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Privacy within the System of Criminal Prosecution in Chile

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Policy paper
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Introduction

The protection of the fundamental rights, within a democratic society, requires dealing with it in every environment of public action. Among them, the work of the public administration in the investigation and prosecution of those actions that society has determined as deserving of penalty, because they affect the same fundamental interests. But life in society requires deliberation of said interests: it is not legitimate to protect one to the detriment of another, unless there is justification, whether abstract or concrete.

The attempts to make the criminal prosecution efficient through the regulation, sometimes contradict with the system of fundamental rights and principles developed for the generality of the legislation, uniformly. In the following pages we will develop a study on the problems of privacy the fight against crime in Chile poses, to do that three main aspects must be analyzed.

A relevant point is constituted by the existing legal framework, applicable to crimes related to privacy and incidents at odds with the constitutional right to private life, and especially the rules that consider proceedings to its protection and legality, at a constitutional level, as well as legal and regulatory. Along with it, the need to recognize the jurisprudential advance and the eventual modifications of the existing proceedings will be covered.

Another aspect is constituted by the way that the Public Ministry's strategic plan, organization in charge of the criminal prosecution, handles the problems of privacy derivative of situations constituent of a crime. Thus, the Constitutional Organic Law of the Public Ministry, confers to the national prosecutor the power to set the criterion for the Public Ministry's proceedings towards the compliance of its constitutional and legal objectives. These guidelines bring closer the practice of the obligation to consider both the prosecution and the rights of the persons involved in the investigation.

Finally, it is appropriate to carry out an examination on the adequate protection of privacy existing in the country, aimed at the future comparisons with relevant aspects from the international law and the corresponding approach on challenges in the legislative field.

In order to develop the previous items, it is necessary to understand the systems of criminal procedure currently coexisting in Chile, in general terms, emphasizing in the criminal procedure system in force since the year 2000, the principles that constitute this proceeding, the vision on the criminal prosecution and the main subjects in charge of the prosecution, with the purpose of contextualizing the general plan in which the existing legislation and the one that could constitute itself as a draft law can be developed. Therefore, the development of those general and special laws, created with the purpose of establishing guidelines of actions with basis in the protection of the constitutional rights considered in the article 19 numbers 4 and 5 of the Primary charter, is relevant. Finally, within an examination of real and contingent implementation, an appropriate jurisprudence and the discussions aimed at the advance and regulatory modification must be developed.

I.The criminal prosecution in Chile

I.I. The current criminal procedure systems in Chile

In our country, currently, two procedural systems coexist in criminal law, the one known as “old”, that is ruled by the Code of Criminal Proceedings, applicable to those causes initiated during its validity and whose processing is currently pending; and the “new” one, the protection of the Code of Criminal Procedure, that came gradually into force within the national territory beginning in the year 2000, completing said process in 2005.

In this regard, it is worth noting that the national doctrine¹ has fundamentally distinguished three criminal procedure systems, namely: the accusatory, inquisitive systems, and the reformed or mixed system. Generally speaking, the accusatory system is characterized by the existence of an oral, immediate, public and contradictory hearing, where the judge must listen to a district attorney, in charge of investigating an accusing, and a defense attorney, who has the role of duty-bearer. The inquisitive system is characterized by the existence of a written proceeding, discontinuous, non-contradictory and only exceptionally disputable, where the judge manages the secret investigation; subsequently, initiates the accusation against who will be subjected to prosecution, and judges him. Finally, the reformed or mixed system establishes the criminal prosecution through the Public Ministry or the Judge, and a process consisting of a preliminary investigation, an intermediate hearing and an oral trial, whose ruling based on the appreciation of the evidence in accordance to the rules of sound judgment, is exceptionally disputable.

I.I.I. The old process: Code of Criminal Proceedings

Up until the year 200, the criminal prosecution in Chile was fundamentally guided by the Code of Criminal Proceedings, from 1906. The message that the law reform introduced referenced three compared systems in existence to date: the trial by jury, the oral trial and the one with written evidence. The first one was dismissed, due to lack of competent citizens for the performance of jurisdictional labor as contributors; and the second one was ruled out despite it being ideal, due to the amount of judges and assistants to the administration of justice required for the substantiation of the proceeding.

As a result, the Code of Criminal Proceedings introduced an inquisitively based system, written, secret and based on a file, whose investigation and judging are made by a sole judge. Its characteristic stages are: the summary, during which

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¹ In this regard, Horvitz and López (2007).

the investigation develops with the support of the police and, if appropriate, the substantiated accusation set at the order of committal to trial, generally accompanied by preventive detention as a precautionary measure; subsequently, the stage of plenary, during which the evidence gathered by the judge and the defenses of the accused or defendant are contrasted; and then the sentence.

The inquisitive and the written evidence systems were severely criticized, among other reasons, because during its processing the judge is capable of forming a conviction from the summary stage, guiding the investigation on points he believes to be right, carrying that internal conviction up to the sentence. That is to say, the one who processes entails a prejudice over the eventual result, even to the point of being able to be guided by it. To the contrary, those who defend the system of written evidence, point out that the judge will never get carried away by his emotions or mere impressions, being the only person prepared to formulate an exact judgment of the truth; in case of not being partial, their decision is subject to the revision of the higher courts.

