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Fake News under Siege

A Century of Regulation in Chile

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9.1 INTRODUCTION

Chile's regulation of fake news dates back nearly a century. The initial instance occurred in 1925 during a constitutional crisis that resulted in the drafting of a new constitution. At that time, a de facto government issued a decree making it illegal to publish and distribute fake news. The second regulatory milestone occurred during the dictatorship of General Augusto Pinochet with the inclusion of provisions related to defamation in the 1980 constitution. Defamation involved spreading false information through mass media to unjustly tarnish someone's reputation.[1] Upon the restoration of democracy in Chile in 1990, these stipulations were permanently abolished from the legal system.[2] Since 2001, the judicial pursuit of disinformation in Chile has been limited to exceptional means such as the State Security Law or, indirectly, through the right to rectification.[3]

Nearly a century after the initial criminalization of fake news in Chile's history, the discussion has resurfaced. In recent years, several bills have been proposed to penalize the dissemination and propagation of fake news. The current government has set up a commission against disinformation to, among other objectives, evaluate the impact of disinformation on democracy and contribute to the design of a policy against it.[4] As in the past, the drive to regulate comes at a time of constitutional crisis

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[1] Constitution, Art. 19(4).

[2] The constitutional provision was abolished through a constitutional amendment in 2005, while the offence of spreading fake news was removed from the legal system by the Press Act 2001.

[3] See notes 48–50.

[4] See Decreto No. 12 of the Ministerio de Ciencia, Tecnología, Conocimiento e Innovación in 'Comisión contra la desinformación', *Diario Oficial de la República de Chile*, No. 43.582, 20 June 2023, www.diariooficial.interior.gob.cl/publicaciones/2023/06/20/43582/01/2331911.pdf.

with a high degree of political tension and instability. As with prior instances, the drive towards regulation could be perceived as an authoritarian endeavour to suppress political dissent. Nevertheless, in contrast to previous contexts, the current regulatory drive is occurring within a democratic framework.

Moreover, the phenomenon of fake news has assumed global dimensions – prompting the present volume – and responds to technological transformations that have accelerated its production and dissemination. In Chile, these shifts have not just influenced the dynamics of shaping public opinion but also destabilized the system of fundamental rights where the right to freedom of expression and information lie. This disruption is due to the fact that the authority to define the scope of online freedom of expression, its boundaries (including false or incorrect information), and the power to penalize transgressors increasingly rests in the hands of major internet corporations and progressively less within the constitutional framework protecting these rights.

This chapter addresses the phenomenon of fake news through the lens of its regulatory history in Chile. The analysis not only elucidates the factors that prompted its regulation but also examines the array of techniques employed to prevent the propagation of disinformation. From this analysis, it will be possible to conclude that although some of the causes that motivated the regulation of fake news in the past coincide with those of the present, persuasive reasons underscore the renewed interest in their criminalization that were absent in the past. These reasons explain the significance that disinformation has acquired in the present and that motivates the publication of this book. The chapter is divided into four sections. Section 9.2 examines the history of fake news regulation in Chile between 1925 and 1973, which corresponds to the period when the 1925 Constitution was in force. Section 9.3 analyses the constitutionalization of fake news during Augusto Pinochet's dictatorship. Section 9.4 looks at the criminalization of disinformation in State Security Law. Section 9.5 delves into the prosecution of fake news once democracy was restored in the country and the offences of disseminating fake news and defamation were repealed. Within this section, it will be demonstrated that the lack of regulation resulted in the procedural redirection of the phenomenon through alternative avenues, such as the right to rectification and the so-called Amparo remedy against injury to individuals' reputation. While these tools have, to a certain extent, facilitated the judicial redirection of prosecuting fake news when disseminated through traditional mass media channels (press, radio and television), the same cannot be stated for those circulating online for reasons to be mentioned here. This brings us to Section 9.6, where the intricacies of fake news in the digital era are examined, along with the impacts they have had on shaping public opinion and the protection of fundamental rights in Chile.

9.2 A CONCISE HISTORY OF DISINFORMATION REGULATION IN CHILE (1925–1973)

The regulation of fake news in Chile has been initiated by de facto governments, in times of great political instability and polarization, as well as during constituent processes or constitutional crises. The first of these instances occurred in late 1924, amidst a severe political crisis that pitted the Chilean army against the President of the Republic, Arturo Alessandri Palma. The catalyst for this conflict was the processing of a legislative bill aimed at establishing parliamentary allowances.[5] This was a significant project as it aimed to ensure parliamentary participation regardless of the economic capacity of the representatives. However, its development sparked substantial tension as lawmakers were determining their own remuneration during an economically difficult period for the country, while failing to enact a set of long-demanded social laws. Among the affected groups was the army, which was lobbying for an adjustment of its wages. During the advancement of the project, a cohort of 200 officers gathered at the premises of the National Congress to express their dissatisfaction. Days following this, the faction issued a series of demands to President Alessandri, which included vetoing the parliamentary allowance, accelerating the process of implementing social laws, replacing specific state ministers and instituting a constitutional reform to establish a presidential regime.[6] At this point, and despite many of the demands being met, the army no longer responded to constitutional authority. After appealing unsuccessfully to President Alessandri to dissolve the Congress, he ultimately resigned and went into exile in Italy.[7]

On 11 September 1924, a governing junta commanded by the military's highest-ranking official seized power. This effectively suspended President Alessandri's constitutional mandate. He would return to the country six months later to lead the constitutional process that resulted in the formulation of the 1925 Constitution.[8] This period was marked by a high degree of political instability and conflict for the control of power. Moreover, it was characterized by a severe crackdown on the media.[9] During this period, the junta shut down opposition newspapers, and censorship became a frequently employed weapon for managing political dissent. The justification for censorship was public safety, and it was enacted through the declaration of constitutional states of exception.[10]

[5] Sofía Correa et al., *Historia del siglo XX chileno* (Santiago: Editorial Sudamericana, 2001) p. 94.
[6] Fernando Muñoz, *Introducción a la historia del derecho chileno* (Santiago: Der Ediciones, 2021) p. 131.
[7] Mario Góngora, *Ensayo histórico sobre la noción de Estado en Chile en los siglos XIX y XX* (Santiago: Editorial Universitaria, 2006) pp. 172–84.
[8] Fernando Silva, 'Expansión y crisis nacional' in Sergio Villalobos et al., *Historia de Chile* (Santiago: Editorial Universitaria, 1975) pp. 818–24.
[9] Fernando Silva, 'Un contrapunto de medio siglo: Democracia liberal y estatismo burocrático 1924–1970' in Villalobos et al., *Historia de Chile*, pp. 905–6.
[10] Ibid.

