Chile

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Country Summary

On the path towards constitutional reform following unprecedented social unrest in 2019, Chile has passed three speech restrictive laws between 2020 and 2022: one establishing the prohibition of disclosing information related to debts incurred to finance education at any level, as well as health services and actions, in order to prevent them from being included in the registry of delinquent or unpaid commercial debt systems, possibly hindering access to such information as debts for public officials. One law punishes anyone who, without legal or regulatory authorization, enters, attempts to enter, or allows the entry of intercoms, telephones, phone chips, or other technological elements into a penitentiary facility that allow inmates to communicate with the outside world. One law amending the law on Cybercrimes criminalizes unauthorized access to computer systems without establishing clear public interest protections that encourage security researchers to inform vulnerabilities they detect. A draft bill introduced in the Chilean Senate in 2021, aimed at regulating digital platforms, is

raising concerns over flagging false information by the provider of the digital platform, and the obligation for platforms to remove or de-index content for lack of consent, which could limit or restrict the circulation of information of public interest, concerning officials or public figures, or candidates in the exercise of their functions, or that involves human rights violations.

Introduction

The period covered in this report was turbulent for Chile. In October 2019, an unprecedented social outbreak brought chaos and discontent to Santiago, in a protest wave that seemed to emerge from the profound malaise that has affected Chilean society, combined with deep and pervasive inequalities and a system that relied almost exclusively on free-market mechanisms to allocate basic goods and services, including housing, education, and health services. The protest cycle prompted Chile's Freedom House score to drop from 95/100 in 2015 to 90/100 in 2020[131] and ushered in two significant political changes. This went up to 93/100 in 2021[132]and 94/100 in 2022.[133] As a way of finding an institutional channel for the social discontent, major political parties agreed upon a path towards constitutional reform—including a plebiscite that widely supported changing a text that was seen, by many, as the source of the political gridlock in which many reform initiatives have found themselves in for years. Within the context of a Constitutional Convention under way, President Gabriel Boric was elected through a new coalition of left-of-center groupings that largely left behind the traditional parties that have controlled Chilean politics since the return to democracy in 1990.

I. Legislation

Laws 21.214 and 21.594

It is in this context that some of the laws identified can be better explained. On February 24, 2020, the Chilean Congress passed Law 21.214[134] and on November 4, it passed Law 21.504.[135] Both aim to limit disclosure of information related to debts incurred to finance education at any level, as well as health services and actions. This is to prevent these debts from being included in the registry of delinquent or unpaid commercial debt systems. Social unrest explains these laws: both health and educational services are highly dependent on market mechanisms that force lower-class and middle-class families to get into debt in order to access those vital services. The law serves a social function, but it may have a detrimental effect on freedom of expression, for it blocks access to information that may be—under certain conditions—in the public interest to be public. Debts by public officials, for instance, may be relevant for public debate in the context of an electoral campaign.

[131] https://freedomhouse.org/country/chile/freedom-world/2020
[132] https://freedomhouse.org/country/chile/freedom-world/2021
[133] https://freedomhouse.org/country/chile/freedom-world/2022
[134] https://www.bcn.cl/leychile/navegar?idNorma=1142880
[135] https://www.bcn.cl/leychile/navegar?idNorma=1184083

Law 21.494

A law that more clearly restricts freedom of expression is Law 21.494,[136] passed on November 4, 2022. The law creates Article 304 bis of the Criminal Code, that establishes the penalty of imprisonment, from its minimum to medium degree, for anyone who, without legal or regulatory authorization, enters, attempts to enter, or allows the entry of intercoms, telephones, parts thereof, phone chips, or other technological elements into a penitentiary facility that allow inmates to communicate with the outside world. The new article proposes an aggravating circumstance. If the conduct referred to in the previous paragraph is committed by a lawyer, prosecutor, or public employee, the penalty will not apply in its minimum degree and will entail, in addition, suspension in its minimum degree or temporary absolute disqualification in any of its degrees for the exercise of the profession or office, respectively.

