

**LIMITS OF TOLERANCE:**

**Freedom of Expression and the Public Debate in Chile**

**Human Rights Watch  
New York · Washington · London · Brussels**

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## INTRODUCTION

### **Freedom of Expression and Transition to Democracy**

Since the 1980s, the term “transition to democracy” has been used to describe those processes of political change that aim to leave behind a dictatorial past, a situation of internal armed conflict or another type of radical breakdown of the political order or absence of the rule of law, and to advance toward the foundation or reconstruction of a democratic system. Chile has generally been cited as one of the cases of transition to democracy most worthy of study.

In Chile, various public figures hold diverging points of view — though their differences are sometimes based only on semantics — as to how advanced is the country’s transition to democracy or at what moment it should be considered to have ended. However, a substantial majority, including many who consider the transition to be fully realized, believe that Chilean democracy can and should be deepened, although they may differ as to the extent and necessity of the changes that should be introduced.

Seen from an international perspective, it is clear that Chile is governed by democracy under the rule of law; however, some aspects of its laws, institutions and practices fall short of international norms and standards it is bound by the ratification of various international treaties to respect.

One of the areas in which this deficiency is most critically evident is of real respect for, and effective protection of, freedom of expression. In fact, this report concludes that freedom of expression in Chile is subject to restrictions perhaps unparalleled among Western democracies.

The gravity of this situation cannot be underestimated. As indicated in this introduction, freedom of expression and information is the cornerstone of public freedoms and of the democratic system. For that reason, advocacy of its full respect and promotion in Chile — which is the purpose of this report —has both a substantive and instrumental aspect. Substantive, because it is internationally accepted that full democracy cannot be understood without the corresponding full enjoyment of freedom of expression, in all its facets. Instrumental, because increasing the protection of this freedom encourages public debate on the improvement of Chilean democracy as a whole.

This report concludes that an authoritarian tendency has prevailed in Chilean laws, political culture and judicial tradition, affecting the balance between freedom of expression and the restrictions to which it is subject. This tendency has historical roots that long pre-date the military government of the period 1973-1990, although the legacy of that regime contributed to exacerbating them. The report also demonstrates that the Chilean courts have not duly taken into account international human rights norms that have been incorporated, and given over-arching



importance in domestic legislation, as a result of Chile's ratification of the respective international conventions.

For these reasons, it is worth reviewing the development of the international consensus that currently exists regarding freedom of expression, as well as its particular relevance for the democratic system.

### **Freedom of Expression and Its Link With Ideas of Democracy and Human Rights**

In modern times, freedom of expression has undergone two historical periods of intense conceptual development and ethical valuation. The first goes back more than two centuries, associated with the dawn of modern democratic thought and with the revolutions that sought to install it in Europe and the Americas. The second period began a century and a half later and is linked to the emergence of a system of international protection of human rights.

In recent years, after the end of the Cold War and the processes of transition to democracy, there has been renewed interest in freedom of expression, both by the legacy of libertarian thought and by human rights norms and concepts. It is worthwhile to briefly review this dual historical legacy, which serves as a framework for current activism in favor of freedom of expression.

Although there are more ancient precedents, freedom of expression as it is known today has its roots in the period of the Enlightenment. The ideas of philosophers and political thinkers that inspired the liberal revolutions of the eighteenth century is reflected in the principal manifestos of those revolutions, among them the Declaration of Independence and Constitution of the United States, and the French National Constituent Assembly's Declaration of the Rights of Man and the Citizen.

The basic concepts of liberal thought may be summarized as follows: human beings are born free and are equal in dignity and rights; among the fundamental and inalienable rights of the individual are those concerning life, security and liberty; sovereignty rests essentially with the nation and the purpose of political organization is, fundamentally, to guarantee the rights and liberties of persons; as such, the legitimacy of government derives from the consent of the governed and from no other foundation, such as the divine origin of power, the dynastic rights of royalty or the recognition of de facto powers.

Liberal thinking, later enriched by other strains of thought, affirmed its confidence in the creative force of individual liberty and the free association and competition between ideas and opinions. For the same reason, it proclaimed the

special importance of freedom of expression, in particular in relation to the communication of information and opinions by all media, including the press.<sup>1</sup>

Freedom of expression was considered to be the cornerstone of a system of freedoms that included freedom of conscience, that is, the right to hold opinions or religious or other beliefs, as well as the right to assembly, demonstration and petition.<sup>2</sup>

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<sup>1</sup> Article 11 of the Declaration of the Rights of Man and the Citizen, adopted by the French National Constituent Assembly in 1789, indicates the special status of freedom of expression and of the press when it states that “the free communication of thoughts and opinions is one of the most precious rights of man; therefore, any citizen may speak, write and publish freely, notwithstanding the responsibility for abusing this freedom, in the cases determined by law.”

<sup>2</sup> Articles 10 and 11 of the Declaration of the Rights of Man and the Citizen respectively establish the freedom of conscience and of expression. Article 10 states: “no one shall be molested for their opinions, even religious ones, provided these manifestations do not perturb the public order established by law.” At the same time, the First Amendment to the U.S. Constitution links freedom of expression and other rights by stating that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government

Propositions formulated during this period are today widely accepted as essential to the notion of democracy. These include the idea that neither political and religious authorities nor judges are competent to determine the goodness or validity of ideas or opinions, which must compete freely; also, that the protection of free expression is meaningless if it does not also extend to ideas or opinions that are generally abhorred.

At the same time, while recognizing the need for a politically organized society, whose institutions must necessarily rely on a public force capable of maintaining order and enforcing the law, liberal thought harbored a fundamental distrust of the state. For this reason, freedom of expression was conceived not only in its creative dimension but also in its preventive role as an indispensable instrument for keeping the powers of the state under the critical control of its citizens.<sup>3</sup>

It is difficult to summarize the complex history that runs from the first liberal revolutions until the period after the Second World War, when the international community proclaimed a set of fundamental rights and later supported their promotion and defense beyond national borders. However, it is interesting to highlight briefly a few landmarks, in order better to understand the present phase of activism in favor of freedom of expression and other fundamental rights.

In the two centuries that have elapsed between the liberal revolutions and our time, the recognition or negation of the fundamental rights of persons was intimately linked to the doctrinal propositions and ideological and political positions that mark that historical period.

The original ideas of liberal democracy inspired the independence process in the Americas, even though in most countries democracy took a long time to become more or less firmly rooted. Meanwhile, in Europe, following the absolutist restoration, the liberal democratic ideal was reaffirmed after the revolutions of

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for a redress of grievances.”

<sup>3</sup>Article 14 of the Declaration of the Rights of Man and the Citizen established that “the right of all citizens to verify the need of a public contribution, accept it freely and follow their employment,” and Article 15 indicates that “society has the right to demand the account of his administration from any public employee.”

1848. In the second half of the nineteenth century, other parallel ideologies emerged, of socialist, social-religious or nationalist orientation, inspiring the creation of powerful political organizations that provided a framework for the expression of acute social demands and conflicts. In the midst of these processes, in the more advanced countries, protection of public freedoms was laboriously and gradually extended to other social sectors and races, apart from those dominant in society, and, later, to both sexes.

The twentieth century has been called the “short century” (if one considers it as having begun with the First World War and ended together with the Cold War). It has also justifiably been described as an age of extremes,<sup>4</sup> due to the exacerbation of the struggle between political ideologies that characterizes it and that was already insinuated at the end of the nineteenth century. In effect, after the end of World War I, the ideologies of liberal capitalism, communism and fascism emerged as clearly opposed political positions each aspiring to international hegemony. The first of these continues to hold power, and the other two managed to conquer it, for periods, in nations of major geopolitical importance. World War II culminated with the defeat of the fascist alternative, and the anti-fascist allies subsequently turned into the principal contenders during the following period, the Cold War, which reached its conclusion at the end of the 1980s.

The unheard-of extremes of inhumanity reached during World War II shook the international conscience and were determining factors in the introduction of humanitarian components in the construction of the new world order. In effect, looking back over the past fifty years, it is clear that in the post-war period, in addition to the emerging world order in the political, economic and military fields, the bases of an international humanitarian order were established, incipient at first but gaining increasing importance through to the present day.

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<sup>4</sup>Eric J. Hobsbawm, *The Age of Extremes* (Vintage Books: New York, 1996).

The international humanitarian order of the post-war period rests on three fundamental pillars: the systems of human rights, international humanitarian law, and refugee law. The first imposes international obligations on states for the protection of the fundamental rights of the person. The second seeks to regulate the conduct of the parties to an international or internal armed conflict, as well as to protect the victims of that conflict. The third seeks to protect persons who, finding themselves outside their country of nationality, are unable to avail themselves of the protection of that country due to well-founded fears of suffering arbitrary persecution.<sup>5</sup>

Of particular interest is the development of the international human rights system, which serves as a framework for freedom of expression and other related rights. Since it emerged in the post-war years, the international human rights system has passed through three distinct phases, outlined below.

During the first phase, which extends well into the 1960s, the initiative was fundamentally in the hands of governments, which acted via international organizations such as the United Nations, the Council of Europe or the Organization of American States. During this period the principal international and regional declarations and conventions on human rights were adopted, and protection bodies within the United Nations system and the European and American regional systems were established or agreed to be established.

In a second phase, which extended from the 1960s through the end of the Cold War, the human rights activity of the United Nations and regional inter-governmental bodies continued. However, the dominating feature of this period is the emergence of an international human rights movement, nongovernmental in nature, which later expanded to various countries throughout the world. This movement, led internationally by organizations such as Amnesty International, the International Commission of Jurists and Human Rights Watch, scrupulously

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<sup>5</sup>Although international humanitarian law has a long history, it expanded considerably in the post-war period with the 1949 Geneva Conventions and their 1977 additional protocols. The international system of human rights has elements that developed in the inter-war period, but as a systematic body of international norms covering the full range of fundamental rights, it is a product of the post-war era. This is also entirely true of international refugee law.

documented and denounced human rights violations, disseminated information and conducted campaigns in order to promote these values and defend the victims of violations. In this way, they attracted the attention of the press and international public opinion, as well as of many governments, and contributed to elevating human rights to the position as an internationally accepted fundamental value of political ethics that it occupies today.

The human rights movement based its actions on internationally recognized human rights norms. However, that apparent consensus could not hide the fundamental ideological differences between the protagonists of the Cold War. These differences extended to the very meaning of democracy and to the level of protection provided for political freedoms, including freedom of expression. In the climate of Cold War ideological polarization, it was difficult for human rights organizations to assume an apolitical position, necessary for the effectiveness of its work, if it chose to question the bases of the competing political systems. For this reason, with few exceptions, human rights organizations tended to concentrate on violations of undisputed norms, such as those protecting life, physical integrity and personal liberty in the face of arbitrary detention.

Nonetheless, several groups in the United States and Europe did work, in this period, to defend the freedom to found newspapers as well as for an end to censorship.<sup>6</sup> At bottom, freedom of conscience and freedom of expression never ceased to be the center of international human rights activism. In effect, the vast majority of the gravest human rights violations (apart from massacres committed during military operations in internal armed conflicts) have been perpetrated as a means of physically eliminating, punishing or restricting the possibility of action of political or religious dissidents, which means that they suffered due to their beliefs, opinions or ideas. The concept of prisoner of opinion or prisoner of conscience itself, so linked to human rights campaigns, summarizes that situation.<sup>7</sup>

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<sup>6</sup>Among other international nongovernmental organizations concentrating on freedom of expression during the 1980s were the Fund for Free Expression (an early component of Human Rights Watch); Article 19 - The International Center Against Censorship; Index on Censorship; The Committee to Protect Journalists; Reporters sans Frontières; World Press Freedom Committee; IFEX - a Clearing House for Freedom of Expression Issues. A large number of journalists' union organizations grew from the same impulse, such as the International Federation of Journalists; associations of writers, such as PEN; or of owners of communications media, such as the Inter-American Press Society and the International Radio Broadcasting Association.

<sup>7</sup>The foundation of Amnesty International originated from a newspaper article published by Peter Berenson about the case of Portuguese students imprisoned for toasting to liberty. Starting with that article, an international campaign was begun for the liberation of prisoners

Many factors help to explain the political changes that have taken place internationally since the 1980s, but it is widely accepted that the sustained international campaign for human rights and the pre-eminent that the human rights issue has gained in international forums, contributed to those changes and to the revaluation of the democracy and pluralism they brought with them.

With the end of the Cold War, however, the system of human rights law and the international movement acting within its margins entered a third phase, marked by new issues and challenges. It is true that grave human rights violations continue to demand the attention of the international community. In various current situations, involving the breakdown in the organization of the state and religious or ethnic struggles, humanitarian protection still requires a major effort. However, increasingly, a principal problem of political ethics consists of overcoming a legacy of human rights violations from the recent past, and of constructing a fully democratic system that offers the greatest possible guarantee of human rights promotion and respect.

This has been the situation of Chile, after its return to democracy in 1990, and it is within this scenario that it is so important to examine the degree of respect for freedom of expression in the country.

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of conscience, later defined as those imprisoned for their beliefs or opinions or for their identifying characteristics, who have not used or advocated violence.

During this third phase of the international human rights movement, action for the promotion and defense of freedom of expression in all its facets has expanded notably. There are various manifestations of this process: new intergovernmental mechanisms have been established to protect freedom of expression.<sup>8</sup> Also, nongovernmental organizations specifically focused on freedom of expression have emerged or expanded. At the same time, nongovernmental human rights organizations of a more general nature, which in earlier periods had concentrated on protection of the rights to life, physical integrity and freedom of persons, began to promote a wider range of rights and the establishment of legal and institutional systems to protect them. Using this approach, they were also interested in the processes of democratization and in the different aspects of freedom of expression. Simultaneously, in this phase the European Commission of Human Rights (hereafter the European Commission) and the European Court of Human Rights (hereafter the European Court) continued to examine situations and cases relating to freedom of expression, while the Inter-American Commission on Human Rights (hereafter the Inter-American Commission) and the Inter-American Court of Human Rights (hereafter the Inter-American Court) gradually began to receive a number of complaints and requests for consultative opinions on the same theme.

The above historical overview shows how an increasing international consensus on freedom of expression has come into being: from its philosophical-political proclamation, at the dawn of the modern era, passing through its development in the legislation and practice of the most advanced countries, eventually becoming part of an ever more complex and sophisticated international system for the protection of human rights.

Having reached this last stage, the international norms on freedom of expression return to enrich national legislation, through the incorporation of international law into domestic law. This is the case of Chile, which has ratified the principal international human rights instruments and has amended its constitution to reinforce the legal hierarchy of those rights.<sup>9</sup>

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<sup>8</sup>By Resolution 1993/45 of 5 March 1993, the United Nations Commission on Human Rights designated a special rapporteur on the promotion and protection of the right to freedom of opinion and expression. In 1998, the Inter-American Commission on Human Rights agreed to establish a special rapporteur on freedom of expression.

<sup>9</sup>Chile ratified the International Covenant on Civil and Political Rights in 1972, which was promulgated in 1976. However, the military government delayed its publication in the Official Bulletin (without which procedure the Chilean courts did not admit its validity as national law) until April 29, 1989. Chile recognized the competence of the Human Rights Committee established under the covenant by decree published on October 24, 1991, with respect to "all acts that were initiated after March 11, 1990" (the date President Patricio



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Aylwin took office, ending the military regime that governed from September 11, 1973).

Chile ratified the American Convention on Human Rights, recognizing the competence of the Inter-American Commission and the Inter-American Court only for acts initiated after March 11, 1990. The decree promulgating the convention was published in the Official Bulletin on January 5, 1991.

Under a 1989 constitutional reform law, a second section was added to Article 5 of the Chilean Constitution, which states: "The exercise of sovereignty recognizes as a limitation the respect for the essential rights emanating from human nature. It is the duty of organs of the State to respect and promote those rights, guaranteed by this Constitution, as well as by the international treaties ratified by Chile and in force."

In sum, the universal ethical ascendancy of human rights, the validity of its norms in Chile's domestic law, as well as the fact that the international systems of human rights protection are the most fertile forum for the elaboration of jurisprudence and doctrine in this area, confirm that the framework of human rights is the most appropriate for the examination of freedom of expression in Chile.

### **The Human Rights Normative System Within Which Freedom of Expression Falls**

None of the fundamental freedoms, including freedom of expression, is absolute. Of all the fundamental freedoms, that of expression is the most elaborated in international norms and jurisprudence.

In order to understand the content of freedom of expression, and the restrictions or limitations that may legitimately affect it, we must look first at the logic implicit in the general treaties on civil and political rights, taking as a basis the American Convention on Human Rights or Pact of San José, Costa Rica, of 1969 (hereafter the American Convention) and the International Covenant on Civil and Political Rights of 1966 (hereafter the International Covenant), both ratified by Chile. It is also interesting to refer to the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 (hereafter the European Convention), because of the wealth of cases considered by the respective commission and court, and because the Inter-American Court has taken into account the jurisprudence elaborated by the European Court.

In examining the internal logic of human rights norms, it is clear that they seek to protect different values or interests. In the tradition of continental European and Ibero-American law, these are known as "juridical values" (*bienes jurídicos*). The degree of protection that the law provides for a given juridical value (for example, by establishing severe sanctions in the case of transgression), indicates the importance attributed to it. However, the majority of international human rights norms do not define the behavior that constitutes a violation, nor assign sanctions to it, but simply consecrate certain rights. In this respect, they more closely resemble the content of the norms found in national constitutions than those found in national penal codes.<sup>10</sup>

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<sup>10</sup>Despite this, there are a number of international conventions that define certain conducts as violations of rights, such as genocide, torture or the enforced disappearance of persons. In this sense, they are more similar to the norms to be found in a country's penal code.

Nor can the importance that international human rights law assigns to different juridical values be inferred solely on the basis of the restrictions imposed on certain rights. That one right may be subject to no restrictions and another may be subject to several restrictions does not necessarily mean that the first has greater hierarchy than the second. The restrictions that international human rights law imposes on some rights may be based on the importance assigned to that juridical value, but it may also respond to the nature of the respective right. In fact, the exercise of certain rights inevitably places them on a potential collision course with other rights or general interests, and it is therefore necessary to regulate these possible conflicts. The same does not occur with other rights.

#### **Juridical Values Involved in Freedom of Expression and Related Rights**

Freedom of expression and the rights most closely related to it are enshrined in the international conventions on civil and political rights. Looking at these rights as a whole, we can identify four groups, in line with the juridical values they seek to protect:

- **Security of the person:** Within this group of rights are the right to life; personal integrity; physical liberty (in the sense of the right not to be submitted to arrest, detention or imprisonment, except in accordance with the law, including fair trial guarantees); the prohibition of slavery; the right to honor and dignity, private life, including the privacy of the home, family life and correspondence; and freedom of conscience, understood as the right to hold religious, philosophical or other beliefs or convictions (although the expression of those convictions, on the other hand, falls within the category of freedoms). The generic value common to all these rights can be characterized as the security of the person, which implies the protection of life and physical security, as well as of the more intimate sphere of identity and privacy. One is entitled to these rights as a person, rather than as an active citizen. They are enjoyed by all, even those who do not participate in any social or civic activity whatsoever.
- **Freedoms:** Unlike the previous group, the exercise of these rights relates to the person in social interaction. The generic value protected is the capacity to act freely (within respect for the law and the rights of others) in political, religious, social or economic spheres. They include freedom of expression, including freedom to seek and publish information, through the press or other media; freedom of assembly; freedom of association; freedom of circulation and residence; freedom to formulate petitions to the authorities and participate in political life through voting (which may at times also be an obligation) or through running for public office.

- **Equality:** The norms that consecrate equal protection before the law, without discrimination on the basis of race, color, sex, language, religion, political or other opinions, national or social origin, economic position, birth or any other social condition, are common to both civil and political rights and to economic, social and cultural rights. The content of the right to equality is formal rather than substantive. It seeks to ensure that neither the protection of the rights of each person nor the restrictions that may be imposed on the exercise of some of those rights is based on arbitrary discrimination.
- **Right to the protection of a legal system, based on a determined status or membership:** Among these are the recognition of juridical personality (status as a person) before the law, and status such as that of national of a given country, citizen, permanent resident or refugee. These distinct qualities bring with them certain special rights and obligations with respect to the respective juridical system, although all persons have equal enjoyment of fundamental rights. The generic juridical value that these seek to protect is to ensure that all persons have the protection of a determined legal-political system (in addition to that provided, in the case of refugees, by the United Nations High Commissioner for Refugees).

#### **Limitations on Human Rights**

Article 32(2) of the American Convention refers in general terms to these limitations: “The rights of each person are limited by the rights of others, by the security of all, and by the just demands of the general welfare, in a democratic society.” Specifically, the categories of limitations are the following:

- **The rights of others:** The exercise of certain rights may come into conflict or collide with the legitimate rights of others and, to that extent, should be limited.
- **Compliance with the law:** In particular, this relates to the repression of crime (“the security of all”). For example, judicial investigations may impose limits on the right to privacy of the home and private communications; the need to investigate and punish crimes may affect personal liberty.
- **“The just demands of the general welfare”:** These also imply that some rights must be subordinated to legitimate requirements relating to national security, public order, public health and public morals.
- **Suspension of certain rights:** Article 27 of the American Convention establishes that “1. In time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to

the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, color, sex, language, religion or social origin.”<sup>11</sup> The reason for this limitation is both “the security of all” and the “just demands of the general welfare.”

The relationship between the various restrictions just mentioned with the four groups of civil and political rights described earlier demonstrates that public freedoms are subject in principle to all the categories of limitations. On the other hand, the other groups of civil and political rights include many rights that cannot be submitted to any limitation. This should not create confusion about the importance of freedoms for the normative system of human rights. Rather, the exercise of these rights, by its very nature, implies a potentially high degree of interaction and, as such, of conflicts of rights and values.

An example well illustrates this point: among inviolable rights is the right to life, which may be affected in situations of legitimate defense. Common sense indicates that the right to life is as important or more so than the right to physical integrity. However, the prohibition of torture is an absolute norm, and the right to life is not. The reason is that in armed conflict situations or cases of illegitimate aggression, the right to life of one often comes into conflict with the same right of others. The same conflict does not occur in the case of the prohibition of torture, except in artificial theoretical examples.

The fact that freedoms are in principle subject to several restrictions does not mean that these may be applied lightly. On the contrary, as discussed below,

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<sup>11</sup> Section 2 of Article 27 establishes that it does not authorize the suspension of the rights determined in the articles of the convention cited therein, nor of the indispensable judicial guarantees to protect those rights. Section 3 of the same article establishes the obligation of the states that make use of the right of suspension to inform the other state parties to the same convention immediately, through the Secretary General of the Organization of American States, of the provisions whose application it has suspended, the reasons that gave rise to the suspension, and the date set for the termination of such suspension.

restrictions should be interpreted restrictively, especially in the case of the right to free circulation of information, ideas and opinions. This is a point that has generally been ignored by the Chilean courts, as the body of this report illustrates.

### **Obligations Imposed on States by International Human Rights Norms.**

Article 1 of the American Convention states: “The States Parties to this Convention undertake *to respect* the rights and freedoms recognized herein and *to ensure* to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination...” (emphasis added).

Article 2 indicates that: “Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.”

The obligations of states in the field of civil and political rights are:

**To respect:** This imposes on the state the obligation of omission, consisting of doing nothing that violates the respective right. For the state, this obligation may be called principal or direct, in the sense that, if it is complied with, the juridical value protected will not have been affected by the state.

**To ensure:** This is a positive obligation, requiring that rights are effectively respected in practice, both by the state and by all persons. This is an important but, conceptually, complementary obligation, as its purpose is to make the effective enjoyment of those rights and freedoms more likely. The obligation to ensure requires adoption of “legislative or other measures.” It also imposes the obligation to ensure that any person whose rights or freedoms have been violated has effective recourse, even against persons acting in an official capacity, and that the authorities comply with any decision arising from that legal remedy. This obligation is contemplated in Article 25 of the American Convention and in Article 2(3) of the International Covenant.

**To promote:** The obligation of the state to promote human rights is included within the term “to ensure” if this is understood in a broad sense. However, in some texts it is mentioned separately, as in Article 5(2) of the Chilean Constitution. “Promote” can be deemed to mean the adoption of educational and dissemination measures, as well as any other measure tending to foster a climate of respect and acceptance of these rights. In terms of freedom of expression and of the press, as described below, this obligation to promote may include specific content relevant to the plurality of communications media.

### **Freedom of Expression: Content and Restrictions**

The most relevant specific norms relating to freedom of expression in Western human rights law are Article 19, taken together with Article 29(2), of the Universal Declaration of Human Rights; Articles 19 and 20 of the International Covenant; Articles 13 and 14 of the American Convention; and Article 10 of the European Convention.

#### **Importance of the right to freedom of expression**

A number of international organizations have repeatedly referred to the particular importance and hierarchy of freedom of expression as the cornerstone of the system of public freedoms and a pillar of democratic order. This assessment is a contemporary echo of similar views that go back, as noted earlier, to the time of the Enlightenment.<sup>12</sup>

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<sup>12</sup> Resolution 59 (I) of the United Nations General Assembly, of December 14, 1946, declares that “freedom of information is a fundamental human right and ... the cornerstone of

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all the freedoms to which the United Nations is consecrated.”

The United Nations special rapporteur on the promotion and protection of the right to freedom of opinion and expression indicated in his report of December 14, 1994 that the right to freedom of opinion and expression is a central right of the International Covenant. It is also a civil right, in its capacity to protect this sphere of the life of the individual against undue interference by the state, and a political right, in its capacity to guarantee the individual’s participation in political life, including that of state institutions. As such, the right to freedom of expression may be described as “an essential test right” whose enjoyment demonstrates the extent of enjoyment of all the human rights contained in international instruments. Respect for this right reflects the level of respect for justice and honesty in each country. United Nations, Economic and Social Council, Document (I/CN.4/1995/32, par. 14).

The Inter-American Court has indicated that “freedom of expression is a cornerstone of the very existence of a democratic society. It is indispensable for the formation of public opinion. It is also *conditio sine qua non* for the full development of political parties, trade unions, scientific and cultural societies, and in general those who wish to influence the community. It is, finally, a pre-condition for the community, at the hour of exercising its options, to be sufficiently informed. Thus, it is possible to affirm that a society that is not well informed is not fully free.” Consultative Opinion OC-5/85, November 13, 1985, par. 50.

Similar concepts of the high value placed on freedom of expression have been repeatedly expressed by the human rights protection bodies of the European system, as well as by the courts of many countries. See “The Article 19 Freedom of Expression Handbook,” *International and Comparative Law, Standards and Procedures*. Bath Press, Avon, United Kingdom, August 1993.



However, within the Inter-American system, freedom of expression has, in the words of the Inter-American Court, the “highest value,” which even exceeds that accorded to it in other treaties. The court indicates that a comparison between Article 13 of the American Convention and the relevant provisions of the European Convention and the International Covenant “clearly demonstrates that the guarantees of freedom of expression contained in the American Convention were designed to be the most generous and to reduce to a minimum restrictions on free circulation of ideas.”<sup>13</sup>

#### **Content of the right to freedom of expression**

Article 13(1) of the American Convention establishes the positive content of freedom of expression: “Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.”<sup>14</sup>

“Information” includes news and other data whose truthfulness is in principle subject to confirmation. “Ideas” should be understood in the broadest possible sense, including beliefs, opinions, proposals, petitions, value judgments, criticisms, or artistic expressions. Even when some of these means of expression may include elements of “information,” as a whole they are not subject to verification. Publicity or commercial propaganda is another mode of expression and has, in general, a mixed character.

The above distinction is relevant to the extent that false or incorrect information may give rise to special responsibilities or rights. Examples of this are responsibility for misleading advertising or the right to rectification or reply with respect to a press publication.

The two aspects of this right, “seek and receive,” as well as “express and impart” information and ideas, are intimately linked. However, they are separate rights. The right to seek and receive information is a right in itself, as highlighted by the special rapporteur on the promotion and protection of the right to freedom of opinion and expression (hereafter the Special Rapporteur) in his 1998 report,<sup>15</sup> and does not necessarily imply the dissemination of the information found or received.

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<sup>13</sup>OC-5/85, par. 70.

<sup>14</sup>This text is virtually identical to that of Article 19(2) of the International Covenant.

<sup>15</sup>United Nations Economic and Social Council, Document E/CN.4/1998/40, 11.

The Inter-American Court has declared that the “expression” and the “dissemination” of thought and of information are indivisible, “so that a restriction on dissemination represents in exactly the same measure, a limit to the right to free expression.”<sup>16</sup>

Freedom of expression not only protects explicit speech, understandable through words, but also symbolic expression, which may consist not only of the artistic expressions mentioned in Article 13(1) but also of a variety of acts or omissions, whose significance often depends on circumstances.

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<sup>16</sup> OC-5/85, par. 31.

Freedom of expression has an individual and a collective dimension. The Inter-American Court has added that if the freedom of expression of the individual is restricted, not only is the individual's right being violated but also the right of all to receive information and ideas. There are thus two dimensions of freedom of expression: not to be prevented from manifesting one's own thinking, and also the collective right to receive any information and to hear the expression of another's thought.<sup>17</sup>

Although all the thematic contents of expression and information are protected by the human rights system, international jurisprudence tends to give more latitude to some modalities of expression, such as political discourse, and to allow states greater discretion in the regulation of others, such as commercial propaganda.

The defense of offensive opinions is one of the demands of pluralism, tolerance and broad-mindedness, without which we cannot talk about democratic society. This principle, which in Western thought goes back to the time of Voltaire, has received constant confirmation in international jurisprudence.<sup>18</sup> The Special Rapporteur has also repeated it, in his 1994 report.<sup>19</sup>

#### **Rights Related to the Freedom to Seek and Receive Information and Ideas, as well as to Express and Disseminate Them**

In the first place, freedom of expression is intimately related to the right to freedom of conscience and religion. Article 12(1) of the American Convention declares that this right "includes freedom to maintain or to change one's religion or beliefs, and freedom to profess or disseminate one's religion or beliefs, either individually or together with others, in public or in private."

In reality, Article 12(1) has merged freedom of conscience and religion with the freedom to manifest them. The first is an absolute right, while the second is

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<sup>17</sup>OC-5/85, par. 30.

<sup>18</sup>An example case is the ruling of the European Court of December 7, 1976, *Handyside v. United Kingdom*.

<sup>19</sup>*Ibid.*, para. 29.

subject to the general restrictions on other freedoms, as Article 12(3) itself points out: “Freedom to manifest one’s religion and beliefs may be subject only to the limitations prescribed by law that are necessary to protect public safety, order, health, or morals, or the rights or freedoms of others.”

Seemingly, freedom of conscience and of expression form an inseparable continuum; however, history shows innumerable examples of persecution for reasons of conscience, including against people who did not manifest their religion or beliefs but whose convictions were inferred or guessed.

In any case, it is worth pointing out that the freedom to manifest religion and belief, including freedom of religion, of proselytism and other religious manifestations, has greater protection under the American Convention than freedom of expression. In effect, Article 27(2) of the convention, relating to the suspension of guarantees, includes freedom of conscience and religion among the rights that may not be suspended but does not include freedom of expression.

Freedom of expression is also related to freedom of assembly and of demonstration, to the extent that the exercise of these rights is usually a method to express ideas or criticisms, either symbolically or explicitly. The denial of the freedom of assembly and demonstration is usually aimed at preventing or prohibiting those expressions or criticisms.

In the same way, freedom of expression is linked to the rights to life, personal liberty and physical integrity. In general, political repression that reaches such extremes is a means of suffocating political opposition or dissent. Other rights also related to freedom of expression include the right to form trade unions, to participate in genuine periodic elections, and to run for public office, as well as some special rights such as the right to use one’s own language in official proceedings.<sup>20</sup>

Freedom of expression is also related to various rights with which it may come into conflict (as will be seen below).

The right to freedom of expression is also related to the right to a fair trial and to certain procedural norms that may limit access to the search for information or determine the opportunity and means in which freedom of expression may be manifested, within court rituals.

### **Political Debate and Other Forms of Expression or Information on Affairs of Public Interest.**

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<sup>20</sup>See “The Article 19 Freedom of Expression Handbook,” pp. 15-17.

Political debate should be understood in the broad sense of circulation of information, ideas, criticism and opinions regarding affairs of general public interest. The notion that freedom of expression is intimately linked to the concept of democracy is applicable, par excellence, to political debate.<sup>21</sup>

Public debate may not be completely suppressed even in times of emergency. This conclusion is supported both by norms on suspension of guarantees (which establish that they must be imposed only to the extent and for the period strictly necessary to face the exigencies of the situation) and by illustrative historical examples, such as the frequently cited tolerance of political debate and criticism under the Churchill government, during World War II.

The general principle that freedom of expression may not affect the rights to privacy, honor and reputation of others, should be understood with greater latitude when criticism of public figures is involved.<sup>22</sup> This greater latitude is extended to other authorities, such as judges.<sup>23</sup>

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<sup>21</sup>The European Court has concluded that “freedom of political debate is at the very center of the concept of democratic society.” Ruling of July 8, 1986, *Lingens v. Austria*. This jurisprudence has been repeated.

<sup>22</sup> “The limits of criticism permitted are wider in relation to a politician considered as such than in the case of a private person.” Ruling of the European Court, *Lingens v. Austria*, par. 42. The report of the European Commission in the same case, dated October 11, 1984, indicates that “the democratic system requires that those performing public functions be *submitted* to close scrutiny, not only by their political adversaries in state institutions or

Freedom of expression on public and political affairs should include the right of the opposition to publish their point of view in the mass media controlled by the state. The principles involved are both freedom of expression and non-discrimination. For the same reason, space for paid political propaganda may not be arbitrarily denied.

### **Freedom of the Press**

Originally understood as the freedom to found newspapers or magazines and/or publish and circulate newspapers, magazines or pamphlets, freedom of the press has been extended, with the development of technology, to all mass communications media.

Certain radio or television transmission frequencies are inherently limited and do not allow for the unrestricted exercise of the right to found communications media. In these cases, state regulation is justified, though not the abuse of official procedures to assign those frequencies.

Freedom of the press implies the freedom to circulate and distribute, as well as the right to determine the format in which the published material published is presented. The same freedom implies a number of other assumptions, among them that access to information should not be hampered by the authorities; this includes freedom of access to official information and the right of the public to be informed about matters that are under consideration by the courts, within certain

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other organizations, but also by public opinion, which is formed and expressed through the communications media. The exercise of this scrutiny is not merely a right; it may even be considered a "duty" and a "responsibility" of the press in a democratic State" (para. 74). Cited by Francisco Fernández Segado, "La Libertad de Expresión e Información en el Convenio Europeo para la Protección de los Derechos Humanos," in *Cuadernos de Análisis Jurídico*, no. 31, serie seminarios. Facultad de Derecho, Universidad Diego Portales (Santiago de Chile: February 1996), p. 382.

<sup>23</sup> European Court, ruling of February 24, 1997, *De Haes and Gijssels v. Belgium*.

limitations. The exercise of freedom of the press also implies the capacity of journalists to protect their sources.

These and other issues have been debated in professional press circles and decided by the jurisprudence of various countries, as well as by international courts. It is not the purpose of this introduction to dwell on them, except to stress that the tendency of jurisprudence in democratic countries is strongly in favor of freedom of the press, whenever it has to be balanced against other considerations, and therefore it justifies restrictions to this freedom only on the basis of values of great importance and in extraordinary circumstances.<sup>24</sup>

The American Convention is more explicit and detailed in its protection of freedom of the press than the International Covenant and the European Convention. This is sometimes believed to be due to the fact that later treaties (the American Convention is the most recent of the three) tend to incorporate more advanced notions; at the same time, this is more feasible where there is greater uniformity among legal systems and cultural traditions among the signatory countries, as is the case in the Americas.<sup>25</sup>

The American Convention is unique in providing, in Article 13(3), that “The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.”

The American Convention is also unique in stating the right to rectification or reply, in Article 14(1): “Anyone injured by inaccurate or offensive statements or ideas disseminated to the public in general by a legally regulated medium of communication has the right to reply or to make a correction using the same communications outlet, under such conditions as the law may establish.”

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<sup>24</sup>For a comparative study on laws, jurisprudence and practices relating to freedom of the press, see *Press Law and Practice. A Comparative Study of Press Freedom in European and Other Democracies*. Article 19 - International Center Against Censorship (United Kingdom: March 1993).

<sup>25</sup>Inter-American Court, OC-5/85, Declaration of Judge Pedro Nikken, para. 5.

The democratic tradition of special reverence for freedom of the press has been taken up by international human rights jurisprudence.

The European Court has emphasized in numerous rulings that, not only does the press have the duty to impart information and circulate ideas, but the public also has the right to receive them.<sup>26</sup> The court also rejected the claim that the duty of the press is to impart information, leaving its interpretation primarily to the reader.<sup>27</sup> On the contrary, freedom of the press broadly understood gives the public one of its best means to learn the opinion and attitude of its political leaders and to form an opinion; at the same time, it allows politicians the opportunity to reflect on the concerns of public opinion. In effect, it allows the participation of all in an open political debate that is the very basis of the concept of democratic society.<sup>28</sup>

The Inter-American Court has also closely linked freedom of the press with democracy<sup>29</sup> and has added that “journalism is the primary and principal manifestation of freedom of expression and thought.”<sup>30</sup>

#### **Pluralism in the Communications Media**

As noted in the body of this report, an effective climate of pluralism is essential for freedom of expression and of the press to fulfill the role expected of them in democratic society.

One of the obstacles to this pluralism is the monopoly or interference of the state in communications media. However, control of the communications media

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<sup>26</sup>See “The Article 19 Freedom of Expression Handbook,” p. 65.

<sup>27</sup>*Lingens v. Austria*, para. 45.

<sup>28</sup>Ruling of April 23, 1992, *Castells v. Spain*.

<sup>29</sup>OC-5/85, para. 70.

<sup>30</sup>OC-5/85, para. 71.



by private groups may affect freedom of the press as much as interference by the state.

In this respect, the duty to take into account the needs of a democratic society<sup>31</sup> may be interpreted as establishing the positive obligation of the state to guarantee or promote a climate of open and plural public debate, and to correct a situation in which these characteristics are absent or distorted. This obligation may also be deduced from the international norms on freedom of expression that establish the right of the public to receive information and opinions from a variety of sources.

This obligation is being recognized internationally, although its content is not precise.

The European Commission of Human Rights has declared that the obligations related to the right to seek and receive information and opinions may be infringed “where the State fails in its duty to protect against excessive concentration of the press.”<sup>32</sup> In the same way, in 1982 the Committee of Ministers of the Council of Europe declared that “States have the duty to prevent infractions against freedom

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<sup>31</sup> The European Convention establishes in its Article 10(2) that restrictions to freedom of expression must be “necessary, in a democratic society....”

The Inter-American Court has considered that the same sense is implicit in Article 29 of the American Convention: “No provision of this Convention shall be interpreted as: c) precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government.” Article 32(2) of the American Convention also refers expressly to democracy: “The rights of each person are limited by ... the just demands of the general welfare, in a democratic society.” The Inter-American Court has also taken into account the jurisprudence of the European Court on this point.

<sup>32</sup> See “The Article 19 Freedom of Expression Handbook”, pp. 77-78.

of expression and information and should adopt policies designed to promote, to the extent possible, a variety of media and pluralism in the sources of information, thus allowing for a plurality of ideas and opinions.”<sup>33</sup>

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<sup>33</sup>Ibid., pp. 78-79.

The United Nations Human Rights Committee has stated that, with the development of modern mass communications media, effective measures are needed to prevent a control of these media that interfere with the right of all to express themselves freely, contrary to the guarantees contained in the International Covenant in Article 19(3).<sup>34</sup>

The Inter-American Court concluded that, just as censorship is inadmissible, it is also inadmissible that the exercise of the right to disseminate information and ideas lead to the formation of public or private monopolies over communications media.<sup>35</sup> Consequently, the Inter-American Court considered indispensable a plurality of media, the prohibition of any monopoly over them, and the guarantee of protection of journalists' independence. The same court also resolved that the obligatory unionization of journalists is against the norms of the convention on freedom of expression.<sup>36</sup>

Finally, in his 1994 report, the UN Special Rapporteur indicated that the state has the obligation to adopt measures in situations where the concentration of the communications media threatens the diversity of opinion or access to opinion.<sup>37</sup>

However, neither existing norms nor international jurisprudence have formulated criteria that make it clear in what circumstances an excessive concentration of the media that threatens the pluralism of communications media is being generated. Neither are there criteria as to what measures should be adopted in such circumstances. One possibility, of course, is the establishment of stricter anti-monopoly laws for this sector than the general laws that normally exist on this matter in various countries. Another possible measure is the establishment of state

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<sup>34</sup>General Comment 10 on Article 19, adopted by the Human Rights Committee, meeting of July 27, 1983, UN Doc. A/38/40, 109.

<sup>35</sup>OC-5/85, para. 33.

<sup>36</sup>OC-5/85, para. 81.

<sup>37</sup>E/CN.4/1995/32, para. 36.

subsidies to favor pluralism in the media. Subsidies would be acceptable as long as they do not discriminate among publications on the basis of the opinions they express. In the same way, the state should not discriminate through the use of indirect subsidies, such as the placement of governmental publicity in different communications media.

In situations in which ownership of the press is concentrated, mechanisms may also be considered to protect the editorial independence of journalists vis-à-vis the owners. These mechanisms are usually the fruit of the development of a certain culture of journalistic independence and of labor agreements between journalists and owners.<sup>38</sup>

#### **Does the Right to Obtain Official Information Exist?**

Some countries have established laws on freedom of access to information held by state organs. These laws establish the right of anyone to obtain that information, except qualified exceptions. These usually include information that may affect national security; secrets relating to the country's trade or foreign relations; the right to privacy; or the course of judicial proceedings. The right to free access to information generally allows the petitioner to receive this information without paying, other than the cost of reproducing it. Sometimes an independent

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<sup>38</sup> A study on law and practice relating to the press in a number of democratic countries, most of them in Europe, concluded that nearly all the countries studied showed a strong increase in the concentration of ownership of the press and a process of "mortality of periodicals" in the face of the advance of television. The governments of the countries reacted to this in different ways. France and Germany have strict laws prohibiting commercial transactions that lead to higher levels of concentration in the ownership of printed media. The effectiveness of these laws is limited, however, due in part to the fact that they do not take into account the problem of ownership of communications media of different types. In the United Kingdom, a commission on monopolies and company mergers supervises the merger of periodicals, but its powers are limited. In other countries there is no specific regulation on press ownership, but this may be subject, to a greater or lesser extent, to anti-monopoly laws.

Some countries have a system of subsidies for specific newspapers with financial difficulties. The subsidies tend to be controversial: while some consider that they prevent the rationalization imposed by the market, others hold that they are necessary to ensure pluralism. In certain countries, subsidies are granted on the condition of editorial independence for journalists. In others, temporary subsidies are granted to assist newspapers "of special character" to begin publishing or to survive in difficult periods. (See Sandra Coliver, "Comparative Analysis of Press Law in European and Other Democracies," in *Press Law and Practice. A Comparative Study of Press Freedom in European and Other Democracies*, pp. 255-289.

body may be granted recourse to verify the legitimacy of a refusal to provide the information, or may pronounce on unjustified delays.<sup>39</sup>

Can an international obligation relating to access to public information be established on the basis of international human rights norms? These norms speak only of the right to right to seek and receive information; they do not refer specifically to the right to accede to official information.

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<sup>39</sup>In Chile, as described in the body of this report, the National Congress is debating a draft law on this issue, which arose from a recommendation by the National Public Ethics Commission, established by the government in 1994.

However, this right may be inferred on the basis of the doctrine that some rights that are not articulated as such are immanent and implicit in the guarantees the law does enumerate.<sup>40</sup>

The UN Special Rapporteur stated in his 1994 report that access to information is basic in the democratic way of life;<sup>41</sup> and in his 1998 report he added that the right to access to information held by the government should be the rule rather than the exception and observed that there is a tendency to classify more information than necessary.<sup>42</sup>

Treaties and international jurisprudence consider that freedom of expression and of the press play an essential role in the democratic process, given that the conclusion that free access to state information must exist is inevitable, except in the case of information justifiably classified for reasons of superior interest.

### **Restrictions on Freedom of Expression**

The American Convention establishes in its Article 13(2) that: "The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure: a) respect for the rights or reputations of others; or b) the protection of national security, public order, or public health or morals."

The basis for restrictions is similar to those of other international instruments, but the American Convention is unique with respect to the prohibition of prior censorship. The convention does permit, in its Article 13(4), prior censorship to which public entertainments may be subject by law, "for the sole purpose of regulating access to them for the moral protection of childhood and adolescence."

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<sup>40</sup>See Soli J. Sorabjee, in "The Article 19 Freedom of Expression Handbook," p. 7.

<sup>41</sup>E/CN.4/1995/32, para. 35.

<sup>42</sup>E/CN.4/1998/40, paras. 12 and 13.

The restrictions must be established by law; they must pursue one of the objectives mentioned in Article 13(2) of the American Convention; they must be necessary for the achievement of those objectives; and they must be in proportion to the end sought, that is, they must not go beyond what is strictly necessary to protect the rights of others or the interest of the public involved.

This requirement of necessity is qualified in the conventions, as we have seen, by the reference to a democratic society.<sup>43</sup> “Necessary” has been understood to mean that it does not have to be indispensable but that the restriction should respond to a pressing social need. It should be possible to demonstrate that the end of protecting public interest or the rights of others cannot be achieved by less restrictive means than those used. The principle of interpretation that a presumption in favor of freedom of expression should prevail, is widely accepted; therefore, restrictions should themselves be interpreted restrictively<sup>44</sup> and in line with the demands of a democratic society.

The restrictions may be previous, as in the case of censorship, or take the form of precautionary judicial measures, which consist of seizure of material through which the opinion, information or idea is expressed, in order to impede or delay its circulation. Or the restrictions may serve only as a basis to establish subsequent responsibilities. Within the inter-American system, as noted, prior restrictions are unacceptable, notwithstanding the fact that freedom of expression and the prohibition of censorship may be suspended in times of emergency, in line with the provisions of Article 27 of the same convention.

Apart from the references to restrictions on freedoms that have been made throughout this Introduction, it is worth highlighting the following points, which may be relevant in the Chilean context:

#### **“The rights of others”**

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<sup>43</sup>See footnote 31.

<sup>44</sup>See Francisco Fernández Segado, “La libertad de expresión e información...,” p. 381.

Freedom of expression may in particular affect the rights to reputation, to property (particularly in the sense of copyrights), to one's own image and to privacy. The jurisprudence of the European Court has established: that politicians must tolerate a higher degree of criticism than private citizens; that this latitude is even greater in the case of government authorities; that people occupying elected posts, especially members of the opposition, deserve special protection when they formulate criticisms on political issues; that criticism of the institutions should also be more widely tolerated than that directed at given individuals; that public personalities in general, not only politicians, should accept a greater degree of invasion of their privacy; and that, in the balance between freedom of expression and the right to privacy, greater weight must be given to freedom of expression where public interest is involved, and not just private ones, such as commercial interests.<sup>45</sup>

#### **Public order and the laws on contempt for authorities**

Incitement to commit illegal acts is usually a conduct punishable under the general rules of penal law. However, under international standards, the laws of some countries that consider some criticisms of public institutions to be crimes are not permitted (even where a highly negative evaluation or a call for political change is formulated), if the expression does not have the immediate and direct nature of incitement to commit a crime.

The laws of some countries establish higher penalties if the honor of an acting public functionary is offended than if that of a private citizen is involved. These laws are equally unacceptable, under the norms of the American Convention and other instruments, as the international jurisprudence summarized in this Introduction shows. On the one hand, tolerance of criticism by public functionaries should be greater, not less, than that which private individuals must withstand. On the other hand, public order is not affected because a law says so but rather because circumstances exist that effectively attack or threaten it.

Allowing national laws automatically to equate some conducts and certain values, such as public order, without substantive reasons justifying the claim that value has been affected, utterly disregards the requirements demanded by international norms for the limitation of freedom of expression.

The Inter-American Commission has concluded that “the laws on contempt for authorities are incompatible with Article 13 of the American Convention on

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<sup>45</sup> For a summary of this jurisprudence, see “The Article 19 Freedom of Expression Handbook,” pp. 146-151.



Human Rights, because they suppress the freedom of expression necessary for the due functioning of a democratic society.”<sup>46</sup>

**National security**

The European Court has granted wide discretion to governments to determine whether national security is affected, but the interest invoked must be a threat to the territorial or national integrity of the state and not only against the government.

