

“Without economic freedom there is no political equality”¹

Constitutional Neoliberalism. The case of freedom of expression in Chile

Neoliberalism is, to use W.B. Gallie’s denomination, an essentially disputed concept. Although common sense associates it with the defense of the individual and negative freedom against state’s interventionism, in the classic dichotomy of state-marketplace-, its restriction to one economic system –mistakenly identified with a rereading of *laissez faire*², is inaccurate. Not only the Chicago school’ influence is considered in its genealogy, but also the contributions of the Austrian school and the Germany ordoliberalism, for whom the State plays a fundamental role for the economic order.³

Regardless of the possible objection due to lack of theoretical cohesion, neoliberal ideology identifies with a precise time and space. It has been understood as a mercantilist *process* of social relations as well as a form of *rationality* capable of extending to all the fields of the existence based on the principle of competition.⁴ But besides from being a process and a

¹ Alvaro Bardón, Chilean economist, president of Central Bank (1977-1981), and vice-secretary of economy (1982-1983) cited in Pilar Vergara pg. 115

²As to identify *laissez faire* as a absence of regulation. This would be one more of the “fallacies of the XIX century liberalism” within which *laissez-faire*, would have derived an “obscure and pedant” dogma. Like that, based on Lippman’s judgement, “was the necessary destructive doctrine for a revolutionary movement. *That was all it was*. It was, therefore, incapable of guiding the public policy of states once the old order had been overthrown”. W. Lippman, pg. 185 (cited with italics).

³ The case of Thatcherismo in England is paradigmatic (see Gamble)

⁴ Brown P. 17; Dardot y Laval. Its common to argue the connection between neoliberalism and *laissez faire*, even though many of its major exponents rejects it directly or indirectly (e.g. Friedman or Hayek).

rationality that affects the subject, it has also transformed the State, from the Keynesian welfare State to a State that ensures a capitalist market-oriented economy.⁵

The historical events in Chile make it for a good case study of the “neoliberal turn” that arises in the seventies. In fact, it is cited as one of the first countries where neoliberalism was established as an economical regime.⁶ Furthermore, it is a better case to analyze the neoliberal form adopted by constitutionalism, given that in this case, along with the imposition of this form of social organization, the political force *codified* the neoliberal rationality into a constitution. And, even though some authors have suggested the connection between neoliberalism and the Chilean Constitution, there still exists a deficit in the development of jurisprudential thinking in relation to *constitutional neoliberalism*. Part I of this paper proposes an interpretation about the form adopted by constitutional neoliberalism in Chile, as the main institutional mechanism to grant immunity to the marketplaces from political demands. In this sense, the rejection of popular sovereignty principle, the strengthening of certain types of rights – under the rule of law ideal– as well as the reversion in the advancement of the social rights agreed upon after the Second World War; the creation of autonomous organizations; the displacement of the political power from parliament to the executive; the weakening of the party system and the consecration of the principle of subsidiarity in various fields like education, are all legal mechanisms adopted by constitutional neoliberalism in the case of Chile.

⁵ The Keynesian State belongs to the post war capitalism consolidated after WWII (Streeck) and it is characterized for a mixed economy. Streeck, pg. (pg. 112; Neil Gilbert, (2002) *Transformation of the Welfare State: The Silent Surrender of Public Responsibility* pgs. 99-134. In the case for Chile, and in the words of Andrés Allamand: “such purpose [of the Military Government] is conceptually equivalent to the replacement of the social statism for the marketplace economy in the field of economics” pg. 171 Drake.

⁶ Ex. Harvey, Rodgers, Brown. About this particular orthodox focus, Felipe Portales, Chile: Una democracia tutelada pg. 379 and ss “such model consisted in an almost annihilation of all the concepts of the social and economic democracy that had been developed...since 1924 a 1973”; Arturo Fontaine A., The economist and Pinochet, where he recounts the process for which the government adopted “rigorously the principles of the marketplace economy”.

The development of the constitutional neoliberalism form, allows us to grasp the underlying tensions in defining the structure of freedom of expression as a right and the role taken by the media (part II). Along with those who view neoliberalism as a threat principally aimed at the commodification of social rights, it is argued that it has also meant a devaluation of a typical freedom right, such as freedom of expression, through the analysis of some decisions issued by the Chilean Constitutional Court-

In part III some conclusions are set out, beginning with the problem that implies having a neoliberal configuration of freedom of expression when the political and social structure face a general questioning process. Under the institutional frame of the *marketplace of ideas* false or wrong ideas are spontaneously eliminated –as emulating an evolutionary process, due to individual actions of the marketplace agents. However, negative externalities caused by the media marketplace - property concentration, ideological monopoly and exclusion of underprivileged groups-⁷ show its failure as a paradigm of a robust public debate.

I. The Chilean constitutional neoliberalism as reaction

“it is definitely, imperative to change the mindset of the Chileans ”⁸

“the same libertarian inspiration guides the constitutional adoption of the bases for a free economic system, founded in private property of the means of production and the individual economic action, within a subsidiary state.

This is a crucial definition that the previous institutional system did not contemplate, and that now rises as a *solid dike* protecting freedom against the socialist statism.”⁹

⁷ Report RSF 2015

⁸ Declaration of Principles March 11, 1974

⁹ Pinochet’ speech, August 10, 1980

Considering the refoundational purpose of Pinochet's regime,¹⁰ an interpretation of the constitutional neoliberalism form adopted in Chile is exposed.¹¹ The Great Chilean Transformation towards modernization was carried out by the civic-military dictatorship (1973-1999), advised by a group of economists with degree from the University of Chicago.¹² The economic development model was radically modified, from one based on the substitution of imports together with State's capitalism, to one guided by *export-led growth* based on the principle of State subsidiarity .

The Chicago Boys (as Chilean media named this group of advisers) and their influence on the history of local neoliberalism has been extensively documented.¹³ However, the development of its legal thought has not received the same attention,¹⁴ even though the legal order had to be modified to achieve the "seven modernizations" announced in 1979.¹⁵ These involved the privatization process of state companies, the reduction of commercial and exchange restrictions, but also the proscription of dissent - in particular of the leftist parties- and the weakening of political participation and unions. These reforms represent a crucial change from a

¹⁰ José Piñera, the purpose is to set the basis of a new political, economic, and social reality pg. 140 (en revista que pasa, 1980 No 454)

¹¹ The idea of a constitutional neoliberalism in U.S.A. has been developed by J. Purdy in *Neoliberal constitutionalism: Lochnerism for a new economy* (2014) where he relates the manner in which currently the First Amendment is conceptualized with the use of the contractual freedom as principal argument in Lochner's era. Also, from a theoretical point of view, about constitutional neoliberalism see Rachel Turner "Neo-liberal Constitutionalism: ideology, government and the rule of law" in *Journal of Politics and Law* (2008).

