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## **WATER AS A MOBILIZER FOR ALTERNATIVE GOVERNANCES. INSTITUTIONAL CHALLENGES OF THE CONSTITUTIONAL CHANGE AND THE WATER CRISIS IN CHILE**

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**Abstract:** The objective of this article is to reflect on the existing political, social, climatic and institutional conditions to outline the institutional challenges that need to be addressed to face the water crisis, considering the tension over water as a mobilizer for the proposal, discussion and achievement of alternative governance, which respond to the diversity of climatic, social and cultural scenarios existing in Chile. The scarcity and the water crisis installed in the diversity of the territory, have put in tension in recent years a highly centralized, commercialized and delegitimized water-political system. The work is articulated from a reflection from the political system to the functioning of the institutions, seeking to make visible that this problem requires a multilevel and transdisciplinary treatment, given the imminent reality of household rationing in widely populated areas and constitutional change, beyond the intended plebiscite. to settle the proposal.

**Keywords:** Water crisis, political crisis, legitimacy, governability, institutional challenges.

## INTERSECTIONALITY OF CRISES

The crisis of representation is perhaps the institutional and social tension that most transversally affects democratic political systems in the world. Questioning the political class and the known forms of representation are insufficient to address the current tensions, what the literature has called the “democratic recession”.(Streeck, 2016). The contexts of political and climatic crisis are spreading around the planet, with the social and economic consequences that the maintenance of the economic model based on accumulation by dispossession brings with it, which generates great inequalities.(Harvey, 2005). As a reaction, the configuration of a series of socio-political responses that seek to

confront these contradictions with elements typical of the emergence of collective action, social mobilization and political participation, inside and outside the limits of the institutional framework.(Rubilar-Stefanini, 2016). Its impact, weakened governance and rigid institutions against the grain of changing societies or that do not recognize and live with their differences, remain on a thin border of legitimacy, stressed by the decline in social cohesion and the exercise of public power. disputed.

Chile is an example of the above, the unfinished transition ad- portas of changes, brings great institutional challenges of adaptation and giving a political response to the intersection of crises. Because the Chilean path to neoliberalism generated a unique case at the global level: The advance of water neoliberalism, established in 1981 and present to this day, with a property right that includes water, allows to commodify and own the use almost in perpetuity for individual profit, unlike the international consensus where it has been declared, more than a decade ago, a human right.

In turn, the country in different projective models of climate change is among the 30 countries with the greatest impact and risk, with household rationing being a situation already present in some areas and its expansion to large cities is projected in the coming years., especially in the most densely populated areas(Center for Climate and Resilience Research & Center for Global Change, 2022).

The foregoing has a political and institutional challenge, which jeopardizes a conception present in the institutional framework since independence: the highly centralized State. The diversity of peoples, cultures, climatic and geographical varieties that coexist within the borders of the country, are the most powerful expression of the

need to seek answers not from where the questions come from, but from where there is experience and other forms of organization of the common life.

The first challenge of complex problems such as water rationing is that it brings greater tension in the context of a political crisis, jeopardizing decision-making. "The sovereignty of the State depends on its legitimacy, and legitimacy grounds its sovereignty" (Hernandez, 2009, p. 156). Therefore, for a governance that promotes the integrity of the political system in crisis, the system must be sufficiently legitimized to exercise sovereignty.

This legitimacy and integrity of the political system is thought from the dispute between the common sense of the modern society of the global north and the principles of liberal industrial societies, where the imposed social order and its principles are not only desirable, but the only possible one. (Lander, 2000, p. 4). And that only possible order is part of the characteristics of the problem, the homogenization of realities and the universality of the response by the State that makes it impossible to move towards substantive equality and the conservation of ways of life, particularly in the southern cone. It is for this reason that we consider the need to generate situated knowledge that is combined with known structures, looking for their tensions in order to think of a multiversal subsystem that allows a response from the articulation of the political system to diverse, adverse and territorialized realities in the face of the crisis. and the worldviews and relationships with the water element in Chile, overcoming the conceptualization of "resource" that has installed the commodification of the neoliberal political water model.

In this regard, the importance of the generation of scenarios and the ductility of the political system and the subsystem

of environmental relations, is given by the variety, not only of climates, uses and relations of water, but also as a founding part of a framework of social and cultural relations for, for example, the fulfillment of the collective right to subsistence of the native peoples or the maintenance of agriculture and ecosystems. This is how it seeks to expand the repertoire of democratic legitimacy, since "it is not the center that determines the periphery, but the periphery that, in its limiting quality, determines the center" (Mohanty, 2008, p. 19). Therefore, the State is the one that has the challenge of adaptation to face the diversity of the periphery.