Governments may also impose the obligation of secrecy on military personnel or other public functionaries who as a result of their functions have access to confidential information that could affect national security. However, these restrictions must comply with the general requirements of all restrictions on freedom of expression, including those of “necessity in a democratic society” and proportionality.

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<sup>46</sup>*Annual Report of the Inter-American Commission on Human Rights 1994*, Secretary General, Organization of American States (Washington, D.C. 1995), pp. 210-223.

“The Johannesburg Principles on National Security, Freedom of Expression and Access to Information,” approved on October 1, 1995, were drafted on this issue after a meeting in that city convened by international organizations interested in freedom of expression. The Special Rapporteur added these principles as an annex to his 1996 report.<sup>47</sup>

### **Hate speech**

In its Article 13(5), the American Convention adds a restriction known as “hate speech”: “Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar illegal action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law.” The International Covenant includes a similar norm in its Article 20.

The bases for this restriction can be found in public morals, public order or the rights of others. The respective norms establish the obligation to prohibit hate speech but not necessarily to classify these acts as crimes, although in practice it is

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<sup>47</sup> United Nations Economic and Social Council. Document E/CN.4/1997/31, February 4, 1997.

highly likely that “incitements to lawless violence” or similar illegal actions would be punished as crimes in domestic law.<sup>48</sup>

**Public morals and the concept of blasphemy**

Standards of public morals differ for different communities and also vary over time. On the grounds of public morals, countries usually prohibit or restrict expressions that are considered pornographic or obscene under their laws and

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<sup>48</sup>A point of legal interest is whether the law may establish a priori that some expressions constitute in themselves incitement to hate, independently of the circumstances of each case. Such is the case of the Gayssot Law in France, which typifies as a crime the denial of crimes against humanity or so-called Holocaust denial. This law rests on the presumption that such denial, even where presented as historical research and in academic language, is at best a covert form of anti-Semitism and, as such, incitement to racial hate; in any case, that denial would affect the rights of others. The United Nations Human Rights Committee rejected, in 1996, the complaint of a French citizen condemned under this law, because the circumstances of the case itself fell within the terms of Article 20 of the International Covenant. Yet, several members expressed reservations about the Gayssot Law. They were troubled by the fact that the law presumed that a given idea necessarily coincided with the conduct described in Article 20 of the International Covenant. However abhorrent or historically ridiculous an idea may be, and even if in practice it is highly probable that expressing such idea will be a covert form of racial hatred, it would be important to ascertain that the requisites of Article 20 have been met rather than establishing an automatic connection. *Robert Faurisson v. France*, Communication No. 550/1993, U.N. Doc. CCPR/C/58/D/550/1993 (1996).

jurisprudence. They also often prohibit or restrict artistic or other expressions that contain extreme violence.

A point of interest relates to blasphemy. There is no generally accepted definition of blasphemy. A common element is the insulting of sacred figures, symbols, or the content of a religion. However, criticism or denial of religions is, of course, a part of permissible debate.

Even if a country were to prohibit insults to a religion, it must not base such a prohibition solely on the point of view of its followers or faithful. It must further be examined whether the expression in question has elements of artistic content or can reasonably be considered to advance certain ideas, controversial as they may be, or whether its intent is exclusively or fundamentally merely to degrade or ridicule a religion or belief, its sacred figures or symbols.

José Zalaquett





## I. SUMMARY AND RECOMMENDATIONS

At present freedom of expression and information is restricted in Chile to an extent possibly unmatched by any other democratic society in the Western hemisphere. Current restrictions form part of a long established authoritarian tradition, which reached its apogee under the military government. Although restrictions on expression were taken to extreme limits by that government, they certainly did not originate with the military coup of September 1973 and had, in fact, coexisted with democratic institutions for decades prior to it.

After emerging in 1990 from a long and troubled period of military dictatorship under Gen. Augusto Pinochet, Chile has come to be seen as a model of political stability and economic creditworthiness in the hemisphere. Notching high growth rates year after year, the country embarked on an ambitious program of modernization intended to propel Chile over time into the league of developed nations. Yet reform of the country's political institutions (among them, its authoritarian constitution) to deepen democratic values has dragged behind these advances. Progress in the reforms needed to extend the enjoyment of human rights to the whole population has been slow and uneven. This report is about the array of restrictions on freedom of expression that Chileans are still subject to, which limit their participation in an open and diverse public debate.

Restrictions on freedom of expression operate at different levels, and in each branch of government. In general they are not attributable to repressive action by the executive branch. Chile is not a country in which journalists or opposition politicians are physically harmed, harassed or threatened by state agents. Nor did the laws that restrict freedom of expression originate with the current administration of President Eduardo Frei Ruiz-Tagle or that of his elected predecessor, Patricio Aylwin. Some were introduced by the military government, under which censorship and harassment of dissidents became systematic, while others have deep roots in Chile's republican history. The problem, then, is not one of abusive action by the current government, but of a failure to take long overdue steps to ensure that freedom of expression is protected and encouraged.

Many seemingly plausible arguments can be advanced to explain the freedom of expression deficit. Among them are political and institutional factors, particularly political restraints imposed by the country's authoritarian

constitution. Government officials frequently point out that the undemocratic composition of the Senate has given conservatives and former supporters of the military government disproportionate power in government, enabling them to frustrate or dilute any far-reaching reform initiatives. The seamless continuity between military rule and democratic government was based on hard negotiation and compromise between democratic leaders and the military. The need to respect this fragile consensus, it is argued, has imposed a tendency of caution, realism and deference to the middle ground, even self-censorship. It is also arguable that violations of freedom of expression arise mainly out of court rulings that reflect the conservative mentality of much of the judiciary. Many senior judges began their careers before the military government and matured under the restrictions of military rule, during which the courts notoriously failed to challenge abuse of executive power. It is true that the most serious cases of censorship in recent years have emanated not from the executive branch but from the judiciary, which has failed to give appropriate weight to the international human rights law treaties to which Chile is a signatory.

No doubt an adequate explanation of the current inhibition of the public debate in Chile would have to take into account all of these contextual arguments. It must be said, however, that they seem less convincing as Chilean democracy becomes more firmly established, since restrictions on freedom of expression show no real sign of diminishing. Furthermore, while these factors may help explain lack of positive government action, none of them can justify it. It is the government's job to use its legitimacy and political capital to expand and strengthen the enjoyment of basic democratic rights. On some of the more conflictive issues discussed below, the government has preferred to keep its political capital intact, to the benefit of political objectives it seems to consider more important.

In this report, we present the findings of a year-long study of freedom of expression and information in Chile. The core concept used to structure our findings is that of the "public debate," by which we mean the sum total of information and opinion available to people that enables them to make up their minds about a range of issues that arise in daily life, including ethical, spiritual, and political ones. A rich public debate empowers people to challenge wrongdoing and assert their rights as citizens. From this perspective we analyze successively restrictions that operate in the fields of political expression, the written media, cinema, and television.

Below we present a summary of our conclusions under four headings, and then consider current government legal initiatives on freedom of expression and information. Finally, we propose a list of recommendations that address



problems we believe have been overlooked and whose implementation would significantly strengthen this essential democratic right.

### **Laws Punishing Contempt For Authority**

Verbal expressions considered insulting high-ranking state officials carry prison sentences or fines under current laws. These include Articles 263 and 264 of the Criminal Code, Article 284 of the Code of Military Justice (threats or insults against members of the armed forces) and Article 6(b) of the State Security Law (Ley de Seguridad Interior del Estado, LSE), which punishes those who “defame, libel or calumniate,” the president, government ministers, parliamentarians, senior judges and the commanders-in-chief of the armed forces. They are variants of the continent-wide phenomenon of laws penalizing contempt of authority, known in Spanish as *leyes de desacato*. These are defined by the Inter-American Commission on Human Rights as “a class of legislation that criminalizes expression which offends, insults or threatens a public functionary in the performance of his or her official duties.”

In the early years of the Aylwin government many journalists and politicians were hauled before military courts to answer charges of defaming General Pinochet. When in 1992 President Aylwin passed these cases to civilian courts, military and police chiefs instead charged critics with the crime of sedition (Article 276 of the Code of Military Justice), over which military courts retained jurisdiction. The application of these military laws has decreased over the years, but their continuing existence undoubtedly imposes powerful constraints on any questioning of the armed forces.

The potential for abuse of the sedition law is great. The current interpretation of the law labels as seditious any comment by a civilian which might affect the morale of the armed forces or the police, and brings the offender before a military court. Since the offended party is the armed forces, the military court represents the victim, as well as acting both as prosecutor and judge.

Under a bill currently in Congress, the government proposes to transfer all prosecutions of all civilians exercising the right of freedom of opinion and information to civilian courts, undoubtedly a positive step. Military laws, however, should not be applicable to civilians, whatever court is responsible for trying them. Nor should military personnel be prosecuted for exercising their right to express criticism, except in circumstances in which military discipline is evidently threatened. Human rights jurisprudence recently developed in Europe recognizes that Article 10 of the European Convention, which refers to freedom of expression, applies to servicemen just as it does to other persons.

In the midst of an extensive program of penal and judicial reform undertaken by both the Aylwin and Frei governments, the military justice structure bequeathed by General Pinochet remains virtually intact, a beacon of authoritarianism. With the recent appointment of Pinochet's successor, Gen. Ricardo Izurieta, it is reasonable to hope that the government will undertake a thorough review of the Code of Military Justice, eliminating from its jurisdiction all but military offenses.

Obligatory deference to authority is not limited to the military sphere. Article 6(b) of the State Security Law, which governs national security and public order, gives public authorities special protection from injurious criticism. The article has been invoked against critics during two successive elected governments. These prosecutions include several initiated by Supreme Court judges and one by the legislature for an alleged attack on its institutional honor. The defendant in that case was a former Pinochet minister. At least seven other politicians, including several governing coalition parliamentarians, and fifteen journalists, have been charged since 1990 under Article 6(b) of the State Security Law. A former president of the Chamber of Deputies (the lower house of Congress) barely escaped prosecution after he had appeased army indignation by appearing in person to clarify his offending remark.

With its origins in the nineteenth century, this contempt for authority law has accompanied Chilean democracy for many decades, and has been invoked under every government since the year 1958, when its most recent version was enacted. Contempt for authority is premised on the notion that public officials deserve a greater quota of respect than ordinary citizens because of the authority they exercise. For their authority to be effective, the argument goes, state officials must be treated with deference. However, in a democracy respect for authority must be based on its *legitimacy*, and legitimacy is always open to question and challenge. For this reason, international human rights law holds that the limits of permissible criticism must be wider with regard to a person in public office than to a private citizen. Tolerance of criticism, even ill-founded and unfair criticism, is one of the obligations of public office in a democracy.

The contempt for authority provision in the State Security Law has more serious implications for the defendant than similar provisions in the Criminal Code (which have been less frequently invoked). The offense is classified legally as an attack on "public order," and court precedent over many years has held that the damage to public order follows from the verbal expressions used and does not require to be proven for the prosecution to be upheld. By following this doctrine, the courts have evaded the crucial job of

establishing that public order was in fact damaged or threatened by an offensive expression, and that the restriction imposed was necessary to safeguard the rights of all.

Prosecutions under Article 6(b) follow special truncated procedures, and rights to a judicial review by the Supreme Court are limited compared to those provided in the Criminal Code for criminal libel. Furthermore, abuse of the law by politicians or officials to silence criticism is facilitated by the fact that the offended parties may both instigate and withdraw prosecutions at their own discretion. If the essential purpose of a contempt prosecution is to safeguard public order and to protect society, a public official should not enjoy personal discretion to call it off once his or her personal honor is satisfied. The underlying logic of the law — that strong criticism of a political leader is tantamount to contempt for the public office he or she holds — allows officials to use their public office as a shield against complaints, denunciations and public questioning directed at them in their capacity as public officials. The law does not even require that any particular individuals be offended: it also serves to protect the “honor” of state institutions themselves against criticism which targets no particular individual. In May 1996, the Supreme Court upheld the conviction of a former Pinochet minister, Francisco Javier Cuadra, for remarks considered insulting to the honor of Congress, sentencing him to an eighteen-month suspended sentence. Cuadra, who had expressed concern in a magazine interview about drug consumption by parliamentarians, but refused to name anyone in particular, was prosecuted by the legislature collectively.

Governments are under an obligation to protect public order and secure the enjoyment of human rights. In international human rights law, public order may be a legitimate ground for restricting freedom of expression. Nevertheless, extensive and comprehensive restrictions that jeopardize the principle of freedom of expression itself are not permissible. Any restriction of freedom of expression must be shown to be *necessary*. It must be tailored and in proportion to an actual risk to public order. The position of Human Rights Watch is that public order cannot legitimately be cited to justify restraining freedom of expression, unless there are exceptional circumstances in which its exercise presents a clear and imminent threat of violent disturbance. In reviewing the history of Article 6(b) prosecutions from the early 1970s, Human Rights Watch found no cases in which it could be sustained that the impugned expressions presented a threat to public order. This supports our view that the real purpose of the law, despite its title, is not to protect public order at all, but simply to establish an ill-defined limit to public criticism of government authorities.

In a valuable report on contempt for authority laws published in 1995, the Inter-American Commission on Human Rights concluded that such laws, in general, are “incompatible with Article 13 of the American Convention on Human Rights because they suppress the freedom of expression necessary for the proper functioning of a democratic society.” Regrettably, the Chilean government has still not presented legislation to Congress to repeal Article 6 (b) of the State Security Law. Politicians continue to avail themselves of it, as can be seen in a prosecution of two journalists by Sen. Augusto Pinochet announced in August 1998.

### **Prior Censorship**

Although the Chilean constitution prohibits prior censorship, it makes an explicit exception for film censorship, which is carried out by an agency of the Ministry of Education called the Council of Cinematic Classification (Consejo de Clasificación Cinematográfica, CCC). This body classifies films for age-group suitability and may also ban films altogether from public exhibition. Films banned by the CCC may not be shown on television either. Press reports indicate that the last film to be banned was in 1994, but it is difficult to vouch for this since the CCC is not required to publish its decisions or report on its activities. In any case, previous bans remain in effect today, including many imposed under the military government for ideological reasons. The jurisprudence established in the *Last Temptation of Christ* case, analyzed below, does not allow the CCC to revise its own bans once they have been confirmed by its appeals panel. Television stations, whether in free access television or cable, face fines and ultimately suspension of their licenses for transmitting these banned films.

With the exception of the CCC, prior censorship in Chile does not emanate from the executive branch, but from the courts. Judicial decisions to prohibit a publication or the exhibition of a film derive from complaints lodged by private individuals who may request injunctions against authors or publishers to prevent a publication they believe violates their constitutional right to honor. This injunction procedure, known as a protection writ (*recurso de protección*), provides a rapid remedy for anyone whose constitutional rights have been, or are in danger of being, violated. In most situations the writ would be filed against a public authority in defense of a plaintiff's right, but when the endangered right is private honor, two rights — that of honor and that of freedom of expression — appear to meet in head-on conflict.

This was the legal logic behind the banning of the circulation in Chile of Francisco Martorell's book, *Impunidad Diplomática*, in 1993. Not only did

the court base its decision on an alleged conflict of rights; it held that the protection of honor and private life were of superior status to freedom of expression. This doctrine is a recipe for censorship and runs counter to norms established in international law. It forgets that the drafters of the American Convention on Human Rights drew a clear and precise line in accommodating the rights of free expression and of honor. The convention distinguishes between "prior restraint" and the "subsequent imposition of liability." The former is impermissible as a means of protecting honor from abuses of freedom of expression, while the latter is considered an acceptable and adequate remedy for such abuses. This was the view of the Inter-American Commission on Human Rights, which found in May 1996 that Chile had violated Article 13 of the American Convention on Human Rights by banning Martorell's book.

In June 1997 the Supreme Court upheld an Appeals Court decision granting a protection writ to prohibit the transmission on cable television of Martin Scorsese's film *The Last Temptation of Christ*. The CCC had banned the film in 1988 but later reversed its decision, giving the film an over-eighteens classification which allowed it to be shown on television after 10:00 p.m. The petitioners, a group of lawyers acting for a pro-censorship lobby, held that the film offended the honor of Christ and of his followers, including the petitioners. The Appeals Court verdict followed the same reasoning as its counterpart in the Martorell case, by explicitly arguing that "respect and protection of honor takes precedence over freedom to omit opinions and inform." In the *Last Temptation* case, however, the concept of honor was taken to hitherto unprecedented lengths when the film was held to offend the honor of Christ. By this logic the followers of any historical figure could present similar petitions to ban critical discussion of them. In accepting that the film offended the honor of the petitioners, the court implied that the right to personal honor or reputation entailed a right to be free from exposure to ideas which present an alternative moral or religious view. This is an extension of the notion of honor into a forbidden zone. As to the truth or error of such an "alternative view," the court reserved for itself the exclusive right to decide on the matter, arguing that the "historical deformation of an event or a person" was not information protected by freedom of expression norms. The court also argued fallaciously that prohibiting such information was not prior censorship, because censorship was uniquely a resource of repressive governments.

This aberrant decision reveals not only a very shallow commitment to freedom of expression, but also a disturbing disregard of Chile's human rights obligations under international conventions it has ratified, and which the courts are obliged to take into account.

### **Freedom to Inform and the Right to be Informed**

The population's access to information and the right to emit it are crucial to the principle of government accountability on which democracy rests. For seventeen years the military government instilled the opposite principle, according to which the exercise of authority requires information to be strictly controlled. The legacy of this doctrine can still be felt in existing laws, in the day-to-day practice of state institutions, and in the practice of journalism.

Current administrative statutes allow public officials broad discretion in deciding what official information may be made available to the public. "Confidentiality" is not defined in the law, as all restrictions on freedom of information must be according to the American Convention on Human Rights. Nor are there clear and narrow legal guidelines determining what military secrets are or when national security may legitimately be invoked in prohibiting access to or publication of information on grounds of secrecy. Chile lacks a specific remedy such as a *habeas data* writ by which a person may reverse a public official's decision to deny access to information. The difficulties experienced by journalists in obtaining first-hand official statistics and documents have encouraged a reliance on second-hand information, normally that released by government officials.

Several special restrictions on freedom of information predate the military government and continue to gravely affect the right to information as well as the transparency of the judicial system. Judges are allowed to declare a reporting ban that prevents the press from carrying any information on the progress of a criminal investigation until the court lifts the ban. Specific reasons showing why the ban is necessary do not need to be given. Reporting bans extend not just to confidential documents or information pertaining to the investigation (under long-established laws all the proceedings of judicial investigations in the early phase are secret anyway). They include any information relating to the case whatsoever.

Under current law, the bans may be invoked when publication about a case, in the opinion of the judge, may prejudice a criminal investigation or affect public morals, state security or public order. While each of these grounds for restricting information on court cases is permitted in international human rights law, Human Rights Watch considers that use of the measure by Chilean courts has far exceeded permissible grounds, as the comprehensive and indefinite nature of these bans facilitates abuse. Usually bans are imposed in cases in which public interest is intense and judges wish to avoid publicity. They are typically justified as necessary to "ensure the success of the investigation" when the media

publish information leaked by court officials. Rather than enforcing the law to prevent such leaks, the courts are tempted to opt for the more expedient solution of banning any and all information about the case. Such bans have even been imposed in libel cases, in which their evident purpose has been to protect the reputation of the litigants against public questioning. At least twenty-three court cases were affected by reporting bans between March 1990 and 1994, and the practice continues, the most recent example being in July 1998. In many of these cases bans were maintained for years even though no progress was being made in the criminal investigation.

### **Self-censorship**

Beyond restrictions that are mandated by law, freedom of expression and information in Chile is also subject to the less easily detectable, but widespread and insidious practice of self-censorship. By self-censorship we mean editorial suppression — exercised at any level of the publishing process — of material which, if published, might incur a sanction that exceeds the grounds for restriction permissible under international law. Self-censorship is often interpreted more widely than this, so as to include unduly restrictive editorial control, or the suppression by media directors or editors of information because of vague apprehensions at the possible political consequences of its publication. This latter sense, widely used in the Chilean press under the term *autocensura*, does not necessarily violate international free expression norms despite its evidently negative effect on the frankness and transparency of the public debate. Independence of editorial decision-making is an inviolable element of freedom of expression. Direct government intervention in editorial policy, such as when a minister tries to prevent the publication of an item about which the government has received advance warning, amounts to a form of prior censorship. The practice of government ministers persistently calling media directors and editors to protest an article or program, or trying to influence editorial policy so that it is more in line with the government's political agenda is also undue interference in editorial freedom. In response to such pressure, editors may practice self-censorship in order to avoid negative government reactions. The chilling effect of government pressure is likely to be greater when the media concerned are under state ownership or control, since these media lack the autonomy and economic independence to ignore it. Such interference is especially objectionable if those media have been established as a public service and must respect the plurality of views in the public.

The medium most affected by self-censorship is television. The television watchdog body, the National Television Council (Consejo Nacional de

Televisión, CNTV), is required to penalize television stations, including cable services, for any of a total of fourteen possible infractions, all of them relating to program content. Punishments may take the form of a warning, fines or ultimately the cancellation of a broadcasting license. To avoid penalties stations must regulate their output. To the extent that penalties exceed legitimate or justifiable restrictions, the stations must engage in self-censorship.

Most of the penalties have been incurred by stations exceeding the limits defined by the CNTV for the portrayal of violence and sex. This kind of restriction is permitted under international human rights norms. Article 13 (4) of the American Convention on Human Rights allows prior censorship of public entertainments for the sole purpose of regulating access to them for the moral protection of childhood and adolescence. Under the American Convention on Human Rights media may also be held subsequently liable for the publication of material considered offensive to public morals. No golden mean exists in the limits imposed by public morality. Although Chile is at the conservative end of the spectrum in continental terms, international law recognizes that in this area standards may legitimately vary according to cultural and religious values. Our concern is with the CNTV's mandate to preserve the "correct functioning" of the medium, which is defined as ensuring "permanent respect for" a number of consensual values. These values have not been submitted to any legal definition, and include such all-embracing categories as "the moral and cultural values of the nation." International jurisprudence has established that vaguely defined restrictions on freedom of expression are suspect, since they are open to arbitrary interpretation and, by creating uncertainty about possible legal consequences, discourage the expression of views that challenge accepted orthodoxies.

In addition, the CNTV is required to apply penalties to stations that transmit before 10:00 p.m. films that have been classified by the CCC as for over-eighteens. This norm accounts for over half the charges formulated by the council. Because many of the films in question were classified under the military government when ideological bans were in force, this norm allows illegitimate and undemocratic restrictions to continue to have effect under democratic governments. Many of the films in this category are very tame in comparison with everyday television fare, and many of them are classics.

Self-censorship resulting from this norm is notoriously evident in cable. Every month the cable operators replace hundreds of scheduled transmissions with unannounced substitute films. They insist that they are only complying with the law. However, recent programming policy of one of the two major operators, Metrópolis Intercom, indicates that a conservative editorial line surpassing the requirements of the law is also at work. Evidence of this emerged



with increasing clarity in 1998 when the company, after repeated cuts, removed one cable station entirely from its offer. After answering public protests by referring to its obligations to respect the law, the company then took out full-page inserts in the newspapers defending its editorial line as a legitimate protection of children from exposure to violence or sex.

Many Chileans have also written letters to the press to protest about films that are cut entirely, broadcast in expurgated form or sanitized by bleeping offending words from the soundtrack. It makes little difference to them that the cuts were made because of, or in excess of, the requirements of national laws. They feel they are not getting the service they thought they had contracted, that the national cable operators do not have the right to decide what parts of the signal's output they may view, and that protection of children is their parents' business.

Editorial policy at the largest open television channels, the state channel TVN and the Catholic University's UCTV has also involved direct intervention by station executives in cuts, alterations, and cancellation of programs. In the case of UCTV which was run autocratically by the same director for twenty-four years until his death in July 1998, strict moral codes reflecting conservative Catholic values have always prevailed and are taken for granted by many Chileans. By contrast, TVN has a public service mission, despite the fact that it is self-financing, and it is legally mandated to ensure pluralism. That it be genuinely pluralistic is important, in that minority views and interests not viewed with sympathy by the Catholic Church have little opportunity otherwise of reaching a mass audience. In practice, after a liberal programming policy at the beginning of the Aylwin administration, TVN's pluralism has increasingly given way to a tendency to discard items that might expose the station to controversy. This tendency may be explained in part as self-censorship imposed by the requirements of the law on "correct functioning." However, in some cases there are strong indications that external pressures or political considerations are involved. Controversial programs have been canceled at the last minute or information of evident interest to the public removed. An example is a 1996 investigation into police torture by TVN's *Special Report* into police that was suppressed, apparently to avoid offending the Carabineros police.

### **Government Reform Initiatives**

As this summary indicates, freedom of expression and information is restricted directly or indirectly by a wide spectrum of laws ranging from provisions in the constitution to the statutes that govern the functioning of public institutions. In 1996 the Inter-American Commission on Human Rights held

Chile responsible for an act of prior censorship in the Martorell case, detailed in this report. Three other freedom of expression complaints have been filed before by the Commission and are under consideration. Indignation and disquiet at media restrictions have been expressed by individuals across the political spectrum, but especially in the parties of the governing coalition. While, in general, public reaction has been muted and limited to a minority, opposition to the censorship of cable, which many subscribers believe they have a right to watch without censorship, appears to be much more widespread.

After eight years of democratic government the progress made in expanding freedom of expression is disappointing in the extreme. On the positive side, there is growing recognition in government of the need for a more agile flow of information to the public to increase the accountability of public administration and the transparency of business. Yet the most important legislation to promote the right to information — the press law — is still pending after five years of parliamentary discussion, and another bill ending film censorship has not even been debated.

As this report went to press, the current version of the proposed press law would abolish reporting bans entirely. It also establishes in principle that administrative rulings and their supporting documents are public and punishes public officials who prevent media access to opinions and information. A bill on “access to administrative information” presented to Congress by President Frei in 1995 would establish a general right to information for the first time in Chilean legislation. It specifies the circumstances under which public officials may deny information and provides a mechanism to appeal to the courts for redress if information is denied. This same bill also provides protection to journalists against being compelled by the courts to reveal the identity of their sources. New legal initiatives on the regulation of television have been promised but have yet to materialize.

Other measures, although equally necessary and overdue, have yet to be tackled. In the first place, contempt for authority laws in the Code of Military Justice noted above, and the similar State Security Law, continue to sharply limit freedom of expression in a fundamental area: evaluation and critique of government institutions and officials.

Secondly, there have been no proposals to strengthen guarantees of freedom of expression during a state of emergency; Chilean legislation still allows restrictions in excess of international norms and does not permit an effective judicial remedy. Although the International Covenant on Civil and Political Rights requires that such measures may be taken only “to the extent strictly required by the exigencies of the situation,” Article 41(3) of the

constitution can be interpreted as allowing courts to challenge the reasonableness of measures adopted under a state of emergency. Nevertheless, when emergency measures were in force under the military government, the courts ruled consistently that this article excluded them ruling on the proportionality of measures limiting freedom of expression. In fact, this self-limiting jurisprudence predates the 1980 constitution. The protection of human rights under states of emergency should be strengthened by *explicitly* providing the judiciary with powers to rule on the necessity and proportionality of measures adopted. The government has also not addressed the problem of defining in law the circumstances in which national security may be invoked to limit freedom of expression. The issue surfaced in 1993 when the navy prevented the circulation of a treatise on military intelligence by a former naval captain on spurious national security grounds (the Palamara case, *see* Chapter IV).

### Recommendations

Protection of freedom of opinion, expression and information is one of the basic human rights that governments everywhere have a duty to respect. Abstention from restrictive administrative acts is only part of their duty. Governments also have an affirmative responsibility to reform the laws to strengthen and expand human rights protection. The fact that restrictions emanate from the other branches of government as much as from the executive does not affect this responsibility.

While we acknowledge and welcome legislative reforms the government has proposed in parliament, these measure must be given top priority and the government must use its political capital in the legislature to the full to speed their passage into law. The government must also enact other legal reforms to bring Chilean laws into line with international standards. These include the following:

- The government should repeal articles 263 and 264 the Criminal Code, article 284 and 276 of the Code of Military Justice, and Article 6(b) of the State Security Law, all of which penalize forms of expression considered insulting or offensive to members of the military or state authorities.
- There should be no more prosecutions of civilians by military courts. The armed forces should be required to carry out an investigation into the status of any prosecutions of civilians for crimes of opinion or expression — including sedition charges — that remain open in military

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courts. These prosecutions should be promptly closed and those affected informed;

- Legislation should be introduced to define the concept of a military secret, so that the principles on which information is classified on national security grounds are clearly understood. The enforcement of secrecy rules should be based on the principle that any constraint on access to information must be the least restrictive means possible of protecting a national security interest. In general, the government should base its approach in this area on the Johannesburg Principles on National Security, Freedom of Expression and Access to Information.
- Current laws governing exceptional powers granted to the executive branch during states of emergency should be reviewed, to ensure that restrictions on freedom of expression when constitutional guarantees are suspended are strictly tailored to specific circumstances and are only adopted when there is no less restrictive option. The grounds for such suspensions should always be open to challenge in a court of law.
- The government should ensure that a protection writ, a remedy against violation of a constitutional right, cannot be abused to obtain injunctions against the publication of material held to be offensive to honor or privacy. This violates the prohibition of prior censorship, and the due process principle that culpability must be established after a fair hearing.
- The government should review current provisions in the Code of Criminal Procedures that allow judges to impound published material or prohibit its publication after the presentation of libel writs. In no case should judges be allowed to remove publications from circulation in such circumstances. This kind of action violates the principle that libel liability is only incurred after publication and also amounts to prior censorship.
- Human Rights Watch welcomes legislative proposals to lessen penalties for the crimes of libel and calumny, and to reduce the scope of criminal liability for these offenses. The government should adopt as a general principle that conflicts arising out of libel and calumny allegations

should be resolved by civil litigation rather than criminal prosecution, and penalties should exclude imprisonment.

- Both the composition and the powers of the Film Classification Council should be reviewed to ensure that the body is democratic and representative of different opinions in society, that its classification decisions are public information, and that the decisions may be reviewed by an independent court. The council's current powers of prior censorship should be terminated. Television channels should not be penalized for transmitting films classified by the council while ideological prohibition was in force.
- Current laws governing the functions of the CNTV should be amended to ensure that the restrictions to which television programs are subject are closely based on the grounds recognized as legitimate in the International Covenant on Civil and Political Rights and the American Convention on Human Rights. In particular, penalties should not be imposed on stations for questioning or criticizing values of any kind.
- The government should provide the judiciary with updated information on decisions on freedom of expression issues reached in international human rights bodies, including the relevant United Nations commissions and committees, the Inter-American Commission on Human Rights and the European Commission of Human Rights, as well as in the respective courts in each jurisdiction.
- The government should reinstate the proposal originally made by the Aylwin government to establish the office of a People's Defender or Ombudsman, among whose powers should be included investigation of, and recommendations of remedies for, violations of freedom of expression or information.

## II. FREEDOM OF EXPRESSION AND THE PRESS: A HISTORICAL BRIEFING

### Introduction

By comparison with its more volatile neighbors, historians have noted the orderly and peaceful evolution of democracy in Chile and a venerable tradition of respect for civic values and the written law. From 1932 until General Pinochet's coup in 1973, eight elected presidents alternated in power under the provisions of a single constitution, and six of them served their full six-year term (presidents Pedro Aguirre Cerda (1938-1941) and Juan Antonio Ríos (1942-1946) died in office). However, this surface order is deceptive. Chronic and recurrent political instability in the nineteenth century due to conflicts between rival cliques in the ruling elites and the military helped establish a tradition of strong centralized government, which came to be seen as a *sine qua non* of stable development.

Alternations between instability and strong government have continued in the present century and mounted in intensity. Beginning in the 1930s, and increasingly in later decades, left-wing parties, labor unions, and peasant organizations expanded, and part of Chile's growing middle class became more radical in its demands, reflecting the deep social and economic inequalities dividing the nation. The country veered from a Popular Front administration which included radicals, socialists, and communists (Pedro Aguirre Cerda), to one which expelled communists from the government, banned the Communist Party altogether and disenfranchised its members (Gabriel González Videla). The strains in the political system were evident in the violent reaction of the conservative elite to land reform measures, part of the "Revolution in Liberty" proclaimed by the government of Eduardo Frei Montalva (1964-1970), father of the current president.

During the Frei government the Socialist Party converted to revolutionary Marxism and, inspired by the model of Cuba, extreme-left Marxist groups such as the Movement of the Revolutionary Left (Movimiento de la Izquierda Revolucionaria, MIR) emerged, advocating the overthrow of the state by direct action. In September 1970, a Socialist, Salvador Allende Gossens, was elected president, heading a coalition of Marxist and left-of-center parties known as the Popular Unity (Unidad Popular, UP), whose program included extensive nationalization of foreign assets and land reform. Left-wing hopes that governmental power achieved through the ballot-box could pave the way for revolutionary change sparked violent opposition from the right. As

parliamentary criticism by the UP's Christian Democrat (centrist) and National Party (right-wing) opponents intensified, the country polarized between the UP's militant supporters and its adversaries outside parliament. Both sides increasingly took the law into their hands, with the respective acquiescence of the government and its powerful right-wing opponents. With mounting economic chaos and the collapse of parliamentary negotiations to bring the sides together, the country neared the brink of civil war. On September 11, 1973, the Chilean armed forces overthrew the UP government in a violent coup led by Gen. Augusto Pinochet, Allende's own appointee as commander-in-chief of the army. Initially greeted with relief by a broad section of the population, the coup extinguished democracy for seventeen years. While the military junta introduced radical measures to privatize the economy, its secret police decimated both the parties of the UP and the extra parliamentary left, using clandestine and illegal methods including torture, extrajudicial execution and enforced "disappearance," as well as imprisonment, exile, and internal banishment.

The origins of today's center-left government can be traced back to 1983, when the first glimmerings of organized opposition to the military coalesced into an alliance which included leaders of the Christian Democrats, the Radical Party, and a sector of the Socialist Party (the political parties were still in recess). In October 1988 General Pinochet lost a crucial plebiscite on the continuance of his rule, and in December 1989, Patricio Aylwin Azócar, leading a coalition of center and center-left parties known as the Coalition of Parties for Democracy (Concertación de Partidos por la Democracia) was elected president. Following elections held in December 1993, Aylwin was succeeded in March 1994 by his fellow Christian Democrat, Eduardo Frei Ruiz-Tagle.

Under the Aylwin and Frei administrations, Chile has attracted international admiration for its economic achievements and political stability. The economy has averaged an annual growth of 7 percent, while inflation has been reduced to single digits after being in the range of 30 percent at the end of the 1980s. Unemployment also has been greatly reduced, and a dent has been made in the abysmal living standards of the very poor (the number living below the poverty line was reduced from 45 percent in 1987 to 23 percent in 1996).<sup>49</sup> Continuing political violence and military tension during the Aylwin government have given way to a period remarkably free of overt social conflict during most

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<sup>49</sup>Joaquín Vial, "La estrategia de desarrollo: crecimiento con equidad," in Cristián Toloza and Eugenio Lahera (eds), *Chile en los Noventa*, Dirección de Estudios, Presidencia de la República (Santiago: Dolmen, 1998), pp.183-184.

of the Frei presidency. Violent actions by left-wing armed groups have ceased, and since the appointment in 1998 of Pinochet's successor as commander-in-chief, Gen. Ricardo Izurieta, the army has reduced its political profile.

This political stability has been bought at a high price, however. Eight years after the return of democracy the country remains unreconciled with its conflictive recent past. The armed forces, and particularly the army, have shunned national efforts at an honest accounting for the events of the 1970s and their aftermath. Justice has been done in only a handful of emblematic human rights cases; for the rest, an amnesty law favoring the military introduced by Pinochet in 1978 and the torpor of the courts have conspired to ensure impunity.

Neither Presidents Aylwin or Frei have been able to implement most of the Concertacion's program of constitutional reform due to the resistance of a powerful conservative bloc in the Senate, supplemented by a group of senators appointed by the military and the Supreme Court. Adding to these political limitations is a growing impression of indifference toward the political elites on the part of the rest of the population, especially among those born during the dictatorship. This apathy was confirmed by a record low turn-out in the December 1997 parliamentary elections.

Although muted in the early years of democracy, dissent and uneasiness about the country's course have grown recently. Critics allege that democratic leaders have renounced open and pluralistic debate on ethical values and principle in favor of pragmatic transactions with business elites and the military, to avoid jeopardizing the country's economic achievements and hard-won political stability.<sup>50</sup> The price of this form of politics, as two government coalition scholars have put it, is "a tendency to hermeticism, a deficient understanding of differing opinion, and a reluctance to impart a democratic political message."<sup>51</sup> One result of this overprotective zeal is that the country has come to accept often unstated but nevertheless powerful limits to the public debate, seen in widespread self-censorship as well as direct censorship and legal

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<sup>50</sup>See, for example, Tombs Moulián, *Chile: Anatomía de un Mito* (Santiago: Lom Ediciones, 1997); Tomás Jocelyn-Holt, *El Peso de la Noche: Nuestra Frágil Fortaleza Histórica* (Santiago: Ariel, 1997); Faride Zerán, *Desacatos al Desencanto* (Santiago: Lom Ediciones, 1997). For the opposite view and a lucid analysis of the strategy of the Chilean transition, see Edgardo Boeninger, *Democracia en Chile: Lecciones para la Gobernabilidad* (Santiago: Editorial Andrés Bello, 1997).

<sup>51</sup>Eugenio Lahera and Cristián Toloza, "La Concertación de Partidos por la Democracia: Balance y Perspectivos," *Chile en los Noventa*, p. 709.



constraints. Underlying these limits is an implicit concern to *protect* society from free expression and criticism, an impulse to *regulate* rather than stimulate debate.<sup>52</sup>

### **Public Debate and the Print Media Prior to 1970**

Competing traditions of liberalism and conservative restraint can be seen in the history of Chile's print media. Until the military coup of September 11, 1973, Chile enjoyed a vigorous and heterogenous press. It combined newspapers of well-established pedigree that expressed the viewpoint of the dominant class, with a wide range of newspapers and periodicals linked directly or indirectly to political parties, ranging from the center to the far left. The absence of any truly broad and politically ecumenical newspaper was compensated by the diversity of competing political media available. This heterogeneity of viewpoint was protected by constitutional guarantees and statutes upholding press freedoms that date back to the early years of the republic.

In practice, however, this liberal tradition has had to contend with an equally powerful strain of authoritarianism. This has emerged recurrently during the episodes of instability which have marked Chilean history. Following the growth of radical political movement in the 1940s and 1950s, pluralism was curtailed by laws banning communism and severely restricting political rights and freedom of expression. Although subsequently amended, many provisions intended to protect democracy in the face of popular challenges from the left and the right were incorporated into subsequent legislation, and many remain in force today. With a return to a liberal regime in the 1960s, a competitive and highly politicized press flourished as social conflicts and popular demands grew in

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<sup>52</sup>This could be seen in the debate in Congress in August 1998 on the need to regulate the whistle-blowing activities of legislators, some of whom many government officials believed had overstepped acceptable limits. The issue was raised for the first time as a result of a successful investigation by deputy Nelson Avila into alleged customs duty evasion by the air force.

force. After intense ideological polarization, that period came to an end with the military coup of September 11, 1973.

It is possible to trace both liberalism and a tradition of authoritarian government to the early years of the republic after Chile asserted independence from Spain in 1810. Norms governing the emerging press were more liberal than the many revisions that followed. The first press law (*ley de imprenta*), promulgated in 1813, a year after the appearance of Chile's first newspaper, *Aurora de Chile*, stated in its first article: "From today there will be entire and absolute freedom of publication (*libertad de imprenta*). Man has a right to examine whatever object is in his grasp: consequently all revisions, approvals and any requirements that are opposed to the free publication of his writings are abolished." Anyone who directly or indirectly violated freedom of the press was considered to have attacked "the liberty of the nation" (*la libertad nacional*) and could be deprived of their citizenship.<sup>53</sup> Punishment for press offenses was limited to fines, and cases were heard, not by criminal courts as later, but by press juries (*jurados de imprenta*), special lay courts presided over by a tenured judge. These norms remained in force for thirty-five years.

For much of the nineteenth century, however, Chile was governed by conservative civilian leaders who answered to a small governing class that included the landowners who controlled the semi-feudal rural estates known as *haciendas*, domestic capitalists and mine-owners.<sup>54</sup> The prevailing political

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<sup>53</sup> Articles 1 and 10 of the Ley de Imprenta, cited in Guillermo Martínez, "Las Bulas y Los Cometas: crónica del régimen decimonónico de libertad de prensa 1813-1925" (Santiago: Friedrich Naumann Stiftung, Serie Contribuciones, No. 8, January, 1995), pp. 3-12. (Translation by Human Rights Watch).

<sup>54</sup> In 1955, 4.4 percent of the landowners owned two-thirds of the arable land, while 1.6 percent owned over 50 percent, one of the most unequal land distributions on the continent

philosophy was a far remove from the radical non-conformism that shaped modern conceptions of democracy and civil rights in the leading countries of Europe. Chile lacked an entrepreneurial middle class. Liberal-republican ideas were grafted onto an archaic social system based on relations of subservience, and moral values were the almost exclusive preserve of the Roman Catholic Church. The new republic's first durable constitution, promulgated in 1833, gave the president and the executive branch virtual control of the political system and maintained Catholicism as the official religion of the state. It also, however, established some individual rights and liberties, among them freedom of expression and the prohibition of prior censorship.

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at the time. D. Baytelman and R. Chateaneuf, "Interpretación del Censo Agrícola Ganadero de 1955," cited in Osvaldo Sunkel, "Change and Frustration in Chile," in Claudio Veliz, *Obstacles to Change in Latin America* (Oxford: Oxford University Press, 1965) p. 127.

By the 1830s the Chilean press was still young, and restricted in its readership to a small educated elite. The government used a system of subsidies to develop the press as a tool for promoting the law, developing a national identity and stimulating trade.<sup>55</sup> The constitution only envisaged light fines for infractions of press laws, and prison sentences were only introduced years later.<sup>56</sup> The introduction of repressive controls began only after the press had begun to acquire a mass audience.

During the latter half of the nineteenth century the press was dominated by private and state-subsidized newspapers. Among the important papers of the time were *El Mercurio* of the port city Valparaíso, Latin America's oldest surviving newspaper; the government-subsidized *El Ferrocarril*; and *El Progreso*. In 1901 Agustín Edwards Ross, a prominent banker, founded the Santiago *El Mercurio*, today still the standard-bearer of the Chilean press, and another more popular paper, *Las Últimas Noticias*, in 1902. *El Mercurio* developed a distinctive style, cultivating an olympian detachment from the

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<sup>55</sup> Jorge Mera and Carlos Ruiz, "Notas sobre Libertad de Prensa, Censura y Cultura Política," in Claudio Durán, Fernando Reyes Matta and Carlos Ruiz (eds), *La Prensa: Del Autoritarismo a la Libertad* (Santiago: Centro de Estudios de la Realidad Contemporánea, and Instituto Latinoamericano de Estudios Transnacionales (ILET), 1986), p.193.

<sup>56</sup> The publications law (*ley de imprenta*) of September 16, 1846 was the first to clearly sanction behavior considered abusive of press freedom. It introduced prison sentences for offenses that became staple features of later legislation, such as "incitation of crime" and the "apology for crime." Others, such as "incitation of hatred between the different classes of the state" and "offenses against morals, public order and the religion of state" sparked strong protests as authoritarian and undemocratic.

power struggles of the day, while firmly defending the viewpoint of the conservative elite.

Thereafter, the growth of a new urban middle-class readership increased the importance of the press as an independent political actor. New papers expressing the viewpoints of the urban middle class included *La Patria* of Valparaíso (founded in 1863), *La República* (founded in 1866), and *La Nación* (founded in 1917 but acquired by the state in 1927). The growth in the late nineteenth century of an organized urban working class in the nitrate mining centers of the north and other industrial towns produced an avalanche of Democratic Party, socialist, and anarcho-syndicalist pamphlets and newspapers. By the 1950s, movements for social and economic reform had given birth to a new generation of opposition newspapers linked closely to political parties, in particular *Las Noticias de Última Hora*, allied with the Socialist Party (1935); the Communist Party organ *El Siglo* (1940); the Radical Party's mouthpiece *La Tercera* (1950); and the left-wing *Clarín* (1954). These papers were political in their origins and agenda and limited in their readership (the left-wing media together accounted for only 25 percent of the market at the height of their influence during the Frei Montalva and Allende governments). None achieved a status that transcended the political band of their readership. By contrast, the *El Mercurio* chain, owned by the Edwards family, preserved its hold on the market and never lost its unique capacity to mold the political agenda.

Many of the features of the present democratic system in Chile can be found in the constitution promulgated in September 1925 by the government of Arturo Alessandri Palma. Alessandri had previously held power from 1920-1924 when he introduced important social reforms and separated church and state. Unable to control hostile infighting in Congress or to satisfy the military's increasingly insistent demands that he assert control, Alessandri was forced from power on September 11, 1924. After six presidents had alternated in office, he returned in March 1925, only to be ousted again seven months later. The 1925 constitution was intended to put an end to the chaotic infighting in parliament that had hamstrung Alessandri's earlier government; it established an even stronger executive branch than the 1833 constitution. In the early years of the new legal regime, however, the country still hovered perilously between authoritarian government and instability; the dictatorship of former Minister of War Carlos Ibañez del Campo (1927-1931) was followed by a succession of eight presidents between July 1931 and December 1932, when Alessandri, elected for a third term, availed himself of emergency powers to reimpose order. The 1925 constitution remained in force, permitting an orderly succession of elected governments until the overthrow of Allende.

For most of this period, the press was regulated by a Decree Law (No.425) which is strikingly similar in many aspects to the press law currently in force. Like the current law, whose provisions we analyze in the next chapter, Decree Law 425 introduced comprehensive, detailed, and punitive restrictions on press freedom. It prohibited the publication of information about a person's private life, information on court proceedings in libel cases, and offenses to a foreign head of state, among others. Its anti-pornography provisions are virtually identical to those still in force.

#### **Freedom of expression and public order**

Freedom of expression was also limited by a new generation of laws to protect national security and public order. Following a period of political turbulence and rapid succession of governments, a series of laws enacted in 1931, 1932 and 1937 made it a crime against state security to publish tendentious or false information, to defend violence or to propagate subversive doctrines. The current State Security Law contains many of the same proscriptions.<sup>57</sup>

With the advent of the Cold War in the late 1940s — a time of growing labor unrest and left-wing political activity in Chile — new laws were enacted with an evidently repressive intent. Following elections in September 1946, radicals and communists held ministerial posts in the cabinet of President Gabriel González Videla (1946-1952). Further communist successes in local elections and a wave of communist-led strikes in 1947, however, provoked González into a dramatic about-face. After dismissing the communist cabinet members he banned the Communist Party and detained scores of leftist leaders in a prison camp on Chile's deserted northern coast (later to be used for the same purpose by General Pinochet).

In 1948 González enacted the so-called Law of Permanent Defense of Democracy (*Ley de Defensa Permanente de la Democracia*), which outlawed the Communist Party and banned the expression of ideas which appeared to advocate "the implantation in the republic of a regime opposed to democracy or which attack the sovereignty of the country." The law gave the executive branch legal powers to repress dissent equivalent to those imposed during a state of emergency. It remained in force for a full decade, marking a hiatus in Chile's

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<sup>57</sup> Felipe Gonzalez Morales, Jorge Mera Figueroa and Juan Enrique Vargas Viancos, *Protección Democrática de la Seguridad del Estado* (Santiago: Universidad de la Academia de Humanismo Cristiano, Programa de Derechos Humanos, 1991), pp.110-111.

democratic development.<sup>58</sup> By disenfranchising members of the Communist Party and banning the expression of Marxist ideas it violated constitutional rights, including the right to vote and freedom of expression. In 1958 President Carlos Ibañez repealed the law for electoral reasons. The preamble of the repeal bill harshly criticized the law — which Ibañez had himself used against the communists — as “a legislative transgression of the principle of freedom of thought.”

Before leaving office in 1958 Ibañez enacted Law No.12,927, known as the State Security Law (*Ley de Seguridad del Estado*), which ended the proscription of the Communist Party and restored penalties for crimes against state security and public order to levels comparable with those that existed prior to 1948. However, the State Security Law retained several other loosely defined political crimes from the Law of Permanent Defense of Democracy. Despite some modifications by both General Pinochet and President Aylwin, the former to toughen its provisions, the latter to relax them, the State Security Law remains in force.

From this brief summary, it is evident that for the past fifty years public order in Chile has been protected by rigorous and detailed legislation, used by successive governments with varying degrees of severity. As we note in Chapter III, this legislation has traditionally covered political speech as much as anti-government action.