In this context, during the final days of the junta's rule (prior to President Alessandri's return), Decree Law 425 of 1925, labelled 'Regarding Abuses of Publicity', was enacted. This decree replaced the Press Act of 1873, which had a distinctly liberal bent and codified what had been specific harassment and press censorship measures during this time period.[11] The 1925 decree brought significant alterations to Chilean press regulation.[12] Notable among them was the abolition of trial by jury for press abuses, as established by the 1833 Constitution. The decree also broadened the scope of offences committable via print or other publication types. Particularly noteworthy is the establishment of the offence of incitement to commit other felonies, such as homicide, robbery, or arson, which is punishable even if the offences are not committed.[13]

This decree introduced the offence of disseminating fake news into the Chilean legal system for the first time. Article 17 imposes custodial sentences and fines for 'the publication or reproduction of fake news, alleged documents, adulterated materials, or inaccurately attributed documents to another individual'.[14] For distribution or reproduction to constitute an offence, it must occur orally in public places or through radio broadcasting, or via written materials sold, disseminated, or displayed at public venues or events.[15] In addition, the provision requires malice to be proven for the execution of such actions and the production of illegal results. Additionally, the decree assigns responsibility not only to the authors of the fake news publication but also to the media outlet's director. In the director's absence, liability is transferred to the publisher, and in the absence of the publisher, it falls upon those selling or disseminating the newspapers carrying the news.[16]

[11] Since the late nineteenth century, both conservatives and liberals exhibited a growing hostility towards the press as a consequence of the expansion of the workers' press. Both sides were insistent on amending the Press Act of 1873 to increase penalties for abuses by the press. See Julio Heise, *Historia de Chile, El periodo parlamentario 1861–1925* (Santiago: Andrés Bello, 1974); Karen Donoso Fritz, 'Las mordazas a la prensa obrera: Los mecanismos de la censura política en Chile 1919–1925' (2016) 28 *Izquierdas* 211.

[12] See Heise, *Historia de Chile*, pp. 336–56.

[13] Many of these rules were supported by conservative and nationalist sectors during the parliamentary period in order to reform the Press Act of 1873. See ibid. pp. 336–39.

[14] Decreto Ley 425, 'Sobre abusos de la publicidad', Art. 17, www.bcn.cl/leychile/navegar?idNorma=6073.

[15] Ibid., Art. 12.

[16] Decreto Ley 425, 1925, Art. 32. This criterion changes radically over time. In one of the latest rulings on fake news, the Supreme Court states that the director of a newspaper cannot be held liable for the publication of fake news because 'it was beyond his reasonable capabilities to personally verify the truth of the published news, a task that corresponds to an investigative function assigned to a journalist . . . in whom the director of the newspaper had to put his trust'. Corte Suprema, January 1998, Rol No. 4.406-97.

The prohibition on disseminating fake news experienced several amendments during its history.[17] The most notable was introduced in 1967 under President Eduardo Frei Montalva's government through the new Press Act. Most of its modifications involved limiting the circumstances under which its publication could be prosecuted criminally, extending the accused's defence opportunities and mitigating the repercussions of its commission.[18] The first of these amendments eliminated imprisonment for the dissemination of false information, leaving only fines as penalties. A subsequent set of amendments sought to increase the standards for liability enforcement. In this context, the law adds a new element to the definition of the criminal offence, requiring that the falsity communicated be substantive. This implies that the false information must be of significant magnitude to alter the essence of the content constituting the information's core. Furthermore, the law specifies that the dissemination of fake news must have the potential to *seriously harm* various public interests enumerated within the provision. These encompass public safety, order, administration, health and the economy, in addition to individual interests such as the dignity, credit or reputation of persons, as well as the interests of legal entities. Additionally, the law affords the defendant, particularly in cases involving mass media outlets, ample opportunities for a robust defence. Notably, the defendant may be exempt from criminal liability if they promptly and exhaustively rectify the falsehood in the disseminated information. Rectification involves a complete acknowledgement of the falsity of the news realized through a publication in the same media outlet, maintaining identical characteristics to the initial publication containing the false information.[19]

These amendments diminished the incentives for judicial prosecution regarding the dissemination of fake news. Nevertheless, such incentives were practically unnecessary, as this offence was scarcely subjected to judicial prosecution between 1925 and 1967. This phenomenon can be attributed to the presence of alternative and more efficient procedural mechanisms. As will be further examined, the State Security Law also regulated fake news. This legislation imposed considerably harsher penalties not only on the individuals responsible for its creation, but also on directors and even media proprietors involved in its dissemination or reproduction.[20] In comparison to the Press Act 1967, which imposed fines for the dissemination of false news, the State Security Law carries the penalty of imprisonment for a maximum of five years.

Furthermore, Decree Law 425 introduced the right to rectification. This provision obligated mass media outlets to disseminate, free of charge, clarifications or

[17] In 1964, Decree Law 425 was amended by Law 15,476; these amendments were subsequently incorporated into the 1967 Press Act. This law instituted only a fine as a penalty (eliminating the penalty of incarceration) and added requirements for the prosecution of the offence.

[18] Ley 16643 de abusos de publicidad, Art. 19.

[19] Ley 16643, Arts. 11–15.

[20] See Ley 12927, Arts. 17(b) and 17(c).

rectifications of information that might have caused offence or made unjustifiable insinuations about an individual. When faced with such material, it became the responsibility of the media outlet to promptly publish clarifications or rectifications upon receiving appropriate notification. Failure to comply with this requirement resulted in penalties such as imprisonment and fines for contempt of court.[21] This was an easier and faster route to obtain redress from the publication of fake news than judicial actions.