Nevertheless, the biggest critics to this penal procedure made reference to the fact that it violated the right to a public trial –since it was a secret and written procedure, of an inquisitive style and colonial inspiration-, and also to the right to a defense of the accused and the presumption of innocence that assists him; all which are human rights recognized in treaties of said character, in force in Chile.²

1.1.2. The current criminal procedure: Code of Criminal Proceeding

The adaptation of the Chilean criminal procedure system in political and economic matters, summarized in the law No. 19.696, it's founded in the changes of the country in democracy matters, the emphasis in the respect towards human rights, the privatization of the productive activity, the State's regulatory role and the market economy. From these changes, it seemed necessary to create a system capable of solving an increasing and varied number of litigations, with characteristics of accessibility, impartiality, equality and maximization of guarantees.

The message that accompanied the admission of the project of the current

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2 “El proceso penal chileno y los derechos humanos. Volumen I, Aspectos Jurídicos.” Cristián Riego. 1994. http://www.udp.cl/descargas/facultades_carreras/derecho/pdf/investigaciones/Cuadernos_de_analisis_Coleccion_Derecho_Privado/especiales/CAJ_n04_Serie_Publicaciones_Especiales.pdf

Code of Criminal Proceedings,³ explains the organizations of the proposed system and of the regular procedure, which considers a stage of instruction, a preparatory hearing of the trial, and the trial itself, oral, the details of which will be comprehensively addressed later.

The existence of this new criminal procedure meant not only the implementation of a series of principles related to the equality before the law and the due process, even by means of a constitutional reform. At the same time, it meant the entry into force of the Code of Criminal Proceeding, whose first title establishes a series of principles that, in a close relation with principles and constitutional rights, serve as minimum guarantees that guide the course of the criminal procedure, as it will be seen below.

For purposes of the present report, without prejudice to the survival of the old system in relation to the judicial causes in which it is applicable and attending its progressive loss of relevance due to its gradual replacement.

I.2. Applicable guidelines

It should be pointed out that in addition to the Code of the trade its legislation is addressing, the following rules are applicable to the criminal procedure:

I.2.1. Political Constitution

In it, the principle of due process (article 19 number 3) is regulated, through the constitutional guarantee to the equality in the legal protection in the exercise of people's rights, establishing as relevant aspects: the right to a defense; the prohibition of judgment by special commissions; the previous and legally processed proceeding and a rational and fair investigation; the impossibility of presuming the criminal responsibility ipso jure; the implementation of the previous law to the commission of crimes, unless its favors the affected; and, the principle of legitimacy. Conceptually, it can be characterized as a group of minimum standards in order for the judicial decision to be fully effective, respecting the fundamental guarantees.

In relation to the already mentioned guarantee of the due process it should be pointed out the illicit evidence, which can be characterized in general terms as the one that has been obtained by violating fundamental rights.

The Chilean legislation does not consider a concrete definition, but deals with it in relation to the exclusion itself. Thus, for example, the Code of Criminal

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3 Biblioteca del Congreso Nacional (2000).

Procedure establishes in the article 295 the freedom of evidence, in relation to the 276 subparagraph 3rd which authorizes the exclusion of those obtained by neglecting fundamental guarantees. Are relevant in this regard, some procedures from the same law organization, such as, the registration procedure, the duplication and the interception of the communications, among others, protected by a legal criterion characterized by the previous judicial authorization in order for it to be valid.

In terms of international treaties on human rights, respected in accordance to the primary charter that guarantees it in the 2nd subparagraph of the 5th article, we find the International Covenant on Civil and Political Rights from 1966 and the American Convention on Human Rights from 1969, that state the due process through the establishment of the right to equality before the courts of law, establish the right of the persons to be publically heard and with the due guarantees by a competent, impartial court established by law, in every criminal and civil trial. Other guarantees that are a part of the system consider the assumption of innocence, the right to a defense, the equality in the exercise of the rights, the general information of the state of the process.

In criminal matters, the Inter-American Convention of Mutual Assistance in Criminal Matters, that obligates the members of the Organization of American States, considers common laws for the mutual criminal assistance in investigations, trials and proceedings regarding the crimes known by the requiring State, considering among the assistance the notification of certain resolutions and persons; the reception of proceedings and testimonies; the practice of proceedings, such as, freezing, seizure of properties and confiscation; the submission and referral of documents; the transfer of persons in custody; among others of similar characteristic previous agreement between the States requiring and required.

1.2.2. Penal Code

A law organization that regulates the acts considered as punishable, and equally the penalties applicable to each one of them. Although it does not consider procedural guidelines, it is around these kind of penalties that the criminal process focuses.

It is structured based on three books, referred as: i) the crimes and the exempting circumstances, extenuating or aggravating of the criminal responsibility; ii) the crimes and simple misdemeanors, and its penalties –among which The crimes against the respect and protection to the private and public life of a person and their family are included, we will refer to them later on-; and iii) the offences.

I.2.3. Special Laws

A series of other legal statutes are applicable to the criminal procedure, and in some cases also create special case-law. Among them we find: the Law No. 19.974, On the State Intelligence System and Creates the National Agency of Intelligence (Agencia Nacional de Inteligencia, ANI); the Law No. 18.314 that Defines Terrorists Behavior and Determines its Penalties; the Law No. 20.000, which Punishes the Illicit Trafficking of Drugs and Psychotropic Substances, and the Law Decree No. 2011 which lays down the rules on the Protection of the Free Competition, which will be object of a more detail analysis in relation to the protection to the private life.