¹² Representative are the words of one of the leading figure, the economist Sergio de Castro (Secretary of Economy and Finance between 1975-1982): "Allende gave the best lessons on economics about what not to do. After this the road was open: without Allende Pinochet would not have been successful and *without Pinochet the free marketplace would not have existed*" Interview at The Clinic: <http://www.theclinic.cl/2015/04/07/el-ladrillo-de-sergio-de-castro/>

¹³ See, Arturo Fontaine A., The Economist and the President Pinochet (where the process by which the radicalized neoliberal approach on the ODEPLAN economist wins the pragmatic battle against the Advisory Committee and R. Saez is discussed), Valdés (specific study about the influence of the University of Chicago on the economics staff of the Universidad Católica), Huneeus, LOM.

¹⁴ For Example, Karin Fischer affirms it this way in "The influence of Neoliberals in Chile before, during and after Pinochet" pgs. 305-346 in *The road from Mont Pelerin*". [include exceptions]

¹⁵ Labor Plan, provisional reform, educational directive, restructuring of the health sector, modernization of the justice system, agricultural development, administrative reform and regionalization.

marketplace economy to a marketplace society, and the configuration of the state as the guardian to such order.

1.1 Neoliberalism and the fallacy of the minimalist state

The expansion of the market-economy dynamics is the result of state action. Precisely, Polanyi's main lesson is to stress the fictitious and political character of the goods on which the capitalist economy is based: capital, work, and property. What this neoliberal spin supposes is not a 'minimalist state' in terms of being weak or less relevant, but rather what is endorsed is a change in its functions and thus, in the conditions of legitimacy of its actions. Before, the modern state action was justified by the democratic principle of participation.¹⁶ Now, the neoliberal State is committed to the creation and maintenance of free and competitive markets, and therefore it is measured under the *efficiency in results* paradigm.¹⁷

The source of growth is transferred from artificially activating the effective demand, (Keynes), to the creation of conditions and incentives to save/invest (*supply-side economics*).¹⁸ The old proper functions of the welfare State are transferred to the marketplace and to individual responsibility (for example, in the case of retirement funds). Also, in order to encourage private action and create new markets, the typical neoliberal policies of privatization, deregulation, and liberalization of commerce are followed.¹⁹ Along with them, the reduction of taxes is fostered,

¹⁶ Be it direct or through the representative democracy

¹⁷ The modification of the terms of legitimation of the States in Wendy Brown, Neo-liberalism and the end of liberal democracy & Ongoing the demos.

¹⁸ About the application of the supply theory as an economic policy: Streeck, Plehwe,

¹⁹ Plehwe pg. 8

which has lead authors such as Streeck, to characterize this transformation as the passage from the Tax-State to the Debt-State.²⁰

The State cannot be disregarded by neoliberalism, since it is through the State's action that fictitious merchandise is created and *maintained*, which also requires the market to achieve its immunity. But, like Streeck warns, protection required by the market - so necessary for the maintenance of wealth (or accumulation of capital)-²¹ can be achieved only by the re-education of the citizens or the *elimination of democracy*. Thus, it can even be argued, that an authoritarian state is an efficient tool to prevent the defensive reaction of society when facing the extension of the marketplace economy.²²

That is why neoliberal ideology is compatible with the dictatorship regimes, or with the authoritarian principles similar to national security doctrine in Chile,²³ and with devaluating democracy.²⁴ Because unlike liberal constitutionalism -which seeks for the limitation and containment of political power, but identifying the sovereign within the people- constitutional neoliberalism aims not only at the *containment of power* but, rather to the *overthrow of politics*.²⁵

²⁰ Streeck, *Buying Time*, The delayed crisis of democratic capitalism.

²¹ Insert pg.

²² Following Polanyi, the only thing that would be spontaneous is society's protective reaction to the tear implied in the extension of the Marketplace economy. In his study, the State appears as the means through which you are able to decrease the speed of change brought by the Marketplace society.

²³ See Lechner and his analysis of the Chilean neo-conservative speech which warns against "the authoritative perception of society" pgs. 3 y 4. The national security doctrine in addition relates to the authoritarianism of the lost community that hierarchical arrangement in the natural order of nationalistic principles, civic values, military unity

²⁴ About the idea of democracy's devaluation (or its transformation) as a necessary path to make compatible the levels of the material inequality with the radical promise of equality (although formal) of the liberal democracy, see Winters [cita paper]

²⁵ F.A. Hayek *The Containment of Power and the Dethronement of Politics in Law, Legislation and Liberty Vol. III The political order of a free people* pg. 128-. One of the ways to overthrow is the uprising of a new collective subject (*constituency*): the creditors of Debt-State. Because the neoliberal State (or Debt-State which Streeck warns us about) does not only answer to the people, but represents the preeminence of a new constituents, not only as a group of voters, rather a group of consumers and defenders of the new state, and it even refers to their moral root, pg. 79. It is important to warn about the international character that this new constituency can adopt, that is not limited to its belonging to the national State. That way, the international organisms such a World Bank or The International

1.2 Constitutional Neoliberalism in Chile

The legal form adopted by neoliberalism is diverse depending on the political and social context in which it is developed.²⁶ The milestone of the Great Chilean legal transformation is the 1980 Constitution – paradoxically- named as the Constitution of Freedom enacted on September 1980,²⁷ since it constitutionalized neoliberalism, reconfigured the State and the economic sphere is protected until nowadays.

The radicalization with which the democratic and social state is dismantled is proportional to the fear generated by its advancement. The imaginary from which the 1980 Constitution is drafted is crossed with the fear of the past attributed to the danger of disintegration of a *national self* in the *unhinging* of the political, social and economic system.²⁸ The story tells that after a few years of chaos and rationing, of industrial strings and expropriation, order and abundance arrived. The discourse of such time stresses a dichotomy between an anarchical past and order:

“Does someone want to return to a destructive and chaotic period in which the factories, businesses, and everything that is produced by work stopped and there was no possibility of progress for anyone? To avoid ever returning to the destruction of our source of work: Yes, to the Constitution of Freedom”²⁹

Monetary Fund, the investors of the diffuse debt, or even the population themselves when playing the role as the creditors of the private pensions.

²⁶ For example, in the American case, J. Purdy defines it in relation to First Amendment’ development.

²⁷ About the controversial character of the plebiscite, Source El Fraude.

²⁸ Like that for example, the military coupe is justified by the Bando No 5_____ (redacted by Sergio Rillón Romani, according to de Fontaine). Also, in the words of Pinochet: Since the mid-sixties there was an increase Marxism in Chile, with all of its consequences, becoming in an instrument of permanent aggression and total soviet imperialism given that, due to the political-institutional regime, it was possible for its external and internal agents to infiltrate in the vital centers of the social body, *and increase its power from within to unhinge everything*. Speech by the Country’s president of the republic on August 10, 1980, pg. 484, Chilean Magazine of the Law vol. 8 (italics is added)

²⁹ Official advertising for the Referendum that ratifies the new Constitution, See Apsi Magazine 1980

Fear becomes a fundamental element to the establishment of constitutional neoliberalism.³⁰ However, such constitutionalism of fear (in the word of Cristi and Ruiz-Tagle) is centered on the expropriation as the turning symbol for class fear, which is profoundly scared of politics and from the consequences of democratic constitutionalism.³¹ The nightmare of losing privileges became too close a reality only because of liberal democracy and the 1925 Constitution.³² This sense of fear is masterfully reflected through the dialogs of the play ‘Los invasores’ written by Egon Wolff and debut in Chile in 1963.

