



## Introduction: Chile's 'Constituent Moment'

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### Abstract

The introduction looks at the constitutional situation in Chile since the demand for a new Constitution erupted in demonstrations all across the country, and argues that the notion of 'constitutional moment' is inadequate to capture the radicality of the popular mobilisation that is sweeping the country as a pure expression of constituent power.

**Keywords** Constitutional moment · Constituent power

Few documents speak more clearly of the alliance between market thinking and authoritarian constitutionalism than a letter written by Margaret Thatcher in February 1982<sup>1</sup> in response to a letter sent to her by Hayek and, more likely, to a conversation that took place possibly a few days before during a dinner organised by Walter Solomon and attended by both. From the letter, one can infer what was already known: Hayek's positive judgment on the performance of the Chilean economy under Pinochet. After all Hayek had first-hand evidence of Chile's economic 'miracle' having personally visited Chile twice: first in 1977 and then in 1981. In both cases, he wrote articles for European newspapers criticising the bias toward Pinochet's Chile exhibited in the mainstream media and praising the outstanding economic performance. But there is more to note. Hayek had no misgivings about the military means deployed for imposing the regime of the market on Chilean society. In a 1981 interview to the Chilean newspaper *El Mercurio*, Hayek went so far as to state that a transitional authoritarian liberalism would be preferable to forms of what

<sup>1</sup> The letter is available on the website of the Thatcher's archive (1982).

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he called ‘unlimited democracy’ (Farrant and MacPhail 2012, p. 514) or the ‘totalitarianism’ of Allende’s government.<sup>2</sup>

In her reply, Thatcher acknowledges the extraordinary growth of the Chilean economy (around 7.3% on average during the years preceding 1983) since the beginning of the dictatorship. She also praises the reduction of government expenditure achieved by the military junta and she notes that ‘many lessons can be learnt’ from ‘the striking example of economic reform’ that can be gleaned from ‘the progression from Allende’s socialism to the free capitalist economy of the 1980s in Chile.’ Nonetheless, she hesitates to recommend following the ‘Chilean path’ for a country like the UK. She remarks that the UK constitutional order is based on democracy and on consent: therefore, those economic reforms realised in Chile ought to take place only ‘in line with our traditions and the constitution’, ‘painfully slow’ as they may prove.

As a document of historical value, this letter gives us the chance to highlight two key aspects of the Chilean ‘laboratory’. The first one is the recognition of the violent and authoritarian nature of the neoliberal *constituent* moment in developing countries. The entrenchment of radical market thinking into the constitutional order does not happen incrementally, but through an act of original appropriation supported by brute (military) coercion. While the operations of market rationality might be hospitable to the discipline of governmentality, the latter cannot explain away the coercive nature of the establishment of a new regime. The coup organised by the military junta and the enactment of the 1980 constitution tell us that there is nothing peaceful about the installation of a neo-liberal constitutional order (Lazzarato 2019, pp. 11–19). A civil war was necessary in order to dis-embed the economy from society and to expose social relations to capture by market rationality. If the lesson regarding ‘law-founding violence’ is clear, a second lesson concerns ‘law-preserving violence’, and more specifically the institutional dimension of the ‘preservation stage’. The constitutionalisation of market rationality requires its separation from the *political* economy, and the elevation of market thinking above political rationality is at the core of the consolidating process. This is where the 1980 constitution and *leyes orgánicas constitucionales* (organic constitutional laws) enter fully into the picture as a key instrument of neoliberal preservation.

All this will be discussed in detail in what follows. In the main paper, Octavio Ansaldi and María Pardo-Vergara provide a careful account of the conditions of the installation of the comprehensive market system under the supervision of the ‘Chicago boys’ and the brutal suppression of any societal resistance to the installation of the ‘market utopia’ by the military junta. Their emphasis is on the constitutional settlement, the way in which the constitutional provisions that sustained the comprehensive market order were locked in place through a very particular constitutional design. Any notion of a societal reaction, any Polanyian ‘double movement’ that might have spontaneously erupted, was extinguished at the root through a system of policing of extraordinary barbarity. It is the violence that permitted the clean slate to

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<sup>2</sup> Hayek had already drawn a clear distinction between transitional authoritarianism (required to bring about an order (*cosmos*, not *taxis*, in his lexicon) and totalitarian government (1960, p. 103).

be introduced for the inscription of the 'total market' (as Alain Supiot refers to it) of the Chicago School, in the act of 'original appropriation' that Thatcher, as we saw, expressed reservations over replicating.

And yet in 2019, thirty years after Pinochet's coup, the double movement *has* erupted with a vehemence and a dynamism that took the world by surprise. The market economy had been locked in place by a constitutional settlement that had subordinated politics to capitalist structures. The 'cheating constitution' as Fernando Atria popularised the description (Atria 2013), devised by the regime's constitutional lawyers at the Catholic University of Santiago under the inspiration of J. Guzman, had made political redress impossible. If the social movement swept away the constitutional settlement with its careful hierarchies, balances and articulations, the induced inertias and political paralysis it installed, it was because Chile's constituent moment could not find expression on the plane of the constituted. Thus, the political found expression as contradictory to the constitution; as *antisystemic*: a moment of negativity on an emergent constitutional imaginary.

