

Back to the Pinochet Constitution

George Tsebelis*

In this response I point out the methodological complementarity between my analysis (based on institutional and comparative grounds) and my discussants (based on the historical and political reality of Chile), and point out how both come to common conclusions. Then, I focus on the differences among policy prescriptions (replacement, or incremental change with or without repair of the birth defect of the current constitution), and present the strategic game between the Left and Right on constitutional issues.

I want to express my appreciation for the choice of the editors of *Política y Gobierno* to follow up on my article about the institutional constraints that govern the replacement and amendment of the Chilean Constitution with two further articles from the most prominent authors of Chilean constitutional politics, Professors Fuentes and Navia (whom I have also cited in the article). With this debate, I continue to learn from their deep understanding of Chilean politics, and I will try to spell out the implications of this debate for the readers of the Journal.

In my article I analyzed the amendment rules of the Pinochet Constitution and came to the conclusion that constitutional rigidity is *in principle*

*George Tsebelis is Anatol Rapoport Collegiate Professor, Department of Political Science, University of Michigan. 505 S. State Street, Ann Arbor, MI 48109. Tel: 734 647 7974. E-mail: tsebelis@umich.edu. ORCID: 0000-0003-0889-8153.

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high. This assessment is “in principle” because it does not include Article 129 which “eliminates the constitutional core and makes a constitutional revision very easy to achieve, by a plebiscite proposed by the President alone”. As I argue, and as my discussants confirm “no political actor in Chile advocates the use of this procedure”. Constitutional rigidity defined by articles 127 and 128 is high, and in combination with the high frequency of actual constitutional amendments (43 according to Professor Navia’s rejoinder), lead to the conclusion that the Chilean constitution has exceptionally high time inconsistency (it changes frequently despite locking provisions). As a means to reduce time inconsistency, I proposed the unlocking of the constitution in several steps: the reduction of the required majorities of 3/5 or 2/3 in each Chamber of Congress, and the reduction of the frequency of organic laws (mentioned 69 times in the constitution) and the alleviation of the stringent requirements for their approval (4/7 majority of both chambers). I think that both discussants agree with these suggestions. I also identified in Article 129 a very unusual (world-wide) set of provisions that are unlikely to be applied by any democratic president and could only facilitate the task for non-democratic presidential candidates. As a result, I proposed the elimination of these provisions. My discussants do not address this particular proposal, although Professor Fuentes deems “a plebiscite very improbable.”

Therefore, in this rejoinder I will focus on the three issues that can further the debate: *a)* the complementarity of methodological issues; *b)* the disagreements on political proposals; *c)* a strategic analysis of the post election situation.

Methodological issues

My article was based on comparative analyses and on theoretical (rational choice) analysis of the Chilean constitution. My discussants make contributions on the historical and political level. These approaches are complementary. While we agree on most of the substantive issues, I provide context for their analyses, and they flesh out my arguments. In other words, while my analysis would have been valid for any country with the same institutional provisions, their arguments stem from a deep understanding of Chilean reality, history and politics. The complementarity of the two approaches demonstrates the astuteness of the Journal’s initiative for this debate.

While the debate covers different dimensions of constitutional issues (institutional, comparative, historical and political) it is the first that supersedes all the others. Why? Because Chile is a democratic society, and the institutional rules have to be respected. So, every analysis has to start from the existing rules and see the margins of maneuverability that these rules provide. How do we change the constitution (the subject of my previous article)? Are the rules flexible so that we can modify them? (all of us seem to agree the answer is “no”). Do we need to make any significant changes? Navia answers “no” to this question; Fuentes probably would have liked several changes, probably the replacement of the constitution, but agrees it is not the time.

The institutional analysis leads to several conclusions that prescribe different courses of action. I will divide the possible conclusions along two dimensions: *a*) constitutional detail and restrictions; and *b*) facility of modification.