In the play ‘Los invasores’ a typical bourgeoisie family suffers the overtake of their home by ‘the people from the other side of the river’. Pieta, Lucas Meyer’s wife asks him, “Who are those people, Lucas?” to which he responds:

“The invaders Pieta. The men that would bring coats to the bonfire...Who send nuns to trespass the walls...They have tripped us with their walking sticks for the blind. They have forced flowers in our lapels...[...] They have finally arrived, Pieta...They already knocked at our door. I haven’t slept a lick, hoping that in the morning this wouldn’t be more than a horrible dream; but the noise increased throughout the night. They crossed the river, finally....we cannot restrain them anymore.”

As Meyer claims, nothing is no longer respected in the country: not nature- because the river has been crossed-, not traditions- because they were making a bonfire with coats, - not even religion because nuns are jumping over the wall. And the law, better not be discussed, because

³⁰ Cristi, Renato y Ruiz-Tagle, Pablo, *The constitutionalism of Fear. Property, common and constituent power* (2015); Lechner, pg. 4 fear to the masses that primes liberalism its conservative course continues being the obsession of the neoconservative thinking.”

³¹ Lechner signals with reason “the neoconservative offensive makes out- even maybe better than the left itself - the linkage between democracy and socialism” pg. 1

³² Incredibly, actually given the constitutional debate, the discursive opposition emerges again between the Constitution that allowed for the anarchy (the one of 25) and that one that has allowed for economic progress (the one of 80). Like that, for example, Letter to the Director, *El Mercurio* March 9, 2016 A Constitution as of 1925?

even in 1963 there was a sense that the political and judicial systems where been pushed beyond their limits: *given we cannot restrain them anymore*.³³

Ten years later only through force order is imposed. Even though studies have shown that the dictatorship wavered between assuming a restoring mission or in following the refoundational path, it certainly did not doubt in self-attributing a messianic endeavor as savior of the Chilean society from the dangers of totalitarian Marxism.³⁴ Such wavering in the political character of the coup d'état also had an economic dimension, at least up until 1975, between the corporatist and the neoliberal path,³⁵ and in the constitutional decisions taken by the *Junta* in the seventies.³⁶

Nevertheless, the Constitution of 1980 represents the triumph of a constitutional conception for which the law did not only have to establish and control the political power, but to assure the theoretical and practical transformation of power and of the State. This transformation and the overthrow of political power are the theoretical foundation for the so-called *protected democracy* and the relevance given to the subsidiary principle in defining the States' sphere of action.³⁷

1.3 The conservatism of the protected democracy

³³ As affirmed by Lechner: “this lack of “impersonality” and “objectivity” of authority is feared by the capitalists, even more in the Latin American societies where the split between the exportation sectors, of the domestic Marketplace and the self-supporting ideal make it difficult to articulate a class of solidarity.” pg.13

³⁴ For example, Vergara points towards the divergence between the discourse of the main sources of media (such as El Mercurio) and the Government. The media emphasized the refounding dimension, calling to establish a new political order that would avoid the errors that made possible the situation the country lived starting in 1970.

³⁵ The account of the growing domino that the Chicago Boys continued to acquire in the administration of the militarized executive that Fontaine makes in..... is interesting

³⁶ As to justify the coup in the supposed violation of the 25 Constitution, at the same time as the form, is to continue recognizing such Constitution [insert DL imperative].

³⁷ Without prejudice to understand that the constitutional neoliberalism is also affirmed in the acknowledgement of constitutional autonomies (creation of technical organisms) and in the distinction of the political and social power.

The special characteristics of the political and constitutional system have affected the way in which the public debate is shaped and the how the limitations to freedom of expression are justified.³⁸ The *authoritative, vigorous, protected, integrative, technified and of authentic social participation* democracy³⁹, is the regime of the government that imposed itself through the 80's Constitution. The authoritarian democracy is a product of the diverse authoritarian warranties, traps or institutional locks that have been identified by various scholars.⁴⁰

This *protected* feature has been fundamentally analyzed in relation to the anticommunist and anti Marxist discourse that is normatively contained in the old article 8 and the principle of ideological-restrictive pluralism.⁴¹ However, this norm was annulled through the 1989

³⁸ This is how it is understood by the HRW report: "The special dynamic of the return to democracy to Chile had profound effects on the media and the public debate... agreed transition pg.94. If we consider that internal relationship between the freedom of expression and the validity of the democratic system, the problems in the political and social structure affect the validity of the individual right.

³⁹ Official letter of November 19 of 1922 to the C.E.N.C., cited by Cristi pg., 177; additionally the speech with which the final text of the 1980 constitution is made known, it is manifested that the objective was to create "an authoritative, vigorous, and protected democracy, based on the concept of unity, participation, and integration of the sectors within the country." Pg. 105 Speech.

⁴⁰ About the authoritative enclaves, see Garretón; Atria has made popular the term 'trap' in the Constitución tramposa...;

⁴¹ Article 8.- Every act of an individual or a group designed to spread doctrines that threatened the family, advocate for violence or a conception of society, of the State or the judicial order, of totalitarian character or founded in the class struggle, is illicit and contrary to the institutional order of the Republic. The organizations and the movements or political parties that through its purpose of by its activities support or favor such objectives, are unconstitutional.

It corresponds to the Constitutional Tribunal to know the infractions to the above mentioned. Without prejudice of the other sanctions established in the Constitution or law, the people that are involved or have been involved in the contraventions pointed out previously will not be eligible to participate in public functions or charges, be it of popular election or not, for a period of ten years starting to count from the date the Tribunal makes the resolution. Additionally, they will not be allowed to be rectors or principles of educational establishments nor will they be allowed to practice in educational functions, nor operate or run any form of media or be a director or administrator of such, nor can they carry out in it functions related to the emission or broadcasting of opinions or information; nor can they be leaders of political organizations or other organization related to education or of neighborly, professional, business, union, student or guild membership character in general during such period.

If the people referred above are in position of a job or public charge, be it of popular election or not, within the restriction time as established by the date when the Tribunal made the declaration, they will lose it, full as of law. The people sanctioned by virtue of this precept will not be able to be an object of rehabilitation during the special term in subsection four. The duration of the ineligibility contemplated in this article will be increased two fold in cases of relapse.

constitutional reform,⁴² and according with the current constitutional text, Chile is a democratic Republic, where since 1990 free elections and periodic representations take place. Further, political pluralism is guaranteed by the Constitution, and even two socialist presidents have been elected.⁴³ Why then do both –the critical focus as much as human rights reports, emphasize the public sphere deficit?

