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# Social coordination through public policies: the Chilean case

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**S**ocial complexity involves inter-relationships between various actors and systems that enjoy considerable autonomy to define their own interests and operating procedures. This provides a backdrop for the development of models of social coordination that combine autonomous actors and systems pursuing coherent objectives. Drawing on examples from Chile, this article reviews: (i) policy-network models (public works concession system); (ii) deliberation systems (presidential advisory commissions); and (iii) reflexive law systems (international trade arbitration). It is found that the high level of reflexiveness of these models makes it possible, albeit with limitations, to combine principles of autonomy and coherence in the implementation of public policies.

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# I

## Introduction

From sociological point of view, one of the most characteristic processes in contemporary society is its growing trend towards greater social complexity (Habermas, 1990; Luhmann, 2007). This can be described in three dimensions:

- (i) At a practical level, it involves the proliferation of multiple private, public, quasi-private or semi-public organizations; national and supra-national corporate stakeholders; transnational protest movements; local or regional representative groupings; and an individualized mode of participation in a variety of differentiated social spaces that are not always consistent but often fragmented.
- (ii) In the social dimension, the trend towards greater complexity (hereinafter referred to as “complexification”) means that each of these fields organizes itself on the basis of its own interests and operating procedures, the most likely outcome of which is a collision of substantive interests and conflicts between each field’s procedures.
- (iii) Lastly, in a temporal dimension, increasing social complexification means that substantive interests and their related procedures establish precise temporal priorities with their own self-regulating mechanisms to achieve the fulfilment of their own objectives, pursuant to requirements ensuring the continuity of each field.

In a word, complexification involves the differentiation of contemporary society in terms of systems and actors that have increasingly autonomous expectations and operating procedures.

Latin America, and Chile in particular, have not been immune from this complexification process. In Chile, over the last three decades at least, classical labour-union organizations and grassroots actors have been joined by a variety of new groupings based on diverse interests: youth groups, senior-citizen groups, feminists, homosexuals, migrants, environmentalists, local community groupings; activists in the fields of urban, consumer, human and citizens rights and others of a neo-religious nature; artistic communities, and

various types of indigenous and student movements. In addition to this, public agencies have diversified to serve the interests of these actors (new ministries, under-secretariats, superintendencies, regulatory bodies); mechanisms such as negotiating forums, expert committees, study commissions, ethical commissions; and a proliferation of so-called third sector organizations, non-governmental organizations (NGOs), national and transnational economic organizations, and diverse private agents operating in various transnational social fields (Domingues, 2008).

*All of this concrete diversification of systems, organizations, and actors spawns substantively mutually contradictory interests, which gain autonomy by establishing their own operating procedures and temporal agendas to achieve their expectations. This begs the question as to the State’s capacity to use public policies to absorb and articulate various demands that are mutually conflictive and have expectations of fulfilment that do not allow much temporal flexibility. The concept of public policies can be seen as a set of administrative and legal measures deployed within the State framework to address social problems and guide agents towards certain forms of conduct (Kraft and Furlong, 2009).*

In the twentieth century, public policies in Chile followed contradictory models in different historical periods: one of these was of the centrist-state type, involving considerable State intervention of a developmentalist orientation, based on planning and aimed at incorporating the middle classes and low-income sectors (1932-1973). Another model was defined by the withdrawal of the State and an emphasis on macroeconomic policies (1973-1989) (Arellano, 1985). The ensuing period was characterized by a dual movement: firstly, the (political) attempt to return to the pre-1973 centrist-state formulas and, the structural impossibility of doing so in a model based on neoliberal reforms. This can be seen particularly in the domains of education, labour, collective goods and services, health, pensions and social security systems, all of which involve high levels of privatization in their mode of operation (Hecht-Oppenheimer, 1993).

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The hypothesis of this article is that, given the impossibility of recreating a centrist-state matrix based on public-policy planning, and the high level of autonomy gained by different systems and actors, a new alternative for deploying public policies started to emerge in Chile from 1990 onwards, in which State's guiding role uses public policies to combine the coordination of systems and actors (unlike centrist-state intervention), with substantive interests and autonomous operating procedures.

To develop this hypothesis, this article firstly identifies the key elements of a view of social

coordination implemented through public policies in complex settings (section II). It then reviews three coordination models, in terms of their theoretical underpinnings and examples relating to their emergence in Chile: the policy networks model for the case of the public works concessions system (section III); the deliberation systems model for the case of presidential advisory commissions (section IV); and the reflexive law or options policy model in the case of arbitration on trade issues (section V). The article ends with a provisional assessment of these models in Latin America (section VI).

## II

### Key elements for a social coordination perspective

Drawing on principles of consistency and autonomy, Norbert Lechner (1997) has identified three basic forms of social coordination: political coordination, market coordination, and coordination by networks. Characteristics of the first include centralization, hierarchy, and an exclusively public orientation; the second form is identified by its decentralized, horizontal, and non-directed nature. The third form, which combines vertical and horizontal communication, involves reciprocal dependency, and aims to articulate interests in a common subject through competitive cooperation. This article reserves the term "coordination" solely for the third case. Expanding this concept to embrace hierarchical-state regulation and market modes merely dilutes its specific and innovative nature. What Lechner calls "political coordination" has generally been recognized as State intervention or social control (Beyme, 1994); and, for the case of "market coordination", Hayek (1986) referred to "Catalactics" or market self-regulation. The fact that market agents also display autonomy of interests and procedures, makes them a case for analysis, rather than the social coordination paradigm. Coordination, in the sense used here, only arises when some public or private agent seeks to relegate the autonomous dynamic of actors and systems by directing their performances in practical, social, and temporal terms.

