

## Democracy and its Development Conference – Irvine

### Strong and Weak Institutionalization: The Chilean-Argentine Paradox

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#### a. Dissertation topic –placing the research

The question that guides my dissertation research is: Why do some countries develop weak institutions while others produce strong ones? This is a crucial issue on the agenda of re-democratizing and democratizing countries today. However, although institutional development is a central concern in most of the literature on the third wave of democracy, surprisingly, this term has been insufficiently conceptualized and operationalized, in particular as regards regimes<sup>1</sup> (O'Donnell, Chalmers, 1977). I am interested in processes of institutionalization within the context of democratic regimes, not in dictatorships, for example, although they can also be weakly or strongly institutionalized.

I compare a process of institutional formation in two countries in order to identify the factors that drive weak, fractured processes of institutionalization and strong, continuous ones. Specifically, I am researching the process of institutionalization<sup>2</sup> of labor through legislation and participation in political parties, in the first decades of the twentieth century in Chile, where relatively early and lasting labor institutions emerged, and in Argentina, where the body of rules that would institutionalize labor appeared tardily and was transformed various times. I consider Chile a case of strong institutionalization because the labor code was enacted very early, in 1924-31 –albeit by military fiat- and continued in force, with a few, not essential modifications until 1979-81 (Drake, 2003). On the other hand, I consider Argentina a case of weak institutionalization because, in contrast, first a code of rules took a long time to be enacted due to both employer and worker resistance and when they finally were, they were successively annulled and re-enacted several times: each time there was a regime change, labor legislation was changed too. By circa 1950 labor was institutionalized: there was labor legislation in place that was effective in practice, and workers were participating in political parties in both countries.

My point of departure is Dahl's (1971:2-3) classic definition of democracy which synthesizes the institutional guarantees and the freedoms necessary for a regime to be considered democratic into two dimensions: a. contestation which refers to permissible opposition and b. inclusiveness which refers to the right to participate in public contestation and universal and equal suffrage. This definition has two important implications: a. an emphasis on the procedural aspects whereby democracy consists of rule-bound processes regulating the rotation of power through elections; and b. that the incorporation of non-elite

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<sup>1</sup> More work has been done on political parties and parliaments –Huntington (1968), Mainwaring and Scully (1995), Levitsky (1998).

<sup>2</sup> I will understand a regime to be institutionalized when contentious issues are resolved, not through a "clash of forces" but through previously set rules specifying actors, arenas and mechanisms (such as vote counting) for defining outcomes that are closed off from questioning by an overwhelming power structure. In contrast, in a weakly institutionalized regime political institutions are "tentative, fluid, constantly transformed and re-invented each time there is a crisis" (Chalmers, 1977).

classes into the political process via political parties that have a mass constituency and the increase in participation is the other crucial dimension of democracy<sup>3</sup>.

At the same time I argue in favor of a conflictual view of democracy. Democracy as a form of political organization, it seems to me, is essentially a way of regulating and settling conflicts. It is because of the existence of dissension and conflict that societies need the elaborate rules for working them out that democracy implies (Rustow, 1970). Obviously, totalitarian governments do not. Now, the emergence of labor –of the “social question”- on the horizon of the Latin American regimes towards the turn of the century represents one, if not the most important conflict a modernizing society has to face. Thus, the study of the incorporation of labor through legislation and participation in political parties provides a very interesting window through which to look at how a society goes about resolving an important conflict through institutionalization; that is, by appointing certain actors and designing certain arenas and mechanisms in the legislation about the organization of trade unions, collective bargaining, conciliation and arbitration boards. On the other hand, these arrangements will affect the country’s future trajectory (as has been shown in the path dependent literature, Collier and Collier, 1991; Luebbert, 1991). Studying how this incorporation was institutionalized makes it possible to study the conflicts centred round the rules of access to and distribution of political power in relation to trade union activity, and how they were resolved over a long period of time (about fifty years). In other words, I will be able to reconstruct the processes of formation of the primary rule-making processes. I believe that the modalities of the conflicts and of their resolutions can provide important clues as to why two societies that lie side by side in the same region, that have experienced the same main historical processes, language and religion, that have similar economic and development indexes, have produced such absolutely different processes of institutionalization (*and* of inclusion).