I.3. The guidelines for the proceedings in criminal procedure

The guidelines existing in the diverse legal systems, are relevant inasmuch as they establish governing guidelines for the proceedings required by law, beyond simple temporary characteristics. Thus, the Code of Criminal Proceedings, adopts a system of guidelines for the substantiation of the proceedings to be developed. Established expressly in law, constitute general rules that inspire the system and must be followed at the moment of the processing of cases and of the interpretation of the legal system in this area.

The Title I of the Book I of the Code of Criminal Proceedings is the one that establishes these guidelines, in thirteen articles. We found the following: sentence founded in criminal matters as a result of a previous trial; only prosecution in regards to a same incident constitutive of a crime; prohibition of judgment by special commissions established after the commission of the incident; exclusive management of the criminal prosecution in hands of the Public Ministry; regarding the accused, it is possible to list the presumption of innocence, the rights of the accused, caution on the part of the supervising judge in any stage of the proceeding; the imposition of terms of imprisonment only in the ways established in law; protection of the victim in every stage of the process, previous judicial authorization for the execution of proceedings that restrict or disrupt the exercise of fundamental rights; and, the application of the law only to uninitiated proceedings, except in the case of rulings favoring the accused.

In the same way, the Code of Criminal Proceedings regulates with certain detail the secret as guide for the development of the complete criminal proceedings. The investigation procedures carried out by the Public Ministry and the police, according to the article 182 of the Code of Criminal Proceedings, will be confidential for the third party strangers to the procedure. The accused and the rest

of the participants,⁴ will be able to examine and obtain copies of the records and documents of the prosecutor's investigation and will be able to examine the ones from the police investigation.

Without prejudice to the previous, whenever necessary for the efficacy of the investigation, the district attorney will be able to mandate certain records or documents to be kept secret regarding the accused or the rest of the participants, identifying the respective pieces or proceedings, setting a period of time of no longer than 40 days for the secret to be kept. The confidentiality will not be able to be decreed on the accused's testimony or any other proceeding in which he or she intervened or had the right to intervene, the proceedings in which the court intervened, nor the reports given by the experts, regarding the accused or the defense attorney. The obligation to confidentiality extends to the civil servants that had participated in the investigation and to the rest of the persons aware of the proceedings.

1.4. Organizations intervening in the criminal prosecution

In this section we refer to the main authorities who support, manage and exercise the criminal and investigatory prosecution, leaving aside others that may also participate as contributors in other aspects of the criminal process.

1.4.1. Public Ministry

The message of the Executive with which it is initiated a project of constitutional reform created by the Public Ministry in the year 1996,⁵ presented as its purpose, the public criminal prosecution. Its specific functions consist on: the investigation crimes, the formulation of the accusation and the backup of the accusation during trial.

The Political Constitution of the Republic, in the article 83, and the Law No. 19.640 Organic and Constitutional of the Public Ministry, characterize it as an autonomous organization, hierarchic and with no jurisdictional functions, in charge exclusively conducting the investigation of incidents constitutive of crimes, that decide the punishable participation and credit the innocence of

4 Considered as participants in the procedure are the prosecutor, the accused, the defense, the victim and the plaintiff, since any procedural actions is carried out or since the moment in which the law allows them to exercise specific faculties.

5 Biblioteca del Congreso Nacional (1997). History of the Law No. 19.696, available at: http://www.senado.cl/apps Senado/templates/tramitacion/index.php?boletin_ini=1630-07. Consulted on 05/27/2014

the accused, carrying out the public criminal proceeding whenever appropriate.

As specific functions considered in law, the following are relevant: the execution of trial proceedings through any of the district attorneys; the faculty of imparting direct orders to the forces of law and order; the obligation to ensure the efficiency and a suitable administration of the resources and essential public goods and the due and coordinated compliance of their functions; and, as a common characteristic of every proceeding carried out by the Public Ministry, they must be agile and unobstructed, without further formalities than the ones established by the law and will procure the simplification and promptness of its proceedings.

The figure of the National Prosecutor is relevant, his main functions are those of setting a criterion of procedure for the Public Ministry for the compliance of its constitutional and legal objectives ; to dictate general instructions for the proper enforcement of the objectives of investigation, the public criminal proceedings and the protection of the victim, witnesses and other subjects that require it; to create specialized units for the prosecution of crimes such as the drug trafficking and sex crimes; to report once a year the criterion of procedure for the following year and to suggest public policies

The National Prosecutor's responsibilities include dictating general instructions (denominated "instructive") it deems necessary for the adequate enforcement of the duties of conduction of the investigation of the incidents constitutive of crimes, the exercise of the criminal procedure, and the protection of the victims and witnesses. In this point, the following are relevant for the specific subject of the present report:

- a. Notification FN No. 224-2008. Notifies general instructions imparted to the police on the matters indicated, by reason of the entry into force of the Law No. 20.253, law that modifies the Penal Code and Code of Criminal Proceedings in terms of public security and reinforces the preventive responsibilities of the police. Addresses the autonomous procedures of the police without a previous judicial order; the identity check; and, the flagrancy as relevant aspects.
- b. Notification FN No. 061-2009. General Instruction that imparts criterion of proceedings in crimes of the Law No. 20.000 that penalizes the drug trafficking. Addresses the undercover and revealing agent; the informers, the telephonic interceptions, the confidentiality of the investigations, and the confiscation of property.