The law is excessively restrictive and hardly passes the Inter-American Court three-pronged test to scrutinize restrictions on freedom of expression. While established by law and pursuing a legitimate state interest—presumably, limiting the possibility of inmates to conduct criminal activities from prison by, for example, exercising power through a criminal network outside the prison—the law does not seem "necessary in a democratic society". Every person deprived of liberty is equal before the law and is entitled to equal protection by the law. The execution of a criminal sentence should not go beyond the scope of the imposed penalty, and therefore, prisoners, in principle, retain all other rights from which they have not been expressly deprived,[137] which includes the human rights and fundamental freedoms enshrined in international human rights instruments, except for limitations that are clearly necessary due to imprisonment.

While common, a blatant prohibition such as the one established in Law No. 21.494 does not seem to be the kind of "narrow" restriction demanded by the three-prong test. Even if there is a clear and compelling necessity to impose the limitation due to security issues, there is an obligation to ensure the use of the less restrictive means available. When faced with various possible measures, the one that imposes the least restriction on the protected right should be chosen,[138] aiming to ensure the exercise of the right to freedom of expression. The measures taken must also be strictly proportional[139] to the legitimate purpose pursued. In today's society, the use of mobile phones is a substantial part of the way in which information is shared and received. Hence, prohibiting imprisoned people from having access to cellphones and any other means to communicate with the outside world, imposing harsh penalties to those who

[136] https://www.bcn.cl/leychile/navegar?idNorma=1184364
[137] https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-treatment-prisoners
[138] http://www.oas.org/es/cidh/expresion/docs/cd/sistema_interamericano_de_derechos_humanos/index_MJIAS.html
[139] http://www.oas.org/es/cidh/expresion/docs/cd/sistema_interamericano_de_derechos_humanos/index_MJIAS.html

enter them into penitentiary facilities without legal or regulatory authorization, fails to provide a proportionate legislative solution.

Law 21.459

Another law that is problematic is Law 21.459[140] enacted on June 9, 2022. The law updated Chilean law on cyber-crimes, aligning it with the requirements of the Budapest Convention, of which Chile is a party. It criminalizes the following acts as cyber-crimes: attacks against the integrity of a computer system, unauthorized accesses, unlawful interceptions, attacks against the integrity of computer data, computer forgery, receipts of computer data, computer fraud, and misuse of devices. Penalties for these offenses, according to their severity, can be either imprisonment or fines.

Regarding the offense of unauthorized access, Article 2 establishes that anyone who, without authorization or exceeding their authorization and bypassing technical barriers or technological security measures, accesses a computer system shall be punished with a penalty of minor imprisonment or a fine of eleven to twenty monthly tax units. If the access is carried out with the intention of appropriating or using the information contained in the computer system, the penalty of minor imprisonment to medium imprisonment shall apply. The same penalty shall apply to anyone who discloses the information that was accessed unlawfully if it was not obtained by them. If the same person obtained and disclosed the information, the penalty of medium imprisonment to maximum imprisonment shall apply.

These laws do not include a public interest exception that would safeguard the work of coders and other professionals who work on the cyber-security business. Indeed, ethical hackers who venture into other peoples' systems in order to find vulnerabilities should be encouraged and protected, not punished. As the Electronic Frontiers Foundation has argued,[141] coders who engage in security research are exercising the freedom of expression—writing code is, after all, writing. Laws such as this one, whose purpose is to protect the integrity of computer systems, should eliminate uncertainty by establishing clear public interest protections that encourage security researchers to inform vulnerabilities they detect. Without clear legal protection, a security researcher may be hesitant to report bugs or other weaknesses in computer systems. Because of this absence, the law defeats the interest it is supposed to pursue. The law discourages the development of certain tools that could be useful for security research—for it could be considered that these tools aid those willing to break into other people's computer systems. As the Electronic Frontiers Foundation has put it, "security tools that could crack a system are also vital for testing computer and network security (with authorization from the target but simulating an attack without authorization) in order to detect security flaws often called penetration testing or 'pen testing.' Thus, the creation, possession,

[140] https://www.bcn.cl/leychile/navegar?idNorma=1177743
[141] https://www.eff.org/wp/protecting-security-researchers-rights-americas

or distribution of security tools should not be criminalized, because such programs are not inherently bad. Rather, they can be used for both good and bad purposes. However, the prohibition on communicating or selling computers or computer programs with the intent of allowing the access is sufficiently ambiguous to undermine legitimate activities needed for independent security research, academic study, and other good-faith activities that ultimately make the public safer."[142]

Draft bill to regulate social media

Finally, a draft bill[143] introduced in the Chilean Senate in 2021 shows a regional trend of drafting bills aimed at regulating digital platforms. The proposed bill would do many things: it would protect freedom of expression (somewhat redundantly), it would establish the principle of network neutrality, and would provide certain guarantees to intermediaries for the content produced by third parties. It would also regulate "fake news" and the so-called "right to be forgotten." Four issues appear as especially problematic from the standpoint of Inter-American human rights standards.

