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Privacy in the Chilean legal system

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Privacy in the Chilean legal system

Policy paper

ONG Derechos Digitales

Executive summary

The present report constitutes the result of an examination of the legal regulations currently valid in Chile and linked to a set of interests related, namely: private life, intimacy, and the inviolability of private communications and the protection of personal data.

From a conceptual point of view, these interests can be gathered, for the purpose of our study, inside the most generic concept, and largely absent from the Chilean legislation, of “privacy”, albeit making present, that the differences that exist between this concept and the “right to privacy of common law, as it will be expressed further on.

Incidentally, the outlines of its elements, aside from being a little inconsistent in the doctrine, the legislation and jurisprudence, have yet to overcome the difficulty of the mutation of their meaning, as a consequence of the changes in social practices and technological media about communication and the storage of each person’s information.

The constitutional protection over the interests linked to privacy is found in the article 19, N°4 and N°5 of the Constitution, regarding the right to “respect and the protection of private life” and the “inviolability of the home and every way of private communication.” There is no explicit constitutional protection, situation that Chile shares with only one other country in Latin-American, (El Salvador), notwithstanding the jurisprudence has offered shelter via the action of protection. Likewise, there are criminal legislations to the protection of private life and the inviolability of the communications, and there is a special personal data protection law.

The Law N° 19.628 of personal data in general regulates the protection of the information concerning natural persons which are considered owners of data. As a counterpart regulates the responsible for the register and bank data, the natural or legal person whom the decisions related to the treatment of personal data are concerned, and who responds in front of the data owner. The main mission of the law is the regulation of the treatment of personal data. In favor of the owners, rights of access or information (about which data are maintained,

what are they used for, and whom is responsible), modification or rectification of data, cancellation or elimination, and opposition or blocking, are established. The law materializes in its articulation principles such as the purpose and quality of the information, and establishes a general rule of express consent of an owner for the treatment of their data, nevertheless, establishes a series of exceptions that allow this treatment. In Chile, a public authority of personal data treatment control does not exist, nor do criminal penalties for serious infringements of the law. The law is today object to various legal reform initiatives.

The report dedicates various chapters to the review of regulations that, in a disintegrated manner in the Chilean legal system, address the protection of the private life as much as the private communications and personal data.

The administration of justice constitutes one of the instances of interaction between the individual and the State in which the delivery of information becomes more relevant, in order for the judge to resolve a conflict. The legislation in Chile grants the principle of disclosure of the acts of the administration of justice as a general standard. Exceptionally, cases are considered in which the information has a private nature; for example, when criminally prosecuting the disclosure of trial secrets by a public employee, or the secret in those procedures of family justice when the privacy of any of the parts may be affected. With more detail, the Code of Civil Proceedings establishes the principle of oral trial and public as a general rule, and the necessity of turn to the Judge of Guarantee for the adoption of measures or the realization of procedures of investigation that affect the fundamental guarantees, including private life and the inviolability of the communications. In this latter case, special requirements are established for the telephonic monitoring by organizations of investigation. Similar rules, but with a greater level of discretion in front of the public and with more specialized organizations, exist with regards to the investigation by state intelligence organizations.

Other areas of action of the State where compromised interests linked to privacy exist are mediated by a general principle of administrative transparency, contemplated in the Constitution. So, as an exception to the public transparency, the 20.285 law contemplates causals of confidential information, which include the national security and the people's rights, among others. This has caused contradictory court rulings in the subject of public employee's e-mails. Also linked to the administration, it's the case of public registers administrated by the State. Particularly, in the electoral rolls prior to each periodic election, that according to the electoral law must be made public via web.

As far as the functioning of the telecommunications, the operators in Chile are private and ruled by the 18.168 law. Alongside the general guarantee of inviola-

bility of the private communications, and the obligation to preserve the users' privacy, the interception or malicious and/or serious gathering of any kind of signal broadcasted through a public service, is punished, as is its distribution. On the other hand, there is a mandate for retention of data on internet suppliers that obligates to save information of connection and IP numbers for as far as a year to facilitate an eventual criminal investigation. It is relevant to mention this point of the Regulation on Interception and Recording of Telephonic Communications and other Forms of Telecommunications, of the year 2005 that establishes general guidelines on interception of telecommunications, intended to safeguard the privacy, and at the same time facilitate the job of the police in the criminal investigation.

Other areas where regulations and jurisprudence exist in a disperse manner appear in relation to the conflicts of surveillance in the workplace, by the regulation of professional secrets, by the management of people's health data, and the management of people's data by the commercial transportation companies

From the findings and the analysis of the legislation and the jurisprudence, concludes the report that Chile doesn't only stands out by the poor protection given by the 19.628 law on personal data, that's been object to strong criticism for a long time, but that that law constitutes an isolated element in the middle of a generally defenseless system regarding areas from private life and personal data itself. This, in that a normative dispersion exists that obeys to different principles and standards of protection. The level of dispersion gets stronger in light of the case-law analysis of various organizations that have decided in diverse directions on similar subjects that involve as much as data as private communications. In this scenario, the report concludes in the necessity to set not only specific protection rules according to the highest standards, but even the need to review the constitutional foundations that guide the dictation of legislation that in some way achieves the core of the interests that we understand as constitutive to the right of privacy.

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Introduction

The free development of personality seems to demand the absence of external influences. Its content and its outlines have had a significant evolution, in a parallel manner to the advance of the technologies and ways of communication.

It isn't easy, nonetheless, to see a close relation between the evolution of the possible ways of encumbrance and the legally adopted clearances to avoid them. The causes are multiple: the overwhelming progress of communication and services technologies, the complexities of the legislative processes, the search for uniformity through international regulations, the attempts of covering the commerce's needs and the pressure of the related industries, among others. In other words, ways of possible encumbrance of the private life are born faster than mechanisms to stop them, beyond the recognition of merely declarative rights.

In the next pages, we will try to see how the Chilean legislation deals with a group of situations related to the private life. In a first part, we will briefly explain the state of the doctrine in relation to the recognition and the legal protection of privacy in Chile, and its relation with an area of law of increasing importance, which is the protection of data of a personal nature. Subsequently, we will review some frequent situations of management of privacy and personal information, in the area of the interaction between the individual and the State. After that, we will cursorily cover important areas of possible encumbrance of the intimacy in the relation between the individual and the society in general. Finally, we will try to outline some ideas as a way of conclusion.

It is not the purpose of this report to serve as an all-encompassing or in depth analysis; on the contrary our aim is to gather legal concerns from the perspective of the practice, adding to each thematic analysis the approach of problems and situations, real or hypothetical, where privacy could be affected beyond needed or acceptable in a State governed by the rule of law. Thus, we seek to generate certain information that gives place to a debate, in order to consolidate on an operational level a regulatory environment suitable to the safeguard of one the fundamental rights most frequently affected.

I. The protection of private life

I.I. Areas of protection of private life

I.I.I. General guidelines

Without getting into the vast existing literature about privacy, we recognize the existence of a legally protected interest to the no intromission in the private life, at a corporal, familiar and spatial level, and in the same way on information related to a person. The contours of such an interest have changed significantly through time.¹

In this strict way, there isn't in Chile a right to the "privacy" in its original conception as right to privacy,² however, various of its consequences are verifiable in the Chilean legislation, a concept, the latter, of Anglo-Saxon roots, that does not count with the constitutional range recognition, unlike what happens in our country that in addition contemplates the protection of the citizen not only in front of the state, but also in front of privates. Besides, the right to privacy enjoys a vast development on a court ruling level, that takes it to shelter under its wings a major amount of legal goods, that exceed those mentioned in the sub regulations 4 and 5 of the article 10 of the Constitution (private life, honor, inviolability of the home and every way of private communication), which, for the purposes of this study, will be reunited under the generic concept of "privacy", majorly absent in the Chilean legislation³ and that will be used from now on.

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1 We follow CERDA SILVA, Alberto on this point. "Autodeterminación informativa y leyes sobre protección de datos", Revista Chilena de Derecho Informático, Number 3 (2003)

2 After looking at the purpose of this work, and considering the existing conceptual differences, we will use the Anglicism "privacy" to refer to a same juridically relevant interest, as partially analogous to the right to the private life and inclusive with the right to the intimacy and the personal information. On the part of the doctrine, the differentiation seems to lack the juridical effects, according to the Chilean legislation; qv JIJENA LEIVE, Renato. Chile, la protección penal de la intimidad de la intimidad y el delito informático. Santiago, Editorial Jurídica de Chile, 1992, p.37.

3 It is possible to find the nomenclature of "privacy" in laws such as the law No. 19.970 that the National DNA Database System, the law No. 19.628, on family courts (since its modification for the law No. 20.286), the law No. 20.453 on the neutrality of the net, and the law No. 20.961 that the Administration of Securi-

At the end of the XIX century “right to privacy” (right to privacy) was defined as a right to be and remain alone,⁴ in opposition to submit to public scrutiny. It emerged as a way to confront the harassment by social communication media at the time to keep secrecy regarding that aspect of personal life that legitimately could be excluded of the interference of the press. This first concept of privacy was picked up and gradually developed over the following decades, especially in the United States.

Meanwhile, the idea of private life, gathered special interest starting from the development of informatics in the middle of the XX century. The potential of computing tools to recollect, process and analyze information, seemed to put at risk the private life of individuals, which motivated the demands for specific rules that would regulate the gathering and management of personal information. The technological advance revealed that it was not enough to understand the right of privacy as the right to exclude the meddling of others, but instead it became necessary to expand its protection, incorporating a positive dimension that would allow the title holder to control the personal information that pertained him/her.

In this way the conception of private information was expanded from a space free from outside intrusion, to one where the title holders of the information could take part in its control, actively; with the privacy, the figure of “confidential space” was no longer referred to outside third party-intrusions, but to the capacity of the data’s title holder to decide by himself the control of its fate. This aspiration for legal recognition for control over personal information gave place to the development of personal data and to the regulation of its treatment, separately and –mostly- independently from the concept of private life and the protection of private communications.

In short, the privacy is linked to a legal manifestation of the respect and protection that each person deserves, protecting the dignity and human freedom, by means of the recognition to its title holder of a power of control over that area where other people do not participate. Beyond the legal terminology, the wide contours of the concept of privacy are enough, operationally, to refer to

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ty and Health at work (in reference to the “privacy of the personal an sensitive data”). In them there isn’t an attempt to define, but it is assumed as an interest or a right worthy of protection in the context of the regulated matters in each of those normative organizations.

4 WARREN, Samuel and Louis BRANDEIS, “The right to privacy”, in Harvard Law Review, Vol. IV, number 5, 1890. Translation. “El derecho a la privacidad”, Ed. Civitas, Madrid, 1995, p.25.

those rights, legal and constitutional, related to that power of control: private life, the inviolability of the communications, and the protection of personal data. From among them, the interest with the most diffused contours form a dogmatic point of view is that of the private life.

I.1.2. Forms of privacy

It becomes apparent that the concept of privacy isn't unequivocal, but rather responds to a diffuse phenomenon with diverse dimensions or meanings. It is also clear that it is a terminology that is not easy to assimilate to the regulatory Chilean context, where private life, personal data and inviolability of the communications have enough conceptual differentiation and regulation.

With merely practical purposes, we will utilize a classification that distinguishes between different human activities related to the fundamental interest in privacy:

- Corporal privacy, that aims to the physical protection of the people in front of invasive procedures, such as blood tests. From the point of view of their infringement, it is related to the intimacy and the physical integrity.
- Territorial privacy, that refers to a determination of limits to the intrusion of the spaces or domestic facilities and others such as the labor center or, even, the public space. In this context, the new technologies have a great impact through the register mediums, that due to the level of miniaturization, connectivity and ubiquity existent, are capable of interfere inside the people's private sphere, considering their household, their conducts in public spaces and in their working space, without filters and limits. It is related to the private life and to the inviolability of the home and the private communications.
- Communicational privacy, which refers to the security and privacy of the mail (physical and electronic), the phone, and other forms of private communication. Internet serves as a support for numerous forms and means of communication, that operate in real time (voice conference systems, video, chat, text, VNC, etc.), as much as asynchronously (forums, e-mail, etc.). These platforms are sensible to interception, which makes it essential the creation of legal and judicial controls to that intervention by public agents, and of rules that block those who have access to this data to use it, give them away in an inappropriate manner, or abuse their technical capacity to the detriment of the people whom that information concerns.
- Privacy of the information, also known as the "protection of personal data" and developed in some latitudes within a legal guarantee of informative auto-determination (over public data as much as over

sensitive information). Its relation comes given by the susceptibility of encumbrance of other interests (such as equality, liberty and intimacy) by means of infringement of the regulations over the processing of personal data. Currently, a great part of the circulating information, is stored and processed within the community, and especially on the internet, by being related to certain people, has the quality of personal data. Any website or service that stores, processes, indexes or broadcasts data handles personal data; and it becomes convenient to analyze if such behaviors do or do not impact the fundamental rights of the title holders of said information, and to what extent.

1.1.3. Private life as an object of legal protection⁵

Private life as a concept, is relevant to determine the area of protection as long as the systematized requirements by the doctrine are fulfilled,⁶ namely:

- a. The extraction from the public area of certain behaviors or manifestations of a person, by his will, by law or by habit.
- b. That an imminent and known damage exists, produced by divulgation, once the characteristics of the person in particular, are attended.

Private life, as an object of protection, is constituted as such by those “phenomenon, behaviors, data and situations of a person that are normally absent from strangers’ knowledge and when known could upset him or her by affecting their shyness and modesty, unless said person agrees to that knowledge,⁷ establishing as fundamental elements for the constitution of the definition the unknown nature of the incidents, the individual’s embarrassment in the event of said incidents getting known by strangers, and the relevance of the choice and consent of the individual.

A less abstract concept of privacy, from the perspective of the individual autho-

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5 The correlation and relation to the normative debate will be developed in the paragraph 2 on regulation of the privacy

6 In this regard: NOVOA MONREAL, Eduardo, *Derecho a la vida privada y libertad de información: Un conflicto de derechos*, Santiago, 21st century, 1979; CORRAL TALCIANI, Hernán. “Configuración jurídica del derecho a la privacidad II: Concept and delimitation”. In: *Revista Chilena de Derecho*, vol. 27, (2000) No. 2, pp: 331-355

7 NOVOA MONREAL, work quoted.

rized to make its protection and shelter required, defines it as the “prerogative of the individual to remove from every strange interference to a circle of subjects, incidents or behaviors that he or she doesn’t want to be known by a third party unless the title holder of the right allows so.”⁸

Moreover, a definition based on the human dignity of the actual individual and its relations has been proposed, in addition of considering the simple interference and knowledge of confidential personal facts, or in a wider sense, the spreading of the contents to a third part, enough for the violation of privacy. This conception considers the exclusion of the area of implementation of privacy relevant, without prejudice of its inclusion in the eventual injury to other legal interests, the utilization or distortion of someone else’s appearance or when the adoption of certain personal decisions is regulated or legally prevented, conceptualizing in that way the privacy, as a legal interest, as “the position of a person (or a personal collective entity) by virtue of which it is found free of interference and cognitive broadcastings of data that belongs to their corporal and psychological personal subjects or the relationships it maintains or has maintained with others, by external agents that, above the reasonable media valuation, are external to the content and purpose of said personal subjects and relationships.”⁹

1.1.4. The violation of private life

From a legal relevance point of view, the privacy is understood as violated, and the protective legislation of this guarantee is made applicable, once the following assumptions are fulfilled:¹⁰

- a. A set of legal relations whose subjects are the title holder or owners of the information and third-parties unconnected to it.
- b. The information has the characteristic of secret or confidential belonging to the title holder.
- c. The mere acknowledgment or disclosure of the information by a third-party.
- d. Absence of consent from the title holder of the information for its

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8 BANDA VERGARA, Alfonso. “Doctrina, estudios, notas y comentarios de la vida privada e intimidación en la sociedad tecnológica actual y futura”. *Gaceta Jurídica* No. 246. Santiago, Chile. December 2000.

9 CORRAL TALCIANI, work quoted.

10 We will use the term “information” in a broad sense, that is to say, it includes the title holders of the documents and the private communications.

extraction from the private area.

- e. Damage produced by the interference and/or divulgation of the information.

a. A set of legal relations whose subjects are the title holders or owners of the information and third-parties unconnected to it

The participant subjects in the area of the information that has a private nature can be classified into two groups.

The first of the relevant subjects in the relation, corresponds to the title holder of the information. On this point, some authors¹¹ distinguish two scenarios: the first one, the information that has an exclusive title holder, but developed within the context of family life or intimate relations, which protects it all within that guarantee. A second scenario, is the actual intimacy, that belongs to the “personality’s core”, that is to say, the most personal area of the title holder. Consequently, this first subject is defined as that person whom the secret information belongs to, either because he created it or because he knows it as a result of his everyday activities.

The subject described is not necessarily limited to a person, but includes the family and intimate circle of a person. This does not require having a full knowledge of all the private aspects of the title holder, but that in certain circumstances, such as those that happen inside the home, may be excluded from being part of the category of “third-party strangers.”¹²

The second group of participants in the private communications incorporates the third-party strangers to the information. They are sub classified as follows: those third-parties that have consolidated the interference, be it by accessing the content or disclosing what has been object of registration; and those third-parties with knowledge of the facts, whether by circumstances previously agreed on or fortuitous. This third-party is necessarily different from the title holder, and is characterized for lacking the faculty of accessing the information in question; that is to say, any person that is not the title holder, nor a part of their family or intimate circle on some circumstances and certain relations, that takes notice or discloses the information obtained.

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11 DESANTES, José María. “El derecho fundamental a la intimidad”. “El derecho a la intimidad y a la vida privada y los medios de comunicación social” Seminar, August 28th, 1991. Santiago, Chile, Public Studies Centre.

12 The article #146 of the Chilean Penal Code is explanatory, it excludes the criminal responsibilities from the spouses in the violation of personal correspondence.

To define the area of implementation of the private information, it is necessary to conceptually specify the public and the private in its wider sense. Thus, the public is defined as the group of aspects of a person which knowledge and disposition by a third-party does not require special authorization by the title holder, while the private supposes the exclusion of certain subjects belonging the family or intimate spheres, demarcated by the title holder of the information or the law, constitutionally and through special laws.

b. Private information belonging to the title holder

In law there isn't a listing of what has the character of private information, being conceptualized in ample terms like all those circumstances in a person's life that have been excluded from the public's knowledge and scrutiny by their own will or by law's determination.

Even without an emphatic characterization, there are regulations whose purpose is the protection of the person's intimate life. Situation in which we find three great groups in which the sectorial regulations are subsumed: the inviolability of the home, the inviolability of the private communications, and the protection of personal data.