At the intersection of crises, we must dialogue with the institutional water system, since it is internationally recognized as a unique system, imposed during the Pinochet dictatorship through the Water Code (CA) and the Political Constitution of 1980, which carries at levels unknown until then, the neoliberal model. In this regard (Ulloa & Romero-Toledo, 2018, p. 18), they mention the paradigmatic example of the implementation of the neoliberal ideal of water policy, practically unmatched, due to the extreme nature assumed by the privatization of water sources. Added to this is a transaction market, since the CA establishes the rights market, like any other merchandise, so it can be sold, rented and transferred. Additionally, the government and its institutions, they have a very limited role in managing water transactions and conflicts because they are defined as issues to be resolved between individuals (Hurlbert & Diaz, 2013). In this regard, it must be noted that reforms have recently been made to the CA, these address the change of ownership to exploitation rights, or mention the good of public use of the resource, but in practice it only restricts the perpetuity of the right, without making substantial changes in the commodification of the same, since the code is

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In addition to the property nature, the imposition of the model and the legitimacy vices that it brings with it, we have an additional factor to mention: The water governance system is also considered a paradigmatic example of a rigid and centralized model, through the General Directorate of Water (depending on the Ministry of Public Works). With this form of over-centralization in a technical body for registration of rights without any social nature, the application

of the CA exacerbated the conditions of inequality and asymmetries of power among users, a factor that explains the excessive stability and rigidity of the governance model. of Chilean water (Galvis et al., 2018).

Finally, CA is increasingly challenged for its association with the overexploitation of water bodies for economic gain at the expense of basic needs and environmental protection. Many analyzes have examined its effects on water management, but have paid less attention to its governance, that is, to the institutional structures, and decision-making processes around water resources (Budds, 2020). Particularly this emptiness is a transcendental part of the reflection of our following reflections.

The complexity of the concept of governance and its ductility to the context poses the challenge of a transdisciplinary view of it, the practice of governance -in the dimensions of its adaptability- (Hurlbert & Diaz, 2013) and its relationship with the capacity to provide legitimacy to a political system that seeks to maintain governability in times of crisis. The various meanings and conceptualizations of the term governance bring with it institutional and political requirements, relational models, and legal elements. The goal is to establish your minimums for implementation in practical terms, to provide governability to the decisions adopted in the framework of the water crisis and to respond to the institutional challenge that arises from the principles granted by the regulatory framework of the new Chilean Constitution (if approved) and international regulations. This means that it is not just water governance, but in what context is it viable?

Studying the conditions of legitimacy and governability of an institutional system that regulates access to water is vital for the maintenance of the political system, given its complexity it is particularly sensitive to

the prevailing political context, where recent studies such as the Social Cohesion Report in Chile in times of Cambio, realizes that the degradation of people's trust in institutions in Chile is growing, which is understood as pre-outburst, but that currently reaches critical levels of degradation (UNDP, 2022, p. 47). Condition that allows us to anticipate the complexities of the establishment of a new national water system to deal with scarcity.

In order to address the paths of solution or the treatment of the problem, we must broaden the constitutional notions that have prevailed in the last 40 years regarding democracy in Chile and its development, since the depth of the crisis tells us precisely about it, "to people the proper functioning of democracy is not only linked to procedural aspects, such as free and periodic elections, but also to the construction of an inclusive and fair society. In this sense, from the perspective of citizens, the persistence of inequality represents a failure of democracy and its institutions. (UNDP, 2019, p. 12).

The democratic deficit, as we can see, is strongly imbricated with the governability of a political system, beyond the degree of consolidation of the systems after transitions to democracies, a common factor (despite the transitional differences) between the cases of Eastern Europe and America. America, agree that only those democratically consolidated countries can guarantee the governability of their political systems (Alcántara-Saez, 1995). Therefore, the need to democratize access and decisions are minimum levels to provide viability for the distribution, occupation and preservation of water.