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<sup>58</sup> Ibid., p. 120.

Under Ibañez's successor, Jorge Alessandri Rodríguez, other freedom of expression restrictions were introduced, this time motivated by a desire to control the sensationalism of the popular press. The brainchild of Alessandri's Justice Minister Enrique Ortúzar (later one of the drafters of the current constitution), a law introduced in 1964 dubbed the "gag law" (*ley mordaza*) made it an offense to publish "any information or comment harmful to the dignity, reputation, honor or creditworthiness of a person;" it also became illegal to publish news "of a sensational character about criminal events." This prohibition was directed at the so-called "red stories" (*crónica roja*) — inserts usually in red ink or large type with lurid accounts of crimes and atrocities — which had become a staple feature of the popular press.<sup>59</sup> Despite the repeal of these features by the government of Frei Montalva, other provisions of Ortúzar's "gag law" became the basis for much of the legislation that regulates the media today, in particular the Law on Abuses of Publicity, promulgated by Frei Montalva in September 1967.

### **Trench Warfare: The Press Under the Popular Unity Government (1970-1973)**

The three-year period of the Popular Unity government was notable for the unbridled competition of ideology and viewpoint in the national press, expressing the increasingly bitter divisions in the nation as a whole. A record number of newspapers and magazines circulated, ranging between both poles of the political spectrum. Rather than attempt to repress the vociferous opposition his policies generated, President Allende sought to combat it by an equally aggressive communications policy using the various media at the government's disposal and compulsory government broadcasts (*cadena nacionales*). On both sides of the political divide, new publications emerged whose sole purpose was to take sides in the political fray. Reasoned debate increasingly degenerated into political diatribe, hyperbole, and the vilification of political opponents. Like presidents before and since, Allende made use of the State Security Law in an effort to silence his most die-hard critics, but this law was also used on several occasions by opposition parliamentarians against the pro-government press.

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<sup>59</sup> In a somewhat comic effort to define "sensational" objectively, the law referred in detail to such factors as ink color, length, typeface, headline size, etc.



Before taking office, UP leaders had reached agreement with the Christian Democrats to broaden and strengthen civil liberty guarantees in the constitution in exchange for their votes in the parliamentary run-off between Allende and Alessandri which brought the coalition to power. The reforms ensured political pluralism and freedom of the press, explicitly granting all political parties access to media owned or controlled by the government, as well as those privately owned; it allowed political parties to found and maintain newspapers, periodicals, and radio stations and prevented them from being expropriated unless both chambers of Congress approved the measure. It also expressly stipulated that no one could be prosecuted for holding or expressing any political idea.<sup>60</sup>

The existence of this agreement limited government interference with the press. On both sides the papers freely engaged in a communications battle for or against Allende. Pro-Allende tabloids like the communist *Puro Chile* and *Clarín* resorted to sexual innuendo, scatological humor, and even racism — particularly directed at politicians and entrepreneurs of Jewish or Arab extraction — to lampoon opponents.<sup>61</sup> The UP's critics were dismissed as reactionaries (“*momios*”), “seditious,” “mercenaries,” conspirators, etc.<sup>62</sup> On the other side,

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<sup>60</sup> Law No. 17,398 of January 9, 1971.

<sup>61</sup> See the examples cited by Patricio Dooner, *Prensa y Política: Periodismo de Derecha y Izquierda 1970-1973* (Santiago: Ediciones Andante, 1988).

<sup>62</sup> “Momios presentaron acusación contra Ministro de Justicia,” *El Siglo*, January 22, 1971; “Golpistas hablaron en cadena,” *La Nación*, April 2, 1971; “No debe confundirse sedición con oposición,” *La Tercera de la Hora*, September 13, 1971.

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right-wing tabloids like *PEC* and *Sepa* portrayed Allende as a drunk and a womanizer. *Sepa* carried a satirical strip called *El Reyecito* (the little king), in which the Marxist president appeared in a crown and ermine-lined robe. Left-wing leaders were mocked for their alleged bourgeois life-styles.<sup>63</sup>

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<sup>63</sup> Hernán González, "Oscar Waiss, el Feroz Guerrillero del Café Haiti," *Sepa*, Semana del 31 de agosto al 6 de septiembre de 1971.

On February 14, 1971, Press Day, Allende announced the formation of Operation Truth, a commission of journalists to counteract the “curtain of lies” allegedly spread by the opposition press and picked up by the international wire services.<sup>64</sup> In a speech on March 31, 1971, Allende said, “I have tolerated this only because I want to teach a moral attitude, because the people cannot be touched by these epithets from mercenaries in the pay of foreign money.”<sup>65</sup> The president’s indignation at opposition press distortion was matched by the anger of opposition parliamentarians at being portrayed as seditious conspirators because they disagreed with UP policies. Senate President Patricio Aylwin accused Allende on television of remaining silent about the excesses of the official press. The government-owned *La Nación* reported Aylwin’s speech in

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<sup>64</sup> “Operación Verdad recorrerá América,” *Puro Chile*, February 14, 1971, cited in Miguel González Pion and Arturo Fontaine Talavera (eds.), *Los Mil Días de Allende* (Santiago: Centro de Estudios Públicos, 1997).

<sup>65</sup> “Allende informa al pueblo,” *Puro Chile*, March 31, 1971. (Translation by Human Rights Watch.)

an article titled “Conspirators speak in national broadcast.” *La Nación* said it was part of a “campaign of terror” against the UP.<sup>66</sup> In April 1971 left-wing journalists formed an association to defend the government against what they denounced as the phony objectivity of the establishment press. *El Mercurio* denounced the initiative as totalitarian and said it was “aimed at ensuring that only one version of what is happening in Chile prevails, the official one.”<sup>67</sup>

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<sup>66</sup> Aylwin, then leader of the Christian Democrat Party (PDC) and president of the Senate, was a frequently attacked and lampooned by the pro-Allende press. “Blessed art thou among old dames (*señoronas*), they say to the sinister Christian Democrat Senator Patricio Aylwin.... Since he insists that his parliamentary stipend (*dieta*) is not enough to live on he got himself a side-job on Radio Agricultura, together with the ineffable Silvia Pinto, Patricia Guzmán, Raquel Correa, and Carmen Puelma. Day by day they rant on against the government. The program seems more like a chorus of hens because of the uninterrupted clucking of Pat and his ladies.” *Las Noticias de Última Hora*, October 2, 1972. (Translation by Human Rights Watch.) The government later closed Radio Agricultura, which had repeatedly criticized Allende’s agrarian reform program, for refusing to transmit compulsory government broadcasts.

<sup>67</sup> “Batalla de la Información,” *La Semana Política*, *El Mercurio*, April 18, 1971, reprinted in González and Fontaine, *Mil Días de Allende*, p. 97.

Under the Nixon administration, the United States Central Intelligence Agency (CIA) channeled funds to the anti-Allende press both before and after the 1970 elections, as part of a covert plan to prevent Allende's election and subsequently to destabilize his government. The CIA funded anti-Allende publications, produced and disseminated in the press articles forecasting economic collapse, and maintained agents in the major newspapers, such as *El Mercurio*. According to the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities (the "Church Committee"), the CIA disbursed more than 12 million dollars on press intervention between 1963 and 1973.<sup>68</sup>

As the violence and unrest increased, the government used states of emergency to force privately owned radio stations to broadcast government information, despite judicial decisions finding these actions unconstitutional. Stations that refused to do so were taken off the air, and others were closed for broadcasting calls to participate in protests and strike activity.

With the increasing polarization of the press, reporting standards lapsed notably on both sides, as did any pretense at objectivity. Numerous suits for contempt of authority under the Law of State Security were lodged both by the executive branch and its parliamentary opponents. President Allende filed charges against *Sepa* and its editor Rafael Otero on several occasions, as well as against the editor of the *Mercurio*-owned *La Segunda*. Patricio Aylwin, then president of the Senate, sued a journalist of *La Nación* for a comment on a Senate debate he considered offensive to the Senate's honor, and several parliamentarians sued the editor of *Puro Chile* for defamation.<sup>69</sup>

The National Commission of Truth and Reconciliation, established by President Patricio Aylwin almost two decades later to investigate human rights violations committed by the military government, passed a harsh judgment on the role of the press in this era. It found that the deterioration of press standards had contributed to the breakdown of the political consensus and the outbreak of open violence:

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<sup>68</sup> *Covert Action in Chile*, Washington D.C.: 1975.

<sup>69</sup>The cases are discussed below, in Chapter III.

Finally, in describing the final phase of the 1970-1973 crisis, we cannot ignore the role of the media. Some media, especially certain widely read newspapers on both sides, went to incredible lengths to destroy the reputations of their adversaries, and to that end they were willing to make use of all weapons. Since on both sides political enemies were being presented as contemptible, it seemed just, if not necessary, to wipe them out physically, and on a number of occasions there were open calls for that to happen.<sup>70</sup>

The military government was to use the same argument to justify repression of the pro-UP press that followed the military coup, conveniently forgetting the aggressive anti-Allende campaign in the right-wing press. The papers that had attacked the Allende government using the methods described by the commission quietly ceased publication after the coup, and some of their most outspoken journalists were appointed to government posts.<sup>71</sup> As we note below, pro-Allende journalists were imprisoned, tortured, exiled, and some were executed or “disappeared” after their newspapers had been forcibly closed.

### **Freedom of Expression Under the Military (1973-1990)**

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<sup>70</sup> *Report of the Chilean National Commission on Truth and Reconciliation* (Notre Dame, Indiana: Center for Civil and Human Rights, Notre Dame Law School, 1993). Volume 1, p. 53.

<sup>71</sup> One of Allende's most venomous critics, *Sepa* Director Rafael Otero, was posted by the military junta as press attaché to the Chilean embassy in Washington. See John Dinges and Saul Landau, *Assassination on Embassy Row* (New York: Pantheon Books, 1980), pp. 266-267

The onslaught on press freedoms and the repression of political dissent in the aftermath of the military coup were harsher, more drastic and sweeping, than anything seen before in Chilean history. All the press that had backed the former government were closed or expropriated, and in some cases their premises were destroyed. Hundreds of journalists were forced to flee the country or thrown out of work, others were banished to distant regions. Television stations were brought under government control and the universities intervened by rectors appointed by the military. In the years that followed, the regime used virtually every method in the censor's repertoire: prior censorship of news and opinion, the banning of films for ideological reasons, concoction and dissemination of false information, impounding of publications, closures, the enforcement of draconian national security laws, harassment and intimidation.<sup>72</sup>

Twenty three journalists were killed or "disappeared" by government agents in the period from 1973 and 1990. Twice that number of press staff or associates, journalism students and print workers met the same fate. None of the authors of these crimes have been brought to justice, and the fate of the "disappeared" is still unknown.<sup>73</sup>

On the day of the coup, with the country under state of siege regulations, the armed forces shut down radio stations, bombing or confiscating their transmitters, and closed *Clarín*, *Noticias de Última Hora*, *El Siglo*, *Punto Final*, *Puro Chile*, and the Cuban agency Prensa Latina. Within the next few days they had taken over *La Nación* and raided the publishing house Quimantú, shredding left-wing publications on the spot. Justifying these measures one year later, a government official accused these publications of the "licentiousness unleashed by the official press of [Allende's government]...its degrading

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<sup>72</sup> Violations of press freedom under the military government are well documented. See especially two valuable chronologies: Lidia Baltra Montaner, *Atentados a la Libertad de Información y a los medios de comunicación en Chile 1973-1987* (Santiago: Centro de Comunicación y Cultura para el Desarrollo (CENECA), April 1988), and Consejo Metropolitano del Colegio de Periodistas, *La Dictadura contra los Periodistas Chilenos* (Santiago: mimeo, July 1988). See also Arturo Navarro, "El sistema de prensa bajo el Régimen Militar (1973-1986)" in Durán, Matta and Ruiz (eds.), *La Prensa: Del Autoritarismo a la Libertad*.

<sup>73</sup> Figures are from Ernesto Carmona (ed), *Morir es la Noticia*, (Santiago:1997). This study, to which more than sixty journalists contributed, including many writing from abroad, recounts the events in every case. Based on the memories of participants, it is a compelling historical record of the period.

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vocabulary and twisted manipulation of the news.”<sup>74</sup> By April 1975 the Journalists Association reported that 400 journalists had lost their jobs as a result of these measures, 200 had left the country, and fourteen were in prison. The authorized press, which included all of the *Mercurio* chain *La Tercera*, *Qué Pasa*, and the independent review *Ercilla* were subjected to prior censorship.

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<sup>74</sup> Col. Virgilio Espinoza Palma, director of the government’s censorship bureau, the National Directorate of Social Communication (DINACOS), in a speech to the Journalists Association in November 1994. (Translation by Human Rights Watch.) Cited in Colegio de Periodistas, *Dictadura contra los Periodistas*, p. 9.



With all of the pro-Allende press silenced, critical comment by the permitted press was kept within close limits by prior censorship and exemplary sanctions. Pinochet's political police, the Dirección de Inteligencia Nacional (DINA), deliberately leaked information to the press about the persecution of dissidents, who were typically portrayed as dangerous subversives and delinquents. Strict controls applied to the publication of any information likely to convey an impression of disorder or opposition to the government, and the DINA concocted information for public consumption about controversial issues.<sup>75</sup> Manipulation of information about political persecution continued until

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<sup>75</sup> In a notorious case of disinformation, the so-called Operation Colombo, the DINA faked foreign news reports of an internal purge in the MIR, during which 119 members of the organization across the continent were supposedly assassinated. The bodies of two of the purported victims were reported to have been found in an abandoned car in Argentina. It later transpired that the full list of the "dead" had been first published in an Argentinian and a Brazilian publication invented by the DINA with the connivance of its Argentinian and Brazilian counterparts (the Argentinian publication appeared only once; the Brazilian one,

the final years of the regime. For example, the press were barred access to the sites where twelve guerrilla suspects were extrajudicially executed in June 1987 in an operation conducted by the DINA's successor, the National Center of Investigations (Central Nacional de Investigaciones, CNI). Allegedly, CNI technicians dressed the crime scene to make it appear that the victims had firearms and explosives, filmed these details and provided the film to the television networks.<sup>76</sup>

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three times). The list of the dead corresponded to prisoners who were known to have "disappeared" after their arrest by security forces in Chile. See *Report of the National Commission of Truth and Reconciliation*, pp. 503-505. This elaborate cover-up of some of DINA's most heinous crimes was given complete credence by the national press. In its July 16, 1975 edition, *La Tercera* reported that the discovery of the bodies "reveals the clumsy maneuvers of leftist elements awaiting the so-called Commission on Human Rights of the United Nations" and that Amnesty International "would have no choice but to cross their names off the list of people disappeared in Chile." Citing government sources, *El Mercurio* reported that "these pseudo-detained or kidnaped are transported to Argentina so that they can join guerrilla movements and after receiving training, they are returned to Chile." *La Segunda* headlined cruelly, "Miristas kill one another like rats." Cited in Eugenio Ahumada, et al., *Chile: La Memoria Prohibida* (Santiago: Pehuén, 1989), Vol. 2, pp. 108-109. (Translation by Human Rights Watch.)

<sup>76</sup> José Hale, "No aparecen videos de Operación Albania," *La Tercera*, August 8, 1998. The videos subsequently disappeared and were reportedly not provided by the military

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prosecutor to a civilian judge investigating the crime in 1998.

Within a few years of the coup, some of the authorized media began push back the limits of censorship. Among the first were radio stations, typically less politicized than the written press and less affected by the repression, in particular Radio Chilena, Radio Balmaceda and Radio Cooperativa. In March 1976 Radio Balmaceda was taken off the air for six days, and its general manager, Belisario Velasco — now deputy minister of the interior — was banished to a remote town in the north of Chile. Later in the year, programs dealing with the expulsion of human rights lawyers and labor issues were banned after tapes had been taken away for scrutiny. In January 1977, Carabineros police broke into Radio Balmaceda's building and closed the station down.

During 1975 and 1976 prior censorship was gradually replaced by a series of decree laws introducing new crimes into the State Security Law and increasing penalties for violations of press laws. But in practice censorship continued intermittently until the state of siege imposed by the junta on the day of the coup was lifted in March 1978. The weekly news magazine *Ercilla*, one of the few periodicals prepared to criticize the government, was repeatedly threatened with closure. In March 1976 the government impounded an issue, accusing the magazine of unpatriotic propaganda. After the government had tried unsuccessfully to persuade Sergio Mujica, *Ercilla's* owner, to change the magazine's editorial line and to fire its director, Emilio Filippi, *Ercilla* was sold to the pro-military Cruzat-Larraín economic group. Filippi and the magazine's staff resigned. After a five-month wait for authorization, they formed a new publication, the weekly magazine *Hoy*.<sup>77</sup> During the late 1970s *Hoy* was closed several times, including once in 1979 for two months.

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<sup>77</sup> Human Rights Watch interview with Emilio Filippi, March 19, 1998.

Although aligned with the Christian Democrats, *Hoy* bridged the historical divisions between Christian Democrats and left-wing critics of the military government, gaining a large and influential readership. In the years that followed, other mouthpieces of opposition opinion appeared, all of them periodicals. Human rights issues were covered by *Solidarity*, a news bulletin of the Vicariate of Solidarity of the Catholic Church, the Jesuit periodical *Mensaje*, and the fortnightly *APSI. Análisis*, which started as an academic publication, became the regime's fiercest critic, and the social democratic *Cauce* broke new ground in human rights investigations. Key players in the articulation of a political alternative to the military, these publications attracted journalists of diverse political affiliations, and especially politicians whose parties had been banned or declared in recess. Further-left publications also circulated clandestinely, although excluded from the new market of opinions by laws prohibiting the expression of Marxist ideas, later mandated explicitly in Article 8 of the 1980 constitution.<sup>78</sup>

#### **Attacks on the opposition press**

During the early 1980s Chile was hit by a deep recession after the bonanza years of the late 1970s, stirring the first open resistance to the Pinochet regime. As street protests in Santiago's poor neighborhoods grew more violent, the anti-government press came under increasing attack by the government, as did independent radio stations.<sup>79</sup> In March 1984 a military edict subjected *Análisis*, *Cauce*, *APSI*, and *Hoy* to prior censorship, a measure not used since the early days of the regime. In November of that year, following the reintroduction of a state of siege, *Análisis*, *Cauce*, *APSI*, *Bicicleta*, and *Pluma y Pincel* were banned from circulation, while *Hoy* was subjected to prior censorship. A new law (Decree Law 320) was introduced to prevent these media from "distinguishing or emphasizing subjects, events or conduct which induce, propitiate or facilitate in any way the disturbance of public order," i.e. reporting on the protests. Two months earlier a military edict had banned them from publishing photographs or carrying information about the "so-called protests" on their cover pages.

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<sup>78</sup>This article remained in force until August 1989, when the constitution was amended following negotiations between government coalition leaders and the military government.

<sup>79</sup>Agents belonging to the CNI harassed and threatened opposition journalists; in a notorious incident in December 1982, CNI thugs beat up six journalists covering a labor rally in Santiago's Artisan Square.

Closures, impoundings, censorship, and the detention and harassment of journalists were only the more visible aspects of this systematic attack on freedom of expression. Far more insidious was extensive self-censorship. Constantly affected by closures, arrests and intimidation, the press nevertheless campaigned vociferously for freedom of expression. Also, it played a notable role in exposing human rights violations at a time when the official press continued to dismiss them as unpatriotic propaganda. In 1987, two opposition newspapers, the popular tabloid *Fortín Mapocho* and *La Epoca*, also started by Emilio Filippi and appealing to educated readers to the center-left, appeared. Like the alternative periodicals, the agenda and profile of these papers, as well as their readership were defined by the struggle for democracy, and by their adherence to the platform of the Government coalition.

The “contempt for authority” provisions of the Code of Military Justice, which criminalize insults to the armed forces, and the public order and national security provisions of the State Security Law were used systematically to persecute government critics and the independent press. By March 1988, a list of journalists under prosecution published by the Journalists Association included Fernando Paulsen, Juan Pablo Cárdenas, Mónica Gonzalez, and Patricia Collyer (of *Análisis*), Felipe Pozo, Gilberto Palacios and Ismael Llona (of *Fortín Mapocho*), Alberto Gamboa, Abraham Santibañez, Alejandro Guillier, Patricia Verdugo (of *Hoy*), Gonzalo Figueroa, Manuel Salazar, Edwin Harrington, Ariel Poblete, Francisco Hererros, Juan Jorge Faúndez, Victor Vaccaro, Eugenio González (of *Cauce*), Marcelo Contreras, Sergio Marras, Marcelo Mendoza (of *APSI*), and Pablo Cruz (of *Prensa Austral*).<sup>80</sup>

### **The Negotiated Transition**

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<sup>80</sup> It is striking that at least nine of the journalists on this list have been prosecuted for contempt of authority or libel since the return to democracy in 1990.

The special dynamics of the return to democracy in Chile had deep effects on the press and the public debate. Chile's was, in local parlance, a "negotiated transition," (*transición pactada*).<sup>81</sup> After complex constitutional negotiations, power was transferred to elected authorities within the authoritarian institutional framework bequeathed by the armed forces. Last-minute legislation was introduced by the departing government in various areas (the so-called tying-up laws, *leyes de amarre*) to preserve "enclaves" of military or conservative influence.<sup>82</sup> These measures ensured a powerful military say in key governmental bodies. Departing government officials were protected from accountability for actions committed prior to the installation of Congress in March 1990 (this was prohibited in a law passed in January 1990).<sup>83</sup> The enormous back-stage power of the army and the decisive influence in parliament of its supporters — due in part to voting arrangement that boosted the right — dictated a government strategy of compromise and pragmatic adjustment. These pressures also tended to inhibit the emergence of a vigorous independent press.

The origins of today's government can be traced back to the year 1984, when the Democratic Alliance (Alianza Democrática, AD), a front that included the Christian Democrats, the Radical Party, and the reformed (non-Marxist) sector of the Socialist Party, made a historic choice to accept the military's terms for a political transition as the only viable alternative to further violence and repression.<sup>84</sup> It meant first competing with Pinochet in a referendum scheduled

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<sup>81</sup>The Spanish word *pactar* is not precisely translatable into English. According to the Spanish Royal Academy it means "to fix or impose conditions or to consent to terms in order to conclude a business agreement or other dealing, which both sides are obliged to honor." Madrid: *Diccionario Manual e Ilustrado de la Lengua Española*, 1989, p. 1136.

<sup>82</sup>Americas Watch (now Human Rights Watch), *Human Rights and the "Politics of Agreements": Chile During President Aylwin's First Year* (New York: Human Rights Watch, July, 1991).

<sup>83</sup> In March 1998, a group of government coalition congressmen finally presented an impeachment motion against General Pinochet, but it was based on his alleged unconstitutional actions since March 1990, not on events that occurred under the military government. The motion, which was opposed by Frei, did not prosper.

<sup>84</sup> The main conservative party, the National Party, declared itself in recess after Pinochet's coup and was not revived. Divisions on the right between pro-military and more critical groups produced two new formations, which emerged within months of one another in 1983. The Independent Democratic Union (Unión Democrática Independiente, UDI,

in the 1980 constitution for October 1988 to settle whether the general would continue in power or elections would be held the following year. It was hoped that this conciliatory position would allow a negotiated speed-up of the timetable for elections, as well as agreement of other constitutional reforms.

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founded by Jaime Guzmán, a right-wing theoretician closely identified with the 1980 constitution and one of its main authors) rejected any modification of the transition timetable. The National Union (Unión Nacional, UN, founded by Andrés Allamand) supported dialogue with the opposition. The UDI continues in existence today as the second opposition party; the other, National Renovation (Renovación Nacional, RN), is a direct descendent of the UN, and includes center-leaning liberals.



None of the parties that opposed Pinochet and are now in government believed that the constitution had a shred of legitimacy. The text had been drafted behind closed doors without consultation or public discussion except in the pro-military press. The long drafting process began with a Commission of Constitutional Studies formed by the military junta in late 1973 presided by Enrique Ortúzar, a jurist and, as noted, former justice minister in the Alessandri Rodríguez administration. This was followed in 1976 by a Commission for the Study of a New Constitution (Comisión de Estudio de la Nueva Constitución), known as the Ortúzar Commission because it too was chaired by Ortúzar. The jurist who most inspired its deliberations was Jaime Guzmán Errázuriz, founder of the UDI.<sup>85</sup> Both men can be located on the conservative right of Chilean politics. General Pinochet himself, with the collaboration of Guzmán and Justice Minister Mónica Madariaga, submitted to the commission in November 1977 a document containing what proved to be the basic elements of the final draft.<sup>86</sup> This was put to a referendum on September 11, 1980, without basic guarantees of a free and secret vote.<sup>87</sup>

The constitution was designed to create what its authors considered a safe or “protected” democracy. It included numerous built-in safeguards to ensure the continuity of military tutelage over elected authorities. These included a formula to have state institutions such as the armed forces directly represented in the Senate. Apart from its twenty-six elected members (increased to thirty-eight in a 1989 amendment), the Senate included nine appointed members, four of whom were picked by the National Security Council (Consejo Nacional de Seguridad, CNS), on which the military has a majority,<sup>88</sup> and two by Pinochet himself. This system, together with other constraints on the powers of a future elected government, were intended to make government policies

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<sup>85</sup> GUZMÁN WAS ASSASSINATED BY MEMBERS OF A LEFT-WING COMMANDO ON APRIL 1, 1991.

<sup>86</sup> Ascanio Cavallo Castro, Manuel Salazar Salvo and Oscar Sepúlveda Pacheco, *La Historia Oculta del Régimen Militar* (Santiago: Editorial Antártica, 1989), p. 310.

<sup>87</sup> Even before the outcome was known, Christian Democrat leaders had issued a public statement declaring that the referendum was “without any validity” and that both the text and any future act carried in its name were “equally illegitimate and valueless.”

<sup>88</sup> The CSN is composed of the president, the presidents of the Senate and the Supreme Court, the commanders-in-chief of each branch of the armed forces and the director general of Carabineros, the uniformed police.

conditional on right-wing approval. After eight uninterrupted years of government, the governing coalition in fact has never commanded the majorities needed to overcome these political obstacles and complete its program of democratization.<sup>89</sup>

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<sup>89</sup> Edgardo Boeninger, Aylwin's general secretary of the presidency and a leading theoretician of the transition, has suggested that of the four major political goals of the government coalition, the most important was governability. The others were the return of the military to the barracks, an ethically acceptable solution to the human rights problem, and reform of the constitution. Edgardo Boeninger, *Democracia en Chile: Lecciones para la Gobernabilidad* (Santiago: Andrés Bello, 1997), pp. 379-385. The failure of the last objective, despite the government's success in other areas such as judicial and local government reform, was ironically evident when Boeninger accepted Frei's nomination in March 1998 to an appointed seat in the Senate.

The constitution also ensured a lifetime role for Pinochet and his continuing presence on the political scene. According to the transitional arrangements, Pinochet would retain his post as commander-in-chief of the army until 1998, when he would immediately assume a for-life senatorial seat. The former head of state's watchful presence in army headquarters across the street from La Moneda, the government palace, had a decisive effect on the recovery of democracy. It shielded the military, if not entirely, from the dishonor of court appearances to answer for human rights charges. Military pressure forced both presidents, Aylwin and Frei, to search for a political formula to close pending human rights investigations, although both were forced to abandon the attempt after opposition from within the government coalition. It also led to the abrupt closure of a major investigation into a corruption scandal implicating Pinochet's son.<sup>90</sup> Presidents Aylwin and Frei both complied scrupulously with the timetable they had agreed to accept. General Pinochet handed over his command on schedule and took his honorary seat in the Senate on March 11, 1998, impassive in the face of emotional but impotent protests from Congress members in the chamber itself.<sup>91</sup>

The pro-government press was deeply affected by these pressures and the government's efforts to trim the sails to avoid open conflict. The army largely treated the press as it had before. It delivered periodic broadsides accusing newspapers of orchestrating an anti-military campaign. Many journalists were prosecuted by military courts for exposing or condemning earlier human rights atrocities. Warning signals from the army also acted as an

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<sup>90</sup>The army show of force is described below, in Chapter IV.

<sup>91</sup>According to Aylwin, after he had explained why the country would benefit from his resignation, Pinochet replied, "You are mistaken, sir. No one will protect it better than I. Don't you see that my people are very nervous?" Aylwin never mentioned the subject again. "Testimonio del ex-presidente Patricio Aylwin a Comisión de Cámara de Diputados," *La Tercera*, April 8, 1998. (Translation by Human Rights Watch.)

invisible brake on the press, applied by government ministers in urgent telephone calls to media directors or even by the directors or editors themselves. These incidents have declined in number over the years, but their combined effect was to curb free expression and instill a climate of caution and restraint which did not favor a vigorous or critical press.

### **The Press in the Transition to Democracy**

Dramatic economic changes in the media industry also had effects on the political debate. The atmosphere of consensus, coupled with a policy of non-intervention by government, strengthened the position of the large-circulation press. The main beneficiaries were *El Mercurio* and *La Tercera*, the latter owned by the media conglomerate Copesa (Journalistic Consortium of Chile, Consorcio Periodístico de Chile, S.A.). Both newspapers had been supporters of the military government and had benefited from financial arrangements with state institutions that rescued them from heavy debt in its final years.<sup>92</sup> The former conservative political profile of both papers shifted toward the center, as they tried to wrest readers away from their pro-Concertación competitors. Success brought with it further concentration of ownership, already given a fillip in 1973 when the military removed the competitors of the conservative press from the scene. In 1998, of Chile's forty-eight newspapers, *El Mercurio* owned sixteen, including *Las Últimas Noticias* and Santiago's evening paper, *La Segunda*. Copesa, formed by a group of young entrepreneurs of center-right views and a former Pinochet finance minister, bought one third of *La Tercera* in 1990. By 1998 they owned *La Tercera*, *La Cuarta*, and a new Santiago evening paper, *La Hora*, and had acquired the influential political weekly *Qué Pasa*.<sup>93</sup>

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<sup>92</sup> By the end of the military government *El Mercurio* owed 14,000 million pesos, 60 percent of it to the State Bank (Banco del Estado); *La Tercera* owed 374 million pesos to TVN.

<sup>93</sup>Eugenio Tironi and Guillermo Sunkel, "Modernización de las comunicaciones y democratización de la política: los medios en la transición a la Democracia en Chile," in

Between them, the two chains now monopolize the attention of Chile's political and business elites without serious competition from any quarter.

Market forces have worked equally decisively against the press that reflected the views of the liberal-progressive segment of Chilean society. By August 1998 only *La Nación* (now concentrating on sports news) survives as a daily newspaper not owned by *El Mercurio* or Copesa.<sup>94</sup> A watershed was reached in July 1998, when *La Epoca*, the most independent of the left-of-center

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<sup>94</sup> *La Nación*, out of favor with the public because of its dependence on the military government, was revitalized under new directors appointed by Aylwin at the start of his government. It reported extensively on human rights investigations in the courts. However, the paper's success was limited by the government's inability to find a formula to secure its financial independence, the only guarantee of the paper's real autonomy of government. It also suffered from declining sales as the appeal of denunciatory journalism waned. A new managerial team appointed by the Frei government repositioned the paper in the market by giving it a prominent sports focus.

dailies, was forced to close down after long financial difficulties.<sup>95</sup> A similar fate befell the political weeklies. Within the space of a few years of Aylwin's inauguration, *Cauce*, *Análisis*, and *APSI* went into crisis and disappeared. All of the weeklies had depended during the military government on annual injections of financial support from foreign donors and foundations. Unable to count on further support after the elections, they were in no position to compete with the aggressive marketing strategies of weekly competitors. Other examples of the demise of this style of journalism were new left-of-center cultural ventures, such as *Pluma y Pincel*, and *Página Abierta*, begun in 1990. The organs of the

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<sup>95</sup> *La Epoca* was founded in March 1987 by Emilio Filippi, editor of *Hoy*, and a group of partners including fellow Christian Democrat Sen. Juan Hamilton. It attracted a distinguished group of journalists and commentators and provided a new forum of debate as the country headed toward the watershed of the 1988 plebiscite. But difficulties in raising seed capital led to *La Epoca's* heavy reliance on credit, which the newspaper proved unable to service from its sales. By 1992 sales had dropped to less than half their level in 1990. Advertising revenue, according to the paper's directors, was affected by the paper's critical image and failed to make up the deficit: even at its peak it never surpassed 12 percent of *El Mercurio's*. After a relaunch in 1991 failed to solve the problems, *La Epoca* entered an association with Copesa, which took over the printing, distribution, and sales of the paper, while *La Epoca's* directors retained editorial control. This arrangement was terminated in March 1998. Cortés, "Modernización Concentración ...," p. 568.

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Marxist left, including *El Siglo* and *Punto Final*, journal of the Movement of the Revolutionary Left (MIR), also ran into serious financial difficulty.<sup>96</sup>

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<sup>96</sup>Guillermo Sunkel, "La Prensa en la Transición Chilena," (Santiago: Facultad Latinoamericana de Ciencias Sociales (FLACSO), Serie Educación y Cultura, No. 26, 1992).



Many readers expressed dismay at the loss of outlets for alternative and more critical points of view, and at what they felt to be an inexorable movement toward the middle ground. The government came under criticism from its own supporters for failing to help these periodicals, which had served politicians well as sounding boards in the pre-electoral period, but the government remained insistently aloof. An ill-conceived bill to enforce media pluralism by law, proposed by two Christian Democrat deputies, was defeated by the media owners' lobby in Congress and also ruled unconstitutional by the Constitutional Court. As happened with daily newspapers, the number of titles in the weeklies market declined, while establishment periodicals like *Qué Pasa* and *Ercilla* adopted a more dynamic and inquisitive style. The purchase by Copesa in 1990 of the formerly conservative *Qué Pasa* (whose editorial board had originally included Jaime Guzmán, architect of the 1980 constitution), eventually led to a new-style magazine that publishes acerbic criticisms of the political and business elite and editorials debunking the myths of the transition. *Qué Pasa's* formula was successful: by 1991 it had overtaken its competitors in circulation and advertising revenue, while the Christian Democrat-inclined *Hoy* trailed behind.<sup>97</sup> In October 1998 *Hoy*, the last survivor of the alternative press that combated Pinochet's regime, finally closed down.

Of even greater impact than these changes in the print media, however, was the expansion of television as a medium of universal access, the appearance of new privately owned channels authorized for the first time in a law passed in 1989, and the dramatic growth of cable. Television in Chile began in the 1960s as a public service provided by the state and the two largest universities. Under the military government it became increasingly self-financing, and in 1992 the Aylwin government refloated even the state channel, TVN, as a self-financing corporation autonomous of government control. Despite this financial independence, however, TVN was by no means immune from political pressures, which affected the transmission of controversial programs, as we note in Chapter IV. In addition, all stations had to contend with the complex regulations enforced by the government television commission. These restrictions are analyzed in Chapter VI.

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<sup>97</sup> Cortés, "Modernización y concentración..." p.582.

### III. FREEDOM OF EXPRESSION IN CHILEAN LEGISLATION

Violations of freedom of expression in Chile are atypical when compared with other countries in the hemisphere. To varying degrees, most countries have a relatively open and diverse press and a dynamic and often acrimonious public debate, but journalists may frequently face physical reprisal from the state for their work. In Chile, journalists and opposition politicians do not generally face physical risk, but the public debate appears comparatively muted, attenuated and timorous, as if uninhibited expression were either personally risky or dangerous to society. Since the return to democratic rule, violations of freedom of expression can be traced not to repressive action by the executive branch but to the persistence of laws that fail to protect essential democratic values and hamper the vigorous discussion that democracy requires.

Chile has always been a society with a pronounced respect for the formalities of the written law. By long tradition courts follow the rule that their job is to apply the law in its literal sense, and they are reluctant to interpret it in the light of underlying concerns, such as the preservation of democratic values and international human rights principles.<sup>98</sup> Many of the laws affecting freedom of expression have their roots in the last century and were refined and developed

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<sup>98</sup>Chile is a party to the International Covenant on Civil and Political Rights, to its Optional Protocol and to the American Convention on Human Rights. Chile is also a party to the International Covenant on Economic, Social and Cultural Rights, the Convention on the Rights of the Child, and to other international human rights treaties. Hereafter the International Covenant on Civil and Political Rights and the American Convention on Human Rights will be referred to as the International Covenant and the American Convention.

in the 1930s and during the Cold War period, with striking continuity in their provisions.<sup>99</sup> While progress to repeal or amend these laws in the legislature has been extremely slow, senior judges, with a few exceptions, have only superficially addressed the constitutional principles involved or the underlying human rights principles.

Two areas of legislation are of particular concern. The first deals with laws that restrict political criticism by prohibiting expressions that are considered offensive to senior officials in state institutions. The second area concerns a range of laws and statutes that limit the public's right of access to information far more strictly than international human rights standards permit. Constitutional protection of right to freedom of expression is limited in both areas. The right to honor and privacy, like freedom of expression, is guaranteed in the constitution's bill of rights. However, freedom of expression is not protected sufficiently from restrictions imposed in the name of honor or privacy. There is no explicit guarantee of the public's right of access to information, and many of the most serious restrictions on this right emanate from the courts themselves.

### **The Weakness of Constitutional Protection of Freedom of Expression**

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<sup>99</sup> Only a few were enacted during the military government. The military revamped much existing legislation to the detriment of political rights but many, if not all, of these amendments have subsequently been reversed by democratic governments.

The constitution of 1980 acknowledges, but does not sufficiently safeguard, freedom of expression. Brainchild of the military and its conservative supporters, it was designed to create an “authoritarian, vigorous, protected democracy, based on the concept of unity, participation and integration of all the sectors of the country.”<sup>100</sup> The political institutions were protected permanently against left-wing subversion, which the military considered to be the permanent danger of democracy: Article 8, for example, outlawed the expression of ideas considered to be contrary to the essence of Chilean institutionality, by banning the “propagation of doctrines which attack the family, promote violence or a conception of society, the State of the legal order of a totalitarian character or based on the class struggle,”<sup>101</sup> a clear reference to Marxism. In a historical parallel with the repeal of the Law of Defense of Democracy at the end of the Ibañez government in 1958, Article 8 was repealed in August 1989, following negotiations between the democratic opposition and the military government. This does not alter the basic authoritarian nature of the constitution.

Many other norms reflecting this “protected democracy” concept remain intact. On freedom of expression, General Pinochet laid down guidelines — as he did on other matters — for the nine conservative lawyers who began drafting the new constitution four years after the military coup. Significantly, his recommendation to the commission regarding the media seemed to address free expression as an afterthought. The general called for:

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<sup>100</sup> Speech of Gen. Augusto Pinochet in the meeting of the Comisión de Estudio de la Nueva Constitución Política del Estado, June 9, 1977, cited in *Constitución de 1980, Comentarios de Juristas Internacionales* (Santiago: CESOC, 1984), p. 7. (Translation by Human Rights Watch.)

<sup>101</sup> Translation by Human Rights Watch.

revision of the legislation on media of social communication with the objective of preventing that they be used to destroy the institutional order, moral principles, the value of nationality or the honor of persons, while respecting legitimate freedom of expression.<sup>102</sup>

The qualification of “freedom of expression” by the adjective “legitimate” is eloquent. It transfers attention immediately to the conditions which must be observed by the person who exercises the right, making it from the start a conditional right, and highlights its potentially negative consequences for society. While international standards do permit certain restrictions on freedom of expression, such restrictions must be shown to be both legitimate and necessary, and they may not jeopardize the principle of free expression itself. This is considered in international law to be a cornerstone of a democratic society.

### **Basic protections**

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<sup>102</sup> Letter from Gen. Augusto Pinochet Ugarte to Enrique Ortúzar E., dated November 10, 1977, cited in CESOC, *Constitución de 1980*, p. 139.

Article 19 (12) of the constitution provides explicit protection to “the freedom to express opinions and to inform” and prohibits prior censorship.<sup>103</sup> However, it does not specify on what grounds the right may be restricted by the imposition of legal penalties for its misuse, beyond saying that such grounds must be established by law. It is clear, nevertheless, that abuses must be dealt with by the imposition of subsequent penalties, not by prior censorship. The rights of others to be protected from abuses of freedom of expression are also explicitly safeguarded in Article 19 (4). The correct balance between the enjoyment of these competing rights must be struck by the courts when they investigate accusations involving the misuse of freedom of expression. Unfortunately, as we note in Chapter IV, judicial precedent established in recent years considers the right to honor and privacy to have superior status to that of freedom of expression, a position that has no support in the constitution. This doctrine has led to instances of prior censorship by the courts, violating the constitutional prohibition of this practice.

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<sup>103</sup>Article 19 (12) of the constitution guarantees

freedom to express opinions and to inform in any way or through any media, without prior censorship, in whatever form or by whatever means, notwithstanding the obligation to respond for any crimes or abuses which may be committed in exercise of these freedoms, according to the law, which must be approved by a special quorum.

(Translation by Human Rights Watch.) A special quorum is an absolute majority of the deputies and senators holding office.

Although the language adopted in Article 19 (12) refers only to the right to express opinions and transmit information, legal experts consulted by Human Rights Watch agree that it includes the right to search for and receive information. The point was addressed by the Ortúzar commission which concluded that the right to be informed was implicit in the right to inform.<sup>104</sup> The right to “seek, receive and impart [information]” is included in the wording of both the International Covenant and the American Convention.<sup>105</sup> In Human Rights Watch’s view this right should be interpreted as generally entailing a right of access to official information, as well as information that is generally available. Although international human rights law does not explicitly provide a right to official information, the state *is* required to “ensure” and “give effect” to the right to inform oneself.<sup>106</sup> Since the right to seek information is an essential part of the right to free expression, the same limitations apply to it as apply to freedom of expression. Consequently, the state can only invoke specific circumstances to limit access to official information, subject to the same rules of legitimacy as apply to limitations on freedom of expression generally. The importance of access to official information in deepening democratic participation has been recognized in European courts and the Council of Europe since the early 1980s.<sup>107</sup> As we note below, Chile has a weak tradition of public

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<sup>104</sup> See José Luis Cea Egaña, “Estatuto Constitucional de la Información,” *Revista Chilena de Derecho*, Vol. 8, No. 1-6, 1981, p. 8, cited in Ciro Colombara López, *Los Delitos de la Ley Sobre Abusos de Publicidad* (Santiago: Ediciones Jurídicas, 1996), p. 222.

<sup>105</sup> Articles 19 and 13, respectively.

<sup>106</sup> According to Article 5 of the constitution “the exercise of sovereignty recognizes as a constraint the need to respect essential rights which emanate from human nature. It is the duty of the organs of State to respect and promote those rights, guaranteed by this Constitution, as well as by the international treaties ratified by Chile and which are in force.” (Translation by Human Rights Watch.) The final sentence was added as part of the constitutional reforms negotiated by the Concertación in the post-plebiscite period.

<sup>107</sup> Several resolutions and recommendations of the Committee of Ministers of the Council of Europe have addressed the issue. A recommendation of January 1973 proposed to expand Article 10 to include the freedom to *seek* information “with a corresponding duty on public authorities to make information available on matters of public interest, subject to appropriate limitations.” In February 1979, the assembly made a similar recommendation, noting that “parliamentary democracy can function adequately only if the people, in general, and their elected representatives, are fully informed.” Free access to official information was identified as a key target in a Declaration of Freedom of Expression and Information of April

access to official information, a fact that has been recognized by the government and has motivated legislative proposals to expand access.

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29, 1982, which espoused “the pursuit of an open information policy in the public sector, including access to information, in order to enhance the individual’s understanding of, and his ability to discuss freely, political, social, economic and cultural matters.”

The European Commission of Human Rights has established a link between the right to be informed and the obligation of the state to provide access to official data. In a decision of April 7 1987, the Commission stated that “although the right to receive information as embodied in Article 10 is primarily intended to guarantee access to general sources of information, it cannot be excluded that in certain circumstances it includes the right of access to documents which are not generally accessible.” Council of Europe, *Critical Perspectives on the scope and interpretation of Article 10 of the European Convention on Human Rights* (Strasbourg: Council of Europe Press, 1995), pp. 44-45.



The prohibition of prior censorship and the requirement that laws punishing abuse of the right to inform be approved by an absolute majority of Congress together represent important formal safeguards of freedom of expression. These basic guarantees are part of Chilean democratic tradition. Similar language can be found in the 1925 constitution, and in the 1833 constitution, generally considered to inaugurate Chile's republican democratic era.<sup>108</sup> In the earlier texts, formal protection of freedom of expression was not buttressed by any specification of the limits governments must observe in restricting the right. While the earlier norms provided some protection from arbitrary acts of the executive branch, they did not, therefore, protect the right from restrictive laws introduced by parliamentary majorities. The problem is addressed to a limited degree in the 1980 constitution, Article 19 (26) of which states:

The assurance that the legal precepts mandated by the Constitution to regulate or complement the guarantees established by it or limit them in the cases that it authorizes, *may not affect rights in their essence* or impose conditions, tributes or requirements which prevent their free exercise."  
[Emphasis added.]<sup>109</sup>

The effectiveness of this guarantee clearly depends on the sense given to "rights in their essence," a phrase that leaves unsettled the question of what the

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<sup>108</sup> As noted in Chapter II, the 1833 constitution tempered liberal principles with a commitment to firm government and a powerful presidency, in order to subjugate the warring factions that contended for power at the time.

<sup>109</sup> Translation by Human Rights Watch.

essence of a right is. Protection of freedom of expression is weakened by failing to specify the permissible grounds for restrictions of freedom of expression, such as those found in Article 19 (3) of the International Covenant and Article 13 (2) of the American Convention.<sup>110</sup>

**Defamation and the right to honor and privacy**

Protection from defamation, as well as invasion of one's private life, is also listed in the constitutional bill of rights. Paragraph 4 guarantees:

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<sup>110</sup> The ICCRP and the American Convention stipulate identical grounds, consisting in the protection of the rights and reputation of other, the protection of national security and public order, health or morals.

Respect and protection of private and public life and the public esteem (*honra*) of the person and of his or her family. The transgression of this precept committed through a medium of social communication and which consists in the imputation of a fact or act which is false, or which unjustifiably causes harm or discredit to a person or his or her family, shall constitute a crime and shall receive the punishment determined by the law. Nevertheless, the medium of social communication may be exempted if it proves before the respective court that the imputation is true, unless it constitutes by itself the crime of libel against private persons. Furthermore the owners, directors and administrators of the medium of social communication shall be jointly responsible for the damages which may be imposed.<sup>111</sup>

The term *honra* in Spanish refers to a person's public reputation or prestige. Chilean law distinguishes defamation from offenses against *honor*, which involve not only public esteem but also its subjective or personal aspect, such as an offense against a person's self-respect or the honor of his or her family.<sup>112</sup> Offenses against honor constitute libel (*injurias*).<sup>113</sup> There is an

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<sup>111</sup>(Translation by Human Rights Watch.) The inclusion of honor and privacy in the constitutional bill of rights is consistent with international human rights law. Article 17 of the International Covenant provides that "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honor or reputation." Article 11 of the American Convention holds that everyone has the right to have his honor respected and his dignity recognized; no one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation; everyone has the right to the protection of the law against such interference or attacks.

<sup>112</sup> Jose Luis Cea Egaña, "Estatuto Constitucional de la Información y Opinión," *Revista Chilena de Derecho*, Universidad Católica de Chile, Vol. 8, 1981, p. 186-197. Cea points out that the borderline between the private and public spheres alluded to in Article 19(4) is not clearly defined. The drafters of the constitution preferred to leave these definitions to jurisprudence.

<sup>113</sup> The Criminal Code contains two offenses, libel (*injurias*) and calumny (*calumnia*). Libel is defined as "an expression proffered or action taken in dishonor, discredit or disrespect for another person." Calumny has the more specific meaning of falsely imputing a crime to someone.

important difference between defamation and libel. The defendant in a defamation suit may establish innocence by proving the truth of the offensive statement (*exceptio veritatis*).<sup>114</sup> In the case of libel, truth is not a defense unless the person affected is a public servant and the injurious statement concerns his or her official function.<sup>115</sup> As we note below, the rule that the defense of truth is not applicable has also generally been applied to prosecutions under the Law of State Security.

No law currently exists covering defamation as a specific offense. However, in recent parliamentary discussion of a government bill to reform the law governing the press, discussed below, one right-wing opposition senator proposed an amendment to transform Article 19(4) into a special law on defamation, increasing penalties above those in existing libel provisions in the Criminal Code. The motion was fortunately defeated.

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<sup>114</sup> Ibid., pp. 193-194.

<sup>115</sup> Criminal Code, Article 420.