Very briefly, theories on building (or the origins of) institutions state that two kinds of situations exist between the social groups that participate in the successful shaping of institutions: one in which actors are relatively equal in terms of the power they wield and come to agreements, and another in which one set of actors is clearly more powerful than the other and can therefore impose rules on the rest. In both these situations rules get agreed on, and are considered –at least for a long period of time- legitimate, or excluded from political contention, fixed (Chalmers, 1977). But if neither of these situations are reached, if “powerful actors are neither included in the rule-making consensus nor definitely defeated by institutional designers ... the resulting formal institutions are likely to be born weak” (Levitsky and Murillo, mimeo, 2004:20). Thus, my initial hypothesis is that Argentina is a case of a lack of consensus –i.e. agreements between actors that wield relatively similar amounts of power- and of lack of imposition –there is no social group that can impose its institutional design on the other because it has vastly superior power. In Chile, on the other hand, agreements were reached between the elites and the lower classes were available to be dominated.

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<sup>3</sup> I think, in contrast to Dahl, that if participation is limited to a few, however ‘liberal’ the regime may be, it is oligarchic and not democratic because “democratization represents first and foremost an increase in political equality” (Rueschemeyer et al, 1992:5, Schmitter & Karl 1991) and also citizenship rights (for example, certain civil, political and social rights as in Marshall, 1950/1992). On the other hand, if all are included in the franchise and enjoy basic rights pertaining to citizenship such as social rights but not full political and civil rights, for example the proscription of political groups and parties, the regime is not democratic either.

## **b. Methods**

My research proceeds in two ways:

1. Through the examination of the debates –generally originated by labour strikes and protest- surrounding proposed and sanctioned legislation at three critical junctures in Argentina: a. the Joaquin V. Gonzalez Law Project in 1904; b. proposed legislation during the radical governments (in particular 1918-1923); and c. the legislation during the rise of and the Peronist regime (1945-55). In Chile: a. a first long juncture from the beginning of the century to 1931 (from the debates between conservatives and liberals about several labor laws to the passing of the labor code under the military/Alessandri and Ibanez (1924-31); and b. the debates during the popular front governments (1938-52).
2. The second way data is collected is through interviews with legislators in Chile and Argentina who have held office during the re-democratization period in both countries (1983-2006 in Argentina, 1990-2006 in Chile). I propose to do about 35 interviews that center on the legislator's experience and expectations of political institutions today (21 have already been completed, on average they are an hour and a half long).

The interviews are related to my theoretical question in that they serve the purpose of finding out how legislators experience and think about institutions: if they work or not, in what ways and why, in the present and the past. They help me think more sharply and adequately about the problem of institutionalization because they connect me directly to the complexity, the vitality, the day to day experience of a country's institutions. I look at the legislators' assumptions, those taken for granted elements in their words about their day to day experience of governing a country. They are the protagonists of resolving conflicts, making rules, coming to agreements, imposing conclusions; they are the main actors of formal political institutions: rules are their working materials.

What I am presenting today is a theme that emerged from these interviews, in and behind the words of the interviewees: the counterpoint between legitimacy and legality (there are also other themes such as the absence of state policies, the rigidity or the cooptation of participation by the state, the importance of the structure of the polity, the diversity of the voices in parliament, etc.).

## **c. Legitimacy and Legality**

Legitimacy is a complicated concept. I do not want to get into a deep discussion about it here. I am simply presenting it as it emerges from the legislators' interviews where it seems to be understood as a principle or a basis for authority, a political construction based on the action of an institution: for example, in Argentina the president is considered legitimate when he carries out the work people expect and want him to, directing the economy, acting in control of the political process, knowing what is going on in the country, not letting social mobilization get out of control nor repressing too violently (these are some of the points that appear in the interviews). Legality means the

path of rules according to which things must be carried out (rules in the Constitution, laws). Now, from the quotes in the interviews below, it emerges that in Argentina, legality is not strong enough to uphold a government when this is perceived as not legitimate. There is a “social legitimacy” -which originates outside the strictly political sphere- that matters almost as much as the existing legality. Legality often cannot survive without legitimacy; thus, institutions in Argentina are viewed from a double perspective: as legal and as legitimate. This means that sometimes it is ‘legitimate’ that the “people” interrupt the government’s ‘legal’ mandate<sup>4</sup>.

