



Constituent Moment, Constituted Powers in Chile

Fernando Atria¹

Published online: 24 March 2020
© Springer Nature B.V. 2020

Abstract

This article discusses the concept of constituent power and its application to the situation in Chile after the 18th October 2019. In particular, it discusses the relation between constituted and constituent powers, with a view to understanding the significance of the 15 November Agreement that opened the way for the ongoing constituent process.

Keywords Chile · Constituent power · Constituted powers · Constitution

I

A constituent moment is the inversion of the relation between facts and norms.

In constituted moments, norms (institutional decisions) are the measure of facts. This means something simple and obvious: norms are issued to affect the behaviour of their addressees, on the assumption that facts will conform to them. When a norm is not complied with, the offending behaviour is declared ‘illegal’. If an action is illegal it will usually be the object of an institutional reaction aimed at denying it, thus ensuring the reality of the assumption that defines normal times.

In constituted moments norms are issued by constituted powers. Constituted powers are themselves created by norms, and thus limited, specified, regulated, relativized, etc. The decisions they make, the norms they create, are as subject to norms as any other action in normal times, for norms are the measure of facts. Hence if constituted powers fail to follow the rules their actions or decisions are illegal, void, etc.

All this changes with the irruption of a social power whose content is initially negative: no to the current order. Constitutional theory has a name for such a social power that bursts in, denying the current conditions of life (in this sense demanding new ones): constituent power.

Constituent power is a form of power. Not of power in a normative sense (it is not granted by a valid norm), but of power as ‘the human ability not just to act but to act in concert’ (Arendt 1969, p. 44). ‘Constituent’ here indicates a quantity: power

✉ Fernando Atria
fatria@derecho.uchile.cl

¹ Faculty of Law, Universidad de Chile, Santiago, Chile

in such a quantity that its irruption can cause the inversion that defines a constituent moment.

Since it is not a normative power, constituent power is not limited, specified, regulated, relativized by norms; it has neither pre-established competences nor given procedures. It is irrelevant whether its action is labelled ‘legal’ or ‘illegal’; what it does cannot be said to be void. Constituent power is an actual *political magnitude*.

When a constituent power appears, facts become the measure of norms.

II

The inversion is sometimes mistaken for one of its usual consequences, the suspension of constituted powers. Thus, to explain the distinction between a constitutional reform and a new Constitution, between a decision by constituted powers to change constitutional laws and a decision by constituent power to change the Constitution,¹ Hans Kelsen claimed that ‘decisive is only that the valid constitution has been changed or replaced in a manner not prescribed by the constitution valid until then’ (Kelsen 1960, p. 209). The reason for this is clear: constitutional forms and procedures exist to protect the Constitution, to ensure that through the exercise of ordinary powers of amendment only constitutional laws, but not the Constitution itself (the fundamental political decision), can be modified. The regular exercise of constituted powers is, by definition, subject to the relativizations and conditions of constituted powers, because norms are the measure of facts.

But since constituent power is not bound by constituted decisions or norms,² it can choose to express itself using any form. ‘Any form’ means any form, including constituted forms, paradoxical as it may sound. In these cases, instead of suspending constituted powers, the irruption of a constituted power is channelled through the forms of constituted powers. Some commentators are misled by this to claim that the notion of a constituent power is dated, that it has been superseded and belongs to the past.³ Some others claim that if it is channelled through constituted forms it cannot be constituent power.⁴ These are serious mistakes, because the fact that a constituent power chooses to express itself though the

¹ This distinction between the Constitution and constitutional laws is, as Carl Schmitt rightly says, ‘for constitutional theory the beginning of any further discussion’ (Schmitt 2008, p. 75).

² ‘As the *pouvoir constituant* that *antecedes* the legal constitution, the constituent power of the people cannot be legally established by the constitution itself, nor can the forms in which it expresses itself be fixed’ (Böckenförde 2017, p. 175). Notice that this statement must be read both ways: constituent power is not only not limited by constituted forms, but is also free to use them.