Constitutional guarantees of freedom of expression are insufficiently protected when the state restricts them under emergency powers. A so-called state of assembly may be declared when the country is at war, during which freedom of expression and information may be restricted or suspended entirely. During internal conflict (state of siege) or instability provoked by natural disasters (state of catastrophe), these rights may only be restricted. The blanket suspension of rights protected under the International Covenant is not permissible even when derogations are in force: restrictive measures must be adopted only "to the extent strictly required by the exigencies of the situation."<sup>116</sup> Moreover, Chilean courts are prohibited under article 41(3) of the constitution from ruling on the validity of the justification given by the authorities in declaring derogations or restrictions. Although this article may be interpreted as not preventing the judge from ruling on the proportionality of restrictions imposed, in practice judges have almost unanimously interpreted the rule as strictly prohibiting such judgments.<sup>117</sup> This jurisprudence, established even before the constitution came into force in 1980, is contrary to the position of the Inter-American Court of Human Rights, which has established that governments may not suspend rights on the basis of an executive decision whose grounds the

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<sup>116</sup> International Covenant on Civil and Political Rights, Article 4 (1).

<sup>117</sup> See Cecilia Medina and Felipe González, "National Security, Freedom of Expression and Access to Information in Chile," in Stephen Bowen, Sandra Coliver, Joan Fitzpatrick and Paul Hoffman (eds.), *Secrecy and Liberty: National Security, Freedom of Expression and Access to Information* (The Hague: Kluwer Law International, forthcoming, 1998); Cecilia Medina, "Libertad de expresión..." p. 188.

courts are not permitted to question.<sup>118</sup> When emergency measures are in force the courts are called upon to play an essential role in checking abuse of executive power.

**Contempt of Authority Laws**

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<sup>118</sup> Inter-American Court of Human Rights, Habeas Corpus in Emergency Situations, Advisory Opinion OC-8/87 of January 30, 1987, and Judicial Guarantees in State of Emergency, Advisory Opinion OC-9/87 of October 6, 1987.

Chile has a set of laws whose purpose is to punish expressions of contempt for those occupying high positions in any of the three branches of government. Contempt of authority provisions exist in the Criminal Code, in the State Security Law, and also in the Code of Military Justice.<sup>119</sup> The underlying logic of these laws rests on the notion that people are obliged to show respect to those in authority because of their rank, reflecting a view of the ordinary person as a subject rather than a citizen.

Laws penalizing offensive or injurious criticism of public authorities are common to most Latin American countries: such laws can be found in the penal codes of Bolivia, Brazil, Chile, Costa Rica, Cuba, Ecuador, El Salvador, Guatemala, Haiti, Mexico, Paraguay, Peru, Uruguay and Venezuela. They have become known generically as *leyes de desacato* (laws of contempt).<sup>120</sup> As defined by the Inter-American Commission on Human Rights:

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<sup>119</sup> The provisions in the Criminal Code (Articles 263 and 264) that protect the president, government ministers, members of congress, and the judiciary from libelous attack have been rarely used, and will not detain us here.

<sup>120</sup> The term is somewhat confusing because in most Latin American countries, including Chile, *desacato* has a more specific sense of "contempt of court," and only in Argentina and Uruguay is the term used to refer to libelous or insulting allusions to public authorities.

Desacato laws are a class of legislation that criminalizes expression which offends, insults, or threatens a public functionary in the performance of his or her official duties. These laws have a long history, originally promulgated in Roman times to defend the honor of the emperor. Today, the desacato laws which persist in many member States are justified as necessary to protect the proper functioning of the public administration. Desacato laws are said to play a dual role. First, by protecting public functionaries from offensive and/or critical speech, these functionaries are left unhindered to perform their duties and thus, the Government itself is allowed to run smoothly. Second, desacato laws protect the public order because criticism of public functionaries may have a destabilizing effect on national government since, the argument goes, it reflects not only on the individual criticized but on the office he or she holds and the administration he or she serves.<sup>121</sup>

The contempt of authority provision in the State Security Law potentially criminalizes criticism of a congressperson, a high court justice or the chief of police, among other state dignitaries.<sup>122</sup> According to Article 6(b) of the law, it is *an offense against public order* to insult

the President of the Republic, Ministers of State, Senators or Deputies, or members of the Higher Courts of Justice, the Comptroller General of the Republic, Commanders-in-Chief of the Armed Forces or the General Director of Carabineros<sup>123</sup>

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<sup>121</sup> Inter-American Commission on Human Rights, "Report on the Compatibility of 'Desacato Laws' with the American Convention on Human Rights," (Washington: Annual Report of the Inter-American Commission on Human Rights 1994, OEA/Ser.L/V/11.88, 1995).

<sup>122</sup>The Law of State Security (Law No. 12, 927) was enacted on August 6, 1958.

<sup>123</sup> Carabineros is the uniformed police force. It is a branch of the armed forces, subject to military discipline and subordinated to the minister of defense. There is also a plainclothes criminal investigations branch, Investigaciones. In this report we refer to Carabineros as the "uniformed police" and Investigaciones as the "civil police." The Comptroller General of the Republic (Contraloría General de la República) is an autonomous



whether or not the defamation, libel or calumny is committed with respect to the exercise of official functions of the offended party.

This law has been used to curb political criticism for four decades since it was enacted in 1958 by President Ibañez. Ironically, it was the left-wing administration of President Allende that added the chiefs of the armed forces and the uniformed police to the list of authorities who could sue under the law.

Contempt of authority offenses are dealt with according to special norms that reduce due process guarantees and rights of defense and prescribe higher penalties. Telescoped investigative procedures allow significantly less time for defense than the crime of libel in the Criminal Code. The initial hearing is conducted by an appeals court judge, who both investigates and rules on the charge. The decision may be appealed to the full appeals court, but rights of appeal to the Supreme Court are limited. Those convicted under Article 6(b) go to prison (although sentences are frequently suspended). The maximum penalty for libel or calumny is three years' imprisonment, while penalties for an infraction of Article 6(b) may rise to five years. In effect, contempt of authority is a more serious offense than ordinary libel.

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body, headed by an official appointed by the president with the approval of the Senate, which is responsible for auditing government funds and overseeing the legality of government actions.

The special procedures applicable show that legislators and judges have conceived of the law as a tool for dealing summarily with expressions construed as likely to disturb public order. The law *defines* contempt of authority as a crime against public order. In practice, courts have long refrained from assessing whether an allegedly contemptuous or insulting expression in fact endangered public order, or was intended to have that effect. Instead they have considered the danger to be implicit in the insult itself. In none of the Article 6(b) cases from 1970 to 1998 that Human Rights Watch studied, was the causal connection proven. Most judges have even ruled that evidence presented on this point was inadmissible, although it is the most obvious defense in a case of this kind.<sup>124</sup> Public order is, in fact, a disguise, one of several disguises contempt of authority accusations assume. The real nature of the offense is the insult or criticism itself.

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<sup>124</sup> There are some notable exceptions, particularly the Santiago Appeals Court decision on the Cuadra case, in which Judge Carlos Cerda, the court's president, analyzed the issue in detail, concluding that there was no threat and acquitting the defendant. The decision was overruled by the Supreme Court. See Chapter IV.

Article 6(b) is ambiguous as to whether its purpose is to shield public office itself from criticism, or just the incumbent against whom the criticism is directed. The law has been interpreted in both senses. Prosecutions presented on behalf of public institutions have been rarer, but as recently as 1995 a critic was convicted of offending the honor of Congress as an institution, without having named any of its members in particular.<sup>125</sup> Is it legitimate to conceive of public institutions as having honor and consequently a right to protection comparable to any private individual? The matter is not addressed explicitly in relevant human rights treaties and there is little consistent international human rights jurisprudence specifically addressing the issue. Our view is that public institutions, being answerable to the general public in a democratic system of government, must be subject to an intense level of scrutiny, as public officials are, and should not therefore enjoy such a high level of protection against injurious attacks as private citizens. Democracies must allow a broad margin of tolerance of destructive and unreasonable criticism in order to safeguard the protection of the essential right to criticize. Furthermore, debate is needed in order to define in what respects, if in any at all, it is legitimate to protect public institutions against unreasonable criticism. Human Rights Watch's view is that citizens should be free, and feel free, to criticize the institutions that represent them and to which they contribute taxes, unless freedom of expression is expressly limited due to an emergency that threatens the life of the nation.<sup>126</sup> It must be remembered that public officials who belong to the institution under criticism still have an individual right of reply as well as access to the press to defend the institution publicly.

A rule in Article 6(b) proceedings allowing an offended official to both launch a prosecution and withdraw it at will further facilitates abuse of this law to silence criticism. As a general principle, the only criminal accusations that may be withdrawn by the victim under Chilean legislation are those that do

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<sup>125</sup> The Cuadra case, discussed below in Chapter IV.

<sup>126</sup> The right to criticize without limits is the essential point. Coincidentally, Chilean legal scholars argue that institutions legally do not enjoy the right to protection of honor that individuals enjoy. Only individuals can be maliciously accused of a crime or of immoral acts, both of which are essential elements of the crimes of libel and calumny in the Criminal Code. See Alfredo Etcheberry, *Derecho Penal* (Santiago: Editorial Carlos Gibbs, 1965), p. 14. Article 19 (4) of the constitution, which refers to protection of the honor "of the person and of his or her family," is clearly inapplicable to an institution. (Jose Luis Cea Egaña, "Estatuto Constitucional de la Información y Opinión," p. 14).

not involve a public interest, such as private libel suits. The public order offenses of Article 6(b) are by definition a matter of public interest, yet despite this the plaintiff has the liberty to call a halt to the proceedings at any time. In this way the law can easily be pressed into service to intimidate critics with the prospect of criminalization and an unequal prosecution.

In its report on contempt of authority legislation laws published in 1995, the Inter-American Commission on Human Rights concluded that “desacato laws are incompatible with Article 13 of the American Convention on Human Rights because they suppress the freedom of expression necessary for the proper functioning of a democratic society.”<sup>127</sup> On the issue of whether or not these laws are necessary, the commission argued:

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<sup>127</sup>“Report on the Compatibility of Desacato Laws...”

The special protection desacato laws afford public functionaries from insulting or offensive language is not congruent with the objective of a democratic society to foster public debate. This is particularly so in the light of a Government's dominant role in society, and particularly where other means are available to reply to unjustified attacks through the government's access to the media or individual civil actions of libel and slander. Any criticism that is not related to the official's position may be subject, as is the case for all private individuals, to ordinary libel, slander, and defamation actions. In this sense, the Government's prosecution of a person who criticizes a public official acting in his or her official capacity does not comply with the requirements of Article 13(2) because the protection of honor in this context is conceivable without restricting criticism of the public administration. As such, these laws are also an unjustified means to limit certain speech that is already restricted by laws that all persons, regardless of their status, may invoke.<sup>128</sup>

The commission considered it inevitable that contempt of authority laws would chill free expression. Its report cited a decision of the European Court of Human Rights that although the penalties or fines did not prevent a petitioner from expressing himself, "they nonetheless amounted to a censure, which would be likely to discourage him from making criticism of that kind again in the future."<sup>129</sup>

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<sup>128</sup>Ibid., p. 210.

<sup>129</sup> European Court of Human Rights, Lingens Case, Judgment of July 8, 1986, cited in the Commission's report, p. 204.

In the debate on the report, the commission's opinion was strongly contested by the Chilean government delegate, Edmundo Vargas Carreño. Vargas maintained that the issue was "not a basic human rights concern in the continent." He noted that the relevant article of the Chilean Criminal Code was more than a century old and that it had been rarely, if ever, applied. Referring to allegations of lack of tolerance by officials of public criticism he said, "I think that it is a problem — I admit — of possibly more theoretical importance, because I have not seen problems in practice which might raise difficulties."<sup>130</sup>

On each of these points Vargas was inaccurate. The relevance of the issue and the problems it posed had been demonstrated by the Verbitsky case in Argentina, which, when presented to the commission in 1992, motivated the commission's study on contempt of authority laws.<sup>131</sup> In his comments on the Chilean criminal code, Vargas failed to mention that only three months before his speech, the Chilean congress had invoked Articles 263 and 264 of the Criminal Code in a highly publicized contempt prosecution that was still underway.<sup>132</sup> A more serious omission was his failure to mention at all the State Security Law and the twenty-four journalists and politicians who have been prosecuted for freedom of expression offenses under this law during the Aylwin and Frei administrations.

#### **Offenses to the armed forces**

The Chilean armed forces and the uniformed police have their own contempt of authorities laws, which are applicable to civilians. They include Article 284 of the Code of Military Justice (threats, offenses or insult to the armed forces) and Article 276, relating to the crime of sedition. Offenses committed by civilians under the sedition law are tried by military courts,

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<sup>130</sup> Comisión de Asuntos Jurídicos y Políticos, Acta de la Sesión Celebrada el 17 de abril de 1995, p.18-19.V.

<sup>131</sup> A serious conflict between the press and the government erupted in Argentina when journalist Horacio Verbitsky was convicted under Argentina's *desacato* laws for insulting a Supreme Court justice. Verbitsky presented his case to the commission in 1992. In September of that year the parties reached a "friendly settlement" under the commission's auspices, requiring the government to remove the offense of *desacato* from the criminal code. The commission agreed to carry out a study on the compatibility of *desacato* laws with the American Convention as part of the settlement.

<sup>132</sup> The Cuadra case, discussed in Chapter IV.

depriving defendants of the right to be tried by an independent and impartial court. Despite the fact that convictions have been rare, the prosecution itself is intimidating and curbs an essential democratic right to criticize members of the armed forces for a violation of human rights.

Article 284 of the Code of Military Justice penalizes those who “verbally, in writing or by any other medium, threaten, offend or insult the Armed Forces, one of its members, units, agencies, branches, classes or specific bodies.” The current wording of the article was introduced by a law enacted by the military government in 1984. Until then the article had been rarely invoked and the maximum penalty had been sixty days of imprisonment. The article was broadened to include any member of the armed forces regardless of rank, made the form of its commission extremely ample (“by word, in writing or by any other means”) and increased penalties to a maximum of ten years in prison.<sup>133</sup> Offenses were tried by military courts until 1992, when an Aylwin criminal reform bill transferred them to civilian courts and reduced the maximum penalty to three years of imprisonment.<sup>134</sup> Article 417 of the Code of Military Justice establishes the crime of offensive language against the Carabineros. This article was routinely invoked by the police in the context of street protests and demonstrations against the military regime. Article 284, by contrast, was directed selectively against lawyers, politicians, and journalists. Neither the Aylwin nor the Frei governments have repealed it. Prosecutions under the law virtually ceased, however, when civilian courts were awarded jurisdiction, suggesting that the military lost confidence in its ability to win prosecutions in courts outside military control.

Critics of the army or the police, however, have continued to face prosecution for comments considered seditious by the military, under Article 276 of the Code of Military Justice. Typical defendants (journalists and human rights defenders) and typical offenses in these sedition accusations were similar to those of Article 284. This strongly suggests that the sedition article has essentially stood duty as a surrogate desacato law. Article 276 of the Code of Military Justice refers to:

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<sup>133</sup> Colegio de Abogados de Chile, *Justicia Militar en Chile* (Santiago: Editorial Jurídica Ediar-Conosur Ltda. 1990), p. 199.

<sup>134</sup> Law No 19,047, part of the penal reform package known as the “Cumplido laws” after Aylwin’s justice minister, Francisco Cumplido.

Whoever, by word, in writing, or resorting to any other medium, induces any disturbance, alarm, or disorder, or brings to the knowledge of the troops matters intended to cause them discontent or half-heartedness in service.

Again, there is unlikely to be any causal connection between a criticism of the army made by a civilian and a deterioration of military discipline and morale. In effect, what the law does is shift the blame for the morale-weakening effects of alleged army irregularities onto those who denounce them publicly. Damage to military morale or discipline is not a legitimate ground for punishing a civilian for exercising his right to speak out and criticize what he or she feels is wrong behavior by the institution or one of its members.

The United Nations Special Rapporteurs on Freedom of Opinion and Expression have pointed out the dangers of blurry definitions in this type of offense: "Mention should be made of the problems arising from the ambiguity of provisions defining the concept of military or State secrets, etc. or the penalization of incitement to treason or sedition. Here again caution is called for; the term "sedition" may be given a very broad interpretation and used to bar the exercise of the right to freedom of expression."<sup>135</sup>

At a moment when Chile is embarking on a radical reform of its judicial system, the wide powers still vested in military courts to try civilians under outdated military laws and without basic guarantees of judicial independence are a glaring anomaly. As the Andean Commission of Jurists wrote in 1995:

The expansive capacity of military justice presently constitutes one the most serious problems of human rights protection in Chile. Military justice is not a simple "authoritarian enclave" or an area still waiting to be democratized. Rather, through its daily exercise, it continues to demonstrate its expansive and pre-eminent character which the institutional system has

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<sup>135</sup> E/CN.4/Sub.2/1992/9, p.7.



assimilated without notable criticism or movements for its reform.<sup>136</sup>

Trial of civilians by military courts for criticism of the armed forces or the police are especially questionable, since in these cases the offended party is the military institution itself, which acts as prosecutor and judge in its own case. Since military judges are officers on active service who form part of a institutional chain-of-command, their independence to rule against the interests of the institution, as these are perceived by their superior officers, is extremely restricted, if not non-existent. Where there is a conflict between the values of military discipline and rights protected in the constitution, the courts must be sufficiently independent to ensure that the defense of military discipline does not encroach on rights that are essential to the proper functioning of a democratic society.

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<sup>136</sup> Comisión Andina de Juristas: *Chile: Sistema Judicial y Derechos Humanos*, May 1995, p.55. (Translation by Human Rights Watch.)

Civilians tried by military courts do not have the same guarantees of an impartial hearing available in ordinary criminal prosecutions. The Military Appeals Court (Carte Marcia) is composed of five judges, three of whom are military officers on active service and two of whom are civilian appeals court judges, the most senior of whom presides the court. To all effects, therefore, the armed forces have the dominant influence at the appeals level.<sup>137</sup> In addition, the most important military justice official — the general auditor of the army — or the substitute, sits on the Supreme Court panel that hears final appeals against military court verdicts.<sup>138</sup>

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<sup>137</sup>The original draft of the “Cumplido laws” included reform of the composition of the Military Appeals Court. The Aylwin government proposed to shrink the courts to three members: the two appeals court judges and a military justice official in retirement. The proposal fell foul of opposition objections in the Senate and has not been reinstated since. All that was achieved in Law 19, 047 was to give the three military judges three-year tenure in their posts, a modest improvement which does not alter the fact that the military judges retain a majority on the court. Furthermore, tenure does not safeguard independence, given the officers’ duties of obedience. See International Commission of Jurists, *Chile: a Time of Reckoning, Human Rights and the Judiciary* (Geneva: 1992), pp. 166-168.

<sup>138</sup> A bill to remove the military official from the Supreme Court was defeated in the Chamber of Deputies on August 4, 1998 when the quorum necessary for a constitutional reform was not met.

Human Rights Watch opposes the trial of civilians by military courts. In our view, based on our assessment of such courts in many countries, they fail to provide adequate conditions of independence and impartiality and often violate guarantees of due process. The Human Rights Committee of the United Nations has stated that “while the Covenant does not prohibit such categories of courts...the trying of civilians by such courts should be very exceptional and take place in conditions which genuinely afford the full [due process] guarantees stipulated in Article 14 ” of the International Covenant.<sup>139</sup> The Interamerican Commission on Human Rights has gone further than the Human Rights Committee, stating that the trial of civilians by military courts would only be compatible with the American Convention if a legitimate state of emergency was in force.<sup>140</sup> In a more recent report, the Special Rapporteur on the independence of judges and lawyers, Param Cumaraswamy, considered the position of the Human Rights Committee to be too cautious, “...in the light of the current development of international law which is towards the prohibition of military tribunals trying civilians.”<sup>141</sup>

### **Press Regulation and Access to Information**

For the past thirty years the Chilean press has been subject to detailed regulation in a law known as the Law on Abuses of Publicity.<sup>142</sup> Freedom of expression for the press, which is restricted in a number of important ways in that law, has been the subject of ongoing debate in Congress for several years.

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<sup>139</sup> Human Rights Committee, “Equality before the courts and the right to a fair and public hearing by an independent court established by law (Article 14),” General Comment 13, April 13, 1984.

<sup>140</sup> Inter-American Commission on Human Rights, *Report on Chile* (Washington DC: Organization of American States, 1985), pp. 138-140, 143.

<sup>141</sup> Commission on Human Rights, Fifty-fourth session, Report of the Special Rapporteur on the independence of judges and lawyers, Mr. Param Cumaraswamy, E/CN.4/1998/39/Add.1, February 9, 1998.

<sup>142</sup> Ley 16,643 Sobre Abusos de Publicidad. REGULATION OF CONSTITUTIONAL GUARANTEES OF FREEDOM OF EXPRESSION BY MEANS OF A COMPREHENSIVE LAW REGULATING THE MASS MEDIA CAN BE TRACED BACK AT LEAST UNTIL 1975, WHEN ARTICLE 137 OF THE CRIMINAL CODE, STILL IN FORCE TODAY, REQUIRED THAT “CRIMES RELATED TO THE FREE EXERCISE OF SUFFRAGE AND THE FREEDOM TO EMIT OPINIONS THROUGH THE PRESS SHALL BE CLASSIFIED AND PENALIZED BY THE LAWS OF ELECTIONS AND OF THE PRESS, RESPECTIVELY.”

78 Limits of Tolerance: Freedom of Expression and the Public Debate in Chile

In July 1993 President Aylwin presented a bill to Congress to replace the Law on Abuses of Publicity. Aylwin's bill, known as the Bill on Freedom of Opinion and Information and the Exercise of Journalism, or simply the Press Law, is still in the final stages of debate in the Chamber of Deputies.<sup>143</sup>

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<sup>143</sup>Proyecto de Ley Sobre Libertades de Opinión e Información y el Ejercicio del Periodismo.

The difference between the bill's title and that of the existing law is significant. The Law on Abuses of Publicity has only two articles (the first two) protecting freedom of expression.<sup>144</sup> The rest of the law is devoted to rules governing the functioning of newspapers and radio stations, the public's right of reply, and a list of criminal offenses ("abuses of publicity") that are punishable by prison sentences or fines. These offenses fit the general categories considered in international law to be legitimate grounds for restrictions of freedom of expression, such as public health, public order, public morals and the rights and reputations of others.<sup>145</sup> Yet they are often very broadly defined, particularly

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<sup>144</sup>As modified in 1991, Article 1 states that "the publication of opinions by the press and in general the public transmission by any medium of the oral or written word is not subject to any authorization or prior censorship whatever. The right guaranteed to all the inhabitants of the Republic by paragraph 12 of Article 19 of the Political Constitution of the State includes the right not to be pursued because of one's opinions and the right to investigate and receive information and to diffuse it without limitation of frontiers by any medium of expression."

<sup>145</sup>CHAPTER 3 OF THE LAW IS TITLED "CRIMES COMMITTED THROUGH THE MEDIUM OF PRINT OR OTHER FORM OF DIFFUSION." THESE RELATE TO PUBLIC ORDER (OVERLAPPING WITH THE STATE SECURITY LAW), PUBLIC MORALS,

with regard to libelous or defamatory expressions published or transmitted in the media, and in regard to violation of privacy. The law restricts the ability of the press to publish certain types of information or report on certain issues, and does not protect the confidentiality of journalist's sources.

The proposed press law was introduced to remedy some of these defects. The long discussions in Congress and numerous amendments proposed to the original Aylwin draft have revealed strong disagreements on crucial themes such as rights to practice journalism, protection against defamation and the promotion of pluralism. As we note below, the version that has emerged from committee negotiations in the Senate is a significant advance on current legislation (the text is not definitive since it must still be approved by the Chamber of Deputies). It abolishes reporting restrictions, establishes a right to information, protects the confidentiality of journalists' sources, and reduces penalties for press infractions. However, it retains many of the punitive measures of the existing law.

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PUBLIC HEALTH, AND THE RIGHT TO HONOR, REPUTATION, AND PRIVACY. PARAGRAPH 1 REFERS TO THE PROVOCATION OR INSTIGATION OF CRIME, AND STATEMENTS IN DEFENSE OF THE COMMISSION OF A CRIME (*APOLOGÍA*), WHICH MAY BE CONSIDERED AN OFFENSE AGAINST PUBLIC ORDER AND AGAINST THE CRIMINAL LAW PRINCIPLES CONCERNING INSTIGATION. PARAGRAPH 2 PUNISHES THE "MALICIOUS" PUBLICATION OF FALSE NEWS WHOSE EFFECT IS TO CAUSE "GRAVE HARM TO PUBLIC SECURITY, ORDER, ADMINISTRATION, HEALTH OR THE ECONOMY OR HARM TO THE DIGNITY, CREDIT, REPUTATION OR THE INTERESTS OF NATURAL PERSONS AND THEIR FAMILIES, AND THAT OF LEGALLY RECOGNIZED INSTITUTIONS." THIS SECTION ALSO ADDRESSES PUBLIC ORDER CONCERNS BUT INCLUDES AS WELL THOSE AFFECTING "PUBLIC HEALTH" AND THE "RIGHTS AND REPUTATION OF OTHERS." PARAGRAPH 3 REFERS TO CRIMES AGAINST "GOOD CUSTOMS" (*BUENAS COSTUMBRES*) SUCH AS THE DISSEMINATION OF PORNOGRAPHY AND THE TRANSMISSION OF INDECENT ADVERTISING, WHICH FALL UNDER THE CATEGORY OF "PUBLIC MORALS." FINALLY, PARAGRAPH 4 REFERS TO "CRIMES AGAINST PERSONS" INCLUDING CALUMNY, LIBEL, EXTORTION AND INVASION OF PRIVACY.

In essence, the existing Law on Abuses of Publicity is a catalogue of crimes that may be committed by journalists in abuse of the right to freedom of expression. While these prohibitions fall broadly within the categories allowed under international law, they are highly restrictive in certain areas. For example, a journalist may be sued for libel for publishing facts about the private or family life of a person without that person's authorization and may not defend itself by substantiating the facts, except in restricted circumstances such as when a public interest is involved.<sup>146</sup> It also penalizes the transmission or publication of recordings, films or photographs of any person without that person's consent.<sup>147</sup>

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<sup>146</sup> Article 22 penalizes the publication of any information about a person's private or family life which, while not amounting to calumny or libel, may cause that person offense or "some form of discredit." This article was part of the *Cumplido* laws, a packet of penal reform laws enacted by the Aylwin government in 1991. It replaced a previous, even broader privacy article in Law No. 18,313, introduced in 1984 under the military government. The Aylwin administration had intended to repeal the military law outright, which had been vigorously criticized as a press gag. However, in the congressional debate it was forced to concede its position in favor of an amended version, at the insistence of right-wing senators. It is interesting to note in this context that the paragraph of Article 19(4) of the constitution (the privacy article) that expressly criminalizes offences against privacy and honor was also a last minute inclusion---at the insistence of conservative president Jorge Alessandri. See Colombara, *Los Delitos*, pp. 322, 324.

<sup>147</sup>The existence of this law helps explain why Chile has been largely free of paparazzi

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and publications devoted to local celebrity gossip. In general, information on private life is based on the interview format, in which the author unlikely to commit inaccuracies or speculation which could lead to legal suits.



Libel under the Criminal Code and the Law on Abuses of Publicity is subject to criminal prosecution and may incur a prison sentence and/or a fine, in addition to damages payable to the offended party. Although prison sentences are generally suspended and are rarely served, it is common for defendants to spend several days behind bars until bail is agreed. Both criminal and civil penalties may be waived or reduced by the court if a prompt and complete correction or apology is printed. The law attempts to draw a line between private and public affairs, with more lenient standards in the latter case, in which the defendant may be acquitted if he or she can substantiate his or her allegations. The inadmissibility of the defense of truth in libel suits initiated by private citizens and in State Security Law prosecutions evidently prejudices the defendant. Barring expressions not involving questions of fact, in which the exclusion of the defense of truth is clearly legitimate, a priori exclusion of any reasonable defense is unjustifiable.

The exception made in cases in which plaintiffs are public officials is a recognition that different criteria apply when a public interest is involved. Nevertheless, the requirement that the defendant *prove* the truth of the allegations to establish innocence in a libel accusation makes defense very difficult, and penalizes journalists who publish incorrect facts without malicious intent.<sup>148</sup> Neither the Criminal Code nor the Law on Abuses of Publicity permit acquittal if malicious intent cannot be proven. Current laws place the onus squarely on the defendant to substantiate the allegation. This norm is likely to have a chilling effect on public criticism. Those who make allegations against public officials on well-founded information but without conclusive proof, as is frequently the case in journalistic investigations, are liable to a criminal conviction for libel.<sup>149</sup> In one illustrative case discussed in Chapter IV, a

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<sup>148</sup> The doctrine of “actual malice” (*real malicia*), commonly applied by United States and many European courts, is not widely accepted as a defense in Latin American jurisprudence. According to this doctrine, untrue allegations directed against public officials concerning matters of public interest do not constitute libel unless the plaintiff can prove that their author was aware that they were untrue or published them with evident disregard for standards of evidence. However, some countries have increasingly recognized the validity of this principle. An example was the landmark verdict of the Argentinian Supreme Court in November 1996, acquitting journalist Joaquín Miguel Morales Solá of libel after finding that the sentencing court had failed to give due weight to evidence of his good faith. See Fernando Barrancos y Vedia, “La libertad de expresión y el debate de los temas de interés público (El caso Morales Solá),” *La Ley* (Buenos Aires: November 26, 1996).

<sup>149</sup> Chapter 3 of the law is titled “crimes committed through the medium of print or other

newspaper editor chose to retract a report on corruption — subsequently proven to be correct — rather than risk the conviction of a journalist. The requirement to prove the truth of an allegation in court can also place at risk the journalist's obligation to protect his or her sources.

Distrust of free public debate is evident in a series of bans and restrictions in the Law of Abuses of Publicity that affect public access to information. Restrictions affect mainly two areas: access to official data and information on criminal investigations underway in the courts.

### **Information denied**

Chile, like many other Latin American countries, has a long tradition of secrecy in public administration. There are no statutes safeguarding public access to official information and specifying the circumstances in which public agencies may refuse access to such information. Decisions to restrict access to documents deemed confidential are commonly taken by low-level public officials. These officials are not required to specify the criteria on which access is refused, nor are they accustomed to having to answer for their actions, since there is no constitutional mechanism specifically tailored to ensure respect for this right.<sup>150</sup> Difficulty of direct access to data has contributed to a tendency

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form of diffusion." These relate to public order (overlapping with the State Security Law), public morals, public health, and the right to honor, reputation, and privacy. Paragraph 1 refers to the provocation or instigation of crime, and statements in defense of the commission of a crime (*apologia*), which may be considered an offense against public order and against the criminal law principles concerning instigation. Paragraph 2 punishes the "malicious" publication of false news whose effect is to cause "grave harm to public security, order, administration, health or the economy or harm to the dignity, credit, reputation or the interests of natural persons and their families, and that of legally recognized institutions." This section also addresses public order concerns but includes as well those affecting "public health" and the "rights and reputation of others." Paragraph 3 refers to crimes against "good customs" (*buenas costumbres*) such as the dissemination of pornography and the transmission of indecent advertising, which fall under the category of "public morals." Finally, paragraph 4 refers to "crimes against persons" including calumny, libel, extortion and invasion of privacy.

<sup>150</sup> Some Latin American countries have specific remedies, as, for example *habeas data* in Paraguay and *mandato de segurança* in Brazil. In general, the right to official information is being increasingly recognized in Latin American legislation in judicial and administrative procedures designed to oblige the state to release public documents on request. See summary in Luis Catalán Olivares and Xavier Dupret, "Ley de Prensa en Chile y su Tratamiento en el Derecho Comparado," *Cuaderno de Estudio Transparencia y Probidad*

among journalists to depend on press conferences and interviews with officials, in which it is the minister or official spokesman, not the inquirer, who selects the information that will be eventually published. A more inquisitive investigator is likely to encounter immediate obstacles.

A recent editorial on crime prevention in the country's best-selling news weekly began with the observation:

In any place where the fight against crime is taken seriously, the figures published by this magazine in its cover article would be no scoop. They ought to be old news since January 1 of this year. Yet obtaining the official statistics on crimes committed in the country during 1977 turns out to be something of a trophy. To access something that in a civilized country is received by fax after a simple phone call to a lower-ranking public official here took intense efforts. In the end, someone was found who dared to flout the government's official policy of keeping the figures under seven locks. This policy not only lays bare once again the way in which power is administered in Chile, in which the government of the day considers it a concession to provide data which show their effectiveness in the management of state policies and funds.<sup>151</sup>

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<sup>151</sup>Cristián Bofill, "La Política del Avestruz," *Qué Pasa*, No. 1411, April 25, 1998, p. 13.

The effects of this kind of informal, but often insuperable, restriction can be seen in the case of the newspaper *La Epoca*, which in August 1994 published a story about alleged fraud in Santiago's Military Hospital. The paper described an investigation being conducted by military prosecutors into irregular hospital acquisitions, attributing its information to unidentified sources in the judiciary. Unable to substantiate its allegations because it had been refused access to judicial records in the military courts, the paper, which had been sued for libel and sedition by the army, published a retraction. Subsequent events, however proved the story to have been correct. In 1998 a major military inquiry resulted in the prosecution of several hospital officials and suppliers. The inquiry had been launched before the *La Epoca* story came out and continued for four years without any further disclosures in the press.<sup>152</sup> A more limited inquiry of our own met the same unjustifiable barriers. In carrying out research for this report, Human Rights Watch was denied access to trial documents pertaining to the cases of journalists prosecuted by military courts during the Aylwin government. After ten days of futile efforts to gain access to the dossiers we gave up the attempt. The denial of access in this instance was in plain contradiction to the law governing access to court documents, and demonstrates how pervasive is the predisposition to limit dissemination of data that are, legally, in the public domain.<sup>153</sup>

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<sup>152</sup>Human Rights Watch interview with Alejandra Matus, the reporter who covered the Military Hospital story, March 5, 1998. See Alejandra Matus, "Indagan presunto fraude en Hospital Militar," *La Epoca*, August 12, 1994; "Presentan querrela contra La Epoca," *La Epoca*, August 18, 1994; "Hospital Militar: auditor Torres confirma causa en justicia castrense," *La Epoca*, December 17, 1994.

<sup>153</sup>Article 9 of the Organic Code of Courts (Ley Orgánica de Tribunales) establishes a

With respect to the secrecy of military trial documents, we are glad to note that the government has proposed legislation in Congress to establish the same norms of public access to these documents as apply to the proceedings of ordinary civilian courts. This new norm would retain secrecy in exceptional cases. The bill has been approved at committee stage in the Chamber of Deputies. This is an important step in the direction of increasing the transparency of military court proceedings. It does not, however, make the trial of civilians by military courts any more legitimate.

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general rule applicable to all trials that “the proceedings of the courts are public, except for the exceptions expressly established in the law.” The chief exception are the pre-indictment judicial investigations, known as the *sumario*, which are secret. The proceedings of the plenary, or trial phase, are therefore public and are in principle available to the public, not just the parties to the case.

Article 19 of the Law on Abuses of Publicity makes it an offense to knowingly publish “orders, agreements, or official documents which have a secret or confidential character under the provisions of the law or under the terms of an official decision based on the law.” This ban is reflected in other legislation. The Administrative Statute of 1989 regulates the obligation of public officials to “respect secrecy in matters which have the character of being confidential.”<sup>154</sup> In practice, the law allows public officials to determine at their own discretion that a document be kept confidential. The law regulating the functioning of Congress provides that “information which by express provision of the law has the character of secret or confidential” must be provided by official bodies to Congress at its request but may only be seen by members of the respective congressional committee, meeting in secret.<sup>155</sup> Again, it is a public official who determines whether or not official data may be discussed in open parliamentary debate. Regulations in the Code of Military Justice prevent public access to any document “whose content is directly related to the security of the state, national defense, interior public order or the security of persons.” Judges also may be refused access to documents that military authorities consider to fall under that description.<sup>156</sup> The office of the comptroller general of the republic has consistently upheld discretionary decisions made by public officials on confidentiality.<sup>157</sup>

As current laws stand, administrative decisions denying the right to be informed on grounds of secrecy are only appealable to the courts in exceptional cases.<sup>158</sup> Chile still lacks a specific constitutional procedure for this purpose. A

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<sup>154</sup> ARTICLE 55 (H) OF LAW No. 19,954.

<sup>155</sup> ARTICLE 9 OF LAW No. 19,919,

<sup>156</sup> Article 436 of the Code of Military Justice. *Cuyo contenido se relaciona directamente con la seguridad del estado, la defensa nacional, el orden público o la seguridad de las personas ...*, Article 144.

<sup>157</sup> See Cecilia Medina, “Freedom of Expression...” p.208. Medina cites a 1994 decision of the comptroller’s office that denied the National Association of Employees of Internal Revenue (Asociación Nacional de Empleados de Impuestos Internos) access to the findings of internal inquiries into malpractice by tax officials.

<sup>158</sup> Military prosecutors may appeal to the Supreme Court for authorization to include classified military documents in their investigations if the respective branch refuses them access.

protection writ may be sought against denial of the right to information, but it is rare for Chileans to seek a court injunction in these circumstances.

### **Reporting bans**

The general lack of protection of the right to information in the Law on Abuses of Publicity is aggravated by provisions that allow a judge discretion to ban the press from reporting any information on a criminal investigation by the court. The judge may introduce the ban at any stage “when the publication could impede the success of the investigation or offend against good customs, the security of the state or public order.”<sup>159</sup> Judges are allowed to declare a reporting ban that prevents the press from carrying any information whatsoever on the progress of a criminal investigation until the court lifts the ban. Specific reasons showing why the ban is necessary do not need to be given. Reporting bans extend not just to confidential documents or information pertaining to the investigation (under long-established laws all the proceedings of judicial investigations in the early phase are secret anyway). They include any information relating to the case whatsoever.

While each of the grounds given in the Law on Abuses of Publicity for restricting information on court cases is permitted in international human rights law, Human Rights Watch considers that use of the measure by Chilean courts has far exceeded permissible grounds. Both the International Covenant and the American Convention allow some restrictions on the publicity of trials. According to Article 8 (5) of the American Convention “criminal proceedings shall be public, except insofar as may be necessary to protect the interests of justice.” Article 14 of the International Covenant allows restrictions on the publicity of trials, “for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice....” As in any restriction of freedom of information, however, the test of necessity and proportionality must be observed. It is important to note that “the interests of justice,” the most common ground given for reporting bans in Chile, may only be invoked as a reason for prohibiting trial publicity “in special circumstances” and “to the extent strictly necessary.” This requires the courts both to specify the nature of the special circumstances and limit both the extent and duration of the ban. Reporting bans in Chile deviate from these

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<sup>159</sup>Article 25 of Law No. 16,643, on Abuses of Publicity.



requirements in that the courts are not obliged to specify the special circumstances in which publicity could prejudice a trial, nor to limit the time period in which they are in force. Over many years the bans came to be applied systematically to controversial cases, and have usually prevented the press from informing or commenting on either the crime or its investigation, placing an unacceptable limitation on the public debate. The systematic practice of banning information on trials contravenes the letter and spirit of international norms and the more general principle of transparency in the administration of justice.

Abuse of this measure became habitual under the military government. The courts failed to specify in what respects publicity could prejudice criminal investigations nor did they limit reporting bans to confidential aspects of the investigation. Abuse was also facilitated by a provision in the law that allows defense lawyers to request a reporting ban to protect their clients' public reputations even in private litigations, such as libel suits. Under democratic government bans have continued. In the period between March 1990 and March 1994 the law was applied in twenty-three cases. Nine of these involved human rights crimes committed under the military government, three were private libel suits against journalists and included a ban on publication of extracts from or comments on the books concerned, five related to terrorist crimes, and only one involved a non-political violent crime.<sup>160</sup> Several newspapers were prosecuted for violating the bans; in November 1994 one issue of *La Epoca* was confiscated because of failing to respect a ban on reporting a human rights case. Human rights organizations argued that the bans contributed to impunity by imposing a blanket of silence and uncertainty about the development of judicial investigations into human rights crimes. Coverage of some of these cases had been silenced for years.

Opposition to reporting bans has mounted and has coalesced into an increasing consensus for their removal. The situation with regard to investigations of some emblematic human rights cases was truly shocking. In September 1996 the Journalists Association threatened to break a reporting ban on a criminal investigation into the murder by government agents of journalist José Carrasco Tapia on September 8, 1986. At the tenth anniversary of his death the ban had been in force for more than five years, although no one had been charged with the crime. Cases like this raised quite reasonable suspicions that

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<sup>160</sup> Comité de Defensa de los Derechos del Pueblo (CODEPU), *Informe Derechos Humanos, 1990-1994* (Santiago: April 1994), p. 23.

judges were using the bans to conceal lack of progress in such cases. In this case, the judge promptly withdrew the ban after the journalists' protest.

In June 1997 Judge Beatriz Pedral of the Fifth Court of Viña del Mar ordered a reporting ban on an investigation of drug-trafficking and money laundering that involved allegations of corruption by judicial officials. The reason given was repeated leaks to the press of documents pertaining to the secret investigation and, exceptionally, Judge Pedral imposed a three-month time limit. Complete enforcement of the bans like this become increasingly impossible with technological developments.<sup>161</sup> Not only did cable television have difficulty enforcing this ban, but one newspaper, *La Tercera*, successfully circumvented it by posting information on the case on an Internet website located outside Chilean borders.

In a rare intervention upholding freedom of expression, President Frei sharply opposed the publication ban in a speech to a gathering of journalists.

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<sup>161</sup> In response to the ban, one cable operator, VTR Cablexpress, announced that it would seek advance warning from international news networks of any item on the case and would block the signal if necessary as a precautionary measure to avoid sanctions. "Prohibición de informar: difícil para el cable," *La Epoca*, June 25, 1997; "VTR bloqueará noticias sobre el Cabro Cabrera," *El Mercurio*, June 19, 1997.

Days later the Valparaíso Appeals Court revoked it, ruling that the measure was tacitly repealed by Article 19 (12) of the constitution, which guarantees freedom of information and prohibits prior censorship. However, one year later, another Valparaíso judge, Marcos Felzenstein of the Sixth Criminal Court of Valparaíso, applied a 120-day reporting ban on the “Operation Ocean case,” which also involved a major drug-trafficking and money-laundering operation.<sup>162</sup> *La Tercera* again posted news on the case on its extra-territorial website and carried daily advertisements of the site on its cover page. The ban was lifted on July 30, 1998 by a unanimous decision of the Valparaíso Appeals Court.

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<sup>162</sup> “Operación Oceano: silencio por 120 días,” *La Tercera*, June 26, 1998; Ceina Iberti, “Los secretos de la prohibición,” *Qué Pasa*, No. 1421, July 4, 1998.

Apart from reporting bans, the public's access to accurate information on the course of police investigations is hampered by a provision in the criminal procedures code, which prevents the police from providing information on the investigations they conduct.<sup>163</sup> They are also obliged not to reveal any data about the case provided by the judge. The purpose of this prohibition is to enforce the police's subordination to the investigating judge and to protect criminal investigations from damaging public revelations. This prohibition is absolute, irrespective of whether a leak is made public or whether the investigation is in fact affected. It has been justified, in part, as a protection of suspects' rights.<sup>164</sup> As in the limitation of trial publicity, a test of proportionality should be applicable to restrictions on the public's access to information about police investigations. However, under Chilean law prohibition is absolute, irrespective of whether a leak is made public or whether or not the investigation is in fact affected. Although the law does not appear to be routinely enforced,

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<sup>163</sup> Article 74 (Bis B) of the Criminal Procedure Code: *"dar informaciones sobre los resultados de las pesquisas que practiquen y de las órdenes que deban cumplir."* The article was introduced in Law No. 18.857, in 1989.

<sup>164</sup> This was the view of Supreme Court Justice Alberto Chaigneau. Human Rights Watch interview, May 11, 1998.

the police have been subject to occasional clamp downs when police bulletins or news conferences have given offense.<sup>165</sup>

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<sup>165</sup>In August 1997, Investigations police ran into serious trouble after the media revealed details in a press conference about the August 18 arrest and questioning of Hernán Errázuriz Talavera, former Chilean ambassador to the United Kingdom, in connection with an alleged money-laundering operation by a Mexican drug trafficker. On August 27, the Santiago Appeals Court ordered Judge Dobra Lusic to open a criminal investigation to establish whether the police had broken the secrecy rules in releasing information on the arrests. Errázuriz, who was released without charge after being held incommunicado for twenty hours, filed a lawsuit against the chief of the Investigations police anti-narcotics brigade for providing the information to the press, claiming that his professional reputation had been irrevocably damaged. "Ex-embajador H. Errázuriz se querelló contra jefe antinarcóticos," *El Mercurio*, September 4, 1997.

The government upholds the need for such restrictions. Its new criminal procedure code, a major reform of the judicial process that is currently in debate in Congress, retains them.<sup>166</sup> All decisions on the release of information will be taken by the prosecutor (fiscal), the official of the Public Ministry (Ministerio Público) created under the new law to lead criminal investigations. Evidence collected in criminal investigations will be ordinarily accessible to the parties to a case but not to outsiders, abolishing the secreto of the *sumario* (pre-trial investigation). The police may not release this information to the press, nor may it reveal the identity of suspects until a formal indictment has been issued; the names of victims and witnesses may not be revealed for the entire duration of the trial. (There are, however, divisions within the governing coalition on this issue. A bill has been tabled to limit the effects of the prohibition, on the grounds that it limits freedom of information.<sup>167</sup>) Blanket bans on police information unjustifiably restrict access to information of public interest. Any restriction in this area must be tailored to protect a legitimate interest such as the rights of suspects and witnesses, while not endangering the general public right to be informed promptly and accurately.

#### **Steps towards a new regime on press freedom and access to information**

At the time of writing, Chile is still waiting for the new Press Law to clear the final hurdles in Congress, after a five-year discussion that has been

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<sup>166</sup> The new Code of Criminal Procedures, currently in debate in the Senate, is part of an extensive program to modernize the criminal system and the administration of justice. One of its purposes is to replace the secret, inquisitorial system of criminal investigation, led by a judge who combines the functions of investigation, judgement and sentencing, with an accusatorial system based on oral and public trials. Criminal prosecutions would be led by an official of a new Public Ministry (Ministerio Público), whose head, the *fiscal nacional* (attorney general), is expected to be appointed by the end of 1998 or early 1999. The new court system is expected to be operating in the year 2000 in pilot regions in the north and south of the country. "Reforma penal partirá según el programa," *El Mercurio*, July 27, 1998

<sup>167</sup> The more liberal bill was proposed by Sen. Sergio Bitar of the Party For Democracy. He argued in a press interview, "No one should have his or her name dragged in the mud by linking it with a crime which is only beginning to be investigated, but this cannot be at the cost of preventing freedom of expression, in which case the cure would be worse than the disease." Ana Maria Sanhueza, "Artículo 74 Bis 'es una ley mordaza'," *La Tercera*, September 23, 1997.

fraught with disagreement.<sup>168</sup> The most conflictive themes have been a proposal in the original draft restricting the hiring of journalists to those holding a university journalism qualification, a principal demand of the Journalists Association, and amendments subsequently proposed to oblige newspapers to be pluralistic. As noted in Chapter II, these latter amendments motivated a writ of unconstitutionality that was accepted by the Constitutional Court. Another amendment to introduce into the law a new crime of defamation was also rejected.

In each case the rejection of these proposals was a gain for freedom of expression. The Inter-American Court of Human Rights has ruled that the compulsory licensing of journalists is incompatible with Article 13 of the American Convention if it denies any person access to the full use of the news media.<sup>169</sup> Protection of the rights of journalists can be achieved without restricting the expression of views and opinions in the press to holders of a professional qualification.

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<sup>168</sup> A total of 300 amendments to the draft bill were tabled in the Senate. "Presentadas 300 indicaciones al proyecto de nueva ley de prensa," *El Mercurio*, June 19, 1997.

<sup>169</sup> Advisory Opinion OC-5/85 of November 13, 1985, "Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Articles 13 and 29 of the American Convention on Human Rights)," Organization of American States, 1985.

Politicians concerned at the disappearance of left-wing publications in the early 1990s made some proposals which amounted to a legal obligation on media to publish minority views. They proposed that the law recognize “the right of all sectors of the population to be duly informed about the totality of cultural, social and political expressions which exist in society.”<sup>170</sup> To guarantee this right they proposed that people might apply to a court for an injunction to force a newspaper to publish an item they considered to have been “deliberately silenced” if it was “of importance to society.” Although motivated by a concern to promote pluralism, this would have meant an impermissible judicial intervention in editorial decisions.

