an even shorter period to the matter. Several changes were made in this body, especially regarding the so-called social rights[51]. In addition, adjustments were made to the systematization between constitutional rights and social aspirations. Once this had been done, the preliminary draft was submitted to the 'Junta', where changes were again introduced before the plebiscite on the text held on 11 September 1980, evidencing changes from the preliminary version to the version made public.[52]

The colourful note in the comings and goings of the text until its sanction in 1980 lies in the fact that, despite the changes introduced by the Council of State, most of the teaching of constitutional law from then on was exercised on the text of the acts of the Commission, even after the constitutional reforms (see García, 2017). An example of this is the use of the study book '*Los derechos constitucionales*' by former commissioner Enrique Evans de la Cuadra[53], or the treaty on constitutional law of the former commissioner Alejandro Silva Bascuñán[54]. Those works reproduced the minutes of the Commission of Studies for a New Constitution, with commentaries by the authors. It should be remembered that, as mentioned, both commissioners resigned from their positions within the Commission and, furthermore, that a large part of the minutes of this body were cut by the other bodies involved in the creation of the constitutional text.

49 Aldunate-Lizana (2008) *Derechos Fundamentales*. Legal-Publishing, Chile p. 302)

50 Aldunate-Lizana, Op. Cit. pp. 331-330

51 Certain conflicting positions on fundamental rights had led to the separation of some members of the Commission. Such is the case of Bascuñán Silva and Evans de la Cuadra. This shows that within the Commission there were conflicting ideas on some matters or concerning our theoretical framework: disagreements in that part of the internal legal culture. For a reconstruction of the controversies between Silva Bascuñán, Evans and Guzmán, see García, J. F., Op. Cit. pp. 554-565.

52 For a comparative systematization of the original provisions proposed by the Commission, plus the modifications made by the Council of State and the 'Junta', see Aldunate-Lizana, 2008, Annex X, pp. 421-424

53 Evans De La Cuadra, E. (1999). *Los derechos constitucionales*. Ed. Jurídica de Chile

54 Silva-Bascuñán, A. (1997). *Tratado de derecho constitucional* (Vol. 1). Editorial Jurídica de Chile.

Closer in time, the study books of José Luis Cea Egaña[55], Humberto Nogueira Alcalá, Sergio Verdugo y Pfeffer among other professors[56] follow the same structure of arguments. Here is a clear example of the exercise of the didactic function supported by the constitutive function, which although subsequently revised, by the organs of government and modified by the various reforms to the text. In this way, this illustrates at least the existence of an ideology in a weak sense, i.e. as a set of beliefs that has the purpose of guiding behaviours.

Today, these works are an almost obligatory source of reference for researchers, but also for law students who, generation after generation, learn the techniques of law from these doctrinal sources. This shows that the influence of the internal legal culture in shaping new legal operators can perhaps be understood in the strong sense of the notion of ideology, i.e. as a false belief or mystification of a certain belief.[57]

2.2.2. Regulatory power and legal reserve: an example of misinterpretation or false belief?

The case of regulatory power is another example of the differences between the internal positions of the Commission, those assumed by the Council of State, and the final decision of the 'Junta'. In this matter, which covers the powers to regulate rights through Congressional laws, the original proposal of the commissioners demonstrates a clear refoundation process in this regard. In this sense, the widespread belief is that the 1980 constitution adopted a system like the French constitution of 1958, where the legal domain was defined in a taxative manner and where the regulatory power operates as a closure rule in the other subjects.[58]

This idea of "closure" was the one supported by the Commission, which started from the notion of restriction and specificity of the matters that could

55 Cea Egaña, J. L. (1999). Curso de Derecho Constitucional. *Apunte Universidad de Chile. Facultad de Derecho*.

56 Blanc Renard, N., Nogueira Alcalá, H., Pfeiffer Urquiaga, E., & Verdugo Marinkovic, M. (1990). La Constitución Chilena. *Tomo I, Centro de Estudios y Asistencia Legislativa, Universidad Católica de Valparaíso, Valparaíso*.

57 This influence extends beyond the new generations of legal practitioners and also permeates judicial decision-making. For instance, a simple search in the Constitutional Court's online database using the terms "Enrique Evans" yields immediate results showing how his work on fundamental rights is cited to support reasoning and justification in actual cases. The same occurs when searching for "Silva Bascuñán" along with "Tratado." Search engine available at: https://tcchile.cl/busqueda/, accessed on 26 June 2025.

