

The Constituent Process and the Police: The First Step in a Democratizing Project

El proceso constituyente y la policía:
El primer paso de un proyecto democratizador

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Abstract

This article addresses the impact that the constituent discussion may have on the institutional arrangement of the police in Chile. After a review of the existing constitutional regulation, characterized by the high degree of autonomy granted to *Carabineros de Chile* (I), a genealogical examination of the kind of power that undergirds police institutions is presented, in order to show that these display inherent characteristics that differentiate them from other organs of the State administration (II). With both antecedents outlined, it is argued that the constituent discussion can lay the groundwork for a process of democratization of the police. The article notices, nonetheless, that democratization of the police is an endeavor that exceeds the formulation of a new legal framework, thus requiring robust citizen participation, both in order for police action to be effectively oriented towards the general interest of citizens (III.a), and for future police reform to be successful, avoiding some of the failures that have occurred in other countries in the continent (III.b).

Keywords: *New Constitution; Police Autonomy; Police Power; Citizen Participation; Democratization of the police.*

Resumen

El presente artículo aborda el impacto que la discusión constituyente puede tener en la configuración institucional de la policía en Chile. Luego de una revisión de la regulación constitucional vigente, caracterizada por la alta autonomía de Carabineros de Chile (I), se examina, con carácter genealógico, qué tipo de poder se encuentra en la base de las instituciones policiales, con el objeto de mostrar que éstas presentan características intrínsecas que las diferencian de otros órganos de la administración del Estado (II). Con ambos antecedentes expuestos, se señala que la discusión constituyente puede sentar las bases de un proceso de democratización de la policía. El trabajo advierte, no obstante, que la democratización de la policía es un proyecto que excede la construcción de una nueva regulación, requiriendo así de una robusta participación ciudadana, tanto para que la actividad policial vaya efectivamente en el interés general de la ciudadanía (III.a), como para que las futuras reformas policiales

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tengan éxito, evitando algunos fracasos ocurridos en otros países del continente (III.b).

Palabras claves: *Nueva Constitución; Autonomía Policial; Poder Policial; Participación ciudadana; Democratización de la policía.*

INTRODUCTION

This work aims to provide an answer to a fundamental question: what impact can the constituent process that –at the time this issue is published– Chile is going through have on the institutional configuration of the police? The question is not only academically relevant. For at least five years, the role of the police has been the subject of severe questioning in Chile,¹ due to the occurrence of severe corruption cases,² the involvement of the police in the murder of members of indigenous Mapuche communities,³ and the actions of the *Carabineros de Chile* during the “social outburst”, which left, among other things, a trail of ocular mutilations and serious injuries.⁴ If all the factors listed support the importance of the idea that the police need reform, the constituent process offers an opportunity to address aspects essential to it. What this article seeks to make clear is how the constituent process can, indeed, lay the foundations for a transformation of police forces.

First, we critically examine the constitutional configuration of the police in Chile. Through a historical overview, and a succinct comparative look, we show that the Chilean legal framework favors a high degree of police autonomy, which has been described as “institutional–political autonomy”, on one side, and “functional–operational autonomy”, on the other.⁵ This autonomy, we claim, correlates with and absence of public deliberation regarding the basic guidelines of police activity in our country. Based on this critical analysis, the first section offers a diagnosis of the present moment, which helps to place the discussion regarding the prospects that are opened (and those that are not) by the constituent process.

¹ To illustrate, approval of the *Carabineros*, the country’s main police force, is reported to have fallen from above 75% in 2017 to around 35% in 2019, according to data from the same survey.

² In 2016, a case of public embezzlement by police officials began to be investigated, reported to amount to close to 35 billion Chilean pesos (approximately 50 million US dollars) and for which more than 130 criminal investigations have been carried out up to arraignment.

³ On November 14, 2018, Camilo Catrillanca, member of a Mapuche indigenous community was killed by police officers stationed in the area as part of a police-military operation informally dubbed the “Jungle Commando Unit” [*Comando Jungla*], in which police officers trained in Colombia in anti-FARC operations were assigned to curb the political actions of the Mapuche people. At first, there was talk of a confrontation, a version that was even endorsed by Senator Felipe Kast, who said that “clearly the crossfire was quite intense”. Some time later, the same Congressman had to backtrack his statement, stating in his Twitter account that he had been “deceived”.

⁴ According to an article by medical specialists from the Ocular Trauma Unit of the *Savior’s Hospital* [*Hospital del Salvador*], published in *Nature’s* journal *Eye*, the number of eye trauma cases caused by the use of kinetic impact projectiles (known as “baton rounds”) represents a proportion never seen in such a short period. As an example, the authors indicate that “[t]he highest number of eye trauma cases was during a six-year period, from 1987 to 1993, in the Israeli-Palestinian conflict. There were 154 cases then. We recorded 182 cases in about a month and a half just at the *Savior’s Hospital*”, as they told in UNIVERSIDAD DE CHILE (2020): <https://www.uchile.cl/noticias/166739/nature-destaca-investigacion-sobre-dano-ocular-tras-estallido-social>. For the full study, *vid.* RODRÍGUEZ *et al.* (2020).

⁵ CONTRERAS & SALAZAR (2020a).

The second section of the article, nonetheless, does not deal directly with the answer to its central question, but offers elements that are crucial to answering it. One of the main hypotheses of this work is that the possibility of redirecting police activity toward the general interest, subordinating police institutions to civilian power, and ensuring its respect for the basic components of democracy, requires recognizing the type of power that police institutions exercise. In this section we seek to show that the police (regarding the case analyzed, the *Carabineros*) deploy the so-called “police power” of the State, which must be understood as a form of governance marked by arbitrariness and the centrality of the concept of order. This is crucially important, as it gives the police features that distinguish it from all other institutions that are part of the architecture of the State. Thus, although, at first, section II may seem disconnected from the central argument, we believe that it is essential for a thorough understanding of it.