The concept of coordination as proposed thus needs to be distinguished from other models of public-private relations:

- (i) Developmentalist interventionism, the preferred model in the Latin American context for much of the twentieth century, which involves State control of the productive structure.
- (ii) Corporatist control, which is distinguished by State co-option and the definition of objectives and orientations for the action of private agents (visible in populist settings).
- (iii) Normative institutionalism, which pertains to analyses of conflicts of interest and power regulations.
- (iv) Self-regulation, which is characteristic of the functioning of markets in neoliberal contexts.

Coordination involves highly complex relations between actors and systems, their substantive and procedural autonomy, and mutual asymmetry of interests. It therefore recognizes that these actors cannot be directed in an authoritarian way (as in the interventionist and corporatist model); and that conflicts of interest can be addressed by deliberation and not only through power transactions (as is the case in normative institutionalism). Nonetheless, coordination diverges from pure self-regulation (which is specific to the emerging market order) to establish general criteria for pursuing specific aims in relation

to problems of public interest. Coordination is a balance between autonomy and coherence.

This balance seems an appropriate way to address the complex dynamic of actors and systems. Two dimensions present themselves in this regard: one sociological and the other historical. The sociological substrate of social coordination is found in the deployment of the functional differentiation process, namely: "The constitution of various relatively autonomous functional systems, structured around certain internal rationales" (Lechner 1999, p. 49). Its historical substrate relates to the crisis in the centralized planning model and the European welfare state, which led to financial atrophy and the "juridification" of social domains known as "eurosclerosis" (Willke, 1995; Peruzzotti, 1999, for the Latin American case). The process of functional differentiation gives rise to systems, organizations, and actors that question the State's capacity to direct their actions through authoritarian planning or interventions aiming to define their own interests and procedures. The planning crisis raises the need for an alternative which, respecting systemic autonomy, is capable of targeting its operations on the parallel achievement of expectations. In the debate on social coordination, three candidates fulfilling these conditions have clearly emerged: policy networks (Mayntz, 1992 and 1993; Lechner, 1997; Messner, 1999; Scharpf, 2001; Heydebrand, 2003), contextual orientation through deliberation forums (Willke, 1995, 1997), and the reflexive law or policy options model (Teubner, 1993). In synthesis, as social coordination strategies, all of them:

- (i) Involve the capacity to introduce coherence in the inter-relationships between autonomous systems and actors, steering them towards specific tasks.
- (ii) Develop a common vision around a problem area with a view to constructing positive-sum relations.
- (iii) Promote a tolerable level of self-limitation on autonomy, without this putting the core of each participant's interests at stake.

- (iv) Are made operational by articulating procedures rather than through generalized regulatory principles.
- (v) Seek to increase the reflexiveness of systems and actors by considering the consequences of their autonomous operations.

Social coordination through public policies thus involves a combination of two principles: firstly, the coherence that can provide a panoramic view of the interests and procedures of various systems and actors; and secondly, the autonomy for them to define their own interests and to self-organize (Scharpf, 1993; Mayntz, 1993; Willke, 1995). Coherence is provided by State view of social problems; autonomy pertains to systems and actors in complex situations. By combining the two, the aim is to create hybrid zones, in which public policies can promote and guide the production of a good or service, without this meaning the centrist-state intervening in autonomous systems and actors to achieve that. While coherence aims to establish coordinated efforts between the parties involved, autonomy seeks to enable the different systems and actors committed to obtain outcomes for their interests and to operate with their own procedures in most cases. Coordination through policies is, in this sense, a double-contingency situation (Luhmann, 2007); in other words, both State operations and those of autonomous systems and actors maintain their differentiated expectations, but are linked concretely, socially and temporarily in a policy issue, from which they can obtain differentiated but coordinated outcomes. This is a positive-sum aspiration, rather than a zero-sum game. Social coordination, in this sense, responds to the integration compulsion of centrist-state planning-based policies, while rejecting the impossibility of a "common view" of social problems that are relevant for the actors involved (Willke, 1995, 1997).

The following sections individually describe three coordination models: policy networks, deliberation forums, and reflexive law. Their functioning is exemplified with Chilean cases drawn from the last decade.