58 The reconstruction of this whole section is mainly supported by the work of Ribera Neumman "Reserva legal, potestad reglamentaria y Constitución de 1980: antecedentes inéditos de la Junta de Gobierno" in *Revista de derecho público*, 2001, no 63, p. 471-488. I am grateful to Prof. Miriam Henríquez Viñas for providing this precise example for my work and for relating what it meant when the issues that Prof. Ribera Neumann aired when making it public came up.

be regulated by law. In addition, it added the autonomous regulatory power, an issue that was novel with respect to the constitutional tradition prevailing until then, through the antecedents of the texts of 1833 and 1925.[59]

This position was rejected by the Council of State because it was too innovative for the local legal culture, restoring in its draft - or in other words, cutting back the Commission's project - the model of the Chilean constitution of 1925 when submitting its proposal to the "Junta". Faced with these positions, the "Junta" opted to clarify the differences between its advisory bodies by using what could be called a middle ground that could reconcile both positions. To do so, it modified the scope and intensity of the legal reservation but made progress in defining the matters of regulatory power. In this way, it proposes a novel approach to the issue that is not directly based on any of the positions of the advisory bodies.[60]

The distinctive feature of the case regarding this issue arises with the "constitution in motion", as the doctrine and the bodies in charge of resolving the issue, in the jurisdictional seat, began to interpret this issue in total ignorance of the content of the discussions of the "Junta": Until not many years ago, these deliberations were kept secret. Therefore, in the face of any controversy, the legal constructions in this regard were mostly carried out considering the minutes of the Ortúzar Commission, which contained a position diametrically opposed to the final intention that was reflected in the constitutional text.

Of course, this is not a criticism of the doctrine or the jurisprudence of the first years of the "working constitution", but the opposite: It is only evidence that the need to construct and interpret the text in concrete, led to the use of sources that did not coincide with the intention of one of the bodies that exercised what was here called "shared constituent power." In other words, this case demonstrates a belief built on "dead sources" that, for a long time, constituted part of the beliefs that the internal legal culture had on this issue of Chilean constitutional law.

3. A SHORT DISCUSSION AND A FEW CONCLUSIONS: ARE THOSE INFLUENCES STILL PRESENT TODAY?

This paper attempted to demonstrate the exercise of constituent power from a different perspective from the one usually proposed: from the beliefs about the constitutional text. To achieve a certain degree of belief about the constitution, it was necessary not only to create the text but also to transmit its set of ideologies, values and interpretations during its first years of validity. Due to the cuts that the first draft had –that of the Ortuzar Commission–

59 Ídem, p. 473.
60 Ídem, p.

intervened by other bodies –i.e. the Council of State and the "Junta"- some beliefs were based on parts of the text which were no longer part of the one that was released in its final version.

This is why this work has attempted to explain that the constituent power in the facto Chilean experience necessarily requires an understanding that encompasses not only the authority that sanctioned the final text, but also those instances where the ideas necessary to put a new constitution into motion were formed. Of course, this shared exercise of constituent power can be analysed gradually, as the final inference of each participating body in the process could be measured.

But as demonstrated, the needs of the context – i.e. the abrupt rupture of an institutional system and the creation of a very particular new one – also required a kind of prospective "constitutivity" – in the sense used here – capable of legitimizing the constitutional text by providing, among other things, the tools to understand it. This is what was called here "constitutive function" and that could not have been fulfilled without the participation of privileged exponents – for various reasons that have already been explained – belonging to the internal Chilean legal culture of that time. What remains to be asked is whether there are still beliefs about the constitution that are comparable to those analysed. The truth is that, with the knowledge of the background of the intervening bodies, it has been possible to settle some controversies. However, the minutes of the Commission still arise as study material and, in certain cases, it is not considered that the constitutional text differs from what is proposed in them.

Today Chile is facing a debate on the need to replace the 1980 text – and its subsequent reforms – with a new one. Some of the debates in this regard can be traced back to the disagreements that existed among the Commissioners, such as the model of a subsidiary versus a social state. That is why this paper not only seeks to instantiate an example of such situations where the context led to justify the unjustifiable – like the 'declaration of the 55' already mentioned– but it also attempts to dive into those issues that today are part of the beliefs about Chilean constitutional law. In other words, those beliefs that those of us who dedicate ourselves to constitutional law must confront.

This work could be understood as a strong criticism of those who acted in that way, but the objective of that task should not be diverted; on the contrary, the Chilean case was used here to demonstrate what role the internal legal culture has in the face of processes of change that presuppose a new legal cultural paradigm. The details of the Chilean case make its experience a little bitter in the mouthfuls of its history. But that is merely contingent.

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