The third section directly addresses the answer to the central question of this article. In approaching it, it takes into consideration the resources resulting from the first two sections. Thus, considering the distinctiveness of the current constitutional regulation, on the one hand, and the specific character of police power, on the other, we argue that the constituent process represents an opportunity to begin a process of democratic control of the police, which involves “deconstitutionalizing” the core aspects of its activity and institutional design, in order to subject it to a greater degree of democratic control. This “deconstitutionalization”, however, is only a first step, since the magnitude of the police power requires a robust control by citizens to counteract the arbitrariness that is inherent to it. In this sense, this section calls for imagining mechanisms of direction and control over police activity that go beyond regulation and judicial actions, and that grant participation and prominence to citizens, especially to those groups that deal on a daily basis with the police. These mechanisms, we argue, are not only essential to remedy current deficits in our country, but also to avoid repeating the recent mistakes of other countries in the subcontinent.

I. THE CONSTITUTIONAL FRAMEWORK AND THE AUTONOMY OF THE *CARABINEROS DE CHILE*

This article has as its starting point a diagnosis that follows from the treatment that the 1980 Constitution, currently in force, grants to the police, in particular, to the institution of *Carabineros de Chile* (“the *Carabineros*” in what follows). According to that diagnosis, the constitutional regulation of the policing function carried out by the *Carabineros* is one that guarantees an autonomy resulting from, on one hand, removing police action from public deliberation and, on the other, the creation of a system of reinforced autonomy. The purpose of this section is, then, to offer a general reconstruction of a constitutional framework for the police that functions as an antidemocratic device, based on the two findings just mentioned.

1.1 A Historical Review of the Legal Structure of *Carabineros*

Carabineros de Chile was established as a police institution, of military nature, in 1927 by the Decree with Force of Law [*Decreto con fuerza de ley*, *DFL*] No. 2.484 of 1927 of the Ministry of the Interior (known as the first “Organic Law” of the *Carabineros*), at the initiative of military officer Carlos Ibáñez acting as commander of the Army’s Carabinier Corps and minister of both

¹ A presidential decree, issued with prior authorization by Congress, which exceptionally regulates a subject matter that falls within the domain of regular legislation [Translator’s note].

War and the Interior. The *Carabineros* resulted from a process of merging the state police corps, the municipal police corps, and the Army's Carabinier Corps, with goals that included securing order within cities and rural areas, overcoming the fragmentation and politicization of local police and the reinforcement of the principle of authority (recitals 1 through 5 of *DFL* No. 2.484 of 1927). The new institution was structured as a centralized and militarized police, after decades of modeling the policing function "in image and likeness of the Armed Forces, similarly to countries like Spain and Italy that have a long tradition of landowners and traditional political institutions".⁶ Thus, if the *Carabineros* had to be related to any of the ideal types of European police that developed during the 19th century, it would undoubtedly be closer to the military state police model, which differs from civilian state and civilian municipal police forces.⁷ In 1960, *DFL* No. 213 of the Ministry of Finance (known as the second "Organic Law" of the *Carabineros*) replaced the *Carabineros'* foundational decree, further detailing its functions and internal structure, and attenuating its military character by redirecting its subordination from the Ministry of Defense to the Ministry of the Interior.⁸

The *Carabineros* was an institution without constitutional regulation until 1971.⁹ Its inclusion in the 1925 Constitution was brought about by Law No. 17.398, of January 9, 1971, known as the "Charter of Constitutional Guarantees" [*Estatuto de Garantías Constitucionales*], which amended its article 22. This provision –until then of very meager content– was expanded so as to specify that public force would be "constituted solely and exclusively by the Armed Forces and the Corps of the *Carabineros*, essentially professional, hierarchical, disciplined, obedient and non-deliberating institutions." The same provision added that the personnel of these institutions could only be regulated by law and that their enlistment would take place through their service academies.

Due to the democratic fracture caused by the civil-military *coup* of 1973, a path toward the remilitarization of the *Carabineros* began.¹⁰ Early evidence of the strengthening of the military features and the autonomy of the *Carabineros*, which was a concern of Augusto Pinochet's dictatorship, can be found in Decree-Law [*Decreto Ley*, *DL*] No. 444 of April 27, 1974, of the Ministry of the Interior. The *DL* had three purposes: to reaffirm the technical and military character of the *Carabineros*, reverting its subordination to the Ministry of Defense (art. 1); to order the

⁶ MALDONADO (1990), p. 3.

⁷ Following EMSLEY (1999), the civilian state police model is linked to the Victorian police developed in London from 1829; the military state police model corresponds to the features of the French *Gendarmerie nationale*, the Italian *Carabinieri* or the *Royal Irish Constabulary*; and the municipal police model is the one developed in different British municipalities and counties or at the local level in France, as in the case of the *gardes champêtres*. In the case of the military state model, intended especially to reaffirm the central authority of the state, it is said to have developed in France and, during the Napoleonic invasions, to have been exported to other regions of continental Europe such as Northern and Central Italy and the territories of the Confederation of the Rhine and Prussia. See, on the latter, EMSLEY (1999), p. 37.

⁸ The explicitly military character, however, was not removed from the legal definition of the *Carabineros*.

⁹ The Constitution of 1925 stated, in its original text, prior to the founding of the *Carabineros*, that "[t]he Public Force is essentially obedient. No armed body may deliberate" (art. 22). The Constitution of 1833 did not refer to the police as an institution but rather to police power in general. Thus, it stated in article 82 that "all objects of police and all public establishments are under the supreme inspection of the President of the Republic".