³ See the views of some Chilean constitutional scholars in Muñoz (2020).

⁴ Thus (in the Chilean discussion), Professor Carlos Peña argued: ‘According to Carl Schmitt [...], constituent power is always outside the rules: the sovereign is the one who decides when exceptions are made to the rules and not the one who complies with them. If people are to be the sovereign, then they cannot be subject to rules!’ (Peña 2015). This is contradictory: since people are sovereign, the form in which constituent power expresses itself would be, to a certain degree, ‘fixed’: not through constituted procedures.

forms of constituted powers does not mean that the relation between norms and facts is not inverted.

III

When norms are the measure of facts, procedures of norm-creation assume in general that norm-creation is important because different norms will cause different states of affairs in the world. Law can regulate collective bargaining, for example, on the assumption that different regulations will make a difference in the world as to how weak or strong workers' collective agency will be and this in turn will (contribute to) define labour relations. Much of what we could call 'normal political science' is dedicated to identifying non-obvious ways in which this is the case: here much attention has been devoted to failures or costs of enforcement, unintended consequences and the like. But the assumption remains in place: since norms are the measure of facts, we discuss norms because they will determine (or at least considerably affect) what actually happens. This is the constant background of both the normal and the pathological aspects of day-to-day politics: public discussion, accountability, lobbying, attempts to 'capture' the regulator and so on. Because the regulation of collective bargaining will to some extent determine the reality of collective bargaining, it will be the result of a myriad of considerations of different normative standing: by the correlation of forces among different political ideologies pushing for different regulations, by the strength of unions and the correlative strength of capital, by particular interests like those of politicians who want to be reelected or to show gratitude to their donors, by the lobbying of big business pressing for the regulation that suits them and the like. The interaction of these and other factors will lead to regulations more or less fine-tuned to reflect the way in which all these forces are, in fact, accommodated. There is nothing new here, this is normal politics.

This is, as we have explained, different in a constituent moment, caused by the irruption of a constituent power. In order to channel constituent power through constituted forms the paramount aspect of decisions by constituted powers is that they be recognized by constituent power. If they are, constituent power will act through them, and the new Constitution will be reached in a peaceful way. To be able to channel constituent power constituted powers will have to make a radical 'switch in time'. They will have to abandon their normal perspective of carefully crafting norms to serve those interests that have been relevant in norm-creating procedures, under the continued assumption that facts will conform to them. Instead, they will have to assume the perspective of creating norms fit for constituent power to express itself.

Needless to say, this switch is highly improbable. Given the reversal of the norms/facts relation, however, failure to perform it will not mean that constituent power will not act, but that it will disregard the decisions of constituted powers and choose whatever other means are adequate for its expression. The improbability of the switch in time and the reality of the inversion explains the fact that the irruption of a constituent power usually means the suspension of constituted powers.

IV

Why talk about constituent power as an agent, rather than just as a social force that irrupted? This is indeed part of its development, and has some important consequences (see below, n. 8). The moment of its irruption is what we could call the *moment of negativity*, in which its constituent content is read from the negation it carries ('No to the current order'). If violence and repression are enough to negate this negation, no constituent moment, no inversion of the norm/fact relation will follow, and the events will be remembered as plain rioting. But if there is power in constituent quantity, the moment of negativity will lead to a *moment of positivity*. And it will be increasingly difficult or cumbersome to avoid using the language fit for agents.

The need for this language is a consequence of the fact that, in this moment of positivity, constituent power does appear as a normative power. Not in the sense, already explained, of a power granted and relativized by a norm, but in the sense that it creates norms. And norms are decisions. And decisions assume agents that take them. The hypostatization of constituent power is a political necessity, a condition of freedom.

But what this hypostatization describes are actual political events. Whether or not constituent power 'recognizes' the path opened by constituted powers, for example, is something that can be observed, something about which, as explained in the last section, we shall have important indications in the coming weeks.

