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Global Perspectives on Freedom of Association: Chile

Sebastian Soto



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Freedom of Association in Chile

*Sebastian Soto**

I. Introduction

The associative practice in Chile has been historically intense. During the 19th century, there was active participation of various associations in different areas, including education, social assistance, housing, infant mortality, malnutrition, etc. In the last century, associativism was expressed in trade unions, students' associations, local and rural organizations and religious groups.¹ Many services that are currently in the realm of the state were initially the responsibility of private associations, such as education and childcare. Today, in all of them, the participation of people through civil society organizations continues to be active.

In recent decades, the expansion of civil society organizations has remained high. It was reported that the growth rate of civil society organizations between 2005 and 2023 is 2.25 times higher than that of companies and 6.75 times higher than the population. The same report states that civil society organizations are particularly concentrated in the following areas: community, economic and housing development (e.g. neighborhood councils, housing committees, indigenous communities), culture and recreation (e.g. sports clubs) and in civic, advocacy and political activities (e.g. senior citizens' clubs, social and women's or youth groups). In addition to these formally registered associations, there are a number of other non-formalized associations that are also protected by the right of association.²

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¹ Luz María Díaz de Valdés, 'Trayectorias En Cambio: Un Recorrido Por La Historia de Las Organizaciones de La Sociedad Civil' (Centro de Políticas Públicas UC 2016) <<https://politicaspUBLICAS.uc.cl/publicacion/trayectorias-en-cambio-historia-de-las-organizaciones-de-la-sociedad-civil/>> accessed 14 March 2025.

² Sociedad en Acción. 'Mapa de las Organizaciones de la Sociedad Civil 2023' (Centro de Políticas Públicas UC 2024) <<https://politicaspUBLICAS.uc.cl/publicacion/mapa-de-las-organizaciones-de-la-sociedad-civil-2023/>> accessed 14 March 2025.

This chapter examines the right of association in Chilean constitutionalism. It argues that associativism has grown substantially in the 150 years since the entrenchment of the right of association in the Constitution. The constitutional protection of associations and their autonomy has also been reinforced. From being understood only as the freedom to create associations, it has come to be interpreted as a right as well. In the last half century, protection has also extended to the association itself, seen as a new space of self-determination and autonomy. Part II examines the historical evolution of the right of association in three fundamental debates during Chile's constitutional history. The first was the incorporation of the right into the Constitution in 1874. The second was a few years before the 1973 coup d'état and then in the drafting of the current Constitution of 1980. The last debate is the recent discussion during the two failed constitution making processes. Part III examines the structure of the right in the Chilean Constitution in its three main elements: the right to form an association, the right not to be forced to belong to an association, and the autonomy of associations. Part IV studies some recent discussions on the right of association in the Chilean context. Among others, I will develop the active debate in Chile based both on the principle of subsidiarity and the role of associations, along with case law regarding the scope of the autonomy of associations. Also, I will analyze one of the most controversial debates regarding right of association, the idea of institutional beliefs as basis for an “institutional conscientious objection” regarding abortion.

II. Three Centuries, Three Debates: Evolution of the Constitutional Text

A. Constitutional Context: Historical and Regional Considerations

The history of Latin American constitutions has always been interlinked. As Gargarella et al. states, “institutional outlooks, rights' declarations, ideological underpinnings and canons of constitutional thought display striking similarities that are far from coincidental”³. For this reason, an analysis of the regional context contributes to an understanding of the national context.

Latin American constitutions began to entrench the right of association in the mid-19th century. After independence from Spain and Portugal, the new nations wrote their first constitutions without expressly including this freedom. However, several constitutions in the region began incorporating the right of association around the mid-19th century: Argentina in

³ Roberto Gargarella et al., ‘Introduction’ in *The Oxford Handbook of Constitutional Law in Latin America* (Conrado Hubner and others eds) (Oxford University Press 2022), xv.

the Constitution of 1853, Peru in the Constitution of 1856, Chile in an amendment in 1874, Brazil in the Constitution of 1891, and Uruguay in 1934. In some cases, as in Peru, the wording was closer to the right of assembly.⁴ In the case of Brazil, the rights to association and assembly were entrenched together.⁵ Currently, the constitutions of Latin America entrenched the right of association in provisions of varying length. Among the shortest are the constitutional clauses of Argentina (5 words), Bolivia (recognized together with the right of assembly in 12 words) and Colombia (18 words). Similarly, Jamaica (7 words) and the Dominican Republic (15 words) in Central America.

Most commonly, constitutions recognize the right of association either as a freedom or as a fundamental right. Several constitutions include an explicit prohibition against being compelled to belong to an association. Constitutions with lengthier clauses develop other topics. Brazil, with one of the longest articles, establishes that the compulsory dissolution of a society may only be by “judicial decision” and that associations have standing to represent their members. Guatemala states that professional associations are an exception to the compulsory association prohibition. Haiti expressly recognizes the right of civil service to form associations, Nicaragua refers to the “social function” of associations, and Paraguay prohibits “secret associations”. Due to the region's own history of violence, Brazil, El Salvador and Paraguay also explicitly outlaw paramilitary associations.⁶

B. Constitutional Entrenchment in Chile: 19th Century

The Constitution of 1833 was the first to be consolidated in Chile after two decades of constitutional instability, and its original text did not contain the right of association. This should not be surprising since the first Latin American constitutionalism, like the European constitutions, looked at the exercise of this freedom with suspicion.⁷ In 1874, the Constitution was amended to incorporate the right of association, together with the right of assembly and freedom of education. This reform was accompanied by other political reforms that marked a shift towards a more open constitutional text, in accordance with the principles of political liberalism.⁸

⁴ “All citizens have the right to associate peacefully, whether in public or in private, without compromising public order” (Article 28).