It should be noted that aside from these categories, information that without having the character of confidential or secret, exists, and benefits from the same protection. This point will be developed later.

c. The simple acknowledgement or disclosure of the information by the third-party

The right to privacy is an object of infringement by a third-party stranger to the information from the moment in which he has accessed and acknowledged the private information in a premeditated or casual manner.¹³ It is relevant to

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13 In this regard, there are doctrinal and jurisprudential opinions converging, mainly for its implementation in the criminal proceedings, where the casual or unavoidable discovery constitutes the "conviction that the result, the evidence, could have been obtained had it been worked rightfully. Which allows the exception of the rule of exclusion. The limits are the prohibition of intentional acts, shortcuts, which tend to anticipate the obtaining of evidence, using the strategy of acting by the fastest and safest ways, even illegal, intentionally rejecting the use of legal and orthodox channels; and in second place the line of investigative acting prior to the transgressions of rights transforming into the starting point of the investigative labor, investing in the foundation of the clause of exception". San Miguel's Court of Appeals. "Ministerio Público con Contreras Gatica Nelson Abeliño". Role: 334-2013. 04/02/2013.

point out that the area of implementation of the responsibility to who simply acknowledges a fact is going to be necessarily related to the use he or she makes of said information. Thus, even though the acknowledgement can be characterized as a violation of intimacy, it is going to present more serious legal consequences depending on the use given to the information obtained, being relevant to these effects the disclosure of the information.

The disclosure is understood as every communication of the information obtained in an unlawful manner, because of having a confidential character, which is shared by a third-party to other people outside the ownership of the information, whether maliciously or not. Considered in an autonomous way, it constitutes an aggravating circumstance on the level of penalties specified for the violation of privacy.

The penal code determines a differentiation of the penalties in some of their regulations. For example, in the article 146, in the context of the “Crimes and simple misdemeanors that affect the rights guaranteed by the Constitution”, where it differentiates for the interference in the correspondence or another’s documents without their will, the mere opening or register of disclosure, punishing the first with a minor reclusion at its minimum grade (restriction or deprivation of liberty, the duration varies from 61 up to 540 days); and the second, with minor reclusion at its medium grade (from 541 days up to 3 years)

d. Absence of consent from the title holder of the information for their extraction from the private area

Part of the doctrine and the constitutional jurisprudence¹⁴ situates the consent

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14 The constitutional jurisprudence has pronounced relating the requirement of inapplicability for unconstitutionality with regard to second subparagraph of the 5th article of the Law of Transparency of the Public Service and of Access to the Information of the State Administration. The management in which the present requirement influences consists in the cause regarding the unlawfulness described as “General Assistant Secretary to the Presidency with Council for the Transparency”, before the Santiago’s Court of Appeals, under the Role No 2496.2012. Considering 14 final part: “If the protected is the communication while it’s developing its guarantee is perfected until the very same time in which it concludes. Thus, for example, what’s communicated between two persons completely satisfies the exercise of the inviolability of the communications, but if one of them expresses its content to a third party the new fundamental right violated has to be verified. If it spreads an intensely personal secret, the right to the respect to the private life, or if what was spread is a creation or a technological innovation, it could be the article #19 No. 25 of the Constitution the one deemed violated. Therefore, it is key to identify a new right that is opened from

of the capable person, either express or tacit, at a prominent place in the protection of the title holder's right to intimacy, conceptualizing it as a faculty of ascertainment of the data that is wished to be maintained private and those considered belonging to a public sphere.¹⁵ Nevertheless, this principle is not absolute, since it requires as copulative background the unknown nature of the facts and moral discomfiture to the subject that produces the extraction from the private area, with exceptions, such as the situations or events occurred inside the home, even if they do not have a private nature and do not produce damage, attaching their protection to the inviolability of the home.

e. Damage produced by the interference and/or disclosure of the information.

The interference to the life of a person is crystallized at the moment of accessing the communication, and the damage when as a consequence of the revelation of said information to others, a prejudice or damage to the title holder. This will be valued in attention to the nature of the communication, to the proper characteristics of the person, the specific situation and the correlative damage to these elements.

The characterization of the damage in civil matters¹⁶ it's based in the injury of a legitimate interest, not necessarily expressed by law, and that it produces a significant prejudice, beyond the simple inconveniences and troubles.¹⁷ For The case of the responsibility for the violation of privacy, for the purposes of conceptualization or compensation, there exist diverse forms that will be relevant while examining the particular cases.

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the non-consensual spread of a communication". Considering 17th: "In second place, if there is a consent from the title holders of the communication towards the third parties in the dissemination of what is communicated, no right can be deemed violated".

15 NOVOA MONREAL, E. work quoted.

16 BARROS, Enrique. Responsabilidad extracontractual. Santiago, Editorial Jurídica de Chile, 2006, pp. 220 and ss

17 The traditional description of damage, distinguishes the property damage from non-property or moral damage, whereas in the first cause there is detriment to the assets ("general damage") or an impossibility of its growth ("lucrum cessans"); and in the second case, it is comprehensively understood in opposition to those economic damages, including the honor, the privacy the physical and psychological pains, among others.

I.1.5. Condition of the legal entities

The legal entities that do not have constitutional or legal protection in privacy matters by the personal nature attributable only to the natural person. Neither does the 19.628 law recognizes them the ownership of the data. Despite this, other interests recognized in the national regulation are objects of ownership by the legal entities as the confidentiality of certain information, the trade secret, the business secret, and even the honor.¹⁸

I.1.6. The Privacy of the deceased

In Chile, there is no express regulation to the personal rights after the death of their title holders, understanding by the doctrine and the jurisprudence that they end for the title holders at the moment of their death, because it is impossible to execute them afterwards. Those responsible for the compliance of these rights are the proper title holder alive, who can organize in a premeditated manner the disposition of its estate; then, the relatives, who must procure the respect to the honor and the eventual activation of responsibility proceedings in front of the State for those that cause a detriment to this right; and, finally and in a diffuse manner, the State, the religious associations and the society as a whole, are guarantors.

In Chile, there isn't a significant advance in the regulation over the subject of relation with the privacy, without prejudice of an isolated development in court. What is more, that same jurisprudential exercise has been produced due to a constitutionally unrecognized event linked to a constitutional guarantee over the honor and the private life, that is to say, over the right to an image.¹⁹ It is

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18 Regarding the protection of the honor of the legal entities, as an example refer to the Supreme Court's ruling, in the cause Role No. 1736-2008, from June 4th, 2008, that indicates on its 8th consideration: "That, in conclusion, although the honor or the virtue is a value attributed to persons individually considered, the right to the own esteem or the good name or reputation in which it consists is not their exclusive property, so that this attribute, in its wider meaning, is based also in the legal entities that, for the compliance of their specific purposes, within the autonomy that the Charter bestows to the intermediate groups, needing their good name and prestige, that would not be duly protected if they were to be excluded from the ownership of said guarantee".

19 The image, characterized as an external feature of the right to the privacy, is constitutive of all those physical features that allow the identification of a person as such. Their use has no express regulation, which does not prevent the existence of some isolated rules that allow to validate its existence. Thus, NOGUEIRA, Humberto, "El derecho a la propia imagen como derecho fundamen-

recognized that this interest currently exists and deserves acknowledgement, being able to take into action by the relatives left behind by the deceased.

On the right to a name, there aren't any express regulations that allow its transcendence after the,²⁰ but it does consider a legal sanction for the usurpation of the name, its requisite is that the person currently exists, and it is not only an alleged name.

With regard to the privacy (including here the personal data) after death, it is a significant situation that of the digital "remains" of the deceased. For example, the personal profile in some social network, could recollect part of the personal data (the information) and the private life (the communication) of the persons and therefore, would deserve to be treated as an object of protection, even after the passing of its title holder. Some authors²¹ maintain that the user has regulated its relations and the contents shared with specific persons, situation that must be considered as preferences of intimacy in life. Despite this, it is possible to note that the profiles of the users after their death have been transformed into commemoration sites, like graves or memorials, and for that reason the an analogy between these two situations is formed: if historically the relatives of the deceased haven't been able to deny access to the traditional places of physical commemoration (cemeteries), they will not have enough faculties for the restriction of digital ones.

I.2. Regulations of privacy

I.2.1. Constitutional recognition

Article 19 No. 4 of the 1980 Constitution guarantees everyone "the respect and the protection to the private life" of the person and its family. Next, in article

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tal implícito. Fundamentación y caracterización". In: *Ius and Praxis* v. 13 n. 2. Talca, University of Talca, 2007.

20 The law No. 19.039 on industrial property, in its article #20, prohibits the register of brands with the name, the pseudonym or the portrait of any natural person, except with consent given by them or their heirs, in case of death. Nevertheless, the names of historical characters will be susceptible to register fifty years after their death, as long as it does not affect their honor.

21 KASKET, Elaine. Access to the Digital Self in Life and Death: Privacy in the Context of Posthumously Persistent Facebook Profiles. Available in: <http://script-ed.org/wp-content/uploads/2013/04/kasket.pdf>.

19 No. 5, it refers to the “inviolability of the home and of every way of private communication”, given the notions of intimacy at a spatial sense.

The guarantee of article 19 No. 4 uses the concept of “private life” and not the one of “privacy”, because the concept of private life, according to some members of the Commission in charge of its formulation, it was more developed in the common language; there was already a recognition by the community that what one respects is the private life, and that the “privacy” was a less known term, foreign to our language.²²

As a consequence of this, a disaggregated protection of the different consequences of the protection of intimacy seems to exist. Starting from the guarantee of protection to the private life, the protection of the people in front of the treatment of their personal data has been outlined, as we’ll see later on; nevertheless, until before²³ the promulgation of Law No. 19.628, the illicit treatment of the same was only disputable by means of constitutional action (or “resort”) of protection.

Even though the Constitution takes the idea of “private life” as a legal right worthy of protection, a definition on the constitutional rule does not exist nor in the law of what must be understood as “private life”, leaving as an assignment of its demarcation to the jurisprudence, as it will be seen later on. Regarding the protection of personal data, it remains without direct recognition as an independent fundamental right, nor among the rights associated to private life. The previous, without prejudice of the attempts for a constitutional reform tending towards the providing from the Primary Charter of safeguard to the personal data.²⁴

The relevant case-law is analyzed in point c. of this subsection.

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22 Official Record Commission of Study of the New Constitution, 129th session, 1975

23 With the law No 19.628 currently in force, it is considered in the article No. 16, the so called “Habeas data”, which has the purpose of securing the exercise of the rights of the title holders of the information and to prevent the actions or neglect of third parties tending to violate them.

24 Newsletter No. 6495-07. “In terms of protection of personal data”, from April 30th, 2009; Newsletter No. 5883-07, “It modifies the article No. 19 No. 4 of the Fundamental Charter, with the purpose to establish as a constitutional right, the protection of personal data and its legal protection”, from June 3rd, 2008.

1.2.2. International treaties

The international treaties on fundamental rights endorsed and ratified by the Chilean State, must be respected and promoted by the State as long as they are in force, according to the second subparagraph of article 5 of the Constitution. Among them, are the Universal Declaration of Human Rights, the International Pact for the Civil and Political Rights and the American Convention on Human Rights, that prohibit any arbitrary interference to the private life, with respect to the dignity of the people, including their family life, domicile and correspondence, in addition to their honor and reputation, in the same sense that the Latin-American constitutions have embrace it.

1.2.3. Legal recognition

The protection of the private life and the associated rights at a legal level materializes fundamentally in the sanction illegal conducts against the areas of privacy or those related to the development of the private life, in a fragmentary manner.²⁵ Where a detailed treatment does exist is in relation to the treatment of data of a personal nature.

For both the guarantees of the private life and the treatment of data of a personal nature, the following should be mentioned as relevant legislation:

Law of protection of the private life

The current regulation in Chile on the data of a personal nature was promoted initially as a form of protection of the privacy of persons. The Law No. 19.628 of the year 1999 is in charge of regulating the protection of the data of a personal nature. Its creation, according to the motion of the senator Eduardo Canturias, followed the need to “fill an evident void in our legal system and whose purpose is to provide de adequate protection for the people’s right to privacy, in the Civil Rights area, before eventual illegitimate interferences”.²⁶ The original project included characteristics from the protection to privacy, understanding it as inviolable, absolute and non-lapsable as a right, and inclusive of the “right to the own image; to personal and familiar intimacy; to anonymity and discretion; to a quiet life, without harassments or distress; and the inviolability of the home and of every way of private communications”, in addition of contempla-

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25 JIJENA LEIVA, R. quoted work.

26 Biblioteca del Congreso Nacional. Historia de la Ley No 19.628. Protección de la vida privada. August 28th, 1999. <http://www.bcn.cl/histley/lfs/hdl-19628/HLI9628.pdf> [Online]. Enquiry: 04.26.2013.

ting a presumption of illegitimacy of every form of interference of the private life. The project is in charge of the protection of personal data, of the specific cases where illegitimate interference is considered and of their actions, aside from the applicable proceedings.

The project was kept without substantial changes until the second report from the Commission of Constitution, Legislation and Justice of the Chamber of Deputies, when the exclusive dedication of the law to the regulation of the treatment of personal data was proposed, emphasizing the informatics, because it is considered as “one of the most serious attempts against the privacy of the individuals”, and much more needed than an extensive and systematic law on privacy. This law’s analysis is contained further on.

Penal Code

The code manifests about private life primarily in the protection to the inviolability of the communications, sanctioning the violation of the secrets and its disclosure, with emphasis in the knowledge of data on the fundamentals of its trade and the classification of places from which the information is obtained.

Also relevant are the penalties that the Article 146²⁷ establishes for the one who opens or registers another’s correspondence or documents without their consent, with reference to the persons that are legally excluded; and the article 161-A,²⁸ that punishes the indiscretion, the interference and the diffusion to the

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27 Penal Code, Article No. 146 “He who opens or registers the correspondence or the papers of another without their consent, will suffer the penalty of minor imprisonment in its medium grade if it were to spread or take advantage of the secrets contained in them, and otherwise, minor imprisonment in its minimum grade. “This regulation is not applicable between spouses, nor to the parents, legal guardians or whoever acts as it, regarding the papers or letters of their children or minors under their care. “It is also not applicable to those persons who by laws or special regulations, are lawfully able to educate themselves of someone else’s correspondence”

28 Penal Code, Article No. 161-A. “It will be punished with the penalty of minor imprisonment in any of its grades and a fine going from 50 to 500 monthly taxing units to who, in an enclosed area or private in nature; either receives, records, films or photographs images or incidents from places that are of no free access to the public, without authorization from the person affected and by any means, receives, intercepts, records or reproduces conversations or communications of a private nature; removes, photographs, photocopies or reproduces documents or instruments private in nature that are produced, carried out, happen or exist in enclosed areas or places that are not of free access to the public.

persons in their communications, private activities and of the material obtained by means of these actions, in particular enclosures and places that do not have open access to the public.

Code of Criminal Procedure

The relevant rules in criminal procedure law contain rules on the entrance and register of places in the investigational period; it also contains in testimonial matters, the faculty of refusing to declare in the cases determined by law.²⁹ They contain, in general, the regulation of the proceedings for the intervention in areas of the private life in the context of criminal investigation. We will carefully review its regulations further on.

Code of Civil Procedure

In terms of civil procedure, the exclusions in testimonial matters are relevant due to the facts that are known because of its profession or trade or because of its specific quality within the trial.³⁰

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“The same penalty will be applied to who spreads the conversations, communications, documents, instruments, images and incidents to which the previous subparagraph refers to.

“In the case that the same person is the one that has obtained and spread them, a punishment of minor imprisonment in its maximum grade and a fine from 100 to 500 monthly taxing units will be applied.

“This regulation is not applicable to those persons that, in virtue of the law or judicial authorization, are authorized to execute the actions described”.

29 Article No. 205. “Entry and registration in enclosed areas. When it is presumed that the accused, or means of verification of the incident investigated, are found in a specific building or enclosed area, it will be possible to enter and proceed to register, as long as its owner or person in charge expressly consents the practice of said procedure”.

30 Article No. 206 “Entry and registration in enclosed areas without authorization or an order. The police will be able to enter the enclosed area and register it, without the express consent of its owner or the person in charge or the previous order or authorization, whenever the distress calls from the persons inside or any other evident signs indicate that a crime is being committed inside the enclosure”.

Article No. 303. “The faculty to abstain from testifying for reasons of secrecy. Those persons that, due to their state, profession or legal function, such as the lawyer, doctor or confessor, have the duty to keep the secret confided to them, won’t be obligated to testify, buy only in when it comes to said secret”

Other rulings

Without prejudice of the prior regulation, there are other sectorial laws that grant in similar terms the previous budgets of the right to privacy, or protection of the data of a personal nature. Among them we find: the Stock Market Law, in dealing with the continuous and discrete information; the Chilean Corporation Law, in relation to the secret and discretion of the social information; the General Telecommunications Law, among others. Other regulations, in turn, have impact over aspects of the personal information or private life, even while not making direct reference to them. We will refer to them in the subsequent chapters.

1.2.4. Jurisprudence

As we mentioned, the protection of the private life in Chile is expressed in the Constitution, through the recognition and the protection of the private life of the person and its family, in addition to the right to the inviolability of the home and of every way of private communication. But it has been the jurisprudence the one that has conceptually deepened in what in Chile is understood as “private life”. Thus, in the sentence of the Martorell case,³¹ it is defined main-

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Article No. 360. “Will not be obligated to testify: 1stly the ecclesiasts, lawyers, notaries, attorneys, doctors or midwives, on incidents that have been confidentially communicated to them due to their state, profession or trade; 2ndly the persons expressed in the numbers 1st, 2nd and 3rd in the article No. 358; and 3rdly Those who are confidentially questioned about the incidents affecting the honor of the witness or of the persons mentioned in the previous number, or those who could be criminally responsible or any of the persons referred to”.

31 Case emerged from the publication of a book named “Impunidad diplomática”, that disclosed the indecent behavior of public Chilean personalities. Some of the persons involved presented a constitutional protection proceeding, upheld by Santiago’s Court of Appeals, and confirmed on appeal, and thus forbidding the circulation of the book in Chile. The case was presented before the Interamerican Court of Human Rights, on December 23rd, 1993, the Commission received the accusation brought by Human Rights Watch/Americas and the Center for the Justice and the International Right (CEJIL) regarding this case, claiming that the prohibition of the entrance, distribution and circulation, in Chile, of the book titled “Impunidad diplomática” constituted a violation to the Right to Freedom of Choice and Expression and specifically declares that: “the exercise of the right... cannot be subject to a prior censorship but to ulterior responsibilities”, the court concludes to recommend to the Chilean state to remove the censorship regarding the book; and, to adopt measures for the entry, circulation and commercialization of the book.

taining that “the private life is violated and originates the penalties that the law establishes, the inappropriate and malicious intrusion in affairs, communications or intimate enclosures that title holder of the legally protected good does not wish to be known by a third-party without its consent, whether or not this motive causes suffering or damage to the person affected.”³²

It's because of this that the privacy has been majorly developed at a jurisprudential level in subjects of inviolability of the private communications and the home, emphasizing the debate and the determination over which communications have a personal nature and which are public. Thus, it has been established that the communications of the employee with a third party from his e-mail account provided by the company has a private nature, without prejudice of the regulation, conditions and the frequency of use by the employer.³³ In this regard, there are declarations³⁴ that have to do with the inviolability of the private communications in front of the Law No. 20.285 (on transparency and access to the public information, where e-mails exchanged by public authorities are required. A verdict adds that “the constitutional guarantee of the inviolability of the correspondence is found, like the other constitutional guarantees, constituted in favor of the citizens in order to guard their individual rights against the power of the State and, precisely, it would be expected in the species to employ said power in detriment of the right of some authorities, that not because of being so would lack the rights they have because of being individually considered citizens”³⁵.