As noted at the beginning of this chapter, the effect of the defamation amendment, proposed by Renovación Nacional Sen. Miguel Otero, would have been to give public officials yet another layer of protection against public criticism in addition to the libel and slander provisions in the ordinary penal code and Article 6(b) of the State Security Law. This proposal met with firm resistance from the National Press Association, a powerful lobby representing the interests of media proprietors.

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<sup>170</sup>Soledad Miranda Herrera, “Las Paradojas de la Ley de Prensa,” *El Mercurio*, July 9, 1995.



The bill enhances protection of press freedoms in several important respects. It eliminates discrimination against non-Chileans owning a newspaper or magazine. (The Law on Abuses of Publicity limits ownership to Chileans resident in the country.) It gives proprietors and directors freedom to contract the staff they want by granting no special privileges to holders of a professional title, although it does not allow those without a title to call themselves journalists, except for correspondents or stringers working for non-Chilean publications.<sup>171</sup> It protects the confidentiality of sources. During the Senate discussions this right was extended to journalism students on practice assignments and non-journalists, and its coverage was to include information on drug trafficking and terrorism, which had been previously excluded. Another right protected in the law's current draft is the so-called "conscience clause" which in its first formulation allowed journalists to prevent their bylines from being used in articles "substantially" cut or altered without their consent and, in serious cases, to terminate their contracts if this right was abused. Although the original terms were watered down, the bill still prohibits editors from modifying the substance of articles without the author's consent and prohibits writers from being obliged to engage in unethical journalistic conduct.

The bill also abolishes reporting bans, ending one of the most serious current limitations on the right to information. The text approved by the Chamber of Deputies had retained these powers in a more restricted form; their proposed removal from Chilean legislation reflects a growing consensus that they are incompatible with the monitoring responsibilities of the press and the transparency of the judicial process in a democratic society. Nevertheless, the bill retains a prohibition on the press revealing the names of minors involved in crimes either as authors, accomplices or victims, and includes minors who witness crimes. Moreover, the press is prohibited by current Chilean anti-narcotics legislation from divulging details of drug-trafficking investigations.<sup>172</sup>

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<sup>171</sup> The Chilean Journalists Association has insisted, so far unsuccessfully, on a closed shop to protect the interests of the profession, which is heavily oversubscribed. An earlier version of the bill established that functions of habitual reporting, writing and editing news "preferentially" belonged to journalists, defined as holders of a professional university qualification. The rights established in the bill were limited explicitly to journalists defined according to this criterion. The elimination of the "preferential" status of title-holders implies that these rights, such as the protection of sources, may be exercised by anyone.

<sup>172</sup> Article 17 of the Norms on the Illicit Traffic of Drugs and Psychotropic Substances (Law 19,336 of 1995 and its Reglamentation, decree 565 of 1996 of the Ministry of Justice).

The most far-reaching change envisaged in the new press law is a norm establishing that administrative information and documents, as well as the reports of private enterprises serving a public function (such as utilities), are public and may be freely accessed. An official asked for information must provide it within forty-eight hours or else provide the reasons for its refusal. If refused, the applicant may lodge an appeal to a judge against denial of access, and if the access is granted, the official who denied it may be liable to a fine. Any public official who prevents the free circulation of opinions and information is liable to fines or imprisonment.

In January 1995, the Frei government presented a bill to the Chamber of Deputies on "Access to Administrative Information" which complements these provisions of the draft Press Law. The aim in the preamble is to improve rights of access to information "so that we may approach the levels of transparency in the management of information that characterize the most advanced and solid democracies in the world."<sup>173</sup> The bill would establish a general right of access to public documents and lists the circumstances in which senior civil servants may deny such access. It provides a mechanism of appeal against denial of access both to the Appeals Court and the Supreme Court. Senior civil servants who unjustifiably deny access to public documents, or provide access after the time limits allowed in the law have been exceeded, are liable to a fine. In addition, the bill requires all public administration departments to publish an annual report summarizing their goals, achievements, and budgetary allocations. Apart from this detailed bill regulating the right of access to public information, the government proposes to incorporate this right into the constitution.<sup>174</sup>

Restrictions on press freedom in defense of honor and private life, in the Press Law as currently in the debate follow the general lines of the Law of Abuses of Publicity; little advance has been made in this area. The bill over-regulates the press to protect honor and privacy to the point of endangering the public functions of the press as a watchdog body in a democratic society and encouraging it to be excessively timorous.<sup>175</sup> Although the senators avoided the

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<sup>173</sup> *Mensaje de S.E. el Presidente de la República con el que se inicia un proyecto de ley sobre acceso a la información administrativa*, República de Chile, Ministerio Secretaría General de Gobierno, January 12, 1995.

<sup>174</sup> Human Rights Watch interview with Ernesto Galaz, J.Olivares and Guillermo Laurent, Legal Division of the General Secretariat of Government, January 29, 1998.

<sup>175</sup> During the Senate debate, these criticism were expressed by Luis Ortíz Quiroga, representing the Federation of Communications Media, *Federación de Medios de*

introduction of additional restrictions, such as the defamation amendment, changes in the existing norms were marginal. They rejected other reforms which would have strengthened the defense of the press against libel accusations, such as an amendment that sought to broaden the circumstances in which the defense of truth may be admitted in libel suits. Nevertheless, penalties for offenses committed by the press were generally reduced, with a tendency to replace imprisonment by fines.

#### IV. RESTRICTIONS ON FREEDOM OF INFORMATION AND PUBLIC DEBATE (1990-1998)

##### Introduction: The Public Debate

In this chapter we focus on restrictions affecting the public debate in Chile since the return of democracy in March 1990. We use the term “public debate” to refer to the sum total of information and opinion available to people that enables them to make up their minds about a range of issues that arise in daily life. By no means limited to politics in the narrow sense, it includes discussion of ethical and religious issues, sexual mores, health, environmental concerns, government or business malpractice, consumer issues, cultural criticism, and so on. A wide variety of organizations, including political parties, religious organizations, civil and professional associations, academic and scientific institutions contribute to the public debate, as well as writers, artists, and other citizens. The mass media, which filters all the information and opinion generated by the government and by the wider public, is not a passive or neutral conduit: journalists select, articulate, and continuously recreate the agenda of the day. The public debate, nevertheless, ranges wider than information or opinion offered in the media: it includes many forms of direct public expression, both political and cultural, whether organized or spontaneous — such as street corner oratory, humor, graffiti, spontaneous protest, and the like.

In a healthy society, the public debate is naturally free-ranging. All restrictions on people's right to obtain information and express opinions, and the media's freedom to research and publish it are unwelcome. International human rights norms are categorical on this point. In the European system of human rights protection, “freedom of expression constitutes one of the essential foundations of a democratic society.”<sup>176</sup> In the American system, freedom of expression is the “primary and basic element of the public order of a democratic society.”<sup>177</sup>

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<sup>176</sup> European Court of Human Rights, *Handyside Judgment*, December 7, 1976.

<sup>177</sup> Inter-American Court of Human Rights, *Compulsory Membership in an Association*

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*Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85 of November 13, 1985, para. 69-70.

Yet even though restrictions are always unwelcome, international norms recognize that in certain limited circumstances they are necessary. Thus, Article 20 of the International Covenant requires that any propaganda for war or, “advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence,” be prohibited by law.<sup>178</sup> Freedom of expression can in certain circumstances be abused to injure other rights. Article 17 of the International Covenant, for example, protects everyone’s right to privacy and honor, and even obliges state parties to provide legal protection against its infringement, such as in libel laws. International human rights law is quite consistent on the circumstances that may be invoked to restrict freedom of expression, and the test that must be applied to determine whether the restriction is acceptable. The permissible circumstances include expressions that endanger “respect for the rights and reputations of others,” national security, public order, public health and public morals.<sup>179</sup> In each case, those who infringe these values by exercising their freedom of expression may subsequently be held liable, both in criminal and civil proceedings, but the state may never subject them to prior censorship.

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<sup>178</sup> Incitement to racial hatred has been one of the grounds given by the Human Rights Committee established to monitor compliance with the International Covenant in dismissing complaints alleging violation of Article 19 of the Covenant or establishing that restrictions were legitimate and necessary. See Human Rights Committee, *J.R.T and the W.G. Party v. Canada*, Comm. No. 104/1981, UN Doc. A/38/40, Annex XXIV, pp. 231-236; *Robert Fuarisson v. France* Comm. No. 550 /1993, views of November 8, 1996, UN Doc, CCPR/C/58/D/550/1993.

<sup>179</sup>International Covenant, Article 19(3), American Convention, Article 13 (2).

To be justifiable, however, restrictions must pass a strict test. First, restrictions must be legitimate, that is, they must serve one of the purposes mentioned above. Second, they must be established by a law, that is, accessible and precise enough for the citizen to be able to predict the outcome of an act and adjust his behavior accordingly. Vague or imprecise restrictions are threatening because there is no certainty how they will be applied, and this unpredictability has a chilling effect on freedom of expression. The hardest test, however, is the final one. Restrictions on freedom of expression must also be necessary in a democratic society. In a key judgment the European Court of Human Rights ruled that “the adjective ‘necessary’...implies the existence of a ‘pressing social need.’”<sup>180</sup> As a general principle, restrictions must be proportionate in severity and intensity to the purpose sought. In a particular case, they must be shown to be the least restrictive means possible of protecting the right or social value in question. In no case may they jeopardize the principle of freedom of expression itself.<sup>181</sup>

Most of the decisions reached by international human rights committees and tribunals on freedom of expression issues have focused on the necessity issue. The Human Rights Committee formed to monitor compliance with the International Covenant has interpreted restrictions narrowly, to the benefit of freedom of expression. It has focused simultaneously on the consequences of the use of the right and the possible negative consequences of its restriction. As the committee pointed out, “it is the interplay between the principle of freedom of expression and such limitations and restrictions which determines the actual scope of the individual’s right.”<sup>182</sup> This kind of legal reasoning is strikingly absent in decisions of the Chilean courts which rarely give second thought to the social costs of a restriction on freedom of expression in a democratic society.

A much less visible restriction is informal pressure by government on media owners and directors to avoid the publication or broadcast of undesirable items, even when such pressure is not backed by legal sanctions. From the perspective of freedom of expression principles, the intensity of such pressures is

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<sup>180</sup> *Sunday Times v. United Kingdom* (1979).

<sup>181</sup> “The Right to Freedom of Opinion and Expression.” Final report by Danilo Türk and Louis Joinet, Special Rapporteurs, UN Docs. E/CN.4/Sub.2/1992/9 July (1992)

<sup>182</sup> Human Rights Committee, General Comments No. 10 (19), adopted on July 27, 1983. UN Doc. A/38/40, Annex VI, p. 109.

much greater when the medium concerned is under government ownership or its directors are government appointees. The restrictive impact will also be greater if these government-owned or -controlled media enjoy a monopoly or a commanding hold in any segment of the communications market. Even when such conditions do not apply, behind-the-scenes interventions by government officials to preempt or criticize the publication of conflictive items should be considered unacceptable.

Finally, the scope and intensity of the public debate is affected by what might be termed self-imposed restraints. The most important of these is self-censorship. Self-censorship involves editorial suppression of information or language that might incur a sanction that is arbitrary or is based on a law that violates international conventions by unjustifiably limiting freedom of speech. The heavier and more consistently applied the sanctions, the more intense self-censorship is likely to be. Apart from their underlying legitimacy, international norms require restrictions to be defined in law and to be precise in meaning. Laws that are vague, ambiguous, excessively broad, or allow ample discretion in their application facilitate abuse of power and have a chilling effect on freedom of expression.

Self-imposed restraints, however, do not arise necessarily out of avoidance of administrative or legal sanctions. Owners, editors, and writers may suppress facts or opinions from publication (or not search for or articulate them) for a wide variety of reasons that are unrelated to censorship or the fear of censorship. These may include an internalized sense of social or political responsibility (key elements in the early years of the Chilean transition), conformity or deference to conservative moral values, or a pandering to public taste for purely commercial motives. Bad journalistic habits, such as a lack of tenacity and rigor in investigative reporting, over-reliance on official sources, excessive hob-nobbing with politicians, or agenda-setting based on the priorities of government are other tendencies that have been mentioned in this context.<sup>183</sup>

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<sup>183</sup> See, for example, Alejandro Guillier and Viviana Rojas, *Chile: la agenda noticiosa de la transición democrática*, in Universidad Diego Portales, Facultad de Ciencias de la Comunicación e Información, *Reflexiones Académicas*, No. 9, 1997, pp. 27-56.



Sexual codes and family mores are other potentially sensitive topics. Quite stringent standards of sexual conduct and family life are characteristic of Chilean society, although there is a wide gulf between the norms and their actual observance.<sup>184</sup> This gulf has been officially recognized; even government leaders have referred openly to a strain of hypocrisy in the culture.<sup>185</sup> In what has been interpreted by some observers as a safety-valve to allow concealment of disapproved moral conduct, Chilean laws jealously protect the private sphere from intrusion and inspection by the mass media. Informal restraints inhibit frank discussion in these areas too.

These moral concerns are part of an established way of life. If the press and the public concur in excluding from public discussion aspects of social life that are provocative or uncomfortable, these are cultural constraints not attributable to the government in power. Yet it should not be forgotten, also, that censorship and restriction of freedom of expression are usually directed against views that already exist in society (often, it must be said, minority views) or cultural products that many people want access to. While democratic governments cannot force the pace of change, they must encourage a free and open debate by removing the barriers which inhibit *any* group in society from freely expressing its viewpoint, or receiving the information it desires, within certain clearly defined limits. An open press, of course, plays an essential role in stimulating this change. The government *is* responsible for removing laws that

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<sup>184</sup> Protection of the family is one the values promoted in laws affecting freedom of expression. Coming from a "well constituted family" (*familia bien constituida*) is widely considered a mark of basic respectability. The statistics, however, show that a large minority diverge from this official pattern. As in most of Latin America, informal unions are common in the lower economic sectors. More than 40 percent of children are born out of wedlock, and 9 percent of nuclear families are one-parent. Although Chile still has no divorce law, legal loopholes allow marriages to be dissolved. Between 9 and 14 percent of people have had more than one stable relationship, and each year the Civil Register records around one thousand bigamous marriages. See Teresa Valdés, "Entre la modernización y la equidad: mujeres, mundo privado y familias," in Toloza and Lahera, eds., *Chile en los Noventa*. Recently, in October of 1998, discrimination against illegitimate children was eliminated by law.

<sup>185</sup> In April 1997, President Frei, attacking the decision of two television channels not to transmit Ministry of Health AIDS commercials advocating safe sex, said "so much hypocrisy causes indignation." Pilar Molina, "Los Nuevos Tiempos, pluralismo sí, pero sólo el mío," *El Mercurio*, April 13, 1997.

act as illegitimate barriers to freedom of expression and for taking positive measures to promote the diverse public debate a vigorous democracy requires.

In this section we focus on illegitimate restrictions of the public debate. We begin by looking at the expression of fact and opinion in the written media and television, and at limitations of the freedom of speech exercised by political actors. In the following section we turn to television and cinema, the two most wide-reaching mass media in terms of opinion formation, as well as entertainment.

### **Government Policy on Freedom of Expression**

Apart from the Press Law discussed above, progress to strengthen freedom of expression rights has been meager. As noted in Chapter III, the Aylwin government solved an immediate problem by transferring the cases of journalists accused of insulting the armed forces to the jurisdiction of civilian courts. However, civilians including journalists can still be, and are, tried by military courts for other freedom of expression-related crimes under the military criminal code, in violation of their right to a trial before an independent and impartial tribunal. Neither President Aylwin nor President Frei have repealed antiquated and anti-democratic articles of the military criminal code that curtail press freedoms. The provisions of the Law of State Security that criminalize defamation of state authorities have been invoked as recently as August 1998. The government has not proposed reforms to end judicial censorship, even though one case of prior censorship, reviewed below, resulted in a condemnation by the Inter-American Commission on Human Rights, and another is under study by the commission.<sup>186</sup> Sections of the Code of Criminal Procedure that are abused by judges to prohibit or suspend the publication of books deemed injurious remain in force.

Official policy toward the media formerly under government control, on the other hand, shows a significant break with the past. The Aylwin government ceded its control of the government newspaper *La Nación* to a board of directors handpicked by Aylwin but with editorial autonomy. The Aylwin government also sold off its interests in Radio Nacional, previously a government-owned station. It restructured Televisión Nacional (TVN), the state television channel as an autonomous channel, under a politically diverse board of directors, an

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<sup>186</sup>The condemnation was for the banning of a book by journalist Francisco Martorell, discussed in Chapter IV. The pending case is that of the film *The Last Temptation of Christ*, see Chapter V.

independent editorial policy and a commitment to pluralistic news coverage. The government's determination to dispense with its inherited press organs, thus distancing itself as far as possible from the practices of its predecessors, was a laudable departure. However, in practice, as we note below, the autonomy of the government-owned media was frequently breached by government officials or government-appointed managers.

#### **Silencing Critics: Military Justice and Sedition Charges**

Although prosecutions of journalists and politicians under articles of the Code of Military Justice have become less frequent with the years, the articles of the code that affect freedom of expression are still in force. Even if they are not invoked, many journalists have recent memories of detention and prosecution under these laws. Until they are repealed there is no guarantee that a journalistic investigation into corruption in a branch of the armed forces will not provoke litigation for violation of military laws. They therefore continue to have a chilling effect on the freedom to criticize. As the summary below indicates, the laws have been invoked periodically over an eight-year period in democracy.

In the early years of the Aylwin administration the number of these prosecutions increased. Charges continued to be filed for "threats, offences or libel against the armed forces" and "incitement to sedition" (Articles 284 and 276 of the Code of Military Justice). Most of the journalists affected by these lawsuits worked for newspapers or publications carrying reports on human rights cases. The laws deterring press denunciations of military wrongdoing helped protect military officials from being held accountable, as did the prohibition on congress investigating wrongdoing by government officials prior to 1990 and the effect of an amnesty law preventing prosecutions for human rights crimes during the height of the post-coup repression (1973-1978).

According to the Chilean Journalists Association, six months into the Aylwin government more than thirty cases, affecting twenty-six journalists, were under investigation by military courts; more than half of them had been initiated over a forty-five-day period between August and September 1990.<sup>187</sup> In May 1990 *El Siglo* Director Juan Andrés Lagos was under prosecution for five separate offenses; in November 1992, together with Francisco Herreros, director of *Pluma y Pincel*, he was sued on a new sedition charge by Carabineros for publicizing alleged irregularities in a police land purchase. Lagos was detained in May 1990 (for five days), September 1990 and November 1992, and again in

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<sup>187</sup> "Como en los viejos tiempos," *Análisis*, October 1-7, 1990.

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February 1993. Juan Pablo Cárdenas, director of *Análisis*, was detained in October 1990 for two weeks on a charge of publishing a letter from a Chilean exile in Canada considered to insult the armed forces,<sup>188</sup> two other cases against him involved articles about human rights violations.

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<sup>188</sup> No. 341, July 1990.

Other journalists affected included Osvaldo Muray (crime editor for *Fortín Mapocho*), who had been in charge of his paper's coverage of a death in police custody; *El Siglo*'s editor Guillermo Torres, jointly prosecuted in May 1990 with Lagos for publishing a list of 900 former CNI agents; Alberto Luengo, deputy director of *La Nación*, prosecuted in 1990 for a report on an army corruption case; Mónica González, editor of *La Nacion*, accused of libel in 1991 by the military judge of Santiago and the director of DINE; *Análisis* columnist Alfonso Stephens, accused of offense to the armed forces; and Manuel Cabieses, director of *Punto Final*, prosecuted in September 1991 for inciting sedition because of a cover depicting General Pinochet wiping his bloodied nose on a national flag, with the caption "Cynicism and sadism."<sup>189</sup>

On February 14, 1991, the Aylwin government promulgated Law No. 19,047, a major penal reform aimed at restoring due process rights for political detainees.<sup>190</sup> The law included provisions transferring prosecutions under Article 284 of the Code of Military Justice (threats and insults to the armed forces) to civilian courts. At the same time the maximum penalty for this offense was lowered from five years to three. Twenty-nine cases were transferred to civilian courts, and more than twenty journalists were acquitted in the course of the year.<sup>191</sup>

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<sup>189</sup> The cover was a reaction to Pinochet's callous comment on the exhumation of victims of extrajudicial executions after the military coup from a common grave in Santiago's General Cemetery: the burial of the dead in pairs was "a saving for the state."

<sup>190</sup> The law was one of three known as the "Cumplido laws" (*leyes Cumplido*) after Minister of Justice Francisco Cumplido.

<sup>191</sup> Amnesty International, *Informe 1992*, p. 89.

The reforms introduced in this law did not benefit journalists prosecuted for other military offenses, in particular sedition. After the law cleared Congress the number of prosecutions for libel against the army under Article 284 dwindled, while those for sedition increased significantly. Some Article 284 prosecutions, such as that of *La Nación* Deputy Director Alberto Luengo, were relaunched by military prosecutors on sedition charges in an evident effort to retain jurisdiction.<sup>192</sup> Although inactive, the cases remain open against the journalists who refused to present themselves to the military courts, a position publicly defended by the Chilean Journalists Association. Guillermo Torres, former editor of *El Siglo*, who had to go underground to avoid arrest, was declared a fugitive from justice. This anomalous situation is not unique; inquiries in the military courts of Santiago by Human Rights Watch revealed that accusations of sedition against Lagos, and against Abraham Santibañez and Alberto Luengo of *La Nación*, were still open, even though the cases had been inactive for years.<sup>193</sup>

In September 1996 the second military prosecutor suddenly reactivated the sedition charge against Manuel Cabieses, also dormant in the military courts since 1991, causing consternation in Chilean journalistic circles and international protests. On September 9, 1996, police went to Cabieses's home and to the newspaper's offices in an attempt to arrest him. Cabieses was in hiding for two weeks, during which the Chilean Journalists Association applied for a protection writ on his behalf.<sup>194</sup> Cabieses had been previously tried for the same newspaper cover on a charge of infraction of Article 6(b) of the Law of State Security. The

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<sup>192</sup> CODEPU, "Libertad de Expresión..." p. 23.

<sup>193</sup> Human Rights Watch was denied permission by military justice officials to view the trial dossiers in these cases. The grounds given by the secretary of the Second Military Court, Ricardo Herrera, was that the cases were only temporarily closed and that access to the files was limited to the parties to the case. This confirmed reports received previously by Human Rights Watch from human rights lawyers about difficulties in obtaining access to trial documentation in cases under military jurisdiction. By law, once the investigative phase of a trial (*sumario*) has been concluded, the trial documents should be available to any member of the public.

<sup>194</sup> The *recurso de protección* is a remedy available to anyone to apply to a court for an injunction to protect his or her constitutional rights if they are violated or in danger of violation by a government authority or private individual.

civilian and military courts had disputed jurisdiction, and the Supreme Court ruled in favor of the civilian courts, leading to his acquittal in 1995 by the Santiago Appeals Court. After two weeks of confusion, the Military Appeals Court (Corte Marcial) accepted the protection writ and dismissed the charges by a four-to-one majority.<sup>195</sup>

#### **Espionage or whistle-blowing?**

A case in which television journalists were prosecuted for sedition, for broadcasting an interview with an informant who made serious allegations about wiretapping of politicians by army intelligence personnel, illustrates the use of Article 276 to deter damaging revelations about illegal practices which would otherwise probably have remained concealed. In a subsequent statement the army accused the station of attempting to undermine the prestige of the institution, whereas the clear intent of the report had been to draw attention to illegal practices. Again, an alleged *desacato* was at the heart of the prosecution.

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<sup>195</sup> "Revocan cargos contra director de *Punto Final*," *La Epoca*, September 27, 1996.

The exclusive report, on TVN's *24 Horas* news program, aired on September 22, 1992. It centered on an interview with a former member of the Army Intelligence Department (Dirección de Inteligencia del Ejército, DINE), unidentified and shown in blurred focus, who claimed that DINE was permanently monitoring the mobile phone conversations of ministers, politicians, and business leaders. The broadcast, which came in the wake of espionage allegations involving both the army and the civil police, created enormous public interest by providing convincing evidence that the allegations regarding the army were accurate.<sup>196</sup> In the days that followed, crowds and reporters surrounded the DINE's Santiago headquarters, and the army declared itself in a state of alert.

In an aggressive public statement the army accused the station of "a communications stunt...a continued and repeated campaign to undermine the prestige of the institution...and a seditious plot." The statement attributed "special gravity" to the fact that the station had investigated an army unit and filmed its activities "on its own account" and without authority of a power of state. (Photography or filming is prohibited in army precincts.) It did not, however, deny any of the allegations.<sup>197</sup> On September 28, the army announced it would prosecute senior executives of TVN, including Director Jorge Navarrete, the head of its press department, Patricia Politzer, and anchor

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<sup>196</sup> In August, in a political panel on Megavisión's *A eso de...* program, Megavisión's founder-owner Ricardo Claro shocked his fellow panelists by suddenly playing a secretly recorded tape of a phone conversation between would-be presidential candidate Sebastián Piñera and a journalist friend, which was highly damaging to Piñera's credibility. It later transpired that tape had been recorded by army intelligence agents.

<sup>197</sup> "Enérgica declaración castrense contra TVN," *La Epoca*, September 25, 1992; and "Televisión Nacional dijo que el Ejército no ha desmentido hasta ahora la denuncia," *La Epoca*, September 26, 1992.



Bernardo de la Maza, for inciting sedition. A separate prosecution for espionage was opened against *La Nación* Director Abraham Santibáñez and journalist Manuel Salazar, for the publication in its September 24 issue of an article on the structure and functions of the DINE, including a photograph of DINE headquarters. The two were questioned by a military judge about their sources for the article but refused to give them.

This blatant attack on the freedom of the press created another uneasy situation for the executive branch. Secretary General of Government Enrique Correa told reporters that the government recognized the right of the armed forces to maintain the secrecy of their installations; at the same time it was committed to freedom of the press and citizens' right not to be spied on.<sup>198</sup> Defense Minister Rojas, however, criticized TVN for its "indiscretion" and said that the report "in some degree affected the security of the country."<sup>199</sup>

The army later suspended its charges against TVN. An investigative commission of the Chamber of Deputies into the wiretapping allegations reported on January 5, 1993 that its investigations had been hampered by lack of military cooperation. Concern about the illegal activities of the DINE, however, was sufficiently strong for the commission to recommend a new law to govern

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<sup>198</sup> "Enrique Correa dijo que TVN estudia presentar querrela contra el Ejército," *La Epoca*, September 30, 1992.

<sup>199</sup> "Según Ministro Rojas, TVN habría atentado de alguna manera contra seguridad del país," *La Epoca*, October 9, 1992; and "Schaulsohn criticó declaraciones de ministro Rojas acerca de informaciones periodísticas," *La Epoca*, October 11, 1992.

the intelligence services — an outcome that seems to have been a result of the public controversy generated in large part by TVN's report.<sup>200</sup>

**Corruption in the military hospital**

The army also filed sedition charges in 1994 to punish *La Epoca* for a story about corruption involving high-ranking officers attached to Santiago's Military Hospital. In an effort to keep the military hospital investigation under wraps, the army used the sedition charge to scare the paper off the story and misled the public to avoid exposure of the scandal. The hospital case subsequently led to several arrests and is still under investigation by military courts.<sup>201</sup>

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<sup>200</sup> "Espionaje: comisión propuso nueva ley sobre servicios de inteligencia," *La Epoca*, January 6, 1993.

<sup>201</sup> "Diagnóstico Reservado," *Qué Pasa*, No. 1418, June 13, 1998.

In a story published on August 12, 1994, *La Epoca* revealed that an investigation was underway in the Second Military Court of Santiago into allegations of fraudulent deals amounting to nearly a million dollars between Military Hospital officials and medical suppliers.<sup>202</sup> The investigation, *La Epoca* said, implicated the former director of the hospital, Atiliano Jara Salgado, who had recently been removed from his post, and Brig. Gen. Juan Lucar Figueroa, then vice-commander of the army's Second Division. In an immediate rebuttal, the army denied there was any investigation in the military courts, or any internal inquiry into irregularities in the hospital, and announced legal action against the paper.<sup>203</sup> This was followed by an accusation of sedition filed by the office of the Military Prosecutor (Ministerio Público Militar) against the reporter responsible for the story, Alejandra Matus, and Ascanio Cavallo, then director of *La Epoca*. A week later, General Lucan opened a libel suit against Matus and Cavallo. His attorney, Col. Enrique Ibarra, told reporters that "the only effect [the report] has is to confuse public opinion especially at this time in which we are coming up to the month of the Glories of the Army (Glorias del Ejército). The gravest thing is that the honor of an official with an impeccable career is affected." Ibarra denied also that the report of an investigation was true.<sup>204</sup> In the face of these legal threats, *La Epoca* published a retraction and apology, upon which the charges against the paper were dropped.

Subsequent events, however, proved that *La Epoca's* story had been substantially correct. Confirmation came in December 1994, when Christian

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<sup>202</sup> Alejandra Matus, "Indagan presunto fraude en Hospital Militar," *La Epoca*, August 12, 1994.

<sup>203</sup> "Los dos pronunciamientos del Ejército," *La Epoca*, June 3, 1998.

<sup>204</sup> "Presentan querrela contra 'La Epoca'," *La Epoca*, August 18, 1994.

Democrat Congressman Andrés Palma reported that a secret investigation by the comptroller general of the republic had revealed irregularities in hospital purchases involving inflated prices. On the basis of the report General Pinochet had ordered an internal inquiry that confirmed the allegations and led to a criminal investigation by the Second Military Court. Palma's statement was confirmed by the army's general auditor, Fernando Torres Silva.<sup>205</sup>

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<sup>205</sup> "Hospital Militar: auditor Torres confirma causa en justicia castrense," *La Epoca*, December 17, 1994.

The case stagnated in the military courts for four years, until the intervention of another civil authority — the Council for the Defense of the State — which made itself a party in the legal proceedings.<sup>206</sup> On May 27, 1998, two people — a retired army major and former head of hospital acquisitions, and a civilian supplier of the hospital — were detained and charged with fraud and bribery. The investigations had revealed the payment of fifty-two checks totaling 137 millions pesos in bribes by suppliers and had established that the acquisitions staff had been charging suppliers “commissions” of up to 10 percent for renewing their contracts, as well as allowing them to overcharge for products and issue phony receipts.

When the full story broke in 1998 the civilian medical supplier charged with bribery and fraud received anonymous threats. Six weeks earlier he had denounced to the police that someone had taken a shot at him and the bullet, narrowly missing him, had struck a car in an automobile showroom he owned. The *La Epoca* reporter covering the case, Jorge Molina, received an anonymous note at his home that said, “We know where and with whom you live. Take note and don’t ask any more questions. We saw you when you entered the hospital at 16.00 hours. Remember that we are more powerful than you think. If you continue with this, things could go very badly for you.” Both men were given police protection.

#### **Retaliation against human rights lawyer Héctor Salazar**

The uniformed police, Carabineros, have filed sedition charges on at least two occasions against non-journalists. In April 1994, Carabineros prosecuted a prominent human rights lawyer, Héctor Salazar Ardiles, in an attempt to silence questioning of the Carabineros director at the time, Gen. Rodolfo Stange Oelkers. The Salazar case was a classic example of the use of military justice to intimidate a civilian critic.

On April 14, the second military prosecutor charged Salazar for interviews he had given on TVN and Channel 13 and that had been published in

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<sup>206</sup> Paula Afani, “Denuncian amenazas de muerte en el caso Hospital Militar,” *La Tercera*, June 6, 1998. (Translation by Human Rights Watch.) The Council for the Defense of the State (CDE) represents the legal interests of the state in judicial proceedings.

*El Siglo*. Salazar's offending words were, "I would ask any member of Carabineros de Chile if he or she is prepared to follow an order from General Stange, running the risk that others have run of facing a life sentence." Salazar was detained overnight in Santiago's white-collar prison, the Anexo Capuchinos.

Two weeks before the indictment, on March 31, fifteen former Carabineros intelligence agents had been sentenced to long terms of imprisonment for the abduction and murder in 1985 of three members of the Communist Party, known as the slit throat (*degollados*) case. It was a landmark verdict, one of a handful of cases in which members of the security forces had been brought to justice for human rights crimes committed under the military government. The judge, Milton Juica, also called for General Stange and five other police officials (then in retirement) to be prosecuted for obstruction of justice. Amid clamor for the police commander's immediate resignation, but lacking constitutional powers to fire Stange, President Frei called on him to stand down as an act of good faith. Stange's flat refusal to do so threatened to provoke a constitutional crisis, averted by allowing Stange to take indefinite leave pending the judicial hearing of his case. The prison sentences, handed down for a crime that General Stange had been accused of helping cover up, motivated Salazar's comment.<sup>207</sup> A former lawyer for the Vicaría de la Solidaridad, Salazar had acted as legal counsel for the relatives of the victims.

The Military Appeals Court upheld the charges against Salazar only to see them dismissed in August 1994 by the Supreme Court, ruling in favor of a complaint against the Appeals Court judges filed by defense lawyer Nelson Caucoto.<sup>208</sup> In a divided vote, the court ruled that criminal intent could not be

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<sup>207</sup> Stange was eventually cleared by the court and returned to his post. He is currently a senator.

<sup>208</sup> Originally intended as a discretionary power of the Supreme Court to reconsider

established in view of the fact that Salazar was speaking in his capacity as a litigant in the case. The court also correctly observed that Salazar's declarations could not be singled out for causing demoralization in the police force, when Stange's resignation was already a topic of public debate.<sup>209</sup>

#### **Dissent in the uniformed police**

In the following case, the uniformed police made an individual into a scapegoat for his role in drawing attention to a crisis in police morale, this time a rank and file officer who had complained publicly about pay and conditions in the force. The jurisdiction of the military court was legitimate since the defendant was a serving police officer and a disciplinary offense was involved. Nevertheless, the sedition charge against the defendant was invalid, since the officer's comments were motivated by a matter of public interest and were not intended to damage the police force. On the contrary, the evidence indicated that widespread discontent in the police force existed before his statement and had, in fact, prompted it.

On May 4, 1998 military prosecutor Juan Solís Torrealba charged police Corp. Hernán Cristóbal Leiva Suazo with sedition following a televised interview that appeared on TVN's *Medianoche* on April 28, in which Leiva, in full uniform, faced the camera to denounce pay and living conditions of rank and file police and criticized superior officers for abusive and arbitrary treatment of subordinates. On the following day Leiva was detained and dismissed from the force.

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verdicts in which judges had committed irregularities, the *recurso de queja* became transmuted over the years into a de facto third-instance appeal, since it was possible to use this appeal to overturn a lower court decision. Recently these powers have been reduced.

<sup>209</sup> "Abogado Héctor Salazar quedó libre de cargo de sedición impropia," *La Epoca*, August 17, 1994.

Leiva's TVN interview was part of a series of events that revealed for the first time the extent and seriousness of grievances in the police rank and file. In early April a group of police wives gave a series of interviews on television and in the press denouncing poor pay and conditions. This motivated an accusation of sedition lodged by the uniformed police high command with the sixth military prosecutor against those "found responsible."<sup>210</sup> At the same time, Metropolitan Region policemen had to sign an undertaking not to engage in "actions that transgress disciplinary principles or affect the institutional prestige of the Carabineros de Chile," and furthermore to assume personal responsibility for any violation of police regulations by their family group.<sup>210</sup> On April 27, a sit-down protest by some seventy police wives was violently broken up by police officers wielding truncheons and dispersed with water cannon. At least four women were injured (later lodging complaints against the police), and seven were arrested. Peaceful protests continued into the night in police housing precincts. It was at this point that Leiva — the first police officer to show his face to the cameras — made his televised protest. "The women took the first step," Leiva told viewers. "I feel proud of the wives who were in the protest. The balloon had to burst... We cannot express ourselves." Among other abuses, he alleged that he had been arbitrarily detained for fifty days for lodging a complaint about the detention without a court order of some of his colleagues. Carrying out their previous threat, on the day of Leiva's arrest the uniformed police announced that the police whose wives had been arrested in the protests would be expelled from the force.<sup>211</sup>

While the police have the right to take disciplinary measures against officers who breach internal regulations, Leiva's prosecution for the serious offense of sedition implied that he had deliberately instigated this crisis of police morale. This was untenable in the light of the circumstances described. More

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<sup>210</sup> "Esposas de carabineros enfrentan denuncia por sedición," *La Tercera*, April 8, 1998.

<sup>211</sup> By July 1998, thirteen policemen, including Leiva, had been fired because their wives participated in the protest. "Oficializada baja de 10 Carabineros," *El Mercurio*, July 7, 1998. Among them was Capt. Eduardo Perales Martínez, who claimed he had been summarily dismissed for telling a joke about the alleged disproportionate share of a recent salary adjustment that went to senior officers. The Carabineros denied that he had been fired because of the joke, but a police official confirmed that his witticism had been taken as an insult to the institution. Jazmín Jaililie, "Ex capitán dice lo dieron de baja por contar chiste," *La Tercera*, August 5, 1998; and "Carabineros dice que cumplió orden de no inovar," *La Tercera*, August 6, 1998.



likely, Leiva was punished for bringing it to public attention. The uniformed police have traditionally resolved internal problems autonomously, without ministerial supervision, and much less, public scrutiny. Leiva's and other punished expressions of dissent within the police led to an immediate parliamentary debate and the announcement by Minister of Defense Raúl Troncoso on May 7 of measures to modernize the force and make it more accountable. Leiva was released on bail in July 1998, but the case against him continues.

#### **Contempt for Authority: Prosecutions Under the Law of State Security**

Defamation of state officials, defined as an offense against public order under the terms of Article 6(b) of the Law of State Security, has formed the basis of most prosecutions affecting freedom of expression since March 1990. Article 6(b) prosecutions launched in the Santiago Appeals Court during this time have affected sixteen journalists or newspaper directors and eight politicians. While the great majority have been launched by the army, one, resulting in a conviction upheld by the Supreme Court, was launched by Congress, acting collectively in defense of its honor. This makes it difficult to argue that this type of contempt accusation is merely a residue of authoritarian attitudes typical of military rule. Chilean courts continue to punish expressions of outrage, moral concern or irreverent satire if the target is a state authority. In most cases the lack of intention to offend was not considered by judges pertinent as a defense, nor was any harm to public order proven in cases in which the defendants were convicted. These continuing prosecutions and the absence of any government initiative to halt them place a permanent brake on public criticism.

Journalists affected by these writs include Juan Pablo Cárdenas and María Eugenia Camus (*Análisis*), Manuel Cabieses (*Punto Final*), Agustín Edwards Eastman, Fernando Silva Vargas and Johnny Fraenkel (*El Mercurio*), Fernando Villegas (RTU television), Juan Andrés Lagos and Francisco Herreros (*El Siglo*), Roberto Pulido and Cristián Bofill (*Qué Pasa*), Mario Urzúa (*El País*), Rafael Gumucio and Paula Coddou (*Cosas*), and Fernando Paulsen (most recently in August 1998) and José Ale (*La Tercera*).

Politicians charged under Article 6(b) include Mario Palestro, then a member of the Chamber of Deputies for the Socialist Party; Eduardo Abedrapo, president of Christian Democrat Youth (Juventud Demócrata Cristiana, JDC); Jorge Schaulsohn, member of the Chamber of Deputies for the Party for Democracy; Arturo Barrios, president of the Socialist Youth (Juventud Socialista); Francisco Javier Cuadra, a former Pinochet cabinet minister; Rodolfo Seguel, Christian Democrat member of the Chamber of Deputies;

Nelson Avila, PPD member of the Chamber of Deputies; Nolberto Díaz, leader of the JDC; and Gladys Marín, secretary general of the Chilean Communist Party. Socialist leader José Antonio Viera Gallo, former president of the Chamber of Deputies, narrowly escaped prosecution.

Since 1991, General Pinochet has sued for defamation on at least twelve occasions in his capacity as commander-in-chief of the army. Many of the expressions he objected to were outbursts of moral indignation in speeches commemorating those who died in the military coup or uttered in heated television debates. Others were reactions to provocative remarks by Pinochet himself, including callous and insulting references to victims of the coup. The courts dutifully processed the general's accusations, collecting and analyzing texts and interviewing witnesses. The only real judicial purpose served by these inquisitorial investigations was to establish what had been said or written, that is, the material existence of the purported "crime." Existing jurisprudence made it difficult, if not impossible, for defendants to plead lack of injurious intent or establish innocence by proof of truth.

For example, Socialist Youth President Arturo Barrios was detained for six days, convicted, and given a 541-day suspended sentence in April 1996 for shouting "Pinochet, Contreras and their henchmen are murderers" at a September 11, 1994 commemoration of the victims of repression following the military coup. Barrios's defense argued that the remarks had been directed at Pinochet as former head of state, not Pinochet as commander-in-chief of the army, and constituted legitimate political criticism. The judge, however, found the statement libelous.

On the same anniversary two years later, Gladys Marín, secretary general of the Chilean Communist Party, said in a speech at the memorial for the "disappeared" in Santiago's General Cemetery: "The main person responsible for state terrorism, for the crimes against humanity, Pinochet, is still doing politics and giving orders. And he does so because the government allows him to." Marín was detained on October 29, 1996, when police patrol vehicles blocked the path of her car. She was taken to Santiago's women's prison, where she spent three days awaiting the outcome of a protection writ filed with the Supreme Court. The writ was rejected, and the court confirmed her indictment. The fact that Marín was a political leader, that her husband was among the "disappeared" and that her comments were clearly a political judgment was not enough to invalidate the charge. One dissenting member of the court, Emilio Pfeffer, argued that Marín's remarks had been made in the heat of a political gathering and that it was up to citizens, not the courts, to make value judgments

about political opinions.<sup>212</sup> After protests and expressions of bewilderment abroad at these events, Minister of Defense Edmundo Pérez Yoma convinced Pinochet to withdraw his accusation adducing “humanitarian reasons.”<sup>213</sup>

On June 6, 1994, Appeals Court Justice María Antonia Morales sentenced Juan Andrés Lagos and Francisco Herreros of *El Siglo* to a 540-day suspended jail term for a cover headlined “Chanfreau case: Supreme Court Upholds Pinochet Terrorism,” with a photograph of demonstrators holding a banner stating “Judges Accomplices in Crimes.” The cover referred to a controversial decision of the third chamber of the court to transfer the case of Alfonso Chanfreau, who “disappeared” in July 1974, to a military court.<sup>214</sup> The journalists argued that they were exercising their legitimate right to criticize a court verdict. The judge ruled that this was not a sufficient defense in an accusation of defamation under the State Security Law:

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<sup>212</sup> “Confirmaron proceso a Gladys Marín, pero ordenaron su libertad provisional,” *La Epoca*, October 31, 1996.

<sup>213</sup> “Pinochet retiró querella contra Gladys Marín,” *La Epoca*, November 1, 1996.

<sup>214</sup> One of the judges responsible for the decision, Hernán Cereceda, was impeached for gross dereliction of duty in 1993 and dismissed from the judiciary for his role in this case as well as other irregularities.

Given the juridical value protected by the law (public security and the “normal activity of the State”)...it is not necessary for there to have been a special purpose of causing dishonor or discredit to the offended party, the generic malicious intent (*dolo*) inherent in the offense itself, that is, awareness of the injurious meaning of the action, [sic] is sufficient.”<sup>215</sup>

After pointing out that the cover and contents of the newspaper “tended to discredit” the Supreme Court judges and the auditor general of the army, Judge Morales argued that the journalists’ right to freedom of expression was limited by other rights of equal constitutional importance. The ruling makes the irrelevance of public order to defamation charges absolutely explicit:

In the case of certain persons who hold dignified rank in that they exercise a public function, as is the case of the judiciary, the law has considered their transgression as an attack on public order, by the very fact of it being committed, even though defamation, insult or slander bring about no disturbance in public tranquility or the social peace.<sup>216</sup>

General Pinochet’s use of the State Security Law as a cattle-prod to keep press and politicians from straying onto forbidden ground was well illustrated by the case of José Antonio Viera Gallo, a member of the Chamber of Deputies for the Socialist Party and a senatorial candidate. After threatening to prosecute Viera Gallo under the State Security Law, Pinochet later withdrew the accusation when Viera Gallo was able to explain away his conduct in making a comment Pinochet found libelous. He made the explanation, he told a newspaper interviewer, to avoid being dragged through the courts in a case he

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<sup>215</sup>Alejandra Matus, “Condenan a periodistas de ‘El Siglo’ por injurias a Suprema,” *La Epoca*, June 7, 1994.

<sup>216</sup>*Ibid.*

felt at risk of losing due to the difficulty of presenting a defense in a State Security Law case.

In a pre-electoral debate in Chilevision's *High Risk* program on September 30, 1997, aggressive questioning about unclarified allegations of corruption in the Frei government prompted a defensive Viera Gallo to retort: "the person who put his hands in the till was General Pinochet, and he is now commander-in-chief of the army and may get to be president of the Senate." Immediately after the program one of the panelists, former Pinochet Justice Minister Mónica Madariaga, alerted the army about Viera Gallo's remark. Army officials, and reportedly the undersecretary of war, called Chilevision to persuade the station to cut the offending segment. Chilevision refused on the grounds that the station could not be held responsible for the opinions of panelists.

The army decision to sue Viera Gallo under Article 6(b) was announced on October 4, after a specially convened meeting of the generals; it had been approved by Pinochet, who was on army business in China at the time. Fearing a snowball of accusations and counter-accusations if the trial went ahead, the government tried to patch up the dispute, and Minister of Defense Edmundo Pérez Yoma persuaded Viera Gallo to make a conciliatory gesture. On October 7, accompanied by Pérez Yoma, the deputy read his explanation to Pinochet's representative, Major-Gen. Rafael Villaroel in the Ministry of Defense.<sup>217</sup> The photograph in the next morning's papers of Viera Gallo inclining to shake the hand of the general, watched approvingly by a beaming Pérez Yoma, was an apt image of the contradictions of the Chilean transition to democracy. Pérez Yoma had previously warned Viera Gallo of the consequences if he allowed the trial to go ahead. As *El Mercurio* reported: "He dined with the deputy on Monday night, and explained to him that in his opinion the situation was delicate because his own legal advisors had reached the conclusion that there were grounds for a libel action, and *since they would apply the Law of State Security, he had every chance of losing*. This was because according to that law, what must be determined is whether or not there was an offense, and not whether the defendant

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<sup>217</sup> Viera Gallo later insisted it was an "explanation" and not an apology.

had the intention to offend or is capable of proving what was said." [Emphasis added.]<sup>218</sup>

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<sup>218</sup> Blanca Arthur, "La imagen de la paz y la guerra, entretelones de un complejo acuerdo," *El Mercurio*, October 12, 1997. (Translation by Human Rights Watch.)

Viera Gallo later took up the theme in a newspaper interview: “With a Law of State Security like we have now in Chile that protects practically all the authorities, freedom is very restricted. If tomorrow a minister or a senator or a member of a high court or a military officer commits robbery, no one can say anything; they immediately apply the Law of State Security. Its not enough for the person to prove the accusation is true, for what is being punished is the imputation of a crime. That is extremely serious.”<sup>219</sup>

#### **The honor of Congress: the Cuadra case**

It would be an error to attribute these constraints on the public debate solely to the interest of Pinochet in curbing criticism of the military government. As we noted in Chapter III, defamation laws run like a counterpoint through the history of Chile and were used by state officials to disarm criticism long before September 11, 1973. Other than the army, the executive institutions have not invoked the law since the restoration of democracy, but at least five prosecutions initiated by the judiciary and Congress since 1990 testify that it is still a brake on political criticism.

In one of these prosecutions, Congress collectively sued a former Pinochet minister for a comment in a magazine interview that was interpreted as a deliberate and calculated attack on the prestige of the parliament. The case is of great interest, and of concern, for several reasons. It was an action promoted by a democratic body against a former high-level official of the military government, the reverse of typical State Security Law prosecutions. It involved an alleged offense against the honor, not of an individual, but of an institution. It revealed a troubling consensus, shared by politicians across most of the political spectrum (with the exception of some Party for Democracy leaders), that an action limiting the right of political criticism was legitimate in defense of the prestige of an institution of state. Finally, this view was upheld by the Supreme Court against an appellate court ruling that defended the right to criticize.

The case involved Francisco Javier Cuadra Lizana, a political analyst and former secretary general of government under Pinochet. During his period of office Cuadra, a Pinochet protégé and hard-liner, acquired a reputation for manipulating news and attacking the opposition press that had made him deeply unpopular with the democratic opposition. In a long interview published in the January 14, 1995 edition of *Qué Pasa*, under the title “Some Members of

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<sup>219</sup> Raquel Correa, “Explicando sus explicaciones,” *El Mercurio*, October 19, 1997. (Translation by Human Rights Watch.)