9.3 THE OFFENCE OF DEFAMATION SINCE THE 1980 CONSTITUTION

On 11 September 1973, another *coup d'état* shook the nation. On this occasion, the armed forces overthrew President Salvador Allende and established a brutal military dictatorship that, under the command of Army General Augusto Pinochet Ugarte, remained in power for seventeen years. The dictatorship radically transformed the country's institutional order and began doing so from the very moment it assumed power. Just days after the coup, the junta entrusted a group of lawyers with drafting a constitutional proposal. In 1978, this Commission concluded its work with what would become the preliminary draft of the 1980 Constitution. The final text was approved through a plebiscite conducted without the existence of electoral records, political parties and a free and independent press.[22] In terms of freedom of expression and the press, the constitutional text reflected the dynamics that characterized the dictatorship's relationship with the media throughout its tenure in power.[23]

The boldest stride in the regulation of fake news in the nation's history took place within the 1980 Constitution, which included an express constitutional provision addressing this issue. This was done in the chapter on fundamental rights, specifically within the provision safeguarding the right to private and public life and reputation. In the relevant part, the provision stipulated that 'the infringement of this precept', meaning the violation of these rights, 'committed through a mass media, and consisting of the imputation of a false fact or act, *or* that unjustifiably

[21] See Decreto Ley 425, Art. 8.

[22] See Robert Barros, *La junta militar: Pinochet y la constitución de 1980* (Santiago: Sudamericana, 2005).

[23] During the dictatorship, there was no free and independent press. On 11 September 1973, the military junta ordered 'the press, radio broadcasters and television channels loyal to the Unidad Popular' to 'cease all informational activities … or face air and ground retaliation'. Multiple media entities were shut down, their assets were confiscated and their employees were detained and exiled. During the dictatorship, critical media that managed to survive did so clandestinely or under constant intimidation, censorship and threats from state agents. See 'Periodismo de Oposición (1976–1989)', Memoria Chilena, Biblioteca Nacional de Chile, www.memoriachilena.gob.cl.

inflicts harm or discredit to an individual or their family, shall constitute an offence and shall be subject to the penalty determined by law'.[24]

The constitutional provision was ambiguous. Not only did it safeguard a broad array of legal interests, including public life – conceptually challenging and of questionable normative value – but also because the criminal offences it encompassed were not precisely defined in either the 1980 Constitution or elsewhere in Chilean law. At first glance, it appeared to include a single offence (referred to as defamation by Chilean legal scholars), yet in truth it contained – at the very least – two distinct offences that are classified as offences against reputation.

The disjunctive conjunction 'or' (highlighted above in italics) separated the first from the second. Both were violations of a person's private or public life or reputation and could only be perpetrated 'through mass media'. The first consisted of attributing a false fact or act, whereas the second referred to any attribution (false or true) that unjustifiably causes damage or discredit to a person or their family.[25] Although the latter was equivalent to libel expressed through mass media outlets (enforced at the time by the 1967 Press Act), the former was similar to spreading fake news (also covered by the 1967 Press Act), with the distinction that the criminal offence in the constitutional provision seemed not to require malice from the party making the imputation. In fact, it is only in the second offence that the inflicted harm is required to be *unjustified*. In other words, what this particular offence seemed to pursue was an objective liability for the attribution of false facts or acts that harm the protected constitutional interests in question.

During the dictatorship, the ambiguities of the constitutional provision were only partially addressed by a law that shaped and established penalties for these criminal offences. This law included two different offences based on the protected constitutional interests. The first of these protects people's private lives and is not relevant for the purposes of this chapter. The second relates to the protection of people's public lives and states that 'anyone who, without intent to libel, maliciously attributes a false fact related to their public life to a person' through a mass media outlet 'that causes or could cause material or moral harm' will face imprisonment and fines as indicated in the provision. This provision establishes a distinct offence against reputation that protects a person's public life, penalizing the deliberate attribution of a false fact via a mass media source. As mentioned earlier, Chilean legal scholars commonly refer to this offence as defamation.

[24] Constitution of 1980, Art. 19(4)(2) (emphasis added).

[25] This is the only way to understand that this same provision explicitly excludes proof of truth when the imputation itself constitutes 'the crime of libel against individuals', as defined by the constitutional provision. In the case of libel, falsity is not a necessary element of the offence. Therefore, it is entirely conceivable for truthful statements to constitute defamation. What is at stake in these cases is not the integrity of the discourse: whether the truth was told or not. What matters is restoring the aggrieved party's honour. Consequently, the old English proverb asserts 'the greater the truth, the greater the libel'.

Even though the repressive political landscape made this provision practically unnecessary, the offence of defamation offered authorities substantial advantages in prosecuting critical publications compared to other press law offences, such as libel and publication of fake news. There were two advantages regarding libel. The first relates to the protected constitutional interest. Libel protects a person's reputation, which is a legally established concept with a long historical tradition and substantial doctrinal development that help define its scope and facilitate its judicial application. On the other hand, 'public life' lacks these traits and is basically ambiguous, allowing it to be infused with any meaning the judge decides to attribute to it. Furthermore, safeguarding public life as a fundamental right is a reversal of the logic of fundamental rights, which protect individual rights against state authority. In this case, it is the political authority that is shielded from the scrutiny by the press and from the right of every citizen to be well informed, particularly about how the authorities wield power.