⁵ “It is lawful for everyone to associate and meet freely and without weapons; The police cannot intervene except to maintain public order” (Article 72.8).

⁶ <<https://constituteproject.org/>> accessed 14 March 2025.

⁷ Ulrich Preub, ‘Associative Rights (the Rights to Freedoms of Petition, Assembly and Association)’ in Michel Rosenfeld and Andras Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford 2013) 953.

⁸ Simon Collier & William Sater, *A History of Chile. 1808 – 1994* (Cambridge Latin American Studies 1996) 121.

The discussion regarding the right of association was intense. Some historians point out that “it promoted one of the most interesting debates that have taken place in the National Congress, both for its perfection in form and its erudition in substance”.⁹ Contrary to what might be expected, conservatives led by Abdón Cifuentes, one of the most important conservative politicians in the 19th century in Chile, promoted a broad and unregulated freedom of association. Under this view, the right of association must not only contain the freedom to associate but should also provide a space of autonomy to the new associations. Cifuentes himself argued that “no authority has the power to confiscate (the right of association) or even to interfere in the internal regime of associations, because it would be to interfere in the internal regime of families”.¹⁰ On the other hand, liberals who were led by Miguel Luis Amunátegui, one of the most famous liberal minds in those decades, promoted greater control over associations and demanded that all associations should have legal personality. This would entail government involvement, as per the rules of the Civil Code which organizes virtually all spheres of private law, government authorization is a requirement for associations to have a legal personality.

Underlying the whole debate hid a fundamental difference: the degree of freedom that the Catholic Church should have to develop its activities. During the 19th century and until 1925, there was no separation between the Church and the State in Chile, so Catholicism was the official religion of the country. In this context, the liberals wanted more civil control over religious authorities and the conservatives wanted maximum autonomy. The right of association and the autonomy of associations became another area to develop in this discussion. The amendment was finally approved, and since 1874 the Constitution has included the right of assembly and the right of association in two separate articles. In the following decades, the right of association was not the subject of reflection or further discussion in Chile. For example, most of the scholarly work that analyzes the constitution of 1833 does not develop this freedom or show substantive debates on the scope of the right.¹¹

C. 20th Century: Two Moments

⁹ Fernando Campos Harriet, *Historia Constitucional de Chile* (4th edn, Editorial Jurídica 1969) 342. Also Julio Heise, *Historia de Chile. El periodo parlamentario* (Editorial Andrés Bello 1974) 39.

¹⁰ José Francisco García, *La Tradición Constitucional de la P. Universidad Católica de Chile. Vol I* (Ediciones UC 2017) 122.

¹¹ Alejandra Ovalle & Sebastian Soto, ‘Sociedad Civil y Constitución. Ideas para el debate’ (Centro de Políticas Públicas UC 2021) <<https://politicaspubblicas.uc.cl/publicacion/sociedad-civil-y-constitucion-ideas-para-el-debate/>> accessed 14 March 2025.

The 1925 Constitution, the second most relevant constitution in Chilean history, included the right of association with almost no debate. Its text recognizes the right to associate without prior authorization and then adds that this must be “in accordance with the law”. The constitutional debates that preceded offered no insight into the intended meaning of this latter provision. In any case, what is certain is that it does not seem to have made a difference as legislation had broad space to regulate rights at that time. It is important to consider that in Chile, judicial review was introduced in the 1925 Constitution and its exercise was quite limited for decades.¹²

The commentators of the 1925 Constitution gave increasing importance to this right, devoting more efforts in determining its content. While José Guillermo Guerra, a law professor and one of the constitution makers in 1925 dedicated only a few lines to studying this right in 1929,¹³ in the 1960s Silva Bascuñán, who was the most prominent scholar of the 1925 Constitution devoted several pages to it. He was the first author to engage deeper with its content and make explicit that the right of association includes the freedom to form and join any type of organization, as well as the right not to be forced to join a particular association. Although not explicitly, he was also the first constitutional law scholar to outline the spaces of autonomy of the associations themselves, although he mostly focused on trade unions and political parties.¹⁴

1. The Statute of Constitutional Guarantees: 1971

In Chile, the debate had its first constitutional expression in 1970 when the Statute of Constitutional Guarantees was approved. This was a set of constitutional amendments negotiated by the Christian Democratic Party and President-elect Salvador Allende in the context of the Cold War. Under the Chilean presidential system of the 1925 Constitution, if no presidential candidate secured an absolute majority of the popular votes in the election, the president was then to be elected from between the two leading candidates by both houses of Congress in a plenary session. Allende, the Socialist Party candidate who represented the leftist forces including the Communist Party, obtained 36% of the popular vote. Therefore, he needed the support of the majority of the house representatives and senators. With this objective, he reached an agreement with the Christian Democratic Party, a center-left party, to amend some

¹² Dante Figueroa, ‘Constitutional Review in Chile Revisited: A Revolution in the Making’ (2013) 51 *Duquesne Law Review*, 394.

¹³ José Guillermo Guerra, *La Constitución de 1925* (Establecimientos Gráficos Balcells y Co. 1929) 114.