### III

## The policy networks model and its emergence in Chile

The topic of the inter-relationships between autonomous mechanisms has a long tradition in organizational analysis, in which dichotomous relations can be distinguished (Hasenfeld, 1972), action sets (Whetten and Aldrich, 1979) and organizational sets (Granovetter, 1973). When applied to the policies problem, this approach gives rise to the policy-networks model. In principle, this involves defining rules for fulfilling commitments between public and private agents, which allow for a distribution of the costs and benefits of a common decision or solution of problems—rules that require participants to voluntarily restrict their freedom of action in each case. This can lead to a model of organizational identities, competencies, and mutually accepted spheres of interest (Mayntz, 1992, p. 27 and ff.). There is no single definition on this subject, however. David Marsh and Rod Rhodes (1992) distinguish between policy networks among communities (few participants, strongly integrated, with high levels of continuity and focused on one or two shared interests), and thematic policy networks (larger number of participants, multiple interests, and greater conflictiveness).

Tanja Börzel (1998) has described two fundamental trends in detail: the German case, which sees policy networks as an alternative form of coordination to the hierarchical control and the market; and the Anglo-Saxon tendency that conceives of policy networks as a model for the State-society relationship in a given area. Mark Bevir and David Richards (2009) draw on ethnographic studies to add a third type, the de-centred policy network, based on the traditions and situated agency of the participants. A similar trend is followed by Pater de Leon and Danielle Varda (2009) with their notion of collaborative policy networks, in which they review not only the composition of actors but also their degrees of institutionalization and discursive exchanges.

The approach has also been extended to coordination problems in transnational spaces, such as the relation between multiple governance levels—local, regional, national, supra-national, global (Scharpf, 2001; Pal and Ireland, 2009)—or to legitimizing

topics relating to global constitutionalism (Kjaer, 2009). Nonetheless, these trends can be defined as “a set of relatively stable relationships which are of a non-hierarchical and interdependent nature, linking a variety of actors, who share common interests with regard to a policy and who exchange resources to pursue these shared interests, acknowledging that cooperation is the best way to achieve common goals” (Börzel, 1998, p. 254).

Joop Koppenjan, Kars and van der Voort (2009) have clearly identified the political-sociological problem underlying this model. Firstly, political-democratic actors stress the relation between principal agents and political authorities, while the relevant execution decisions are taken at decentralized governance levels (private, quasi-private). Secondly, decentralized actors have the expertise and capacity to pursue their objectives (again Willke, 1995), but they find it hard to generate political support to avoid interventions from above. In this sense, a policy network can be seen as a linkage between the vertical nature of representative democracy and the horizontal nature of multiple forms of governance among private actors outside the domain of representative democratic relations. To achieve this linkage, Koppenjan, Kars and van der Voort (2009) propose developing a framework setting to regulate relations between participants and define the procedural limits of joint action. In doing so, they have to face three types of problem: complexity, interdependence, and the dynamic of any policy issue. The first of these must be overcome through a constant dialogue between the participants; the second, by considering the framework of conditions as loose coupling (Weick, 1976), which allows for deviations in response to possible contingencies; and, the third, through openness to learning based on the internal dynamic of policy implementation.

Even in the case of loose couplings, policy networks contain elements that encourage their maintenance. One of these is mutual resource dependency: funds, legitimization, executive capacities, information, and political-institutional elements (Park, Rethemeyer and Hatmaker, 2009); other very important elements are

socio-structural resources, in other words “patterns of communication and resource exchange between three or more actors” (Hatmaker and Rethemayer, 2008, p. 430), the stability of which depends on the returns accruing to the people sustaining them. The social capital of the participants would also contribute to a better network performance and thus to its continuity (Sandström and Carlsson, 2008). Nonetheless, an essential aspect of network operations seems to be that they function by producing collateral goods—goods that the State wants to produce but it cannot owing to a lack of resources and expertise, and private agents do not produce owing to the lack of an appropriate framework of conditions and guarantees against the emergence of free riders (Willke, 1996). The term “collateral goods” represents a structural reformulation of collective goods, whose lack of competitiveness discourages their production. In policy-network terms, collateral goods involve mutual (public-private) resource dependency, a framework for their operation, relatively stabilized patterns of communication and exchange, focus on a policy issue, and intensive use of knowledge and executive capacities. The infrastructure concession system in Chile reflects these characteristics.

Lack of financial resources, specialized knowledge and executive capacity, compounded by the infrastructure deficit that prevailed in Chile in the early 1990s, were key incentives for the development of collateral goods in the public-works sector. Until the passing of the 1996 Concessions Law (MOP, DS No. 900), financing and execution were in State hands. In the late 1970s, however, outsourcing was introduced for the building and maintenance of public works, but the design and management of the works remained centralized (Engel, Fischer and Galetovic, 2001). Under the concession system, the public sector basically plays a regulatory role, while other functions are in private hands in the various regulatory domains: highways, airports, water systems, prisons, ports and others.

As previously stated, this is a policy network in formation. Public and private agents are brought together to produce collateral goods under a specific regulation, in which the costs and benefits are distributed in a self-regulated fashion by a legal and deliberative framework. This consists of the relevant legal instruments (Concessions Law, regulation, mandate agreement, bidding documents, technical bid and award decree), standard build-operate-transfer (BOT) type contracts, or design, build, operate, transfer

(DBOT) type contracts, and conciliation and arbitration commissions. While the first two of these contain contract award and implementation procedures, the latter target the disputes that may arise in the execution and operation phases (Figueroa, 2003). The deliberative space that these two mechanisms open up is crucial for their constitution as a policy network, since they afford reflexivity to the specific legal framework in response to the changing conditions in the contractual environment. With the conciliation panel particularly, patterns of communication and exchange are stabilized between agents in response to disputes that arise and, if not resolved, are heard by the same commission now acting as an arbitration commission. Both parties can appeal to the conciliation panel: for contractual non-compliance for reasons of force majeure or destruction of the works, for example, in the case of the State; or because of changes in services or rates, delays caused by the State, or suspension of the concession, in the case of private agents (Figueroa, 2009).