The Strategic Plan of the Public Ministry,⁶ whose objective is the creation of a series of guidelines, linings and projects for the development of the criminal proceedings, organizes the criminal prosecution by crimes of privacy in various areas of processing. In its most relevant aspect, can be classified among those of high complexity, for example, those involving the telephonic interception or the entry and registration, whose parameters are: the presence of a criminal organization; the supraterritoriality of the crime; complex means of investigation and criminal prosecution; probability of the configuration of more than one crime; quality and importance of the participants that could seriously complicate the use of customary investigation techniques. For the solution of these cases the creation of a supraterritorial department is considered, with multidisciplinary working teams, capacity to generate and anticipate the event of cases of importance; another requirement is the definition of guidelines for the identification of high complexity cases.

The prosecution in criminal procedure,⁷ constitutes the main element of the institutional strategy of the Public Ministry, coherently gathering the objectives, goals, projects, initiatives, process and resources. In this sense, it is possible to identify three main axes of development in the Chilean system: the guidelines of instruction, types of processing and crimes of a special relevance. The consensus is the central axis derivative of the instructions manual and notifications with procedure criterion and normative interpretation that were scattered from the beginning of the reform. They are subjected to a process of revision and systematization that requires the equalization of the decisions facing similar incidents, translated in general guidelines and unique to the procedure in terms of crimes of corruption, financial crimes and crimes under the law of drugs, without prejudice to strengthening on the non-regulated the role of the specialized units to consolidate the unity. The categorization of cases has its basis in the solution differentiated in the processing of cases with specific characteristics, whose main objective is the efficiency. This, it is possible to differentiate less complex cases, complex and of high complexity. For their part, the crimes of special relevance consider in particular, the processing of sex crimes, the crimes considered under the law of drugs, and the crimes of domestic violence. In view of this, the distinguishing aspects are relevant when facing other crimes, because of their importance in society, the permanent risk, and the legal rights they affect.

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6 Office of Chile's prosecutor. Strategic Plan of the Public Ministry 2009-2015.
<http://www.fiscaliadechile.cl/Fiscalia/quienes/plan.jsp>. Página 24.

7 Public Ministry of Chile (2009), p.24.

I.4.2. Police

The Code of Criminal Proceedings regulates the police as litigant in the articles 79 et seq. The law-enforcement organizations in Chile, the Policía de Investigaciones and Carabineros de Chile, are considered as assistant to the Public Ministry in investigational tasks, developing the necessary proceedings in order to achieve the purposes of the criminal prosecution, in relation to the orders imparted by the prosecutors. In addition to these actors, it is the Gendarmería de Chile's duty to investigate the incidents occurred inside of penal institutions. As common background, the tasks entrusted to these entities, will be executed under the management and responsibility of the prosecutors and in agreement with the particular instructions provided by them for purposes of the investigation, immediately, without further formalities, keeping an account of them, and without previous qualification. The communications between the prosecutors and these assistants, will be carried out in the manner and by the most unobstructed means possible. Besides, are subject to general instructions imparted by the Public Ministry for the compliance of the procedures.

Without prejudice to the previous authorization under which the police assistants must act, there are circumstances during which a previous order is not required, considering in them: to assist the victim, to arrest in case of flagrancy, to safeguard the site of the incident, to identify the witnesses and to record the testimonies, to receive the reports of the public, to do identity checks, and to carry out the rest of the proceedings needed by other legal organizations.

I.4.3. Court

The Constitutional Judge constitutes an innovation in the Code of Criminal Proceedings. Without prejudice to not being called "prosecution authority" as such, it is relevant due to its function as guarantor of the rights acting in an objective manner in the proceedings carried out by the Public Ministry and the police in the exercise of their functions. This, because as it is indicated by its name, is its main function to protect and defend the due process and the fundamental rights of the parts during the investigation. In this way, it is requisite of validity its presence in those hearings that seek to examine the legality of the privation of liberty of the person, the decision on precautionary measures, the one of formalization of the investigation, among others.

The Criminal Oral Trial Court is another innovation of this new system. It is the collegiate court in charge of the oral trial, composed of three professional judges. It has the functions of knowing and judge the cases of crime or simple misdemeanor, excepting those related to the simple misdemeanors whose awareness and sentence correspond to the constitutional judge; to decide over

all of the incidents brought during an oral trial; and the rest of the tasks that the law requests. In the stage of the oral trial, the criminal oral trial court, led by the presiding judge of a courtroom, is in charge of the guarantee of fundamental rights, thus relieving the constitutional judge.

I.5. Development of the criminal prosecution

As it was previously noted, the ordinary procedure considers a stage of instruction, a preparatory hearing of the trial, and the trial itself, of an oral nature. The stage of instruction is constituted by the preparation for the trial by means of the investigation of the reported incident –if it considers that these do not merit the initiation of an investigation, it dismisses them and orders its provisional archiving, until the existence of new information–, the gathering of means of evidence and the preparation of the accusation, whose fundamental actors are one of the parts, the prosecutor and the police or other specialized organizations. It is considered in this stage a sole examining supervisory judge (nowadays, Constitutional Judge), whose function is the resolution of the conflicts that may present themselves between the Prosecutor’s investigational activity and the rights and interests of the accused and the participants.