Ordinarily one would invoke a 'constitutional moment' at this juncture. Such moments mark occasions on which 'the people' exercise deliberative, 'considered judgements' regarding 'the rights of citizens and the permanent interests of the community', as Bruce Ackerman famously put it in his 1984 Storrs lectures (1984, pp. 1013–1072). They are 'ratified by a mobilized mass of ... citizens expressing their assent through extraordinary institutional forms' (1984, p. 1042). Because the constitutional provisions do not license these moments of creativity, the innovation that the constitutional moment carries is not, *legally speaking, democratically licensed*. Yet they are democratic in a more fundamental sense as exercises in 'constitutional creativity' (Ackerman 1991, p. 314), in the sense that the 'populace as sovereign periodically instigates transformations of such depth that they can be credibly claimed to have re-situated the meaning of freedom, democracy and self-determination.'<sup>3</sup> Such is Ackerman's narrative, and the insight has since populated constitutional theory, bent on discerning 'moments' in any movement whatsoever of political societies.

Were the constitutional revolution in Chile to be described as a 'constitutional moment', two key qualifications would need to be inserted at the outset. Firstly, *because* the moment gains its leverage from the constitution, one would need to detect that leverage. Of course, as we know not just from Ackerman, but from the whole tirade of these 'episodic' histories, the concept was always paradoxical, caught between a certain democratic/political surplus that might qualify something as a *moment* in the first place, by carving it out of the homogeneous flow of business-as-usual constitutional history and the slow-burning processes of constitutional evolution, and at the same time keeping it *constitutional*, that is in line with what

<sup>3</sup> 'While established Constitutional Law did not always resolve America's deepest crises, it has always provided us with the language and the process within which our political identities could be confronted, debated and defined—both during the periods of normal politics and on those occasion when Americans found themselves called, once again, to undertake a serious effort to redefine and reaffirm their sense of national purpose.' Ackerman (1984, p. 1072).

the Constitution might comprehend as opportunity for renewal. And yet the *constitución tramposa*, as we will see, affords no leverage. It is a mechanism of deadlock, not of openness. The Chilean Constitution is what eclipsed political capacity rather than granted it. The movement would then be a constitutional moment *despite* the Constitution.

The second problem with transposing ‘constitutional moments’ to the Chilean context is this: the resistance that flared up in Chile and spread like a bushfire, was an *anti-systemic movement* of the type that has not been observed in North America or Europe in the last century. Constitutional moments intimate containment as they intimate acceleration of the constitutional dynamic. In Ackerman’s movement-party scheme, the impulses coming from social movements have to be internalised by political parties whose task is to translate the creativity of the movement into constitutionally acceptable language. Hence, even when they mark constitutional innovations, constitutional moments remain rooted in the logic of institutional processes, which, in extraordinary cases, move beyond the framework of their reproduction, and supposedly reconfigure this framework in the process. After all, in Ackerman’s account (for example, 2013), the movement-party has to win over two of the major branches of government (Congress and Presidency) through electoral wins in order to instantiate a constitutional change. But for the most part, overwhelmingly so, constitutions are results of gradual evolutionary processes. Caught in that dialectic, revolutionary outbursts or *moments* are accelerations of *embedded* social and political processes, in which otherwise indiscernible and slow-burning cognitive learning processes give rise only exceptionally to transformative changes in society’s normative structure and self-comprehension. But what confronts us in Chile are volatile revolutionary irruptions of norm-giving and dramatically emancipatory social activity, ‘moments’ of large-scale constitutional innovation. Chile has offered us moments of constituent power, constitutional episodes that express constitutional presence (of a people) and suspend constitutional constraints. It is for that reason that we prefer the term *constituent moment*.

We are privileged to be exploring the terrain of this extraordinary constitutional innovation with the help of constitutional lawyers and theorists who have been witnessing it first hand, and attempting to make sense of it in terms of a constitutional genealogy, and the current conjuncture. Octavio Ansaldi and María Pardo-Vergara give us an account of the ‘Chilean awakening’ through a careful reading of Chile’s constitutional history; Ricardo Sanín-Restrepo and Marinella Machado Araujo warn against theorists’ readiness to categorise and discipline spontaneous action, especially in the context of the disappearance of the ability of the societies of the ‘north’ to create new collective perspectives; Fernando Atria offers us a statement of the political conjuncture from the battleground of strategy. From the point of view of those incapacitated societies of the north, it is with attention and humility that we observe the popular movement that courses through the country, anxious not to speak for those engaged in resistance (as has happened so often in the past), to let political praxis run its course, thankful to the people of Chile for having initiated for the second time this half-century a profound process of the renewal of socialism.

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