¹⁰ MALDONADO (1990), p. 20.

[†] From the French "*décret-loi*". In Latin America it usually refers to decrees issued by *de facto* regimes regulating matters that under normal circumstances would fall within the domain of regular legislation. [Translator's note]

creation of an Under-Secretariat of the *Carabineros* (art. 2); and to order the creation of an Advisory Commission for the development of a new regulatory framework for the *Carabineros* (art. 3), which would later result in *DL* No. 1063 of 1975 (the third “Organic Law” of the *Carabineros*).

Consistent with this new profile for the *Carabineros*, the dictatorship introduced a completely unprecedented model of constitutional regulation of the police. A first finding, pertaining to its formal aspects, is the density of the provisions regulating the armed forces and the public order and security forces, to which, for the first time, a separate chapter of the constitutional text was devoted. Secondly, in relation to its substantive aspects, the Constitution contains a series of institutional choices that are at the base of the statement made at the beginning of this article as a diagnosis, namely, that the 1980 Constitution removed police action from public deliberation, while providing reinforced autonomy to the *Carabineros*. For some, this new constitutional framework resulted from the military junta’s intention of creating within the 1980 Constitution a true “security power” that would operate as guarantor of the institutions of the Republic and that should be shielded from political control by democratic authorities, as had been expressly conveyed to the Study Committee for the New Constitution through a Message from the Executive of November 10, 1977.¹¹

1.2 Main Features of the Constitutional Framework of the *Carabineros*

The fundamental institutional outline of the constitutional framework of the *Carabineros* are currently found in Chapter XI of the 1980 Constitution (Chapter X, in its original version). Within that chapter, article 101, second paragraph, identifies the public order and security forces (“*Carabineros* and *Investigaciones* [Investigative Police]”), defines their functions (“to give effectiveness to the law, guarantee public order and internal public security, in the form determined by their respective organic laws”) and places them under the purview of the Executive through the “Ministry in charge of Public Security”, which, formally at least, makes the *Carabineros* an institution subordinated to the Executive, unlike constitutionally autonomous bodies that are not subordinated to other branches. It must be borne in mind that, prior to the 2005 constitutional amendment (Law N.º 20.050), the Constitution stated that military and police forces exist “for the defense of the fatherland [*patria*], are essential for national security and guarantee the institutional order of the Republic”, and that they would be subordinated to the Ministry of Defense, which was in line with the previously mentioned ideological commitments of the military regime.

Regarding its features, article 101 states in its third paragraph that the Armed Forces and the *Carabineros* are essentially obedient, non-deliberating, professional, hierarchical, and disciplined bodies. After the 1925 Constitution (as in force in 1971), article 102 provides that entry into the armed forces and the *Carabineros* takes place through their respective service academies. Article 104, in turn, defines a restricted system of appointment and removal: the President can only appoint as Commanders-in-Chief or Director-General of the *Carabineros* someone from among the five highest seniority officers, who will enjoy permanent tenure. Prior to the 2005 amendment, it was only possible to call for early retirement the heads of these institutions in qualified cases and with consent of the National Security Council. Currently, the provision states that the President can call for early retirement by issuing a substantiated decree, having previously informed both chambers of Congress. Finally, article 105, which was rewritten by Law No. 18.825 of 1989, defers to a

¹¹ CONTRERAS (2015), p. 320; CONTRERAS & SALAZAR (2020b), p. 15.

constitutional organic law the basic regulations relating to entry, tenure, social security, seniority, command, temporary command, and budget of the Armed Forces and the *Carabineros*.

This kind of constitutional framework, and especially the fact of allotting a separate and specific chapter to regulate military and police powers, has been described as anomalous and exceptional in the comparative context.¹² A review of different constitutional texts seems to confirm this. For example, examining Latin American constitutions currently in force shows that out of 18 constitutional texts,¹³ 14 contain some type of constitutional provisions on the police, either establishing its existence, defining its general purpose or outlining its institutional physiognomy.¹⁴ Within this group, only 7 devote a specific chapter to armed and police forces.¹⁵ The inclusion of the police in the constitutional text appears to be even more exceptional within the context of the European Union.¹⁶ Only 6 of its 27 member countries include constitutional provisions on police function,¹⁷ and out of these, only 4 devote a specific chapter to the subject.¹⁸ This superficial analysis indicates that constitutional regulation of the police is not a widespread trend at the comparative level.

Despite that, it is interesting to note that, among those constitutions that do contain provisions on the police, the regulation is rather modest, restricted to stating its purpose and general features. Moreover, among the constitutions reviewed, deferral to supermajoritarian legislation appears as a feature exclusive to the Chilean text. Almost invariably, the comparative trend is to defer to ordinary legislation the regulation of the structure and specific powers of the police. The only notable exception is the Hungarian constitution of 2011 which, with regard to the police, assigns to so-called “cardinal laws” the regulation of the details of its organization and operation (article 46, para. 6), which entails reserving the matter to a type of legislation that requires for its enactment two-thirds of the members of Parliament present.¹⁹ At first, it could be thought that the Spanish constitution does

¹² CONTRERAS & LOVERA (2020), p. 292.

¹³ The 18 constitutions reviewed, in addition to the Chilean one, are Argentina (1994), Bolivia (2009), Brazil (1988), Colombia (1991), Costa Rica (1949), Cuba (2019), Ecuador (2008), El Salvador (1984), Guatemala (1985), Honduras (1982), Mexico (1917), Nicaragua (1987), Panama (1972), Paraguay (1992), Peru (1993), Dominican Republic (2015), Uruguay (1967), and Venezuela (1999).