According to Moulian, writing in the nineties, the Chilean political system is an “iron cage,”⁴⁴ in which the absence of discussion about the “essential knots of the accumulation and sociability models”⁴⁵ resulted critical, and in his book he bemoaned for the “disappointment of the common men who feel they have nothing to say, because now politics takes place even further up the chain in inaccessible summits.”⁴⁶ Of course, it is the era of the so-called consensus democracy of the Aylwin-Boeninger duo, which lasts up to the 2000s. Following this line, for Garretón the *reconstruction of the polis* as the space of debate, conflict and decision about matters of general interest of the population, was the key problem faced by Chilean society.⁴⁷ Furthermore, from a constitutional point of view, Ruiz-Tagle analyses the constitutional norms of an ‘openly authoritarian and neoliberal’ system under the Constitution of 1980,⁴⁸ and more recently, confirming the criticism of earlier critics such as Moulian, Carlos Huneeus in a historiographic retrospective has referred to the Chilean system as a “semi-sovereign democracy”.⁴⁹

⁴²Law No 18.825, published August 17, 1989 in which 54 amendments to the Constitution are included. Legalized on June 30, 1989.

⁴³The 1989 amendment ‘transferred’ part of the old Article 8 to article 19 No 15 together with adding “The Constitution guaranties the political pluralism.”

⁴⁴(Moulian, 1997:51)

⁴⁵pg. 58 Moulian

⁴⁶pg. 65 Moulian

⁴⁷Garretón, pg. 184

⁴⁸Cristi y Ruiz-Tagle, *The Republic in Chile*, 2006.

⁴⁹Huneeus, Carlos, *The Semi-overeign Democracy*, 2014.

Therefore, even when the constitutional reform of 1989 purports the return to legality of leftist parties, the problem in the public sphere remains. The Chilean tutelary democracy is based on the collective good of a limited ideological pluralism, not only as ‘antidote against Marxism’ but rather as a guarantee for a political, economic, and social system that was considered to be under a permanent threat.⁵⁰ The old article 8 is just the symptom that reveals the illness: democracy. It is democracy that requires protection from itself⁵¹ and only – by denying popular sovereignty- it is possible to ensure the stability of the political system and prevent its debasement into a totalitarian system. The institutional dilemma faced by those who participated in the drafting of the Constitution was precisely how to contain an *active political life*:

What one must do is to slow down a logical desire and preclude a political life that becomes too intense. [He declares that] he is afraid that political life becomes too active, that too many opinions and information are given, and that they may be too passionate.⁵²

Departing from this baseline different legal forms are justified: appointed senators, the binominal electoral system, supermajority quorums to approve laws, up to *the essential rights derived from human nature* embodying a rule of law that serves to uphold the social power of the market.

In a somehow paradoxical turn, the tutelary democracy becomes a depoliticized democracy. Under this new conception of democracy, the sphere for disagreement is reduced, given that public policies are settled under technical-objective standards. Political participation becomes mere *public entertainment*,⁵³ since common people –to which Moulian cites above-

⁵⁰ The accumulation of capital and the policies of defense and protection of the wealth are closely linked, as developed by Winters.

⁵¹ See Hayek pg. 150 vol III; as it coincides with the instrumental character of the Guzman democracy and the mistrust towards the electoral democracy based on the universal suffrage.

⁵² Sergio Diez, session 234

⁵³ (Streeck, 2014) what is also strengthen by the show period.

have really nothing to say. What possible can they say about technical means through which the collective interests are accomplished, since they were already fixed without being consulted, by the Founding Fathers of Chilean constitutional neoliberalism? Decisions of general interest are determined by formal rationality standards, a common technical or marketplace criterion.⁵⁴

1.4 The Constitution of Subsidiarity: music for chameleons

The second focus of the constitutional neoliberalism is the principle of subsidiarity, which –following what has been addressed by Cristi- allows in Chile for the articulation of a theoretically controverted alliance between conservative Catholicism and neoliberalism.⁵⁵ This principle fosters the autonomy of private associations or intermediary groups against the intervention of the State. This principle explains the transformation of the functions and responsibilities of the State and justifies the return to the social power of the marketplace.⁵⁶

The political discourse that promotes subsidiarity as a foundation of the Chilean state, sustains that is the “key to the respect of citizens *real* freedom [and] of the validity of an authentic libertarian society”⁵⁷. It is grounded in a dichotomy between a real freedom and a mere formal one. The hostility towards political activity, asserts the conceptual distinction between political and social power, emphasizing that only in the social sphere real freedom can be enjoyed, in detriment of political power through which only formal freedom can be

⁵⁴ About the limits of the States’ intervention to promote development policies in Aninat, Weyland

⁵⁵ For Cristi the articulate principle of the alliance is impossible between corporatism and neoliberalism. Cristi, PRT 104, where elements of the social doctrine of the Church and the Chicago school mix. The abandonment of corporatism is accomplished by the end of the seventies [see] the memorandum sent by Pinochet to the Commission declaring “the aforementioned intermediary entities should have their own legitimized institutional means to communicate with the political power, *but it cannot be allowed in any case that this be generated on the basis of the entities in question*, how it is erroneously fostered by the corporatism” pg. 50 Cited in ASB volume IV

⁵⁶ From an organic point of view, the creation of constitutional autonomies and the constitutionalism of technical entities such as the Central Bank is also relevant.

⁵⁷ Declaration of Principles 1974.

accomplished. Likewise, the State symbols coercion and arbitrariness from which it becomes logical to protect oneself; and, therefore, society –understood in terms of a social entity conformed by different organizations- demands *immunity to intermediary groups*, in the form expressed in subsection three of article 1 of the Constitution:

The State recognizes and protects the intermediary groups through which society is organized and structured and it guarantees them the adequate autonomy to fulfill their specific end.

In addition, it is normatively stated in those constitutional norms identifying with the public economic order.⁵⁸ According to Jaime Guzmán - “in this matter, the basic principle of Catholic thought, is that of subsidiarity...according to this principle, the State is prevented from performing any specific function that individuals or intermediary entities can accomplish on their own. As a consequence , in the economic field free initiative arises.”⁵⁹

In this way, the State subsidiarity can be associated with the humanist and Christian conception of society, just as much as with the capitalist order of the economy.⁶⁰ Following the social doctrine of the Church, this principle has a communitarian root, fostering social participation, the solidarity between individuals and the assistance amongst themselves- as very well identified by Finnis-⁶¹ and followed by some local constitutional doctrine.⁶²

But this interpretation is not the one that has triumphed in Chilean constitutional law. Because the scope of the autonomy constitutionally granted, is limited “to develop in terms of a

⁵⁸ Specifically starting from the constitutional dispositions of article 19 No 21 to 26 Cea: Volume 1 pg. 135

⁵⁹ Jaime Guzmán, cited by Cristi, pg. 82

⁶⁰ Declaration of Principles 1974.