The previous, determines the general criteria applicable in any conflict that causes the collision of rights, where the shelter of the private area of the person is imperative, displacing some relevant characteristics of the person, such as

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32 See sentence in the Revista de Derecho y Jurisprudencia, Volume XC, No. 2, year 1993, second part, 5th section, pages 164-174. Cited by BANDA VERGARA, A., work cited.

33 Labor Bureu. “Milena González Aída con Almiron Negral, Luzmira”. Verdict 260/19. Role: T-417-2012; Labor Court. “Jorge Negrete Herra con Gesfor Chile S.A”. 12/15/2011. Role: T-385-2011.

34 Court of Appeals of Santiago. “Subsecretaria del Interior con Consejo para la Transparencia”. 21/17/2012. Role: 6704-2011.

35 Court of Appeals of Santiago. Claim of illegality against the verdict of protection C406-II dictated by the Council for the Transparency. Available at: http://www.consejotransparencia.cl/consejo/site/artic/20121220/asocfile/20121220163731/fallo_a_favor_subsecretaria_interior__rol_6704_2011_correos_melipilla_.pdf

the subordination in the work sphere or the quality of public employee. In this previous case, no controversy is provoked by treating the e-mail similarly to the correspondence, which is applicable to other technological platforms used as means of communication, considering in this sense that websites such as Facebook require the title holder authorization for the utilization of the information it contains,³⁶ or the corresponding legal consent. The same situation occurs in reference to the telephonic conversations, where there isn't major debate over the possibility of interfering communications without the title holder's consent, but with judicial authorization.

1.2.5. Comparative and international law

The Latin-American constitutions establish the right to privacy on a relatively uniformed manner. In such a way, it is possible to find common elements in them that allow to characterize the privacy as a limited guarantee, referred primarily to the inviolability of the communications, private documents and the home, eventually treating other associated rights like the habeas data as specific protection in Brazil, in addition of being expressed together with other guarantees like the honor, the image and the reputation, as is the case of Bolivia, Brazil, Ecuador, among others.

In Europe, without prejudice of the sectorial regulations, the OCDE guidelines related to the protection of the intimacy and to the interstate circulation of personal data are especially relevant,³⁷ where in general terms it is recommended to the countries to consider during the creation of a national legislation of the protection of intimacy and the individual liberties, in addition to the pursuit of agreements in subjects of consultation and cooperation procedures. In a more relevant way, the "Directive 95/46/CE of the European Parliament and of the Council, from October 24th, 1995, relating to the protection of the physical persons with respect to the treatment of personal data and the free circulation of these data", or Directive on the Protection of Personal Data, rules in the European Union. Starting from it, standards are established which allow other countries outside the European Union to exchange personal data with them.³⁸

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36 In this sense. Supreme Court. "Omar Alejandro Figueroa Silva con Carabineros de Chile". 08/30/2012. Role: 5322-2012.

37 OECD. "Directrices de la OCDE relativas a la protección de la intimidad y de la circulación transfronteriza de datos personales", September 23rd, 1980. Available at: <http://inicio.ifai.org.mx/DocumentosdelInteres/OCDE-Directrices-sobre-protecci-oo-n-de-privacidad-Trad.pdf>

38 On this subject, qv CERDA SILVA, Alberto. "El 'nivel adecuado de protección' para

I.3. The protection of personal data and its relation with privacy

I.3.1. General guidelines of the Law No. 19.628

In the context of the transmission of the initially named “Law of Protection of the private life”, and during the second constitutional procedure, the Commission of Constitution of the Chamber of Deputies determined the specialization of the initial content of the general rule on privacy, towards a specific law dedicated to personal data, that would respond to certain principles such as the legitimacy of the media for the gathering of the personal data, the purpose as a determining factor of the legality of the treatment, and the safeguard of the records that constitute the “sensitive information”.³⁹

With what has already been said, the law on privacy and its general guidelines transforms the law No. 19.628 of the year 1999, on protection of personal data, which aims to protect it, primarily in the area of consent for their treatment, the regulation of the specially protected data, the quality of the data and their security, the duty of secret and the assignment of the data.

I.3.2. Content of the Law No. 19.628

In the tables below we’ll see the substantial content of that law’s initiative and its parliamentary evolution, until becoming what it is today.

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las transferencias internacionales de datos personales desde la Unión Europea”. Revista de Derecho de la Pontificia Universidad Católica de Valparaíso, vol. XXXIV, 1st Semester 2011. Valparaíso, PUCV, pp. 327-356.

39 Biblioteca del Congreso Nacional. Historia de la Ley 19.628 sobre Protección de la Vida Privada, p. 142

Original project: Draft law on civil protection of the private life (date: January 5th, 1993)

Law No. 19.628: protection of personal data

It does not consider a preliminary title

Preliminary title: General regulations
Holds the treatment of the personal data in registers or data banks to the law, with the exception of the ones executed in the exercise of freedom to express an opinion and to inform.
Aside from guiding concepts for the development of the law, such as, storage, blocking, data in its diverse meanings (obsolete, statistical, personal and sensitive), accessible sources for the public, register or data bank, responsible for the registration, title holder, among others.

Title I: General guidelines
Treats the protection against any illegitimate interference to the private life, constituted by the own image, the personal and familiar intimacy, the anonymity and discretion, the quiet life and the inviolability of the home and of every way of private communication.
This title refers to the impossibility of founding legal decisions in illegitimate interferences to the private life and the use of market researches or surveys for different purposes from what they were required for.
On the characteristics of private life, it indicates that this is unavoidable and non-lapsable, including the memory of the deceased person.
It considers a presumption of illegitimacy to every interference to the private life of a person.

Title II: about the rights of the title holders of the data
In this chapter the rights of information, modification, cancellation or blockage are established.

<p>Title III: about the illegitimate interferences to the private life The cases in which an interference is illegitimate and those that are not are determined. Among the first are considered the listening, recording, or any other mean able to reproduce the intimate life or the knowledge of it. The divulgation or the revelation of information, utilization of name, the reiterative and illegitimate harassment through phone calls, correspondence or stalking of the household, and in general every action or arbitrary omission that bothers, disturbs or threatens the title holder; the image of a person when it is manifestly accessory to the information, and the cases where the title holder had given its consent. It's about the private diffusion of incidents related to private life, which does not take away this nature from them, nor does it prevent the exercise of civil actions.</p>	<p>Title III: About the use of personal data related to the obligations of an economic, financial nature. Banking or commercial The people in charge of the records or databases will only be able to communicate the information this title is about, when it concerns to bills of exchange and protested promissory notes, the non-compliance of obligations arising from mortgage loans and savings and loans cooperatives, public organizations and companies of the State subject to common legislation, among others.</p>
<p>Title IV: About the actions given place by the illegitimate interferences in the private life Protects the privacy through civil action, regulating the compensation of damages.</p>	<p>Title IV: About the processing of data by the public organizations By general rule, the treatment of personal data by a public organization, can only take place relating subjects of its competence and following the rules established by law.</p>
<p>Title V: Competent court and the procedure The trial judge of the domicile of the plaintiff.</p>	<p>Title V: About the responsibility for the violations to this law The person in charge of the database, be it natural or legal, will have to compensate the property and moral damage that the inappropriate treatment of data could cause, without prejudice of the obligation of eliminating, modifying or blocking data according to what's required by the title holder or ordered by the title holder, in summary judgment.</p>

It does not consider a preliminary title	Final Title The discretion of the medical prescriptions and the analysis or exams by clinical laboratories and services related to healthcare, are added to the Sanitary Code.
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This variation of the content acquires sense, as the Commission of the Constitution to the Chamber of Deputies informed, like a materialization of the more delimited and concrete aspirations but it also implicates to recognize the relative abandon of subjects that are not considered by the legislative authority.

1.3.3. Categories of data in law

In general, in the article No. 2 the law delimits key concepts for the development of the chapters, among which those referred to the categories of data are counted:

- The data of a personal nature or personal data, are defined as those relative to any information concerning natural, identified or identifiable persons, in the same terms as it is defined in comparative law, and in the international instruments that deal with this subject;
- The sensitive data, limited to those that refer to the physical and moral characteristics of the persons or to the incidents or circumstances of their private lives or intimacy, such as the personal habits, the racial origin, the ideologies and political opinions, the beliefs or religious convictions, the physical health or psychological states and the sex life.

In addition to this, it presents the characterization of an expired fact or statistical fact. The first one is that which has lost relevance by law's ruling, compliance of the condition or expiration of the period indicated for its validity, change of the incidents or circumstances that record if there's no express regulation. It is a statistical fact that which cannot be associated to the title holder identified or identifiable.

1.3.4. Subjects in the treatment of personal data

The responsible for the register or database and the title holder of the data are considered in the development of the law, conceptualized in the following terms:

- Responsible for the register, the natural person or the private legal entity, or the according public organization, whom is responsible for the decisions related to the treatment of the data of a personal

- nature, and whom responds in front of the title holder of the data.
- Title holder of the data, the natural person whom the data of a personal nature is referred to.

The Chilean law does not expressly contemplate the figure of the “person in charge” of the personal data (the person that performs the treatment of the data, and whom responds in front of the “responsible”), but determines the figure of the “representative” in the article No. 8, akin to the considered in other legislations such as the Spanish, where the person in charge is characterized as “the physical or legal person, public authority, service or any other organization that, by itself or together with others, treats the personal data on account of the responsible of the treatment” (article No. 3 letter g. of the law No. 15/1999). In general, the law establishes that the general rules of mandate will be applied to the representative, which will have to be given in writing with express evidence of the conditions, respecting the stipulations of its assignment.⁴⁰

The Law No. 19.628, by referring to the personal data, it refers only to the personal data related to the natural persons. It doesn’t take responsibility for the treatment of the information of legal entities, leaving said regulation to the general regulations on secrecy, property, industrial property, among others.

1.3.5. Treatment of data

The treatment of data is law’s object of regulation. The treatment is defined as “any operation or operational complex or technical procedures, of an automated nature or not, that allow to collect, store, record, organize, elaborate, select, extract, confront, interconnect, disassociate, communicate, relinquish, convey, transmit or cancel data of a personal nature, or utilize it in any other way”. In general, the following terms, are relevant:

- a. Every person can conduct the treatment of personal data, according to the law and for authorized purposes, with respect to the fundamental rights.⁴¹

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40 The figure of the “person in charge”, characterized as the one who carries out the processing of personal data on the account of the one “responsible” for the database, it is mixed up in Chile with the latter, defined in the letter n) of the article 2 from the law No. 19.628.

41 In connection with this point, it is important to note that in Chile, the law No. 1968 establishes the obligation of registration of databases only to the public organizations. Thus, the article 22 of the law prescribes that it is the Civil Registry and Identification Service is in charge of said registration consisting of the legal

- b. The treatment can only take place when the law or the title holder expressly consent to it.
- c. The treatment of data that comes from sources accessible to all do not require authorization.
- d. There is an obligation to keep secret on the people that work in the treatment of personal data, when they have been collected from sources inaccessible to the public.
- e. The sensitive data cannot be object of treatment, with legal exceptions.
- f. The title holders have the right to demand to the responsible for the data: information, modification, cancellation, blockage, elimination of the data in his power.
- g. The public organizations will be able to treat data in matters of their competence without consent of the title holder, as long as they are subject to law.
- h. The responsibility falls on the responsible of the data, and implies a compensation for the property and moral damage by the wrongful use of the data.

It is important to state that in Chile, unlike other legislations, there isn't a legal obligation of registration of the personal databases, except in the case of public organizations.

1.3.6. Associated rights to the protection of personal data

For the rights of access or information, modification or rectification, cancellation or blockage, there are common rules applicable to all of them, among which can be considered the gratuitousness of the information, modification or elimination of the data; the impossibility of limitation of some of the rights given by the law by means of no act or convention; the possibility to deny the information if it slows down the proper compliance of the regulation functions or affects the discretion or secret in law, rulings, when required by the security of the nation or the national interest; finally, on the modification, cancellation or blockage of personal data stored by legal mandate, other than the cases established in law this actions won't be able to be asked.

- a. Right of access or information
The history of the law No. 19.628, in the second report of the

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basis of its existence, its purpose, the type of data stored, and the description of the universe of persons it comprehends; who must provide the necessary antecedents for the making of the data is the public organization itself at the moment of the base's initiation of activities, communicating the change within 15 days since it's been made.

Commission of Constitution of the Chamber of Deputies⁴² conceptualizes the right to the information as the one that any person has to know that their data is object to automatized treatment, its purpose and the person responsible for the database; for its part, the right of access is characterized as the one the person affected to request and obtain information of their data of a personal nature included in the databases.

The right of access is defined in the law No. 19.628, in the letter i) of the article No. 2 conceptualizing the sources accessible to the public such as all those personal data registers or summaries, public or private, with restricted or confidential access to the requesters, for its part, the article No. 14, establishes that if the personal data in a database to which diverse organizations have access, the title holder can require information to any of them, the article No. 16 indicates the procedure.

b. Right of modification or rectification

The right to the modification of data, is defined in the letter j) of the article 2 of the law 19.628 as every change in the content of the data stored in registers or databases, and conceptualized in the history of the law as that which has the aim of obtaining the correction or integration of the data that exists in an inexact or incomplete manner in a database. It also enables the updating of the information that has become obsolete. The article 6 establishes the modification when the data is incorrect, inexact, confusing or incomplete.

c. Right of cancellation

The history of the law 19.628 conceptualizes the right of cancellation as that which requires to eliminate from the database the personal data that no longer must appear on it, either because they should've never been registered, because, having been legally collected, some cause demands its removal. Law defines the elimination or cancellation of the data in the letter h) of the article 2, pointing out that it corresponds to the destruction of data stored in registers or databases, whatever the procedure used for it, in addition to it, in the article 6 it contemplates the elimination or cancellation when their storage lacks the legal basis or have expired.

d. Right to blockage

The right to blockage is defined in the letter b) number 2 of the law 19.628, as the temporary suspension of any operation of treatment of the data stored. The history of the law establishes this right as

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42 Biblioteca del Congreso Nacional. Historia de la Ley 19.628 Sobre Protección de la Vida Privada. Page 172.

everyone whose accuracy cannot be established or whose validity is uncertain and where cancellation does not correspond.

1.3.7. Relevant case-law in personal data matters

The jurisprudence has treated the Law 19.628 attending diverse aspects of it. On the responsibility for the publication of the background without legal basis,⁴³ has given account of the existence of two types of actions established in law, the Habeas Data and the action of reparation of the damages, whereas the first constitutes the faculty of the person affected to obtain the modification, elimination or blockage of data, be it by its own request or by legal order; while the second contemplates the patrimonial and moral reparation in the case of neglect of duty of the care demanded in the treatment of data, characterized by having made public illegal, inexact, erroneous, confusing, incomplete, expired data that does not correspond with the veracity of the real situation of the title holder's data. The former, determines which behaviors are responsible of an inadequate treatment, considering two copulative elements: negligence and information or publication of erroneous background information or that do not correspond with the truth.

In this sense, and in relation to the treatment of the data by a third party and to the right of the data's title holder to demand the cancellation or blockage, in concordance with the right to oblivion and to the person's honor,⁴⁴ it has been established that the data's title holder has this established right in certain circumstances, as guarantee in the 19 4 and specific regulations according to the subject in question. In the case of the financial institutions that publish unpaid debts they will be ruled by the regulations corresponding regulations from the Superintendence of Banks and Financial Institutions, where the governing rule is that the quality of debtor only subsists as long as it isn't paid and in case the obligation is not found extinguished, as long as the executive title exists and until they are found following the executions. In addition, the governing principles on the treatment of a third party's data are established, based on the self-determination, rationality, coherence and veracity. On this last point, the concept of "truth in time" is relevant, related to the right to oblivion, whose aim is to prevent that the weight of the past crushes the person, making him or her lose their freedom and preventing the renovation or redo of their personality, favoring the intimacy over the information after a determined period of time has passed, without prejudice of it being true.

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43 Banco Santander Banefe con Lobos Quijanos Angel. Role: 6968-2010.

44 Rosa Hidalgo Aguirre con Banco BBVA. Role: 1705-2012.

About sensitive data, it is possible to find technical and quotidian jurisprudence,⁴⁵ on the first, the relation to the law 19.223 related to the computer crimes, the article 4 penalizes the one who maliciously reveals or spreads the data contained in a system of information, considering the employment of intentional procedures destined to affect the system of treatment and storage of the data, and the following diffusion to third parties of the information obtained by illicit means, which makes the sensitive information (“hard core of the intimacy”⁴⁶ the protected legal right; on the daily aspects, the visits a person gets and are registered in the “record book” of a condominium or building are considered sensitive data, since the visits that a person gets daily in their domiciles informs of their routines, their traditions, preferences, personal habits, etc.; which is an aspect clearly within the framework established by the above mentioned Law and constitute data of not only a personal nature, but also sensitive. Because of this, its divulgation and treatment can only be conducted when the title holder consents to it or the law authorizes it.

The situation of Costa Rica is relevant, country in which the circulation 42 from March, 2013, on elimination of the personal data in the information generated from March 5th, 2013, in relation to the law on protection of the person against the treatment of their data, allows the depersonalization of sensitive data in the judicial sentences, among which the name, identification card, are considered, and other considered as sensitive data.

A final aspect in relation to the use of databases is related to the flexibility in the matter, this is, the ease in the transference of the data obtained for specific purposes, which can be obtained in an open and free form or at a low price. The former is reflected in the sale of databases, which we’ll treat in the following chapters, primarily in that which refers to the electoral data.

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45 Carlos Eltit Ortega con Presidente de la Directiva del Condominio Las Palmas II y otro. Role: 9702-2012.

46 con Sergio Valenzuela Cruz y otro. Role: 3951-2012.

2. Privacy in the administration of justice

2.1. The principle of disclosure in the administration of justice

The administration of justice constitutes one of the instances of interaction between the individual and the State in which the delivery of information is most important, in order that the impartial third party (the judge) arrives to a resolution for the conflict with biggest possible amount of background.

The judiciary acts in the exercise of their functions, have, according to the law, the nature of public or private attending certain specific characteristics of the procedure, with special consideration to the collision of the fundamental rights such as the right to information, to intimacy and to honor. Among these proceedings, all those procedures and resolutions that are a part of the dossier, of the investigational file, or the corresponding universality, contributed by the parties involved, by the court, or by any other organizations destined to that effect, are included in the context of a judicial proceedings.