Parliament Use Drugs,” Cuadra argued that drug consumption in political and government circles was an increasing problem, and he expressed concern that excluding this problem from the political agenda could have dangerous consequences. When asked whether he was referring to drug use by members of the political elite, parliamentarians or public servants, Cuadra replied:

There are reports of it, yes. There are some individuals in the political elite. There are some parliamentarians and other people who hold public office who use drugs. The most serious thing is that they are politicians of potential relevance.

We are in a stage of consolidation of democracy, and I would be very concerned if, among other things, the democratic system could not be consolidated because part of the political class is incapable of assuming its responsibilities in due manner.

When pressed by interviewer Cristián Bofill, Cuadra refused to name any officials, parliamentarians or political parties as particularly prone to drug use. He stressed that “fortunately the problem is one of individuals, and of a few individuals, it has nothing to do with the parliament as an institution, nor with the political parties as such, nor with any other public institution in particular.”

These declarations sparked an immediate reaction from members of Congress across the political spectrum. Cuadra’s refusal to substantiate his allegations by naming individuals was felt to undermine the prestige of Congress itself by putting the integrity of all of its members into question. Many thought that this was Cuadra’s express intention. On January 30, 1995, the then-president of the Senate, Gabriel Valdés, laid charges against Cuadra before the Santiago Appeals Court under Article 6(b) of the State Security Law and several articles of the criminal code, including Article 263, the defamation article. Vicente Sota Barros, then president of the Chamber of Deputies, did the same. The two accusations, plus another from Renovación Nacional, were combined into a single case by the Santiago Appeals Court, which appointed Rafael Huerta Bustos as the investigating judge.<sup>220</sup> On June 14, after a four-month investigation, Judge Huerta indicted Cuadra under the State Security Law and Article 263 of the criminal code for defaming the honor of Congress. Cuadra

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<sup>220</sup>As noted in Chapter III, hearings for the offenses under the State Security Law are rapid procedures that begin with an investigation conducted by an Appeals Court judge.



was arrested on June 19 and taken to the Anexo Capuchinos prison, where he was detained for nineteen days, until July 7, when he was released on bail.<sup>221</sup>

On December 19, Judge Huerta convicted Cuadra and sentenced him to a 540-day suspended prison sentence, disqualification for public office for the duration of the penalty, a fine of \$220, and assumption of court costs. Cuadra appealed, and on January 18, 1996, the Santiago Appeals Court unanimously reversed Judge Huerta's verdict and acquitted the defendant. The court held that Cuadra's expression could not be construed as jeopardizing public order. The litigants lodged a writ of complaint against the appeal judges, which was accepted by the Supreme Court on May 14, 1996.<sup>222</sup> The Supreme Court upheld Cuadra's conviction and reinstated the prison sentence on the State Security Law charge. In accordance with the procedures contemplated under the State Security Law, the sentence admitted no further appeal.

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<sup>221</sup> Cuadra could have obtained bail earlier but preferred to wait until a decision by the Supreme Court on an amparo writ lodged with the purpose of canceling the indictment. The writ was rejected by the court on July 5.

<sup>222</sup> A writ of complaint (*recurso de queja*) can be made to the Supreme Court, exercising its disciplinary powers over the judiciary, to correct a fault or abuse in a lower court judgment. This type of appeal became widely used as a *de facto* last instance appeal, since if the sentencing court is found to be at fault, the Supreme Court may revoke or modify the sentence. In February 1996, a law was passed to restrict the use of this procedure to judgments against which ordinary judicial appeals were unavailable.

The reasoning on which court rulings were based in the Cuadra case reveals a profound disagreement on the interpretation of Cuadra's statement and on the notion of public order that the law is supposed to uphold. The Appeals Court, presided by Judge Carlos Cerda, based its judgment on an idea of public order tied intimately to the exercise of human rights, including the right to criticize. It sought to demonstrate that on this definition Cuadra's allegations had not been harmful but, on the contrary, a constructive use of that right, by criticizing conduct that might bring Congress and hence democratic institutions as a whole into disrepute.<sup>223</sup> The trial judge who convicted Cuadra and the Supreme Court chamber that upheld the sentence, on the other hand, interpreted Cuadra's comments as an affront to the honor of the institutions of state.

Convicting Cuadra, Judge Huerta rejected his defense that he had not intended to offend, using the same argument seen in prior cases, that defamation is an attack on "objective honor," in which it is unnecessary to prove malicious intent. He also dismissed the argument that an offense under Article 6(b) must be directed against specific individuals, rather than at an institution such as Congress. He countered by referring to the fact that Cuadra had revealed some names in the course of subsequent court interviews. While this was true, the names were not known at the time of the accusation, when Cuadra had expressly declined to reveal them, claiming them to be irrelevant to the point he wanted to make.

The Santiago Appeals Court decision overturning this verdict focused on the relationship between the two values at stake: public order and freedom of expression. Breaking down the meaning of public order into three components — the rules governing the functioning of state institutions, public tranquility, and the basic values underlying social life — the court found that Cuadra's words were inoffensive. They had not challenged the rules of the state, disturbed the public peace or undermined basic values. On the contrary, stressing the context and significance of Cuadra's words, the Santiago Appeals Court held them to show

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<sup>223</sup>Carlos Cerda, a distinguished judge and academic, was one of a handful of judges who stood up against the military government. His insistence on pursuing investigations into "disappearances" despite physical danger won him bad grades in the Supreme Court's annual rating of judges. However, it earned him the respect of his colleagues and the admiration of the international human rights movement.

an intent to reveal certain facts in a timely fashion so as to produce a sense of alert regarding a possible threat to the most sacred element of social organization: the parliament as an institution, public institutions in general, the political parties as such, the consolidation of democracy, and the independence of authority in the adoption of its decisions, all of which are consistent with the most essential contents of the axiological definition of public order.

Since public order, the Santiago Appeals Court ruled, was conceived in the preamble to the State Security Law in terms of the human rights preserved and protected under a democratic system of government, it could not be invoked to restrain the right to express criticism except in the most extraordinary circumstances. This was a truly exceptional decision, which faithfully interpreted the fundamental importance that international human rights law gives to freedom of expression. In an unusually forthright aside, the court expressed the hope that

...a decision of this type will have an instructive effect so that, discarding obvious criminality, people will have the courage to speak up about the faults of the public system, however uncomfortable or painful it may be, with the purpose of mitigating those ills for the common good.

The Supreme Court rejected these arguments, scarcely entering into debate on the issues presented in the lower court. It concluded that Cuadra's statements were

disparaging to all of the parliamentarians in office, because without naming any in particular, *they sow doubt about who are the people who may be enslaved by drugs, diminishing consequently their loyalty to the law and national interests.* That is, the moral suitability and integrity as patriots which must be demanded of them to fulfill their lofty responsibilities is thus compromised in the eyes of public opinion.<sup>224</sup>  
[Emphasis added.]

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<sup>224</sup> "Condena de 540 días de cárcel para Cuadra," *La Epoca*, May 15, 1996.

By upholding the disciplinary complaint against the Appeals Court, the Supreme Court judges held that their colleagues had incurred in a “fault and abuse” by giving the infractions committed by Cuadra “a different gloss from that which flows clearly and naturally from the legal text.” Their fault was to advocate an interpretation of the law that the Supreme Court ruled to be a maverick one, even though it was consistent with the international human rights obligations of Chile.<sup>225</sup> This ruling dashed hopes that the pernicious effects of Article 6(b) could be remedied by judicial interpretation alone.<sup>226</sup> The continuing existence of this law is likely to dissuade and deter any outspoken criticism of state authorities even when democratic institutions appear to be functioning normally. It is very troubling that it was precisely elected democratic leaders who initiated this prosecution and that their view that Cuadra’s acquittal was arbitrary found support in the highest court of the land.

In 1996 Human Rights Watch and the Center for International Law and Justice (CEJIL) presented the Cuadra case to the Inter-American Commission on Human Rights.

#### **The price of irreverence: the Cosas case**

Recent prosecutions under Article 6(b) of the Law of State Security, launched in January 1998 by former Supreme Court Chief Justice Servando Jordán López against four journalists, seemed to be motivated by little more than resentment against press comment, some of it highly irreverent. They reveal another objectionable element of this law, the dangers of its abuse by officials who invoke their authority to protect themselves against a public slight.

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<sup>225</sup> Ibid.

<sup>226</sup> In this legal summary of the Cuadra case, we draw on the analysis in Medina, “Libertad de Expresión...” pp. 193-202.

Jordán's relations with the press had soured during 1997 following allegations of judicial corruption in drug-trafficking cases and the presentation of two impeachment motions against him in Congress, which had received prolonged press coverage. In a motion presented by UDI, Chief Justice Jordán had been linked to an alleged drugs protection racket involving judges and court officials, while the Socialist Party and PPD accused him of allowing the release from prison under controversial circumstances of a Colombian drug kingpin, Luis Correa Ramírez, who promptly fled the country. Although the Chamber of Deputies voted against his impeachment in July 1997, Chief Justice Jordán's period of office was reduced from three years to two as a result of a law restructuring the Supreme Court passed in December that year, and he retired from the judiciary in early January 1998. The chief justice was bitter at his premature retirement, considering that he had been "expropriated" of one year of his tenure.<sup>227</sup>

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<sup>227</sup> Letter from Servando Jordán to Raimundo Díaz Gamboa, the judge investigating charges under Article 6(b) against Rafael Gumucio and Paula Coddou, cited in "Jordán se desistió," *El Mercurio*, January 29, 1998.

On January 9, 1998, he filed a writ under Article 6(b) against journalists Rafael Gumucio of Rock and Pop television and Paula Coddou of the magazine *Cosas*. The offending words were a reply by Gumucio to a joke questionnaire published by *Cosas* in its January 2 issue, as part of a humoristic round-up of 1997, titled "Laughing at 1997: A Fantastic Year." In answer to the question "Why was minister Servando Jordán not appointed to be a senator?" Gumucio had written, "He was old, ugly, and had a murky past, not like the others on the Supreme Court." On January 21, acting with unusual speed, Raimundo Díaz Gamboa, the judge appointed by the Santiago Appeals Court to investigate the allegation, indicted Gumucio and Coddou under Article 6(b) and detained them both. It proved impossible to assemble a quorum of the Santiago Appeals Court bench to approve bail, so Gumucio and Coddou were detained overnight in prison.<sup>228</sup> They were released at noon on the following day on payment of bond of approximately \$220.

The court ordered the immediate confiscation of all copies of the edition, both those on sale and in stock, as well as faxes of the questionnaire sent to six celebrities and of the respondents' replies. Police arrived at the *Cosas* office to impound the material but were unable to do so since the edition had sold out and the faxes had been destroyed.<sup>229</sup> Restraint of the publication does not seem to have been legal. Article 41 of Law on Abuses of Publicity says that only four copies may be impounded by the court, unless the offense affects external security, public morality or encourages the commission of a serious crime such as homicide, robbery or arson.<sup>230</sup> The demand for the faxes and questionnaire replies was a breach of the confidentiality of the journalists' sources.

Pleas on behalf of the journalists by dignitaries apparently convinced Jordán to drop the proceedings against Gumucio and Coddou, and the case was closed on February 6. The former chief justice's ability to stop the prosecution at will exemplifies the power of the litigating party under Article 6(b) to terminate the proceedings unilaterally. As noted in Chapter III, powers of a

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<sup>228</sup> Mónica Retamal Fuentes, "Periodistas al Banquillo de los Acusados," *El Mercurio*, January 10, 1998.

<sup>229</sup> Jazmín Jalilie Madrid, "Falló intento de requisar revista *Cosas*," *La Tercera*, January 23, 1998.

<sup>230</sup> Ley No. 16.643 Sobre Abusos de Publicidad, Article 41.

litigant to terminate a penal action under Chilean law are generally limited to cases in which no public interest is involved, such as ordinary libel proceedings. By contravening this principle, the discretion granted to the litigating authority in State Security Law prosecutions creates a dangerous fusion of public power and private interest. It can be assumed that a threat of prosecution for breach of state security, even if not carried out, would be enough to deter irreverent comment, giving ministers and officials a highly convenient shield from public scrutiny.

Together with the action against Gumucio and Coddou under Article 6 (b), former Chief Justice Jordán also sued *La Tercera* reporter José Ale, author of a brief article on the troubled career of the former president of the Supreme Court that appeared in the newspaper on the day of Jordán's resignation (January 7), as well as *La Tercera's* director, Fernando Paulsen. The objected texts in Paulsen's case included the Ale article and two letters to the editor concerning the former Chief Justice, as well as an interview with Rafael Gumucio in which he commented on the lawsuit against him. Paulsen and Ale were questioned by judge María Antonia Morales, but immediately released while the investigation continued.

In this case, the former Chief Justice persisted implacably with the litigation. On January 29 Judge Morales had closed the investigation after finding that Ale and Paulsen had not committed an offense. Jordán's counsel appealed, but Judge Cornelio Villaroel, temporarily replacing Morales, upheld her decision. After a further appeal, on March 10, 1998 the second chamber of the Santiago Appeals Court unanimously confirmed the decision not to press charges.<sup>231</sup>

The matter did not, however, rest there. In a September hearing to decide the final closure of the case, the Fifth Chamber of the Santiago Appeals Court suddenly reversed the Second Chamber's earlier ruling and ordered Paulsen and Ale to stand trial. The hearing, held on September 16 before a

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<sup>231</sup> Ana María Sanhueza, "Corte confirmó resolución de no procesar a director de La Hora," *La Hora*, March 10, 1998. (Paulsen is also director of Copesa's evening paper, *La Hora*.)

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different panel of the Appeals Court from that responsible for the investigation, was announced at the last minute, and according to Paulsen, his lawyer had no time to plead.<sup>232</sup> Paulsen and Ale were detained on September 16 and taken to Capuchinos prison where they both were held for more than twenty-four hours before a court could be assembled to consider bail.

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<sup>232</sup>Jazmín Jalilie, "Detenidos director y periodista de *La Tercera*," *La Tercera*, September 17, 1998.



True to form since the early 1980s when this kind of scene became habitual, journalists and members of the public reportedly gave Paulsen and Ale a round of applause as they were taken by police from *La Tercera's* offices and shepherded into the courthouse to be notified of the charges. The judges hearing the bail application barred the press from the proceedings. What was described by the mayor of Santiago as “a legal maneuver typical of personalities from the past” proved to be very much in use after eight years of supposedly democratic government. Apart from the mayor, personalities who visited Paulsen and Ale in Capuchinos or telephoned to express support included Deputy Minister of Justice José Antonio Gómez (in his personal capacity), Secretary General of Government Jorge Arrate, Foreign Minister José Miguel Insulza, and Senate President Andrés Zaldívar. Only the former president of the Chamber of Deputies, José Antonio Viera Gallo, himself victim of a close encounter with Article 6(b), was reported to have expressed any criticism of the law, however.<sup>233</sup>

#### **A Question of Honor: Prior Censorship By the Judiciary**

The coexistence in the constitution of the right to privacy and honor and the right to free expression inevitably leads to clashes between these two rights. International human rights norms recognize this potential conflict and deal with it by asserting that the right to free expression is subject to eventual liability and penalty for offenses caused to the honor of third parties. In the cases discussed below, however, the courts considered that protection of private honor was sufficient justification to *prohibit* the publication of information, opinions or imagery that individuals considered offensive to their honor or that of their families.

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<sup>233</sup> Jazmín Jalilie and Eduardo Rossel, “Libres director y periodista de *La Tercera*,” *La Tercera*, September 18, 1998.

One vehicle by which individuals may seek a judicial injunction against a publisher is a protection writ (*recurso de protección*), a mechanism available to anyone to protect his or her constitutional rights.<sup>234</sup> In recent years Chilean jurisprudence has given *explicit* precedence to the right of privacy and public esteem over the right to freedom of expression and information. In accepting arguments for imposing these injunctions, the courts have failed to take into consideration the very restricted grounds allowed in international law for prior restraint. Such judicial decisions amount to prior censorship, explicitly prohibited under Article 19(12) of the Constitution. There has also been a limited jurisprudence championing freedom of expression and expressing a viewpoint more consistent with modern concepts of democracy. These valuable decisions are highlighted in the comments on the cases that follow.

#### **The banning of *Diplomatic Impunity***

In justifying its decision to ban the circulation in Chile of Francisco Martorell's book *Diplomatic Impunity*, the Supreme Court ruled that censorship could only be practiced by tyrannies or dictatorships. It formed part of a "policy of a non-democratic state, practiced by administrative agents who operate as vigilantes of religious, political or moral ideas — not conduct — that are considered dangerous, preventing them from reaching the public because they are considered contrary to the interests of the rulers, or for the control that they

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<sup>234</sup> Judicial protection against violation of a constitutional right is provided in Article 20 of the Constitution. This states that anyone who "as a result of arbitrary or illegal acts or omissions suffers, privation, obstruction or threat to the legitimate exercise of the rights and guarantees established in Article 19... may apply on his or her own account, or through anyone acting on his or her behalf to the respective Appeals Court, which shall immediately take the measures it considers necessary to re-establish the rule of law and assure due protection to the affected party, without prejudice to the other rights that he or she may assert before the authorities or the appropriate courts."

exert over society.” By this view, the justices ruled that censorship did not exist in a democratic society.

They held that the ban was justified in order to prevent a violation of the right to honor, which, they ruled, takes precedence over freedom of expression when the two rights clash. Neither of these arguments can be reconciled with Chile’s international human rights obligations. Under international human rights law, honor is protected from abuse of freedom of expression by the subsequent imposition of liability (prior restraint being impermissible). Article 29 of the American Convention states that governments may not use the defense of one right as a justification for suppressing another or restricting it beyond the limits the convention allows. The International Covenant expresses a similar principle.

*Diplomatic Impunity* was an investigation into the circumstances leading to the dismissal and sudden departure from Chile of Argentine Ambassador Oscar Spinoza Melo in 1991. It described allegations that Spinoza had attempted to blackmail leading Chilean politicians and businessmen by revealing details of parties held at the embassy, and it included copies of the blackmail letters. Spinoza’s alleged extortion attempts had been denounced to the Ministry of Foreign Affairs by Julio Dittborn, the vice-president of UDI, one of the two conservative opposition parties.<sup>235</sup> The publisher, Planeta, which had previously released the book in Argentina, planned to launch it in Chile on April 22, 1993. At the last moment the Santiago Appeals Court ordered the publishers to suspend the release, having received a writ by Andrónico Luksic Craig, one of Chile’s wealthiest businessmen. On May 31, the court voted by a two-to-one majority to grant Luksic’s writ, and prohibited *Diplomatic Impunity* from being imported into Chile and distributed in the country. Orders were transmitted to customs authorities in Chile’s ports and airports to seize any copies found in travelers’ luggage.<sup>236</sup> In June the Appeals Court verdict was upheld unanimously by the Supreme Court.

Any comment on the book or the judicial proceedings was suppressed under a reporting ban dated April 23, 1993. Two days later, the court withdrew the reporting ban but prohibited any citation of the book by the press. Martorell

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<sup>235</sup> Human Rights Watch takes no position on the information or points of view expressed in *Impunidad Diplomática*, which remains unavailable to the public.

<sup>236</sup> “La surcursal de Planeta en Chile no comercializa libro en el país,” *La Epoca*, April 24, 1993.

alleged that he was being intimidated by strangers and himself petitioned a court for protection of his physical integrity. In September he left the country, on the same day that the Santiago Appeals Court ordered him arrested to face charges for libel, and went to live in Buenos Aires. Eight of the personalities named in the book, including Dittborn, successfully sued Martorell for libel, and he was eventually given a 541-day suspended sentence. Martorell returned to Chile, but his book has never been allowed to enter the country.

Regarding the conflict between the right to honor and freedom of expression, the Santiago Appeals Court argued that the rights protected in the constitution were listed in descending order of priority and freedom of expression was listed near the bottom, below the right to honor.<sup>237</sup> Upholding this ruling, the Supreme Court held the ban under the protection procedure to be sound, since the purpose of the remedy was to *prevent* a violation of constitutional rights that would be impossible to fully redress once it had occurred:

the mere initiation of a violation [of the right to privacy and honor] causes harm that is impossible to repair in terms equivalent to the value of respect [for these rights] to the person who possesses them and wishes to preserve them in their integrity and inviolable.

The court also agreed with the Appeals Court that the protection of honor and private life were

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<sup>237</sup> By this logic, respect for reputation takes precedence over the right to inviolability of the home and private correspondence (paragraph 5), freedom of conscience and religion, (paragraph 6) and personal liberty (paragraph 7).

values of such hierarchy and transcendence that political society is organized precisely to preserve and defend them, so that no conception of the common good is admissible that allows them to be sacrificed or to convert such sacrifice into a means for the prevalence of another constitutional guarantee.<sup>238</sup>

In May 1996, the Inter-American Commission on Human Rights found Chile to be in breach of the freedom of expression provisions of the American Convention of Human Rights by prohibiting the import, distribution and circulation of *Diplomatic Impunity* in Chile. The commission called on Chile to lift the ban and to allow Martorell to return to promote his book in Chile. Martorell has since returned to Chile, where he is now working as a writer and television journalist. The ban is still in force.

Defending the ban to the Inter-American Commission on Human Rights, the Chilean government argued that there was a direct clash between Martorell's right to freedom of expression and the right of the people referred to in his book to protect their honor. Under Article 25 and Article 11(3) of the American Convention, the government sustained, individuals have a right to legal protection from attacks on their honor and dignity; the preventive use of the protection writ was thus legitimate, the government insisted, if honor and dignity were in imminent danger of being violated.

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<sup>238</sup> Article 19 of the constitution contains a final paragraph (no. 26) to the effect that the regulation of constitutional guarantees by other laws must not "affect rights in their essence, nor impose conditions, financial levies or requirements that prevent their free enjoyment."

In rejecting the Chilean government's defense, the commission pointed out that the values at stake included not only the right to express ideas but the "right of the community in general" to receive them.<sup>239</sup> It also referred to the "absolute" prohibition of prior censorship in Article 13 of the American Convention; the only circumstances in which prior censorship is permitted in the American Convention is in the case of "public spectacles" that could be harmful to minors. While prohibiting prior restraint, the convention recognizes limits to the right of freedom of expression by establishing the liability of the authors and publishers should they violate the rights of third parties.

In a joint submission to the Inter-American Commission of Human Rights in representation of Martorell, Human Rights Watch and CEJIL stressed:

The drafters of the Convention, well aware of the debate emphasized by the Chilean government, drew a clear and precise line in accommodating the rights of free expression and of honor. Specifically, in Article 13(2), the Convention makes a critical distinction between "prior restraint" and "subsequent imposition of liability." In the view of the Convention's drafters—coinciding with that of a great many respected legal scholars—the imperatives of the right to free expression absolutely preclude recourse to prior censorship as a means of protecting the right to honor. Instead of prior censorship, therefore, the Convention permits "subsequent imposition of liability" as an acceptable and adequate means for curbing any abuses of the right of free expression that might impinge upon the right to honor.

The commission confirmed this doctrine:

Article 13 determines that any restriction imposed on the rights and guarantees contained in it must be effected by the subsequent imposition of responsibility. The abusive exercise

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<sup>239</sup> The commission cited a consultative opinion on the Inter-American Court of Human Rights on this point. See Inter-American Court of Human Rights, Consultative Opinion OC-5/85 of November 13, 1985.

of freedom of expression cannot be subject to any other type of restraint.<sup>240</sup>

The commission also rejected the government position that some rights protected by the convention take natural preference over others. It cited Article 29 of the convention, which expressly prohibits governments from using any of the provisions of the convention to justify suppressing a right or restraining its exercise beyond the limitations contemplated in the Convention. The point has been expanded in a comment on the case by a Chilean expert on international human rights law:

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<sup>240</sup>Comisión Interamericana de Derechos Humanos, *Informe Anual de la Comisión Interamericana de Derechos Humanos, 1996* (OEA/Ser.L/V/II.95), p. 251, para. 58.

International doctrine and jurisprudence are in absolute agreement that human rights are interdependent and non-hierarchical, so that in international law conflicts between rights are resolved on a case-by-case basis, and it must be the circumstances of each case that decide which right prevails, there being no hierarchy of rights established a priori and in the abstract.... Since international law establishes the limits within which each right may be regulated — and consequently limited— the judge must examine, before resolving the apparent conflict between human rights, if the form of restriction used is permitted in the case of this right and if it complies with the requirements of international law. If these requirements are not met, it is unnecessary to enter into the question of which right should prevail. The judge must declare that the restriction exceeded the permitted limits and consequently rule that it was unjustified.<sup>241</sup>

The doctrine established by the Inter-American Court of Human Rights is that the right to free expression without prior censorship “has a special scope and character” and is “a cornerstone upon which the very idea of a democratic society rests.”<sup>242</sup>

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<sup>241</sup> Cecilia Medina, “Libertad de Expresión...,” p.175.

<sup>242</sup> Inter-American Court of Human Rights, Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 19 of the American Convention of Human Rights, Advisory Opinion OC-5/85 of November 1985, separate opinion of Judge Puza Escalante, Series No. 5.



The *Diplomatic Impunity* jurisprudence in Chile contributed to weakening guarantees of freedom of expression. It established that the courts would look favorably on requests for the prohibition of a publication from anyone who felt he or she had been defamed or insulted.<sup>243</sup> Furthermore, a court injunction against the circulation of a book or magazine article in Chile provides no immunity against prosecution of the author or publisher for libel. If the purpose of the injunction obtained by the plaintiffs was to prevent damage to their honor and reputation it seems evident that this purpose was served by the injunction itself, and no further criminal action against the author should have been possible.

The “honor beats free expression” logic of the Martorell decision can be seen in subsequent court rulings. The most recent was in July 1998, when the Fifth Chamber of the Santiago Appeals Court granted an injunction against the magazine *Caras*. The court acceded to a protection writ lodged by relatives of a man who committed suicide following the death of his daughter in a plane crash in Peru in February 1996. *Caras* was investigating press reports, based on information attributed to the family’s counsel, that the man had killed himself in a severe depression after an adverse court decision on a compensation claim. Questioned by a reporter, members of his family declined to comment on the case. They also applied for a protection writ on the grounds that *Caras* had threatened to publish the story without their permission. On July 2 the court granted the writ and ordered the magazine not to publish it or any other information directly or indirectly related to the case. Furthermore, it ordered

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<sup>243</sup>Article 20 of the constitution gives those whose constitutional rights are violated the right to make a formal denunciation to the Court of Appeals, “which shall adopt *immediately* the measures it deems necessary to re-establish the rule of law and ensure the due protection of the affected party, without prejudice to the other rights that he or she may assert before the authorities or the competent courts.” [Emphasis added.]

*Caras* to hand over its files. *Caras* suspended the publication but appealed to the Supreme Court. In a public statement, *Caras* Director Paula Escobar stated convincingly that the court decision “can only be based on the false assumption that public events which involve pain and tragedy for a family cannot be discussed in the press.” Not only did the court ban the article from being published; it also prohibited any discussion of the subject in the magazine or in any other publication in any form whatsoever.<sup>244</sup>

**An exception: the case of the poisoned cakes**

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<sup>244</sup> “*Caras*: prohibido informar,” *El Mercurio*, August 2, 1998; “Revista *Caras*: prohibición de informar es un atentado a la libertad de prensa,” *La Tercera*, August 15, 1998.

The Supreme Court has not consistently confirmed Appeals Court rulings granting protection writs against journalists, suggesting divisions of opinion on the issue of privacy and honor among its judges. A court order suspending the transmission of a television documentary in 1996 on grounds similar to those advanced in the Martorell case was unanimously reversed by the Supreme Court, which upheld the arguments advanced by a dissenting judge. Six months after the lifting of the ban on this program, the Supreme Court upheld a ban on the transmission on television of Martin Scorsese's film *The Last Temptation of Christ*.<sup>245</sup>

The program in question was an episode in TVN's *Mea Culpa* series, dealing with the true story of a student who sent his fiancée poisoned cakes in an attempt to cause her an abortion. *Mea Culpa*, one of TVN's highest-rated programs, dramatizes sensational criminal cases using actors resembling the real-life characters, who are also often interviewed in person. The program narrated the story of an architectural student sentenced to thirteen years' imprisonment for sending his fiancée cakes laced with arsenic, causing permanent injury to two members of her family. Even though the student had been convicted of the crime, his sister successfully lodged a protection writ prohibiting TVN from showing the program. Interviewed in the press, the attorney representing the family argued that the writ was obtained "to protect, over and above freedom of information, a greater right, which is the right of persons to their honor." In granting the writ, the Appeals Court ruled that transmission of the program would be an "arbitrary and illegal act" affecting the rights of the student and his family, which bore no responsibility for the crime.<sup>246</sup> The dissenting judge, Milton Juica, made the following compelling argument:

To prevent the development of a television program on the hypothetical basis that its transmission may affect the honor or dignity of a person, in respect of true events, would constitute a form of prior censorship not permitted in the law. Consequently it would affect another constitutional guarantee, the right of opinion and information contemplated in Article 19 (12) of the Constitution. This does not prejudice the right

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<sup>245</sup> The case is discussed in Chapter V.

<sup>246</sup> "El desconocido' reemplazó caso de los pasteles envenenados en TVN," *La Epoca*, October 23, 1996.

of the parties to exercise the actions that are appropriate if the transmission effectively includes passages or circumstances that may damage the dignity or honor of any person.<sup>247</sup>

Juica's opinion was upheld in December 1996 on appeal by the Supreme Court in a unanimous vote, allowing the program finally to be shown.

#### **Censorship as a precautionary measure**

Chilean law allows litigants another line of defense to prohibit the publication of information they consider libelous, even when it is already in the public domain. Precautionary measures which the courts may adopt at the outset of any criminal investigation may include the confiscation of publications named in a libel suit. Under Article 7 of the Code of Criminal Procedure, a judge investigating a crime is required to "give protection to the prejudiced parties, deposit the evidence of the crime that may disappear, and gather and place in custody whatever may lead to the crime being proven and to the identification of the felons...." Article 114 empowers the judge to secure "the instruments, arms and objects of any sort that appear to have been used or intended to be used to commit the crime...." In a freedom of expression "crime," books, magazines or newspapers are regarded by judges as instruments of the crime or possible crime and may therefore be requisitioned.

Judges may issue injunctions ordering the seizure of copies of a publication at the petition of the plaintiff when he or she opens a suit for libel or slander. Such powers may include the preventive restraint of the publication until such time as the judge rules to lift the measures. Although clearly intended to ensure that a criminal investigation begins by securing protection for the victim of a felony, application of this provision becomes problematic in a criminal libel case, since it carries with it the denial of a constitutional right. In the case of journalist María Irene Soto, analyzed below, a restraint order led to the prohibition for more than four years of a publication that was subsequently found by the judge not to be libelous.

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<sup>247</sup> Oscar Pinto, "Levantán prohibición a 'Mea Culpa,'" *La Epoca*, December 11, 1996.

*The Secrets of Fra Fra (Los Secretos de Fra Fra)*, a book by María Irene Soto, an investigative reporter then working for *Hoy*, was published in Chile on December 27, 1991. It is an investigative report of allegedly controversial land acquisitions and business deals reportedly involving Francisco Javier Errázuriz (popularly nicknamed “Fra Fra”), a prominent entrepreneur, presidential candidate in the 1989 elections for the Center-Center Union Party (Unión de Centro Centro, UCC) and now a senator. The book was published by a small independent press, Mosquito Editores, in a cheap edition and distributed at newspaper kiosks throughout the country. On January 3, 1992, Errázuriz sued Soto for criminal libel and slander. The judge of the First Criminal Court of Santiago, exercising discretionary powers, ordered that the book be impounded immediately. *The Secrets of Fra Fra*, which had sold briskly for a week, disappeared from the kiosks within twenty-four hours. On January 6 the judge applied an injunction against press reporting on the case (*prohibición de informar*). She also banned “the written or oral divulcation of information” concerning the book.<sup>248</sup>

*The Secrets of Fra Fra* utilizes sources almost entirely derived from court documents from lawsuits in which Errázuriz appears either as defendant or litigator, most of them unknown to the general public. The book avoids hearsay or rumor. Its contents have public importance since it deals not with the private life but with the business dealings of a political leader and former presidential candidate.

The libel case against Soto languished in the courts until September 23, 1996, when it was finally dismissed by the Supreme Court. During this period of four years and nine months, Soto was never formally charged with any offense. The judge investigating Errázuriz’s allegations in fact refused several petitions from the plaintiff to indict her, being unable to establish that any offense had been committed. When the plaintiff appealed the judge’s ruling to the Santiago Appeals Court, it upheld the judge and returned the file to the court for further investigation. Despite having no evidence that Soto had transgressed the law, the judge refused to reconsider the injunction preventing circulation of the book.

Furthermore, the reporting ban imposed by the judge silenced any public discussion of the book or its contents for the full duration of the judicial investigation. The book has not reappeared since in Chile.

The discretionary power of judges to remove books from circulation pending their investigation for injurious content is intended to be a temporary

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<sup>248</sup> “Juez prohíbe informar sobre libro, *La Epoca*, January 7, 1992.

measure to protect the litigant's honor or reputation while the judge investigates to determine whether an offense has been committed. Current laws do not, however, specify under what circumstances such an injunction is permissible; the judge does not have to justify his decision or observe any time limit. The Soto case indicates that a powerful litigant may hold in check embarrassing disclosures and prevent them from reaching the public by merely presenting a libel writ. Although Errázuriz lost his case, Soto was deeply affected by it. She was subjected to an inquisitorial investigation for nearly five years, suffered considerable financial loss (she eventually recovered only a fraction of the books impounded).

#### **National Security in the Palamara case**

Across the world, national security is one of the grounds most frequently cited in justification of censorship. Because of the secrecy that surrounds questions of national security, its invocation as a reason for censorship requires courts to be alert to ensure that a genuine risk is involved, and that any restriction on freedom of expression is tailored and proportionate to the risk. A principle increasingly accepted by international law scholars and U.N. experts is that national security may be invoked only "to protect the existence of the nation or its territorial integrity or political independence against force or the threat of force."<sup>249</sup>

One of the most controversial areas in which national security has been invoked concerns the publication of classified documents or privileged information by former military officers, civil servants and journalists. There is a growing weight of opinion in European jurisprudence that the fact of information being classified does not constitute sufficient grounds *per se* for prosecuting civil

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<sup>249</sup> The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, U.N. Doc. E/CN.4/1985/4, para. 29. See also the 1995 report of Abid Hussein, U.N. Rapporteur on Freedom of Expression, which states: "For the purpose of protecting national security, the right to freedom of expression and information can be restricted only in the most serious cases of a direct political or military threat to the entire nation." report of the Special Rapporteur on Promotion and Protection of the Right to Freedom of Opinion and Expression, Mr Abid Hasten, U.N. Doc. E/CN.4/1995/32 (1994).

servants who divulge it publicly, and that it is necessary to weigh the potential good to the public of the disclosure against the possible harm it could cause.<sup>250</sup>

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<sup>250</sup> An example is Section 97B of Germany's Criminal Code, which provides that publication of a genuine secret by one who erroneously believed that the information was not entitled to be kept secret, is not a crime if the person intended to stop an activity that he or she believed to be illegal. This progressive thinking is reflected in the Johannesburg Principles on National Security, Freedom of Expression and Access to Information. Article 16 of the Johannesburg Principles, referring to "Information Obtained through Public Service" declares that "no person may be subjected to any detriment on national security grounds for disclosing information that he or she learned by virtue of governmental service if the public interest in knowing the information outweighs the harm from disclosure." ("The Johannesburg Principles on National Security, Freedom of Expression and Access to Information," *Human Rights Quarterly*, Vol. 20, No.1, February 1998).

The principles were adopted on October 1, 1995 by a group of experts in international law, national security and human rights convened by Article 19, the International Center against Censorship, in collaboration with the Center for Applied Legal Studies of the University of the Witwatersrand in Johannesburg. The principles are based on international and regional law and standards relating to the protection of human rights, evolving state practice (as reflected, *inter alia*, in judgments of national courts), and the general principles of law recognized by the community of nations. See Sandra Coliver,





This principle implicitly challenges the right of government agencies to invoke national security grounds as a basis for imposing blanket bans on their employees revealing privileged information. Such bans can allow the suppression of innocuous or critical information of public interest, as well as information whose diffusion could cause a genuine security risk. The following case is illustrative.

In early 1993 Humberto Palamara Iribarne, a former naval captain working at the time as a civilian under contract to the navy, was completing a book on military intelligence titled *Ethics and Intelligence Services (Ética y Servicios de Inteligencia)*. Palamara was planning to publish the book with the Ateli press, a small company in the southern city of Punta Arenas, where he was living. The main thesis of the book was that military intelligence must be conducted within a framework of respect for human rights.

Navy regulations forbid persons in its service to publish articles in the press that “involve a criticism of the services of the navy, public institutions or the government” as well as “articles that refer to matters of a secret, reserved or confidential nature, political or religious issues or others that may give rise to a polemic or controversy that could compromise the prestige of the institution.”<sup>251</sup> Publications in the press are only permitted with the knowledge and prior permission of the commander or competent naval authority. Palamara applied for permission and was refused on the grounds that the publication would compromise national security. For failing to hand over the book, he was prosecuted for “failure to carry out military duties” and “disobedience,” both offenses under the Code of Military Justice.

On the same day naval court officials visited the Ateli offices and confiscated all the copies of the book, including the originals, and a diskette. They later went to Palamara’s home, where they seized all the copies in his possession and wiped the text from the hard drive of his computer.

The Valparaíso navy appellate court (Naval Corte Marcial de Valparaíso) sentenced Palamara to sixty-one days of imprisonment, a fine of eleven months salary and suspension from his duties for a remark he had made criticizing a naval judge. In June 1996 he was sentenced to 662 days imprisonment on the other two charges. The sentence was later reduced by the Supreme Court to 102 days.

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<sup>251</sup> Article 89 of the *Ordenanza de la Armada* (Navy Regulations).

During the trial Palamara was under naval orders not to comment publicly on his case or make “critical comments, in public or in private, written or orally, which disparage or damage the image of the institution, the naval authority or those instructing the lawsuit and administrative investigation against him.”

According to naval experts who testified in his trial, Palamara’s book did not jeopardize national security. Rather than release the book immediately, however, the court extended its inquiries into other aspects of its contents that might be “relevant from the institutional point of view of the navy,” “obtainable only through privileged sources” or that could “affect institutional interests.” Another group of experts was called in, who concluded that the book did not contain information obtained from privileged sources but that it *was* relevant to the navy and did affect its institutional interests.

In January 1996, Human Rights Watch and the Center for Justice and International Law (CEJIL) have presented the Palamara case to the Inter-American Commission on Human Rights, on grounds that Chile has violated Articles 8 and 13 of the American Convention on Human Rights in the actions it took against Palamara. The case is still under review by the commission.

### **Autonomy and Political Influence in the State-Owned Media**

As noted in the introduction to this chapter, a free-ranging public debate depends not only on freedom from censorship and from illegitimate legal controls and restraints but also on a government policy of encouraging the right to criticize and creating the conditions in which it can be vigorously exercised. Governments that have direct access to influential media, either by ownership or control, have a responsibility to ensure that the intervention of government officials in editorial policy or process is reduced to a minimum and that these media are allowed to function autonomously without government pressure. In this section we look at the policy followed by the Aylwin and Frei governments toward the two state-owned media companies, *La Nación* and TVN. To what extent has the autonomy and pluralism of these media been respected in practice?

On assuming office President Aylwin was apparently convinced that these media should be allowed to operate autonomously and compete in the market as if they were independent private concerns. The new policy was strongly advocated by Enrique Correa, whom Aylwin appointed to the cabinet post of secretary general of government.<sup>252</sup> His posting was a key one, since the

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<sup>252</sup> The Secretary General of Government (Ministro Secretario General de Gobierno)

job entailed the tricky task of balancing the principle of free expression with the government's objective of preserving a political climate favorable to the stabilization of civil-military relations. The ideal was that intervention in the press could be avoided altogether if directors and editors themselves exercised self-restraint. Aylwin himself advocated this repeatedly to newspaper owners and journalists. In a speech to the National Press Association on August 24, 1990, he asked owners and editors "to exert extreme caution so that in doing their job of informing, they are vehicles of unity and not of dissension, of truth and not of error."<sup>253</sup> Three years later, in a speech to the Chilean Journalists Association on July 2, 1993, Aylwin said, referring to information that could disturb the public peace, "I think that society has a right to ask of you a self-regulation which for higher reasons you must establish as a norm."<sup>254</sup>

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combines the functions of a press secretary with overall responsibility for the government's policy toward the mass media.

<sup>253</sup> Cited in Sunkel, "La Prensa...", p. 26.

<sup>254</sup> "Presidente enviará Ley de Prensa en la semana, *La Epoca*, July 3, 1993.

During the first two years of the Aylwin government *La Nación* and other pro-government publications showed every sign of independence, with extended coverage of the human rights debate and exposures of corruption scandals under the military government. This was a continuation of the crusading style developed in earlier years, although it now implied more sensitive dilemmas: how to criticize the former military government without creating problems for a democratic government still vulnerable to military insubordination and under constant vigilance by the pro-military opposition. Inevitably, media directors allowed the imperative of preserving the consensual climate to affect editorial decisions, although to an extent that is difficult to assess.<sup>255</sup> The harmonization of editorial policy and governmental objectives was aided by the close contacts forged in opposition under military rule between politicians, media directors and journalists.<sup>256</sup> A tendency to self-restraint

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<sup>255</sup> One expert on the Chilean media described the situation in these terms:

Once the process of mobilization for the elections had been concluded, the press proved to be functional — and subordinate — to the scheme of the transition, with dysfunctional behavior limited to certain themes and moments.... It was not a question of any “formal” commitment established after a process of negotiation. Rather it was a tacit agreement by which the actors kept within fixed limits, whose transgression generated a danger signal with regard to the stability of the system.

Guillermo Sunkel, “La Prensa en la Transición Chilena,” Facultad Latinoamericana de Ciencias Sociales (FLACSO), Serie Educación y Cultura, No. 26, 1992.

<sup>256</sup> These links were present in the origins of the alternative news media, which were essentially expressions of political resistance organized and run in large part by politicians. The founder and director of *Hoy* and *La Epoca*, Emilio Filippi, was a close friend and former associate of President Aylwin. From the early 1980s Filippi had held regular Tuesday breakfasts at the magazine’s office, inviting leading Christian Democrats as well as leaders of the National Party’s moderate wing and some military officers. Abraham Santibáñez, whom Aylwin appointed as the new director of *La Nación*, had also been a *Hoy* director. (Human Rights Watch interviews with Santibáñez and Filippi, March 9 and 20, 1998, respectively.) On the political origins and purpose of the alternative media of the 1980s, see Eugenio Tironi and Guillermo Sunkel, “Modernización de las comunicaciones y democratización de la política: los medios en la transición a la democracia en Chile,” *Estudios Públicos*, No. 52, Spring 1993.

resulted also from the continuing professional insecurity of journalists, whose rights were still not protected by law even on such basic matters as preserving the anonymity of sources.

However, apart from self-restraint there were also direct pressures from government officials and politicians on the pro-government media to suppress information or opinion, or to publish information in the government's interest. *La Nación* and TVN were still treated by some ministers as if they were subservient to the government, while the army evidently did not believe that they were truly independent and assumed any criticism to be instigated from the presidential palace.

#### **Pressures on *La Nación***

Ministers and undersecretaries exerted pressure on the pro-government press throughout Aylwin's tenure and have continued to do so during the current administration. During the early years of the Aylwin government, senior staff at *La Nación* received dozens of telephone calls from government ministers, undersecretaries and local government officials. Irate calls were made to lodge complaints over items that portrayed the government or its representatives in a negative light, to preempt the release of items considered threatening to the transition, or simply to cull publicity for official events.

The most common complaint was that the paper was failing to give sympathetic coverage to activities in which ministers were involved. "They thought they had the right to ask us to publish what they wanted, and not to publish what they did not want," former *La Nación* Deputy Editor Luengo told Human Rights Watch. Frequent callers included the then-minister of the interior, Enrique Krauss, and Minister of Defense Patricio Rojas. According to Luengo, there was also an angry reprimand from the minister of agriculture because the paper had interviewed a group of Mapuche Indians with a grievance against the ministry. When photographs later appeared in the paper of the Mapuche protest, the minister called back and angrily demanded the heads of the journalists responsible. "We replied that we were not going to sack anyone, that nothing that we had published was false. And then of course he called Correa to complain, but Correa said, well, they have a director. In fact, Correa often acted as an umbrella to protect us from this rain of accusations."<sup>257</sup>

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<sup>257</sup>Human Rights Watch interview with Alberto Luengo, deputy director of *La Nación*

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from 1990 to 1994, March 18, 1998.

A sensitive theme in the Ministry of Defense was the refusal of General Pinochet to subordinate himself to the authority of the minister, Patricio Rojas, and Pinochet's insistence on dealing with Aylwin directly. On several occasions Rojas was greeted with whistles and catcalls by army relatives and supporters at solemn public ceremonies. When these were reported by *La Nación* and *La Epoca*, the minister reacted angrily, accusing the papers of undermining the government's credibility.<sup>258</sup> Episodes like this persuaded *La Epoca's* director, Ascanio Cavallo, that Aylwin's media policy was a double discourse, and that the reality was often at odds with the version presented to the public.<sup>259</sup>

Even *El Mercurio* was not entirely immune from these pressures, despite its vantage point of financial security and political independence from the government. President Aylwin and later President Frei both telephoned the general editor, Juan Pablo Illanes, to complain on several occasions. Illanes told Human Rights Watch that Aylwin called him to complain about an article by writer Enrique Lafourcade he thought to be offensive to Argentine President Carlos Menem on the eve of Menem's state visit to Chile. In other cases, calls were sparked by the publication of articles or information considered damaging or offensive to the president or members of his family.<sup>260</sup>

Behind-the-scenes pressure of this kind amounts to unwarranted intervention by the executive branch in editorial freedom, since governments have a responsibility to ensure that state-owned media serve the public interest and are not subjected to political influence by any group. Rather than attempt to alter editorial decisions through urgent messages and telephone calls, government officials have many other resources to get their message across, which ensure that the debate is publicly aired. What is more, their right of reply

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<sup>258</sup> Rojas repeatedly telephoned Ascanio Cavallo, who replaced Emilio Filippi as *La Epoca's* director in January 1993, protesting at press coverage of these episodes, and reminding him of his responsibility to "protect democracy." On one occasion, when *La Epoca* headlined a statement by Interior Minister Enrique Krauss, that there had been a "collision of powers" during a conflict with the judiciary (Krauss claimed to have said that there was *no* collision of powers), a furious Krauss persuaded Correa to call the paper and oblige it to publish a correction, to which the paper agreed.

<sup>259</sup> Human Rights Watch interview with Ascanio Cavallo, January 19, 1998.

<sup>260</sup> Human Rights Watch interview with Juan Pablo Illanes, managing editor of *El Mercurio*, April 6, 1998.

is protected both in Chilean law and the American Convention.<sup>261</sup> The constitution stipulates that “any natural person or legally recognized institution (persona legal) offended or unjustly alluded to by any social medium of communication has the right to have their statement or correction published free of charge, in the conditions that the law shall determine, by the same medium of communication in which the information was published.”

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<sup>261</sup> ACCORDING TO ARTICLE 14 (1) OF THE AMERICAN CONVENTION, “ANYONE INJURED BY INACCURATE OR OFFENSIVE STATEMENTS OR IDEAS DISSEMINATED TO THE PUBLIC IN GENERAL BY A LEGALLY REGULATED MEDIUM OF COMMUNICATION HAS THE RIGHT TO REPLY OR TO MAKE A CORRECTION USING THE SAME COMMUNICATIONS OUTLET, UNDER SUCH CONDITIONS AS THE LAW MAY ESTABLISH.”