¹⁴ Alejandro Silva Bascuñán, *Tratado de Derecho Constitucional, Tomo II* (Editorial Jurídica 1963) 249. For a longer review of the right of association in the 20th century, see Alejandra Ovalle & Sebastian Soto, ‘Sociedad Civil y Constitución. Ideas para el debate’ (Centro de Políticas Públicas UC 2021)

provisions of the Constitution. The amendments had the objective of providing reassurance that a left leaning government would not purport to emulate other Latin American leftists' governments that were seen as a threat to democracy.

In this context, the protection of associations was deemed fundamental. The autonomy of unions, educational institutions, the media, political parties and other associations had to be constitutionally reinforced. The justification for this reform was provided by the Christian Democrat Senator (and later President of Chile after the return to democracy) Patricio Aylwin: "Wherever the Marxist sectors triumph, they immediately begin to apply their methods: they suppress party pluralism (...), they monopolize all the media (...) they completely nationalize education and impose an official ideology on it (...) constitutional guarantees are, as it were, to set the ring for the democratic combat (...) we will have a suitable field to successfully wage the fight that is necessary to give in Chile in this moment".¹⁵

These amendments incorporated into the constitutional text important rules for the protection of associations.¹⁶ First, it established the freedom to join political parties and the freedom of political parties to organize themselves internally as they deem convenient. Second, private schools were granted autonomy to determine their administrative organization and the appointment of personnel. Third, the academic, administrative and economic autonomy of universities was established. Fourth, the right to join trade unions was established, as well as the right of unions to legal personality and to federate. Fifth, the right to participate in social, cultural, civic, political and economic life was recognized as necessary to allow for the full development of people. Sixth, the independence and freedom of social organizations¹⁷ that seek "the solution of their problems" was recognized as well as their freedom to collaborate with the state. The changes made by the reform in 1971 did not last, as the 1925 Constitution was suspended by the 1973 coup d'état. Nevertheless, it was the first time a Chilean constitution contained provisions that strengthened and specified the right of association, and to some extent its effects are found to be present in the third Chilean constitution.

2. The current Constitution: 1980

¹⁵ Joaquín Fernando, *La revolución inconclusa. La izquierda chilena y el gobierno de la Unidad Popular* (Centro de Estudios Públicos 2013) 345.

¹⁶ Statute of Democratic Guarantees (ley 17.398).

¹⁷ The amendment mentioned several "social organizations" such as unions, neighborhood councils, cooperatives and mothers' centers.

The 1980 Constitution was drafted between 1973 and 1980 during the dictatorship of Augusto Pinochet,¹⁸ and replaced the 1925 Constitution. Since then, it has been profoundly amended. The most important amendments were in 1989, at the end of the Pinochet government and after a political agreement between the outgoing military regime and the democratic opposition, in a reform that was ratified in a referendum; and then in 2005, in a broad reform that symbolically eliminated Pinochet's name and replaced it with Socialist President Ricardo Lagos' signature. In addition to these two broad reforms, more than fifty constitutional amendment bills have been approved since 1990. Overall, this means that almost all articles of the original constitution have been amended.¹⁹

The current constitutional text reiterates old constitutional provisions and incorporates new ones. The debates during the 1925 Constitution reinforced the importance of making explicit the two facets of the right: the right to form associations and the right not to be forced to belong to an association. It also established voluntary union affiliation and prohibited compulsory membership in professional associations. Following this lead, it increased the regulation of political parties and established several provisions to strengthen the autonomy of associations and the prohibition of political parties from influencing them. In this vein, it entrenched as a constitutional principle the “autonomy of intermediate groups” in Article 1 of the Constitution. As we shall see, this last provision has been highly debated in Chile. Finally, it enshrined freedom of association by establishing the right to join unions, recognizing the legal personality and autonomy of unions, and prohibiting intervention in political party activities (Article 19.19).

D. XXI Century: The Failed New Constitutions Processes

In October 2019, after intense days of mobilization and high levels of violence, it was agreed in Chile to initiate a process to replace the 1980 Constitution. The first process lasted twelve months starting in July 2021. In September 2022, 61% of citizens rejected the proposal. This led to the initiation of a second, shorter and more contained process, which took place between March and November 2023. In December 2023, the citizens again rejected the new proposal (55%).²⁰ Throughout these processes, three constitutional texts were drafted. The first was that

¹⁸ Robert Barros, *Constitutionalism and dictatorship. Pinochet, the Junta and the 1980 Constitution* (Cambridge 2002).

¹⁹ For a global review of the current constitution Domingo Lovera, ‘Chile’ in *The Oxford Handbook of Constitutional Law in Latin America* (Conrado Hubner and others eds) (Oxford University Press 2022).

²⁰ An analysis of both failure processes Sebastián Soto, ‘Two Drafts, Three Referendums, and Four Lessons for Constitution-making from Chile’ (*ConstitutionNet*, International IDEA, 22 December 2023)

of the Convention, composed mainly of left-wing forces. The second was that of the Expert Commission, which achieved a political agreement between the left and the right. The third, also during the second process, was drafted by the Constitutional Council, composed mainly of right-wing forces, which reviewed and rewrote the text of the Expert Commission. The two referenda were over the Convention and the Constitutional Council texts.