The principle of disclosure as guiding principle of the actions of the courts of justice, is defined by the doctrine as “the faculty the law bestows to every person so they will be able to impose to legal proceedings, even while not being an interested litigant, through the means that the law itself gives them”.⁴⁷ Without prejudice of the general rule of disclosure of the legal proceedings, there are operations that represent the exception, among them: the agreement of the High Court of Justice, the request for further information (the list of questions destined to produce the confession in a trial), the book of judges where the disciplinary measures are applied, the divorce, annulment and separation of the marriage trials if it is appropriate, the summary stage in the old criminal proceeding, among others.

The disclosure of the criminal proceedings is not a directly established requisite in the Constitution, but it is considered as part of the proper legal process (article 19, number 3). Its consideration matters by being understood as “the only effective possibility of guaranteeing an adequate behavior of the judges, an efficient defense, of controlling the sufficiency of the proof, among other aspects, it is by means of the realization of the trial in a public manner, in front of the population as a whole”,⁴⁸ thus avoiding the

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47 CORREA SELAME, Jorge, 2005. Curso de Derecho Procesal. Tomo I, Derecho Procesal Orgánico. Santiago, Chile. Ediciones Jurídicas de Santiago. P. 104.

48 RIEGO, Cristián. “El proceso penal chileno y los derechos humanos”. Cuadernos de análisis jurídico. Law School, Universidad Diego Portales. Available at: http://www.udp.cl/descargas/facultades_carreras/derecho/pdf/investigaciones/

violation of the fundamental rights caused by the concealing of information.

In the following pages we will address general aspects of the constitutional guarantee of protection to the private life in relation to the secrecy of the acts of the administration of justice and of the shelter of the participants of the proceedings' data. In a later chapter we will focus on the problematic of the interference in the context of a criminal investigation.

2.2. Legal aspects

2.2.1. General regulations

As we have mentioned, the general rule in matters of acts of the administration of justice is the disclosure, established in the Politic Constitution, in the Basic Court Code and in the Law of Transparency.⁴⁹

The exceptions that the law refers to are sectorally determined in attention to each procedure's characteristics, circumstances and specifically of the persons that participate in it. Thus, it is possible to considerate the following relevant regulations:

Basic Court Code

The Basic Court Code speaks of confidential activities related with the operation of the tribunals, more than the persons' rights.

Art. 81 BCC. "The Courts of Appeals will celebrate their agreements privately; but will be able to call the court reporters or other employees when deemed necessary"

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Cuadernos_de_analisis_Coleccion_Derecho_Privado/especiales/CAJ_n04_Serie_Publicaciones_Especiales.pdf

49 The Constitution establishes in the second subparagraph of the 8th article that "The acts and resolutions of the organizations of the State, as well as their fundamentals and the proceedings used. However, only a law of qualified quorum will establish the reserve or secret from the former or the latter, when the disclosure could affect the due compliance of the functions of said organizations, the rights of the persons, the security of the Nation or the national interest"; the Court Statute Code establishes in the 9th article, the disclosure of the court acts, save in the legal exceptions; finally, the Law No. 20.285 on Access to the Public Information establishes in the 7th article criterions of active transparency applicable to the organizations of the administration of the State.

Art. 375 BCC. "It is forbidden to the court reporters to reveal the sentences and agreements of the court before they are signed and published".

Penal Code

The Penal Code determines in the article 224 the temporary absolute disqualification for public positions in any degree and minor imprisonment and reclusion in their minimum degrees, in the context of the perversion of justice to whom reveals secrets of the trial. Logically, this reaches the confidential information that concerns the persons involved.

Code of Criminal Procedure

The article I of the Code of Criminal Procedure establishes as every person's right the existence of a previous trial, oral and public. In this sense, the registers of actions of the judge are by general rule public (article 44) for the participants and for the third parties, with the legal exceptions or the court's restriction during the investigation or processing to avoid affecting its normal substantiation or the principle of innocence. Notwithstanding the foregoing, the registers are public after 5 years since their processing begins.

In the context of protection to the victims by the Public Ministry, the district attorney can adopt or request measures during the whole trial for the protection of the victim and its family against probable harassment, threats or attempts (article 44). In this line, the police officers count with a prohibition of informing to the mass media about the identity of the detainees, accused, victims, witnesses, or any other person that are or could be linked to the investigation of a crime (article 92).

The investigation proceedings by the Public Ministry and by the police (article 182) have a secret nature for the third parties stranger to the procedure, without prejudice that the district attorney will be able to decree that certain proceedings, registers or documents be maintained secret regarding the accused or the other participants when the efficiency of the investigation requires it, clearly distinguishing the pieces or proceedings that will remain secret, as long as these do not refer to the declaration of the accused or any other procedure that has intervened or has had the right to intervene, for a period of no longer than forty days.

About the disclosure in the hearing of an oral trial (article 289), the court will be able to mandate upon request of the interested party and by means of a substantiated resolution some necessary measure to protect the intimacy, the honor or the security of any person that should take part in the trial or to avoid

the divulgation of a secret protected by law. These measures are related to the access or exit of the people from the courtroom, prohibition of making any statements in front of the media, among other similar characteristics.

Other regulations deal with the protection of the witness' domicile (article 307), when there's risk of danger for the witness or another person.

Code of Civil Procedure

The article 349 referring to the instruments (that is to say, the documents) as means of evidence in the civil action, establishes about the exhibition of those, the constrains of having a direct relation with the issue discussed and that do not have the character of secret or confidential. In other words, the request of showing a document of a private character in court does not serve as means of evidence.

2.2.2. Specific regulations

Proceedings before de Family Court

The Law 19.968, which creates the Family Courts, establishes that disclosure of any of the court's administrative proceedings, except for those in which there exists a risk of encumbrance of the right of privacy of the parties involved, if that's the way it has been requested by the part. The measures considered constitute the impediment of access or exit for determined persons from the room where the audience is being held, and the impediment of access to the general public, or the order of its exit for the practice of specific errands.

The privacy in the context of the proceedings for domestic violence are dealt in a more specific manner, establishing the protection of identity of the complainant (the one who reports the criminal act) or the plaintiff (the one who in addition to reporting the criminal act, presents requests to the court).

In the scope of mediation (the search for a solution, sometimes obligatory, in a prejudicial stage), it is preserved among the governing principles the confidentiality of everything that has been seen and heard by the mediator and the impossibility to appeal to it in trial in the subsequent judicial proceeding. This kind of confidentiality is protected by the professional secret of the mediator.

In terms of marriage, separation, annulment and divorce, the Law 19.947 relating to Civil Marriage expresses in its article 86 that the process will be confidential, unless the judge, with good reason and expressly requested by the spouses, decides otherwise.

In terms of filiation, according to the Civil Code's modification introduced by the Law 19.585, the investigation of the paternity or maternity through the "filiation acts",⁵⁰ constitute a proceeding of secret character until the issuance of final judgment, that is to say, during the stage of investigation, with the possibility for the parties and their legal representatives to access the case history.

In terms of adoption of minors, in accordance with the Law 19.620, the governing principle is the best interest of the child, consequently a series of regulations are established to protect the identity of the parties involved and the background information gathered during the proceeding. For the aforementioned, the legislator emphasizes the confidentiality of the proceeding with regard to third parties distinct from the applicants with occasion of the personal care (article 19), and in general the confidentiality of every processing, judicial or administrative and the guard of documents the adoption gives place to, without prejudice of the possibility of resignation to this confidentiality by express request of the parts. The adopted is protected in its prior identity by means of the cancellation of the old birth registration and the administrative measures leading to this very purpose (article 26, number 3).

Finally, also in terms of adoption, there are special penalties for the civil servant that discloses or allows others to disclose the confidential case history that their position allowed them to know, sanctioned with the sentence of suspension from their jobs, consisting in its minimum grade of 61 days to a year, and in its medium grade for a year and one day up to two years, in addition to a fine. In case of reiteration, the sentence will be the absolute disqualification from running for public office in any of its grades and a fine, said sentence will be applied if, due to the disclosure, any harm is caused to the minor or its biological or adoptive parents. Also, there are fines established for anyone who discloses the case history being aware of its nature (article 39 and 40)

Consequently, the disclosure is not a proper general rule in the family courts, due to the confidentiality that directs the specific proceedings. These are mainly characterized by the protection of the family life developed within the context of the intimate relations, in addition to situations that compromise the interest of the minor or the honor of the persons. The aforementioned implies that the proceedings in general have a confidential character, preventing the simple acknowledgement by the third party, and impeding the free access both face-to-face and/or via computer system, being required for this latter case a user and a personal secret and non-transferable password, that only allows

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50 With the term "affiliation acts, we generically refer to the action of reclamation of affiliation, action of objection to the reclamation, action of ignorance of the affiliation and the action of invalidity of the recognition.

the search of those causes in which it figures as an authorized lawyer or part of the process.

Sex crimes

The sex crimes in Chile are regulated in the Penal Code, where the measures the court must adopt are relevant, needed to organize the confidentiality and secure the privacy of the actions of the process the victim must appear in court for. Among these measures, those that stand out are the ones about the institutions that carry out the examinations, medical exams and biological test conducive to confirm the corpus delicti (that is, to confirm the fact if the crime was committed) and to identify the participants in its commission, they shall be confirmed in a certificate, and maintained in custody and under strict confidentiality in the address of the establishment of healthcare for no less than a year, to be sent to court, situation that is stated in the article 182 of the Code of Criminal Procedure.⁵¹

The sex-change in civil matters

The legal identity in Chile is related to sex in a binary distinction, male or female- When there isn't a counterpart between the sex with which a person is socially identified and that with which it is legally recognized, it is probable that there exist an intention for overcoming that dissonance. But there isn't a special legal proceeding to regulate the sex-change, which is why one must resort to court by means of an ordinary civil proceeding, which by general rule is public and susceptible to revision by third-party strangers to the proceeding.

The ordinary proceeding consists in the presentation of a lawsuit before a civil court, accompanied by documentation relevant to the judge's certainty, among

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51 Code of Criminal Procedure, Article 198. "Medical examinations and tests related with the crimes established in the articles 361 through 367 and in the article 375 of the Penal Code, the hospitals, clinics and similar health facilities, whether public or private, will have to practice the conducive recognitions, medical examinations and biological tests to confirm the crime and to identify the participants on its commission, having to keep the antecedents and the corresponding samples. The minutes will be recorded, in duplicate, of the recognition and the examinations conducted, which will be subscribed by the boss of the facility or of the corresponding section and by the professional who may have performed them. A copy will be given to the person subject to the recognition, or to their legal guardian; the other, as well as the samples obtained and the results of the analysis and examinations carried out, will be kept under custody and strict reserve in the hospital, clinic or health facility's management, for a period of no less than a year, to be sent to the Public Ministry.

which are included:⁵² documents from the psychiatrist and psychologist's diagnoses, and certificates that can confirm the genital surgical interventions and the hormonal treatment in transsexuals. The plaintiff is subject to evaluations requested by the court to the Medical Examiner's office. Along with this, the plaintiff must present witnesses that can confirm he or she lives a life as a person of the opposite sex to legal, that he or she has been known by his male (or female) name for at least 5 years.

The former is relevant to this study, considering that's about sensitive data protected by the Law 19.628, that despite it, are exposed to the public scrutiny. Situation that's supported by the law by not establishing causals of confidentiality for this kind of proceeding that given its nature should count with special regulation.

2.3. Cases

The jurisprudence has referred to the confidentiality of information in the administrative proceedings, and in particular in the proceedings of the administration of justice, through the knowledge of the Courts of Appeal in cases that have been rejected by resolution of the Council of Transparency and that have been object to claims of illegality.⁵³ This, the disclosure has been emphasized as general principle that regulates the acts, resolutions, foundations and proceedings of the government agencies and the necessity of a law of qualified quorum to stablish confidentiality or secret, applicable in those cases in which the compliance of the agencies, the persons' rights, the National security or the nation's interests are affected.

In constitutional protection presented to the Council of Transparency,⁵⁴ in which it is requested to inform with regards to the identity of the person that presented a lawsuit against the commercial premises, complainant that has been identified under a false name, the Court of Appeals decides, then the claim of illegality, that

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52 Informe sobre Chile – Violación de los DDHH de Personas Transexuales, Quinta Ronda del Examen Periódico Universal ONU (Organización de las Naciones Unidas). Available at: <http://www.indh.cl/wp-content/uploads/2012/03/EPU-OTD.pdf>

53 In this regard, Court of Appeals of San Miguel. "Vásquez Tapia Luis Alberto con Consejo para la Transparencia" Role: 1391-2012, 95/13/2013. Court of Appeals of Santiago. "Universidad de Santiago con Consejo para la transparencia". Role: 7855-2012- 03/27/2013.

54 Court of Appeals of Punta Arenas. "Muñoz Barría Carolina Angélica con Consejo para la Transparencia". Role 262-2012. 02/25/2013

“the name of the complainant, constitutes an attribute of personality and personal data from which he is the title holder and as such it is protected by the Law No. 20.628 and only with its consent can said data be handed over or published, unless it is obtained from a source accessible to the public”.

3. Privacy in the criminal prosecution

3.1. The principle of disclosure in criminal matters and its exceptions

The general rule in Chile characterizes the processes as public, idea reinforced in the first article of the Code of Criminal Procedure, as a guarantee of transparency and of susceptibility to the public scrutiny. Without prejudice of it, there are exceptions in some regulations, in attention to the persons that participate and the nature of the trials, which could eventually affect fundamental guarantees, such as the honor and the intimacy.

The confidential character of the actions made according to the Code of Criminal Procedure it's presented in the investigational stage for the third-party stranger to the proceedings, without prejudice to the possibility of confidentiality whose reason may be the efficacy of the investigation, mainly for the protection of the victims and witnesses of some crimes. Thus, the guidelines given to the Public Ministry's prosecutors makes direct reference to the "need to conciliate the right to defense of the accused with the need to protect the victims and third-parties that collaborate with the same, who may be exposed to an objective condition of risk, as a consequence of the contribution they execute to the elucidation of the criminally relevant incidents".⁵⁵

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55 National Public Prosecutor's Office Legal Document No. 246. Complements the instructive No. 32 from the year 2000. "La reserve de identidad como medida de protección de los testigos". Santiago, May 27th, 2004.

3.2. Legal Aspects

3.2.1. Law No. 19.696: the current criminal prosecution⁵⁶

In general, the Code of Criminal Procedure's system of protection tends to an equilibrium of interests between the criminal prosecution and the participants' rights. Nevertheless, the mechanics of protection suppose a strict adherence to the law in order to maintain its effectiveness, there should be a previous and specific judicial order before any measure capable of violating the fundamental rights.

It contemplates a series of intrusive, regulated measures, reconciled with the principles of legality and proportionality as foundation of the precedence of the actions, without prejudice to contain in its proceedings elements that put at risk the private life and honor of the person. These procedures consider medical and physical examinations, entrance and registration in an enclosed area, retention and confiscation of correspondence, interception of communications, confiscation of objects and documents.

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56 It is important to mention on the model of the "old" prosecution or criminal procedure in Chile, which was active since 1906, and that it is still operational only regarding either the ongoing cases or for un-prosecutable crimes committed during its validity, the application of an inquisitive model, in two stages. The first, of investigation or "summary", in which a judge served as the conductor of the investigation, to subsequently charge the accused or defendant. Along with the charge started the "plenary" stage, during which evidences for or against were displayed, culminating with the sentence.

The article 78 gives a secret character to the actions of the summary stage by general regulation, which are formed as of the investigation of the incidents that constitute the crime or minor misdemeanor, to determine the person or people responsible, and the circumstances that could influence its qualification and penalty, that is to say, the proceedings conducted in order to prepare the trial by means of such elucidations and to ensure the person of the presumably guilty and their pecuniary responsibility, as it is established in the article 76.

Other confidential proceedings within this law are constituted by the discretion towards the victim's identity in crimes of distressing sentence (that is, especially serious crimes, penalized with a term of imprisonment of more than three years), when agreeing on parole, among others considered by this law, and in reference to incest and sexual intercourse with a minor of less than 18 years old of the same sex without the mediation of the circumstances of rape established in the Penal Code; the confidentiality of the witness's identity regarding third parties of so required; and the confidentiality of the information and the adjustors' conclusions, among others.

As we've mentioned, said proceeding is in process of discontinuation and closing, having been implemented at a national level the current criminal proceeding.

As far as the development of the proceedings, the Code of Criminal Procedure establishes relevant regulations for it. The article 19, in its second subsection, notes about the requirements of the confidential information that the Public Ministry and a legally competent court request to other State organizations, that “it will be dealt with by analyzing the corresponding law’s prescriptions, should there be any, and, otherwise, adapting the precautions that would allow the information not to be disclosed”; then, the fourth subsection delivers the decision to the Supreme Court if the authority established that the disclosure could affect the national security.

The article 182 establishes, about the secrecy of the actions of investigation, that these will be kept secret for the third parties stranger to the proceedings; being the accused and the rest of the participants the only ones allowed to examine and obtain copies of the record and documents of the investigation, with exception of those pieces or actions precisely identified that the district attorney decides should be kept secret from the accused and from the rest of the participants whenever required for the efficacy of the investigation and should not exceed a period of forty days.

In this sense, the confidential declaration is not possible regarding the actions in which the accused has intervened or has the right to intervene, the actions in which the court participates, nor the expert witness’ report concerning the accused or its defense attorney.

The public servants who had participated in the investigation or that have knowledge of the actions have the obligation to keep secret. The violation of this obligation constitutes a crime of violation of secrets from the Penal Code.

The possibility of abstaining from declaring in certain cases on the grounds of confidentiality, it’s appropriate for those persons that because of their state, occupation or legal function have the duty of keeping the secret that has been entrusted to them in the aspects concerning said secret.⁵⁷

In terms of confidentiality, the article 236, second subparagraph, addresses the authorization to practice procedures without the victim’s knowledge, after being formally notarized. The judge will be able to authorize such procedures “when the confidentiality becomes strictly indispensable for the efficacy of the procedure”.

The article 246 establishes the confidentiality over the records in which the Public Ministry the cases in which, if the conditional suspension of the proceeding

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57 QV, in this regard, the chapter on professional secret.

was decreed or if a compensatory agreement was approved, without prejudice of the victim's right of knowing the information related to the accused.

Concerning identity, the prohibition to inform from the article 92, that impedes the identity of the "detainees, accused, victims, witnesses, or the persons that were or could be involved in the investigation of a crime" from being disclosed to the media, falls on the police; in testimonial matters, the article 307 allows the safeguard of the witness' identity, upon previous request and decree of the prohibition.

The article 78 letter b), on protection and information to the victims mandates that the court will be able to order, or the victims themselves request, the measures destined to protect said victims and their families against possible harassments, threats or assaults. In this sense, the article 308, in its second subparagraph, establishes that the Public Ministry by itself or at a part's request, must adopt proper measures to protect the victim or the witness before or after their testimonies are given.