I should quickly explain that both presidents had to step down before completing their mandated terms. In the midst of spiraling inflation and social unrest, President Alfonsín’s unscheduled transfer of power took place in June 1989 when he should have stayed until the 10<sup>th</sup>. of December. The presidential elections had been brought forward to May 1989 and won by the Peronist candidate, Carlos Menem. President De la Rúa’s term ended in 2003 but a combination of economic and political problems in the governing coalition and what was seen as a lack of leadership qualities, lead to his early departure in December 2001, also amid social unrest.

The following quote by a Union Cívica Radical legislator about Alfonsín’s early departure illustrates this separation between legitimacy and legality. The UCR is Alfonsín’s party and it should be noted that this legislator belonged to the hard core of Alfonsín’s supporters: (the quotes will be reduced for the presentation)

**So what justifies that he [Alfonsín] left early, that he did not fulfil his term?** He left early because there already was a president who had been elected and could stabilize the political process. **Yes but Alfonsín’s term finished on the 10<sup>th</sup>.** [of December]. Yes but the conditions to complete it were not present, unless he resorted to the Armed Forces, unthinkable in a man like him, or that he governed with a state of siege for four or five months, which was also unthinkable for him. And even if he had taken the decision to do so, he did not have the political conditions necessary to control the system, to control economic policy. **So, what justifies that he left?** Maintaining the democratic system [...] In a democracy like ours, if you don’t have political power to lead and you have lost the legitimacy to do so, it is very difficult to direct the economic process. **But didn’t he have legitimacy if by law his term finished on the 10<sup>th</sup>. of December? So what is the basis of legitimacy then?** Well, he could legally stay until the 10<sup>th</sup>. of December, but he had lost his legitimacy because he had lost the elections, he had a president elect con mayoría calificada facing him and also a series of situations of strong political, institutional and economic instability which strongly conditioned the exercise of government. **So legitimacy is fractured... like split from legality?** They go together, you need both... but in this case they were disassociated, yes. [...] I think his departure was positive for society as a whole, even if it left a precedent of course [...]... He had progressively lost political power [...]. And political power was necessary to

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<sup>4</sup> For example, both Del and Flo mention how the neighbors of the city of Buenos Aires have decided coups. Flo remembered Yrigoyen’s (in 1930) and Alfonsín’s early departure in 1989 [“the light cuts affected the] the human conglomeration that defines whether a government stands or falls, which is the city of Buenos Aires”]; Del evoked De la Rúa’s early departure in 2001.

intervene in the system and political power in a presidentialist system like ours, above all at that moment, was in the hands of the President elect (Gon).

So, the loss of political power implies a loss of legitimacy (not the other way round). The sequence seems to be: lose control of the economic and social process, which means you have lost political power, which means you have lost legitimacy. What are the implications of this? What is the relationship between legitimacy, legality and power?

In Argentina “social reality” and results emerge as a basis for legitimacy such as certain levels of economic and social welfare and also social indignation and mobilization. The next quote also expresses this idea of a separation between “social reality”, a source of legitimacy, and legality as a path of rules that is subordinate to the former:

“Very theoretical constitutions that respond to liberal models are games of intelligence in which ideal solutions are proposed for countries like Europe or the US, which are not the solutions for Latin America. In the last 20 years we had two governments that did not finish their terms. Our constitutions provide elements but what it does not provide for are the crises, the difficulties, the failures to fulfil obligations. So it is necessary to search for legal paths that are really strong, concrete, connected to the realities of these societies, growing or developing or third world or whatever you want to call them. So, with abstract models, when crisis break out, we end up doing things that are questionable from the point of view of Argentine juridicity and this is bad for the country. It has to have legal instruments that give security to foreigners, to investors, and to us, adapted to the reality of our countries. Everybody must know what the rules of the game are and how to act in moments of institutional crisis as our country has [...] [then, thinking about the De la Rúa crisis] More important than norms -and they are really important- is the fact that countries overcome their problems and if countries do that *and* have norms then so much better for that is the synthesis... I believe in norms, seriously, I give them superlative value, but I also value social reality (*la realidad social*). You cannot have 20,000 dead in a country, as could have happened if we had not resolved things. And no one wants 20,000 dead on their conscience, Licenciada (Rog).

In the last quote legitimacy appears as a social legitimacy, originating outside the strictly political sphere, which can and should change legality (a legality that does not seem appropriate), if necessary.