If in the stage of investigation sufficient information is gathered, it will be appropriate to formulate the accusation in the corresponding interim hearing (nowadays, preparatory hearing for the oral trial), before the same supervisory judge, with the objective of preparing the trial setting the content and the means of evidence that will be accepted, to prompt the defense’s formalization facing the accusation and to allow the judicial control by means of the judge’s faculty of correcting formal vices, along with the possibility of rejecting the accusation by ruling the definitive dismissal of the case. Other alternatives are exercising the faculty to not persevere, or the case is discontinued.

In addition, during this stage it is possible that there may exist alternative solutions for the sentence that can shorten the process, thus preventing the case from getting to oral trial. There are two types of solutions: the conditional suspension of sentence and the legal settlements.

The first one consists of the imposition of certain conditions to the accused on the part of the constitutional judge, suspending the investigation and the procedure for an undetermined amount of time, so that if they are fulfilled the criminal proceedings may be closed. For their part, in the legal settlements the accused is obligated with respect to the victim “to repair the detrimental effects of the commission of a crime, in those cases where it is about crimes that affect the available legal rights

of a patrimonial character, less severe damages or unintentional crimes.”⁸

It is also possible the termination of the trial by the application of the simplified procedure, before the same supervisory judge, regarding the processing of minor crimes, allowing to decompress the penal labor as well as implementing a more loose punitive framework. Within this kind of procedures, we find the admonitory, which is even more agile, applicable to criminal misdemeanors to which the prosecutor only requires a fine.⁹

Finally, the oral trial before a collegiate court formed by three members, as main element of the procedure, constitutes an opportunity for the formulation of the accusation, the exercise of the defense, the occasion to present evidence, the debate on the evidence and the issue of the sentence.

Eventually, the alternative of an abbreviated trial can be an option, this implies an agreement in which the accused expressly accepts the incidents subject to the accusation and the registers of the investigation that found it, in addition to being subjected to this procedure, as the Prosecutor of the Public Ministry requires the imposition of a sentence of no longer than five years. In this way the trial is directly developed before the constitutional judge, who cannot impose a sentence larger than the one requested by the prosecutor of the Public Ministry.

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8 <http://www.dpp.cl/resources/upload/files/documento/8a4ab33c5e2e7bb0e-41b1ab9c7e6e9ff.pdf>

9 Notice FN No. 286/2010 of the District Attorney’s Office of the Public Ministry.

2. Constitutional and legal aspects of the protection of the private life.

2.1. Constitutional aspects

Constitutionally, the private life and the inviolability of the communications, are established in the article 19, numbers 4 and 5 respectively, stipulating that “The Constitution assures every person: 4°.- The respect and protection to the private life and to the honor of the person and their family. The home can only be broken into and the communications and private documents be intercepted, open or registered in cases and ways determined by the law”. Insofar there is no explicit constitutional protection of the personal data, which exists only at a legal level, without prejudice to this the jurisprudence has given its legal protection through the action of protection.

The substantial character of the guarantee recorded in the numeral 5° makes it object of care in those cases in which the legislation establishes the illegality of the evidence, founded in the violation of the fundamental guarantees.

As it is possible to appreciate, our constitutional legislation recognizes the existence of a legally protected interest to the non-intromission to the private life, be it at a physical or family or spatial level, and in the same way over the information related to a person. The outlines of said interest have significantly varied in time.¹⁰

In strict sense, in Chile there isn't a right to “privacy” in its original sense as right to privacy,¹¹ concept of Anglo-Saxon roots, that does not count with the recognition of constitutional status, unlike what happens in our country that in addition considers the protection of the citizen not only against the state, but also against other privates. Besides, the right to privacy enjoys an extensive

10 We follow in this point CERDA SILVA, Alberto. “Autodeterminación informativa y las leyes sobre protección de datos”. Revista Chilena de Derecho Informático, No. 3 (2003). Centro de Estudios en Derecho Informático, Universidad de Chile.

11 Attended the purpose of this job, and without pretending to not recognize the existing conceptual differences, we will use the Anglicism “privacy” to refer to a same legally relevant interest, as partially analogous to the right to the private life and inclusive of the protection to the intimacy and to the personal information. For part of the doctrine, the differentiation seems to lack the juridical effects according to the Chilean legislation; qv JIJENA LEIVA, Renato. Chile, la protección penal de la intimidad de la intimidad y el delito informático. Santiago, Editorial Jurídica de Chile, 1993, p.37.

development at a legislative level, which leads to protect under its wings a bigger amount of legal rights that exceed those mentioned in the numerals 4 and 5 of the article 19 of the Constitution.

On the other hand, internationally, it is worth to mention again the International Covenant on Civil and Political Rights from 1966 and the American Convention on Human Rights from 1969, which establish the right of the persons to be publically heard and with the due guarantees by a competent, impartial court established by law, in every criminal or civil trial. With all this, the disclosure of the trials present exceptions, among which the interest of the private life is considered. For example, it is established the right to not being object to arbitrary or illegal interferences in their private lives, their families, their home or correspondence, nor to illegal attacks to their honor and reputation.

It is worth mentioning that, by application of what is mandated in the 2nd subparagraph of the 5th article of the Constitution, the international treaties on fundamental rights must be respected and promoted by the State as long as they are in force; entrusting an additional procedural channel, of supranational character –be it at a Latin-American or worldwide level-, to which it is possible to resort to in case of an infraction to the legal rights aforementioned.