3.2.2. Law No. 18.314: Determines terrorist behavior and sets their penalties

The law on terrorist behavior, by request of the Public Ministry the Constitutional Judge, allows the interception, opening or recording of telephonic and computer communications and of regular and telegraphic correspondence, of all those conducts that qualify as terrorism by law, when the acts are committed with the purpose of producing in the population or in part of it the justified fear of being victim of crimes of the same kind.

3.2.3. Drug trafficking

The law No. 20.000 that penalizes the illicit narcotics and psychotropic substances trafficking, establishes between the means of restriction and the other technical means of investigation, the interception or confiscation of correspondence, the obtaining of copies of communications or transmissions, the interception of telephonic communications and the use of other technical means of investigation, sufficing the consignment of the circumstances that individualize the subject or determine him, without a need to indicate in detail the name or address of the person affected by the measure. The particularity of this investigation is that it can be secret to the participants when the Public Ministry mandates it for a maximum period of 120 days successively renewable for maximum periods of 60 days; the possibility of judicial control does not apply prior to the legal formalization established in the Code of Criminal Procedure, through which any person that is considered affected by an investigation that has not been judicially formalized, will be able to request to the Judge that will mandate to

the public prosecutor to inform about the acts subject to the investigation or sets a period of time for the investigation; finally, establishes penalties to whom informs, spreads or reveals information related to the investigation protected by secrecy or to the fact that an one is taking place, will incur in ordinary imprisonment within its medium grade to the maximum.

3.2.4. Prosecution for economic crimes

The National Economics Prosecutor's office is the public organization in charge of investigating and prosecuting the attempts against free competition, before the Free Competition's Court of Defense. This requires a different mechanism of persecution in this kind of crimes. The LD 2II, that regulates its functioning, deals with confidentiality in relation to the exhibit on formulas, strategies or commercial secrets or any other element whose revelation could significantly affect the competitive development of its title holder, without prejudice to the possibility of ordering in any stage of the procedure, even as a measure to better resolve the preparation of a public version of the instrument, so that the other parts will be able to exercise their right to refute or observe it.

The National Economics Prosecutor's Office can authorize the police to enter public or private premises and, if necessary, to break into and break open; search and confiscate any kind of objects and documents; authorize the interception of any kind of communications; and order to any company that provides communication services, to facilitate copies and records of the communications transmitted or received by it in serious and qualified cases.⁵⁸

In Agreed Judicial Decree II/2008 relating the reserve and confidentiality of the information in the trials⁵⁹ the reasons for the safeguarding are established: the serious damage to the individuals or to society as a whole and the importance of the strategic information. It is in relation to these purposes that the protection to the personal information is maintained, as it is explained in the preceding paragraph.

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58 This is admissible to confirm the express or tacit agreements between competitors or the practices agreed on among them, which confer them market power and consist on setting prices of sale, of purchase or any other commercialization conditions, to limit the production, to assign zones or market fees, to exclude competitors or affect bidding processes results, that are within the competence of the National Economic Prosecutor's Office.

59 Agreed Judicial Decree No. I5/2012, establishing the consolidated text of the Agreed Judicial Decree No. II/2008 from November 26th, 2008 on the Confidentiality of the Information in the Proceedings. Available at: <http://www.tdlc.cl/DocumentosMultiples/Auto%20Acordado%20N%C2%B0%20II%20Refundido.pdf>

3.3. Cases

3.3.1. Public Ministry's background

According to what the Court of Appeals of Santiago⁶⁰ has recognized, everything that is involved with the background and criminal information carried out by the Public Ministry's prosecutors have a confidential nature, even though by themselves they are not protected by any express regulation. Thus, the 182 of the Code of Criminal Procedure and the article 21 of the Law No. 20.285 are broad in sources of reserve, for which reason the data involved in the system of support to prosecutors (SSP)⁶¹ is protected, even though there is no express regulation.

3.3.2. Declaration of a witness with concealed identity

Relating to the oral and public trial, the Supreme Court has declared that the statement of a witness whose identity is not revealed⁶² is possible without breaking the proceeding's guarantees, since this circumstance is different to the anonymous statement of a witness. While in the first case the discretion constitutes a special measure for its protection, being its identity perfectly demonstrable to the court, in the second case, the identity is unknown to the accused, the defense, the court and the rest of the participants.

An official letter by the National Public Prosecutor's Office to the regional and attached public prosecutors of the country,⁶³ determines the cases in which the law expressly contemplates the faculty to decree the identity's confidentiality, among which terrorist crimes, illicit drug trafficking and money laundering are included. It also notes, the cases in which there is no express regulation, as it is

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- 60 Court of Appeals of Santiago. "Ministerio Público con Larredonda Alcayaga Pablo". Role: 3470-2012. 01/18/2013.
- 61 The SAF is a database for the quantification of statistical variables contained in the newsletters of the Public Ministry, whose elements are the identification of the participants of an investigation, the quality they hold, the identifying number of unique role of cause (RUC), the internal identifying number of the court (RIT), the designated district attorney, the investigational proceedings carried out, the e-mail inboxes of each of the deputy prosecutors designated for such cases.
- 62 Supreme Court. "Eric Montoya Montoya y otros". Role: 1179-2013. 04/22/2013
- 63 National Public Prosecutor's Office Legal Documento No. 246. Complements the instructive No. 32 from the year 2000. "La reserva de identidad como medida de protección de los testigos". Santiago, May 27th, 2004.

the case with homicide, sex crimes, and others where the persons' security is compromised, in which general regulations are applied. The aim of said discretion is to safeguard the integrity of the persons whose identities are protected, against possible attempts or retaliations.

3.3.3. The re-victimization

A significant aspect of the allocation of the private life is constituted by the re-victimization or secondary victimization. It consists of the suffering endured by whom, after being the victim of some traumatic situation, encounters it again by testifying on the same. In the context of criminal proceedings, this can only occur once the account of some criminal offence on the victim's part, for investigational purposes or at the moment of the prosecution, is demanded.

In acceptance of the public character of the criminal trial, the situation described above is capable of attempting against the right to intimacy, since it implies revealing the suffering of humiliating or especially harmful situations in compliance to the legal duty, against both third parties and the judge, the employees of the administration of justice, and even the general public. That is to say, it is revealed before the entire society the fact of having participated, as a victim, in the crime situations.

In Chile there are not express regulations tending towards preventing the re-victimization in general. Nevertheless, there are rules for the protection to minors in a criminal trial⁶⁴ and in the family trials,⁶⁵ which, with the purpose of mitigating the negative effects of the statement of minors in their physical and psychological integrity, alter the general probatory regulations.

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64 Code of Criminal Procedure. Article 191 bis, subparagraph I: "Anticipation of evidence of minors. The prosecutor will be able to request the anticipated testimony of children under the age of 18 that were victims of any of the crimes considered in the Second Book, Title VII, paragraphs 5 and 6 of the Penal Code. In said cases, the judge, considering the personal and emotional circumstances of the minor, will be able to, granting the request for anticipated evidence, interrogate the minor, and the participants must direct their question through him".

65 Family Courts Law. Article 41: "Child and teenage witnesses. The child or teenage witness will only be interrogated by the judge, and the participants must direct their question through him. Exceptionally, the judge will be able to authorize the direct questioning of the boy, girl or teenager, when due to their level of maturity it is estimated that it won't personally affect them".

4. Privacy and the public administration

4.1. The access to public information

The handling of the information in the public administration is governed by the Law 20.285, in force since April, 2009, about the access to the public information, which is closely related to the 8th article of the Constitution, which establishes the principles of integrity and administrative transparency. The current legislation guidelines are determined in the article No. I of the law, and regulate “the principle of transparency in the civil service, the State’s organizations right to access the information, the proceedings to exercise the right and its protection, and the exceptions to the disclosure of information”.

4.2. Legal aspects

4.2.1. Political Constitution of the Republic

The current 8th article of the Constitution was incorporated by the constitutional reform of the Law No. 20.050 of the year 2005. According to the same, the state acts are public, as well as their fundamentals and the proceedings to arrive to them. At the same time, it established that by law of qualified quorum it is possible to establish the confidentiality or secrecy over said acts and resolutions “when the disclosure affects the proper enforcement of said organizations functions the persons’ rights, the Nation’s security or the national interest”.

At the moment of the modification of the 8th article of the Constitution,⁶⁶ the disclosure and transparency are distinguished as the State’s governing principles, where the first corresponds with the obligation of the organization that develops the function to deliver to the public the themes that are of public relevance, while the second implies that the citizens have a right to demand that information so that the performance of the organization can be effectively legitimized from the point of view of what a democratic society is.⁶⁷

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66 Biblioteca del Congreso Nacional. “Historia del artículo 8 de la Ley 20.050”. Available at: http://www.bcn.cl/leytransparencia/histley/lfs/HLartConstitucion/Art8_probidad.pdf

67 The Constitutional court, in sentence 2153-II, understands the existence of conflict between the respect towards private life from I9 No. 4 (and jointly, the inviolability of the communications of the article I9 No. 5) and the access to the public information expressed in the article 8 of the Constitution, it must be understood that the latter acts as an authorized limit of the fundamental right in question. The previous, as long as it is about public information. The full verdict

4.2.2. Law No. 20.285

The 3rd article of the Law of Transparency establishes the transparent public service as that which “it is exercised with transparency, therefore allows and promotes the knowledge of the proceedings, contents and decisions that are adopted in its exercise”.

The second subsection of the 4th article notes that the principle of transparency of the public service consists in “respecting and preventing the disclosure of the acts, resolutions, proceedings and documents of the Administration, as well as the disclosure of its fundamentals, and in providing the access of any person to that information, through the media and proceedings that the law establishes for this effect”.

The law distinguishes between active transparency and passive transparency. The first one consists of maintaining at the permanent public’s disposal certain background information specified in the 7th article, with special emphasis in the background information that must be had at the public’s disposal in the letter i); and the second, the right to require and request information from any organization of the administration of the State contemplated in the title IV.

The causals of confidential information are contained in the article 21 and correspond in general to those in which its disclosure affects the proper enforcement of the organization’s functions, the people’s rights, the security of the nation, the national interest, or when the law of qualified quorum has declared reserved or secret the documents, data or information in compliance to the causals of the 8th article of the Constitution. Among these causals, the causal of “people’s rights” stands out, supposing that where the duties of disclosure and transparency of the State implicate affecting the private life of the people, a reserve or secret should exist.

4.3. Cases

4.3.1. The sensitive data of a public employee.

About the disclosure of the sensitive data of a civil servant, understanding in a particular case⁶⁸ that this includes the full name and the pension’s amount, the jurisprudence has collected guidelines from the Comptroller’s General Office in

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is available at: <http://www.tribunalconstitucional.cl/wp/ver.php?id=2537>

68 Constitutional Court. “Jerónimo Alvear Castillo c. Sin identificar”. Role: 2409-2013. 04/09/2013.

the implementation of regulations thereupon. Thus, it has decided that in this case in particular, the disclosure of data contained in a verdict from the Comptroller's General office in the appropriate website, must obey the following guidelines:

- a. The Comptroller's General Office's pronouncements, as well as the background that serves as basis to its dictation are public, as long as they do not influence in neither secret nor reserved subjects in virtue of some law of qualified quorum, and in agreement to the causals established by the Primary Charter.
- b. The personal data characterized as relative to any information concerning the natural persons, identified or identifiable, establishes that the treatment of these data by a public organization can only take place with regard to the matters of its competence and subject to the precedent rules that notes, and in these conditions it will not need its title holder's consent.

According to this jurisprudential judgment, the public organizations are authorized to process personal data, even though the title holder's consent does not mediate, as long as they act in the scope of the subjects proper to its competence.

4.3.2. Public information and private communications

The Supreme Court, following the interpretation of the Court of Appeals, has understood that the delivery of the information contained in e-mails by the authorities, affects the inviolability of every way of private communication.⁶⁹ It notes that although the citizens and the rest of the authorities will not have the right to access the relevant public information, being restricted from knowing the acts and resolutions of the organizations of the State when these are contained in e-mails, the 19's guarantee number 5 of the Constitution it's prioritized, and protects every way of private communication, enclosed and extensive to the public information.

4.3.3. The RUT ID number as sensitive data

In Chile, identity comes associated to the unique number, that's equivalent to the code for effects of the tributary management. The number of the unique tributary role or RUT, it is assigned to the natural persons as well as the legal

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69 Constitutional Court. "Alcalde de la I. Municipalidad de Melipilla con Ministros de la Corte de Apelaciones de Santiago". 05/22/2013. Role: 9563-2012; Court of Appeals. "Subsecretaría del Interior con Consejo para la Transparencia". Role: 6704-2011. 12/17/2012.

entities that register before the Internal Revenue Service (that is to say, they report their own functioning for purposes of tributary payment). In a more precise manner than the name, unequivocally identifies a person.

- a. By means of a request to access the information, required to the Ministry of Housing and Urban Planning are the qualifications of all the staff and employees from 2003 to 2008, considering among the variables the unique tributary role (RUT), requirement replied with the consideration of concurring causals of confidentiality of the law No. 20.285.
- b. In legal protection AIO-09, the Council of Transparency distinguishes the information requested by the petitioner, establishing about the RUT that it must be considered as personal data whose aim is its treatment inside the public service and not to its transfer to a third party. The former, without prejudice to the duties of active transparency that raises the reservation of the RUT, whom at the discretion of the Council requires the notification to its title holders in agreement to the article 20 of the Law of Transparency because it is information that hasn't been revealed and that in case it is, it could mean undermining the public servants' rights.
- c. In this regard, the qualifications of the period 2003 to 2008 of the entire FONASA staff were requested, in legal protection AI26-09,⁷⁰ pronounced in Council of Transparency with the negative in the delivery of the RUT of the public servants, by being required as an enablement requirement the written consent to these, because of not being found in a database as an accessible source to the public.

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70 Council for Transparency. Legal protection AI26-09. "Fondo Nacional de Salud con Miguel Rojas Zúñiga". 06/29/2009. http://www.consejotransparencia.cl/data_casos/ftp_casos/AI26-09/AI26-09_decision_web.pdf

5. Privacy and electoral data

5.1. The automatic inscription system and the databases

Within the management of personal data by the State, the handling of the data of persons registered and authorized to vote has special relevance. This comes specially marked by the evolution of the electoral system in Chile, which includes among other features the existence, until quite recently, of a list of registered voters to which the persons must go to register. Although the lack of inscription does not mean the absence of a right to vote, it was understood that the register alone testified to the compliance of the legal and constitutional requirements to vote; consequently, the bureaucratic processing was the only mechanism for the participation of a universal right.

Since the year 2012,⁷¹ the inscription in the list of registered voters in Chile is automatic for those of a legal age that haven't registered beforehand. The information contained in SERVEL's registers of electoral data, belongs to 13.404.084 persons.⁷² In the case of those persons voluntarily registered, they have not consented the use of their data for any other purposes other than voting. In the case of the persons automatically registered, the lack of consent is far more obvious: their data is obtained from the databases of the Civil Registry and Identification Service, the register of resident foreigners in the Immigration Department, the National Central Office of Immigration and International Police.

5.2. Legal Aspects

5.2.1. Political Constitution of the Republic

In agreement to the article 13 of the Political Constitution, the status of citizen gives the right of political participation, including the vote. According to the article 15, the vote is "personal, egalitarian, secret and voluntary". The vote's secrecy has been traditionally understood as the guarantee of freedom at the moment of voting, since the political preferences of a person are not controlled in its more direct exercise.

The article 18 of the Constitution contemplates the creation of a public electoral

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71 Law No. 20.568 on automatic inscription and voluntary vote.

72 Servel. Definitive Census 2012. "Cantidades de inscripciones electorales por sexo y región y sus porcentajes en el total del país". Available at: http://sitio.servel.cl/controls/neochannels/neo_ch30/appinstances/media516/Informe_Inscripciones_Vigentes_por_Region.pdf

system. It delivers an organic constitutional law of regulation of its organization and functioning, the way to carry out the electoral and plebiscitary processes, the financing system, the transparency, the limit and control of electoral spending, and the electoral register system.

5.2.2. Law No. 18.556

The Law No. 18.556 about the system of electoral registration and electoral department, it is the concretion of the constitutional mandate. This law creates an electoral register that contains the list of “all the Chileans included in the numbers 1st and 3rd of the article 10 of the Political Constitution of the Republic, older than 18 years of age”, and the rest of the Chileans and the foreigners older than 18 years of age that fulfill the requirements of the article 13 and 14 of the Constitution⁷³ by operation of law, using as basis to conform the electoral rolls of each plebiscite or election.

The electoral register contains all those persons that fulfill the requirements to vote, serving as basis for the manufacture of the respective electoral roll to use at each plebiscite or election. The electoral roll, considers the persons that, fulfilling the general requirements to exercise the right to vote, are authorized by the corresponding election; that is, the electoral roll is developed listing the members of the register for a particular voting excluding the disqualified.

About the electoral data contained in the register, there are encompassed in them, in a non-limited way, subject to those necessary to maintain the electoral register updated:

- a. Name and surname of the registered
- b. Unique National Role
- c. Date and place of Birth
- d. Nationality
- e. Sex
- f. Occupation
- g. Electoral domicile
- h. Constituency (identification of the region, province and county it be-

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73 Art. 13. The Chileans that have turned eighteen years of age and have not been sentenced are considered citizens. The quality of citizen bestows the right to vote, to run for positions chosen by election and others that the Constitution or the law bestows.

Art. 14. The foreigners settled in Chile for more than five years, and comply with the requirements noted in the first subparagraph of the article 13, will be able to exercise the right to vote in the cases and ways defined by law.

longs to, the number of the voting reception table in which it has to vote and the compliance to the requisite of residence, if needed).

The register must contain the necessary background information to decide if a registered person has lost its citizenship, the right to vote, or if it is suspended from this right.

The access to the electoral data in a direct and permanent way belongs to the Electoral Service (Servel). Servel will determinate the electoral roll with audited character and the Audited List of Disqualified; listings that must be published by the Electoral Service in its website seventy days in advance to the date that an election or plebiscite should be verified (article 32 fourth subparagraph of the law 18.556).

The 4th article establishes that the data of the electoral roll may not be used for commercial purposes, ordering the penalty of ordinary confinement in its minimum grade and fine from one to three monthly tributary unities to whom uses them for commercial purposes, and the penalty of ordinary imprisonment in its medium grade, fine from ten to fifty monthly tributary unities and the absolute and perpetual disqualification from the performance of public positions and professions to whom commercializes said data, with express mention to the fact that it will have to fulfill what's expected in the law No. 19.628.

5.3. Cases

5.3.1. Copy of the alphabetical computational census of current electoral registrations.

On October 1st, 2009, through the request of access to the public information directed at Servel, a copy of the alphabetical computational census of current electoral registrations is required, male and female, whose answer by the institution by means of Of. Ord. Number 10.305 informs the possibility of acquiring the electoral roll by any person, previous payment of an amount determined in resolution extent Number 1076/2009, ascending to the total amount of \$21.698.799 (approximately USD 40.000 so far).