The topics discussed during these years were numerous: political system, judiciary, indigenous peoples, right to life, property, etc. No topic was off-limits, although some stirred up more controversy than others. The right of association was not among the most controversial. Even so, it is worthwhile to briefly review the proposals that were made. Although they were rejected, they show consensus and points of differences between both texts. The consensus included the entrenchment of the right, the recognition of autonomy of associations,²¹ a limited right of association for members of the Armed Forces, and the delegation to legislation of the rules for granting legal personality to associations. Among the points of differences, we can highlight that the text of the Convention eliminated the existing restriction on associations that conflict with morality, public order and national security. It also eliminated the right not to be forced to join an association. It also suppressed any references to the autonomy of intermediate groups. The Expert Commission and the Council maintained the mentioned limitations and included the autonomy of “social groups that freely arise among the people”. In addition, the Expert Commission and the Council extensively regulated political parties. The Convention did not mention them and referred only tangentially to “political organizations”²². Finally, the text of the Convention established a broad right to strike, in both the public and private sectors, and a strengthening of trade union organizations. The text of the Expert Commission prohibited compulsory membership and delegated various topics to legislation. The Council's text reinstated certain provisions of the current Constitution on union matters.

<<https://constitutionnet.org/news/voices/two-drafts-three-referendums-and-four-lessons-constitution-making-chile>> accessed 14 March 2025.

²¹ The text of the Convention established that the right of association "includes the protection of the autonomy of associations for the fulfillment of their specific purposes and the establishment of their internal regulation, organization and other defining elements" Article 72.2. The text of the Expert Commission and of the Council establish that "the right to associate includes the right to form, organize and maintain associations, to determine their purpose, their officers, members and internal statutes in order to pursue their objectives" Article 16.17.

²² See Samuel Issacharoff & Sergio Verdugo, 'The uncertain future of constitutional democracy in the era of populism: Chile and beyond' (2023) 78 U. MIA L. Rev. They note that “the Convention reflected the anti-institutionalism of the times”

III. Right of Association in the Constitution of Chile: Contents

The three facets that are in general attributed to this right are entrenched in the constitutional text: the right to form associations, the right not to be forced to belong to them and the right of the association itself to a certain degree of autonomy.²³

A. The Right to Form an Association

Article 19.15 of the Constitution assures to all persons “the right to associate without prior permission”. The provision also forbids associations with objectives “that are contrary to morality, public order and the security of the State”. Regarding these limits, the ambiguity of these categories has not been disputed, at least at a constitutional level. Both in comparative constitutional law and in international law, the right of association has limits. Article 16 of the American Convention on Human Rights, for example, sets limits on “national security”, “public order”, “public health or morals” and “the rights and freedoms of others”. The Chilean Constitutional Court has recognized the centrality of the right and its essential content when it notes that “the right enshrined in Article 19.15 is not reduced to guaranteeing the freedom to join or leave an association, but, first and foremost, the freedom to create or form any type of group”.²⁴

Article 19 also refers to the legal personality that associations may obtain. It establishes that “in order to enjoy legal personality, associations must be constituted in accordance with the law”. Thus, although the power to associate is not subordinated to the law, if an association wants to obtain legal personality and, therefore, to become a legal person that has separate rights and obligations, it is necessary for it to comply with the requirements and forms established by law. Furthermore, it is relevant to consider that legal personhood is an additional benefit but not a requirement to enjoy constitutional protection. In this manner, the Constitutional Court has held that it is not necessary to be formed as legal persons to exercise the right and consequent freedom to create associations. The difference established by the Constitution between the right of association and the right of association with legal personality, is that of genus - species: “the first, the genus, does not require law for its exercise; the second, the species, must comply with the prescriptions established by the legislature for that

²³ For a constitutional approach of the right of association in Chile see José Luis Cea, *Derecho Constitucional Chileno. Tomo II* (Ediciones UC 2012) and Humberto Nogueira, *Derechos Fundamentales y Garantías Constitucionales. Tomo III* (Librotecnia 2019). For a more theoretical approach see Daniel Loewe, *Multiculturalismo, identidad, plurinacionalidad y todas esas cosas* (Fondo de Cultura Económica 2023).

²⁴ Groups of senators v labor bill [2016] TC 3016-16, c.30.

purpose”.²⁵ Decades later, the Court has ratified this approach, protecting to the same degree both types of associations: “it is true that an association that has legal personality will normally reflect a greater will of permanence in time than one that is not organized in this way. But this type of legal formality is not a requirement of the Constitution”.²⁶

The various ways of obtaining legal personality are regulated by common law and offer ample alternatives. This was not the case in the past. The Civil Code, drafted by the jurist Andrés Bello, had a much greater impact than the constitutional enshrinement of the right of association in the Constitution. Cifuentes himself, to whom we referred above, was critical of this and in his memoirs published in 1936 stated that, “the absurd provisions of the Civil Code on legal personality have continued to govern, in open contradiction with the constitutional precept”.²⁷ Along the same lines, the 1925 Constitution gave the President the power to grant legal personality to “private corporations and to cancel them; to approve the statutes by which they must be governed, reject them and accept modifications” (Article 72.11). In 1980 this provision was excluded from among presidential constitutional powers, and at present, the procedures for obtaining legal personality are generally simple and expeditious.

Legislation regulates various types of associations. The text of the 1925 Constitution, as mentioned before, explicitly recognized the right of association “in accordance with the law”. In the current text there is no explicit mention of the law. This has not prevented legislation from establishing certain proportional and reasonable requirements for the exercise of the right in the multiplicity of associations that recognize civil, commercial and many other legal areas (neighborhood councils, public interest organizations, trade associations, etc.). Associations of civil servants, for instance, were regulated by law in the 1990s and exclude associations of military and police personnel. The last relevant modification was made in 2005, when the authorization for the formation of non-profit legal entities was moved from the government to local counties.