¹⁴ The following would be on the list of constitutions listed in the previous note, excluding those of Argentina (1854), Cuba (2019), Guatemala (1985) and Uruguay (1967), which do not regulate the police.

¹⁵ These are the constitutions of Bolivia (Title VII, Chapter II), Brazil (Title V, Chapter III), Colombia (Chapter 7), Ecuador (Chapter 3, Section 3), Panama (Title XII), Paraguay (Chapter V) and Venezuela (Title VII, Chapter IV).

¹⁶ The constitutions reviewed are those of the 27 countries of the European Union: Austria (1920), Belgium (1831), Bulgaria (1991), Croatia (1990), Cyprus (1960), Czech Republic (1993), Denmark (1953), Estonia (1992), Finland (1999), France (1958), Germany (1949), Greece (1975), Hungary (2011), Ireland (1937), Italy (1947), Latvia (1922), Lithuania (1992), Luxembourg (1868), Malta (1964), Netherlands (1814), Poland (1997), Portugal (1976), Romania (1991), Slovakia (1992), Slovenia (1991), Spain (1978) and Switzerland (1999).

¹⁷ The constitutional texts are those of Austria (1920), Belgium (1831), Cyprus (1960), Hungary (2012), Luxembourg (1868) and Portugal (1976).

¹⁸ This is the case of the constitutions of Austria (Chapter 3), Belgium (Title VI), Cyprus (Part VIII) and Luxembourg (Chapter VII).

¹⁹ It is noteworthy that Hungary’s current constitution was adopted in 2011 under the rule of the nationalist and conservative party Fidesz. Fidesz’s members of Parliament were the only ones who voted to pass the constitutional text,

the same, since it states, when referring to the powers [*competencias*] of the autonomous communities, that local police is a matter of organic law (article 148 No. 22). However, said legislation requires an absolute majority to pass (art. 81), less than the four-sevenths of deputies and senators in office that the 1980 Chilean constitution requires for constitutional organic laws.

1.3 The Autonomy of the *Carabineros* as a Result of its Constitutional Regulation

According to the analysis presented so far, it can be argued that, by introducing a regulation of police forces, the 1980 constitutional text was innovative from the point of view of the Chilean constitutional tradition, and exceptional in comparative perspective. We can thus take the analysis further and highlight, as part of the diagnosis presented here, that the 1980 Constitution has functioned as an undemocratic instrument due to the extent of the autonomy granted to the main Chilean police force, namely the *Carabineros*. This autonomy can be analyzed on two levels. Firstly, due to the place given to the police within the constitutional scheme, which entails a decisive exclusion of this matter from political deliberation. And, secondly, due to the specific system of autonomy which has been enabled by the constitutional scheme under review. It is convenient to refer to each of these levels of autonomy separately.

On one level, there is an autonomy resulting from the specific place that the *Carabineros* occupies within the constitutional scheme, which has been categorized by some as “institutional political autonomy”.²⁰ Thus, a significant sphere of autonomy has been granted to the *Carabineros*, which protects the institution from spaces of political deliberation by giving constitutional status to its basic institutional structure and by deferring to a constitutional organic law the regulation of the central aspects of the police body. Neither choice, as we have seen, aligns with constitutional models in other jurisdictions. The fact that the main contours of police institutions are outlined in chapter XI of the Constitution has an obvious consequence: any changes to what has been defined in the constitutional text will require the vote of two-thirds of the deputies and senators in office, because the legislative supermajority for constitutional amendments set out by article 127, second paragraph, would apply. Moreover, as with other fundamental matters of the model imposed by the 1980 Constitution, the deferral to a constitutional organic law, and the mandatory *ex ante* constitutional review by the Constitutional Court for this type of legislation, makes the basic features of police institutions an area practically out-of-bounds for processes of democratic deliberation. Certainly, the above does not consider other devices found in the original text, such as the binomial electoral system and the presence of former members of the armed and police forces as unelected senators, that further reinforced the normative shielding of the military and police forces which entailed that any significant reform of the design of these institutions required the consent of the political right, most of whose representatives in Congress at the time had had a close relation with the dictatorial regime, when not plainly members of its personnel.²¹

since the party controlled two-thirds of Parliament. The 2011 constitution was adopted despite strong criticism from the European Union and the United Nations due to its markedly illiberal overtones.

²⁰ CONTRERAS & SALAZAR (2020b), p. 16.

²¹ CONTRERAS & SALAZAR (2020a), p. 243.

On a second level, there is an autonomy that can be found in several features of the *Carabineros*, which has been referred to as “functional operational autonomy”.²² Several of these aspects are found in the current constitutional organic law of the *Carabineros* (Law No. 18.961 of March 7, 1990), issued during the last days of the dictatorial regime. Contreras and Salazar²³ identify several of them, among which the following can be pointed out: the broad powers granted to the Director-General to decide on issues of tenure, appointments, evaluations, promotions and retirements; the regulation of a specific system of pensions and social security; the assurance of specific budgetary and extra-budgetary resources; exemptions from public sector transparency regulations by virtue of its military nature, which manifests in the allowance of secret or restricted reporting of certain expenditures, and in the application of the grounds for secrecy of article 436 of the Code of Military Justice;²⁴ the application of the Code of Military Justice, notwithstanding the recent reduction of military jurisdiction introduced by laws No. 20.477 and No. 20.968; and, the existence of an autonomous administrative disciplinary system. To this list can be added the authority of the *Carabineros* to self-regulate with regard to especially sensitive matters, such the rules on its own actions in maintaining public order and the use of less-lethal weapons.²⁵

A degree of autonomy such as the one described can be considered inadequate, both because the text of the Constitution states something different (namely, that the *Carabineros* is an obedient and non-deliberating force), and because of the immense power with which the police are endowed, which constitutes, as we will argue in the next section, the most important institutional repository of legitimate violence. Both considerations make advisable a greater degree of control over the police, one which allows the political community to decide in what way and for what purposes the monopoly of force which is materialized in the police will be exercised. The question, therefore, is how to achieve this degree of control. The third section of this article will show that the fundamental element is citizen participation regarding police activity, controlling and directing it. However, the second section is key to demonstrating why this participation is inescapable. The answer, we will argue, lies in the particular kind of power that the police represent and which differentiates it from every other administrative agency. In order to better understand this power, a genealogical analysis is particularly useful.