The legal protection formulated against the measure⁷⁴ was based on the contradiction between the public character of the data and the high value that is charged for it, in response to the fact that the required format is the e-mail,

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74 Council for Transparency. Decision for legal protection role no. C407-09. "Servel con Sebastián Rivas Vargas". 10/27/2009. Available at: http://www.consejotransparencia.cl/consejo/site/artic/20100528/asocfile/20100528122803/c407_09_decision.pdf

and additionally, in case of not counting with the technical feasibility, in compact disk, that has a value of approximately \$200 (USD 0.40, approximately), based in the article 18 of the Law, which notes that it can only be demanded the payment of the direct costs of production and the rest of the values that a law expressly authorizes to charge.

The petitioner adds the necessity of a pronouncement about the domicile, RUT and condition of disability within the electoral roll, in relation to the consideration as sensitive data and the lack of consent due to the fact of the register.

The Council for the Transparency accepts the legal protection, considering that even though the Servel supports the origin of the charge in the current legislation,⁷⁵ the Law of Transparency must prevail, because of having the character of regulation subsequent to the function that required the payment, organizing the charges as a factual rejection of public information, applying the article 18 aforementioned as a solution.

About the delivery of data understood as sensitive by the petitioner, the Council estimates that they must be delivered based in the disclosure established in the law No. 18.556, and as a way to secure the social control, in reference to the duplicated registrations, being the co-legislative organizations' task to determine if it is necessary to modify this circumstance.

5.3.2. Publication of the voter's registration list by SERVEL

In April, 2012, the Electoral Service's online search engine, in the context of the implementation of the law No. 20.568, allowed any person to access the information contained in the register, including sex and the electoral jurisdiction of anyone registered. This information came associated to the RUT number or the full name of each voter, in addition of being divided by the electoral office, thereby it was enough to know the name of a person or its RUT number in order to access their domicile information and their polling place.

The data published did not necessarily counted as sensitive information, since the name, electoral data, authorizations and electoral functions are of a public nature. Nevertheless, there was public commotion because of the ease with which one could obtain said information, because of its volume and level of accessibility as well as its systematization, before the level of transparency demanded by the Electoral Service. At first, the Electoral Service defended its action, arguing verdicts and rulings of the Constitutional Court, the National

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75 Article 83 of the law no. 18.768 from 1998 that establishes the complementary guidelines of the financial administration, of budgetary and personal influence.

Comptroller's Office and the Council for the Transparency, of disposing the data in a public manner,⁷⁶ but after the controversy, Servel mandated as an immediate measure the temporary suspension of the page,⁷⁷ and as a permanent measure to restrict the delivery of information to the entry of the RUT number.⁷⁸

In June, 2012, a draft law was presented by a group of government party's congressman⁷⁹ with the purpose of repealing the deposition that obligates the Electoral Service to publish the electoral roll and the audited list of the disqualified to participate in the electoral process. As of today, the project is being processed in the Senate.

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76 Terra Chile, April 26th, 2013: "Servel corregirá publicación de datos privados de electores". Available at: <http://noticias.terra.cl/nacional/servel-corregira-publicacion-de-datos-privados-de-electores,f342847a600f6310VgnVCM10000098c-ceb0aRCRD.html>

77 Biobío Chile, April 27th, 2013: "Gobierno confirmó que sitio web del Servel no está disponible por polémica filtración de datos". Available at: <http://www.biobiochile.cl/2012/04/27/gobierno-confirmando-que-sitio-web-del-servel-no-esta-disponible-por-polemica-filtracion-de-datos.shtml>

78 Accessible at: <http://consulta.servel.cl/>

79 Newsletter No. 8345-06, submitted Wednesday, June 6th, 2012.

6. Privacy and intelligence activities

6.1. Regulation of the State's intelligence

With "intelligence activities", we refer in general to those means used for the obtaining of information relevant to the security or defense of the State, its territory or the nation it inhabits, and that usually maintain their secret or confidential character relating the public in general, with the purpose of safeguarding the goals of external and internal security, made extreme by situations such as international terrorism and the national and international contingency. Besides, in Chile, the intelligence system currently in force is extended to the fight against the activities of organized crime and drug trafficking, thus increasing the protection of the State and the society to other internal and more complex threats, even though they are commonly subject of competence of the regular investigational and criminal prosecution organizations.

The Executive's message,⁸⁰ precedent of the Law No. 19.974 about the System of Intelligence of the State, conceptualizes as intelligence the "useful knowledge, result of the processing of information, developed by a professional organization, to advise in their decisions to the State's superior levels, with the purpose of preventing and informing the risks to the national interests and the accomplishment of the country's objectives, the security and the defense".

The reasons for the fulfillment of "intelligence activities" to the obtaining of information to proceed, above the principle of disclosure of the State's performance, have been systematized in the following points:⁸¹

- a. Plurality of States that have the necessity to defend themselves to maintain the security, the order and the peace.
- b. The State's protection is exercised ad extra, but also ad intra.

The National Agency of Intelligence leads the intelligence services in Chile. Nevertheless, the system of intelligence is formed also by the intelligence services from the different branches of the armed and security forces, including: the Intelligence Bureau of Defense of the General Staff of National Defense; the Intelligence Bureaus of each of the Armed Forces, and the

80 History of the Law NO. 19.974. Message No. 52-35 from November 6th, 2001, count on session 14, legislation 345. <http://www.leychile.cl/Navegar/scripts/obtienearchivo?id=recursolegales/10221.3/3784/1/HLI9974.pdf>

81 ABA CATOIRA, Ana María. "El secreto de Estado y los Servicios de inteligencia". Cuadernos Const. De la Cátedra Fadrique Furió Ceriol, number 38/39. Valencia, 2002.

Bureaus or Central Offices of Intelligence of the Forces of Law, Order and Public Security.

6.2. Legal Aspects

6.2.1. Political Constitution of the Republic

The general rule is that every action, reason and proceeding of the State's organization is public. However, the Constitution, in its 8th article, reserves to a law of qualified quorum the determination in cases in which confidentiality or secrecy applies, in cases in which the disclosure could affect the compliance of the purposes of said organizations, the persons' rights, the Nation's security, or the national interest. That is to say, the legal reserve requires a parliamentary approval high in shape, in addition of specific purposes in essence, to authorize the state actions in a confidential or secret way. To that standard of approval any reform to the intelligence activities authorized in reserve are subject to, including those covered by the Law No. 19.974.

6.2.2. Law No. 19.974: On the State's intelligence system and creation of the National Agency of Intelligence

Chile establishes and regulates, in the year 2004, the current State's intelligence system, through the creation of the National Intelligence Agency (ANI),⁸² distinguishing in first term the intelligence and counter-intelligence, considering the first as "the systematic process of gathering, evaluation and analysis of the information, whose purpose is to produce useful knowledge for the decision making; and the second, as that part of the intelligence activity whose purpose is to detect, locate and neutralize the intelligence actions developed by other

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82 Predecessors of the ANI in terms of intelligence of the Chilean State have been the Dirección Nacional de Inteligencia (DINA), created by the Law Decree No. 521 in the year 1974, with the purpose of producing the required intelligence for the formulation of politics, planning and the adoption of measures to ensure the protection of the national security and the development of the country; and, the Central Nacional de Informaciones (CNI) created in 1997 by the Law Decree No. 1.878 with the faculties to gather and process information at a national level, coming from the different fields of action, required by the national government for the formulation of policies, plans and programs and the adoption of necessary measures for the protection of the national security and the normal development of the national activities and an institutional environment. In both cases, said agencies gathered information relevant to the objectives of security of the State that in the actual events were confused for political purposes of the dictatorial regime in force at the time. Its existence is associated to the systematic violation of human rights for political reasons.

States or persons, organizations or foreigner groups, or by their local agents, director against the security of the State and the national defense”.

The National Intelligence Agency carries out duties of gathering and processing of the information at a national and international level; elaboration of periodical reports of a secret nature to be given to the President of the Republic; the proposal of regulations and protection procedures of the systems of information; requiring to the other intelligence organizations of the Armed Forces and the Forces of Law, Order and Public Security, among others, information within their competence; requirements of information to certain information services, such as the ones from forces of law and order; setting the implementation of intelligence measures with the purpose of detecting, neutralizing and counteracting the actions of terrorist groups, both national and international, and of criminal translational organizations; and, to set activities of counterintelligence.

- Secret proceedings established in law: The law considers some procedures with express secret nature, among them:
 - a. The report and the sessions about the work carried out and the functioning of the ANI presented to a Special Commission of the Chamber of Deputies once a year.
 - b. The records, information and registers operated by organizations that make up the system or its personnel, and all the background that has a secret character or of restricted circulation.
 - c. The studies and reports that the intelligence organizations elaborate.
 - d. The information of a secret character, applies even to those persons that without being public servants learn the execution of special procedures for obtaining information.
- Proceedings qualified as special. In those cases where the information required is strictly indispensable for the compliance of the system's objectives and cannot be obtained from open sources, these proceedings could be used with the objective of safeguarding the security and national protection from threats from terrorism, organized crime and drug trafficking. These measures consider the proceedings of telephonic, computer and broadcasting interventions; intervention of systems and computer networks; electronic taping; intervention of any other technological system destined to the transmission, storage or processing of the electronic communications. The previous circumstances will require a judicial authorization if so determined by the law.
- Relevant aspects of the law
 - a. Requirements for the procurement of information
There are two ways of obtaining the information on the part

of the ANI: according to the general rules or according to the special proceedings.

The first way, considers the acting inside the legal faculties of the 8th article, among which, in a general way, the gathering and processing of the information in every aspect, the reports, the proposals, the requirements of other organizations and the implementation of its measures.

A second way of proceeding involves the impossibility of obtaining the information by means of open sources, and it being strictly indispensable for the compliance of the system's objective, limited by the national security, the protection of Chile and its people from the threats of terrorism, organized crime and drug trafficking. It considers the intervention of telephonic, computer, broadcasted communications, and of the correspondence in any of its shapes; the intervention of systems and computer networks, the electronic taping including the audiovisual; the intervention of whatever other technological systems destined to the transmission, storage or processing of communications and information.

The law authorizes the use of secret agents with the faculty to infiltrate (article 31) and of informers (article 32), without the necessity of a judicial authorization.

b. Criterion for the delivery of judicial authorization

For the concretion of special proceedings considered in law, a judicial authorization is required, that must be solicited by the directors or chiefs of intelligence organizations, with the sole purpose of safeguarding the national security and to protect Chile and its people of the threats imposed by terrorism, organized crime and drug trafficking.

The directors or the chiefs of the intelligence services of the Armed Forces will be able to present the applications directly to the Minister of the Court of Appeals from the territory where the procedure takes places or where it begins, or through the corresponding institutional judge, in accordance with what's established in the II Title of the First Book of the Code of Military Justice, who'll be the ones called to consent that authorization. Thus, the authorization will not be seen by a guarantee judge like in the common system of gathering of information, but rather by a ministry of the court or by a military judge.

c. Possible uses of the information obtained by the ANI through other State's organizations.

The article 42 of the law establishes that the information

gathered, elaborated or exchanged by the organizations that make up the system shall be used exclusively for the compliance of its respective commitments. In that sense, the main objective of the intelligence organizations is the counseling of the President of the Republic, to whom in compliance of the intelligence tasks will execute global and sectorial evaluations, will perform periodical reports, will propose regulations and protection proceedings, and will order the implementation of intelligence and counterintelligence measures, among others noted in the 8th article.

By general rule, the organizations of the State will not have access to the information obtained by the Intelligence Agency, this due to their restricted circulation and secret character. Exceptionally, data requested by the House of Representatives, the Senate, the Courts of Justice, the Public Ministry, the National Comptroller's Office through the Minister of Internal Affairs, of National Defense and the Bureau's Director, without prejudice to the authorities and the public servants that had been informed of the background to what the previous paragraph refers, will be obligated to maintain the secret character of its existence and content even after the termination of its functions in the respective services.

6.3. Cases

There isn't public information about the activity of the intelligence organizations, nor of the intrusive measures adopted with basis on the national security, defense and the compliance of the state goals. It is only known by its actions in certain incidents and conflicts, as it was the investigation for the use of explosive artifacts known as the "Caso Bomba" (Bomb Case),⁸³ and the participation in the conflict in the south of Chile in relation to the violent incidents with demands from the Mapuche people, that diverse State organizations have described as terrorists. About the latter, the Senate Defense Committee summoned ANI's director to a (secret) session in early 2013,⁸⁴ without further information about its proceedings in the zone.

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83 La Tercera. "Cronología del caso Bombas". 05/06/2011. <http://www.latercera.com/noticia/nacional/2011/05/680-363827-9-cronologia-del-caso-bombas.shtml>. [search: 01/30/2014]

84 Senate of the Republic, Department of Press. "Director de la ANU expuso en sesión secreta sobre la situación de La Araucanía". Available at: http://www.senado.cl/prontus_senado/site/artic/20130115/pags/20130115184922.html

In relation to the “Caso Bomba”, a sentence under the title of terrorist crimes was not achieved despite the efforts of the Public Ministry, the Investigation Police, and the ANI.⁸⁵ Nonetheless, the persecution organizations were accused by the media for leading a not very transparent investigation and detrimental to the constitutional guarantees, including the realization of telephonic hearings and e-mail interception, without previous judicial authorization. The ANI’s director was summoned more than once before the respective commission of the House of Representatives to report of said incidents, in secret session.⁸⁶

However, since there isn’t public information on the activity of the ANI in this sense, the intelligence activities that have been known as infringing the privacy have been fundamentally from foreign governments, by means of leakage of information to the press or by non-detailed public information.

Among these activities from foreign governments, we find the use by the United States of America of unmanned flying devices (drones) for the gathering of images in “cases and particular necessities” occasionally and without the corresponding privacy regulations,⁸⁷ according to what the Director of the National Intelligence Office (FBI) Robert Mueller has confirmed; and the gathering of information online through the PRISM software of the National Security Agency (NSA), characterized as a surveillance software qualified as top secret. According to the leaks of the year 2013⁸⁸ published by the English newspaper “The Guardian”, the

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85 In this investigation, a gathering of information of the bank account of the accused Omar Hermosilla, considered the fundraiser of the illegal association subject of the case, was made by the ANI. The evidence indicated was dismissed by the court with the basis of not having been obtained by means of the modality of the law no. 19.974 on intelligence of the State and that creates the ANI, whilst the institution indicates that the law aforementioned authorizes the action and contemplates the faculties in question. The evidence would have been significant in the development of the trial. For further detail, see: “Tercer Tribunal Oral en lo Penal de Santiago. Sentencia ‘Caso Bombas’”. A.R.I.T. No. 138-2011, R.U.C No. 0700277303-6.

86 House of Representatives, Department of Press: “Comisión Caso Bombas citará nuevamente a director de la ANI por escuchas ilegales telefónicas e interceptación de correos electrónicos”. Available at: http://www.camara.cl/prensa/noticias_detalle.aspx?prmId=50105

87 In Chile, the “drones” have been dealt with in relation to the surveillance in the region of Araucanía. On this subject: <http://www.derechosdigitales.org/6796/es-un-pajaro-es-un-superman-es-un-drone-vigilancia-y-nuevas-tecnologias-en-la-araucania/>

88 ABA CATOIRA, Ana. “El secreto de Estado y los servicios de inteligencia”. Available at: <http://dialnet.unirioja.es/descarga/articulo/830972.pdf>

NSA counts with direct, unilateral and unconditional access to some systems such as Google, Facebook, Apple, among others, that allows the surveillance of citizens in real time through the obtaining of data and meta-data in channels of information such as e-mails, conversations, browsing history, among others.

7. Privacy in telecommunications

7.1. Range of the concept of telecommunications

By telecommunications we understand all those ways of communication between persons among which there is geographical distance, via radio, electronic or telematics means. The telecommunications are conceptually inclusive of diverse branches, such as the telephony and the digital networks like the internet. Its use, converges in the implementation of fundamental guarantees such as the property right and the right to the intimacy of the communications as the guiding aspects of its content: where there is a long distance communication between two persons, their rules of privacy are as applicable as in relation to the transportation of private information via physical form. Moreover, the existence of telecommunication services providers, puts upon them the duty of reserve over such communications

In this regard, the telecommunications mainly regulate the use of the radio, the telephony, the television and the internet, services characterized by the distance interaction and the relevance of the information in societies.

7.2. Legal aspects

7.2.1. Law No. 18.168: General Law of Telecommunications

In Chile, the general law of telecommunications regulates every transmission, broadcast or signal, signs, documents, images, sounds or information of any nature, by physical line, radio electricity, optical means or other electromagnetic systems, considering regulations on the interception, diffusion and protection of the users. It aims to regulate the telecommunications as a service, and to the relation among the different operators of that system.

In terms of privacy, and along with the general guarantee of inviolability of the private communications, the law establishes that the authorized dealers of telecommunication services maintain primarily, the obligation to preserve the privacy of the users.

The law penalizes the interception or malicious or serious sampling without the proper authorization of any kind of signal that's broadcasted through a public service, with restrictive or prison sentences and a fine, the punishment increase if there is public or private divulgation of the content of said signals.

7.2.2. Law No. 19.496: The spam in the regulation on consumer's rights

The use of spam or unsolicited e-mail Chile is regulated by the rules on consumer protection with basis in the respect to their will, and in general terms in relation to the guarantee of the right to intimacy. Without prejudice to this, other countries like Peru, United States and Canada, have developed specific legislation,⁸⁹ situation that hasn't prospered in Chile, despite the parliamentary initiatives referred to the this subject,⁹⁰ that have searched the strengthening of the penalties, the request for previous consent, the responsibility of the providers of the services, among others.

The law No. 19.946, about the protection of consumer's rights, deals with the subject in the following terms:

- The right to the freedom of choice of the goods or services as guiding principle of the legislation.
- The spam, characterized as every promotional or advertising communication, shall indicate the subject or what's about, the identity of the sender, a valid address for the consignee to request the suspension of the shipments, with expeditious indication for the request.

This regulation, ultimately, means that the spam is fully legal in Chile. The annoyance over the privacy of the users appears as a secondary issue, being favored the commercial communication.

7.2.3. Telephonic Interception

On the whole, the Penal Code authorizes the interception or recording of the telecommunications, when there are well-founded suspicion regarding a person or a criminal organization, which has committed or prepared the task of some crime considered by the regulation, among those the production of pornographic material and the promotion or the supply of this material, being alternatively regulated by the Code of Criminal Procedure.

The Code of Criminal Procedure, in the articles 222 through 226, regulates the interception of telephonic communications. For its admissibility, a previous authorization from the qualified Guarantee Judge before the request from

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89 Perú: Law No. 28.493; Senate Bill S-235; United States: CAN-SPAM 2003; Canada: Senate Bill S-235.