B. The Right not to be Forced to Belong to an Association

The Constitution also guarantees the negative expression of the right, which in other words, is the prohibition of being forced to join an association. Article 19.15 states that “[n]o one may be compelled to belong to an association”. This provision is complemented by two other relevant provisions. Article 19.19 states that “trade union membership shall always be

²⁵ Constitutional review of Political Parties Organic Constitutional Law [1987] TC 43-87, c. 14.

²⁶ Groups of senators v labor bill [2016] TC 3016-16, c.29.

²⁷ Abdón Cifuentes, *Memorias T. II* (Nacimiento 1936) 103.

voluntary”, while Article 19.16 provides that “no law or provision of public authority may require membership of any organization or entity as a condition for carrying out a particular activity or work, or disaffiliation to keep it”. These provisions generally prohibit the use of coercion to join an association and specifically prohibit any obligation to join a union or a professional association. These latter provisions were included due to legislation from the 1920s establishing certain mandatory membership mechanisms to work as a lawyer, architect, physician, teacher, journalist, or so on.²⁸

The Constitutional Court has stated that “this freedom consists precisely in the power of self-determination as to whether or not to belong to, create or not, a society, association or specific corporate group, that is, not to be coerced to join a particular corporate body, to freely accept or not, as a member, a particular subject who wishes to join it, and finally to freely withdraw or not from that group or associative body”.²⁹ In a case involving conflict between a university student and the student federation of his university, the Supreme Court stated that in a regime of “automatic affiliation” for those who meet the requirements indicated in the statutes, the right of the students of the university arises “not only legal but also constitutional, to leave the association”. For that reason, it was deemed unconstitutional for the Student Federation to not accept the student's claim for disaffiliation.³⁰

In recent years, some professional associations have promoted the reinstatement of compulsory licensure as a way to reinforce the ethical control of professions. The proposal has generated disagreement, and it is unlikely that such a provision will be approved in the future. There have also been discussions on how to strengthen unions. A few years ago, a bill amending the Labor Code sought to grant trade unions the exclusive right to represent their company in collective bargaining.³¹ This reform was declared unconstitutional because it was against, among other things, the right of association of workers outside unions (in Chile known as “negotiating groups”), as well as the freedom to unionize. Regarding the latter, the Court held that under said regulation, “if the worker wants to exercise his right to not join a union, their right to bargain collectively will be radically limited”. It added that this established a “disproportionate difference in treatment in terms of the privileges” that the trade union received and the workers associated in other modalities did not.³²

²⁸ Alejandro Silva Bascuñán, *Tratado de Derecho Constitucional. Tomo XIII* (Editorial Jurídica 2003) 267.

²⁹ Constitutional review of the bill that amend capital market laws [1994] TC 184-1994, c.7.

³⁰ Toro v Student Federation of UCN [2019] SC 23.233-2018, c. 5.

³¹ A review on labor regulation in Chile from a comparative perspective: OECD ‘Negotiating Our Way Up: Collective Bargaining in a Changing World of Work’ (OECD Publishing 2019) <<https://doi.org/10.1787/1fd2da34-en>> accessed 14 March 2025.

³² Groups of senators v labor bill [2016] TC 3016-16, c. 35 & 36.

C. The Autonomy of the Association

After the right to form an association and the right not to be forced to belong to an association, the third dimension of the right is the autonomy of associations. This third element of the right is recognized in other constitutional norms, and its incorporation in the 1980 Constitution has generated various debates which we will examine in Part 4. The first chapter of the Constitution is called “Bases of Institutionalidad”, and its norms bring together a set of fundamental principles. Article 1 of the Constitution establishes in its third paragraph:

The State recognizes and protects the intermediate groups through which society is organized and structured and guarantees them adequate autonomy to fulfill their own specific purposes.

The location of this clause is not random. The first paragraph of Article 1 refers to the person; the second, to the family; the third, to intermediate groups; and the fourth, to the State. Thus, the first article of the Constitution is based on the dignity and freedom of persons, and the following develop the various forms of social relations. As noted previously, the Constitution was drafted in the 1970s during the Cold War, and it was a deliberate political decision to base the Constitution on the person and not on the State.

It is thus assumed that the community is not only made up of individuals and state entities, but also of families and a varied set of private organizations that aim to fulfill the most diverse objectives. Arguably, civil society is a core element in the constitutional identity of Chile. The Constitutional Court has pointed out that intermediate groups originate from the exercise of the right of association, unlike public bodies and services that are constituted and configured by virtue of the principle of legality. It has defined them as “all associations other than the public apparatus, all those that are not organs of the State in all its manifestations, i.e., organs of the State administration, courts, autonomous organs, public law corporations.”³³ However, the autonomy recognized by the Constitution is not unlimited. As various constitutional law professors have pointed out, when “adequate” autonomy is protected, it is that which is “appropriate, proportionate or convenient for the specific purposes of the group”.³⁴ That is why “the specific purpose of the intermediate society determines the scope and limit within which it can legitimately govern itself with autonomy”.³⁵

³³ *Insurance companies v SVS* [2009] TC 1295-08, c. 55.