Pressures from the army contributed to this under government interference in the media. On several occasions government ministers publicly reprimanded media considered to have overstepped the boundaries of prudence, and twice they intervened directly with media directors to prevent the publication of conflictive items. Human rights violations (especially the fate of the “disappeared” and the discovery of the remains of victims of extrajudicial execution in clandestine burial sites) and corruption scandals in which army personnel were implicated were particularly sensitive themes. The press reported both issues energetically.<sup>262</sup> With the avenue of direct intervention blocked by the government’s hands-off policy, the army reacted to bad press by lodging a succession of lawsuits against individual journalists, as well as public declarations denouncing press collusion in a campaign of defamation. The government, despite its adherence to press freedom, generally remained aloof from these confrontations rather than defend the media involved.<sup>263</sup> There were, however, some dramatic exceptions which revealed the limits of the government’s ability to ward off army attacks on the press. A headline in *La Nación* in 1993 precipitated the most serious crisis in civil-military relations since the re-establishment of democracy. On May 28, 1993, soldiers in full camouflage combat gear, some carrying bazookas and heavy equipment, appeared in the street outside the armed forces headquarters, where an

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<sup>262</sup> During the first four years of the Aylwin government, press coverage of at least eight cases involving human rights violations was prohibited for varying periods by judges using reporting bans. Coverage of four cases involving libel suits against journalists were also prohibited, usually at the request of the litigants. Figures from CODEPU, “Libertad de Expresión...,” p. 23.

<sup>263</sup> In a revealing incident in October 1990, Interior Minister Enrique Krauss abruptly abandoned the hall during a Latin American press gathering on discovering the presence of two journalists who had refused to appear before a military court to answer charges involving articles they had written. As *Análisis* commented:

This gesture of Krauss, who cited his investiture as a representative of a power of state who could not associate himself with an act of contempt of another branch of government, was almost surrealistic in that he simultaneously expressed moral support for the journalists in question. Secretary General of Government Enrique Correa described Krauss’s action as unpleasant duty.

“Como en Los Viejos Tiempos, Justicia Militar versus Prensa,” *Análisis*, October 1-7, 1990.

emergency meeting presided over by General Pinochet was in progress. This threatening demonstration of power was staged at a moment when Aylwin was in Scandinavia and Interior Minister Enrique Krauss was acting president.<sup>264</sup>

The immediate pretext was a headline in *La Nación* which had announced a court decision to re-open the case of the so-called Pinocheques, a judicial investigation into the receipt by Pinochet's son, Augusto Pinochet Hiriart, of checks from the army totalling \$3 million for the purchase of a bankrupt arms components manufacturing company. Evidently convinced that *La Nación* acted on instructions from the presidency, the army called Krauss to demand that the paper carry a retraction on the following day. Krauss agreed to advise the newspaper. Later, *La Nación* Deputy Director Alberto Luengo received a telephone call from General Concha, head of General Pinochet's committee of advisors, direct from the meeting room where the generals, including Pinochet, were ensconced in discussions. Concha demanded that the paper carry a headline announcing the correction.

He told me that as the government had warned me, he was calling to order me to publish a denial by the army, that they were going to send me a document which we would have to publish in full. "And now let's talk about the subject of the headline," he said. "But you don't decide the headline, we do that," I replied. He insisted that the government had authorized the rectification. And their title — I don't remember the exact words — was something like "Army obeyed law in checks case." General Concha hung up and said he would call back in half an hour, after talking to the government.

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<sup>264</sup> The incident was referred to as the "Boinazo," after the black berets (*boinas*) worn by the special forces who participated.

Both Krauss and Secretary General of Government Enrique Correa called the newspaper to insist on the publication of the headline, but Luengo, who received the calls, said the request was unacceptable. "Accept it or not, but publish it," warned Correa. Luengo replied that if he was forced to publish the headline he would quit immediately, and he was backed by most of his editors and senior journalists. In a later emergency cabinet meeting, Correa told his colleagues about the imminent resignations: "Let them resign" was the initial reaction, until Correa announced that if Luengo went, he would go too.<sup>265</sup>

In the end, the paper devised a compromise that saved the government from a serious split and also rescued *La Nación* from being dismembered. The army statement was published in a box on the front page, and the issue of the headlines was side-stepped by dispensing with a headline altogether. Instead, a full-page photo, with no comment, showed the menacing presence of camouflaged soldiers in a Santiago street. The crisis passed as the army's attention turned to more substantive disagreements with the government.<sup>266</sup>

### **Limits to pluralism on TVN**

In the case of the state-owned National Television (TVN), formal independence from government control and checks designed to ensure a politically diverse managerial board have ensured a degree of autonomy unknown in the company's history, indeed dramatic when compared with the station's subservience to the executive branch during the military regime. Paradoxically, however, respect for political quotas in the running of the station has not brought a notable gain in the diversity of its programming so as to ensure possibilities of expression for the widest possible range of opinion or cultural

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<sup>265</sup>Human Rights Watch interview with Alberto Luengo and Enrique Correa (March 21, 1998). Luengo confirmed to Human Rights Watch that Correa had threatened to resign.

<sup>266</sup>It only became known in April 1998 that in the aftermath of the "Boinazo," Correa and Krauss signed documents with General Pinochet's representative, Gen. Jorge Ballerino, recording the basis for negotiated agreements on several issues, including the handling of cases of human rights violations under the military government that the courts were investigating. The government also committed itself not to reverse the law passed by the outgoing military government in 1990 which prevented Congress from investigating government actions prior to March 1990. In July the Council for the Defense of the State reopened the checks case, but a week later President Frei ordered it closed, adducing "reasons of state." "El Documento que puso fin al boinazo," *Qué Pasa*, No. 1408, April 4, 1998.

interest. Rather, there has been a tendency, particularly under the current government, for material that might be provocative or challenging to be suppressed or cut in deference to political or conservative moral sensibilities. Rather than pluralism bringing greater diversity — the expression of conflicting views side by side and in healthy competition — there has been a tendency to opt for safety.

Examples abound of controversial programs which have been suppressed or cut on the orders of the station's executive director, or following pressure from its board of directors. Station executives defend these decisions as the simple exercise of editorial control. In the abstract, this is a legitimate, since editorial control by media directors is an inseparable part of freedom of expression. But the matter is not as simple as that. In some cases, like those we detail below, the surrounding circumstances, or the reasons given by directors to the journalists for omitting material, strongly suggest that political considerations rather than editorial values were the underlying factor. This was also the interpretation of many of the journalists themselves. Most of the material we learned of that had been cut or never shown despite being ready for transmission, and in some cases advertised beforehand — was on politically sensitive or morally controversial topics.

We were told by a senior station executive that controversial programs are normally approved by the executive director prior to transmission and that last-minute cuts or changes are often ordered. This is defensible, in that the executive director is ultimately responsible to the board for all broadcasting content. However, such cuts become questionable when they conflict with the station's declared commitment to pluralism and the representation of minority as well as majority perspectives. During the early 1990s there was a well-publicized history of friction in the station over pressures from the board on editorial decisions. More recently the cuts appear to have emanated directly from the executive director. One instance was clearly the result of a direct presidential intervention.

Decision-making in TVN is supposed to be shielded from direct external political pressures by a seven-person governing board that is representative of the opposition as well as the government. Six members of the board (which also has a non-voting member of the station employees' union) are appointed by the Senate, on the basis of a slate presented by the president of the republic, that must be accepted or rejected as a whole. They may not be removed for eight years. The seventh member is appointed directly by the president and has fixed tenure throughout the president's term. Underneath the board is the station's executive director, who is appointed by the board with a

very large majority, and can only be removed with a large majority. This voting system favors a consensual candidate who, on appointment, is allowed considerable autonomy. The executive director's senior staff are appointed by him but must also have the approval of a majority of the board. These formal guarantees of independence and political pluralism were introduced by law in May 1992. Government ownership was retained but no form of government subsidy was permitted. Essentially, it was intended that the station become an autonomous self-financing corporation with a public-service vocation.<sup>267</sup>

Under the military government, TVN had been used aggressively to transmit propaganda and was correctly perceived as heavily biased. Months after the military coup, the military junta issued a decree suppressing TVN's board of directors and concentrating power in the hands of one person, the director general, appointed directly by the government. Viewed by the public as closely identified with the military, the station lost audiences and ran up large debts until, at the close of the period, it was on the verge of bankruptcy. Mismanagement and corruption reached such a level that President Aylwin's appointee as executive director, Jorge Navarrete, denounced it in an extended stock-taking which was broadcast and published in full-page newspaper inserts. Several of those implicated were later prosecuted, and a parliamentary investigation was launched, although none of the individuals named replied to the allegations.<sup>268</sup>

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<sup>267</sup> Human Rights Watch interview with Enrique Aimone García, general secretary of Televisión Nacional, July 23, 1998.

<sup>268</sup> Navarrete is convinced that there were political motives for the catastrophic run-down of TVN. "First of all," he told Human Rights Watch, "there was plain dishonesty; second,

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there was what could be called an extraordinary degree of frivolity in managing the company. But third I don't have *any* doubt that a significant part of the government and of the administration of the company during the last year [of the military government] worked to create a situation that would be uninheritable and force President Aylwin and the Concertación to do what they [the then-management] had wanted to be done, that is to sell the company and close down TVN." Human Rights Watch interview with Jorge Navarrete, April 15, 1998.

During the first two years of the Aylwin administration TVN was still governed under the legal regime introduced by the military, with authority vested in an executive director appointed by presidential decree and subject to removal by him at any time. During this period the station's autonomy was dependent ultimately on the executive director retaining the president's confidence. By all accounts, President Aylwin set great store on the station's autonomy. However Aylwin appointee Jorge Navarrete came under great pressure from other sectors of the government and its political parties, especially members of the Christian Democrat Party (Aylwin's own party). Vexation and incomprehension in the governing coalition with regard to TVN's "lukewarm" portrayal of government achievements was widely reported in the press. Interviewed by Human Rights Watch, former Executive Director Jorge Navarrete praised Aylwin's efforts to shield the station from these pressures.<sup>269</sup> Although General Secretary of Government Enrique Correa also supported TVN, relations with other ministries were often strained. Revelations about human rights violations implicating serving military officers were of particular concern to the Ministry of Defense. The publicity given to the brief court appearances of these officers provoked resentment in the army, and army pressures were relayed by indignant ministry officials, including the minister in person, to the station.

#### *The Townley interview*

Only once did President Aylwin intervene directly in an attempt to alter an editorial decision of TVN. On August 5, 1993, TVN's *Special Report (Informe Especial)* was due to air an extended and exclusive interview with

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<sup>269</sup> "I would say that during this period President Aylwin to an extraordinary degree surprised even myself with his respect for TVN, even when he didn't like what we did. He not only respected us, but he was a sort of giant umbrella protecting us from the pressures. Over the months, as we became more and more successful, the pressures increased. Now, I think that all media receive pressures, from government, the churches, business, the unions and the political parties, whatever. The important thing is how you process it. You have to separate what are legitimate demands for the expression of a point of view from what are unacceptable pressures on editorial decisions. We had pressures of this latter kind from every minister in the cabinet. They or their public relations people would call us constantly. These sorts of pressures you have to resist. I would try to explain our editorial line to them, and if I could not convince them, I told them to take their concerns to the president, and a lot of them did. Aylwin was extremely supportive of us." Human Rights Watch interview with Jorge Navarrete.

Michael Townley, a former DINA agent convicted in the United States for his role in the 1976 assassination in Washington of Allende's former Defense Minister Orlando Letelier. The interview, programed long in advance and announced a week before its planned transmission, coincided with a crucial moment of the trial in Chile of Townley's former chief, DINA Director Manuel Contreras, when special investigating judge Adolfo Bañados was on the verge of an indictment. Concerned about the repercussions on the trial if the interview went out, President Aylwin wrote a letter to TVN's board of directors urging them to delay the transmission. The board voted to accept Aylwin's request.

The president's intervention was construed by members of the *Special Report* team as army-induced, and members of the team publicly criticized Aylwin for betraying his commitment to respect the station's autonomy. Aylwin explained his motives in a letter to the Chamber of Deputies Committee on the Constitution (Comisión de Constitución). Referring to the proximity of the trial, Aylwin pointed out that he had merely made a request, not given an order, and he repeated that the station's executive was autonomous in its decisions. This did not convince TVN journalists, who wrote a letter to Aylwin, signed by forty-two members of the press department, to protest what they interpreted as "a form of pressure" on TVN that betrayed all of Aylwin's efforts hitherto to protect the channel's independence.

The Townley interview finally aired on August 16 to audiences swelled by the political controversy it had caused. With hindsight it is difficult to understand Aylwin's intervention on the grounds given. The interview contained no new material of importance on the Letelier case, and at the moment of the controversial decision to delay the screening, Judge Bañados himself dismissed any possibility that the screening could influence the trial.<sup>270</sup> There are strong indications that other factors affecting civil-military relations were involved: the Ministry of Defense was concerned about revelations in the interview affecting a close military advisor of General Pinochet, and a ministry official previewed the program at Executive Director Navarrete's invitation.<sup>271</sup> The row within TVN

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<sup>270</sup> "Cámara citó a directorio de TVN y a personeros de gobierno," *La Epoca*, August 4, 1993.

<sup>271</sup> "Schaulsohn dice que Jorge Burgos conocía la entrevista de TVN a Michael Townley"; "Navarrete confirmó el hecho," *La Epoca*, August 11, 1993. Although Aylwin insisted that he had learned of the interview's contents only through advance publicity and had not seen the program, Executive Director Navarrete confirmed later that he had invited Undersecretary of War Jorge Burgos to a private screening. Navarrete told Human Rights Watch that he had been personally worried about the timing of the screening before he knew



sparked by the postponement of the program led to the dismissal of the editor of *Special Report*, Patricio Caldichoury, for breaching the confidentiality of Navarrete's memorandum to him explaining the board's decision.

The scale of the political reverberations of the crisis in TVN surprised even President Aylwin. They starkly revealed the tensions between a policy of genuine media autonomy and the government's expectation, implicit and rarely stated, that the media respect the political sensitivities of the transition as these were conceived by the executive branch of government. Such considerations had led to the TVN board's decision in May to postpone a showing of two segments of the program *El Mirador* at the height of the "Boinazo" crisis. Critics observed that such decisions could only reinforce the military's conviction that TVN was still controlled from the presidential palace, while undermining the credibility of the station as an independent medium.<sup>272</sup>

#### ***Editorial policy during the Frei government***

Paradoxically, an increasing relaxation of civil-military relations and improvements in the troubled relationship between TVN's executive director and its governing board under the Frei government did not lead to a more relaxed and permissive editorial line at the channel. In fact, external political protests coming from both cabinet ministers and government coalition politicians, as well as from the right-wing parliamentary opposition, multiplied over the years.<sup>273</sup> In

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of Aylwin's concern and had invited Burgos for his comments. Burgos had expressed special concern about the possibility that Townley might name serving army officers in his interview — in particular Col. Jaime Lepe, General Pinochet's secretary, who had been implicated in a judicial investigation into the alleged murder by the DINA of Spanish diplomat Carmelo Soria. Since Burgos was the only government official known to have seen the interview it is probable that the pressure to suspend the screening originated in the Ministry of Defense. Enrique Correa, who opposed Aylwin's intervention, and as minister responsible for television felt that his authority had been undermined, took sick leave for a week. Human Rights Watch interviews with Jorge Navarrete and Enrique Correa, April 14 and March 21, 1998, and with Marcelo Araya, *Special Report* editor and maker of the Townley interview, April 21, 1998.

<sup>272</sup> Fernando Paulsen, "En la medida de lo posible," *La Epoca*, August 10, 1993.

<sup>273</sup> TVN had been under criticism from the outset by advocates of privatization. A prominent critic was the Instituto Libertad y Desarrollo, a free-market think tank founded by Hernán Büchi, the right-wing candidate in the 1989 presidential elections. "Instituto de la derecha acusa de parcialidad a TVN," *La Epoca*, October 14, 1992.

1994 President Frei called Executive Director Navarrete to complain about a *Special Report* feature on Indonesia that documented political cronyism and human rights violations under the Soeharto government. What angered Frei was that the station aired the report on the eve of the president's official visit to the Asia-Pacific Economic Cooperation (APEC) countries, which led to Chile's admission to the group. The relationship between the executive director and the board, difficult at the best of times, continued to sour.

More serious for Navarrete, however, was the loss of confidence of the board's Christian Democrat members in the news staff. There was sharp criticism in party ranks at TVN's alleged failure to do justice to government achievements. Complaints were voiced about a lowering of moral standards on such themes as divorce and homosexuality, issues on which Christian Democrat board members made common cause with their conservative opposition colleagues. Finally, two Christian Democrat directors cast their vote with the opposition for Navarrete's removal, and he was fired in November 1994. Nine months later, Navarrete's replacement, Carlos Hurtado, resigned in exasperation at the board's lack of confidence and what he claimed was its meddling in day-to-day management and editorial decisions. Station programmers were slammed by conservative board members for the political content of a documentary feature and the portrayal of female homosexuality in an issue of *Special Report*.<sup>274</sup>

Following the appointment in 1995 of the current executive director, René Cortázar, former minister of labor under the Aylwin government, editorial control tightened significantly. Unlike his predecessors, Cortázar, reputed to be a conservative on moral issues, established fluid relations with the board. However, he personally assumed day-to-day managerial control of editorial decisions in programs considered sensitive, which caused considerable resentment among staff. TVN journalists told Human Rights Watch that completed programs were shelved or cut, after a meticulous revision of the smallest details, down to the phraseology and language used.<sup>275</sup> The stifling

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<sup>274</sup>The documentary was a series on the youth movement of the 1960s. The last episode caused offense to some members of the board by ending the story with the military coup. "Carlos Hurtado renunció en forma sorpresiva a la dirección de TVN," *La Epoca*, October 19, 1995, and Human Rights Watch interviews with TVN officials.

<sup>275</sup>For example, in a program on the use of the contraceptive pill in Spain, a reference to Spain as "a Catholic country" was cut to avoid negative comparisons between Spanish and Chilean Catholics; in a documentary on prisons, references to torture under the Holy Inquisition were also cut. The title of a program on sex and aging, entitled *Sex in the Third*

rules imposed led to frequent conflicts with program-makers. In an effort to establish ground rules and avoid future incidents, the station management initiated a long internal debate which culminated in 1997 with the publication of a handbook of ethical guidelines.<sup>276</sup> In order to suppress damaging publicity, the rules required journalists to avoid public statements that “damage the corporate image of the Channel, its independence, pluralism and objectivity.”

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*Age (El Sexo en la Tercera Edad)* was changed to *Love and the Third Age (El Amor en la Tercera Edad)*.

<sup>276</sup> Televisión Nacional de Chile, "Orientaciones Programáticas," April, 1997.

In the following examples, political considerations appear to have been uppermost in decisions to cut material. During the period he worked as anchorman on TVN's current affairs chat show *Midnight (Medianoche)*, Fernando Paulsen, the current director of *La Tercera*, was vetoed when he suggested inviting Francisco Javier Cuadra, who had been recently charged under the State Security Law for defaming Congress, to participate in a panel. Paulsen's planned interview had nothing to do with Cuadra's own case: he proposed to invite him in his capacity as former Chilean ambassador to the Vatican as a panelist in a discussion of Cuban leader Fidel Castro's visit to the Vatican. According to Paulsen, the former Pinochet minister had earlier been banned from appearing on *De Pé a Pá*, a chat show chaired by Pedro Carcuro. Paulsen has since appeared with Cuadra on a panel on the independent channel La Red to discuss the 1997 parliamentary elections, but to our knowledge Cuadra has never been invited to appear on TVN.<sup>277</sup>

The television program most affected by editorial pressures emanating from the station management has been *Special Report*, a documentary series on current affairs and social issues, which first aired in June 1984. Unlike most Chilean current affairs programs, which predominantly use the interview or panel format, *Special Report* features weekly investigative projects on themes of social interest or controversy. In the last years of the dictatorship the program was highly rated because it opened up areas of debate previously taboo such as intra-family violence. This created tensions about how much editorial autonomy would be permitted, and interference and restrictions were frequent. A 1987 program on medical negligence was cut without the journalist's authorization to remove all references to a well-known public hospital. Another program on religious vocation, which included references to the subject of married clerics, was quietly shelved after its transmission had been announced. "I was in another city at the time," the program's maker Marcelo Araya told Human Rights Watch. "I turned on the television to see my work, and out came a different program."<sup>278</sup>

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<sup>277</sup>Human Rights Watch interview with Fernando Paulsen, March 3, 1998.

<sup>278</sup>Human Rights Watch interview with Marcelo Araya, editor of *Informe Especial*, April 21, 1998.

Although these limits have been relaxed significantly under TVN's new management system, the present executive director is known to meticulously control broadcasting. Programs addressing sensitive themes are consistently reviewed, and if necessary amended, before airing. A considerable number are simply shelved and never shown. An example was a 1990 documentary on the persistence of armed opposition groups in Chile despite the return to democracy that was never shown.

A broadcast on police abuse and torture was suppressed in September 1996, after it had been approved by the station's press director and announced the previous week.<sup>279</sup> Suppression of this feature censored information about police brutality against young working-class crime suspects. The documentary cited the report recently published by the United Nations Special Rapporteur on Torture, Nigel Rodley, providing an opportunity to make the findings of the United Nations available to the general public.<sup>280</sup> According to journalists in TVN, the veto of the program, originally titled *Torture in Democracy* but later amended to *Police and Human Rights* (after editorial objections to the original title), was due to management fears that its transmission could torpedo government efforts to reform the Carabineros. Such a concern is consistent with the Frei government's frequent statements in defense of the Carabineros when the police have been criticized for brutality. It also reveals an ambivalent attitude towards the independence of TVN. If the station were genuinely autonomous and saw its role as informing the public, it would not likely be concerned about the effect its program would have on the *government's* relation

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<sup>279</sup> "TVN suspende reportaje por 'asuntos internos'," *La Epoca*, September 5, 1996.

<sup>280</sup> Despite a notable drop in torture cases since the Pinochet years and the adoption of measures to safeguard detainees' rights, domestic and international human rights organization, including Human Rights Watch, documented dozens of new cases of police brutality against suspected delinquents during the first five years of the democratic government.

with the uniformed police. Other programs vetoed in 1996 were a documentary on male striptease dancers (whose subject matter was considered tasteless) and one on gold and copper mining shelved without explanation. These were not projects aborted at the planning stage but completed documentaries ready for transmission.

A program on intra-hospital infection, which aired on October 24, 1997, was cut to avoid identifying the Military Hospital as among the institutions affected by this problem. The documentary included interviews with directors of several public hospitals and mentioned the results of hospital inquiries into negligence leading to the propagation of infections. By coincidence, the one case profiled in the report was of a patient who died as a result of an infection contracted in the Military Hospital. The original report reconstructed the events as told by the patient's relatives, identified the hospital and mentioned that its director had refused to be interviewed on the program. The version that finally aired included the interviews with relatives but did not identify the Military Hospital.

TVN's secretary general, Enrique Aimone, told Human Rights Watch that the torture program had been shelved since the project had not been on the list of programs previously approved by the station management. Assuming this to be true, it hardly explains why the program was not rescheduled and shown later. Aimone did not recall details of the other cuts mentioned above. However, he considered that suppression of the name of the Military Hospital was probably to avoid singling out any institution for blame in what was a general problem affecting many institutions.<sup>281</sup> Our information, however, is that the program included interviews with directors of other medical establishments and was a balanced treatment of the issue by an experienced medical journalist. Furthermore, provided documentaries meet traditional standards of objectivity and responsible fact-finding, there is no reason why they should desist from naming those responsible for irregularities, who are already protected in the libel laws from unsupported allegations. Indeed suppression of the identity of those responsible in the interest of a "balanced view" is a questionable journalistic practice.<sup>282</sup>

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<sup>281</sup> Human Rights Watch interview with Enrique Aimone, secretary general of Televisión Nacional, July 23, 1998. Human Rights Watch was not successful in obtaining an interview with Executive Director René Cortázar.

<sup>282</sup> Aimone pointed out that in other cases TVN has broadcast conflictive material. He cited *Special Report* features on the military coup, showing images of the destruction of La

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Moneda for the first time in color, on the summary execution of Catholic priest Juan Alsina, and the *Midnight* interview with Corp. Hernán Leiva, during a police protest at pay and conditions. Following the transmission of this program, the uniformed police lodged a complaint against TVN with the Ethics Council of the Communications Media (Consejo Ética de los Medios de Comunicación), a voluntary press standards body.

## V. FILM CENSORSHIP

Human Rights Watch is concerned at the continuing practice of film censorship in Chile, which is carried out by a film classification council whose decisions are not made public and whose structure has remained unchanged since 1974, the first year of the military government. The grounds entertained in the law for film censorship are extremely broad and include prohibition on ideological grounds, although this norm has not been enforced by the council since the return of democracy. Censorship also extends to video cassettes and to films shown on television. Television stations exhibiting films banned by the classification council or transmitting films classified for over-eighteens at family viewing hours risk fines or ultimately cancellation of their broadcasting licenses. These prohibitions apply both to open television and cable services.

### History and Legal Norms

Prior censorship of the cinema is mandated in the constitution of 1980. The final paragraph of Article 19(12) provides that "THE LAW SHALL ESTABLISH A SYSTEM OF CENSORSHIP FOR THE EXHIBITION AND ADVERTISING OF CINEMATOGRAPHIC PRODUCTION." THIS IS AN EXPLICIT EXCEPTION TO THE RULE IN THE PRECEDING CLAUSE OF ARTICLE 19(12) THAT ASSURES "FREEDOM TO EXPRESS OPINIONS AND TO INFORM WITHOUT PRIOR CENSORSHIP IN WHATEVER FORM AND IN WHATEVER MEDIUM." THE CONSTITUTIONAL PROTECTION THAT FILM CENSORSHIP CONTINUES TO ENJOY IN CHILE COMPLICATES EFFORTS TO REMOVE IT FROM THE STATUTE BOOKS. ANY AMENDMENT OF THE ARTICLE IN QUESTION MUST BE CARRIED BY A CONGRESSIONAL MAJORITY OF TWO-THIRDS. FURTHERMORE, THE CONSTITUTIONAL PROVISION EXTENDS NOT ONLY TO FILMS BUT ALSO TO FILM ADVERTISING, SUCH AS POSTERS AND TRAILERS, AND HAS BEEN INTERPRETED AS APPLICABLE TO VIDEOS AS WELL.

Established in 1924, Chile's film censorship council was originally composed of five persons: the director general of libraries, two persons designated by the president of the republic, and two appointed by the municipality of Santiago. The council was later expanded to eleven. Writing of the early 1950s, when he worked as a critic for the weekly *Ercilla*, journalist Hernán Millas described its center of operations as "a kind of attic in the National Library, a place which, for me and my colleagues, exerted a spell like I felt when I visited the headquarters of the Inquisition in Cartagena de Indias.... Although the council was made up of eleven persons, attendance was very sparse. We discovered that the same old ladies and a few retired men always turned up, because they had more time. A colleague found out that one of the members of the council was a friend of the education minister at the time, a very



pious widow who was awarded the job to give her something to do.”<sup>283</sup> The decisions made behind closed doors by the councillors have affected generations of Chileans, who are still forbidden to see Ingmar Bergman’s *The Silence* and must still wait until the age of eighteen to see in the original format *Casablanca* and *The Maltese Falcon*.

The legislation still in force in Chile today, Decree No. 679, dates back to October 1974, when the country had recently come under control of the military junta and its secret police. It was supplemented by the Regulations of Cinematic Classification (Reglamentos de Calificación Cinematográfica) issued by the Ministry of Education in April 1975. There has been little change of substance since.

Decree Law 679 established a Council of Cinematographic Evaluation (Consejo de Calificación Cinematográfica, CCC), described as a “technical body dependent on the Ministry of Education,” whose job is to “orient cinematographic exhibition in the country and carry out the evaluation of films according to the norms established in this law.”<sup>284</sup> No film may be shown in Chile or imported into the country for exhibition unless it has been approved and classified by the council.

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<sup>283</sup> Hernán Millas, “La Tijera de la Dictadura sigue cortando,” *La Epoca*, July 26, 1992. (Translation by Human Rights Watch.)

<sup>284</sup> Article 1.

The council is composed of the director of Libraries Archives and Museums (Director de Bibliotecas, Archivos y Museos), three members of the judiciary, three representatives of the Council of University Presidents (Consejo de Rectores de Universidades), one representative of each branch of the armed forces (four in all), three representatives of the Ministry of Education, two representatives of the Parents and Tutors' Association of Public High Schools and of Private Schools, (Centro de Padres y Apoderados de los Liceos Fiscales y de los Colegios Particulares), and three representatives of the Journalists Association, preferably cinema or theater critics. The aim here evidently was to create a body representative of the major institutions of the state, including the judiciary, public schools and the armed forces, with only a nod (the reference to film critics) to informed public opinion.<sup>285</sup> Councillors, apart from those appointed for the public office they hold, have tenure for two years but may be re-elected indefinitely.<sup>286</sup>

The council's job is to classify films and video cassettes into one of four categories:

- approved for general release;
- approved as apt for over-fourteens or over-eighteens;
- approved for educational purposes;<sup>287</sup> or
- rejected.

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<sup>285</sup> Although the CCC was created before the 1980 constitution was drafted, its top-heavy composition is similar to that contemplated for the CNTV, the television watchdog body, by jurist Jaime Guzmán in the constitutional drafting commission. Guzmán argued: "On the other hand, I have considered that in regard to radio and television it is necessary to put together an autonomous council, independent of the executive branch, which may be an exact expression of Chilean institutions, of the best of these institutions, of those which, if they one day become corrupted, one would have to assume that the country as a whole has become corrupted." Enrique Evans de la Cuadra, *Los Derechos Constitucionales* (Santiago: Ediciones Jurídicas), Vol. 1, p. 314. The identification of the "country as a whole" with the judiciary, the educational system and the armed forces suggests an evident conservative bias.

<sup>286</sup> Article 9 of the regulations.

<sup>287</sup> According to Article 24 of Decree 679, "films of an educational, scientific, technical or cultural character that the universities import or produce for their exclusive use, may be exhibited on university campuses with the classification of strictly 'cultural granted' by the Council of Rectors, after they have sent information in writing to the Council of Cinematic Classification."

A higher age limit of twenty-one in the original decree was later eliminated to reflect the reduction of the legal age of majority from twenty-one to eighteen.

Rejected films fall into four categories:

- “those that foment or propagate doctrines or ideas that are contrary to the fundamental principles of the fatherland or nationality, like Marxism and others”;
- those that offend states with which Chile maintains international relations;
- those that are contrary to public order, morals or good customs; and
- those that induce the commission of anti-social or criminal actions.

The first of these categories is in line with the prohibition of the expression of Marxist ideas contained in Article 8 of the constitution, which was repealed in August 1989. The CCC has not invoked it in recent years and considers it to have been tacitly repealed by the constitutional reform.<sup>288</sup> The second category, also rarely invoked, is nevertheless an unacceptable limit. It assumes that governments have the right to hold other governments to account for failing to restrain their citizens' exercise of freedom of expression, a proposition totally at odds with current standards of international law and incompatible with Chile's international human rights obligations. The last two categories allow censors ample discretion in deciding when a film endangers public morality and public order, concepts that are left undefined in Decree Law 679.

FROM THE STANDPOINT OF INTERNATIONAL HUMAN RIGHTS LAW, IN ANY CASE, THESE CONSIDERATIONS ARE IRRELEVANT. THE ONLY EXCEPTION THE AMERICAN CONVENTION ALLOWS TO ITS GENERAL PROHIBITION OF PRIOR CENSORSHIP ARE “PUBLIC ENTERTAINMENTS,” WHICH MAY BE “...SUBJECT BY LAW TO PRIOR CENSORSHIP FOR THE SOLE PURPOSE OF REGULATING ACCESS TO THEM FOR THE MORAL PROTECTION OF CHILDHOOD AND ADOLESCENCE.”<sup>289</sup> EVEN IF FILMS AND VIDEO CAN BE CONSIDERED “PUBLIC ENTERTAINMENTS” (WHICH IS QUESTIONABLE SINCE THE LATTER ARE GENERALLY CONSIDERED TO BE LIVE PERFORMANCES) PREVENTING THEM TO BE SEEN BY ADULTS IS IMPERMISSABLE.

FROM 1995 UNTIL JULY 1996, THE CCC BANNED FIFTY-TWO 35 MILLIMETER FILMS, AND 299 FILMS IN VIDEO FORMAT.<sup>290</sup> IT IS IMPOSSIBLE TO KNOW HOW MANY FILMS MAY NOT BE SHOWN BECAUSE

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<sup>288</sup> Human Rights Watch interview with Hilda Hernández, member of the CCC, June 2, 1998.

<sup>289</sup> American Convention on Human Rights, Article 13 (4).

<sup>290</sup> “52 cintas se han prohibido en la última década,” *El Mercurio*, January 22, 1997.

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INTERNATIONAL DISTRIBUTORS CONSIDERED IT A WASTE OF EXPENSE TO SUBMIT THEM FOR CLASSIFICATION. THE COUNCIL'S DELIBERATIONS ARE SECRET. THE LAW DOES NOT REQUIRE THE NAMES OF THE CENSORS ON THE PANEL RESPONSIBLE FOR THE DECISION TO BE IDENTIFIED; IT IS IMPOSSIBLE TO KNOW HOW THEY VOTED. FOR YEARS THE PUBLIC WAS MERELY INFORMED WHETHER OR NOT THE DECISIONS WERE UNANIMOUS: IN THE CASE OF REJECTED FILMS THE COUNCIL WAS OBLIGED ONLY TO EXPLAIN ITS REASONS TO THE DISTRIBUTORS IN WRITING. A NEW RULE, INTRODUCED IN 1992 REQUIRED THAT THE REASONS FOR A BAN BE MADE PUBLIC.<sup>291</sup> HOWEVER, NO GROUNDS ARE GIVEN, EITHER TO THE DISTRIBUTORS OR THE PUBLIC, OF THE REASONS FOR AGE-CLASSIFICATION. IN EITHER CASE THERE IS NO MECHANISM TO ALLOW THE PRODUCERS OR DISTRIBUTORS TO REPRESENT THEIR VIEWS.

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<sup>291</sup> "Fallo de comisión será público," *La Epoca*, August 11, 1992.

The functions of the CCC are not subject to any judicial control or oversight. A review panel, misleadingly called an appeals court, may be called on to reconsider the *rejection* of a film following the presentation of a written appeal.<sup>292</sup> The “court” is composed of the education minister, the president of the Supreme Court, the president of the Bar Association and the head of the Defense Chiefs-of-Staff. Its decision is final and may not be reviewed by a court of law. For good measure, any film approved by the CCC may be suspended from exhibition “temporarily or permanently” by a joint decision of the ministers of the interior, defense, and education “when the circumstances require.”<sup>293</sup>

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<sup>292</sup> Films finally shown as a result of an appeal include Bertolucci's *Last Tango in Paris*, exhibited for the first time in 1992, nineteen years after its release. Oliver Stone's *Salvador*, banned for ideological reasons in 1987, was finally passed for exhibition in 1992, coinciding with the director's visit to the country. Stephen Frears's *Prick Up Your Ears*, authorized in the same year after a two-year ban, became the first candid film about homosexuals to be shown in Chile. “Censura autorizó la exhibición de *Salvador* de Oliver Stone,” *La Epoca*, January, 1992; Alejandro Jiménez, “Los ocultos llamados del deseo,” *La Epoca*, August 7, 1992.

<sup>293</sup> Article 18 of Decree 679.

There is no appeal mechanism against a classification decision. Nevertheless, since these are administrative rulings of a public body, film classifications may be subject to later review and amendment by that body if in the public interest. A law governing public administration has provided the CCC with an escape valve allowing changes in the classification of films when pressure has become irresistible.<sup>294</sup> Examples are the Chilean film *Cien Niños Esperando un Tren*, (*A Hundred Children Waiting for a Train*), originally classified as apt for over-twenty-ones although its actors were minors, and *Dead Poets' Society*, classified for over-eighteens and later changed to over-fourteens as a result of its enormous popularity with schoolchildren in the months following the installation of the elected government. In a few cases bans have been reversed by the council, such as those affecting *Imagen Latente* and *The Last Temptation of Christ*, discussed below.

The council also is mandated to enforce the law by supervising cinemas. Enforcement is carried out by inspectors who are required, with police aid if necessary, to eject children surprised in the act of watching a film considered inappropriate, unless they can produce their identity cards and prove they are old enough.<sup>295</sup> Adults irritated by the presence of minors in the cinema may have them expelled, and the inspector is required to note their names and addresses.<sup>296</sup> An exception is made for under-age children who are married. Children are not allowed into the cinema to see any kind of film before 6:00 p.m. during schooldays.<sup>297</sup>

Article 63 of the regulations of 1975 expressly considers video cassettes as films for the purpose of the law; in 1989, Law No. 18,853 established a regime for the inspection of videos. This is of questionable constitutionality, since videos are principally for private domestic use and are not normally

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<sup>294</sup> Article 8 of Organic Constitutional Law No. 18,575 on the Bases of the Administration of State (*Ley Organica Constitucional 18.575 de Bases de la Administración del Estado*) states that "the organs of State Administration shall act on their own initiative in carrying out their functions or on petition by parties when the law expressly requires it or use is made of the right of petition or complaint."

<sup>295</sup> Articles 38 and 43 of the regulations

<sup>296</sup> Article 19 of Decree 679.

<sup>297</sup> Article 20 of Decree 679.

“exhibited” as the language of the constitution stipulates. For the private video collector, the consequences are moments of trepidation on passing through Customs. Any video of a commercial film rejected in Chile may be confiscated. Any video not classified by the council — the great majority of European films, for example — may be impounded and sent to the council for evaluation. If the film is accepted the owner still must pay a classification fee to recover it.

The receipt of videos by mail order can be a bureaucratic nightmare. Arriving parcels are inspected randomly by customs, and if the addressee is unlucky he or she must make the journey to the central post office and pay duty to claim it. He or she is then given a piece of paper and referred to the CCC on the top floor of the Education Ministry. To recover the film a fee is payable for a license, as well as a “deposit for fees” — a contribution to the censors’ stipend — and a shipping fee for the dispatch of the parcel from customs to the CCC. Such archaic procedures scarcely encourage a free flow of culture, information, and ideas.

Despite an important revival in Chilean cinema in recent years, much of the work of prize-winning Chilean directors in exile during the dictatorship has not yet been put on general exhibition in Chile. Many of these works were not submitted to the censor, probably to avoid a futile waste of time and expense. Examples are Patricio Guzmán’s classic documentary *The Battle of Chile* and Miguel Littín’s *The Promised Land*. Pablo Perelman’s *Imagen Latente* was rejected by the CCC in 1988 because of its reference to the “disappeared,” prompting the withdrawal of the Journalists Association representatives from the council for three years until the ban was rescinded. The disruption of Chilean film culture after seventeen years of military rule is well conveyed by Littín, describing the first screening in democracy of his Oscar-nominated *Actas de Marusia*:

There, on a foggy night, more than a hundred people squeezed together in front of a screen which, moving in the wind, showed the now extraordinary images of a northern Chile at the beginning of the century, shaken by the social conflicts of the time. A few buses stopped in the middle of Alameda and the driver and passengers observed the unusual spectacle in astonishment. At the start of the projection, from the balconies of the big townhouse, Arturo Barrios and other young people

had thrown pamphlets against censorship, which covered the sidewalk.<sup>298</sup>

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<sup>298</sup>Miguel Littín, "Censura: y sin embargo, se mueve," *La Epoca*, August 18, 1992.



While the composition, powers, and modus operandi of the CCC have been subject to only cosmetic change since the election of President Aylwin, the council has adjusted its role in three respects: first, it has increasingly refrained from exercising its powers of prior censorship<sup>299</sup>; second, it has reversed bans on some films and has lowered the age-classification of others; third, it appears, like television, to have concentrated on the protection of minors from exposure to excessive violence and explicit sexual content and films that seem to advocate deviant or antisocial behavior and in which minors are portrayed. Discussion of the role of the CCC is inevitably speculative because of the secrecy of its decisions and the fact that, unlike the CNTV, the CCC is not required to publish any periodic reports on its regulatory activities. The press only reports very sporadically on the issue of film censorship when a public debate is aroused by a particularly egregious decision.

An example occurred in July 1992 when the CCC prohibited the exhibition of two films, Bigas Luna's *Bilbao* (1978) and Iván Zulueta's *Arrebato* (1980), which had been included in a traveling retrospective of Spanish cinema organized by the Institute of Iberoamerican Cooperation and the Spanish Ministry of Culture. The two films were due to play in the Normandie art cinema in single screenings on July 23 and 24, as part of a successful tour that had already included eight Latin American countries. On July 18, the Normandie posted on its billboards the "rejected" certificates, which it had received without any explanation of the reason for the bans. Initial confusion was increased by the fact that Raúl Allard, undersecretary for education and president of the council, said he knew nothing of the case.<sup>300</sup> After scandalized reactions in newspaper editorials, Allard called on the council to view the films again, citing the norm that administrative decisions are subject to revision. As a result of his intervention, the ban on *Arrebato* was lifted for adults over twenty-one. The about-face merely sowed more confusion and increased the impression of arbitrariness of the council's decisions. It was impossible to discern on what grounds the ban on *Bilbao* had been maintained, since neither film was intended for commercial exhibition and both were of obvious cultural interest.<sup>301</sup> *Bilbao*

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<sup>299</sup> The council banned two films in 1990, one in 1991, six in 1992, one in 1993, one in 1994 and none in 1995-1996. "52 cintas se han prohibido," *El Mercurio*, January 22, 1997.

<sup>300</sup> "Censuran dos películas incluídas en retrospectiva de cine español," *La Epoca*, July 19, 1992.

<sup>301</sup> Earlier in the year, the CCC had rejected a promotional poster of the *El Rey Pasmado*,

was a landmark in the cultural renaissance of the post-Franco transition in Spain, making its prohibition in Chile doubly significant.

***The Last Temptation of Christ***

The court ban imposed on the exhibition of Martin Scorsese's *The Last Temptation of Christ* in January 1997 provides another key example of the highly restrictive jurisprudence followed by the Chilean courts in the Martorell case. In the *Last Temptation* ruling, however, the protection of honor was extended much further, so as to include the honor of Christ himself as well as of those who follow his teachings.

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by Spanish director Imanol Uribe, which showed Goya's painting of The Naked Maja, and insisted that the distributors cover the Maja's behind. Allard intervened on this occasion, too, to get the decision reversed. Jazmín Lolas, "Censura cambió de idea: permite una de las películas," *La Epoca*, July 21, 1992. It was also reported in the press that *La Tarea*, by Mexican director Jaime Humberto Hermosilla, was able to be shown at the Viña del Mar International Film Festival in October 1991 due to last-minute intervention by education ministry officials. According to "unofficial sources" the film had been banned by the CCC for its sexual content. "La tarea, otra cinta cuestionada," *La Epoca*, July 21, 1992.

The *Last Temptation* ban resulted, ironically, not from a prohibition by the CCC but from a judicial appeal against the council's decision to *reverse* its earlier censorship of the film. In 1988 the CCC had rejected *The Last Temptation* for exhibition arguing that it contradicted the teachings of the Bible and "constituted a fiction of part of the life of Christ."<sup>302</sup> In March 1989 the CCC's appeals panel confirmed the decision. Like many other titles still banned in Chile, the decision was taken at a time when the council was mandated to ban films FOUND "CONTRARY TO THE FUNDAMENTAL PRINCIPLES OF THE FATHERLAND OR NATIONALITY."

The distributors, United International Pictures, presented the film for a second time to the CCC in November 1996, and the council proceeded to reclassify it as apt for over-eighteens, using the principle of administrative review described above. Before the film could be shown, seven lawyers acting on behalf of a pro-censorship group known as Porvenir de Chile (Chile's Future) filed a protection writ against the CCC, whose decision to lift the ban, it argued, offended the right to reputation of Christ and his followers, including the Catholic Church and the petitioners. Apart from their substantive objection to the film, Porvenir de Chile claimed that the council had no authority to revoke a decision of its appeals panel. Plans to exhibit the film were immediately stayed by a court order.

On January 20, 1997 the Santiago Appeals Court granted the protection writ, annulling the decision of the CCC to legalize the film and reconfirming the appeals panel's original ban. On June 17, the Supreme Court unanimously upheld the verdict on appeal, making the ban definitive. On the issue of legality, the court held that the decision of the CCC's appeals panel was irrevocable and that the council had no authority to reverse a decision of a "higher organ."

On the right to honor, the high court found that the figure of Christ had been "so deformed and humiliated, that his honor appears to be gravely affected, which certainly cannot be explained away, as has been tried, by attributing everything to a dream-like fantasy."

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<sup>302</sup>"Critican censura a filme en TV cable," *La Epoca*, August 29, 1996.

Jesus Christ lived two thousand years ago and died on the cross, and although this court takes no position on his resurrection, whose acceptance is a matter of faith, it must agree that the offense against his honor is detrimental to the honor of the petitioners themselves, tied essentially to their dignity as persons, since this implies, among other attributes, the capacity to determine one's life in accordance with values and beliefs. For this reason, by offending, debilitating or deforming the person of Christ, the questioned film offends and causes grievance to those who, like the petitioners, base their faith in the person of Christ, God and man, and on the basis of this conviction and reality assume and direct their own lives.<sup>303</sup>

The Supreme Court agreed with the Appeals Court's assessment that the portrayal of Christ was humiliating. The Appeals Court had objected the "portrayal of Christ as a secondary individual, without a scrap of dignity and completely robbed of his divinity"; Christ was made to appear an "insecure man of little personality," whose "poor oral expression and exaggerated sentimentality only allow an absurd and demeaned image of the being who has substantially influenced philosophy, the Christian religions and universal history and the lives of millions of persons."<sup>304</sup>

In Scorsese's film, which is based on Nikos Kazantzakis's book (never banned in Chile), Christ's self-doubt and yearning for a fallible human existence reach a climax when he is dying on the cross. In a long sequence, the delirious Christ is saved by an angel and lives a parallel earthly existence married to Mary Magdalene. He is awoken from his seductive fantasy and finds himself once more on the cross. Christ dies after shouting with triumph at discovering that he had not, after all, betrayed his divinity.

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<sup>303</sup> Sentence, June 17, 1997, paras. 13,14. (Translation by Human Rights Watch.)

<sup>304</sup> Sentence, para. 7.

The Appeals Court decision merits further discussion since it reveals a mode of thinking inconsistent with the value placed on freedom of opinion and pluralism in a secular democracy. In essence, the verdict was a theological disquisition on the nobility and divinity of Christ, backed by meticulous quotations from encyclopedias and religious historians. It reads like the pronouncement of an ecclesiastical tribunal rather than a court representing a culturally diverse nation of mixed beliefs and faiths, in which church and state have been separated since 1925. The judges evaded their responsibility to reconcile the rival claims of freedom of expression and the principle of honor by establishing, on legal argument, where their limits lay in the case before them. After citing sources selected to support their point of view that the film was offensive to the “true” Christ, the court claimed that “respect and protection of honor takes precedence, furthermore, over freedom to emit opinions and inform.” This claim, unsupported by any argument, is incompatible with the principles of human rights law, as already noted in regard to the Martorell case.

In the judges’ closing comments they argued that

protection of the necessity of information or expression bears a close relation to the truth of the events and for this reason *the historical deformation of an event or a person ceases to be information. For this reason, the court believes that the right to emit an opinion is the right to describe a reality but never to deform it making it appear as something else.* [Emphasis added.]<sup>305</sup>

By disallowing the use of free speech to present an alternative view to an accepted historical reality, the verdict is contrary to the essence of freedom of expression in a democratic society, which upholds the right to make such

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<sup>305</sup> *Last Temptation of Christ* judgment. Seventh Chamber of the Santiago Appeals Court, para. 18.

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challenges without fear of censorship.<sup>306</sup> As the European Court of Human Rights established in 1979:

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<sup>306</sup> José Zalaquett, "La Última Tentación Judicial," *La Segunda*, January 28, 1997.

Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10 [of the European Convention on Human Rights] it is applicable not only to "information" or "ideas" that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broad-mindedness without which there is no democratic society.<sup>307</sup>

By accepting that the film offended the honor of Christ, the judgment opened the door to the prohibition of any work critical of the orthodox view of figures who are worshiped or widely venerated.<sup>308</sup> As one commentator asked:

Christ's character as a "person" has been resolved historically and theologically, but to extend this into the legal arena is audacious to say the least. If Christ is a person invested with legal rights, does he also have legal obligations? What is his civil status, his nationality or his patrimony? Is he domiciled at Ahumada 312, as the petitioners maintain?<sup>309</sup>

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<sup>307</sup> European Court of Human Rights, *Handyside* judgment of December 7, 1976, Series A, No. 24, para. 49.

<sup>308</sup> Zalaquett, "La Última Tentación...", *La Segunda*.

<sup>309</sup> Christ's domicile was given in the petition as an address on the Paseo Ahumada, in downtown Santiago. Lucas Sierra Iribarren, "Razonamiento Judicial," *El Mercurio*, January 26, 1997. (Translation by Human Rights Watch.)