90 Newsletter 6136-03. Regulates the e-mail sending and of calls or telephonic spam, of commercial or advertising character. Archived.

the Public Ministry when there are well-founded suspicions, based on specific incidents, that a person had committed or taken part in the perpetration of some crime worthy of penalty and the investigation made it indispensable. It is treated, in addition, the register of the interception by means of tape recording or other analog means, the notification to the affected after its realization, and the prohibition to use it as means of proof when it takes place outside the circumstances envisaged by the law.

The telephonic interception is authorized in investigational assumptions and criminal prosecution already seen, consequently we refer to the aforementioned.

Supplementary to this rule are the Regulations about the interception and recording of telephonic communications and other ways of telecommunications, of the Ministry of Transport and Telecommunications, from the year 2005. The same establishes general guidelines about the interception of telecommunications, tending towards the safeguarding of privacy, and at the same time to facilitate the police's work in the criminal investigation.

7.2.4. Interception of other ways of telecommunication: internet

The growing importance of the internet as way of communicating, in addition to its technical complexity, has made the regulation and interception of these communications necessary. For this purpose, the Regulation about Interception establishes in its 6th article obligations for the providers of internet services, to maintain information about the communications of its users.

Consequently, the providers of internet access must maintain:

- a. An updated list of their authorized ranges of IP addresses.
- b. A register of the IP numbers of their subscribers' connections, for a period not minor than a year.

The Regulation does not consider a rule for the elimination of said data, because it mandates that the registration of the IP will be maintained by a period not minor than six months, without noting a maximum limit. If we take the IP number address as a numerical set that identifies a device on the internet, which has been recognized by the foreign jurisprudence as personal datum,⁹¹ the general guidelines in matters of data protection must be applied, established in the law No. 19.628, including the possibility of elimination.

In relation to the interceptions and decreed recordings, mandate in regulation

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91 <http://www.delitosinformaticos.com/OI/2008/proteccion-de-datos/la-ue-considera-las-direcciones-ip-como-datos-de-caracter-personal#.UeAe3TuQW8A>

that the providers of telecommunication services will comply to them, in the period and way established in the corresponding notice by the court familiar with the cause.

7.3. Cases

In April, 2012, it was formalized (that is to say, formally informed of the criminal investigation against him) the retired major of Carabineros (Chile's police), Gonzalo Alveal Antonucci. According to the investigation, between the months of May and July of the year 2012, the then Head of Internal Affairs of the Intelligence Bureau of Carabineros, Dipolcar, had allegedly ordered the telephonic interception of two cellphone numbers of officers from the same institution, without a judicial order and in the context of an police investigation.⁹² According to what the Public Ministry understood, that information was used with purposes unconnected to the investigation under way, consequently the major was formalized for the crimes of obstruction to the investigation and recording of private communications without judicial authorization.

The process is under way, in the investigational stage that should end the month of July, 2013. One of the alerts raised by the existence of cases such as this one, lies in the importance of counting with safeguarding for those entities, especially state's, that count with the technical capacity (at a technology level as much as of knowledge of espionage) to obtain information starting from the non-authorized intervention of private telephonic lines, with different purposes to those that inspire any public or police service.

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92 "La Tercera", April 29th, 2013.

8. Privacy in the work environment

8.1. The intimacy of the worker against the faculties of the employer

The workplace seems to be one of the environments where a person can more openly interact in society. However, the fact of being developing productive tasks does not by itself imply a situation of diminishing fundamental rights. In this sense, it is feasible to find situations of damage to the constitutional rights that, along with the harm that cause by themselves, acquire abusive dimensions for the worker. This is even more susceptible to happen there where the worker carries out communicational acts worthy of protection in the working environment, be it caused by its labors or not, be it through the means provided for the employer or not. In principle, the full validity of the fundamental rights do not have exceptions in the relation between the employer and the worker; nevertheless, practice has demonstrated questionable situations.

The recurring conflicts in matters of the intimacy of the worker in the exercise of its functions, does not present big conflicts for the resolution by the Labor Department and by the jurisprudence in general, since the intimacy of the worker has been understood as a legally-protected right, it is superior to the power of the employer even in the context of the working relations and the inherent faculties of the employer, such as the supervision of the workflow and the gathering of information for determined purposes such as the verification of records and the fulfillment of the tributary obligations.

8.2. Legal Aspects

Concordant with the Constitution, the Labor Code considers among its regulations the intimacy of the worker as a fundamental aspect and of great importance in the working relations. In this way, the 5th article establishes that “the exercise of these faculties that the law recognizes to the employer, has as limit the respect to these constitutional rights of the worker, especially when they could affect the intimacy, private life or the honor of these”. In this regard, treats the confidentiality by the employer of every information and private data of the worker accessible due to the working relation, by way of the making of the internal guidelines and the temporary services contract.

In the context of the labor procedure reform⁹³ of the year 2009, the procedure of working custody is developed in depth for all those conflicts developed in the working relations, emphasizing the infringement of the fundamental rights,

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93 Law No. 20.087. Replaces the labor proceeding considered in the V book of the Labor Code.

where it is expressly noted the application relating the inviolability of every way of private communication.

It is relevant to this procedure the reduction of the burden of the probation imposed to the holder of rights, in consideration of those circumstances of inequality specific to the working relations. A great contribution is given to those precedents considered “enough evidence”, where after being given by the complainant, the defendant shall explain the fundamentals of the measures adopted and their proportionality, as noted in the article 493.

Conflicts between the workers’s right to intimacy and the faculties of the employer.

The right to intimacy in working relations carries bigger complexity than other procedures, in consideration to the dissimilar relation between the employer and the worker. For this reason, it is necessary to determine the aspects over which the employer has the power of knowledge, intrusion and divulgence of the information known by way of their activities opposite the employee, in the daily activities as much as in the communications.

The situation of the work e-mail

In relation specifically to the working environment, there are no express regulations about the treatment to the communications nor to the e-mails in particular. This does not prevent the existence of criteria and the association of the same under the correct application by the Labor Department or by the judge of the existent guideline against particular cases.⁹⁴

The employer, who presents as inherent characteristics the faculty to organize, direct and manage the company, it is expressly limited by the law in these, regarding the respect to the constitutional rights of the worker. In that sense, the administrative jurisprudence of the Labor Department, in the multiple ver-

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94 In addition to the guidelines of the Division of Labor, the Constitutional Court in Verdict 2153-II, determines during the forty-fourth recital the guidelines of the National Comptroller’s Office, which understands that it is not appropriate to qualify the use of institutional computers as misuse of essential public goods, given that the access to private e-mail accounts, from a terminal institutional computational equipment, it’s not forbidden. (Ruling 074351/2011). It has also been established that institutional e-mail accounts can be used for personal or private communications, unless it is expressly forbidden by the authority. (Ruling 038224/2009).

dicts,⁹⁵ has expressed the inviolability of the work e-mail, determining as relevant considerations the impossibility of limiting the exercise of this right as an agreement of both parts or as an object of regulation by the internal guidelines of the company, without prejudice to the regulation of uses of e-mails, being a supply made available to the employee.

8.3. The Supreme Decree No. 14 and the Ministry of Economy⁹⁶

On February 27th, 2014, it is repealed among others, the supreme decree 77, of 2004, of the Ministry of the General Secretariat of the Presidency that approves the technical regulation over the efficiency of the electronic communications between the organizations of the administration of the State and between these and the citizens, that in the relevant allow the civil servants to borrow institutional e-mails in an immediately, without waiting the 6 years established by regulation.

With the prior precedents, the Center North Regional District Attorney's Office, notified the government ordering to not erase the e-mails, particularly in those cases in which there are criminal investigations developing. Without prejudice to this, the regulation continues in force.

8.4. Cases

In terms of the worker's privacy, two cases are important to analyze. These are, the case of security cameras, and the institutional e-mail. In this paragraph we will cover the first situation.

The jurisprudence has pronounced in the following terms: It has been extended, without prejudice to the right of the employer to provide himself of every kind of elements that allow the safeguard, protection of the privacy and the security of the workers, the limit expressed in the 5th article of the Labor Code are fundamental rights of the worker, with express mention to the charge to the private life, intimacy and honor of the worker. Consequently, some requisites must be complied, whom consider:

- It must be considered in the Internal Guideline of Order, Hygiene and Security of the company in accordance with the law.

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95 Eloquently and exemplary, qv: Division of Labor, Directive No. 260/19. Available at: <http://www.dt.gob.cl/legislacion/1611/w3-printer-63171.html>

96 Supreme Decree 14 of the Ministry of Economy. <http://www.leychile.cl/Navegar?idNorma=1059778&idParte=9409404&idVersion=2014-02-27>

- Their operation must not mean the exclusive vigilance of the worker, but that of the company as a whole or the unity or section inside it.
- The rights of the workers must be respected, in this case, especially the one referred to their intimacy, not being able, the closed circuit television system installed in the company, control the lockers or places destined to the changing of clothes of the workers, or in the bathrooms, nor in the doors of access or exist to the places just noted.

Another relevant case was presented to Temuco Court of Appeals, between the labor union of a transport company, against their employer.⁹⁷ The union presented an action of protection against the company, for the installation of surveillance cameras with audio, situation that didn't count with the authorization of the labor union, establishing as an arbitrary and illegal act of the company, since the right to intimacy, honor and private life from the article 19 4 has been violated, situation that causes a state of tension or inexorable pressure with the human life, and without possibility to be attributed to thefts, since these are minimum.

The Court considers the use of surveillance cameras as licit only in two cases: when it has the sole purpose of supervising the driver and when its use is needed for safety reasons. On the other hand, the installation is justified by the vulnerability of the activity of transports in terms of assaults, the inclusion to the internal guidelines is confirmed, and the position in panoramic view, reasons why the appeal is rejected.

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97 Court of Appeals of Temuco. "Sindicato de trabajadores de la compañía JAC Transportes Limitada contra Compañía JAC transportes limitada." Role: I292-2009. 10/13/2009.

9. Privacy and the professional secret

9.1. The secrecy as guarantee for the professional

The professional secret, characterized as “the confidential information that’s known via the exercise of a determined profession or activity”⁹⁸ constitutes a double guarantee. On the one hand it protects the professional in the autonomous performance of its functions and the background obtained by virtue of its position, which could eventually result in criminal responsibilities, such as, the crime of concealment; and on the other, it protects the title holder of the information of a secret character that resort to the professional by the need of technical assistance obtained by the study of a determined science or art.

Regarding the lawyers, the simple reason of this right/duty, supposes that the relation between lawyer and client will be developed naturally, if there is a guarantee that the information provided in court, whose basis responds to the right to privacy, honor and the “good name” of that who confides a secret. The professional work itself is better developed when there is full knowledge of the client or patient’s circumstances, without the fear that third party strangers may have access to their lives.

By general rule, it is possible to find guiding regulations in the legal system regarding this subject, including either direct guidelines of reserve or the non-obligation to disclose. The truth is that the development in extent, it’s found in the ethics codes of different professions.

The main characteristics of this secret are:

- a. *It is an essential aspect of the professions that deal with intensely personal aspects of the clients or patients.*
- b. *It is inviolable, since the professional as a general rule is obligated to maintain it, with exceptions when it must be safeguarded.*
- c. *It is undisputable to third parties, which is why it produces effects outside the relation between the professional and the title holder of the information object of secrecy.*
- d. *It varies regarding the different professions, although it does find its common source in the Code of Civil Procedure.*

It is relevant to mention the Ethics Codes, as an important source of regulations to support the professional secret and to regulate its outlines. But a caveat must be made that in Chile, the affiliation to the professional associations (and

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98 Costa Rica’s Constitutional Court, Verdict C-301/12. Available at: <http://www.corteconstitucional.gov.co/relatoria/2012/c-301-12.htm>

with it, the obligation to subject to these codes) is voluntary, which is why the applicable penalties vary to those affiliated in relation to those who are not. Thus, the first respond in principle to the violation to the ethical rules before the respective association, whereas the non-affiliated, will respond for their acts before the ordinary courts.

9.2. Legal Aspects

9.2.1. Code of Civil Procedure

The article 360 of the Code notes that the ecclesiastic, lawyers, notaries, attorneys, doctors and midwives will not be obligated to testify about incidents that have been communicated to them confidentially because of their state, profession or trade.

9.2.2. The Ethics Code of the Bar Association

The Ethics Code of the Bar Association regulates the professional secret based on the obligation of strict confidentiality to the client, demanding the recognition to the professional secret extended to all those issues that have been known in the exercise of their profession. In this regard, if a lawyer is required by a competent organization to testify about subjects enshrined under the professional secret, he or she may be excused because of it, in relation to what is determined in the Code of Civil Procedure.

The rules that a lawyer must follow in its relations with the client determined by the Ethics Code, are constituted among others by the interpretation of the law favorable to the confidentiality, the abstention to fundament the reasons of the secret if these compromise it, the obligation to impugn the authority's proceedings that order the testimony on subjects object of professional secret, ethical legality of the denial to testify or inform on matters subject to confidentiality.

Among the principles established for the lawyer, the ethical authorization is considered to declare in the case of having justified grounds to consider that the profession service provided was used to carry out an incident that is charged to that client as a crime or a simple misdemeanor or other serious event that the law punishes and orders an investigation; and, if the information corresponding to a deceased client and its disclosure could prevent the accused that has been formalized, of being erroneously convicted for a crime or simple misdemeanor.

The professional secret extends to all those formats that contain confidential information, to the order or requirement of the law or the authority competent to confiscate, register, give or exhibit documents or other physical, electronic

formats subject to confidentiality, and to the information produced by the lawyer of a confidential character.

9.2.3. The Press Law and the Ethics Code of Chile's Association of Journalists

The 8th article from the Ethics Code of Chile's Association of Journalists, determines that the journalist must cite its sources based on the receiver's right to know them, with the exception of those whose silence has been requested by the source, previous confirmation of its suitability and confidentiality, respecting the reserved information.

The Law No. 19.733, about freedom of opinion and information and the exercise of journalism, establishes in the 7th and 8th article, the right to reserve over the informative source for the director, editors of social communication media, correspondents, among other related actors. This protection of sources it's understood as necessary for the exercise of journalism: the probability of obtaining significant information if and when the sources of said information understand that they will not be subject to consequences for disclosing the information, it's higher. In addition, it notes that the journalist will not be obligated to act in contravention to the ethical rules generally accepted for the exercise of its profession.

The pronouncements from the National Television Council, autonomous organism that has penalized diverse television entities for violation to the intimacy of the persons,⁹⁹ are relevant.

9.2.4. Medicine: Ethics Code of the Medical Association

The doctor's professional secret is founded in the respect to the intimacy of the patient, who reveals useful personal information for the treatment of their illness, applicable to all those documents which register clinical data, therapeutic diagnoses and prognoses. This information represents an extreme area of intimacy: the patient's own body.

The exceptions are constituted firstly by the patient's authorized information in written form, with the precision about what is authorized to be disclosed and who can access to it; and secondly it will be able to disclose the information among other cases whenever the information it's an obligatory testimony, when the courts of justice orders it, and whenever it were indispensable to prevent a serious damage to the patient or a third party.

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99 In this regard, INFORME DE CASO A-00-I2-I750-MEGA. Applies penalty to Red Televisiva Megavisión S.A for violating the article I of the Law No. 18.838 by means of the exhibition of the program Meganoticias Central, on December 29th, 2012 for violating the intimacy of the minors involved.

About the sanitary databases, no doctor will be able to participate in the constitution of sanitary databases in which the reserve is not guaranteed.¹⁰⁰

9.3. Cases

It has been established by the jurisprudence¹⁰¹ that by being in rivalry the disclosure of public information to individuals (protected by the Law of Transparency) and the professional secret of the lawyers that work for a public institution, and specifically for the State Defense Council (protected by the Decree with force of law No. 1 from 1993 from the Ministry of Finance), this last hypothesis of protection prevails, according to the following reasons:

- The 8th article of the Constitution that establishes the principle of disclosure of the proceedings and resolutions of the State, admits as an exception that a law of qualified quorum mandates the reserve or secret.
- The Ethics Code of the Bar Association establishes the professional secret as a duty for the client that is extended to every incident, circumstance, datum, among others, that, due to its position, it has taken cognizance of.
- The implementation of the article 6I of the Constitutional Law of the State Defense Council referred to the professional secret is appropriate.

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100 Regarding the privacy of the medical data, qv the corresponding chapter of the present report.

101 Court of Appeals of Santiago. 03/13/2012 "Presidente del Consejo de Defensa del Estado con Santiago Urzúa Millán" Role: 5746-2011.

10. Privacy and the medical data

10.1. The secret and the medical data

It is relevant to formulate a conceptual distinction between the doctor's professional secret and the medical data.

The doctor's professional secret is an inherent characteristic of the doctor-patient relation, founded in the respect to the intimacy of the latter, whose reach extends to documents, diagnoses, and prognoses, among others, whose duty of custody rests in the doctor that has had access to the information. That is to say, the medical secret constitutes a consequence of the relationship of trust between two persons, where one of them (the patient) gives information related to the physical and moral circumstances of its body, and the other (the doctor), it's obligated to keep secret by reason of its position.

The medical data is considered within the category of sensitive data, since it is part of the estimates of the law No. 19.628, which presume the physical and moral features of the persons, incidents and circumstances of their private or intimate life, such as the personal habits, ethnical origin, ideology, political or religious opinions, state of physical and psychological health, etcetera. That is to say, they are the very purpose of the relation doctor-patient constituted and contained in the professional secret.

10.2. Legal Aspects

10.2.1. The Ethics Code

The Ethics Code of Chile's Medical Association, establishes in the article 29 and following the professional secret, conceptualizing it as "an inherent duty in the exercise of the medical profession and it is founded in the respect towards the intimacy of the patient, who reveals personal information, inasmuch as it is useful for the treatment of its illness". Thus determining the confidentiality of every document in which clinical data obtained in examinations or interventions are registered, and the verbal communication, including the name of the patient, as indispensable in the relation, applicable even after the services are finished, or once the patient dies, adopting for this purposes every preventive measure needed. The reserve in the information can be given up by the patient.

On the constitution of sanitary databases, it is established that the doctor will not be able to collaborate in it, if the reserve to the confidentiality of the patient it's not guaranteed.

The exception to the reserve is left to the doctor's deliberation in: the cases in which it is an illness of obligatory testimony,¹⁰² when it is ordered by the courts of justice; whenever necessary for the birth or death certificates; whenever indispensable to prevent serious damage for the patient or a third party; and when the revelation of confidential data is necessary for its defense, before ordinary, administrative or trade courts, in trials caused by the patient.

10.2.2. Code of Civil Procedure

The article 360 number I mandates that the ecclesiastic, lawyer, public notaries, attorneys, doctors and midwives will not be obligated to testify about incidents that have been confidentially communicated to them with reason of their state, profession or trade. Logically, the medical data is part of the data over which no obligation falls to testify in trial.

10.2.3. The sensitive data of the Law No. 19.628

The Law 19.628 on personal data, conceptualizes the sensitive data as all those physical and moral characteristics of a person, indecent or circumstance of their private or intimate life, such as the personal habits, ethnical origin, ideology, political or religious opinions, state of physical and psychological health, etcetera, not being able to be object of treatment, unless the law authorizes it, there is consent from the title holder or the data is needed for the determination or granting of medical benefits that correspond to their title holders. In attention to the characteristics of the medical data, they can be included within a category of data, since they constitute an intromission or knowledge of the physical and moral characteristics of a person, specifically of the physical and psychological state of the person.