³⁴ José Luis Cea, *Derecho Constitucional Chileno. Tomo I* (Ediciones UC 2015) 217.

³⁵ Arturo Fernandois, *Derecho Constitucional Económico. Tomo I* (Ediciones UC 2001) 87.

IV. Discussions

In recent years, disputes over the exercise of the right of association in Chile have focused on various issues, which we will examine below.

A. Autonomy of the Associations and the Debate on Principle of Subsidiarity

Since the 1980s, a highly contested issue in Chile has been the influence of the principle of subsidiarity in constitutional law. Unlike in Europe where territorial subsidiarity concerns the proper allocation of powers between higher and lower bodies, such as central and local governments,³⁶ the principle of subsidiarity in Chile emerged as a response to defining the role of the State.

Until the 1970s, the Chilean state apparatus had acquired enormous power. Arturo Valenzuela, author of one of the most renowned books on the Chilean breakdown, wrote that in those years “the state played a greater role in the nation’s economy than it did in the economy of any other Latin American country with the exception of Cuba”.³⁷ In this context, the new Constitution proposed by the Pinochet regime sought to limit the role of the State and used the principle of subsidiarity as a key justification. Under this principle, the State itself should only assume one specific activity when the private sector could not do so within a reasonable margin of quality. This narrative coincided with the process of economic modernization that began in the 1980s and was consolidated in the following decades. Both the Pinochet government and the center-left governments that democratically came to power in the 1990s initiated a series of pro-market reforms that expanded private participation in different areas: health, education, housing, infrastructure, transportation, and so on.³⁸

Why is this discussion related to associations and their autonomy? Many argue that the principle of subsidiarity is enshrined in the Constitution. An originalist interpretation of the Constitution often argues that one of the provisions that “implicitly” uphold the principle of subsidiarity is the autonomy of intermediate groups (in addition to other clauses in the Constitution that limit the entrepreneurial state and favors freedom of choice in health and

³⁶ For a critical analysis of the European interpretation of subsidiarity, see Maria Cahill, ‘Theorizing subsidiarity. Towards an ontology-sensitive approach’ (2017) *International Journal of Constitutional Law*, Vol. 15 N. 1, 201–224.

³⁷ Arturo Valenzuela, *Chile. The breakdown of democratic regimes* (Johns Hopkins University Press 1978) 13.

³⁸ Sebastian Edwards, *The Chile Project. The story of the Chicago Boys and the downfall of neoliberalism* (Princeton University Press 2023).

education). This has allowed many to link the Chilean economic modernization of the last four decades with the constitutional framework and the principle of subsidiarity.

From the constitutional perspective, the principle of subsidiarity was very present in constitutional adjudication in the 1990s, although it has lost force in judicial argumentation in the following decades. However, from a political perspective the principle of subsidiarity has maintained its presence as a justification for changing the 1980 Constitution. A decade ago, Ricardo Lagos, a social democrat who served as president of Chile between 2000 and 2006 stated: “I do not like a constitution that starts by saying that the State is subsidiary”.³⁹ Although the text does not explicitly consider subsidiarity, criticisms against the Constitution have often become criticisms against that principle.

The failed constitution-making processes opened a new discussion when all three drafts included a clause establishing the social state. The question was whether it is possible that, constitutionally speaking, a social state can coexist with the autonomy of intermediate bodies and the active participation of private associations in all areas. Both the National Congress and the Expert Commission of the second constituent process—which, as noted before, reached a constitutional agreement between left and right—included several clauses in its draft that enshrine the social state clause, the autonomy of associations, and public-private provision.⁴⁰ Whether this represents a lasting compromise for the future remains uncertain. However, it can be argued that the decades-long constitutional debate, between a subsidiary State that relied on the autonomies of associations and the social state clause, may find paths of convergence.

B. Politics and Autonomy of Associations

The autonomy of the intermediate bodies was conceived by the drafters of the Constitution as one among several provisions within a constitutional framework that aimed to separate civil society from politics. For many, in the middle of the 1970s, one of the causes of the breakdown of Chilean democracy had been the intervention of political parties in civil society associations. This interference generated ideological instrumentalization and polarization of civil society’s groups. That is why the 1980 Constitution sought to separate the “social order” from the “political order” to protect the autonomy of the “intermediate associations” from the intervention of politics and parties.

³⁹ Ricardo Lagos, ‘La cuestión constitucional: reflexiones de un actor’ (2015) 139 Estudios Públicos.

⁴⁰ Most notably, in the second constitution making process (2023), Congress required that the new constitutional project entrenched the following provision: Chile is a social and democratic state under the rule of law “that recognizes the fundamental rights and freedoms and promotes the progressive development of social rights, subject to the principle of fiscal responsibility and through state and private institutions” (Article 154).

This approach is also expressed in other regulations. Article 23 delegates to legislation the establishment of sanctions for intermediate groups that misuse their autonomy, unduly intervening in activities unrelated to their specific purposes. It then adds that legislation will establish sanctions for union leaders who intervene in partisan political activities, and for political leaders who interfere in the functioning of intermediate groups. Article 19.19 declares that trade union organizations may not intervene in partisan political activities. Another provision states that political parties may not intervene in activities “unrelated to their own” (Article 19.15). In the same sense, union or neighborhood leaders must resign from their positions if they register as candidates to the National Congress (Article 57). At present, these constitutional norms are dormant. Some of them call for sanctions without any legislation specifying them, and those that establish the prohibition of non-interference in political activity have not been enforceable.