It may be that the constitution includes general prescriptions that enable the legislature and/or the courts to create a more complicated institutional framework that will adapt to different political circumstances. Usually, this implies short constitutions that delegate adjustments either to the legislature, or the judiciary (like the United States). Or, it could be that the constitution is long and detailed, but easy to amend (like most articles of the constitution of India that require a simple majority in both chambers for modification). The Chilean constitution does not follow any one of these models. It is long, providing detailed constraints on a series of issues and locked (difficult to modify). Yet, as Professor Navia points out, it has been modified many times, so there is no need to change it, as it is close to equilibrium after all these modifications. I will come back to this point in the second part of this rejoinder when I discuss various policy prescriptions. My argument is that there is a discrepancy between the intentions of the authors of the constitutions that locked it and the representatives of the Chilean people that change it. And this discrepancy has to be resolved (the argument of time inconsistency I make in my article as well as elsewhere) (Tsebelis, 2017).

So, according to professor Navia constitutional rigidity may be high in Chile, but it does not matter very much, because the constitution has nevertheless been frequently amended. In his words: “That history shows that the Pinochet constitution might be difficult to change, but Chilean politicians have shown their capacity to build the necessary consensus to bring

about 43 constitutional changes since democracy was restored in March of 1990” (Navia, 2018: 485-499). One point that is not included in this argument is the significance of these modifications. As I say in my article: “However, according to all accounts, there have been two extremely significant revisions to the constitution, in 1989 and in 2005” (Tsebelis, 2018: 24). The first was before the transition to democracy. Professor Fuentes (2006: 17) provides a full account of these modifications. “The second major amendment enterprise began in 2000 and ended in 2005, covering 58 topics of the Constitution” (Tsebelis, 2018: 25). The full account of the changes can be found in Fuentes (2015: 111). So, the constitutional restrictions have been significant and binding, since five years of negotiations were necessary in order to achieve the necessary majorities. This is a point of our discussion that should be highlighted and investigated in historical and comparative perspective: the frequency of amendments is not a sufficient variable for the study of constitutional rigidity. *The study of significance of amendments is necessary* if we want to understand the empirical implications of constitutional rigidity.

On the other hand, Professor Fuentes’ argument is that the constitutional analysis may be correct, but it is not relevant, because it was the intention of (soon to be ex-) President Bachelet to replace, not modify, the constitution. According to Professor Fuentes: “In the case of Chile, we need to explain the following paradox: knowing the institutional and political difficulties properly described by Tsebelis, President Bachelet nonetheless sought to replace the Constitution through a totally impracticable path for her goal. Despite not having a large enough majority in Congress and despite the massive existing legal barriers, her administration tried the apparent ‘political suicide’ of promising a constitutional change that would not happen. Why?” (Fuentes, 2018: 469-483).

I do not know why Bachelet’s desire to produce a constitutional replacement and subsequent failure to do so constitutes a major puzzle. However, if one wants to explain the discrepancy between plans and results, there are two possible lines of argument. The first would be incomplete information: The president was thinking that she would have the required support to achieve her goal when the time came (but these expectations did not materialize). The second would be her involvement in a “nested game” where she was more interested in the evaluation of supporters within her own coalition than in the success of the constitutional replacement enterprise (Tsebelis, 1990). These are the two possible explanations of the proposal and failure of constitutional replacement.

However, Fuentes introduces a major issue that until today has not been answered (and in my opinion cannot be answered theoretically, but only *a posteriori*). The basis of his argument is the distinction between “constituted” and “constituent” power.

The Colombian Constitutional Court has to my knowledge made the clearest distinction. Here I am quoting from a piece by Richard Albert (2017: 13): “The Court stressed that the amendment power in Colombia is limited even though the constitutional text imposes no explicit limitations on it. The reason why, wrote the court, is that the amending power is a constituted power, a lesser and bounded power in comparison to the constituent power, itself a power that is “absolute, unlimited, permanent, without limits or jurisdictional controls, because its acts are political and foundational and not juridical, [and] whose validity derives from the political will of the society” (attributed to Colón-Ríos, 2013).

The distinction between constituent and constituted power is usually attributed to Sieyes: “The constituent power can do everything in relationship to constitutional making. It is not subordinated to a previous constitution. The nation that exercises the greatest, the most important of its powers, must be, while carrying this function, free from all constraints, from any form, except the one that it deems better to adopt” (cited in Kalyvas, 2005). However, Kalyvas traces it back to “the highest power of command,’ proudly pronounced in 1576 by Jean Bodin in his celebrated treatise” (Kalyvas, 2005).