⁶¹ See Finnis, pg. 146. Like that, according to Finnis, the appropriate function of the associations is precisely to *help its members help themselves*, with the objective of choosing and carrying out the individual commitments

⁶² The chameleon-like form as explained by the editorial El Mercurio of Mach 24, 2016. In it, two members of a liberal think tank (but of democratic Christian origin) associate the subordination with the constitutionalism origin and with the papal letters, calling for us to maintain the sense of subordination.

legitimate autonomy [that is] in order to obtain its specific purpose.”⁶³ And such sentence is deceptive in the sense that hides *the elbow used to erase that which the hand has written*, given that settles a boundary between the proper sovereignty or political power and the social power.⁶⁴ The participation promoted by subsidiarity is social participation that impairs politics. The field of action of intermediate associations is respected just as long as these abstain from making material or subjective demands common to political rationality, and only while restricted under the formal rationality of the marketplace. *The specific ends cannot be political ends.*

Therefore, and following what was advanced in the eighties by Lechner, before building an attempt to diversify the action (in *arendtian* terms), the social power that is constructed through subsidiarity is a form of power naturalized by the market and another way to achieve immunity. Only then is it possible to understand the constitutional sanctions due to “poor use” of the autonomy established through article 23.⁶⁵ This norm punishes the participation of organizations in matters unrelated to its particular interests, creating a civil society individualized in groups with diverse but conflicting interests. Therefore, the recognition, protection and immunity of the intermediary groups –far from promoting participation in decisions and matters of general interest, prevents the rise of political subjects critical to the economic system and/or who could stress with their demands the spontaneous order of the market, appealing to a material rationality.⁶⁶

⁶³ Memorandum fundamental goals and objectives

⁶⁴ See Fundamental goals and objectives

⁶⁵ The intermediary groups of a community and its leaders who make a bad use of the autonomy granted by the Constitution, by improperly intervening in others activities separate from its specific ends, will be sanctioned in accordance with the law. The managing charges of the guild organizations are incompatible with the superior, national and regional managing charges of the political parties.

The law will establish sanctions that correspond to be applied to the managing guild organizations that intervene in the political bipartisan activities and to the leaders of the political parties that intervene in the functioning of the guild organizations and other intermediary groups as earmarked by law.

⁶⁶ See Lechner ,about rationality, distinction in Weber.

Actually, this is a basic principle imported from *hayekian* neoliberalism. According to Hayek, it is just an illusion to pretend that Parliament or the people can govern up to its last detail, a highly modern and complex society.⁶⁷ He asserts that even when the State has a de facto monopoly over certain services “a legal monopoly cannot be configured.” In his view, the government’s task is to maintain rule of law under the principle of subsidiarity: “the task of government is to create a framework within which individuals and groups can successfully pursue their respective aims, and sometimes use its coercive powers of raising revenue to provide services which for one reason or another the market cannot supply.”⁶⁸

The Chicago Boys used the idea that the crisis was caused by the lack of capacity of the state to coordinate the economic development in Chile⁶⁹, and successfully argued that the State’s action was intrinsically inefficient and coercive, paving the way for the resurgence of the libertarian ideal of social self-regulation through the market, in the sense of a ‘spontaneous order.’⁷⁰ Thus, the constitutionality of this principle responds to the devaluation of the social (political) responsibility along with the rise of individual responsibility, process that has been referred to as “the silent surrender of public responsibility.”⁷¹

II. The tension between the liberal rights and the *neoliberal* rights: the devaluation of freedom of expression

⁶⁷ Hayek pg. 144 vol iii)

⁶⁸ Hayek pg. 139 Vol III

⁶⁹ See Valenzuela

⁷⁰ (lechner gp. 13)

⁷¹ Neil Gilbert, Transformation of the Welfare State. The silence surrender of public responsibility (2005)

According to the majority of local doctrine, Chile has a strong liberal tradition of free speech, identifying its core with the proscription of censorship along with ulterior responsibilities.⁷²

Notwithstanding, neoliberal constitutionalism –under the form of a tutelary democracy and the subsidiarity principle, affects the way in which the fundamental rights are shaped, in particular the reach of freedom of speech. The neoliberal character of this right is expressed in the transformation of the expressive rights of the press into a privilege imposed against individual and collective expressive rights to receive information.

To explain the above, recall the eloquent words of Guzmán at the Commission for the Study of a New Constitution (hereinafter “C.E.N.C.” or “Commission”). The importance of the subsidiarity principle is revealed as the general principle that grants real freedom (over a merely formal one), and the one that has shaped the configuration -and devaluation- of several rights, such as education or health, and thus, it is necessary to extend it for the outlining of freedom of expression:

“where there is respect to the subsidiarity principle –true, real and in good faith- on behalf of the authority, there will be freedom, and where there is no respect there will be no freedom. [He regards] this is the core of the problem in

⁷² Article 19 No 12 of the Constitution [The constitution assures to every person:] the Freedom to express one’s opinion and to broadcast, without censorship, in any way and through any media, without prejudice of responding to the offenses and abuses committed in the exercise of such liberties, in adherence to the law, which must be quorum qualified.

The Law in no case establishes a State monopoly over the social media. Every natural or legal person offended or unjustly alluded to by any type of social media, has the right to at no cost to freely broadcast his or her declaration or rectification, under the conditions as determined by law, through the same social media under which such information was broadcasted.

Every natural or legal person had the right to establish, edit and support journals, magazines, and newspapers, under the conditions established by law.

The States, universities, and other persons or entities that the law determines, can establish, operate, and support television stations.

There will be a National Board of Television, autonomous and with judicial personality, in charge of looking after the correct operation of such media outlet. A quorum law qualified to show the organization and other functions and responsibilities of the referred Board.

The law will regulate a grade system for the cinematographic production for display.

respect to any matter, it is what we have been trying to do with property rights, when established as something different to the property right already constituted; it is what we have been trying to do with education; it is what we have been trying to do, somehow, with healthcare, in more modern term, due to the institution's own nature and belief that this is what comes in regards to this social right [in reference to freedom of speech]"⁷³

In this section the influence of constitutional neoliberalism is analyzed in the jurisprudence of the Chilean Constitutional Court. For such purpose, some constitutional decisions about freedom of expression rendered by the Court will be examined. In some of them, the subsidiarity principle is explicitly raised as a theoretical foundation to transform the space of action by the State, and to achieve the immunity of the communications market by enshrining and strengthening the judicial position of the media as intermediary groups,.

Freedom of information (STC 226 of October 30, 1995) is the first decision in democracy where the Constitutional Court develops the constitutional limits of freedom of information.⁷⁴ Four fundamental matters are decided: the coverage of the freedom to receive information, the State's duties, the right to reply in case of deliberate omission, and the limits of property over media. Out of these four topics, only the first three are developed, given that the limitation on the concentration of media was declared unconstitutional due to form matters.⁷⁵ Notwithstanding, through this decision the right to receive information is debased converting it into a superfluous right, *without teeth*: not only implicit, but rather limited and without a correlative duty.

Additionally, a group of decisions dictated in 2013 will be discussed; decisions that reveal the problems caused by the configuration of a marketplace of communications, and the

⁷³ Session 234 pg. 250 History of the Law

⁷⁴ Previously STC TVN, m Law of Telecommunications

⁷⁵ For not meeting the required quorum for its approval. Without prejudice that TC declared that it will not refer to the background arguments, if it announces that such limitations constitute an infringement to property rights...

argumentative confusion that implies justifying the press' privilege and the that of the media when these act exclusively under the criteria and logic of private enterprises.

First devaluation: exclude the media from the correlative duty.