C. The Autonomy of Associations in some Decisions of the Constitutional Court and the Supreme Court

Based on the autonomy of intermediate groups, the jurisprudence of the Constitutional Court has built a robust body of caselaw that protects these spaces of autonomy from legislative intrusions that are deemed excessive or disproportionate. It is worth noting that constitutional case-law and doctrine have relied much more on this clause to construct areas of non-intervention than on the right of association. Early on, the Constitutional Court specified that the autonomy of the associative bodies is configured “by the fact of being governed by themselves; that is, by the necessary and indispensable freedom to organize themselves in the most convenient way according to their statutes, to decide their own acts, the form of administration and to set the objectives or goals they wish to achieve, by themselves and without interference from persons or authorities outside the association, entity or group in question”.⁴¹ In this way, it constructs autonomy as self-determination.

Subsequently, in later rulings, it has gradually established areas of autonomy in different sectors. In the 1995 *Media Law* case, a regulation that required television stations to broadcast certain content was declared unconstitutional. The decision was based on the autonomy of the media and freedom of expression.⁴² The result of this ruling was repeated years later in the *People Meter Online* cases (2013), which banned or excessively conditioned the use of online

⁴¹ Constitutional review of the bill that amend capital market laws [1994] TC 184-94, c.7.

⁴² Group of deputies v Media law bill [1995] TC 226-95.

audience measurement systems by television broadcastings. The Court states that it has made clear “the inconvenience of any form of state interference in the media, in the face of the infringement of the autonomy of intermediate groups”.⁴³

In the following decade, new rulings deepened other areas of autonomy. The *Manuel de Salas School* case⁴⁴ and *School Day* case established a substantial space of autonomy for educational institutions, connecting the autonomy of intermediate groups with freedom of education. In the latter, the Court held that the autonomy of the association is “broadly applicable” and also includes schools “with such capacity to govern themselves in teaching, in the educational, administrative and economic spheres, the aforementioned institutions are empowered by the Constitution to fully exercise their freedom of education, without undue intervention or interference by the State or third parties”.⁴⁵

However, it is uncertain as to whether these decisions are still good law. The Constitutional Court does not adhere strictly to precedent, and changes in case law can occur within just a few years with potentially significant consequences. For instance, the Court has not considered that legislation prohibiting student selection processes in publicly funded elementary or secondary schools violate the Constitution or the autonomy of an intermediate group.⁴⁶ It has also rejected constitutional challenges against several laws limiting autonomy in universities.⁴⁷

The Chilean Supreme Court also has case law related to fundamental rights. Among its responsibilities, the Court decides actions for the protection of fundamental rights. In this role, it has developed a series of rulings regarding the disciplinary powers of private associations, extending the horizontal effect of the right. In 2023 the Disciplinary Committee of a local organization in Valparaíso expelled one of its members for “having unjustifiably caused damage or harm to the assets of the organization and its members”. After following the sanctioning process established in the internal rules, the organization's assembly expelled one of its members. The Supreme Court affirmed the power of a private association to apply disciplinary measures on its members following the disciplinary procedures by its internal control bodies. This authority derives both from the law that regulates that association and from the Constitution itself, which recognizes the autonomy of intermediate groups and the freedom

⁴³ Group of deputies v Digital Television bill [2012] TC 2358-12, c. 18. See also [2013] TC 2509-13, c. 6.

⁴⁴ Group of deputies v Liceo Manuel de Salas bill [2002] TC 352-02.

⁴⁵ Group of deputies v School day Bill [2004] TC 410-04, c. 26. See also Arturo Ferandois, ‘Autonomía de los cuerpos intermedios: ¿objeción institucional o protección constitucional?’ (2018) *Sentencias Destacadas 2017*.

⁴⁶ Group of senators v school regulation bill [2015] TC 2787-15.

⁴⁷ Group of deputies v bill on provisional administration of higher education institutions [2014] TC 2731-14.

of association. However, it then adds “that even in the case of a conflict between individuals, which must be resolved within the rules of that association, in the exercise of its autonomy, it is essential that the parties in dispute are on an equal ground so that the dispute can be resolved through proportionate and rational means”.⁴⁸ That is why it requires some guarantees of due process to exclude, for example, unreasonable decisions. In this case, the Supreme Court accepted the claim as various procedural provisions had not been followed to apply the sanction. Many other rulings of the Supreme Court examine sanctions imposed by private associations on their members such as sports clubs, firefighters, associations of public officials, professional associations, student organizations, among others.

D. Abortion and Institutional Beliefs

In 2017, the Chilean Congress approved a bill legalizing abortion on three regulated causes: risk of life for the mother, fetal non-viability, and in case of rape of the mother. As is common in this type of debate, the constitutionality of the bill was challenged before the Constitutional Court, which finally declared its overall constitutionality. The Court's ruling addresses the issue of conscientious objection. The bill stated that “conscientious objection is personal and may in no case be claimed by an institution” (Article 1.3 of the bill). The Court upheld the constitutionality of conscientious objection by medical personnel involved in abortion and extended it not only to physicians, but also to every health professional involved in the procedure. It then declared unconstitutional the prohibition contained in the last part of the provision noted above, in what is colloquially known in Chile as “institutional conscientious objection”.