²² CONTRERAS & SALAZAR (2020b), p. 17.

²³ CONTRERAS & SALAZAR (2020b), pp. 17-19.

²⁴ Article 436 of the Code of Military Justice lists which documents are considered secret in the case of the Armed Forces and the *Carabineros*, including “those relating to personnel structure [*plantas*] and end strength [*dotación*]” (No. 1); “plans or installations of military or police compounds and the plans of operation or service of such institutions” (No. 2); and “those concerning firearms, parts thereof, ammunition, explosives, chemical substances” (No. 3), among others.

²⁵ A recent example is a reform to the protocols for the maintenance of public order, specifically, the use of riot shotguns, weapons that caused hundreds of eye injuries among protesters during the social crisis of October 2019. This reform, mandated by General Order No. 2780 of July 14, 2020, recognized as enabling norms “[t]he powers granted to the Director-General of the *Carabineros* by articles 51 and 52, subsections h) and p), of Law No. 18.961 ‘Constitutional Organic Law of the *Carabineros* of Chile’; and article 19 of the Regulation on Documents, No. 22, of the *Carabineros* of Chile”.

II. THE POLICE INSTITUTION AS A MANIFESTATION OF POLICE POWER

2.1 Origin and eEvolution of Police Power

In his influential work of legal-historical reconstruction, Markus D. Dubber has linked the origins of “police power” to a distinctive ancient Greek form of government. According to Dubber, police power corresponded to the patriarchal power to command that the “head of the household” exercised over the domestic unit. The goal of this power was to maintain happiness and harmony within this unit, in the terms defined by the head of the household himself. In this form of governance there was, therefore, no consideration for dignity or individual rights. The means available to the head of the household for the exercise of this power were practically unlimited. Thus, police power, understood as a form of command over a domestic unit, was in opposition to –and, in the case of the head of the household, complemented by– the way in which public affairs were governed in the *polis*, in which the instrument of governance was the law, structured around considerations of equality and, alongside them, deliberation and decision-making rules. In this scheme, police power and the law appear as opposite ways of regulating social relations, which nevertheless coexist in order to allow the course of social life. Their domains of application, as follows from the above, were completely different: the law was the instrument for regulating public activity; police was the power that the head of the household exercised over the members of the domestic unit.²⁶

According to Dubber, police power as a form of governance was embraced by Roman political-legal culture, and from there it was adopted by medieval law. Starting with the 16th century, the concept of “police” began to be the subject of profound theoretical and practical developments in the German principalities, birthplace of so-called “police science”, which was that branch of knowledge whose purpose was the maximization of the “happiness and well-being” of the political community understood as a whole.²⁷ Thus, police power was seen as a form of governance that construed its subjects as subordinate to a common project, there being no consideration for individual respect on which to stand. “Police science” was a form of knowledge pursued in the interest of the sovereign, that is, the monarch, not those who were the final recipients of government action.²⁸ The term police, thus understood, comprised at least three meanings: (i) the conditions necessary for order to exist in the community, understood as prerequisites of a good order; (ii) all laws and rules whose purpose was to establish and maintain a good order; and, (iii) more narrowly, the rules whose specific subject was police matters, that is, those that regulated disorderly behavior.²⁹ In other words, “police power” included all those aspects necessary to produce an orderly community, a goal for which the sovereign had a great variety of instruments.

The emergence of modern constitutional states, following the American Revolution in 1776 and the French Revolution in 1789, entailed a radical shift at the foundations of the legitimacy of state power. Devoid of the theological legitimacy that sustained monarchies, the republics that

²⁶ DUBBER (2005).

²⁷ KNEMEYER (1980); ZEDNER (2006).

²⁸ We prefer to avoid, here, the use of concepts such as “the people”, as we consider them an anachronism by virtue of the historical period analyzed.

²⁹ ZEDNER (2006), p. 82.

opened the door to the 19th century had to find a rational and secular foundation capable of justifying the exercise of power. The idea of popular sovereignty, according to which, roughly, sovereign power rests on the political community, and no longer on the ruler, is perhaps the most prominent heir to this new understanding of the political. The political community came to hold the constituent power and was thus able to reinvent again and again the rules of its common life.³⁰ Further, this gave rise to a radically different understanding of the role of the law, especially of what is now known as public law, since it became the instrument on which the faculties and limits of any exercise of power were founded. As a form of regulating acts of governance, the law provided it with legitimacy by directing it towards goals and grounding its exercise on a consideration for the equality of every person. What, then, was the case with regard to the form of governance we have labeled “police”? A tentative answer is to assume its disappearance, subsumed under the scope of the law. However, a closer look at the governance structures of modernity, Dubber claims, confirms the survival of police power.³¹

Following Dubber’s reading, police power persists to this day in all those government structures whose power is deployed to ensure the existence of an orderly community, eliminating all threats to that order. The concept of order that is maintained is contingent, that is, its content is defined by the same agent in charge of securing it. Both the definition of what that order is, and the way to secure it, are, in this interpretation, prerogatives of the State. Given the multifaceted nature of modern states, the existence of police power can be found scattered within them. It would not belong to a specific agency or be the prerogative of a particular body. All those powers whose purpose is to secure a certain order can be traced back to the police power of the State. However, there is one state agency where the memory of police power most clearly remains: the police. According to this view, the police are the state agency whose primary purpose is to uphold the survival of a certain order, eliminating all threats to that order. As we said above, the content of the order is defined by the agencies that hold the power to do so, thus making it radically contingent.