In *Freedom of information*, the Court reviews the constitutionality of the draft bill about Freedom of Expression and Information and of Journalism that was being discussed in the Parliament. Article 1 subsection three of the bill referred to the right of being properly informed about different cultural, social or political expressions in society.

The Court declares it constitutional but under an important distinction. Even though it recognizes the existence of an implicit right of the community to receive information, this does not seem to be enough to justify the imposition of a correlative right to the media. Thus, the right to receive information is *only born once the information is provided*. Based on the Court's judgement, the duty to communicate is understood as a form of prior censorship, proscribed by the main core of freedom of speech as a right.

In support to this conclusion, the constitutional reasoning quotes the discussions of the C.E.N.C., regarding this right to receive information.⁷⁶ The 1976 Commission –like the Court in 1995- analyzed the legal effects of the right to receive information, the content and the subject of the correlative legal obligation. In one of the sessions of the C.E.N.C. president Enrique Ortúzar asked about the correlative duties to the right to receive information: “Does it imply the

⁷⁶ Unfortunately, it is not uncommon to refer to the discussions of the C.E.N.C. also known as the “Ortuzar Commission” in the jurisprudence of the Constitutional Tribunal, following an originalist form of interpretation, without prejudice to the fact that sustaining an argument based on the will of the constituents may result controversial today. Not only due to its appointment (on October 25, 1973), but rather because the 1980 Constitution project had a period of revision and change of hands in the State Board (of which there is only a partial registry of its records) and subsequently both projects were modified by the Board and the team of legal advisers, of which there is no information.

obligation to every social media to give all information? Or is the information given required to be truthful, timely, and objective?”. The response to such question is important to cite because it reflects the historical origins of an alliance between the economic, political, and communications interests.⁷⁷ Jaime Guzmán, who was the main drafter of the norm, asserted

“it cannot be sustained that the correlative duty falls upon the private social media given that its existence will depend upon the will of the those who create and maintain them. Tomorrow, media owners could well leave them and nobody could say that they are not fulfilling their constitutional obligation with the community. There is no reason why Mr. Agustín Edwards has the obligation to have a journalistic company. If he wants to have one, he can; and if he does not want to have one, he can abandon it. *It all depends on his will.*”⁷⁸

It is not by mere chance that Guzman had in mind the interest and will of Agustín Edwards Eastman when the extension of the right to receive information was discussed. The owner of El Mercurio (the most important newspaper in Chile) had the privileged opportunity to present his arguments and thoughts –through Arturo Fontaine A., the deputy-head of the paper- to the Sub-commission especially appointed to discuss the subject matter of media communications.

The legal position that is revealed as fundamental is that of the private media. Such position is the one that requires protection over the collective legal one of the population to be informed. From the commissioner’s point of view, it is just a contradiction to transform a liberty

⁷⁷ The history of the Chicago Boys takes us to the Cofradía Náutica del Pacífico Austral, an association founded in 1968 by Edwards and Merino (self-proclaimed Commander in Chief of the Navy) and openly declared a person involved in a military coup. See, Fontaine A. (The economist and the President). Another precedent about the importance of said media is that one delivered by the its own member and president of the CENC who (after discussing the lack of expropriation of the media) earmarks: “nonetheless, if “El Mercurio” would have been expropriated in the past regime, [I believe] it would have been difficult for the country to be freed from the Marxist regime.” In turn, the Vergara study (published in 1985) analyses the first stage of the regime when the divergence between the restorer and refounding path existed, and it emphasizes the influence that -through its editorials- El Mercurio exercised to establish the refounding mission of the regime.

⁷⁸ Session 231 (indented)

into an obligation “because nobody has the right to be informed with news that nobody wants to provide.”⁷⁹

In turn, the Constitutional Court said that there was an implicit right to receive information, but following the discussion that took place almost twenty years before in the Commission, concluded

“there is no correlative obligation to inform, rather what is assured is the right to receive information that is given [...] meaning that this subsection plays a role when someone informs; given the information, there is the obligation to ensure its proper reception” (c. 18)

Therefore, the right to receive information relies on the information broadcasted by the media. Rather than establishing an analytical distinction regarding the implicit right, the Court simply associates it to the freedom to inform of the intermediary entities or private media, without explaining in which way this right is different from the freedom to inform. And, once the right to receive information is converted into a freedom to inform, the Court ends by reinforcing the immunity of the information marketplace through the principle of subsidiarity, given that:

“no legal norm can force individual and juridical persons to provide information or opinions or to interfere in the autonomy granted to the intermediary groups, as social media” (c. 22)

Second devaluation: Exclude the State from the correlative duty

Article 9 of the draft bill established the State’s responsibility to ensure pluralism in the information marketplace and “the effective expression of the different opinions, as well as the social, cultural and economic variety of the regions.” This norm is declared unconstitutional by

⁷⁹ Ovalle, session 234

the Court, because it interprets in the layout the *possibility* of legitimizing the imposition of an obligation onto the media, the ones that have been granted immunity as being intermediary entities (by the principle of subsidiarity):

“from the moment that the State imposes the obligation to equalize the information flow in order to achieve an ideological or cultural pluralism, *and for such purpose has to impose obligations to the social media*, there is an undue intrusion in the decisions that the media can take. This interference not only constitutes a clear violation to the autonomy of the media –autonomy recognized, protected, and guaranteed by the Constitution- but also, a direct violation to the freedom of expression and freedom to inform- freedom that is recognized, assured and protected by the Constitution in article 19, No 12-, without prior censorship in any way and by any means.” (c. 31)

The Court’s decision implies that the recognition of an obligation to grant pluralism is a threat to the freedom-autonomy that demands the non-interference of the state. There is no other legitimate end that justifies restricting the autonomy of the intermediary groups, but only moral reason, the public order or national security. (c. 29). Nor it is considered the possibility that the State can carry out such duty through incentives, or development or strengthening of a line of *public media*.

Third devaluation: Limiting the reach of action

Finally, the draft bill included the right of reply to the individual or legal person that “had been deliberately silenced with respect to a fact or opinion of importance or of social transcendence” (article 20 second subsection). This right was an extension of the constitutional right of reply acknowledged to every person who was offended or unjustly alluded to by any form of social media outlet, that his or her statement or reply be freely and at no cost broadcasted by such media outlet (subparagraph 3, article 19 No 12). In this case, the provision extended the terms by which the access to the media outlets was guaranteed. The action contemplated by the

bill, corresponded to a true *juridical power* just as accurately defined by the court (c.____). Accordingly, it recognized that any member of the community affected by the deliberate silencing of a transcendental social matter, could access the media outlet space, justified in the public function of the media.

However, the Court's reasoning did not refer to the consequences of having a public interest service provided exclusively by private agents. Nor did it consider relevant to analyze the responsibility that media has in the exercise of its communicative *power*. Its arguments, however, centered in the matter of autonomy, as an extension to the subsidiarity principle. Again the legal position of the media was recognized and protected, since because they are intermediary entities, they are autonomous and free to inform on whatever they want given that their activity

“supposes free choice -without anybody's interference- of the news or broadcasted opinions, as the media owners consider them to be important, transcendental, or relevant, in agreement with its principles or editorial line. Interference with them is precisely an invasion on this freedom and on the media pluralism pursued”

Additionally, the Court accepted the argument that challenged such right because it harmed the property and threatened the power of use and enjoyment, “by gravely interfering its managerial authority concerning to what is to be informed or not, the opportunity of disclosure or broadcasting, and its form, duration or reach” (c.____)

The reasoning to defend the immunity of the media' legal position becomes repetitive: the freedom to inform is similar to the autonomy of the intermediary groups, and this latter one will equip the right to property. And, the immunity- sometimes so necessary to defend the freedom of the press- is transformed in this decision into a privilege of the private media that lacks a.