Another benefit of defamation over libel is malice. Libel requires the complainant to prove not merely that the defendant acted with malice, that is, with an intention to harm the offended party through illegal behaviour. According to well-established precedent, the complainant in a libel case must also demonstrate that the defendant had a specific intent, frequently referred to by legal scholars and case law as *animus injuriandi*: the intent to offend.[26] In this regard, the Supreme Court in a relatively recent judicial decision has indicated that the *animus injuriandi* is a 'distinct subjective element from malice, revealing a direct predisposition to harm one's reputation, and without which sanctioning for said offence is not possible'.[27]

The key issue here is not just that the absence of *animus injuriandi* precludes criminal liability, but that the presence of other types of motivations, such as the purpose to inform, precludes *animus injuriandi* as well. As a result, courts have historically been reluctant to convict mass media outlets of libel in circumstances involving publications that, while insulting to an individual, serve informative purposes. This is what motivated Enrique Ortúzar, the President of the Commission (bearing his name) that drafted the preliminary proposal for the 1980 Constitution during the dictatorship, to advocate for the inclusion of the offence of defamation within the constitutional framework.[28] In a session of the Commission, Ortúzar argued that in cases of libel 'judges considered the presence of *animus injuriandi* as a condition for the existence of the criminal offence, and there was no professional libeller who, when brought to court, would not claim that

[26] Jaime Vera, 'Delitos contra el honor' in Luis R. Collao (ed.), *Derecho Penal, Parte Especial* (Valencia: Derecho PUCV/ Tirant lo Blanch, 2022) pp. 562–63.

[27] Case No. 5935/2015, Corte Suprema, 11 June 2015.

[28] Enrique Ortzar was historically an unwavering advocate of highly restrictive measures on press freedom. In 1964, as Minister of Justice under then-President Jorge Alessandri Rodríguez, he defended the creation of the defamation offence before the parliament, a law that was enacted, but only in effect for three months.

there was no *animus injuriandi* in their conduct, thus largely avoiding any criminal liability'.[29] The provision of defamation explicitly excluded this intent by stating that the law applied to 'anyone who, without intent to injure, maliciously attributes a false fact related to their public life to a person'. This granted defamation significant procedural advantages over libel.

Defamation also offered more advantages for criminal prosecution than the offence of publishing fake news. In fact, it is important to recall that while the Press Act of 1967 kept this offence (which originated from Decree Law 425 of 1925), it introduced significant modifications to make judicial prosecution of the crime more demanding. The first of these is that the falsehood of the news must be substantive and significantly harm a public right or interest as specified by the law. The second is that the defendant may avoid criminal liability by admitting the falsehood and rectifying the information promptly and completely.[30] None of these limitations applied to the offence of defamation. On one hand, the law made no mention of the quality of falsehood, merely criminalizing the attribution of a false fact concerning a person's public life. On the other hand, the provision did not allow rectification of the information in order to avoid criminal liability. In contrast to the imposition of fines for the publication of false news, defamation was subject to penalties potentially resulting in up to five years of imprisonment. The aforementioned characteristics have endowed defamation with significant efficacy in maintaining the existing status quo, while simultaneously posing a formidable threat to democratic principles and freedom of speech. It is not surprising, as we will see later, that upon the restoration of democracy in Chile this offence was swiftly removed from the legal system.

9.4 FAKE NEWS AS A THREAT TO STATE SECURITY

Before analysing the regulation of false news in Chile following the restoration of democracy, it is necessary to provide a concise overview of the State Security Law, which also criminalizes the dissemination of fake news. This is the only law that remains in force to sanction such dissemination. It establishes that individuals commit crimes against the security of the state if they, among other things:

> propagate verbally or in writing or through any other means, or send abroad, tendentious or fake news information intended to destroy the republican and democratic regime of government, or to disrupt the constitutional order, the country's security, the economic or monetary system, price normalcy, stability of

[29] Actas de la Comisión de Estudios de la Nueva Constitución, Sesión No. 129 del 12 de junio de 1975, Historia de la Constitución Política, Art. 19(4), p. 23.

[30] See n. 19.

values and public assets, and the supply of populations, and Chileans who, while outside the country, disseminate such news abroad.[31]

This provision extends back to another dictatorship, which lasted from 1927 to 1931 and was led by General Carlos Ibáñez del Campo. Towards the end of this period, during a moment of high political tension that eventually forced Ibáñez to resign from power and go into exile in Argentina, he issued a decree that contained the initial version of the aforementioned provision.[32]

In its current form, the offence of disseminating deceptive or fake news, as outlined in the State Security Law, constitutes an offence of endangerment. What is pursued is disinformation that could be detrimental to state security or economic public order, without the need for actual harm or a specific threat to legally protected interests.[33] During Pinochet's dictatorship, individuals were convicted of this offence under these terms. For instance, a woman was convicted of transporting anti-government documents on a flight to Europe, despite the fact that these documents never reached the people they were intended for. The lower court judge was incapable of distinguishing the political nature of the information and ruled that 'labelling the military government as a "dictatorship" or using similar terms constitutes a false statement because our country has both a democratic and a republican system of government'.[34]

Notably, prior to 2001, the law allowed the courts to suspend media outlets for up to ten days if they committed an offence sanctioned by this law, such as the dissemination of false news, and to confiscate immediately any editions in which the commission of these offences is evident.[35] In addition to the authors, the directors of the media outlet where they were published and potentially their owners and even printers if the latter did not exist were also criminally liable.[36] Ultimately, the penalties associated with these offences have historically been much more severe than those related to the Press Act-regulated dissemination of fake news.[37]

[31] Ley 12,927, Art. 4(g).

[32] The provision is contained in DFL 143 of 5 May 1931.

[33] See Carlos Künsemüller Loebenfelder, *Estudio de los delitos atentatorios de la seguridad interior del Estado contenido en leyes penales especiales* (Santiago: Jurídica de Chile, 1970) p. 16.

[34] Corte de Apelaciones de Santiago, Rol 6-1983.

[35] Ley 12,927, Art. 16.

[36] Ibid., Art. 17. Under this rule, in June 1999, two executives of Planeta Publishing were apprehended for their involvement in the publication of *El libro negro de la justicia chilena* by Alejandra Matus. This case ultimately reached the Inter-American Commission on Human Rights, which issued recommendations for the State of Chile to redress the harm inflicted upon the author due to the violation of her freedom of expression. See Case 12,142, *Alejandra Matus y otros* v. *Chile*, Informe No. 90/05, 24 October 2005.

[37] In its latest version (2001), the Press Act established only fines and civil sanctions for this offence, whereas the State Security Law stipulates imprisonment for up to five years.