2.2 The Police as Inheritors of Police Power

Conceiving the police as a state agency committed to the preservation of a certain order allows us to define it in a way that challenges certain traditional understandings about its identity. Thus, for example, a view of the police as the institution responsible for securing the rule of law, or as the agency whose mission is controlling crime, is called into question by a broader and less defined understanding which rests on the notion of order. The police appear, in this way, as the last institutional repository of force. As Egon Bittner has pointed out, a defining feature of modernity is the attainment of peace by peaceful means. Unlike other eras, in which the goal of peace was pursued by violent means –Bittner cites, as exemplary, the case of the wars carried out by the Roman Empire to seek peace–, modernity is characterized by having means that avoid the use of force, such as diplomacy, at the international level, and courts of law, at the national level. However, Bittner claims, force is a phenomenon that cannot be suppressed,³² and in modern societies it would be relegated to three places. First, self-defense; second, specific authorizations for certain persons, who perform

³⁰ BÖCKENFÖRDE (2017).

³¹ DUBBER (2005).

³² Bittner states this descriptively, to point out those places where force survives. He has no value commitment as to the reasons why force exists, or a possible suppression of it.

certain institutional roles, to exercise force, if necessary, as would be the case with workers in mental health facilities, and gendarmerie officials. The third repository of force would be the police.³³

As a repository of force, the police possess a characteristic that differentiates it from the other two. It is the only case in which the authorization of the use of force is generic, or “essentially unrestricted”,³⁴ since there is no *a priori* restriction on the cases in which the police can deploy force, despite the existence of limits regarding what could be called the degree of deployable force (thus, the call for a “minimal use of force” that is often required of police officers makes sense). Considering the above description, Bittner defines the police as “nothing more than a mechanism for the distribution of situationally justified force in society.” This broad definition offers, according to Bittner, three advantages. First of all, it matches with the expectations that people usually have when they go to the police. Secondly, it accounts for the powers that are usually given to police officers. Thirdly, this view of the police allows a coherent reading of the diversity of activities that police carry out in democratic societies.³⁵

The definition of police we have offered above has two important consequences. First, the police are defined by a capacity (the use of legitimate force in a practically unlimited way) and not by one or more specific functions. Second, the power of the police as an institution has an irreducibly discretionary component. Since the gamut of actions in which legitimate force can be used cannot be defined *a priori*, its use is always subject to the judgment of the person who must deploy it. The criterion for deciding on the appropriateness of its use, despite the vagueness with which it can be formulated, has to do with the protection of a certain state of order. Thus, endowed with discretion and a considerable breadth in its decision-making criteria, the police as an institution can be read in light of the concept of police power, in the terms in which we have described it in this article. Thus, it appears as the institution designed to maintain a certain order, of indeterminate content and by various means. This characterization affects the ways in which institutional design can be imagined. Being an institution at the root of which is a power whose control is inherently difficult and arbitrary, the police must be designed in such a way that that power can be contained and controlled to some degree. It can be stated, according to what has been reviewed up to this point, that the current regulation produces the opposite effect, by strengthening the autonomy of the institution. The constituent discussion, therefore, can be an opportunity to imagine a different institutional design. That is focus of the following section.

III. THE CONSTITUENT PROCESS AS AN OPPORTUNITY FOR A DIFFERENT POLICE. BEYOND REGULATION

3.1 Deconstitutionalization of Police Regulation; New Institutional Arrangements

The path followed in the first two sections allows us to begin to answer the central question that guides this article: what can the constituent process offer in order to imagine a different configuration of the police? Answering this question -we have tried to argue- requires taking into consideration both the very special constitutional configuration that the police have historically had in Chile and the nature of the police power represented by the police. Put differently, only by taking

³³ BITTNER (1970), pp. 36ff.

³⁴ BITTNER (1970), p. 37.

³⁵ BITTNER (1970), p. 39.

into account both elements we can adequately answer what place the police should hold in our social arrangements. Regarding the first of these elements, the constituent process is an opportunity to remove from the Constitution, (and to remove the legislative supermajority requirements in force), the regulation of the fundamental aspects of the police institution. As we saw in section I, the constitutional architecture has provided the *Carabineros* with a high degree of “institutional political” and “functional operational” autonomy. Although the former was reduced by the constitutional amendments of 2005, functional-operational autonomy is still very high, and it allows the institution itself to make crucial decisions about its actions under no substantive supervision by civilian authorities.

The constitutional architecture we have mentioned rests, essentially, on two normative sources, which we have described succinctly in the first section: chapter XI of the Constitution and the Constitutional Organic Law of the *Carabineros*. The recognition in these materials of some fundamental aspects of the design and activity of the *Carabineros* greatly hinders citizens from having any influence –either directly or through their representatives– on the way in which police activity is carried out, due to requiring the highest legislative majorities for any changes in such aspects. In this way, the continuation of certain basic definitions is effectively secured, which, furthermore, were never the subject of democratic discussion due to the origin of the regulation. Put in a perhaps slightly pretentious but forceful manner, the impossibility of democracy operates not only synchronously, that is, with regard to the present, but also diachronically, prolonging a history of democratic deficit. The constituent process offers an opportunity in this regard because it makes it possible to subject those fundamental aspects of institutional design and police activity to the control of citizens, subjecting them, for example, to amendment procedures that are not obstructed from the outset by counter-majoritarian legislative requirements.³⁶