A framework of this type may seem inflexible for a loose coupling of actors. Nonetheless, there are broad margins of flexibility and strong incentives to form policy networks:

- (i) BOT-DBOT type contracts involve private agents acting in consortia. This does not involve direct outsourcing by the State; private actors self-define their partners and roles.
- (ii) The reconciliation panel consists of “university professionals”, in other words experts that are appointed by the parties, but not necessarily related directly to them.
- (iii) The commission decides on its own rules and applicable procedures, as well as its evidence, complaint and notification mechanisms.
- (iv) Any other parties may request establishment of the conciliation panel.
- (v) The concession holder may choose between an arbitration panel or the Appeals Court of Santiago, if within 30 days there is no conciliation (DS MOP No. 900 art. 36; Also Presidential Message No. 358-355, 2007, p. 14).

These elements are characteristic of policy networks. Firstly, knowledge is distributed in projects involving high levels of complexity and technological investment. Not only is the State aware of its limitations in this regard, but the formation of consortia and expert panels (conciliation panel) reveals the distribution of knowledge between private agents. Not only does social capital contribute to the performance of the

network, but also and mainly, to cultural capital in the form of knowledge (Willke, 2007). Secondly, the self-constitution of the panel in terms of rules and procedures, and the flexible dispute settlement channels that it offers, reveal an operation based on an “autonomy of will” of the parties (Mereminskaya and Mascareño, 2005), which indicates a reflexive exercise of self-linkage and self-limitation on the part of the actors involved. Thirdly, this means that the widely debated issue of contract renegotiation (Guasch, Laffont and Straub, 2007; Rivera, 2008; Engel and others, 2009) is inherent to contracts of the BOT type and the flexible nature of a policy network. Numerous risks flow in them and raise the dilemma of proceeding or not proceeding (*go/no-go*), which is a problem of risk modelling and, hence, knowledge management (Ock and others, 2005). The proliferation of side agreements is an outcome of this risk management, and the draft amendment to the Concessions Law was its institutionalized response.

This amendment draws attention to certain constraints on consolidating a policy network. It proposes to create a concessions council as a consultative body to guide policy, and therefore, formulate meta-decisions that involve both representatives of various public agencies under inter-ministerial coordination, and independent “specialists” from the public sector and concession holders, but appointed centrally by the President of the Republic (Presidential Message, No. 358-355, Art. 1 No. 2).

Fundamental in any policy network is the multiplication of observations, particularly on public-works issues that have repercussions for other fields. Moreover, knowledge incorporation is decisive for better network performance. Nonetheless, a failure to include private actors in the process makes governance relations vertical and imposes a constraint on the decentralized nature of a policy network. It is not only

concession-holder representatives that are excluded but mainly the public affected by the works; and a failure to incorporate people who are potentially affected heightens the risk of decisions, since they are taken without explicitly considering the affected public (Luhmann, 2006). This leads to ex post reactions and, ultimately, higher transaction costs.

The introduction of a Superintendency of Public Works to inspect service levels (Presidential Message, No. 1.194-356, Art. 2), is intended as a response to these risks. Nonetheless, policy networks require deliberative mechanisms as well as regulatory ones. Nor is much achieved by changing from an arbitrator in equity (*árbitro arbitrador*) to an arbitrator in law (*árbitro mixto*) (Art. 36). The former has a broader space of deliberation, since it can diverge from the law by drawing on interpretive norms, general legal principles, comparative legislation and equity. In contrast, the latter must adhere to the law in its ruling on the substance of the issue in question (Figuroa, 2003). This excludes consideration of the network environment from arbitral decisions, and also the evaluation of international experience of these global issues, which is crucial for consolidating hierarchical policy networks.

In brief, if the key dilemma of policy networks is the encounter between the vertical nature of democratic-representative institutions and the horizontal nature of private forms of governance (Koppenjan, Kars and van der Voort, 2009), the changes proposed seem to stress lines of verticality rather than horizontality. This tends to reduce the degrees of freedom available to actors, and even their alternatives for participation in a policy network, with consequent disincentives to join it. If the legislation tends to reduce degrees of freedom once opened up, policy networks may become ritualistic and ineffective as a decentralized coordination mechanism.

## IV

### The deliberation systems model: the case of presidential advisory commissions

Forms of interrelationship between actors such as the Concessions Council, represent what are referred to here as deliberation systems (Beyme, 1983; Scharpf, 1993;

Willke, 1995; Parkinson, 2006; Whitman, 2007; Dryzek, 2009). These are commissions, councils, dialogue roundtables, forums, and discussion and expert panels

that bring together a variety of corporate and technical actors or agents representing the various mechanisms that can be affected by policy decisions. Deliberation systems are a constituent component of policy networks, but they can also be formed independently of them for policy discussion purposes.