At the same time, environmental conflicts and their associated identities have become a catalyst for social mobilization, pushing the creation of new theories about the collective action that motivates them. In this sense, it becomes interesting "to activate a

concept such as environmental governance implies a detailed analysis of social sectors, environmental movements, business groups, unions and scientific organizations, as well as their role in solving environmental conflicts. Under this optics, the discussion on the theory of the State, its new forms of legitimacy and its expansion channels is recovered: the so-called democratization of democracy" (Alfie Cohen, 2013, p. 76)

## **DISCUSSION AND INSTITUTIONAL CHALLENGES OF CONSTITUTIONAL CHANGE AND WATER CRISIS**

As mentioned in the conceptualization of governability, water governance must be addressed as "the unique product of diverse forces", since the interests, generally conflicting, must be configured in a framework of complex relationships that allows the supply, distribution, maintenance of ways of life, protection and guarantee of individual and collective human rights, and also, preservation for future generations. This is how conclusions on the approach to the climate crisis in other latitudes are reinforced, uncertainty must be taken care of (including scientific given the stochasticity of extreme weather events) and complexity (both of an institutional framework incapable of generating certainty) of hydropolitics and water management, is that a subsystem of water relations that contemplates all voices and opinions, disciplinary and interdisciplinary diversity is essential to promote the development of alternatives and the legitimacy of actions. "In a context of uncertainty and a plurality of legitimate perspectives, the need to take risks in decisions has no other counterweight than that of democratic transparency, extended to all forums (...) In complex environmental issues, which lack clear solutions and require The support of the actors involved, the quality



and intensity of public participation in the decision-making process acquire special significance for the achievement of an effective result. disciplinary and interdisciplinary diversity to promote the development of alternatives and the legitimacy of actions. “In a context of uncertainty and a plurality of legitimate perspectives, the need to take risks in decisions has no other counterweight than that of democratic transparency, extended to all forums (...) In complex environmental issues, which lack clear solutions and require The support of the actors involved, the quality and intensity of public participation in the decision-making process acquire special significance for the achievement of an effective result. disciplinary and interdisciplinary diversity to promote the development of alternatives and the legitimacy of actions. “In a context of uncertainty and a plurality of legitimate perspectives, the need to take risks in decisions has no other counterweight than that of democratic transparency, extended to all forums (...) In complex environmental issues, which lack clear solutions and require The support of the actors involved, the quality and intensity of public participation in the decision-making process acquire special significance for the achievement of an effective result.(Ituarte & Mateos, 2002, p. 132)

In this regard, Chile has a complex recent history of attempts to change the model imposed under the dictatorship. The reforms to the Water Code have not only been insufficient and have not changed the matrix or the founding principles of the system. So neither are its effects in the territories with the greatest water stress.(General Comptroller of the Republic, 2022). The resistance to change from conservative sectors and/or those with serious conflicts of interest have further delegitimized the model in the eyes of citizens, for example, with the so-called “water rights benches”, in which parliamentarians discussed

and voted. for years the modifications or not of the AC, having rights to them, evidencing serious conflicts of interest, which parliamentary regulations have not faced, such as the inability of those who legislate for their own interests.

The foregoing is related to the pressure for change that was manifested from various sectors before the beginning of the expansion of water scarcity areas, household rationing, the increasing loss of legitimacy of the water and political system. This is how, parallel to the outbreak and social revolt, there were already 15 procedures for the law to modify the CA. In tune, the social demands in water matters were also revealed in the meetings held in the context of the social outbreak by universities, for example. In them, the theme “water” concentrates 17.2% of the total observations and proposals(Rivera et al., 2021, p. 8). To this is added, that the themes related to water were among the most voted in the popular initiatives of the Constitutional Convention and the recent election of the environmental activist and iconic spokesperson of the Movement for the Defense of Access to Water, Land and Environmental Protection, MODATIMA, Rodrigo Mundaca, as one of the most voted regional governors in Chile, in one of the regions hardest hit by water rationing.

Notwithstanding all of the above, we find ourselves with a constitutional change ad portas, which, if approved, would address several of the problems presented here, at least on paper, to deal with conflicts of legitimacy and legitimacy of the water and political system. If it is not approved, the discussion has non-existent minimum floors prior to 2019, which allow visualizing the confrontations on the possibilities of transformation. However, if the constitutional change proposed by the Constitutional Convention is approved or not, the challenges of institutional transformation are evident and structure water management

in both scenarios.

The first of them is a highly centralized State, which even, having tools for provision in rural sectors with a rural drinking water subsystem based on other principles, its centrality and inability to meet the minimum supply, has impacted the violation of the human rights to water and sanitation in a significant part of the population that does not live in large cities, which has increased, jeopardizing the speed of implementation of rural systems with the immediate crisis due to the installed drought.