9.5 THE RETURN TO DEMOCRACY AND THE END OF FAKE NEWS REGULATION

Upon the restoration of democracy in Chile, the government led by President Patricio Aylwin made the normal operation of the mass media a top priority. This endeavour required a substantial transformation of the legal framework governing the press, which was accomplished in two legislative stages. The first step consisted of an urgent measure to align existing legislation with the democratic reality, in which freedom of expression would play an important role. The second stage, which spanned a significant amount of time, involved the drafting of a new Press Act designed to effectively protect the freedom of the press and strengthen the media's contribution to the democratic process.

On 17 April 1990, less than a month after assuming the presidency of the Republic, Patricio Aylwin submitted to the National Congress a bill intended to adapt press legislation to the country's new political and institutional realities. The purpose of the bill was to eliminate all restrictions imposed by the law that impeded the free exercise of speech.[38] This law introduced two significant amendments that are especially relevant to this chapter. First, it repealed the criminal offence of defamation, which was introduced to the Press Act by the ruling junta in 1985. A broad spectrum of political parties agreed that the regulation of defamation enacted during the dictatorship severely impeded the exercise of free speech, and that the legal interests it protected were already covered by the slander and libel laws. In contrast to the brief duration of legal defamation, the constitutional provision lasted longer, as it was not until 2005 that the necessary political support was gathered to implement one of the most extensive and significant reforms to the 1980 Constitution. This reform included the elimination of defamation from the Constitution, as well as numerous other modifications.[39]

The second relevant amendment pertains to the offence of disseminating false news under the Press Act 1967. Although retaining the core elements of its regulation, it modified the liability of mass media outlet owners, editors and directors. Prior to the reform, they were all jointly responsible for false information spread through their media. In three instances, the reform absolved them of liability. First, when it involves the simple reproduction of information or news from news agencies or information provided by public authorities on matters within their jurisdiction, or

[38] Mensaje presidencial, Sesión 5, Legislatura 319, 17 April 1990, Historia de la Ley 19,048, www.bcn.cl/historiadelaley/nc/historia-de-la-ley/7421.

[39] The reform dismantled the authoritarian legacy of the 1980 Constitution. It achieved this by transforming the Senate into a fully democratically elected chamber, placing the army under the authority of the President of the Republic and abolishing the political influence of the National Security Council. Additionally, the reform bolstered the Deputy Chamber's political oversight of the government, removed the binominal electoral system from the constitution and enhanced the role of the Constitutional Court. See Francisco Zúñiga (ed.), *Reforma Constitutucional* (Santiago: LexisNexis, 2005).

from individuals or institutions that, in the court's opinion, are reasonably reliable or appropriate in relation to the subject. The second scenario is in the case of live radio or television broadcasts, assuming the media outlet exercised reasonable care to prevent their dissemination. Lastly, they are exempt from liability in the event that fake news is disseminated in programmes or sections that are accessible to the public, with an explicit statement that what is broadcast there does not bind the media entity.[40]

The second legislative effort, related to the democratization of mass media, was a lengthy endeavour initiated by President Aylwin during the return to democracy. In July 1993, the president sent a bill to Congress, and eight years later, in May 2001, the 'new' Press Act went into effect. Some of the objectives of this law were to democratize the mass media and consolidate of a set of issues that were scattered across various legal statutes. Despite the fact that the contents of the new law were not radically changed from those of the 1967 Press Act, there are some significant differences. Among them, the principle of pluralism was incorporated for the first time in the history of press regulation in Chile. This was intended to promote the expansion of mass media outlets and to encourage the diversification of informational content.[41]

Significant modifications were also made from the perspective of reducing punitive measures. First, the legislation repealed the so-called offence of contempt under the State Security Law. This offence included libel, slander and defamation directed at the President of the Republic, ministers, parliamentarians, members of higher courts of justice and other important authorities. It was essentially a form of seditious libel aimed at preventing hostile attack against government and preserving public order. During the dictatorship, the government made extensive use of this provision and its application continued during the transition to democracy. Indeed, its use eclipsed reliance on other, related offences (such as disseminating fake news).[42] At that time, many international human rights organizations severely criticized the existence of the offence of contempt.[43] With its repeal, Chile made a significant step towards democratization and the expansion of freedom of speech. As previously explained, a second substantial change to the State Security Law was the elimination of the provision that authorized courts to suspend media outlets and confiscate their publications in connection with convictions for violations of the law. In the same vein, the strict liability of directors and owners of media outlets was eliminated

[40] Ley 19,048.

[41] John Charney, 'Media Regulation in Chile: Authority and Liberty Compounded' in Paul Wragg and András Koltay (eds.), *Global Perspectives on Press Regulation* (Oxford: Hart, 2024), Vol. II.

[42] See Felipe González, 'Hacia la derogación de las normas de desacato en Chile' in *Libertad de expresión en Chile* (Santiago: Universidad Diego Portales, 2006) pp. 199—241.

[43] See Informe Anual Comisión Interamericana de Derechos Humanos 1994, www.cidh.oas.org/annualrep/94span/indice.htm.

and a common procedure for adjudicating criminal and civil liability for offences committed through a mass media outlet was established.

A number of long-standing criminal offences contained in the Press Act 1967 were also repealed by the Press Act 2001. For the purposes of this chapter, the dissemination of fake news was the most relevant one. Undoubtedly, its repeal was a significant historical event, as it signalled the end of a provision that had been in effect in Chile for an important portion of the twentieth century. However, despite its long existence, this offence had a limited impact in judicial practice. Very few cases exist in which the courts actually applied this provision, and even fewer cases in which they used it to convict someone of spreading fake news.[44] Numerous reasons explain why this was so. First, fake news was not only governed by the Press Act, but also by the State Security Law. This law provided more favourable conditions for criminally prosecuting the dissemination of fake news than the Press Act did.[45]