10.2.4. Law No. 19.779 that establishes regulations regarding the Acquired Immune Deficiency Syndrome.

The principle of confidentiality of the Law No. 19.779 is based in the necessity for the prevention and control of AIDS, according to the history of the law No. 19.799. One of the declared causes, indicated that "the fear of isolation and the stigmatization would only make the illness more clandestine and would reduce the access to those who need the support and the education to the actions of prevention and information, in attention to this, it is understood that the stigmatization and discrimination will only multiply the illness without a possibility

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102 It is about specific diseases, such as the poliomyelitis, the measles or the human hydrophobia. , established in the Supreme Decree No. 158/04, "Reglamento sobre Notificación de Enfermedades Transmisibles de Declaración Obligatoria".

of control, insofar as the persons affected or whose condition puts them at risk will prefer to suffer their illness in hiding, thus complicating their changes of behavior, the treatment of prevention and the epidemiologic control".¹⁰³

The law determines that the examination to detect the acquired immune deficiency syndrome is always confidential and voluntary, the consent of the interested or its legal representative must be in writing, previous information about the characteristics of the illness. The previous is increased by the Decree 182 of the examination for the detection of the human immune deficiency.

In case of violation of the confidentiality established in the law No. 19.779, the same statutory organization contemplates the penalty with a fine to tax benefit of 3 to 10 UTM, without prejudice to the obligation to respond for the property and moral damages caused by the affected, which will be reasonably valued by the judge. In case of having committed the infringement by two or more persons, they can be condemned to jointly respond for the fine and the compensation.

10.2.5. Article No. 175 Code of Criminal Procedure: obligation to report.

The article 175 of the Code of Criminal Procedure, establishes to certain persons the obligation to report the existence of criminal acts. This is applicable to the "bosses of hospital establishments or of private clinics and, in general, to the professionals in medicine, odontology, chemistry, pharmacy and other branches related to the conservation or recovery of health, and to those that execute assistant performances for it, that note in a person or in a corpse signs of poisoning or of any other crime". Said situation is openly at odds with the medical secret, from its more substantial aspects at communicating to third parties of a known situation in the exercise of their functions. That is to say, it not a mere exception to the reserve, but an obligation to break it.

The penalties for whom does not report, correspond to those of the 494 of the Penal Code consisting of a fine of 1 to 4 UTM, or to the special regulations if they exist.

10.2.6. Law No. 20.584 and the patients' rights

The Law No. 20.584, which regulates the rights and duties that the persons have in relation to the actions linked to their attention in healthcare, establishes in

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103 Biblioteca del Congreso Nacional. "Historia de la Ley 19.779. Establece normas relativas al Virus de Inmuno Deficiencia Humana y crea Bonificación Fiscal para Enfermedades Catastróficas". December 14th, 2001. Page 8. Available at: <http://www.bcn.cl/histley/lfs/hdl-19779/HLI9779.pdf>

the 5th paragraph the reserve of the information contained in the clinical file.

The clinical file consist of the obligatory instrument in which the group of antecedents related to the different areas linked to the health of the persons is registered, that has the purpose of integrating the necessary information in the assistance process of each patient. Thus, both the clinical file as the documents that register procedures and treatments of the persons will be considered as sensitive data. The file remains for a period of minimum fifteen years in power of the provider, responsible for the reserve of its content against third parties and public employees that are not directly linked to the assistance of the person. Exception to this reserve is produced before the request made by someone of the following persons.

- a. The title holder of the clinical file, their legal guardian or, in case of the death of the title holder, their heirs.
- b. A third party duly authorized by the title holder, by means of a simple power given before a public notary.
- c. The courts of justice, as long as the information contained in the clinical file is related to the causes that were knowing.
- d. The district attorneys from the Public Prosecutor's Office and the lawyers, previous authorization from the competent judge, when the information is directly linked to the investigations or defenses they have at their charge.

Those institutions and persons must adopt the necessary measures to secure the reserve of the identity of the title holder of the clinical files to which they have access, the medical, genetic data or others of a sensitive character contained in it and in order that all those information be exclusively used for the purposes for which it was required.

10.2.7. The Law No. 19.628 and the Sanitary Code

The article 24 of the law No. 19.628 adds to the Sanitary Code regulations related to the reserve of the medical prescriptions and the analysis or examinations from clinical laboratories and healthcare services, establishing that their content can only be revealed or give copy of it with the express written content from the patient or the doctor.

10.3. Cases

10.3.1. Abortion and the doctor's obligation to report

The article 175 of the Code of Criminal Procedure, about the obligation to report, opposes the one in the article 360 of the Code of Civil Procedure and the

regulations established in the appropriate Ethical Code about the professional secret, including the intimacy of the patient and the right to healthcare, demarcated by the necessity of an opportune treatment facing an urgency that in the treated cases the abortion supposes.

In Chile, the rules are absolute, because the abortion is not appropriate in any case, arguing the pre-eminence of the fetus' life against the mother's regardless of the situation, unless when the abortion is a unintended consequence of the procedure to try to save the mother's life; in the event of an abortion, there is a penalty for both the pregnant woman that consents it and the one that causes it, unless it is a doctor that intervenes "abusing his trade", in which case, he gets the same penalty as the woman.¹⁰⁴ Even in less extreme cases where the fetus is nonviable, a characteristic situation for the approval of the abortion in comparative law, the woman in question must be reported and the penalty must be applied by the law.¹⁰⁵ As we have mentioned, this publically reveals the women who within their most private corporeal realm carried out procedures criminalized by the law in Chile.¹⁰⁶

Numerous cases have been known of women that, after complications resulting from irregular abortion procedures, have arrived to hospital centers, where the professionals assigned to the attention have carried out the legally demanded reports, naturally causing an investigation for abortion against the women under medical care. Nevertheless, a resolution from the Ministry of Health clarified part of those duties, restraining its possible effects: the Ord. A15/I675 of April 24th, 2009, sent to the directors of healthcare services, wherein is indicated:

"Even when the abortion is an illegal conduct and constitutes a criminal offence in the Chilean legislation (Art. 342 of the Penal Code), it does not apply to extract confessions from the women who require medical assistance as a result of an abortion, especially when said confessions is

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104 BASCUÑÁN RODRÍGUEZ, Antonio. "La licitud del aborto consentido en el derecho chileno". *Revista de Derecho y Humanidades*, Faculty of Law, Universidad de Chile, No. 10, 2004, pages. 143-181.

105 In this sense, the following case is relevant: <http://ciperchile.cl/2008/04/04/mujer-presa-por-aborto-del-hospital-me-trajeron-a-la-carcel/>

106 Needless to say that this dramatically contrasts with the considerations on an environment of privacy worthy of protection, that it is more intense in the first months of pregnancy, that justifies the abortion as a decision of the woman that must not be punished, as it has been recognized in comparative law. *QV Roe v. Wade*, 410 U.S. 113 (1973).

requested as a condition for the provision of healthcare required, since it violates the rule contained in the aforementioned 15th article, from the “Convention Against Torture”, as well as the essential right to healthcare protection, guaranteed in the article 19, number 9 of our Political Constitution, in the International Covenant on Economic, Social and Cultural Rights (art. 12, number 1 and 2, letter d). With it the constitutional guarantee of a fair and rational process (art. 19, Number 3) is affected.”

Notwithstanding the aforementioned, organizations that promote women’s rights have kept expressing their displeasure towards the continuous denunciations by the doctors of the women that need their care with complications due to an abortion.¹⁰⁷

In this respect, various countries have questioned the obligation to report and the penalty of the abortion, by understanding it as a violation to the intimacy of the woman. In Mexico,¹⁰⁸ there is an Ethics Code focused in the doctor-patient relation with basis in the confidentiality and discretion of the information given, and at the same time, a regulation in terms of the provision of medical care services with an obligation to notify the Office of the Public Prosecutor, in addition to the possible crime of concealment criminally penalized. Without prejudice to this, the revelation of secrets from the Penal Code and the revelation of the confidential information considered in the law of Transparency and Access to the Public Governmental Information could eventually be used as legal loopholes.

In Argentina, the Code of Criminal Procedure in the article 177 number 2 establishes the obligation to report “to doctors, midwives, pharmacists and others who practice any branch from the art of curing, regarding the crimes against the life and physical integrity they become aware of in the provision of assistance of their profession, except that if the known incidents are under the protection of the professional secret”. Basing on this rule, the jurisprudence has understood that currently there is not an obligation to report on the part of the doctor that

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107 Soyvalparaiso.cl, November 15th, 2012: “Organizaciones feministas protestaron frente al Hospital Fricke por denuncia de aborto”, available at: <http://www.soychile.cl/Valparaiso/Sociedad/2012/11/15/134250/Organizaciones-feministas-protestaron-frente-al-Hospital-Fricke-por-denuncia-de-aborto.aspx>
Resumen.cl, February 22nd, 2013: “Mujeres solidarizan con mujer criminalizada por abortar”, available at: http://www.resumen.cl/index.php?option=com_content&view=article&id=6901

108 Grupo de información en reproducción elegida A.C. “Aborto y secreto profesional del personal de salud”. Available at: http://www.gire.org.mx/publica2/abortoSecretoProfesional_nov2010.pdf

is aware of the abortion under professional secret, without distinctions between the public and the private servants.¹⁰⁹

In international terms,¹¹⁰ the contrast to the duty to report, the medical secret and the right to intimacy, has been understood in favor of the former, resolving that the opposite would mean a violation to the principle of legality; acting as the district attorney is not up to the doctors in the exercise of their functions, since it isn't up to them to persecute the crimes, even if it is to "assist the district attorney", their role is to protect the health and the life of the persons; the life of the woman is damaged, in relation to their reproductive functions.

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109 Among others, by the following reasons worthy of being read: "The persecution of crime that may follow the communication of the doctor that took notice of the abortive maneuvers in exercise of the profession will not be able to take hold, since the inquiry for the truth must be displaced before the possible charge to the rights of constitutional roots that protected S., by making available for the doctor the situation she was going through (C.N.C.C., Courtroom VI, S., A. E., rta. 10/23/2007); the doctor of a public hospital to who his patient informs, in the context of the relation between them, that she has had an abortion, it is not obligated to report. By doing so he would be disregarding the right to medical secret and violating the article 156 CP (Courtroom I, NN s/abortion, rta. 11/28/2006); It is unacceptable to differentiate the situation of the doctor questioned by his private clinic from the one that works at a public hospital. Nor the imperative of procedural digest, nor the simultaneous condition of the worker, nor the particular circumstances of this proceeding configure a just cause for a discriminating revelation. On the other hand, the opposed situation leads to the unreasonable discrimination among those patients with enough financial means to resort to the particular medical assistance, from those who put up with indigence and would be subdued to choose between their lives –in need of sanitary assistance- or their prosecution and sentence for the crime harming their health. The article 177, 1st subparagraph, CPP regulates the duty to report for every civil servant in general, and when the legislator wanted to explicitly regulate that which is relative to the duty to report in the case of the medical appointments, he did it explicitly in the 2nd subparagraph, in which, in reality, he made clear that the duty to report has as limit the supremacy of the professional secret".

110 In this regard, the Interamerican Court of Human Rights, in sentence issued in 2004 in a process against Perú, General Analysis 28, issued by the United Nations (UN) Committee of Human Rights in the context of the Article 3 of the International Covenant on Civil and Political Rights.

In 1999 the UN Committee announced final observations to Chile^{III} in which it establishes about the abortion that:

“The penalization of every abort, without exception, poses serious problems, especially in view of unchallenged reports according to which many women undergo illegal abortions putting their lives at risk. The legal duty imposed over the healthcare staff to inform the cases of women that have undergone abortions can inhibit the women to get medical treatment, thus putting their lives at risk. The State has the duty to adopt necessary measures to guarantee the right to live of every person, including the pregnant women that decide to interrupt their pregnancies. In this sense: The Committee recommends to review the law in order to establish exceptions to the general prohibition to every abortion and to protect the confidentiality of the medical information”.

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III Human Rights Center, Faculty of Law, Universidad de Chile. “Compilación de observaciones finales del Comité de Derechos Humanos sobre países de América Latina y el Caribe (1977-2004). [http://www2.ohchr.org/english/bodies/hrc/docs/publications/HRC-Compilacion\(1977-2004\).pdf](http://www2.ohchr.org/english/bodies/hrc/docs/publications/HRC-Compilacion(1977-2004).pdf)

II. Privacy and the financial data

II.1. Financial data

The financial data is that which contains the information of a particular person regarding the obligations contracted with financial institutions, among which the assets are included, the investment instruments, the loans contracted, among other similar ones.

The relevance of processing this data in a separated way, has a quantitative basis, in attention to the amount of client's data handled by the financial institutions, and a legal basis, for the evident regulatory deficiencies regarding that kind of information, in addition to the nonexistence of the controls and mechanisms specific to the protection of data and the strengthening of user rights. Likewise, the existence and circulation of financial data can mean not only eventual harassment to the persons that are viewed as potential clients, but also the negative to access the financial market with respect to the background of a person, possibly worsening their financial situation.

II.2. Legal Aspects

II.2.1. Law No. 19.628

The law on personal data deals in a general way with the treatment of the financial data in some of its rules, in the same terms that the economic, banking or commercial.

In the 4th article it is noted that an authorization for the treatment of data coming from sources accessible to the public is not required when they are of a financial nature and "are contained in listings related to a category of people limited to indicate precedents such as the belonging of the person to the group, their profession or activity, their educational qualifications, address or date of birth, or that are necessary to commercial communications of direct response or commercialization or direct sale of properties or services". Consequently, as long as the data comes from sources which are accessible to the public (a very wide requirement according to the Chilean law), it is possible to elaborate a new database, without the consent of the persons concerned.

Then, the title III especially explains "the use of the personal data relating obligations of an economic, financial, banking or commercial character", elaborating on the information that the people in charge of the treatment of data are allowed to communicate. The most general exception is contained in the article 18, it establishes that "in no case can the data related to the person identified or

identifiable can be provided after five years have elapsed since the respective obligation was made claimable, similarly, it is established that the data related to said obligation may not be provided after being paid or extinguished through other legal form. Nonetheless, the courts of Justice will be provided with the information they require on the occasion of pending trials”.

II.2.2. General Law of Banks

The General Law of Banks distinguishes the information subject to secrecy from the reserved information. In the first case the “deposits or fundraisings of any kind that the banks receive” are counted, institutions that won’t be able to provide themselves of information related to said operations, but to the title holder or the person expressly authorized by them or their legal representative, considering for their infraction the punishment of ordinary imprisonment, on its minimum to medium grades.

The reserved information, is constituted by all those operations that do not proceed in the causal of confidentiality, being able to be known for who shows legitimate interest and whenever it isn’t predictable that the knowledge of the information can cause property damage to the client.

It is relevant the possibility of the ordinary, military justice and the Office of the Public Prosecutor’s district attorneys, previous authorization from the guarantee judge, to gain access to the previous precedents, the remission of the precedents related to specific precedents directly related with the trial or order its examination.

II.2.3. Financial data draft law

On August 30th, 2011, enters the House of Representatives through a message that submits to consideration a draft law that regulates the treatment of the information about obligations of financial or credit character.¹¹² Among other aspects, the initiative looks to expand the relevant information available on negative and positive payment behavior of the persons and their credit situation (their “reputational capital”) that allows to access to better conditions in the credit market and the most correct evaluation of risks. In addition, it expects to regulate the system of commercial information and to create a system of centralization of financial information, directly or indirectly in charge of the Superintendence of Banks and other Financial Institutions. The project is extensive

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112 Newsletter 7886-03. Regulates the treatment of the information about obligations of a financial or credit character. Available at: http://www.camara.cl/pley/pley_detalle.aspx?prmID=8280&prmBL=7886-03

and it's still under discussion, but does not include equally substantial reforms in the regulation of the personal data in general, except when it extends the majority of the rules of the 19.628 to the legal entities.

Conclusions

From a cursory review of the doctrine in the article 19 of the Political Constitution of the Republic in its numbers 4 and 5, passing through a relation to the law No. 19.628 on protection of personal data, based on the history of its dictation, we've examined the basis of the legislator's original intention in terms of private life and personal data. Making explicit that, although a fragmentary and incomplete system of protection does exist, it is also true that the legislative intentions included a system of civil protection to the private life, of a much larger range than the one we are presently acquainted to, but that suffers, during the parliamentary process, a considerable reduction of its guarantees. Without prejudice to this, it is clear, with the constant proposals and creation of laws on the subject, that the legislator's original intention is still valid in principle, although it still does not have enough normative concretion.

For example, regarding the interception of private communications, these are considered highly intrusive even during a criminal investigation, it should only be used in circumstances restricted by the legislator, thus avoiding unjustified violations of rights. Nevertheless, in Chile there is a wide range of possibilities to intervene in criminal matters, specifically regarding telephonic communications. This means that the existence of founded suspicions about a person or a criminal organization that has committed or prepared the commission of a crime established in law, it is enough reason to judicially authorize the access to private information. This situation is capable of producing a high number of authorizations without a real examination on its foundation and origin, which puts at risk the basic principles pursued in privacy matters.

On the treatment of personal data, the regulatory shortage in matters of creation and traffic of databases. The situation facilitates the presence of personal information, including those of a sensitive or intimate character, available on the internet for free or at a low price, openly attempting against the spirit of the legislation and international treaties, which in fact urge for an effective protection for the title holder of the information and the pursuit for responsibilities. In this same way, the shortcomings are latent in the absence of a public supervisory authority for data protection, the lack of effective solutions for unlawful uses of data and the correct identification of the ones responsible with the purpose of obtaining a sentence, lacking as well criminal charges for the violation of law. In penalty matters against violations, the law No. 19.628 considers the compensation for property and moral damage that the wrongful treatment may cause, appended to the elimination, modification and the blocking of data as a means for reparation, rights and penalties that aren't correctly socialized and generally do not act as dissuasive to the typified conducts.

The huge dispersion in rulings and in the regulations inferred from them, the lack of clarity in the applicable normative, the real impossibility to use analogy criteria among sectorial laws in order to fill legal gaps; and the absence of laws that allow an effective control over one's own data, allows space for the susceptibility of privacy in general, and specifically an absent autonomous determination of processing the personal data from which one is the title holder, as a more visible and recurring way of violation.

As it was once noted, while trying to regulate these matters, although the necessity for an extensive and special protection of personal data is effective, it isn't reason enough to omit the need to comprehensively regulate privacy, whose rules allow to lay the general foundation for the implementation and uniformity of the Chilean legal system, thus correcting the shortcomings in the protection of a fundamental guarantee on the right to privacy, and to widen its conception towards a privacy and an informative self-determination as appropriate guarantees for the human dignity and operational in the current global context.