Fourth devaluation: the confusion between private interest and public entertainment

This is one of the more controversial subject matters, due to the conflicting reasoning rendered by the Court in a considerably short period of time. Four decisions issued by the Constitutional Court in 2013 about television regulation are analyzed.

The decision *People meter I* and *People meter II* (STC 2358-2013 and STC 2509-2013) refer to the constitutional challenge of the policies that sought to prohibit or limit the use of people meter, aimed at improving the quality of television and to “avoid the manipulation of the television programs by changing its original content; the exploitation of a sexist image of women and the artificial raise of publicity costs.”⁸⁰

In *People meter I*, the Court review the constitutionality of the absolute prohibition to the use of people meter. It was declared unconstitutional on January 9, 2013. Following this decision, Parliament played down the prohibition setting a definite range of time in which it could be used, introducing an *overnight* system. On September 24 of the same year, *People meter II* was issued. In both decisions the Court decided that such absolute prohibition of use or its limitation, were unconstitutional, given that it would result in disproportionate and not reasonable policies (c. 15). Further, in their reasoning, those policies infringed the freedom to operate television stations, the autonomy of the intermediary groups, equality under the law, and the right to develop any economic activity.⁸¹

⁸⁰ (*People meter I*, c. 9)

⁸¹ In the latter, it deals with the legal position of the enterprises that promote the service people meter. In the following, the quotes of reasoning by the constitutional judges refer to the STC 2358, *People meter I*. In this decision a precaution by Judge Peña is presented (she considers the measure as a form of prior censorship) and the dissent of Judge Carmona (drafter of the dissent), Fernandez, Viera-Gallo, and Garcia. In *People meter II*, the

First, the majority analyzed if the policy complied with proportionality. It arrived to the conclusion that such did not meet the necessary requirement of the test, due to lack of evidence showing the prohibition would have a bearing on improving the quality of television as a legitimate end. Along with this, the sole hypothesis in which the proposed regulation was based on, was considered as elitist, since it implied that the people subject to the measuring system “will be fatally attracted to triviality and vulgarity.” But rather, for the Court the online measuring system was neutral given that it only reflected trends (c. 26), and it was especially useful having in mind the well-known volatility of the audience (c. 16). Then, the formal economic rationality was applied to legal conflict analysis: the television industry requires technological measures to discover the interests and satisfy the consumers-audiences wishes. The logic of supply and demand was directly appealed by the Court. In their words, this system allows to find out

“trends or drifts of the audience, *with the purpose of satisfying the television programing receptor’s expectations and tastes*. And this is a lawful process, which does not hinder the entry nor distorts the full freedom of the media to send its message” (c. 9)

The use of people meter was as reasonably and necessary as a market survey or a *focus group* for the marketing department of a company that sells toaster ovens. Because, according to the Court’s logical reasoning, television as a private enterprise is financed through publicity and it cannot be indifferent to the competition for increasing its audience.

Furthermore, the audience appears as a merely passive group that receives the final product from television, under the classical model of mass media communication, characterized

drafting of the decision is done by Minister Aróstica, the precaution by Minister Romero, and the dissent by Minister Carmona.

la prevención el Ministro Romero, y la disidencia la redacta el Ministro Carmona.

by the unidirectional information that extends from the centers of production to the peripheral receptors.⁸²

Notwithstanding the above, mass media remains to be considered as exercising a public interest function, not only as the guardians of power and the so-called ‘fourth power of the State’, but rather because of their influence to define the agenda and as a means of constant education and information of public opinion.

Therefore, the Court’s reasoning is surprising, because it completely forgets the different functions of public interest that are alluded to the television as media, and inexplicably ignores the arguments where it previously affirmed the exceptionality of the television’s regulation (restricted ownership, far reach, impact, and public purpose, cited by STC 56-1988). These special features have also been used to justify the imposition of certain public obligations, such as the free broadcasting of political propaganda during election periods (STC 56-1988 and 2487-2013). Unlike the cited reasoning, the Court argues based on *television as an industry*, and in the freedom to *establish, operate and maintain a television station* (article 19 No 12, subsection 5th) which protects the position of the communications’ entrepreneur. Following *Freedom of information*, such legal position is reassured through the principle of subsidiarity that protects the autonomy of intermediary groups. Thus, it is stated that the choice over the use of technological tools, like *people meter*, is part of the autonomous managerial decisions covered by editorial control (c. 15); that also qualifies within the capability of *operation*; or as the accessory rights of the licensee; and as a legitimate way of directing the intermediary group where there can be no State’s interference (c. 19).

⁸² Benkler, Castells.

An additional problem is the conflicting argument used by the Court when justifying the use of people meter in the same line as it is justified the protection of the source, as a classical right of journalism. For the Court, public interest justifies the former and the latter. Then, as oppose to what was argued in subsection 9 - where freedom of expression of the media is justified as a way to satisfy the merely passive audience's wishes-, in subsection 17 the Court shifts from this position and its reasoning is over the effects that it has in the development of public opinion as an *active agent*. Here, television is not justified as service of entertainment, but rather as necessary to

“protect a space of public opinion through the free flow of information that sustains the democratic social control actions of an organically established power and allows the full development of people's subjectivity, through their *opinion, expression, and participation*” (c.17)

The dissent notices such contradiction. The minority advise that the constitutional granted autonomy is a mean to broadcast contents to third parties and not for practicing an economic activity. Although the former is licit, its practice involves a public function. The Court's reasoning evidences that television is a form of *media* outlet in the most literal sense of the word, given that through it the fundamental right to freedom of expression is exercised, and it must consider the general interest of the community (quoting STC 56-1988). Therefore, according to the dissent, if one sacrifices the exercise of such right to obtain greater utility – this is, the freedom to inform for the economic freedom- “the autonomy is distorted” (c. 29 dissent) and there is no valid justification to maintain immunity, or as affirmed by the Court to respect “the intangible sphere of operation” (c. 14).

The dissent's position in *People meter I* became the majority's opinion in *Franja electoral en Primarias* (STC 2487 June 21, 2013). In such decision, the constitutionality of the

obligation to broadcast political propaganda for the presidential primary election period was discussed and upheld. Unlike *People meter I*, the Court affirmed the exceptional nature television regulation has. Such media outlet cannot be regarded as any other intermediary group “completely out of the reach of legislative intervention” (c. 46). It is a privileged group, given that “not just anyone can carry out television broadcasting, rather only those who are granted concessions. Those who have them can use the assigned radio-electrical spectrum.” (c.55)

However, inexplicably such reasoning is completely omitted by the majority in *People meter II* (of September 2013) who decided unconstitutional *people meter overnight*. In this case, the majority followed the same reasoning of *People meter I*, without taking into account the position sustained by *Franja electoral en Primarias*.