As a result of the 2001 repeal of the fake news law, alternative measures have been taken to redirect its prosecution. The right to rectification and clarification was one of them. The Decree Law 425 of 1925 first granted this power, which the Press Act of 1967 subsequently reaffirmed, and which the Press Act of 2001 again reaffirmed. The right to rectification and clarification holds constitutional status in the Chilean legal system. Incorporated initially in 1970 as an amendment to the 1925 constitution, it was also enshrined in the 1980 Constitution and is still in effect today.[46] This right allows any person who has been unfairly mentioned or offended by a mass media outlet to demand that the outlet publish a clarification or retraction. The responsible media outlets are required to publish it, and if they fail to do so, the offended party may pursue legal action.[47] The courts have used the right to rectification in various ways in relation to disinformation and misinformation. For example, courts have recently indicated that the rectification procedure is appropriate for challenging the dissemination of false news,[48] and have ordered media outlets to correct any such news and imposed fines for failing to do so.[49] On the other hand, courts have occasionally considered the rectification by media outlets regarding the

[44] One of those cases is *Staub Jacqueline con Pinto Marco*, Supreme Court, 1 June 1993, where the director of the *Diario Austral* was sentenced for disseminating fake news.

[45] See notes 35 and 36.

[46] Its constitutional origins date back to 1970, when a set of reforms to the 1925 Constitution were introduced as a prerequisite for the centre political forces in parliament to support Salvador Allende's bid for the presidency of the Republic. This constitutional amendment, like other processes examined in this chapter that led to the regulation of fake news, was the result of a highly polarized political environment. See Arturo Valenzuela, *The Breakdown of Democratic Regime: Chile* (Baltimore: Johns Hopkins University Press, 1978).

[47] Constitution, Art. 19(12); Press Act of 2001, Arts. 16–20.

[48] See Corte de Apelaciones de Santiago, Rol 35815-2022.

[49] C-3069-2014, 28° Juzgado Civil de Santiago; C-8146-2021, 17° Juzgado Civil de Santiago.

dissemination of false news as pertinent evidence to exempt them from civil liability for damages or constitutional liability for the violation of fundamental rights.[50]

Lastly, false news has also been pursued through constitutional measures that protect fundamental rights. This is the Amparo remedy, which offers a rapid procedure and grants courts broad powers in the face of violations of constitutional rights, whether they originate from a state entity or even from a private entity (such as a media outlet). Although some courts have been reluctant to grant these remedies,[51] arguing that there are legal avenues to resolve such disputes, a significant number of cases have seen these remedies granted. They mainly involve situations where the dissemination of false news harms a person's reputation. As reputation is a constitutionally enshrined right and is safeguarded by the Amparo remedy, the courts have accepted these actions and ordered media outlets to rectify false information they have published.[52]

9.6 THE REGULATION OF DISINFORMATION IN THE DIGITAL CONTEXT

Over two decades after the repeal of the offence of dissemination of fake news from the Press Act, a new regulatory drive has emerged in Chile. In June 2023, the government established a commission against disinformation, responsible for analysing the phenomenon and its implications for democracy. Among its primary responsibilities is the provision of recommendations to the relevant authorities regarding the steps necessary to develop a comprehensive public policy to address the challenges posed by disinformation and its detrimental impact on democratic processes.[53] Furthermore, beginning in 2020 and continuing onward, no fewer than six bills have been presented in the National Congress aimed at criminally penalizing the dissemination of false news in the country. These bills have garnered support from parliamentarians from across the political spectrum, reflecting a broad consensus regarding the urgent need to address the proliferation of false information, particularly on digital platforms and during electoral cycles.

[50] See C-3151-2010, 17° Juzgado Civil de Santiago. For identical reasons, constitutional actions for the dissemination of information affecting the right to honour have been rejected when the media has corrected false information, see Corte de Apelaciones de Valdivia, Recurso de Protección 196-2017. Likewise, it has been pointed out that the refusal by a social media company to rectify is an illegal act that constitutes the basis for a constitutional action against the media company for misinforming the population. See Corte Suprema, 150.450-2020.

[51] Corte de Apelaciones de Santiago, Recurso de Protección 46752-2019; Corte de Apelaciones de Santiago, Recurso de Protección 35815-2022.

[52] Corte Suprema, *Berríos González con revista Qúe Pasa*, 19 March 1991; Corte Suprema, *Contreras López Feliciano y otros con El Mercurio de Antofagasta*, 2 November 1982; Corte de Apelaciones de Santiago, Rol 84116-2018; Corte de Apelaciones de Talca, Rol 3779-2019.

[53] Decreto No. 12 of 2023 of the Ministerio de Ciencia, Tecnología, Conocimiento e Innovación, published in *Diario Oficial*, No. 43.582, 20 June 2023.

Does this renewed desire to regulate the dissemination of false news correspond to a similar motivation that led to its regulation in the past? Fake news has historically been regulated in Chile by de facto administrations and during periods of high political polarization. Moreover, regulation has occurred during constitutional processes,[54] as a result of those processes,[55] or immediately following the ratification of a new constitution.[56] Since October 2019, Chile experienced a constitutional crisis triggered by a massive popular uprising that engaged millions of people nationwide. In response to this pervasive discontent among citizens, a political consensus was reached to initiate a constitutional process aimed at addressing these issues through institutional means.[57] Two attempts were made to replace the constitution through democratically elected conventions.[58] Both failed as the public rejected the constitutional proposals in a referendum held in October 2022 and then in December 2023.[59] Unquestionably, this process has occurred in an atmosphere of high tension and political polarization, similar to the political climate that characterized different historical periods in which Chile has regulated fake news. Despite these similarities, there is a significant difference between the political conditions motivating the current regulatory interest, as Chile is presently governed under a democratic system.

Despite the political parallels between the contemporary interest in regulating false news and its regulation in the past, significant differences exist that distinguish contemporary efforts to combat disinformation and misinformation from those of the past. All of them can be attributed to the technological transformations that have reconfigured the public opinion formation process in the modern world.

The transition to digital technologies has significantly altered what Jack Balkin refers to as the 'infrastructure of freedom of expression' – that is, the technologies and institutions that people use and trust to inform and communicate.[60] Today, our ability to inform and communicate depends significantly on large private companies

[54] This is the case with the regulation of fake news in Decree Law 425 of 1925, which was a precursor to the process that led to the Constitution of 1925.