In its reasoning, the judgment draws parallels between individual conscientious objection to institutional conscientious objection. It states that both are protected “by the dignity of persons who—individually or projected in association with others— refuse to perform certain types of actions for ethical, moral, religious, professional or other relevant reasons”.⁴⁹ As a second argument, the Court states that the autonomy of institutional ideologies is protected not only freedom of association, but also freedom of religion and freedom of education. Regarding the right of association, the decision states: “conscientious objection can be legitimately raised by legal entities or private associations, in this case, in accordance with

⁴⁸ NN v Comité de Vivienda Los Estandartes [2023] CS 68610-23. See also Corvacho v Asociación Gremial [2020] CS 143-20; Pereira v Cuerpo de Bomberos [2021] CS 30428-21; Sarzosa Constanzo v Corporación Educacional Newentun [2022] CS 152329-22.

⁴⁹ Group of senators and deputies v abortion bill [2017] TC 3729 (3751)-17, c. 141.

the constitutional autonomy that the Fundamental Charter itself recognizes for intermediate groups of society (...). The interposition of this legitimate objection is not exhausted in the individual order, since it also extends and spreads to associations intended to embody the same free thought, in accordance with the right that ensures to all persons the (right of association)". Further in the judgment, the argument relates to religious freedom and freedom of education: "religious institutions, legal persons or entities with confessional ideals that project themselves into the field of health, under the protection of (religious freedom), can also assert it. As it is also possible for them to oppose the objection in question to educational establishments with a function and ideology in the sense indicated, in accordance with (freedom of education)".⁵⁰

The judgment holds that associations may also have beliefs that must be protected. These beliefs are more evident when it comes to educational establishments or religious institutions that not only exercise their right of association, but also the freedom of teaching and religious freedom. The same holds true for any association that builds a space of autonomy which unites individuals around a shared position rooted in their freedom of thought. The ruling has generated multiple debates. The possibility that institutional belief can be invoked as a basis for exemption from legal obligations has been extensively discussed. The discussion not only exists in Chile, but also in the rest of Latin America. In recent years, while Argentina and Uruguay have recognized this kind of objection, the Colombia Constitutional Court has declared it unconstitutional.⁵¹

Years later, the Constitutional Court in Chile had to resolve another related dispute. A regulation issued by the Ministry of Health prohibited private institutions that received public funding from being "institutional objectors". The regulation stated that private health facilities that had signed agreements with the Ministry of Health for obstetrics and gynecology services could not refuse abortions. The rule severely affected hospitals belonging to Catholic universities. The Constitutional Court declared this prohibition unconstitutional for violating the autonomy of the institutions. The ruling states that the constitutional autonomy of intermediate groups "implies the necessary and indispensable freedom of these groups to set their objectives, to organize themselves in the way their members deem most convenient, to decide their own acts and also the form of administration, as well as the rules by which they are to be governed, without outside interference, whether public or private, unless they violate the legal system or their own statute". It then adds, in an approach that resembles the American

⁵⁰ Group of senators and deputies v abortion bill [2017] TC 3729 (3751)-17, c. 136.

⁵¹ Carmen Asiaín Pereira, 'Los principales desafíos para el ejercicio del derecho de objeción de conciencia en Latinoamérica' (2019) 35 Anuario de Derecho Eclesiástico del Estado.

unconstitutional conditions doctrine,⁵² that conscientious objection cannot result in punishment against the objecting entity, and that the receipt of public funding does not imply that they gave up their core beliefs.⁵³

V. Conclusion

In this chapter, I have analyzed the evolution of the right of association within Chilean constitutionalism. The constitutional evolution of the right of association can be seen in several important debates over the last three centuries. The first was when the right was entrenched in 1874, which mainly protected freedom of association without previous authorization. Almost a century later, in 1971, a new constitutional amendment—this time to the 1925 Constitution—introduced important provisions for the protection of various associations, such as political parties, schools, universities, unions and local organizations. Then, the 1980 Constitution transformed the “autonomy of intermediate groups” into a core constitutional issue. Finally, the last debate on freedom of association took place during the two constitution-making processes that began in 2019, where the limits to freedom of association and the autonomy of associations, among other issues, were discussed.

The current Constitution of 1980 regulates the three facets of the right of association: the right to form an association, the right not to be forced to belong to an association and the autonomy of the associations. Several decisions of the Constitutional Court have recognized the centrality of this right in all its facets. This includes the freedom to create or form any type of group, the protection of both formal associations and associations without legal personality, the prohibition of any obligation to join a trade union or a professional association, and a general clause that protects the “adequate autonomy” of associations “to fulfill its own specific purposes”.

Finally, we examined some debates concerning this right. Some are local debates, such as the one linking the autonomy of associations and the principle of subsidiarity. There have also been discussions about a series of constitutional provisions that, since the 1970s, have tried to separate civil society from politics. Other debates have focused on relevant case law from other jurisdictions, providing a comparative perspective on how the right has been interpreted in different legal systems. The focus has been on the scope of the autonomy of associations,

⁵² Kathleen Sullivan, ‘Unconstitutional Conditions’ (1989) 102 Harvard Law Review. Also, Philip Hamburger, ‘Unconstitutional conditions: the irrelevance of consent’ (2012) Virginia Law Review.

⁵³ Group of senators v Health Department [2018] TC 5572-18, c. 10, 21 - 22.

even in controversial areas such as institutional beliefs and the regulation of abortion, which represent the most recent major judicial debates. This constitutional and jurisprudential trajectory shows that the right of association is strong in Chile, and constitutional provisions have been progressively strengthening this right over the last half-century.