However, if we accept the supremacy of the institutional part of the analysis over all other dimensions, the distinction that Fuentes introduces is irrelevant, because the rules (as he admits) were the same: “...any change should proceed within the current institutional framework. The idea of transforming the rules of the game within the Constitution itself is something agreed upon by virtually all of the political actors that have some parliamentary representation” and “the Bachelet administration’s secret hope was that a change of mind would be generated in the veto players through an inclusive mechanism...” (Fuentes, 2018: 469-483).

So, the institutional analysis I presented was neither empirically irrelevant because of the frequency of amendments (Navia) nor misplaced because it deals with constitutional amendments (constituted power) instead of constitutional replacement (constituent power) (Fuentes).

One more point on methodology: Even if these particular conditions were not true, and even if one is not persuaded by these arguments, we

would still have to analyze the power to amend included in the constitution in its current form because we know for one and a half centuries now, that “[the] [a]mending clause [...] describes and regulates [...] amending power. This is the most important part of the constitution” (Burgess, 1893: 137). In other words, this has to be the basis of the analysis in order to come to conclusions about whether we should focus on judicial interpretation, legislative action, constitutional amendment, or constitutional replacement as a means to produce the necessary (in our opinion) changes. To this point I now turn.

Policy prescriptions

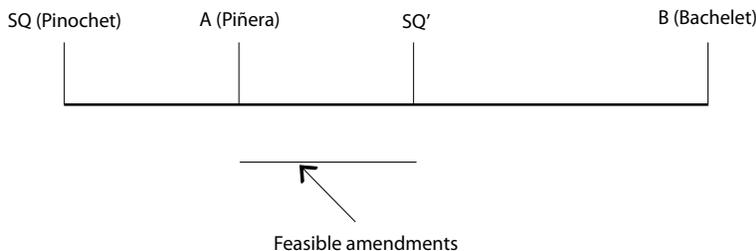
Policy prescriptions are the product of the analysis on the one hand, and the personal preferences of the actor of the other. As much as one tries to stress the analysis and take a distance from personal preferences in a professional journal it is impossible to eliminate them altogether. So, despite the similarities in our analyses, we come to three different prescriptions in the Chilean case. Professor Navia suggests keeping the constitution and making incremental changes if such changes are deemed necessary. I agree with him in substance, but suggest the replacement of the Pinochet constitution for symbolic reasons. Professor Fuentes seems to be sympathetic to a complete replacement although he argues that the (extraconstitutional) conditions for such a choice do not exist today in Chile. I will try to explain why my personal position is located in between the positions of my discussants.

The institutional analysis that we all share indicates that the Chilean Constitution is locked, and requires overwhelming majorities for amendment. Consequently, the only possible changes are the ones agreed by the main political forces of the country. I have suggested that these changes should include the locking of the constitution itself (actually, such a policy was implemented in 2005 when the required majorities for amendment were reduced). I also suggested the elimination of Article 129: “The fact that Article 129 has been used only once in the history of Chile (to adopt the constitution that introduced these restrictions for the first time) does not mean that Article 129 cannot be used to legitimize a departure from the democratic order” (Tsebelis, 2018: 28). Finally, I was sympathetic to the replacement of the title “Pinochet Constitution” with one created by the democratic forces of the country; this particular point turned out to be the most contentious point in my article.