Deliberation systems theoretically aim to combine multiple observations on the topic of interest for the actors involved. They serve as a decentralized articulating mechanism that involves high degrees of freedom in participating mechanisms, in terms of substantive interests and the procedures for achieving them. Deliberation specifically recognizes this heterarchy of actors and the need for their mutual reference and interpolation to achieve—through an act of balance—commitments on the subjects within their competency, without this necessarily meaning a change in preferences, although it is certainly possible to refer politically to greater legitimacy (Habermas, 2000; Ulbert and Risse, 2005). To produce this effect, a political system needs to possess—apart from parliamentary representation—mechanisms for procedural deliberation (not coercive, principles-based), inclusive (open to multiple interests) and with consequences (in other words with repercussions on policy decisions) (Dryzek, 2009). The capacity to produce consequences may stem from direct participation in policy formulation (strong public space), or else from an indirect influence of informal forums on decision-makers (weak public space) (Janssen and Kies, 2005). In either case, elements of a deliberative system are a public space with minimal limitations on participation by institutional actors, or a (private) space empowered with communication channels with the former, more accountability mechanisms, and influence on decisions (Dryzek, 2009, pp 1,385-1,386). Thus, the conditions for the emergence and operation of deliberative systems are: (i) recognition of a problematic situation for public-private actors; (ii) tolerance of ambivalence and initial imbalances that are only resolved through long-term calculated action; (iii) development of trust stemming from long-term interaction, acceptance of surprises and new options; and (iv) reflexive capacity to incorporate the perspectives of others into a future combinatory gain (Kaldor optimum), limiting the present maximization of benefits (Pareto optimum) (Willke, 1995 and 1997; Barabas, 2004).

The coordination mechanism that prevails in these situations involves a contextual orientation that is opposed to purely hierarchical-authoritarian

intervention, and an autarchy of actors independent of all contextual consideration (Willke, 1997). The contextual orientation in deliberation systems establishes the conditions and options through which the actors, without ignoring their own autonomy, can mutually orient themselves by combining options in a flexible framework of possibilities. In other words, they link principles of consistency and autonomy. In the best of cases, its results are: (i) feelings of internal efficiency, an aspect of autonomous citizenship; (ii) perceptions of greater government response capacity, as part of political legitimacy; (iii) political participation, which is fundamental for good representation; and (iv) civic commitment, community and neighbourhood identity, which contribute to a democratic community (Searing and others, 2007, p. 612).

Nonetheless, deliberation systems should not be seen as an infallible solution to problems of representativeness; they are subject to various constraints. Firstly, reflexiveness and trust in other actors is formed during the process. For autonomous actors it is not obvious that present benefits should be limited in exchange for future gains. In particular, if there is a problem involving current costs that differ for each individual, the tolerance of ambivalence and initial imbalances will depend on the trust that actors place in the procedure itself and, hence, their past results with deliberation systems. Secondly, the above leads also to the figure of a “third-party”—an impartial actor within the deliberation system or an external source of authority. In policy-oriented deliberation systems, this position is filled by a convening government agency, which restores centralization through ideological attributions and generates incentives for the impartial agent; and, through actors, it is always possible to have recourse to a specific idea of “common good” as an external source to sustain individual interests (Luhmann, 2005). Thirdly, as they combine argumentation and negotiation rationales, one cannot invariably expect consensus from deliberation systems. Elements of argumentation, persuasion and negotiation operate jointly in them, and these are interpenetrated in communicative action (Ulbert and Risse, 2005) and constitute parallel targets (commitments without consensus) as a most likely outcome (Willke, 1996 and 2002).

The deliberation systems mechanism has been used in Chile since 1990, particularly in the form of advisory commissions and dialogue forums (Fuentes, 2006), the latter particularly on human rights issues.



According to Carolina Aguilera (2007a, 2007b and 2009), a distinctive feature of the Government led by Michelle Bachelet was its implementation under a discourse of “citizen participation” in the formulation of policy ideas. For the author, commissions in the Bachelet period can be classified as those aimed at a participatory democracy and those targeting public-policy efficiency. In the explicit intention of the government, these criteria are combined with three objectives: promotion of dialogue between stakeholders, creation of a participation space, and formulation of policy recommendations (Aguilera, 2009). The author’s evaluation of this is nuanced. Firstly, a vertical relation would have been caused if the government processed the proposals of the commissions *a posteriori* and only incorporated experts but no stakeholders in any of them, although consultation mechanisms existed (Aguilera, 2007b; Moulian, 2006). Secondly, it is recognized that many experts are also sociopolitical actors, and that the commissions made it possible, at least, to bring positions closer together, reach minimal agreements and legitimize policy recommendations.

Her general conclusion is that: (i) they were effective in providing dialogue and policy-proposal spaces; (ii) they had a limited effect in terms of broadly representing interests; (iii) they included social actors in cases of protests (such as the Education Quality Commission following the student protests, or the Employment and Equity Commission following protests by subcontractors, among others); (iv) they allowed for a change in political style, but in general continued to be linked to relevant actors; and (v) it was political debate in Congress that ultimately defined the draft laws on public policies.