Just a month after *People meter II*, the court resolved STC 2541 *Televisión Digital*, where it reviewed the constitutionality of the bill that “allows the introduction of digital ground television.” The unconstitutional petition focused on four subject matters: the definition of pluralism, the broadcasting obligation regarding public interest campaigns, the granting of a second concession to Television Nacional de Chile (TVN), and the *must carry* obligation.

In this decision, the Court returned to a public interest justification to uphold the regulation. For example, in relation to the broadcasting obligation of public interest campaigns, the interest protected by the Court is that of the community to be informed. According to the Court, in this case there is no conflict between the rights of the broadcasting entity and the receiver of information, given that both the broadcast obligation and the right of freedom to inform “have the purpose of maintaining the community informed.” (c. 23). The justification of public interest is found on both side of the coin. It is not enough to just assert that television

companies provide of a *public utility* service, but rather recognize that because of it, obligations imposed over the media and based on public interest, must be uphold as constitutional.

III. Partial Conclusions

The legal-constitutional form adopted by that freedom of expression is not innocuous to define the reach of social transformations. Following Hirschman, the purpose of public action refers to a *future state of the world*; through a bill, the promotion of a public policy, or the results of an election. It is not about an individual preference acquired *ex ante*, but about a process through which people work together with others and a factual result that depends on the community's imagination to think about social change.⁸³

Under the Government of *Concertación* neoliberal regulations won legitimacy, both electorally and discursively,⁸⁴ resting upon a media system that reaffirmed the construction of such consensus,⁸⁵ and regardless of some critical and isolated opinions in the 90's.⁸⁶ Nowadays, the individual right to the freedom of expression is guaranteed, in the sense that the public sphere is not perceived, directly (or indirectly), to be threatened by positive State intervention. The

⁸³ Albert O. Hirschman pg. 324

⁸⁴ (Boeninger, 2014). It is affirmed by the Secretary of State to the Presidency, Nicolás Eyzaguirre (ex-finance minister Ricardo Lagos 2000-2006): "First, nobility obligates: even though the element of democratic approval of the process had to arrive sooner rather later, because then no reform is viable, I believe that this confrontation with a growing dynamic module, that has brought so much prosperity, begins with Hernán Büchi not with the Concertation. He understood that you had to have an exporting model, a responsible monetary policy to ancho inflation, a private economy, a tributary system that encouraged savings, and all these things where deepen during the Concertation." Interview Capital Magazine, ed. No 415, March 4 to March 17 in: <http://www.capital.cl/poder/2016/03/03/100317-eyzaguirre-los-que-se-espantan-con-las-reformas-estan-ancrados-a-un-modelo-rentista> (March 3, 1916).

⁸⁵ In part, that is how Tironi and Sunkel recognize it, with regard to the role they've had in "the most recent process of shaping the basic consensus around the pluralist democracy and the open marketplace economy" Tironi, Sunkel (Cep Chile)

⁸⁶ (Moulian, Garretón, Jocelyn-Holt)

Executive power does not control the content broadcasted or written in traditional media (press, radio and television⁸⁷) or on the Internet,⁸⁸ but neither owns or has influence over any massive media outlet. There is no public sector in the radio,⁸⁹ nor in the written press- given that the State sold in 2013 its majority stake in the newspaper *La Nación*-⁹⁰, and the public television channel- even when it is state owned, is self-financed, managed like any other private entity, and currently is facing a crisis. Coherently with a neoliberal logic, the state transformed its functions also in the communication sphere, becoming the free marketplace of ideas custodian.

In spite of this market of ideas (that reached an ideological monopoly during Sebastián Piñera presidency, in the case of the press)⁹¹ since the social movement of 2011 critical analysis have arise,⁹² claiming the crisis of neoliberal system and ideology. Additionally, in 2014 the reformist project presented by the *Nueva Mayoría* (before know as *Concertación*) assumed the presidency with a robust electoral support. Their platform included cost free system for higher education, promoted a tax reform, the change of the binominal electoral system, labor reform, decriminalization of abortion and a new constitution.

The problems that the government has faced to implement its reformist agenda, reveal the political problem of a public sphere exclusively under the market institution and controlled by

⁸⁷ It is appropriate to emphasize that Television is the only media outlet that has a regulating organ. The National Board of Television is an autonomous public service, functionally decentralized, well-endowed with legal personality and its own patrimony, created by law No. 18.838, published in the D.O. on September 30, 1989, according to what is prescribed in article 19 No 12, subsection 6.

⁸⁸ En relación a este último ámbito, se destaca que Chile ha sido el primer país en América Latina en consagrar el principio de neutralidad en la red para los usuarios de Internet, Ley No. 20453 de 18 de agosto de 2010, que garantiza el libre flujo de información en internet.

⁸⁹ In Particio Aylwin's administration participation in the National radio was sold. See Human Rights Watch report.

⁹⁰ With the return of democracy, the government transferred the control of the newspaper La Nación to a new director chosen by Patricio Aylwin but equipped with editorial autonomy. See Human Rights Watch Report / Freedom House. Since 2010 the newspaper's written edition had come to an end; and, finally in 2013 the State sold its majority stake.

⁹¹ Additionally, Piñera control the television station Chilevision (2005-2010). See Couso analysis about the written press marketplace.

⁹² (Atria et. al., Cristi and Ruiz-Tagle, Mayol, Mayol and Ahumada, Ruiz, Ruiz and Boccardo)

private agents. When freedom of information is understood as negative autonomy, the rationality of the expressive agent will respond to a gain standard and the possible risk is the uniformity of content (also depending on other factors). Under the system of massive media communications financed through advertisement, it is reasonable to expect that before focusing on feeding the transformative imagination of society and the analysis of the conflicts and interests that it supposes, the media will choose to broadcast a more neutral informative product, that will keep the audience's loyalty and will not generate rejection.

But also, when it is the neoliberal consensus what becomes questioned, the media has shown the power that is implicit in its communicative role, showing itself as a true political opposition to a number of government initiatives. Freedom of information has been theoretically and historically considered a power rather than immunity, with regard to its influence in the formation of public opinion. In particular, not only had a role in the definition of the refoundational path taken by the dictatorship, but also took part in weakening the dictatorship's social support and thus leading to its end. Then, it can be well understand why a political analyst simply suggested in 2015 that “you cannot make structural changes without the media,”⁹³ while another in 2014 anticipated that “the forthcoming battle in Chile is that of the media,”⁹⁴ and the constitutional devaluation of freedom of information results worrisome.

⁹³ Interview with Ernesto Águila, in El Mostrador, August 25, 2015: <http://www.elmostrador.cl/noticias/pais/2015/08/25/no-se-pueden-hacer-cambios-estructurales-sin-medios-de-comunicacion/>

⁹⁴ Héctor Soto, August 17, 2014: <http://voces.latercera.com/2014/08/17/hector-soto/la-batalla-que-viene/>