Why was I sympathetic to the replacement of the Pinochet constitution for symbolic reasons? When I visited Santiago for a discussion of the Chilean Constitutional reform, I heard one of the discussants say that a Chilean official visited Germany and in the typical exchange of gifts received from his German counterpart a copy of the “Basic Law of the Federal Republic of Germany” (The German Constitution). The Chilean representative felt envious and embarrassed. I felt sympathy for his feelings. I remember when in the beginning of the seventies Greece (my country) was under military dictatorship and we were reading the news from Chile with envy. And one of Greece’s biggest composers, Mikis Theodorakis, had turned Pablo Neruda’s “Canto General” into an oration, with plans to give the world premiere in Santiago in solidarity with the victims of the Greek dictatorship. Historical events modified the plans: Allende was killed by the forces of Pinochet in 1973 and in 1974 the Greek dictatorship fell under pressure from atrocious policies, which led to the invasion of North Cyprus by Turkish forces. The world premiere of “Canto General” was given in Athens instead of Santiago in solidarity with the victims of the Pinochet (instead of the Greek) dictatorship. And Pinochet has been one of the leading figures of atrocity of dictators across the world. These are my reasons why replacing the constitution would be a welcome event. This is not an original thought. Gabriel Negretto investigated whether “there may be a greater incentive to replace constitutions that are established by non-elected authorities or unilaterally imposed by a dominant party as soon as the balance of forces changes” (Negretto, 2012: 769). His empirical research indicates that the variable “Origins” has no effect in the longevity of a Latin American constitution.

So, Chile is not the only Latin American country possessing a constitution with a dictatorial birth certificate. But that does not mean that the people of Chile should forget this lineage and abandon efforts to change it. The analogy presented by one of my discussants — “Yet, just like adoptive parents who raised a child born out of a rape should take pride in having raised a good person, Chileans should be proud that, despite the initial intent, the Pinochet constitution allowed for a democracy to flourish” — is an unfortunate one (Navia, 2018: 485-499). The fundamental reason that it is unfortunate is that it ignores the moment of choice. In most countries such a moment is offered to the mother, and then the choice is respected by everybody: people and government. Chile (for historical reasons having to do with the transition) was not offered such a moment of choice. When this choice is made, it should of course be respected.

DIAGRAM 1. Feasible amendments



Source: Own elaboration.

Post-election strategic analysis

These are the main points of the intellectual debate with my discussants. It would be a serious omission not to try to situate this debate in the current political situation. Diagram 1 helps us understand the situation in a crude way (at least as I understand it from afar).

The *statu quo* is the Pinochet constitution as modified by the 43 amendments. President Michelle Bachelet wants more substantive modifications than President-elect Sebastian Piñera who supports “perfecting” the constitution. If we assume that both players will accept a solution that is closer to their ideal points than sq , then the feasible solutions are presented in Diagram 1. The failure of Bachelet to even present (let alone make) the constitutional reforms she desired along with the electoral victory of Piñera, means that the agenda setter of the constitutional game is now Player A instead of Player B. While Player B would presumably make an offer to the left side of the feasible solution interval (close to sq'), Player A could make an offer close to the right side of the interval (point A). Of course, the agenda setter could also make a proposal somewhere in the middle of the interval and gain the good will of the other side.

I have argued that “the constitution of a country is not the place to include good ideas, but workable compromises” (Tsebelis, 2018: 28). President Piñera has stated a similar idea much more elegantly: “We are ready and prepared to have a democratic debate without thinking about the next election, but rather about the next generation”, he said. “Because that is the true mission of a constitution in a civilized, free and democratic country” (Martín, 2017).

What exactly will happen remains to be seen. Professor Navia does not see much room for improvement. Professor Fuentes thinks that a reduction

of the powers of the President would be a good idea. I agree with him; in a previous analysis of the legislative powers the President along with my co-author we have demonstrated that the Chilean President is among the most powerful in Latin America (Tsebelis and Alemán, 2005). However, I doubt that such proposals will get the required 2/3 of the vote (a support of players A and B in the diagram). We all agree that expansion of the rights is feasible although I have serious doubts about how consequential such modifications can be (Tsebelis, 2017). I have included as suggestions the reduction of constitutional rigidity of Chile (both of the constitution and the organic laws; a repetition and advancement of the 2005 reforms). I think I have the agreement of my discussants on the issue. Finally, I think it would be particularly good for this next generation that President Piñera talks about if the constitution did not bring us back to Pinochet, and corrects the birth defect of the constitution (the name Piñera-Bachelet comes to my mind, but any other name would be preferable to the current one). The size of the segment “feasible amendments” in diagram 1 is as large as the distance between the current constitution and President Piñera’s preferences. The rules require agreement between the two actors. We will see which one of these points will be selected. 

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