First, while the inclusion of obligations to treat data traffic fairly and without discrimination is valuable, the obligation of neutrality imposed by the article, referring to the obligation not to impose any 'restriction' or 'interference' on content, is inadequate. Digital platforms are precisely characterized by managing content, engaging in its indexing, organization, and provision. While it is necessary to establish criteria for content moderation to prevent arbitrary interference, the intervention in content traffic carried out by major digital platforms is acceptable, if it complies with the principles of international law regarding freedom of expression and the consistent and coherent application of rules, without discriminating on illegitimate and private grounds.

Second, Article 6 establishes that manifestly false information may be clarified or rectified by the provider of the digital platform by attaching notes to the questioned content. While the authority to provide more context itself poses little risk from the perspective of freedom of expression, it could be problematic,[144] if such labeling had effects on how information circulates; for example, if the content recommendation algorithm negatively considers those labels. It is worth mentioning that companies have shaped their moderation policies as a result of their own economic interests and external pressures.

Third, Article 7 establishes the right to rectification and the right to be forgotten. The project recognizes that every digital consumer has the right to have content published through digital platforms rectified if they undermine their image, personal and family privacy on the Internet.

[142] https://www.eff.org/wp/protecting-security-researchers-rights-americas
[143]https://www.senado.cl/appsenado/index.php?mo=tramitacion&ac=getDocto&iddocto=15047&tipodoc=mensaje_mocion
[144] http://www.oas.org/es/cidh/expresion/docs/publicaciones/internet_2016_esp.pdf

They also have the right to request, with proper justification, the inclusion of an update notice alongside news that concerns them when the information contained therein does not reflect their current situation, causing harm to them. The bill is somewhat consistent with cases decided by the Supreme Court in 2019[145] and 2021,[146] where the Supreme Court considered and rejected a broad construction of the "right to be forgotten" but accepted that updating information that became inaccurate because of the passing of time is a sound remedy.

According to the proposed legislation, platforms must remove or de-index content posted by another user (including from media accounts and journalists), without grounds or prior due process, because it "circulates without their consent," based solely on their request, "by indicating so." This provision is particularly problematic as it does not make distinctions regarding the type of content or the individuals requesting its removal. While the protection of personal data is a legitimate goal, it should never be invoked to limit or restrict[147] the circulation of information of public interest, concerning officials or public figures, or candidates in the exercise of their functions, or that involves human rights violations. The creation of the right to rectification and erasure, as outlined in the project under consideration, constitutes a disproportionate and incompatible measure with international standards.

II. Non-Legislative Developments

From 2015 to 2022 there were no major non-legislative developments concerning freedom of expression.

III. Enforcement

No relevant case law.

Conclusion

Chile ranks well[148] in indexes that measure, among other things, freedom of expression. In the Freedom House score, Chile scored 95 in 2015 and 94 in 2022 (even though it dropped to 90 after the social unrest of 2019). It has also been a pioneer in Latin America in issues such as freedom of information[149] and net neutrality.[150] However, problems remain. The laws that have been discussed in the report are common in many Latin American countries, but problematic, nevertheless. On the other hand, the bill on platform regulation would incorporate into Chile's

[145] https://globalfreedomofexpression.columbia.edu/cases/surgeon-v-court-of-appeals-of-santiago/
[146] https://globalfreedomofexpression.columbia.edu/cases/maureira-alvarez-v-google/
[147]https://www.palermo.edu/Archivos_content/2021/cele/papers/Desinformacion-y-acciones-de-plataformas-2021.pdf
[148] https://freedomhouse.org/country/chile
[149] https://www.bcn.cl/leychile/navegar?idNorma=276363
[150] https://www.bcn.cl/leychile/navegar?idNorma=1016570

legal landscape proposals that are being made elsewhere and that are deeply problematic from a freedom of expression standpoint.