2.2. Legal Aspects

2.2.1 Code of Criminal Proceedings

The Code of Criminal Proceedings considers and regulates a series of intrusive measures that are in agreement with the principles of legality and proportionality to fundament their precedence, without prejudice to contain within themselves elements that attempt against the private life and honor of the person. These proceedings consider physical and medical examinations, entry and registration of enclosed areas, confiscation and seizure of correspondence, interception of communications, confiscation of objects and documents. These aspects will be analyzed in the third part of this report.

2.2.2. Penal Code

In the Penal Code, it is relevant to mention the establishment of crimes against the private life and against the intimacy, even to the communications: in those cases in which said behaviors are analyzed outside the law in criminal activities, not only the constitutional guarantee will be affected, but it will concurrently exist an associated penal punishment.

The open and registration of correspondence or the documents of others with-

out their will, is punished in the article 146 in the following terms:

- a. If it were to disclose or take advantage of the secrets contained in them, it will be punished with the sentence of minor imprisonment at its medium degree.¹²
- b. If it were to disclose or take advantage of the secrets contained in them, it will be punished with the sentence of minor imprisonment at its minimum degree.¹³

The exception to this rule is ordered in favor of the spouses; the parents, keepers or whoever carries out this role, regarding the papers or letters of their minor children under their dependency,; and, in favor of those persons that the laws or special guidelines enable.

Among the crimes against private life, it is considered in a special section for crimes against the respect and protection to the private and public life of the person and their family, punishing in the article 161-A, the person which within private premises or of no free access to the public, without authorization and by any means, except legal or judicial authorization:

- a. Receives, intercepts, records or reproduces conversations or communications private in nature.
- b. Steals, photographs, photocopies or reproduces documents or instruments private in nature.
- c. Receives, records, films or photographs images or incidents private in nature that happen, are carried out, occur or exist within private premises or places of no free access to the public.
- d. Spread the conversations, communications, and documents, instruments, images and incidents referred to in the previous points.

On crimes committed by a criminal organization, the court upon request of the Public Ministry will be able to authorize the interception, recording of telecommunications, the photography, filming, undercover agents or any other means of reproduction of images conducive to the elucidation of the facts, whenever there where founded suspicion of the preparation or commission of a crime by a person or criminal organization, on the person or member of the organization.

The sentence of minor imprisonment is considered in tis minimum degree¹⁴
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12 541 days to 3 years.

13 61 days to 540 days.

14 Sentence issued between 61 to 540 days of jail.

for the employees of the post-office and telegraph or any others that take advantage of their authority were to intercept or were to open or suppress correspondence Or enable a third party to do so; the punishment will add up to a minor reclusion at any of its degrees¹⁵ and fines going from 11 to 12 UTM.¹⁶

2.2.3. Law on computer crimes

Along with the typical rules of the Penal Code, the Law No. 19.223, that typifies the penal figures related to the informatics, considers punishments to whoever, with the intention of seizing, using or illegally know the information contained in a system of processing, will be punished with the sentence of minor imprisonment at its minimum to medium degree.¹⁷ With this, whoever, in addition, maliciously reveals or spreads the data contained in said system, will suffer the sentence of minor imprisonment at its medium degree.¹⁸ In addition, if the accused is the person in charge of the system of information, the sentence will increase its degree.

2.2.4. System of state intelligence

The Law No. 19.974, On the System of Intelligence of the State and Creates the National Intelligence Agency (ANI), established and regulated in the year 2004, whose objective is the development of the intelligence and counter-intelligence, through the functions of gathering and processing of information at a national and international level, the elaboration of regular reports secret in nature to be presented to the President of the Republic; proposal of guidelines and procedures for the protection of the systems of information; requirements to the

15 Equivalent to an extension of time that goes from 61 days to 5 years of imprisonment.

16 Unidad Tributaria Mensuales (UTM), unit used for the application of fines and others, updated according to inflation. To the month of June, 2014 amounts to a value equivalent to \$42.052 Chilean pesos, approximately USD\$ 75. Consequently, the fine indicated here equates to a range covered between the \$462.572 and the \$921.04 Chilean pesos, or between USD\$ 825 and USD\$ 1.500 American dollars.

17 Equivalent to the extension comprised between 61 days to three days of imprisonment.

18 From 541 days to 3 year in jail

organizations of intelligence of the Armed Forces and the Forces of Order and public Security, among others of information of their competence; and, to mandate the application of measures of intelligence with the purpose of detecting, neutralizing and counteracting the actions of terrorist groups, both national and international, and of international criminal organizations.

According to the noted regulations, the following crimes are punished:

- Violation of secrets of the article 38, these are, the records, information and registers that act in power of the organizations that make up the system or its personnel or those which become aware if the performance of their functions will suffer the sentence of major imprisonment at its minimum degree¹⁹ and the temporary absolute disqualification at its medium degree²⁰ to perpetual to practice public positions or offices; the civil servant who were to use the information of the article 38 for his own benefit or external, in benefit to a person, authority or organization, or to exercise pressure or threats, will suffer the sentence of major imprisonment at its minimum to maximum degree²¹ and the absolute and perpetual disqualification to practice public positions;
- Violation of the obligation to keep secret of the article 39, on control of the Congress and of other organizations, will be punished with minor imprisonment at its minimum to medium degrees²² and a fine of ten to twenty monthly tax units (UTM).

On the special procedures of obtainment of information considered in law, are authorized the intervention of the telephonic, computer or radio communications and of correspondence in any of its shapes; the intervention of systems and computer networks; the phone tapping and electronic recording including audiovisual; and, the intervention of any other technological systems destined to the transmission, storage or processing of communications or information, whenever it may be strictly essential for the compliance of the

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19 5 years and 1 day to 10 years of jail

20 5 years and 1 day to 7 years.