This process, which can broadly be called “deconstitutionalization”, represents, however, only a first step toward building an institutional design capable of exercising effective control and direction over the police. Once the essential aspects of its regulation are subjected to democratic scrutiny, the question arises as to what kind of institutional arrangements could facilitate such control and direction. Although a thorough and exhaustive answer exceeds the scope of this work, in the remainder of this section we wish to offer some preliminary guidance, of a general nature so as to account for the fact that one of the most important objectives of deconstitutionalization is the democratization of decisions regarding the police, which is why we wish to offer some broad guidelines that are compatible with the diverse possibilities that an open discussion can yield. In general terms, citizens’ control over the police must be allowed. This requires a discussion of the forms of involvement on police decisions that allow effective citizen participation, in such a way as to make it more likely that police work will be carried out in furtherance of the general interest. This step requires expanding the usual understanding of the forms used to control police activity. During the last decades, under the idea that the police must be “accountable to the law”, a model according to which control of police activity falls to the judiciary has spread.³⁷ Considering how common this view is, we believe that the models that allow citizen participation immediately have a counterintuitive resonance. In order to reckon with that, the following question should be explicitly answered: what

³⁶ CONTRERAS & SALAZAR (2020b).

³⁷ REINER *et al.* (2019), p. 244.

values or goods can be served by this type of institutional arrangement?⁹ The answer can be summarized in two levels, as presented below.

First, by participating in decisions about police activity, it is possible to direct said activity toward the advancement of the general interest. In broad terms, this general interest can be understood as the provision of security. Again, this may seem odd at first, as security is often associated with a special technical activity, which requires certain expertise, and which often works in secret. Without denying that many of these aspects may be true at times, we believe that security should be understood as a public good, in which the State has an indispensable role to play. Thus, the State has the tools to make it possible for access to the means that allow people to experience their daily lives safely to be distributed according to criteria of citizenship, and to not be mediated by the ability to pay, which, as is typical of goods provided by the market, tends toward an unequal distribution.³⁸ For this to happen, it is essential that citizens have ways of participating (again, we must remember this, either directly or through their representatives) in decisions about the way in which police activity is carried out.

Secondly, institutional arrangements capable of deconcentrating power over police activity can contribute to greater control of the performance of an institution that represents, as we have said, an inherently uncontrollable power. The apparent paradox must be noted. The police, as an institution, represent a power that, as we argued at length in section II, resides in the State, and that is not controlled in the traditional ways designed to limit power, as typically fundamental rights do; rather, it obeys abstract and general notions, such as order. For this reason, more deconcentration of decision-making regarding the institution that embodies this power makes it possible, if not to counteract it absolutely, to reduce the arbitrariness with which it is used. This is why effective control over police activity cannot be achieved only through legal tools, but requires citizen participation. This leads us to highlighting the role played by social groups that usually live daily with an over-presence of the police. As is well known, during at least the last two decades, under the auspices of different programs, there are places (usually referred to in administrative instruments as “neighborhoods” [*barrios*]) that include as part of the everyday landscape a high police presence. One example is the case of the *La Legua* slum [*población*], in which, according to a report by the National Human Rights Institute [*Instituto Nacional de Derechos Humanos*], 72 police officers rotate daily, divided into four shifts of 18 officers each.³⁹

When this over-presence of police⁴⁰ is not accompanied by an effective participation of citizens regarding its purposes and means to achieve them, it is likely that police power will result in abuse and arbitrariness, since it is deployed to meet objectives whose attainment inevitably requires the highest degree of discretion, such as maintaining order or security. What we can see in places like *La Legua* is that, indeed, police abuses have been frequent,⁴¹ while measures of interpersonal

³⁸ On security as a public good, and the indispensable role of the State, see LOADER & WALKER (2001); LOADER & WALKER (2007); and ZEDNER (2009).

³⁹ INDH (2015), p. 20.

⁴⁰ We use the term “police over-presence” in a value-neutral way. Its use is due, rather, to comparative reasons: it is a much higher number of police officers than is usually found in places of similar physical and demographic dimensions.

⁴¹ COMITÉ DE DEFENSA Y PROMOCIÓN DE DERECHOS HUMANOS DE LA LEGUA & UNIVERSIDAD DIEGO PORTALES (2017); and CORTÉS & GARCÍA-CAMPO (2018).

violence have not decreased during the time that police officers have been permanently stationed there, one of the objectives that, in theory, their presence should achieve.⁴² These facts, in our opinion, do not show a deviation from the purposes for which the police are used (although they do represent a deviation, sometimes even a criminal deviation, from prevailing legality), but rather show what is likely to happen when police power is deployed without counterweights. The institutional arrangements whose general outline we present in this section seek to counterbalance this phenomenon, namely, that there should be some type of control over police power, in such a way that its inherent arbitrariness is contained. Therefore, we argue, further, that over-policed groups should play a leading role in decisions about the ways in which police power is used. Given that this power is part of their everyday landscape, they are the ones best able to help this power contribute to the provision of security, and not be a permanent source of abuse.⁴³

One caveat, however, must be made. The institutional arrangements that deconcentrate decisions about police work, which we have outlined in the previous paragraph, should not be confused with “community policing” models, which have occupied a large part of the proposals for police reforms in recent years.⁴⁴ These models insist on the need to understand the police as a service provider, and that it should be “close” to the places where they carry out their daily activities, being aware of the needs of the places they “serve” (a word that agrees with the “service provider” view). However, the “community policing” model tends to overlook the issue of the distribution of power in the relation that communities establish with police forces, advocating for closeness as the key factor in producing positive results. In our opinion, this omission is crucial, and it differentiates the proposals that we present in this article from “community policing” models, since we believe that beyond closeness and knowledge of the local environment (without a doubt, necessary aspects), what is necessary is that the people who interact with the police on a daily basis have greater control over the way in which they carry out their functions, so as to prevent the arbitrary use of power and abuses.⁴⁵