V

The suspension of constituted powers can have severe consequences. This is not a form of institutional fetishism but something learnt from experience, particularly in Chile. It is also something that Salvador Allende saw as clearly as possible, before the 1973 coup, in controversy with his own Socialist Party:

The Socialist Party must be fully aware that if the people got to power on the 4th November 1970, in the regular form in which it did, it was precisely because of our institutional system. Had it been corrupted or rotten, it would have broken down and Chile would have probably entered into a state of unbounded violence (Allende 1972).

Much hinges, therefore, on the ability of constituted powers to recognize a constituent moment and to make the switch in time from the usual strategies and horse-trading of normal politics to denying themselves and becoming the mouth-pieces of constituent power.

VI

The 18th of October (what the media has eloquently labelled the *estallido social* [*lit.*, social explosion]) marked the beginning of a constituent moment in Chilean history, still under development. I assume the reader has had a chance to look at the splendid piece by María Pardo-Vergara and Octavio Ansaldi in this volume, in which the events since that day, including the ‘*Acuerdo*’ (agreement) reached by political forces on 15th November 2019 and its aftermath are described with enough detail. I will not describe them again here, but interpret them in the light of the considerations above.

Since 18th October the inversion between norms and facts that marks the irruption of a constituent power is notorious. This can be seen clearly in the November *Acuerdo*. Its point was to create a constituent process that could be recognized by a constituent power as a path that would in fact allow for its expression. The usual calculus and cajoling of normal politics was to a considerable extent suspended, because constituted powers realized that if no such path was offered, constituted powers (‘institutional stability’) were at risk. This suspension was, so to speak, objective rather than subjective. It is clear that up to the early hours of Friday 15th November there was much negotiation and horse-trading, but in severely restricted conditions. This was shown by the fact that with the Agreement all the locks that had kept in place the *Constitución tramposa* for 30 years, all those devices that gave the heirs of the Pinochet regime a veto to prevent real constitutional change (on which see Atria 2013), suddenly evaporated. A constitutional referendum, which had been categorically rejected three years before (and not only by conservative thinkers but also by some reputedly centre-left jurists and intellectuals⁵), was announced to general acclaim. The new constitution would be discussed and decided by a ‘Constitutional convention’ that would decide from a clean slate subject to a 2/3 quorum.⁶

⁵ See, for example, Zúñiga (2015, p. 193), who opposed the idea of a constitutional referendum claiming that ‘it stinks like a constitutional loophole’ that was likely to lead to ‘Caesarisms or authoritarianisms’, reducing Parliament to the condition of an ‘accomplice to the President’ in the latter’s attempts to ‘irregularly crush political minorities’; also Patricio Zapata, who claimed the referendum was a ‘short-cut’, a ‘cunning trick’ (*‘pillería’*) (see López and Faúndez 2015). Professor Zúñiga is a prominent constitutional scholar, member and regular advisor of the Socialist Party; Professor Zapata, on the other hand, had recently been appointed by President Michelle Bachelet to chair the Council that would oversee her government’s (eventually failed) attempt to set off a constituent process.

⁶ Constituted procedures of constitutional reform are defined by two features (see a detailed explanation in Atria 2015): on the one hand, there is a constitution in force that will continue to be in force as long as it is not reformed; on the other, they must satisfy high countermajoritarian requirements (in the Chilean case, the vote of 2/3 of members of Congress). This means that those who support the *status quo* need only a third (plus one) of the vote to carry the day. This is the unilateral veto that supporters of Pinochet’s regime claimed for themselves, and they used it assiduously over the last 30 years to prevent the amendments of the cheats that define the *Constitución tramposa* (except of course, when they had no use for them). By removing the first condition of procedures of constitutional reform (the new Constitution will have to be agreed from a clean slate), the Agreement eliminated this unilateral veto: since there is to be a clean slate, nobody is in a position to use a minority to maintain the validity of a constitutional provision. The veto is now contained in the 2/3 requirement, but it is significantly different: now it is a negative veto (a minority of more than 1/3 can prevent a given content to gain constitutional status), and is entirely reciprocal (any minority of more than 1/3 enjoys it).