21 5 years and 1 day to 20 years of imprisonment.

22 61 days to 3 years.

objectives of the system and whenever it cannot be obtained from open source.

These procedures may be used exclusively for activities of national intelligence and counter-intelligence, incurring in the punishment of minor imprisonment at any of its degrees anyone who carries out these procedures without belonging to the services regulated by this law, without prejudice to the crimes and simple misdemeanors as a result of the illegal activity. Additionally, it is worth noting that the law considers as measures of protection, in its articles 33 et seq, that the intelligence agencies are subject to certain measures of internal control (on the part of the Director or Boss of each agency that are a part of the system) and external (in charge of the National Comptroller's Office, Courts of Justice and the House of Representatives), in the interest of safeguarding its proper operation; the complete respect to the constitutional guarantees, and under the regulatory framework currently in force.

2.2.5. Law No. 18.314. Defines terrorist behaviour and determines its penalties

The law on terrorist behavior, allows by request of the Public Ministry to the Constitutional Judge, the interception, opening and register of the telephonic and computer communications and their epistolary and telegraphic correspondence, of all those behaviors qualified as terrorist by law, whenever the incidents were committed with the purpose of producing in the population or in a part of it the justified fear of being victim to the crimes of the same kind.

2.2.6. Drug Trafficking

The Law No. 20.000, Penalizes the Illegal Traffic of Narcotic Drugs and Psychotropic Substances, establishing among the means of restriction and other technical means of investigation, the seizure or confiscation of correspondence, obtainment of copies of communications or transmissions, interception of telephonic communications and use of other technical means of investigation, sufficing for it the record of circumstances in order to individualize and define the subject, without the need to indicate in detail the name and the address of the person affected by the measure.

Among the particularities of the investigation it is found that this can be secret to the participants whenever the Public Ministry mandates it, for a period of no longer than 120 days subsequently renewable for periods of time of no longer than 60 days; not applying the possibility of legal control prior to the formalization established in the Code of Criminal Proceedings, through which any person considering themselves affected by a non-legally formalized investigation, will be able to ask the Judge to order to the district attorney to inform about the incidents objective of the investigation or set a due date for it.

Finally, it establishes penalizations for who informs, discloses or spreads information related to an investigation protected by confidentiality, or the fact of one being carried out, incurring in the sentence of minor imprisonment at its medium to maximum degree.²³

2.2.7. Free Competition

The Law Decree 2011, that sets rules for the defense of the Free Competition, gives the power to the Comptroller to authorize the police to enter public or private premises and, if necessary, to break into; to register and confiscate every kind of objects and documents; to authorize the interception of every kind of communications; and to order to any company that provides communication services, to provide copies and registers of the communications transmitted or received by it in serious and qualified cases. This is admissible only in the context of confirming the express or tacit agreements between competitors or the practices jointly agreed on, that give them market power and consist on setting selling and buying prices or any other commercialization conditions, limiting the production, assign zones or market shares, exclude competitors or affect the result of request for bids, that are object of the competence of the National Economic Prosecutor's Office.

2.2.8. Labor Code

The Labor Code establishes the procedure of labor protection, for the resolution of questions raised in the employment relationship due to the implementation of working conditions that may affect the fundamental rights of the employees, among which the numerals 4 and 5 of the Political Constitution of the Republic are considered. Understood as damage to said rights are those cases during which, the exercise that the law recognizes acknowledges to the employer, limits the full exercise of those without significant justification in an arbitrarily and disproportionate manner, or without respect to its content.

Indeed, "the 5th article of the Labor Code decrees that the exercise of the employer's faculties within the company has as a limit the respect for the fundamental rights of the workers, especially in the right to the intimacy, the private life and the honor."²⁴

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23 541 days to 5 years of imprisonment.

24 The protection of the fundamental rights of workers in the new labor protective procedure. Juan Carlos Ferrada Bórquez * Rodolfo Walter Díaz. At: http://www.scielo.cl/scielo.php?pid=S0718-09502011000200004&script=s-ci_arttext

For that purpose, the articles 485 et seq. of the Labor Code regulate the procedure applicable in this case, that refers to the general application procedure, with the modifications and specifications noted in the aforementioned regulations. With all this, it is feasible for a prosecution criminal in nature to initiate, before the competent court, derivative of a procedure of labor protection.

2.2.9. Draft Laws

Currently, the draft laws presented with the objective of reforming the existing legislation, or directly, to create a new one, are scarce. In this sense, there are no sufficient interests to reform or to question the legality of the Public Ministry's responsibilities or to address issues concerning e-mails, or crimes against privacy considered in the Penal Code, or regarding judicial authorization. Notwithstanding the foregoing, there are intuitions on the part of the members of the parliament in order to reform some aspects of the existing law. In those cases we find the following:

In terms of telephonic interception, the year 2010, the Senator Navarro presented a draft law on the subject²⁵ concerning the following points: the invasion of privacy for those talking over a tapped telephone that requires a consideration over the legality of these measures; the private communication as means of personal expression within which aspects of intimacy are exhibited; the necessity of harmony between the right to privacy and the purposes of the justice, which are presently far above the first; the extent of the power of the Public Ministry that allows the tapping of the communications even outside the law and without mediation from the corresponding organization; the selection and transcription of communications as a worrying element in attention to the characteristics of the evidence shown. Finally, the necessity to restrict the application of this method is contemplated through the reform of the Code of Criminal Proceedings.