3.2 The Need for Citizen Participation in Police Reforms

What we have tried to argue so far is that the constituent process offers a valuable opportunity to “deconstitutionalize” the fundamental aspects of police regulation, that is, to subject them to the democratic scrutiny that is currently impeded by that regulation. We have pointed out, however, that, in order to design a police force that truly carries out its functions according to the general interest, it is not enough to imagine new legal regulations, but rather an effective participation of citizens in the control of police activity is required. Only this participation, we have insisted, allows for the exercise of some kind of direction over the power held by the police institution. The control of the police, in short, requires robust citizen participation. However, in the remainder of this section we want to emphasize that citizen participation in the future of police reforms is not only a condition in order to be able to control the police on a day-to-day basis, but is an essential requirement for any

⁴² CÁMARA DE DIPUTADOS (2016).

⁴³ SIMONSON (2021).

⁴⁴ DAMMERT (2019).

⁴⁵ For a similar critique of community policing models in the case of the United States, see SKLANSKY (2005), pp. 1810-1814.

police reform to be successful. Put another way, we believe that any reform that is attempted without a political discussion on the role of the police does not bode well for the future.

This point has been noted by police studies, arguing that police practices are not particularly reactive to formal changes in legal regulation, so that any significant change requires change to the structural social role of the police.⁴⁶ Similarly, absence of a substantive political alignment on the role of police power may explain, at least in part, the failure of multiple attempts at police reform in Latin America. As Yanilda González has correctly pointed out, the police have an extraordinary capacity to block or even dismantle reform efforts.⁴⁷ According to González, minor reforms focused on an operational level often neglect a broader political and institutional context that gives the police considerable structural power to defend their prerogatives and to thwart reforms.⁴⁸ González has also argued, based on a study of the cases of Argentina, Brazil and Colombia, that in political settings with fragmented preferences, a police reform will be seen as inconvenient in electoral terms, a situation that can only be overcome to the extent that there is a convergence of political positions capable of counterbalancing the power of the police.⁴⁹ An earnest constituent discussion of police power and the police can favor this kind of convergence.

In Chile, from the end of 2019 until today, different proposals for police reform have been articulated by commissions convened by the government and Congress, as well as by think tanks. The creation of a Ministry of Public Safety that, among other functions, would be in charge of coordinating the different police bodies and exercising an external monitoring role; an improvement in the standards of transparency, responsibility and accountability; changes in the criteria for entry, promotion and retirement; changes to the training processes; changes in order to secure gender equity; advances in functional specialization; and the creation of an independent office of police conduct control are some of them.⁵⁰ Most of these proposals are desirable and can contribute to a democratization of the *Carabineros*. However, their impact will be limited if they are not presented as the result of a previous citizen discussion. Constituent deliberation may lead to the deconstitutionalization of the basic rules on police power and the *Carabineros* -which, as has been said, could favor the reduction of its very broad autonomy- or it may set down new rules, different from those of the 1980 text. Regardless of the result, the argument previously offered holds that what cannot be ignored is the substantive debate on the role that will be given to the police.

⁴⁶ Reiner analyses the concrete changes following the Police and Criminal Evidence Act (PACE) of 1984 in England and Wales and argues that despite significant changes, the reform did not reach important areas of police practice, because the real changes depend on police culture and this, in turn, depends on the socially determined role of the police (“the structurally determined social role of the police”). See REINER *et al.* (2019), p. 241.

⁴⁷ GONZÁLEZ (2019a), p. 291.

⁴⁸ GONZÁLEZ (2019a), p. 293.

⁴⁹ GONZÁLEZ (2019b).

⁵⁰ See Consejo de REFORMA A CARABINEROS (2020); COMISIÓN DE REFORMA A CARABINEROS (2019); and DUCE & DAMMERT (2019).

IV. CONCLUSIONS

This work began by arguing, by way of diagnosis, that the 1980 Constitution established a system that, on the one hand, has removed police activity from public deliberation, and on the other, created a sphere of reinforced autonomy for the *Carabineros*. This design can be described as a break with Chilean constitutional tradition, as well as unusual in comparative perspective. A diagnosis like the one presented—shared by part of Chilean constitutional scholarship—would demand imagining an alternative constitutional design within the constituent process in the making. Preliminarily, the priority seems to be the need to dismantle a constitutional arrangement that has made a democratic discussion of the police impossible.

We have attempted to contribute to the constitutional discussion by arguing in section II that the police, as an institution, is the main inheritor of a special type of power that makes it an agency of the state bureaucracy unlike other public entities. Taking this into account is relevant to understand the limitations that the law has as a tool for controlling and directing the police. We have suggested, therefore, that, although the deconstitutionalization of the fundamental rules of the *Carabineros* appears as a first step to make a democratic reform possible, the next step should take into special account the importance of promoting a public discussion among citizens about the purposes that are socially assigned to the police. This conversation should also be able to make visible the voice of the groups that have been the preferred subject of police intervention. Surrounding police institutions with a process of citizen deliberation is, we argue, a more promising way to control the police than mere reliance on the traditional tools of the rule of law. We have argued, as well, that political discussion about the role of the police is indispensable for any future police reform to have any prospect of success. Different experiences would suggest that reforms that are not preceded by a discussion of the role of the police are destined to have a limited effect. In summary, the constituent process has the potential to allow citizen participation on the fundamental definitions of the police function that is crucial to control and reform it. Until today, under the current constitutional scheme, these issues seem impossible.

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