Aguilera’s assessment is interesting because it reflects the possibilities and limitations of deliberation systems in the Chilean case. They are a proven mechanism for harnessing actors with different interests and operating procedures around a specific topic that affects them; and their incorporation is recognition of their autonomy. Moreover, the fact that the processes culminated reports shows that significant degrees of reflexivity were achieved, and the fact that consensus was not reached (for example of the case of education, where students and teachers dissented from the report) shows that a negotiating approach makes it more likely to expect an orientation towards parallel targets. Similarly, the trend towards expertise in deliberation systems should not itself be understood as technocratization; instead,

it shows that the complexity and specialization of the problems currently being faced by Chile require meta-political visions, with intensive use of specialized and interdisciplinary knowledge, supported by comparative international experiences.

Nonetheless, the absence of important social stakeholders in some cases (commissions on pensions, early childhood, higher education, probity) imposes a significant constraint for achieving higher levels of reflexivity in deliberation systems, contrasting expert knowledge with that of the affected parties. As in the case of policy networks, this increases the risk for the sectors of the public which the decisions taken will eventually affect, since their direct experience is not incorporated. Whether owing to the logistical complexity of including the affected parties or the lack of development of corporate actors in certain fields in Chile, their exclusion from certain deliberation systems reduces the latter’s effect as a decentralized coordination mechanism, tending to make them more technocratic and reducing the plurality of perspectives on a given policy issue.

Nonetheless, the potentials and limitations of the experience with deliberation systems in Chile are intrinsic to this model. In other words, they can contribute to policy evaluations and recommendations through expert knowledge and that of the affected parties, but they are not intended to replace other democratic-deliberative mechanisms such as parliamentary or inter-ministerial debates, and a classical public, mediatic or daily domain, none of which, for that matter, passes the most demanding democratic tests (Johnston and Searing, 2005; Ulbert and Risse, 2005). In other terms, the problems of the verticalization of deliberative systems stem not from the fact that their proposals can be discussed in other democratic forums, but, in the Chilean case, from the centralized way their members are chosen, the exclusion of unorganized affected parties, or the incompetency of the impartial third party to be steer towards a balance of emerging asymmetries in negotiation processes, as also stressed in the empirical analysis made by Aguilera (2009).

The risks of verticalization are also present in deliberation systems. Nonetheless, as these are mechanisms for coordinating systems and actors with high degrees of normative and procedural autonomy, the balancing process that is attempted will always be subject to asymmetries and confrontations, particularly in their initial phases of development, such as in Chile.

## V

## The reflexive law model for the arbitration in trade disputes

An interesting way to address these asymmetries, and at the same time generate hierarchical social coordination mechanisms, is “reflexive law”. According to Gunther Teubner (1993), this consists of implementing a policy of options whereby the law, abandoning all-embracing pretensions, would produce an optional regulation that stakeholders can either accept or reject. In this framework, reflexive law is binding if the affected parties decide to make it so. The underlying premise is that in a context of highly autonomous actors and systems, the law cannot oblige, integrate, or direct conducts; but it can serve as a way to manage disputes between private actors. The aim is to make the law more effective, by offering actors the possibility of feeling motivated to operate with it.

The emergence of various supra-national private legal regimes is proof of this: *lex mercatoria*, *lex sportiva*, *lex digitalis*, *lex finanziaria*, *lex constructionis* (Fischer-Lescano and Teubner, 2006 and 2007). These develop substantive and procedural forms of self-regulation, which at times collide with and at other times are coupled to national legal systems (Mascareño, 2006a and 2006b). Their common feature is the formation of supra-national decision-making panels for dealing with disputes—one of these being international trade arbitration in *lex mercatoria*. This is a mechanism for resolving contractual disputes between private agents of different nationalities, although it also operates for disputes between foreign investors and the State. Its key characteristics are:

- (i) Neutrality of the tribunal since this does not form part of any national structure.
- (ii) Temporal efficiency by generating “tailor-made” procedures without higher instances for reviewing rulings.
- (iii) Flexibility, which stems from the principle of “autonomy of will” of the parties to autonomously define arbitrators, the place and language of the arbitration, deadlines, acceptable evidence and the applicable substantive law.
- (iv) Intensive use of knowledge, since the arbitrators are selected for their specialization and experience in the issues of the dispute.

- (v) Regulatory optionality made available to the parties through clauses in contracts and treaties (Buchanan, 1988; Guzmán, 2000; Mereminskaya, 2005).

Although trade arbitration has developed over a long period, the intensification of trade relations and consequent proliferation of private contracts and agreements between States and regions of the global society, over the last few decades, has introduced new consequences that can be analysed in public-policy terms. The incentive of commercial activity and attraction of investments are not merely a private issue. The welfare consequences are also of public interest (employment, knowledge, infrastructure). Just as an unfavourable tax structure can lead investors to choose a foreign alternative (Agostini and Jalile, 2009), a rigid domestic legal regime can also discourage commercial activity and foreign investment (Mereminskaya, 2004). The law itself then becomes a public good (Casella and Feinstein, 2002), whose flexibility can favour and its localism can restrict economic relations between private agents of different nationality, and between them and States.