[55] It is the case of the defamation clause included in the original text of the 1980 Constitution.

[56] It is the case of DFL 143 of 1931, which criminalizes fake news as a state security offence.

[57] See John Charney, Pablo Marshall and Emilios Christodoulidis, '"It Is not 30 Pesos, It Is 30 Years": Reflections on the Chilean Crisis' (2021) 30(4) *Social & Legal Studies* 627–68, for an analysis of the causes that prompted the constitutional process.

[58] See Diego Gil, Guillermo Jiménez and Pablo Marshall (eds.), *El dilema constitucional: Una aproximación institucional al proceso constituyente* (Santiago: Fondo de Cultura Económica, 2023), for a critical analysis of the first constituent process.

[59] The initial process led by a majority of radical left-wing social movements lacking prior political experience ended in a dramatic failure, as their proposal was rejected by 68 per cent of the population in a referendum held in October 2022. The second constituent process was spearheaded by a radical right-wing majority which proposed a Constitution that was rejected by 56 per cent of the population.

[60] Jack M. Balkin, 'Old School/New School Speech Regulation' (2014) 127(8) *Harvard Law Review* 2296.

such as Google, X (Twitter), Meta (Facebook), YouTube and TikTok. These companies have created enormous user communities worldwide, so much so that in January 2023, the latter three combined had more than 6 billion active users.[61] The phenomenon of disinformation and misinformation has evolved significantly within this framework. The legal regulatory structure in Chile has, to date, not been updated to address the new challenges that these technologies have created.

Pivotal events like the 2016 UK referendum on exiting the European Union and the election of Donald Trump as President of the United States of America during the same year were early indicators of the vast scale and scope of the new issues associated with disinformation and misinformation. These events underscored the digital infrastructure's capability to generate and disseminate false information, on a vast scale, carrying profound implications for electoral processes and the overall democratic system. Although an in-depth exploration of the structural factors contributing to the expansion of false news in the digital realm is beyond the scope of this chapter, certain aspects warrant elucidation to grasp its distinctive nature and differentiate the current regulatory efforts against false news in Chile from past initiatives.

The first point underscores the remarkable level of user concentration that prominent internet corporations have achieved in recent years.[62] Initially conceived as a realm promoting freedom and democratization in communication, the Internet represented a shift away from the vertically centralized content production model dominated by major media corporations. It embraced a decentralized model, allowing individual users to create and distribute content under conditions resembling those of traditional media outlets.[63] However, this ideal was overshadowed by the explosive growth of major internet companies, which solidified their dominance by expanding their global user bases. Billions of users now converge on a single network, effectively competing with established news publishers for attention. Unlike these publishers, who generate their content – requiring careful curation to retain audience trust and avoid legal liabilities – major internet firms and platforms serve as intermediaries, organizing or disseminating content produced by third parties, generally lacking editorial control over it.[64]

[61] 'Most Popular Social Networks Worldwide as of January 2023', Statista, www.statista.com/statistics/272014/global-social-networks-ranked-by-number-of-users.

[62] See Martin Moore and Damian Tambini (eds.), *Digital Dominance: The Power of Google, Amazon, Facebook and Apple* (Oxford: Oxford University Press, 2018).

[63] Yochai Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom* (New Haven, CT: Yale University Press, 2006); Eben Moglen, 'The Invisible Barbecue' (1997) 97 *Columbia Law Review* 945.

[64] This is changing, and for economic and legal reasons, as will be demonstrated, they are increasingly participating actively in content moderation; see specifically Kate Klonick, 'Inside the Making of Facebook's Supreme Court', *The New Yorker*, 12 February 2021, www.newyorker.com/tech/annals-of-technology/inside-the-making-of-facebooks-supreme-court.

The primary challenge stems from the business model employed by these companies, which depends on retaining users' attention for extended durations, and evidence suggests that sensational content tends to attract more attention.[65] In essence, major internet corporations possess incentives for the widespread dissemination of false news that traditional media outlets either lack or possess to a lesser degree. Furthermore, users receive this content as a result of potent algorithms that determine their political preferences based on their online searches and likes.[66] These users then become potential conduits for propagating this information across highly concentrated networks that facilitate rapid and extensive dissemination. The combination of these factors has produced an unprecedented capacity to disseminate false or misleading information at an unprecedented rate and to an audience unparalleled in human history.

Section 230 of the Communications Decency Act is a second important legal factor that further explains the ease with which fake news spreads on the Internet. Except in cases involving federal offences or violations of intellectual property rights, this provision provides internet intermediaries with complete immunity regarding illicit content posted on their platforms or services. One of its primary goals was to eradicate the ambiguity created by precedents that determined intermediary liability based on the amount of editorial control they exercised over content.[67] If intermediaries exercised editorial control, they were considered *publishers* and held liable for illegal content; otherwise, they were regarded as distributors and were exempt from liability for the same content. The issue was that courts frequently struggled with these classifications, causing uncertainty for intermediaries regarding potential legal actions and discouraging self-regulation through content moderation on their platforms due to the elevated risk of being classified as *publishers*.[68]

Section 230 of the Communications Decency Act eliminates the ambiguity surrounding intermediary liability by granting them complete immunity with respect to illegal content circulating on their platforms or services. Internet intermediaries in the United States that host or transmit third-party content are therefore exempt from a set of laws that would otherwise hold them accountable. This provision is frequently praised as the most important rule protecting freedom of expression on the Internet and a driving force behind its current form.[69] Some

[65] See Craig Silverman, 'This Analysis Shows How Viral Fake Election News Stories Outperformed Real News on Facebook', BuzzFeed News, 16 November 2016, www.buzzfeednews.com/article/craigsilverman/viral-fake-election-news-outperformed-real-news-on-facebook.

[66] Eli Pariser, *The Filter Bubble: What the Internet Is Hiding from You* (London: Penguin, 2011) p. 9.

[67] Kate Klonick, 'The New Governors: The People, Rules and Processes Governing Online Speech' (2018) 131 *Harvard Law Review* 1604.

[68] Ibid.