In this regard, the Hydraulic Works Department, in charge of its implementation, estimates that some 500,000 people lack drinking water in these sectors, with entire communities (when it occurs) ending up being supplied by means of tank trucks. This, even when, at the regulatory level, the Water Code contemplates provisions that allow measures to be taken in the event that there is no water supply for human consumption, such as: the expropriation of exploitation rights (article 27 CA); the power to dig wells without registration (art. 56 CA); also, the presidential powers to directly constitute a right of use (art. 148 CA) or to partially deny it (art. 147 bis CA), as well as that of declaring any area, commune or basin of the country as water scarcity (art..314 CA)(Valencia, 2018).

However, the only solution for these people has not been the application of the regulations, but the prosecution of cases. This is how, as a precedent has been generated recently, regarding the situation of the communes of La Ligua, Petorca and Cabildo, iconic of the process of violation of rights and accumulation by dispossession, since they adjoin large areas of avocado crops for export, which They have not lost the supply, but they have lost the rivers and the total closure of the home supply by pipes. In these cases, the Supreme Court rules, through the appeal filed by the communities

and the National Institute of Human Rights, the responsibility of the Provincial Government of Petorca and the Seremi de Salud de Valparaíso for illegal omission to adopt necessary measures to provide drinking water in sufficient and adequate quantity to supply the communities of Petorca, Cabildo, and La Ligua for the indicated purposes, “a situation that violates the constitutional rights of the people who inhabit those territories.” It must be noted that said pronouncement doubles the sufficient and adequate amount that was used to use as a supply measure, from 50 liters per person per day to 100 liters. This is still without considering that the area was (and tries to continue to be), prior to the crisis, a small-scale agricultural and livestock territory. “a situation that violates the constitutional rights of the people who inhabit those territories.” It must be noted that said pronouncement doubles the sufficient and adequate amount that was used to use as a supply measure, from 50 liters per person per day to 100 liters. This is still without considering that the area was (and tries to continue to be), prior to the crisis, a small-scale agricultural and livestock territory. “a situation that violates the constitutional rights of the people who inhabit those territories.” It must be noted that said pronouncement doubles the sufficient and adequate amount that was used to use as a supply measure, from 50 liters per person per day to 100 liters. This is still without considering that the area was (and tries to continue to be), prior to the crisis, a small-scale agricultural and livestock territory.

Another of the institutional challenges refers to the coordination and planning of the new and existing structures. Currently, more than 40 public institutions have a regulatory mandate on the use, control and preservation of freshwater bodies, many of them without even minimum internal management

procedures for interrelation, installed human or material capacity to ensure compliance with the powers that are attributed to them. An example of this is that according to the State Transparency Portal, the Aysén region, the largest in extension and one of the richest with fresh water availability on the planet, only has two officials assigned to roles linked to the control in the General Directorate of Water, who has the main mandate of regulatory plans to ensure compliance with the provisions of the CA. Additionally, coordination between the institutions is practically null, due to these and other reasons, among them, that their structures do not have the same levels of territorialization, so that the responsibilities and possibilities of coordination end up being diluted and reflected only on paper..

The foregoing supposes a paradigm shift in inter-State public relations, due to duplicity or conflicting roles, for example, in fjords between DGA and DIRECTERMAR in auditing, situations that must be addressed in the transition according to the proposed constitutional change of be approved and face a way of understanding the State in its division of the borders of the rigid structure of the territorial divisions misunderstood as political-administrative divisions and that in the case of the Basin Councils and other institutions to be created, around the confrontation of the water crisis and the constitutional change, need to be overcome and understand the flow, capacity and load of the hydrographic basins as complex territories that exceed the traditional limits of territorial administration.

Transversally, a challenge to face the political and water crisis is corruption within the state apparatus and in this, the phenomena of corruption have not left the water market in Chile exempt. "From a legal perspective, the concept of water security is related to the allocation rules that seek to guarantee

the way in which rights are established and informed to other users and in this approach, water security can be linked to some aspects of the water governance regarding the need for accurate and reliable public records. This becomes relevant when corruption phenomena in the water market have been detected in Chile." (Álvarez & Tobar, 2019, p. 3)

To achieve this, the first thing that is required is to have real information in a timely manner, which is made difficult by the aforementioned of the supervisory entity, but also since the public records of the rights granted are not complied with, Therefore, the uncertainty of information is even greater and leaves the doors open to the expansion of acts of corruption.