Given that a cheating Constitution could only survive these 30 years because any reform required the consent of the cheats' beneficiaries, the Agreement meant in fact giving up the *Constitución tramposa*.

VII

The Agreement seemed to show that constituted powers had been successful in making the required switch in time; that they realized they were in a constituent moment, that the relation between fact and norms had been reversed. Right-wing parties agreed to a referendum that they had opposed as much as they could when it had been proposed in the past. And they also accepted to give up their unilateral veto power, replacing it with the reciprocal veto implied by the 2/3-from-a-clean-slate rule.

It is clear that they gave up their veto not because of normative considerations (as if they had been convinced that it was unfair), but because they understood that clinging to it risked the whole institutional structure. This is the political reality of the inversion that marks constituent moments.

The possibility of failure was considerable at the beginning. Some refused to accept the reality of the inversion, rejecting the need for the switch in time. Thus, right after the *Acuerdo* some on the Right started to have second thoughts. Maybe they had conceded too much too quickly; maybe it was not a constituent moment; maybe they had mistakenly thought that there had been an inversion of the norm/fact relation; maybe they could have got away without giving up all the cheats. Maybe, all of this is to say, there was a way to back out of the constituent process. Right-wing Senator Andrés Allamand led the way. A few days after the Agreement he claimed that it did not envisage a clean slate (Peña 2019). This, of course, was (and was widely seen as) an attempt unilaterally to walk out of the Agreement.

Some others claimed that there had not been a switch in time, or that it had not been radical enough. The extraordinary levels of public distrust of institutional politics in Chile⁷ (themselves the consequence of the *Constitución tramposa* and the neutralization of politics that it sought and achieved) gave credence to those who criticized the Agreement as a shady deal made behind the backs of the Chilean people by 'politicians' to prevent significant change.

This was fuelled by some of its less obvious implications that came to light over the following days. One in particular has been at the centre of public discussion: according to the Agreement, the Constitutional convention was to be elected subject to the same rules applicable for normal elections to the *Cámara de Diputados* (the lower chamber). This would have (*inter alia*) three highly problematic consequences: in the Constitutional convention women and indigenous peoples would be,

⁷ According to what is widely seen as the most reliable poll (available at cepchile.cl), support for the President was at an all-time low of 6%, and Congress fared even worse with 3%.

as they are in the *Cámara de Diputados*, grossly under-represented, and only candidates belonging to political parties could realistically hope to be successful, because of the rules of proportional representation. And political parties are one of the most distrusted institutions in Chile; another legacy of the *Constitución tramposa* (see Atria et al. 2017). For this reason, the very social force that made the constituent process possible was likely to be excluded from the Constitutional convention.⁸

In the discussion of these three issues we have seen a constant coming and going from the constituted and the constituent perspective. They were supposed to be settled by the end of January by complementary legislation, but that proved impossible. In the first week of March, however (February is a holiday month, with Congress not in session), the prospect of big demonstrations for Women's Day created the conditions to vote on gender parity at the Convention, which was approved. In this case, the constituent perspective won the day. But it is unlikely that there will be adequate solution to the issue of political parties, and of course we are to this day not clear as to how the 2/3 requirement will affect the working of the Constitutional convention.

VIII

It is too soon to know whether constituted powers will maintain the switch they were able to make in November; and it is also too soon to know whether the constituent power will be convinced by the designed procedure. We shall have a first clear indication of the latter in the voter turnout of the coming referendum. Ordinary elections have a very low turnout in Chile.⁹ A change in this trend in the constitutional referendum would mean that the path opened by the Agreement has been recognized by constituent power, and this will likely lead to a successful constituent process that will produce a new Constitution and a solution of the Chilean legitimacy crisis. If there is no change in turnout, we will have to understand that the procedure was not deemed apt by constituent power. In this case the so-called constituent process will continue but *pro forma*, as a constituted procedure; it will not lead to a new Constitution, nor will it be the channel chosen by the constituent power, which will then find other ways to express itself.