Nor could the judgment establish that the honor of the petitioners was affected, since the film obviously made no reference to them, nor indeed could it be read as an attack on the Christian faith or on Christians generally. Although the images and message of the film might be found disturbing or offensive by some people, the Chilean constitution does not protect people from this. To do so would transgress its own principles of pluralism which do not allow the suppression of divergent opinion. The court did not attempt to establish any objective basis for finding that the petitioners' grievance at the contents of the films amounted to an attack on their honor.

The Appeals Court held that there was no prior censorship in granting the protection writ, citing an anachronistic and misleading definition of prior censorship as "any preventive procedure that forms part of a state policy, applied beforehand by vigilant administrative officials in authoritarian governments."<sup>310</sup> Here the court merely reproduced the same erroneous ruling used two years earlier in the Martorell case, making no reference to the findings of the Inter-American Commission on Human Rights on that case.

The *Last Temptation* verdict has two other disturbing implications. First, it constitutes another judicial precedent — following that of the Martorell case — for the improper use of a protection writ to obtain the limitation of a human right guaranteed in the constitution. The admission of repeated writs of this kind is an invitation to anyone who feels his or her reputation is endangered by a publication to apply to a court to have it restrained.<sup>311</sup> By asserting that the CCC has no authority to reassess films banned by its appeals panel, the judgment prolongs indefinitely the prohibition of films under norms that violated international rules when they were in force and which are now plainly unconstitutional. This makes the case for new legislation on the regulation of cinema overwhelming, since until the laws are changed, and even if the CCC

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<sup>310</sup> Last Temptation of Christ Judgment. Seventh Chamber of the Santiago Appeals Court, para. 14.

<sup>311</sup> An example was a protection writ applied for by descendants of a nineteenth-century senator and government minister, Claudio Vicuña Guerrero, against the producer of the 1998 Chilean film *Gringuito*. The film included a dance sequence in the Vicuña family's mausoleum in Santiago's General Cemetery, which the family found offensive to its honor. The writ was unanimously rejected by the Santiago Appeals Court, but an appeal is currently before the Supreme Court. G. Núñez, "Apelan en caso Gringuito," *La Tercera*, August 8, 1998.



desists from further prohibitions, those it formally decreed are irreversible, placing the state in permanent violation of its treaty obligations not to permit prior censorship.

In May 1998, the Inter-American Commission of Human Rights declared admissible a complaint lodged against the Chilean state by six lawyers representing the Association of Lawyers for Public Liberties (Asociación de Abogados por las Libertades Públicas), a Chilean civil liberties group. The complaint held that the judicial ban on the screening of *The Last Temptation of Christ* made the state responsible for violating freedom of expression guarantees in Article 13 of the American Convention.

### **Proposals for Reform**

Despite what appears to be an increasing consensus for the abolition of prior censorship, an amendment to Article 19(12) of the constitution tabled by the government in the Chamber of Deputies in April 1997 has not progressed, and at the time of writing (August 1998) Congress has still to vote on the issue. The reform proposed is simple: to replace the word "censorship" with "classification" and remove the word "publicity" from the last clause of Article 19(12). The effect would be limit the CCC's role to the classification of films and abolish controls over film advertising.

While the political spectrum supporting the change embraces opinions ranging from the left-of-center PPD through to the liberal wing of the RN,<sup>312</sup> and

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<sup>312</sup> Renovación Nacional's political commission pronounced itself in favor of the constitutional reform in May 1997. "RN aprobó poner fin a censura cinematográfica," *El Mercurio*, May 29, 1997

the press appears united behind it,<sup>313</sup> the majorities required by law for a constitutional reform are not assured. Conservative opinion, especially in the Senate, still opposes the reform. Sen. Sergio Diez of RN has compared films with narcotics: "Everyone agrees that drugs must be combated. Certain types of spectacle are equivalent to a kind of moral drug against good customs. That is why the State is obliged to take measures."<sup>314</sup>

Apart from the constitutional reform, Congress has still not acted on a bill to reform the composition and functions of the CCC, introduced by the Alwyin government in January 1992. The bill, drafted by the Education Ministry, is essentially a updated version of the 1974 law and retains prior censorship. Its main purpose is to eliminate the political veto of films, to allow classifications to be modified by a review panel, and to replace the category of "rejected" by "objected" films, which also may be reconsidered by the appeals panel. It increases the technical representation of the council, cuts representation of the armed forces from four to two members, and makes it a requirement for all of the council's decisions to be well-founded. "Objected" films fall into three categories: pornographic, excessively violent, and those that are offensive to a social, religious or ethnic group. These films may not be put on public

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<sup>313</sup>*El Mercurio* was categorical in an editorial supporting the government proposal: "The inclusion of cinematographic censorship in the same constitutional statute which prevents prior censorship in general constitutes a vestige of state paternalism which is inconsistent with the spirit of the constitution. If the constitution's drafters made an exception to this rule regarding cinematographic matter, their apprehension was motivated by the desire to adopt precautions against the totalitarian ideological propaganda which characterized the Cold War." "Censura Cinematográfica," *El Mercurio*, February 14, 1997.

<sup>314</sup>Carmen María Vergara, "Senador Diez se opone a reforma constitucional del Ejecutivo que suprime la censura," *La Segunda*, February 5, 1997.

exhibition. On prior censorship, therefore, the older bill has been superseded by the January 1997 initiative, although its other proposals will be taken into account when Congress eventually establishes new mechanisms to regulate the cinema.

## VI. THE REGULATION OF TELEVISION

### **Chilean Television: From Dictatorship to Democracy**

Direct censorship of television programs is not permitted in Chilean law. Television is regulated by a watchdog commission, the National Television Council (Consejo Nacional de Televisión, CNTV) which exerts control by means of a system of penalties imposed on stations that violate television programming laws. Regulation is imposed on programming at all hours, there being no scheduling slot which allows the transmission of unregulated material. Unlike the film classification council (CCC), the CNTV is a democratically structured body, representative of the range of political opinion represented in Congress, and all its decisions are public. What is more, the CNTV is explicitly mandated to safeguard pluralism, understood as ethnic, cultural, religious and gender pluralism, not just ideological diversity.

The main concern about the CNTV's regulatory role relates to the extent to which the application of programming restrictions may lead to self-censorship and whether it is consistent with the pluralism that current television legislation upholds. Two aspects of the system are especially troubling. First, the CNTV is obliged to enforce bans on the transmission of films rejected by the CCC and to penalize stations that transmit outside family hours films classified by the CCC for over-eighteens. Second, it enforces norms relating to moral values which are ill-defined and exceed the boundaries accepted in international law for restrictions of free expression. International law accepts public morals as grounds for restriction of pornography and the depiction of violence. But there is an important difference between the protection of public morals and the inhibition of moral or ethical discussion or of material that challenges orthodox moral perspectives. The danger of confusing the two could be clearly seen in a penalty imposed on the satire program *Plan Z*, discussed below, which mocked national stereotypes.

From its experimental beginnings in the universities during the late 1950s, television broadcasting was conceived by Chile's elites as a public service, with a strongly educational and integrative function. During the last decade, this model has given way to an entirely market-based one, in which even the state channel has been forced to compete, without privileges or subsidy, for audience ratings. The fierce competition for audiences has centered on well-tried formulas, such as popular soap operas (*teleseries*), magazine programs

featuring national and international stars, reality shows, and comedy.<sup>315</sup> Paradoxically, despite the emergence during the 1990s of three new private channels, the available fare is remarkably uniform. The two most widely viewed channels, the state channel TVN and the Catholic University Television (UCTV), screen rival soap operas to capture pre-teen viewers during the early evening, placed strategically to hook audiences for the main 9:00 p.m. news broadcast.

Opinion surveys suggest that the main criticism of the content of television comes less from the general public than from traditional elites who watch it comparatively little but at the same time fear that it has a corrosive effect on conduct and morals. Such fears have coexisted with television since its birth and have given rise to an elaborate system of public controls. The two elements, consumer preference and regulatory controls, maintain a precarious balance under the current legal regime regulating the medium.

Chile's first television law, Law No. 17,377 of October 1970, was promulgated by the Frei Montalva government. Law 17,377 contemplated three university television channels — the University of Chile, the Catholic University and the Catholic University of Valparaiso — and a state channel, Televisión Nacional de Chile (TVN), the only one allowed to transmit across the entire nation. TVN was established as a public corporation linked to the state through the Ministry of Education. Apart from its educational goals, the objectives the law defined for television could be described as integrative:

to spread knowledge of the basic problems of the nation and to procure the participation of all Chileans in the great initiatives undertaken to resolve them; to affirm national values, cultural and moral values, dignity and respect for the rights of the person and of the family, to promote education and the development of culture...to inform objectively...and to provide

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<sup>315</sup> Rivalry among the *teleseries* is a prime topic in the cultural sections of the newspapers.

healthy entertainment, safeguarding the spiritual and intellectual development of children and young people.<sup>316</sup>

The law reflected a broad political consensus against private television, which it was felt would lead inevitably to a lowering of moral and intellectual standards. Instead, a system of mixed finance was created, based in part on advertising revenues, in part on state subsidy. The “state-university” model created in 1970 lasted until the final year of the military regime. During the 1970s and 1980s, however, mounting operating costs forced the university channels to depend increasingly on advertising income; in 1977 the military government abolished the tax from which state funds had been derived. A new law, No. 18,838 of September 1989, opened the market for the first time to private operators, a further step away from the initial public model.

The eminently public role envisaged at the outset for Chilean television entailed a regulatory mechanism to ensure that the public interest was safeguarded in its day-to-day operations. For this purpose the 1970 law established a watchdog body, the National Television Council. The CNTV was to “safeguard the correct functioning” of the medium, with powers to fix programming and advertising standards but without powers to intervene directly or previously in programming decisions.

The CNTV has reflected the political outlook of successive governments. Its composition and powers have been modified three times — twice under the military government (in 1974 and 1989) and once since the return to democracy, by the Aylwin government in 1992.

The foundational values of Chilean television laid down in 1970 included a commitment to ideological pluralism as well as to “the free pluralistic expression of critical awareness and creative thought.” The composition of the CNTV ensured a substantial degree of autonomy from the government. Headed by the education minister, it included one presidential nominee, six members elected by Congress, two representatives of the Supreme Court, the rectors of the three universities with television channels, the president of TVN, and a TVN worker representative.

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<sup>316</sup> Cited in Flavio Cortéz, “Modernización y Concentración...” p.594.

Under the military government, the pluralism-autonomy model was transformed into its diametrical opposite. The 1974 amendments to Law 17,377 broadened the powers of the CNTV and left their definition to the council itself, whose role was redefined as one of moral supervision. In 1980 the CNTV approved a detailed list of “norms for the classification of suitability of programs,” that *inter alia*, prohibited nudity or “licentious reference to nudity,” required dress to be “within the limits of decency,” the movements of dancers to be “decorous,” and strait jacketed the portrayal of “the passions and sex.”<sup>317</sup> Political realities after the coup brought the CNTV under effective government control. No longer with any elected members since the dissolution of Congress in 1973, the presence on the council of the university rectors and the president of TVN (all of them now appointees of the military junta) meant that the two judicial appointees were the only counterbalance to executive power.<sup>318</sup> The council’s mandate to “safeguard the correct functioning of television” was written into the 1980 constitution, leaving the crucial definition of “correct functioning” to later legislation. In the event, the 1974 norms remained in force for a full fifteen years, transforming the CNTV into a body representative of political and moral views associated closely with the military government.

The 1989 television law, one of the last legislative acts of the military government, defined “correct functioning” as “the *constant affirmation*, through programming, of the dignity of persons and of the family, and of moral, cultural, national, and educational values, especially the spiritual and intellectual formation of children and young people.” [Emphasis added.] By doing so, the law narrowed the council’s functions to what was, in essence, one of moral protection — the 1970 law, as noted above, had sought also to safeguard pluralism, a critical spirit and the right to be informed, all an essential part of the original conception of television as a public service. The 1989 law also reshuffled the composition of the CNTV to make sure that the military had a

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<sup>317</sup> “It must be based on the institution of marriage and the home. No film must infer that casual or promiscuous sexual relations are an acceptable or common thing.” Cited in Brunner and Catalán, *Televisión*, p. 56.

<sup>318</sup> Chile’s universities were intervened after the coup and their rectors replaced by “rector-delegates” appointed by the junta. The Supreme Court retained its formal independence throughout the Pinochet era but became ardent in its support for the military coup and failed, with tragic consequences, to oppose human rights violations in the years that followed. See International Commission of Jurists, *Chile, a Time of Reckoning*, pp. 73-89.

voice after an elected government came to power. The council was reduced to seven members, two of them appointed by the commanders-in-chief of the armed forces and Carabineros and one a former member of the Supreme Court, ensuring a powerful conservative voice in the council's deliberations.<sup>319</sup>

Among the council's functions was to "dictate general norms to prevent the transmission" of pornography and excessive violence and to impose penalties on stations transgressing the norms of "correct functioning," ranging from admonitions and fines to the cancellation of operating licences. The law attributed a quasi-judicial role to the council, allowing offending stations to appeal against a penalty, in which case the council had a fifteen-day period to reconsider the evidence. There was a final right of appeal to the Santiago Appeals Court, although penalties were enforced while the hearing was in progress.

#### **The CNTV in Democracy: New Values and Old**

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<sup>319</sup>The other four members included one appointed freely by the president, one appointed by the president subject to the approval of the Senate, and two appointed by the university rectors.



With the advent of a democratic government, the composition of the CNTV changed and its functions were redefined again. In the preamble to the Aylwin administration's television law,<sup>320</sup> society is stated to "be obliged to exercise special care in regard to the use made of television" because of its almost universal outreach and suggestive power. At the same time, control was to be exercised within a pluralistic democratic framework.<sup>321</sup> To the list of conservative values in the 1989 law some were added to reflect the moral preoccupations of the center and the left. Thus, to "the moral and cultural values proper of the Nation, the dignity of persons, the protection of the family," and the "spiritual and intellectual formation of children and young people within said moral framework" were added "pluralism, democracy, peace, and the protection of the environment." "Correct functioning" was redefined to mean "permanent respect for" rather than "constant affirmation of" these values, entailing an obligation not to transgress them, rather than a duty, as before, to propagate them. Furthermore, "pluralism" was expressly intended to include ethnic, cultural, religious, and gender diversity as well as ideological pluralism.<sup>322</sup>

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<sup>320</sup> Law No. 19,131 of April 8, 1992.

<sup>321</sup> "It is the purpose of the present bill to assure the development of Chilean television within a framework of democracy, pluralism, freedom, respect for the human person and promotion of the great national values."

<sup>322</sup> According to Secretary General of Government Jose Joaquín Brunner, who was the new CNTV's first president, the Senate committee that revised the bill established cultural pluralism "within the value, ethical, moral and cultural framework indicated" as a central objective of the council. Brunner interpreted this concept to imply a built-in self-limitation

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in the sense that ensuring respect for basic moral values did not mean repressing the expression of alternative points of view, lifestyles, etc. Brunner and Catalán, *Televisión*, p. 67.

Apart from safeguarding correct functioning under Article 1, the council was required under Article 12 to adopt and enforce norms to prevent morbid violence (*truculencia*), pornography, and the “portrayal of children or adolescents in immoral or obscene acts.” Each of these four concepts was defined by the council in its “General Norms on Content of Television Broadcasts”<sup>2</sup> published in the *Official Gazette* on August 20, 1993.

Article 13 requires the council to take measures to avoid the transmission of films that have not been classified by the Council of Cinematographic Classification (CCC), usually because they were not intended for general release. The CNTV may also sanction any television company that transmits a film the CCC has banned, and it may establish a time-slot for the transmission of films classified by the CCC for over-eighteens, penalizing stations that transmit such films at other hours. Such films may not be transmitted between 6:00 a.m. and 10:00 p.m., during which time advertising of tobacco and alcohol is also prohibited.

In short, the CNTV may penalize television stations for fourteen types of infractions under articles 1, 12, and 13 of the amended 1989 law. These include eight infractions under Article 1 on “correct functioning,” namely programs offending: the moral and cultural values of the nation, the dignity of persons, protection of the family, pluralism, democracy, peace, protection of the environment, and the spiritual and intellectual development of children and young people. In addition there are four infractions under Article 12, consisting of excessive violence, morbidity, pornography, and the participation of children and adolescents in immoral or obscene acts. Finally, Article 13 refers solely to films classified by the CCC. It penalizes the transmission of banned films at any hour, and those classified for over-eighteens before 10:00 p.m.

The 1992 law retained the system of penalties established under the earlier law but expanded the powers of the council by allowing members of the public to denounce television companies for infractions. At the same time it strengthened due process guarantees by allowing television stations a period in which to prepare and present a defense after the council had formulated a charge against them. If the council accepted the defense, the station could be cleared of any infraction.

The CNTV was enlarged in 1992 to eleven members and its composition broadened. It now included one councillor appointed freely by the president and ten appointed by the president with the consent of the Senate, all of whom must be “persons of relevant personal and professional merit,” such as academicians, holders of a national prize, university professors, school directors, former parliamentarians, judges or military or police officers. The removal of

the armed forces and judicial nominees made the commission more democratic. The CNTV's composition is dependent on political negotiation in the Senate, where the conservative opposition has held a majority since 1990, due in large part to the presence of the appointed senators. In addition, there is no longer any representative of the medium itself on the council.

At present, the council includes members of the Christian Democrats, the Radical Party, the Socialist Party, and the PPD, as well as representatives of RN and UDI. The balance is approximately even between the government and the opposition parties. The CNTV president, Pilar Armanet, is a member of the PPD. Political pluralism, rather than any direct representation of civil associations or non-governmental groups, is intended to ensure that the council reflects the cultural diversity of Chilean society. Essentially, the council could be considered to reflect the diversity of viewpoints in the cultural elite represented in parliament.

The council reaches all its decisions by a majority vote. Under the previous president of the council, José Joaquín Brunner, decisions had been reached by consensus, a method considered by Armanet to be inconsistent with the principle of political representation, as well as unworkable due to the unbreachable divergence of opinion that often emerged in its discussions. The council's secretariat monitors open television round the clock and cable television by monthly samples, sending excerpts from programs that might constitute infractions to the councillors for their review and comments, which are then discussed and voted at the council's next meeting.<sup>323</sup> a research department, established by Brunner, carries out periodic studies of the development of the

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<sup>323</sup> Human Rights Watch interview with Pilar Armanet, president of the National Television Council, May 27, 1998.

medium and of audience behavior and evaluation. These have included surveys to find out what kind of programming regulation the population wants and how the regulatory role of the CNTV is assessed.<sup>324</sup>

### **The Conflictive Issue of Cable Regulation**

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<sup>324</sup> See, for example, Consejo Nacional de Televisión, División de Estudios Supervisión y Fomento, *Principales Resultados Encuesta Nacional de Televisión, 1996*. According to this study, 51.8 percent of the sample were either against any form of regulation in open television at all or against any regulation in a time-slot reserved for adults. Forty-eight percent said there should be a regulated adult time-slot or stricter controls on content and scheduling. While there is a clear consensus for control over the scheduling of “adult” programs, therefore, a slight majority would prefer a more liberal system than the present one.

Since September 1995, the CNTV has also monitored signals generated outside Chilean borders applying the same regulatory norms to these as to Chilean cable television companies.<sup>325</sup> In May 1996, Metr polis Intercom became the first cable company to be penalized by the CNTV, receiving an official warning for transmitting on the Cinemax channel *Las Chicas de la Barra*, a film judged pornographic by the council; in November it was fined for showing *Tres Formas de Amar* and *Max Mon Amour* for the same reason. The Santiago Appeals Court rejected a protection writ lodged by four congressmen against the CNTV in which they had argued that the council's monitoring of cable was an arbitrary and unconstitutional interference in the right to enter into a commercial contract and their right to information. The Appeals Court, later upheld by the Supreme Court, rejected the appeal, arguing that regulation of cable was prescribed in the 1992 law which allows the CNTV to regulate "restricted services of television" and that it was legitimate for the state to limit

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<sup>325</sup> Chile is no exception to the explosive growth of cable in the region during the 1990s. By 1996, 598,903 homes were cable subscribers, but due to the high number of pirate connections the real number of families with cable access was estimated at 755,000 (23 percent of households). Cable transmissions almost tripled between 1994 and 1996 (from 454,714 to 1,204,865 annual hours, whereas free-access television increased only slightly (22,000 to 49,000 hours). More than 200 operating concessions had been granted by 1994 (involving seventy-five companies), although the market then underwent an equally rapid process of concentration. Currently the market is shared by the two giants, Metr polis Intercom and VTR Cablexpress. Figures from Flavio Cortez, "Modernizaci n y Concentraci n," pp. 598-599.

freedom of contract since all contracts were subject to the constitution and the laws.<sup>326</sup> Opinion surveys conducted by CNTV during the same year showed that 47 percent of the population were opposed to any form of state control over cable.<sup>327</sup>

#### **Legitimacy of the CNTV's Role**

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<sup>326</sup> "Cornejo: El fallo legítima la censura de la TV cable," *La Epoca*, October 12, 1996.

<sup>327</sup> Consejo Nacional de Televisión, *Encuesta 1996*, p. 67.

In a literal sense, the CNTV has no mandate to interfere in programming decisions, to preview programs or suppress items before transmission; it may only apply penalties after the event. Current norms, however, do entail prior censorship in one important area. By penalizing the transmission of films previously banned from public exhibition by the CCC, the 1992 law extends to television, including cable, the effects of prior censorship of the cinema.<sup>328</sup>

Unlike the regulation of violence and pornography which are defined in the law, the eight values enumerated in Article 1 that television is obliged to respect are undefined, and there are no legal guidelines to specify what infractions are. "The moral and cultural values of the nation" is an eminently vague and inclusive category, as are "protection of the family" and "the dignity of persons." Restrictions based on these concepts exceed the restraints on freedom of expression allowed in the American Convention on Human Rights to protect public health and morals. Their extensiveness is inconsistent with the principle that any restraint on freedom of expression must be clearly drawn and tailored strictly to the protection of a defined and legitimate right or social imperative. Current television norms do not clearly specify the conduct constituting an infraction, thus contravening a basic principle of due process. In addition, they encourage self-censorship, since in the absence of such criteria stations may act with excessive caution to avoid penalties. Finally, if their effect is to suppress minority perspectives, they lead to an impoverishment of the public debate.

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<sup>328</sup> Referring to the banned film *The Last Temptation of Christ*, Jorge Nararrete, in his new post of executive director of VTR Cablexpress, said, "*The Last Temptation of Christ* is a film we can't transmit. And if there are other films we cannot transmit it is because we must comply with the law. Our decision is not the product of an editorial line." "Navarrete: debemos cumplir la ley," *La Epoca*, August 30, 1996.



In fact, the actual effect of the application of Article 1 has been less punitive than the law permits, which we believe reflects awareness on the part of the council, or some of its members, of the need for a margin of tolerance. In the four and a half years from October 1993 to April 1998 the council has imposed 118 penalties, only fifteen of them under Article 1. Seventeen other charges under this article have been dropped after hearing the station's defense.<sup>329</sup> According to its president, the council has increasingly adopted a principle of proportionality, avoiding penalties unless the infraction is evident and severe.<sup>330</sup> The sparing use of Article 1 is an indication of an the council's awareness that its use threatens the guarantees of pluralism the council is mandated to respect. The council has frequently split when called on to vote in Article 1 cases.

These splits seem to be another reflection of the competition of views within the political elite over permissiveness. According to one view, society must be protected against "offensive" expressions, and weak controls are a sign of moral laxity (*libertinaje*). Another view, still a minority one among opinion-leaders, holds that offense to conventional orthodoxies must be tolerated, and that the mature citizen should be entitled to make up his or her own mind about what they read or view. In a typical discussion, the council voted after a long debate not to charge Megavisión for a sketch in its popular humor program *Jappening con J*, which pictured the president and his wife in their home in banal, everyday circumstances. Both conservatives and Christian Democrats on the council felt this was a harmful lampoon because it mocked the "ordinariness" of the president, and that it set a troublesome precedent in the portrayal of his

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<sup>329</sup> Consejo Nacional de Televisión: "Formulación de Cargos, Absoluciones y Sanciones 23 de Julio de 1992 a 11 de Mayo de 1998," unpublished. The CNTV documents each of its decisions and makes this information public.

<sup>330</sup> Human Rights Watch interview with Pilar Armanet, May 27, 1998.

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office. In the end the liberals won the argument, and none of the council members voted for the charge.<sup>331</sup>

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<sup>331</sup>Ibid.

Sex and humor are two areas that have been particularly vulnerable to penalties under Article 1. In October 1994, Megavisión's humor program *Chileans All (Chilenos Todos)*, starring one of Chile's most popular comedians, Coco Legrand, was issued a warning for showing scenes "contrary to the moral and cultural values of the nation and the dignity of persons." The station was later absolved of the charge. Chilevisión's *Let's Talk about Sex (Hablemos de Sexo)* was penalized in May 1995 for a discussion of oral sex that was considered to affect "the spiritual and intellectual development of youth." The same channel's chat program *Scruples (Escrúpulos)* was reprimanded in October 1995 for infringing the "moral and cultural values of the nation." *Special Report's* October 1995 feature on lesbianism was charged for an infraction of the norm protecting the family. Following complaints from the president of Chile's Olympic Games Committee, Sergio Santander, La Red's program *Bonvallet en la Red* was charged in August 1996 with "offending the dignity of persons." Eduardo Bonvallet, a sports commentator notorious for his abrasive criticism of sports personalities, had offended Santander by referring to him as "Don Sata" (Mr. Satan). The charge was later dropped. Bonvallet was, however, sued for libel by Santander and others and in April 1996 was arrested and spent five days in Capuchinos prison.<sup>332</sup>

### **Crossing the line: *Plan Z***

The most controversial decision of the council was a penalty imposed in April 1997 on Rock and Pop's humor series *Plan Z* for a sketch based on the suicide of Allende. *Plan Z* was also charged for infractions in other sketches but absolved in the midst of strong press criticism at the charges. Produced by a group of journalists in their twenties, *Plan Z* deliberately broke with conventional television genres by using an informal potpourri of styles, including hand-held 8-millimeter sequences and zany camera movements, to debunk national myths, prejudices, and stereotypes. When a predecessor, *Faked Goods (Gato por Liebre)*,<sup>333</sup> aired in 1996 it was a novel element in Chilean television and soon developed a cult following. The producers, Rock and Pop television,

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<sup>332</sup> "CNTV formula cargos a La Red por Bonvallet," *La Epoca*, September 10, 1996; and "Consejo de TV absolvió a La Red," *La Epoca*, October 8, 1996.

<sup>333</sup> "Gato por liebre" literally means "cat for hare"; it refers to something mediocre dressed up to look like something special.

described *Plan Z* as not only aimed at myths but also at conventional television manners and style.<sup>334</sup>

*Plan Z* was first charged by the CNTV for three sequences in its January 14 edition, involving the Bible, the Chilean national flag and anthem, and Barbie dolls made to appear like Mapuche Indians.<sup>335</sup> Stating its grounds for the charges, the council recognized the right to make “incisive, mordant, and ironic” (*incisiva, mordaz e irónica*) criticism, but this was not to be confused with “facetious, merely offensive, and denigrating exploitation of the dignity of persons and respect for institutions of special significance and value in the national culture. Neither the Bible, nor national symbols like the flag may be subjected to an abusive use of this style on a screen of public television.”

The council decision continued:

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<sup>334</sup> Mónica Maureira, “Conductores de ‘Gato por Liebre’: ‘Queremos ser más inteligentes,’” *La Epoca*, October 30, 1996.

<sup>335</sup>The Mapuches are Chile’s largest indigenous group.

These infractions have been committed by wrongly presenting the Bible as a story of conflicts between Nazis<sup>336</sup> and Jews, protagonized by Jesus and the Jewish patriarchs, and by treating the national flag in ridiculous situations. Finally, by using dolls which are children's toys and presenting them as objects of sexual deviations or in mockery of a national ethnic group is contrary to the dignity of persons and of values in the formation of children.<sup>337</sup>

In its defense, the station explained that the Bible sketch was a satire on superficial and badly informed literary critics. It had been aimed at "the custom of certain television literary critics of popularizing a work at the expense of gross oversimplifications" and had formed part of a series which had begun with Don Quixote and Romeo and Juliet. The flag and national anthem sketch — which involved a contest to choose the most beautiful — had not been aimed at the symbols of the nation but at a streak of chauvinism in the national character. The Barbies were chosen as a cultural icon because of the values, conducts, and attitudes they represented to the program-makers. "Adding negative values to a well-known and familiar product is an obvious way of exposing latent streaks of racism in a Chile that prejudices and relegates members of a race to inferior jobs" the station argued, denying that the Barbies had been represented as "the object of sexual deviations."<sup>338</sup> By a narrow margin, the CNTV voted to withdraw the charges.

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<sup>336</sup> The "Nazis" were the Romans.

<sup>337</sup> Consejo Nacional de Televisión, Formulación de cargo a Radio Cooperativa Televisión por la exhibición del programa "Plan Zeta," el día 14 de enero de 1997.

<sup>338</sup> "Honorable Consejo Nacional de Televisión," Defense of Luis Ajenjo Isasai, Executive Director of Radio Cooperativa Televisión S.A., April 1, 1997.

Even greater offense was caused by the comedy group's satire on popular myths about the circumstances of the military coup. By portraying Allende in the stereotyped guise of a drunk and a crook, the program, according to its makers, sought to expose typical elements of anticommunist mythology, such that Allende was an alcoholic and a scoundrel who robbed the country, that the military took power amid universal clamor, and that human rights excesses were committed in self-defense.<sup>339</sup> The CNTV, however, considered the depiction of Allende to have "offended the dignity of persons." The council again split down the middle. A minority of five accepted the station's defense that the sketch had not been a straight lampoon of the former president but rather a satire of his portrayal in right-wing "pseudo-history."

The case was reminiscent of the scandal that erupted in Chile in August 1994 at the reproduction in *La Epoca* of a satirical portrait of Simón Bolívar, Latin American liberator and patriarch, by avant-garde artist Juan Dávila. The *caudillo* was pictured as a person of undefined sex, with breasts exposed beneath his tunic, making an obscene gesture at the onlooker. This flagrant violation of the aristocratic image of the liberator motivated angry protests from the Venezuelan, Colombian and Ecuadoran embassies, and Chilean flags were burned in Caracas by nationalist demonstrators. The Chilean government called the publication of the work a "lamentable incident," and simultaneously apologized for and disowned Davila's work, which had been part of project financed by FONDART, the state fund for support of the arts. The principled argument advanced by defenders of the work was that art could not be subjected to, moral orthodoxies or political control of any sort.<sup>340</sup>

There are dangers of applying a regulatory process to any form of expression for the values it supposedly expresses. In the first place, it rests on the questionable assumption that there is general agreement about what the injured value is. Secondly, it implies that there can be an objective interpretation

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<sup>339</sup>Ibid.

<sup>340</sup>"Conflicto por retrato de Bolívar," *La Epoca*, August 17, 1994; Sebastian Brett, "¿El libertador liberado?" *La Epoca*, August 19, 1994.

of a cultural product or a work of art (clearly Plan Z's makers had a radically different interpretation of the Allende sketch than the CNTV councillors who ruled it offensive). Apart from the element of subjectivity in any such judgments, criticism of values or the advocacy of other values is a permissible use of freedom of expression.

Public morals are in flux everywhere, and Chile is no exception. The Human Rights Committee has recognized that "public morals vary widely, that there is no universally applicable standard and that consequently a certain margin of discretion must be allowed to the responsible national authorities."<sup>341</sup> In the case under its consideration, which involved the censorship by the Finnish Broadcasting Company of a program about homosexuality, the committee ruled that the restriction was within the margin of discretion and could not be judged in violation of Article 19 of the International Covenant. The key question here is not about the legitimacy of this margin of discretion, but how wide it should be and whether the restrictions imposed in each case are "necessary" to protect public morals. One of the Human Rights Committee's members, Mr. Opsahl, expressed an individual opinion, which should be highlighted:

In my view, the conception and contents of "public morals" referred to in Article 19 (3) are relative and changing. State-imposed restrictions on freedom of expression must allow for this fact and should not be applied so as to perpetuate prejudice or promote intolerance. It is of special importance to protect minority views, including those that offend, shock or disturb the majority.<sup>342</sup>

There is a distinction between the encouragement of immoral conduct, which may be a legitimate ground for restrictions, and the expression of dissident views or the breaking of taboos on moral issues. There is no provision in international law justifying restriction of the right to criticize or question a *value* or to favor a competing value. In the words of former Secretary General of Government José Joaquín Brunner, the purpose of restrictions is to preserve a "limit or threshold which is set by the 'moral consensus' and which, in this area

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<sup>341</sup> U.N. Human Rights Committee, *Hertzberg et al. v. Finland*, Views adopted on 2 April 1982.

<sup>342</sup> *Ibid.*

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of communication, society wishes to protect and which may not be infringed by television."<sup>343</sup> Moral consensus, in our opinion, is not a comparable notion to public morals. It is essentially not a question of conduct, but of conformity to a dominant or majority mode of thought.<sup>344</sup>

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<sup>343</sup>Brunner and Catalán, *Televisión: Libertad, Mercado y Moral*, p.79.

<sup>344</sup> The issue of abortion, for example, has been virtually excluded from public debate in Chile, even though Chile has one of the highest rates of abortion in Latin America, according to a recent estimate. Abortion is illegal under any circumstances, even when to save the mother's life, and carries prison sentences both for the mother and the abortionist. Conservative senators are currently pressing legislation to toughen the law. Clifford Krauss, "Abortion debated in Chile, where it's always a crime," *New York Times*, August 9, 1998. Suppression of the topic from public debate has not diminished the number of abortions, and the lack of discussion of the topic on television contributes to the marginalization and stigmatization of many women.



Restrictions and penalties imposed in defense of a moral consensus are suspect to advocates of free expression. There may or may not be a consensus in society on moral issues, although in a plural society there normally are many divergent perspectives. Measures that enforce a consensus by restricting the expression of divergent ideas, it could even be argued, are inconsistent with the very idea of consensus: agreement, if it exists at all, must emerge freely out of a confrontation of points of view. As UN Human Rights Committee member Opsahl pointed out, such restrictions may also perpetuate prejudice and intolerance towards minority groups whose beliefs are different. A distinguished scholar in this field has stressed the dynamic role of confrontation of ideas in the development of knowledge. "If one starts with an absolute conception of the truth that holds that the truth has been given at some point in the past, then one's job as its custodian is to make sure that it is in no way tainted."<sup>345</sup> He distinguishes this concept of custodianship from a dynamic concept of truth, according to which advances in ideas often take the form of a what seems at the time a heretical or eccentric departure from normality. It is a truism that many of the ideas and values now taken for granted were once advocated by isolated individuals or groups against an overwhelming consensus of scientific or ethical thought. Freedom of expression is about the right of every citizen, not just writers, artists or scientists, to say what they think from their own perspective, experience and beliefs, even when what they have to say may seem preposterously wrong, offensive or shocking to others.

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<sup>345</sup>W.M.Reisman, "Freedom of Speech as a Matter Fundamental to all Human Rights. Why and What for?" in Manfred Wichmann (ed.), *Freedom of Expression and Human Rights Protection*, (Brussels: Friedrich-Naumann-Stiftung, 1998), p.81. Reisman is Wesley N.Hohfeld Professor of Jurisprudence at Yale Law School.

It is difficult to see in practice any way of harmonizing enforcement of respect for consensual values with the requirement of genuine pluralism of the kind the CNTV advocates. The senate commission that debated the television law decided not to give the CNTV powers to lay down more precise norms for the definition of the values in Article 1. The government had intended to do so, to avoid the possibility of the article being interpreted too liberally or too conservatively, but the senate disagreed. Most likely an effort to define infractions has been avoided because there is little consensus on what they are. It is troubling that television is required to abide by standards that have been left for definition entirely to the council's decisions, with no prior public debate. One likely effect of the lack of definition of the norms is extensive self-censorship, passed down the line from station directors to editors and program-makers. This was pointed out by the makers of *Plan Z*, who complained of a "climate of self-censorship, characterized by fear of transgressing something undefined, which is not known, which may change without apparent reason, whose limits are imprecise and which presents itself suddenly and threateningly."<sup>346</sup>

### **Regulation of violence and pornography**

Chilean norms on the depiction of violence and sex are stringent in both print and visual media. Since October 1993, sixty-six of the 118 penalties imposed were for infractions under Article 12, involving excessive violence, the exploitation of suffering, pornography or the depiction of children in immoral or obscene acts. Violence and pornography, and particularly the exposure of children to them, appear to be concerns widely shared in the population: 87.5 percent of the CNTV sample agreed that they should be subject to some form of regulation. At present these restrictions are applied in open television and cable throughout their programming. There are no hours reserved for unsupervised viewing. The present system aims to prevent the transmission of violence and sex through self-censorship by the stations, minimizing freedom of choice and the role of parental control. In fact, films transmitted both on open and cable television are frequently cut, sometimes by bleeping obscenities from the soundtrack. Scenes with scantily dressed models and violent games were reportedly cut from the Chilean version of *The Great Game of Oca* (*El Gran Juego de Oca*), a Spanish contest show transmitted by Catholic University's Channel 13 in 1996. The same channel's *Top Secret*, a series based on the

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<sup>346</sup> "Honorable Consejo Nacional de Televisión," Relexión sobre censura previa, correcto funcionamiento y autocensura.

Brazilian *I Promise*, was reportedly provided with a different ending considered more suitable for Chilean audiences; in the original Brazilian version the hero finally abandoned his wife and went off with his mistress.<sup>347</sup>

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<sup>347</sup> Axel Pickett, Matías Carvajal and Fernanda Perelló, "El disfraz de la censura en Chile," in *Cosas*, February 28, 1995.

It is not easy to say whether such self-censorship is a result of the dissuasive effect of CNTV's penalties or whether it arises from the editorial policy of station directors and owners; most likely both factors come into play. 13's popular series *Adrenaline (Adrenalina)*, an attempt to challenge TVN's domination of the popular drama series, provides an interesting example of editorial self-regulation. In order to gain points on TVN, whose series *Sucupira* had featured numerous girls in bikinis, the Catholic station's producers loosened its normal strict codes on dress and nudity. After elation at the initial rating success of the series, top station managers began to object to glimpses of the black lacy underwear of the program's teenage stars, and the ebullience of its principal characters. Instructions were issued for skirts to be lengthened, cleavages to be covered, kisses to be shortened and de-eroticized, and a fistfight in a discotheque to be cut as too violent. According to *El Mercurio*, Santiago Archbishop Carlos Oviedo had protested about *Adrenaline* to a high-ranking station official, and on the following day the station's drama director was unceremoniously fired.<sup>348</sup>

### **The protection of minors**

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<sup>348</sup> "Triunfar sin transar, Adrenalina: Las Bondades de la Maldad," *El Mercurio*, September 8, 1996.

Of the 339 charges formulated by the CNTV since October 1993, almost half (157) have been for the transmission during family hours of films classified by the Council for Cinematographic Classification as for over-eighteens. Most of these have been lodged against cable companies that have failed or been unable to adjust transmitting schedules to ensure that the CCC's classifications are respected. In the great majority of these cases (124) the cable companies have been excused of any infraction. There is profound unhappiness in the CNTV at its obligation to enforce Article 13, because most of the classifications, which are unreviewable, were made by the CCC in previous years on the basis of standards that now appear absurdly restrictive and unworkable.<sup>349</sup>

To cite a few cases, the CNTV is obliged to protect Chilean minors from exposure to *Gone With the Wind*, *Jailhouse Rock*, *Accident*, *Husbands and Wives*, *Rambo 2*, *Bugsy*, *Gumshoe*, *Pat Garret and Billy the Kid*, and *The Witches of Eastwick*. Even classics like *Rebel Without a Cause*, *Casablanca*, *The Seven Samurai*, or *1900* can be screened only after 10:00 p.m., although any of these titles are freely available for rental on video. Council members have found different ways of sidestepping the bind of having to enforce a norm they find patently absurd. Some vote for the charge while signaling their disagreement with the classification; others abstain for the same reason; while others consistently vote against any charge. The high acquittal-penalty ratio clearly reflects the strength of this discreet opposition — and the urgent need for reform.

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<sup>349</sup> Replying to an interviewer, Gonzalo Figueroa, the Radical Party member of the CNTV, said, "What I mean is that I am not going to impose a penalty on criteria that are not my own. And the CCC's criteria are not mine. That is why I have abstained from voting in the sessions I have participated in. I want to know what it is I am sanctioning. I think that the CCC is pretty obsolete and retrograde in its classifications." Gonzalo Figueroa, "Los del cable se ponen más papistas que el Papa," *La Epoca*, September 8, 1996. The CNTV's president, Pilar Armanet, has also publicly criticized the norm and described it to Human Rights Watch as "our big drama." Human Rights Watch interview, May 27, 1998.

**“Holier than the Pope?” Self-censorship in cable**

Chilean cable companies must meet not only the explicit requirements for films classified as eighteen-plus; cable companies must also contend with the indefinable values protected in Article 1. In 1996 the word “*largometraje*” (full length film) — usually indicating a vacant slot after the cable company had removed a previously scheduled film from the schedule issued by the signal — appeared seventy-seven times in *Metrópolis Intercom*’s September catalogue. In the March 1998 issue, the word appeared 296 times, meaning that nearly ten programmed films a day had been altered.<sup>350</sup> An official of *Metrópolis Intercom* told Human Rights Watch that the films cut belong to one of three categories: those banned by the CCC, those classified by the CCC as for eighteen-year-olds and above and originally scheduled to be shown before 10:00 p.m.,<sup>351</sup> and films that have not been classified by the CCC but are considered by the operator to conflict with the criteria laid down by the CNTV for “correct functioning.”<sup>352</sup>

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<sup>350</sup>The programs for eight signals (HBO Olé, Cinecanal, Cinemax, Fox, TNT, Space, Entertainment USA and Isat), all providers of movie and popular series, were analyzed. *Revista Metrópolis Intercom*, March 1998. Due to repeats, the actual number of films affected is considerably less.

<sup>351</sup>In October, films in this category included *To Bed with Madonna*, *Acoso Sexual* (t), *Mortalmente Parecido* (t), *Rambo 2*, *Soldado Universal* (t), *Dangerous Liaisons*, *Arma Mortal* (t), *Stallido Mortal* (t).

How are cable companies to review and judge the scores of action titles programmed every week by eight or more signals, when transmission of a film like *Robocop 2* is penalized for excessive violence, cruelty and the participation of minors in immoral and indecent acts? The response appears to have been: if in doubt, cut it.

While the cable operators insist that they are only complying with the law, members of the CNTV accuse them of overzealous editorial control, i.e. self-censorship.<sup>353</sup> In fact, one of the two major cable operators, Metr polis Intercom, adheres to standards on sexual content that appear more prim than could be expected from mere adherence to the norms laid down by the CNTV.

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<sup>352</sup> Human Rights Watch telephone interview with Fernando Manns, deputy manager of production, Metr polis-Intercom, May 25, 1998.

<sup>353</sup> M nica Maureira, "Gonzalo Figueroa: 'Los del cable se ponen m s papista que el Papa,'" *La Epoca*, September 8, 1996.

In September 1995, Metrópolis and Intercom, then separate companies, replaced *American Undercover*, a series on HBO about underground sexual practices in the United States, with cartoons and a feature on swimsuits, announcing on-screen that the series did not comply with the 1992 law.<sup>354</sup> a re-transmission by HB. in December 1996 was also blocked.<sup>355</sup> In January 1998, the company censored América's program *Da 2* because of sexual content, on grounds that it infringed Law 19, 131 (VTR-Cablexpress, which transmitted the program, however, was not charged with any infraction).<sup>356</sup> In May, Metrópolis Intercom cut a report in its *America's Zoo* series on the porn film industry and later removed América's transmissions altogether from its offer, replacing them with a channel "appropriate to family audiences and more in accord with Metrópolis' line," according to a company official.<sup>357</sup> While the company blamed Chilean laws for the cuts, the secretary general of CNTV, Hernán Pozo, denied that the council had penalized the program and said that the cuts were the operator's responsibility alone.<sup>358</sup> Despite the pervasiveness of self-censorship in Chilean society, no one likes to own up to it.

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<sup>354</sup> Bárbara Partarrieu, "El sexo es un problema en Metrópolis Intercom," *La Tercera*, May 27, 1998.

<sup>355</sup> "Censura en TV Cable," *El Mercurio, Revista Wikén*, December 20, 1996.

<sup>356</sup> "Estamos en desacuerdo con censura de Metrópolis," *El Mercurio*, January 30, 1998.

<sup>357</sup> Bárbara Partarrieu, "El sexo es un problema."

<sup>358</sup> Bárbara Partarrieu, "El CNTV no ha dicho que ese canal transgrede la normas," *La Tercera*, May 29, 1998.





**APPENDIX:**  
**RELEVANT INTERNATIONAL NORMS AND RULINGS ON  
FREEDOM OF EXPRESSION**

**International Covenant on Civil and Political Rights,  
Article 19:**

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
  - (a) For respect of the rights or reputations of others;
  - (b) For the protection of national security or of public order (ordre public), or of public health or morals.

**American Convention on Human Rights (Pact of San José)  
Article 13:**

1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.
2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:
  - 1) respect for the rights or reputations of others; or

2) the protection of national security, public order, or public health or morals.

3. The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.

4. Notwithstanding the provisions of paragraph 2 above, public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence.

5. Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law.

**Article 29:**

No provision of this Convention shall be interpreted as:

1. permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein;

**Article 30:**

The restrictions that, pursuant to this Convention, may be placed on the enjoyment or exercise of the rights or freedoms recognized herein may not be applied except in accordance with laws enacted for reasons of general interest and in accordance with the purpose for which such restrictions have been established.

**Article 32:**

2. The rights of each person are limited by the rights of others, by the security of all, and by the just demands of the general welfare, in a democratic society.

**Inter-American Court of Human Rights**

**Advisory Opinion OC-5/85 of November 13, 1985: Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Articles 13 and 29 of the American Convention on Human Rights):**

Paragraph 39: "Abuse of freedom of information thus cannot be controlled by preventive measures but only through the subsequent imposition of sanctions on those who are guilty of the abuses. But even here, in order for the imposition of such liability to be valid under the Convention, the following requirements must be met:

- a) the existence of previously established grounds for liability;
- b) the express and precise definition of these grounds by law;
- c) the legitimacy of the ends sought to be achieved;
- d) a showing that these grounds of liability are "necessary to ensure" the aforementioned ends."

Paragraph 67 (extract): "[...] the Court wishes to emphasize that "public order" or "general welfare" may under no circumstances be invoked as a means of denying a right guaranteed by the Convention or to impair or deprive it of its true content. These concepts, when they are invoked as a ground for limiting human rights, must be subjected to an interpretation that is strictly limited to the "just demands" of "a democratic society," which takes account of the need to balance the competing interests involved and the need to preserve the object and purpose of the Convention."

Paragraph 69: "Freedom of expression constitutes the primary and basic element of the public order of a democratic society, which is not conceivable without free debate and the possibility that dissenting voices be heard."

Paragraph 85: "The compulsory licensing of journalists is incompatible with Article 13 of the American Convention on Human Rights if it denies any person

access to the full use of the news media as a means of expressing opinions or imparting information.”

### **Interamerican Commission of Human Rights**

#### **Annual Report 1994, 81st session, February 17, 1995. Chapter V: Report on the Compatibility of "Desacato" Laws with the American Convention on Human Rights:**

“...the Commission notes that the rationale behind desacato laws reverses the principle that a properly functioning democracy is indeed the greatest guarantee of public order. These laws pretend to preserve public order precisely by restricting a fundamental human right which is recognized internationally as a cornerstone upon which democratic society rests. Desacato laws, when applied, have a direct impact on the open and rigorous debate about public policy that Article 13 guarantees and which is essential to the existence of a democratic society. In this respect, invoking the concept of "public order" to justify desacato laws directly inverts the logic underlying the guarantee of freedom of expression and thought guaranteed in the Convention.”

“The Commission considers that the State's obligation to protect the rights of others is served by providing statutory protection against intentional infringement on honor and reputation through civil actions and by implementing laws that guarantee the right of reply. In this sense, the State guarantees protection of all individual's privacy without abusing its coercive powers to repress individual freedom to form opinions and express them.

In conclusion, the Commission finds that the State's use of its coercive powers to restrict speech lends itself to abuse as a means to silence unpopular ideas and opinions, thereby repressing the debate that is critical to the effective functioning of democratic institutions. Laws that criminalize speech which does not incite lawless violence are incompatible with freedom of expression and thought guaranteed in Article 13, and with the fundamental purpose of the American Convention of allowing and protecting the pluralistic, democratic way of life.”