[69] Emily Bazelon, 'How to Unmask the Internet's Vilest Characters', *The New York Times Magazine*, 22 April 2011, www.nytimes.com/2011/04/24/magazine/mag-24lede-t.html.

scholarly literature has even described it as a mechanism intended to foster the economic growth of internet companies, aligning with the principles of the First Amendment of the United States Constitution by preventing any state interference in the exercise of their freedom of expression.[70]

The immunity rule of Section 230 of the Communications Decency Act (CDA) has an impact on the current interest in regulating the dissemination of false news in Chile. In fact, the Chilean Press Act 2001 targets media outlets. They are the entities that will be held accountable for the offences or abuses, specified by the law. Although this law abolished the crime of disseminating fake news, the right to clarification and rectification has been used to address these issues since its repeal.[71] In certain cases, media-based libel and slander have also been used for the same purpose. The problem is that the law is not clear about the legal status of internet intermediaries and digital platforms, such as Meta, X or YouTube.

Courts have occasionally categorized these services as media outlets, but this has not always been the case, and they have never held them liable for the crimes outlined in the law. Furthermore, because many of these companies are headquartered in the United States, they are not subject to the jurisdiction of Chilean courts, remaining entirely subject to Section 230 of the CDA. The immunity rule means that the limited legal options that the Chilean legal system currently provides for the prosecution of false news do not apply to the platforms that most vigorously disseminate such news at present.

Another significant effect of Section 230 of the Communications Decency Act is relevant to Chile's ongoing efforts to regulate false news. This provision not only absolves intermediary services of liability for illegal content posted on their platforms, but also grants them broad authority to define the scope of acceptable expressions within their domains. Remarkably, it grants them immunity for actions taken in good faith to restrict access or availability of offensive material. This has prompted self-regulation among digital platforms and contributed to the development of sophisticated content moderation systems. These systems frequently involve centralized regulatory bodies responsible for formulating moderation policies, establishing rule-based frameworks delineating the boundaries of freedom of expression and creating adjudicatory entities tasked with resolving user disputes using procedures they independently devised.[72] In both their operational principles and organizational structure, these systems bear striking similarities to legal systems, particularly the model of the First Amendment of the US Constitution. Notable is the fact that those responsible for designing these moderation systems, shaping their procedures and training individuals engaged in content moderation are frequently US legal

[70] Anupam Chander, 'How Law Made Silicon Valley' (2014) 63(3) *Emory Law Journal* 639.
[71] See notes 48–50.
[72] Klonick, 'The New Governors', at 1630–62.

professionals educated in First Amendment doctrine and rooted in a legal and political culture they export to global user communities.[73]

These systems have effectively transformed major digital platforms into influential governance structures that not only define the fundamental rules of communication within the digital domain but also enforce these rules through intricate moderation mechanisms.[74] The magnitude of the power amassed by these major digital platforms is such that, particularly in the Chilean context, it poses a potential threat to the established framework of fundamental rights that underpins the right to information and freedom of expression. This framework is enshrined in the Constitution, and the regulation of these rights is delegated to legislative acts. It operates under the supervision of a Constitutional Court, which examines whether legal provisions regulating freedom of expression are consistent with the Constitution. In contrast, conflicts involving an individual's freedom of expression are resolved by the courts, which can directly invoke the Constitution to protect these rights or, when necessary, employ legal provisions to assess and penalize unlawful or abusive expressions.[75]

In sum, major digital platforms pose a direct threat to the principles of the Chilean constitutional system. By autonomously defining the limits of acceptable speech on their platforms, they affect the basic principle according to which any restriction or limitation on the right to information and freedom of expression must be derived from statutory law. Moreover, because decisions made by these platforms in this context are beyond the jurisdiction of the Constitutional Court, judicial review is undermined. Furthermore, since major digital platforms fall outside the jurisdiction of Chilean courts, illegal content posted on them may remain immune, leaving the fundamental rights of their users inadequately protected under the Chilean legal system. This is why the current interest in regulating false news must also be understood as an effort to regain control over the basic rules governing the scope of freedom of expression within the basic system of fundamental rights. These factors represent novel variables that were absent from the equation that prompted the regulation of fake news in the past, and they are essential to understanding the impetus behind the current drive for regulation.

9.7 CONCLUSION

The Chilean history of regulating fake news demystifies the notion that disinformation is a contemporary phenomenon. A century-old regulation reveals historical patterns that can offer insights into current approaches. One such pattern is the

[73] Ibid. at 1621.
[74] Ibid.
[75] John Charney and Pable Marshall, 'Libertad de expresion' in Pablo Contreras and Constanza Salgado (eds.), *Curso de Derechos Fundamentales* (Valencia: Tirant lo Blanch, 2021).

tendency to introduce regulations during periods of heightened political instability, often in the wake of constitutional processes or immediately thereafter. These regulations typically emerge under de facto governments. Conversely, they tend to be relaxed or abolished during democratic periods. This historical trend suggests that the regulation of fake news in Chile has been employed as a tool to quell political criticism, a stance at odds with the principles of free speech.

The current impulse to regulate fake news in Chile, much like previous instances, arises against the backdrop of a constitutional process marked by intense political polarization and instability. However, the present situation is unique in that it unfolds within a democratic government framework. Of greater significance, fake news has evolved into a global threat to democracy, primarily due to the ease with which disinformation and misinformation can spread in today's digital public sphere. These circumstances introduce new arguments in favour of regulating fake news. Another pertinent argument applies specifically to Chile's situation. As digital platforms assume increasingly influential roles of governance in digital communication, wielding the power to establish and enforce intricate systems of communication norms, they have begun to impact the fundamental rights framework, including free speech and the right to information. Concurrently, basic constitutional principles such as the rule of law, due process and transparency are now compromised.

Rather than serving as a tool to suppress political dissent, fake news regulation could be an appropriate means of tackling these issues. When tailored to address the regulatory challenges posed by digital infrastructure to free speech, it must be designed within a framework that upholds fundamental rights and aims to prevent significant threats to democracy. Lessons from past regulatory experience can offer valuable guidance in this endeavour.