In Chile there are at least two registries, of which there is a legal obligation to report on paper. One is the unified Real Estate Registrar (CBR) and the other, Public Registry of Use Rights that is part of the Public Water Cadastre (CPA) in charge of the General Directorate of Water. However, the legal obligation to inform, various studies show that it has not been enough to encourage the commitment of the holders, while the CPA continues to be incomplete and outdated. Among the studies that are cited, it is estimated as of 2019 that only 50% of water rights in use are registered in the CBR and less than 20% in the CPA (Álvarez & Tobar, 2019, p. 8).

Subsequently, talking about adaptability and resilience of the water system in Chile seems complex, since the institutional conditions to establish the minimum regulations that already exist are executed and progress can be made towards the participation of the different hydropowers and communities present in the territories. Endorsing the idea, the ability to adapt will be given by the legitimacy granted by the parties and by an institutional framework that allows informed decisions to be made. In this regard, "the water governance regime



in Chile presents low levels of adaptability and resilience and requires a renewal of its regulatory framework. A transformation is needed to face the tensions generated by new conditions such as climate change, social demands and the emergence of various approaches to the appreciation and valuation of water resources. In other words, more inclusive forms of governance must be found, which promote participation in decision-making by actors and stakeholders, in order to guarantee better allocation, distribution and access to water resources, taking into account the identified needs. for all sectors.”(Galvis et al., 2018, p. 216)

In this context, if we think of approaches and models such as the Integrated Water Resources Management (GIRH) model or Adaptive Management that includes: Experimentation of new management practices, constant modification and testing; evaluation and continuous learning from past experiences (or implemented practices); inclusion of multiple actors in decision-making processes; self-organization of the governance system; and abrupt changes, not stable(Galvis et al., 2018, p. 217), the logical question is: Is it possible with the installed management capacity in Chile? The answer is no. Lights of this are presented by the aforementioned studies and the prosecution of cases, but it has recently been demonstrated by the comptroller, through the audit carried out by the Comptroller General of the Republic of the actions carried out by the Water Directorate (DGA).

The report is lapidary, in it it was determined that the DGA has not adopted the measures that allow full and timely compliance with the provisions of the legislation, which establishes as a “function of that direction, to plan the development of the resource in natural sources, in order to formulate recommendations for its use and arbitrate the necessary measures to

prevent and avoid the depletion of aquifers in accordance with the strategic basin plans”. Likewise, in this context, “it does not have instructions or procedures, duly sanctioned and disseminated internally, that define the mechanisms and actions by which such functions must be carried out”(General Comptroller of the Republic, 2022). With this it is determined that it has not responded to its legal mandate, corroborating the insufficiency of the institutions to respond to the minimum established in a tremendously commercialized system, in which the availability of water for the provision and assurance of the human right to access, It depends on the supervision of private individuals by the State.

At the same time, the audit contemplated the review of previous audits to the DGA, in particular, referring to the defense made by the audited institution, which appeals to the fact that the functions in question are exercised by means of the indications and recommendations contained in the Strategic Plans of Gestión Hídrica, the control agency confirmed that “this entity has not executed the aforementioned plans for the 101 basins in the country in an effective and timely manner, since it had, as of February 19, 2021, 2 published plans; 3 plans in the process of being published; 9 in progress; 13 in bidding process; and 18 in preparation of bidding rules, for a total of 45 plans that would cover 58 basins”(General Comptroller of the Republic, 2022).

Likewise, it has not implemented the Monitoring Plan that it is mandated to execute in the crisis zones, called restriction areas, in order to have reliable information on the state of capacity and charge of the basins, coinciding with the aforementioned investigations. Without this information, the institutionality cannot determine the prioritization of consumption or execute restriction actions against those who maintain

the rights to exploit the water.

Indeed, knowing the amount of water available to be distributed, secured and preserved, versus that which is already assigned to private parties, turns out to be a basic issue for building and practicing the idea of water governance and ultimately for water security and the guarantee of human rights(Álvarez & Tobar, 2019).

Paradoxically, to talk about water and institutions, we must talk about transparency.

Finally, the transition to a water model that does not violate by action or omission the individual rights of access and collective

subsistence, either with the proposed constitutional change or by other means, requires a substantial modification to the State institutions linked in the matter and, mainly, compliance with the regulations in a Rule of Law. Currently, in the various proposals for change presented, we can see a fundamental and structuring challenge, which goes through the institutions, since even the current model far exceeds the capacity of the State to take charge of the conflicts caused by the water crisis, which unfortunately, if we do not act, will become more and more frequent.

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