In Chile, on the other hand, there is less separation between these two concepts. Often in the interviews references came up about how Chileans abided by the law.

“[In Chile] there is a legalist, institutional tradition in which the declaration of the formal aspects carries weight. It goes back, as you know, to Diego Portales, an early institutionalization, this idea of a strong, neutral government over and above the *caudillos*, but strongly institutionalized, and a state with less impunity than other experiences” (Val).

Or,

I think that in comparison to Argentina, the Chilean in essence is very legalist, very... I wouldn't say respectful of the law, but he believes in the law, he understands the law is something important in institutional life, in the life of the country, that it has bearing on him. [...] I think that in Argentina they don't give a dam. [...] There is a tradition in which we have had avowedly respectable persons, in the understanding of the people [gives names Alessandri, Frei]] (Cor).

Actually, to such an extent do Chileans abide by the law that they did so also in the dictatorship.

-The force of an institutional dynamic is really impressive. To take an extreme example, during the dictatorship, a norm was established that a detained person could be subjected to torture for only twenty days and the twenty-first day he had to be handed back. And in prison they never... that is once that norm was established nobody was ever got back from prison and taken out to torture once again. If you compare this to Argentina or Uruguay, at any moment there was... [he interrupts himself] (Mon).

Briefly, Chile suffered a long dictatorship under Augusto Pinochet from 1973 to 1990. In 1988 a plebiscite was held (according to the 1980 military Constitution) in order to decide whether Pinochet would renew his mandate for eight more years or if after one more year the country would hold general elections. The opposition won the plebiscite and then there started a conditioned "transition" to democracy; that is, the military regime imposed conditions on the democracy (such as non-elected senators that favored the right, a certain autonomy for the armed forces, etc.). These authoritarian enclaves were finally removed last year, under Lagos.

Now, in the Chilean interviews very rarely did the interviewed legislators use the word "illegitimate" to refer to the military 1980 Constitution or the authoritarian enclaves (or reserved domains) it introduced in their democracy. Legality trumps legitimacy in this country. However, the little story a senator told me helps illustrate the relationship between these two elements in Chile. Explaining the path to the plebiscite, a senator said:

"We spoke of free elections because you couldn't sell to the people, from one day to the next, that we were going to accept these institutions which were illegitimate [he refers to the plebiscite contained in the military's 1980 Constitution] by going straight into the plebiscite. So we said 'we are not speaking of the plebiscite, we are talking about free elections', but knowing that the free elections would not be successful and that once the elections had failed we would already be sufficiently involved in the matter to enter the plebiscite. And then this was rationalized with the juridical theory that the Constitution was illegitimate but it was fact. And if it was a fact, well, it was necessary to work with that fact and then modify it" (Bo).

In Chile the illegitimate law was accepted because it was law. What emerges from the interviews is almost no difference, no space between legitimacy and legality, legality founds legitimacy. A rule becomes legitimate simply because it is there (a fact), because it is a law, regardless of how it came to be. It also seems that when the strength of the

political elite backs a norm, the source is of secondary importance (as in the quote). There is a similar logic in the way the judicial system accepted and followed Pinochet's rules although their origin was pure force. However, this perspective seems more productive for a democracy although it can also work the other way.

In Argentina legitimacy and legality work loose from each other, in Chile they are held closer together (in both cases for better or for worse). In Argentina, the supporters of Alfonsín and De la Rúa themselves thought the presidents had to leave because they had lost their legitimacy even though they were upheld by legality which was recognized as what ultimately gave them the political power to exercise their authority as presidents of the Republic. So in Argentina there is a social legitimacy haunting the political landscape that can become embodied in people and threaten and modify legality. In Chile, they are clamped closer together, legality is the foundation of legitimacy to a greater degree. In the US, legality reigns over legitimacy or what explanation if not is there for Bush to be President after a not totally clear resolution and in spite of receiving fewer votes as we found out later?

A part of legitimacy is separated from legality in Argentina, related more to content than to form. The opposite is true in Chile, although sometimes it is so much related to form that the source does not matter. Can I say that the space between the concepts is a feature of weak institutionalization and their overlapping a characteristic of strong institutionalization? What implications do these situations have for democracy? What are these two concepts and how should they be embodied and related in democratic institutions?

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