As a form of reflexive law, arbitration is a mechanism that is highly adaptable to the conditions and various disputes that arise between autonomous economic agents. This gives it legitimacy among users, and a greater reduction of uncertainty; and it builds an environment that is favourable for trade and investment (Mereminskaya, 2005). Encouraging its use, therefore, cannot be excluded from policy objectives.

Since the ratification of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), the Conventions of Panama (1976) and Washington (1965), which set up the International Centre for the Settlement of Investment Disputes (ICSID), and particularly since promulgation of the law on International Trade Arbitration (No. 19.971) in 2004, Chile has understood it in this way. This law is comprehensively adopted on the basis of the so-called Model Law, drafted by the United Nations Commission on International Trade Law (UNCITRAL) and recommended to member States in

1985 (UNCITRAL, 1985). Its objective is to implement international arbitration independently of national courts, as explicitly indicated in its Article 5: “In the matters governed by this Law, no court shall intervene, except where so provided in this Law”. Domestic arbitration has a long tradition in Chile. As an alternative mechanism, it has seemed compatible with highly integrated institutional reciprocity structures (Mereminskaya, 2006; Xiao and Huo, 2005), and this may currently predispose agents towards it. Nonetheless, the jurisdictional restriction established by Law 19.971 for domestic courts necessarily entails a phase in which they adapt to supra-national criteria, and this will have consequences for the economic and political domain.

One of the most important parts of this adaptation phase is the construction by national courts of the notion of public order (mandatory rules that set contractual limits) adapted to supra-national criteria. In terms of the review of rulings of annulment in the Court of Appeals or the recognition of foreign arbitral rulings by the Supreme Court, it is not possible to mechanically apply the domestic notion of public order, which is always more restrictive than its international counterpart, the supra-national one or that implicit in *lex fori* (Buchanan, 1988). In the international arbitral regime, the only non-repealable regulation is “good faith” (UNIDROIT, 2004, art 1.7; Mereminskaya, 2003; Mereminskaya and Mascareño, 2005).

In the domestic domain, in contrast, even Article 16 of the Civil Code (application of Chilean laws to property located in the country) has been considered a norm of public order (Mereminskaya, 2006). Application of this criterion is an obstacle to the recognition of foreign arbitral rulings in Chile, which destabilizes, in terms of judicial practice, the politically and legislatively constructive institutional order that favours judicial linkage with a transnational order and, ultimately, promotes international commercial relations and foreign investment. Given this restriction, anchored in Chilean legal doctrine, it seems necessary, in public policy terms, to give guidance to domestic judicial bodies, on how to apply the aforementioned conventions and the implications of Law 19.971.

As in the previous cases (policy networks and deliberation systems), there is both private and public responsibility. Accordingly, the formation of policy networks in this field may be very useful for greater coordination between the private sector and the State. In such a dynamic, the former are responsible for coordination and efficient administration of international

arbitration in its procedural dimension, whereas the State would be responsible for supervision and correct functioning of its legal institutional framework in relation to inter- and supra-national criteria. This is increasingly necessary following the signing of multiple bilateral agreements over the last decade, which contain arbitration clauses (Direcon, 2009). These two dimensions are reviewed successively below.

Firstly, in the private domain, international commercial arbitration may be ad hoc (organized by the parties) or institutional (in arbitration centres). The first avoids the monetary cost of the second, but its transaction costs may be too high, because it requires the parties to plan the arbitration before the dispute arises. This encourages the use of institutional arbitration. This being the case, it is essential to structure the arbitral process efficiently from a procedural standpoint, giving clarity and simplicity to the arbitral clause (Millet, 2006), ensuring expertise among administrators and stability in the organizational conditions under which they operate. This includes keeping its members academically up-to-date, presence at meetings of the international arbitration community, convening capacity to at the institutional headquarters, and organizational adaptation to international quality standards.

Since 1992 Chile has had the Santiago Arbitration and Mediation Centre (CAM-Santiago) of the Santiago Chamber of Commerce, which is highly efficient in the national domain and now open to international arbitration. Other centres in Latin America have also grown in importance (in Mexico, Peru and Brazil). Given the processes of economic liberalization in Latin America and the high degree of regional and national variability, it does not seem advisable to form an arbitration centre for the region, as might be viable in Asia (Koh, 2000). Nonetheless, institutional informality and the specific regulatory features prevailing the region remain a procedural constraint (Mascareño, 2006b). It would therefore seem essential for these arbitration centres to form policy networks, to enable them to exchange knowledge and experiences of arbitration administration, comparable procedural levels and transparency in their operations. This interaction also allows for specialization in the future and cooperative thematic differentiation between the various arbitration centres, with a constant reduction in opportunity/alternative costs.