⁸ The social force that irrupts saying 'No to the current order' need not be politically articulated. No political articulation is necessary in this moment of negativity. But in order to act in the moment of positivity political articulation is necessary. And because of the radical rejection of political parties already mentioned, the social force that irrupted on 18th October lacked political articulation. This is the reason why, as explained in the main text, unless this problem is solved somehow (and there are under way different initiatives to solve it), that social force risks exclusion from the Constitutional convention.

⁹ In the 2017 presidential election, 46% of those entitled to vote (a surprising 49% in the ballotage). In the previous local elections of 2016, 35%; in the previous, 2013 presidential election 49% (41% in the ballotage). Detailed and aggregated data is available at www.servel.cl/estadisticas-de-participacion/.

References

- Allende, Salvador. 1972. *La vía chilena al socialismo y el aparato del Estado actual (Report to the Socialist Party)*. In Martner, Gonzalo (Ed). Salvador Allende: Obras escogidas. Centro de Estudios Políticos Simón Bolívar, Fundación Presidente Allende. 1992.
- Arendt, Hannah. 1969. *On violence*. San Diego, CA: Harcourt Brace and Company.
- Atria, Fernando. 2013. *La constitución tramposa*. Santiago: Lom Ediciones.
- Atria, Fernando. 2015. Sobre el problema constitucional y el mecanismo idóneo y pertinente. In *La solución constitucional*, ed. Claudio Fuentes and Alfredo Joignant, 41–69. Santiago: Catalonia.
- Atria, Fernando, Constanza Salgado, and Javier Wilenmann. 2017. *Democracia y neutralización. Sobre el origen, desarrollo y solución de la crisis constitucional*. Santiago: Lom Ediciones.
- Böckenförde, Ernst-Wolfgang. 2017. The constituent power of the people: A liminal concept of constitutional law. In *Constitutional and political theory: Selected writings*, ed. Mirjam Künkler and Tine Stein, 169–185. Oxford: Oxford University Press.
- Kelsen, Hans. 1960 (trans. 1967). *The pure theory of law*. Berkeley and Los Angeles: University of California Press.
- López, Hernán, and Gloria Faúndez. 2015. Patricio Zapata, Abogado: ‘Quienes se sumen temprano a la discusión van a salir en los libros de historia’. In *La Tercera*, 21 November. Available at https://www.undp.org/content/dam/chile/docs/PNUD_en_la_prensa/undp_cl_pnudprensa_La_Tercera-22-nov.pdf.
- Muñoz, Andrés. 2020. Podrá la Convención Constituyente arrogarse poderes que no tiene? El debate que enredó a Corral, Atria y Joignant. In *La Tercera*, 20 February. Available at <https://www.latercera.com/la-tercera-pm/noticia/podra-la-convencion-constituyente-arrogarse-poderes-no-debate-enredo-corral-atria-joignant/1015947/>.
- Peña, Carlos. 2015. Fin del misterio constitucional. In *El Mercurio*, 24 May. Available at <http://www.elmercurio.com/blogs/2015/05/24/32075/Fin-del-misterioconstitucional.aspx>.
- Peña, Juan. 2019. Allamand y los 2/3: ‘Nunca alguien pensó que si no hay acuerdo eso significa que se transforma en ley simple’. In *El Mercurio*, 20 November. Available at <https://www.emol.com/noticias/Nacional/2019/11/20/967819/Allamand-nueva-constitucion-convencion-constituyente.html>
- Schmitt, Carl. 2008 (1928). *Constitutional theory*. Duke University Press.
- Zúñiga, Francisco. 2015. La potestad constituyente y la nueva constitución. In *La solución constitucional*, ed. Claudio Fuentes and Alfredo Joignant, 187–203. Santiago: Catalonia.

Publisher’s Note Springer Nature remains neutral with regard to jurisdictional claims in published maps and institutional affiliations.