Secondly, the proliferation of bilateral investment agreements at the State level also requires coordination in the form of policy networks between arbitration

institutions and the State agencies responsible for designing and supervising them. Various doctrinal and procedural restraints that tend to concentrate dispute settlement within the national legal domain can be addressed in this way, for example: (i) elimination of the Calvo doctrine (dispute settlement in national courts); (ii) review of the most-favoured-nation clause when the laws in dispute are not stipulated in the bilateral investment agreement; and (iii) the stabilization of umbrella clauses used in cases that need to reconcile differences between contract and treaty courts (Cremades, 2004). Lastly, the formation of supra-national public-private policy networks in this field could result in higher levels of transparency, information and trust in international arbitration —constraints that currently exist in Chile and other countries of the region, given the relatively recent creation of the system (in Chile this has been possible since 2004, with Law 19.971). An alternative to the

above may be coordinated criteria for publishing rulings handed down by arbitration institutions (an aspect of international arbitration that has been criticized (Lord, 2001; Vandenberg, 2005)), or a procedure to control the consequences of the use of privileged information, corruption, or family and friendship privileges in the public domain —common issues in Latin America that discourage investment and make the system less predictable.

In short, the dynamics generated by the reflexiveness of law in Chile and Latin America promote the principle of autonomy among actors and systems, as shown in the case of international arbitration. The development of policy networks in this field is important to counteract the doctrinal constraints of national juridical openness to supra-national criteria, build confidence in the model and coordinate the political-legislative field of treaties with that of domestic judicial orders.

## VI

### **An approach to evaluating these models in Latin America**

Social coordination through public policies is an appropriate way to deal with the increasing social complexity of actors and systems in the current Chilean, Latin American and global context. The high levels of substantive and procedural autonomy gained by these actors is reactive in the face of a vertical mode of relationship between policies and publics. At the same time, autonomy involves risks unless it is accompanied by reflexive mechanisms that take account of the consequences of the actions of systems and actors in the framework in which they operate. Autonomy also means consistency through reflexiveness.

Policy networks, deliberation systems and reflexive-law models aim to combine those two principles and articulate private and public actors and systems through negotiations, roundtables, exercises in which expectations are self-limited by external expectations, problem-oriented approaches, optional contracts and self-coupling, in relatively stable social coordination structures. Three Chilean cases show the effectiveness and also the limitations

of these strategies for dealing with complex social contexts. The autonomy gained by various actors and systems in the Latin American context over the last few decades is undeniable; but equally clear is the survival of centrist-state tendencies in the sociopolitical matrix of Latin America, either in the form of a high degree of presidentialism, corporate populism or authoritarian trends (Garretón, 2000).

Moreover, conditions of social inequality also act against the formation of autonomous actors and open up spaces for constructing strong community identities that are resistant to deliberation or for resolving conflicts through coercion or corruption (Mascareño, 2009). Under these conditions, the development of heterarchical coordination strategies is difficult to sustain. Mechanisms such as the community councils in the Bolivarian Republic of Venezuela aim at the ideological consolidation of Bolivarian socialism, rather than the formation of participatory mechanisms for policy design and supervision (Romero, 2007). Something similar is happening with the constituent assemblies in the Bolivarian Republic of Venezuela,

Ecuador, and the Plurinational State of Bolivia: they aim to legitimize a prior political construction rather than articulate perspectives. In addition, the high level of armed conflict in Colombia makes authoritarian forms of decision-making attractive. In contrast, the cronyism present in the Argentine model is resistant to the construction of autonomous actors; and, in the case of Chile — as in Brazil with its industrial policy sector chambers (Diniz, 1995) — while there are signs of relative success in the construction of these mechanisms, their tendency towards political concentration in final decision-making and the exclusion of potentially affected parties in some cases demonstrates their current limitations.

Any centrist-state trend limits the formation and effectiveness of decentralized mechanisms such as policy networks, deliberation systems, and the policy options of reflexive law for supra-national disputes. Presidentialism concentrates decisions; populism absorbs them in the face of institutional incapacity to respond to demands; and authoritarian models conceal them. The question in the Latin American case is how far these vertical political constructions can resist, without opening a window in response to the region's growing social complexity. The effects of economic globalization are expressed in various bilateral and multilateral trade and investment agreements; different private agents develop their action strategies in regional or global terms rather than national ones; different actors demand their rights with a transnational rather than local perspective; and

transregional mobility (to Europe, North America or Asia) is far greater now than it was at the end of the twentieth century.

Despite its current limitations, in the Chilean case one can discern the incipient formation of social coordination mechanisms through public policies in the Latin American context. This seems to be a reasonable and necessary option for deploying such policies, when recourse to vertical State control proves inappropriate for dealing with increasing social complexity. Proceeding in this way has advantages both for the State and for private actors. Without losing the general orientation of thematic priorities, the former is partly relieved of the task of an exhaustive society design and increasing bureaucracy, with the investment of time that this involves; the second can make its practical and technical knowledge available to that design, along with its experience as parties affected by policies, and thereby gain recognition and autonomy of action. Coordination mechanisms such as policy networks, deliberation systems, and reflexive law policy options are an attractive alternative in the Latin American context, where traditional political structures are put under pressure by actors and systems that demand, or already exercise, autonomy and ambitions for participation and recognition. Nonetheless, those same structures restrict their realization, so tension is more likely than change in this regard. How that tension is channelled will determine their future viability in the Latin American region.

(Original: Spanish)

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