On the personal precautionary measures different to the preventive detention, the utilization of a telematics system or supervision via technological means is proposed for qualified cases and with the objective of supervising the technological means,²⁶ consisting on the positioning on the accused of a device that

25 Draft Law. On the telephonic interception in criminal procedure. Legislature 358. Date of entry: Tuesday, December 14th, 2010, number of newsletter: 7354-07.

26 Draft Law. Modifies the Code of Criminal Proceedings, with the object to add within the precautionary measures the establishment of telematics monitoring. Legislature 360. Date of entry: Thursday, January 10th, 2013. Number of newsletter No. 8781-07.

allows to demarcate his geographical position at every time, with basis in the lack of effectiveness and deficiency in the compliance of the measures.

Another proposal that is filed established a system of surveillance and electronic control of persons. This initiative is broader than the one considered for the efficacy of the precautionary measures, since it considers a device that allows to know the location on a permanent basis with the purpose of securing the person during the processing of its trial. The previous, despite the existence of the presumption of innocence, relevantly noting that it does not correct behaviors but it monitors and controls the movements of a person, issuing a warning if its routine is altered or enters a prohibited area, not because it implies that the person has or will necessarily commit a crime, but because it increases the risk that he could.

3. Intrusive measures of investigation in the criminal proceedings

In the following section we will delve into those measures considered in the criminal proceedings that have direct effects over the private life, affecting it. Although those are legitimate, given that it is the proper regulation that which authorizes them under certain circumstances and fulfilling the noted requirements, it isn't less interesting the establishment at a legal level of the measures opposing the constitutional regulations.

In this sense, we find express acceptance of intrusive measures based in well-founded suspicions even before the commission of a crime; the notification of the proceedings as long as it does not oppose the purposes of the investigation; the withholding of correspondence; the investigation based on circumstantial evidence; among other methods used by the law, openly undermining of the constitutional rights, but allowed due to the existence of the figure of the Constitutional Judge and the specific legal establishing.

3.1. Interception of private communications

As it was previously stated, the fundamental guarantee of the article 19 No. 5 of the Political Constitution of the Republic establishes the inviolability of the home and every private communication, specifically noting that the private communications can only be intercepted, open or registered in the cases and manners stated by law. Concerning the Public Ministry, the article 83 subparagraph third of the same Constitution, points out that those acts that deprive the accused or a third party of the exercise of the rights that the Constitution guarantees, or restrict or disrupt him, require previous judicial authorization.

On its part, the Code of Criminal Proceedings contains various regulations in terms of interception of communications:

- a. Regulations that allow the interception. In the articles 222 et seq. establishes the cases and ways in which the communications can be intercepted, open or registered, exceptionally and in compliance to the reserve of law established in the numeral 5 of the article 19 of the Constitution.
- b. Cases where the interception is applicable. The following requirements must be complied in order to intercept a telephonic communication:
 - If there were founded suspicion, based on specific incidents, of the relation of a person with the crime deserving of sentence of crime; has committed the crime, has participated in the preparation or commission of the crime; has prepared the commission or participation of the crime. In this subparagraph the preparatory acts are not included,

those which are exceptionally punishable,²⁷ in accordance with the provisions of the 8th article of the Penal Code.

- If the investigation were to make it indispensable. In this case, the Constitutional Judge, by request of the Public Ministry, will be able to order the interception and tapping of telephonic communications or any other means of telecommunication, said order will only affect: the accused; any person with respect to whom there exist founded suspicion regarding specific incidents for which they serve as intermediaries of said communications; providing their means of communication to the accused or its intermediaries.
- c. Requirements that the order of interception and recording must contain. The order from the Constitutional Judge, requested by the Public Ministry, shall indicate in detail: name and address of the person affected by this measure; manner of interception of the communication; term that cannot exceed sixty days. The term is extendable for periods of equal duration, for which the judge must examine each time the concurrence of the requirements for the interception. Once the time period established has expired or the suspicions have disappeared, the measure will be immediately interrupted.
- d. Communications that cannot be intercepted. The communications between the accused and his lawyer cannot be intercepted, unless the Constitutional Judge were to order the opposite on the grounds of well-founded considerations that the lawyer could have criminal responsibility in the acts under investigation.
- e. Role of the telecommunications companies. The telecommunications companies shall carry out the measures ordered by the Constitutional Judge, providing the people in charge the abilities for the opportune observance of these, without refusals or obstructions, which will be constitutive of contempt,²⁸ and, to keep secret on the same, unless when cited as a witness. As a precautionary measure, said companies must keep an updated list of their authorized status of IP addresses and a register, of no less than a year, of the IP numbers from the connections carried out by their subscribers.

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27 Horvitz, María Inés; López M., Julián. 2007. Derecho Procesal Penal Chile, Tomo I. Santiago, Chile. Editorial Jurídica de Chile. Pp. 638 pages. Pages 528.

28 The article 240 of the Code of Civil Procedure notes in relation to the contempt that once the resolution is fulfilled, the court will have the faculty to decree the measures tending towards leaving without effect everything made in violation to the executed. He who breaks the ordered to comply will be punished to minor imprisonment at its medium to maximum degree.

- f. Register of the interception and destruction of the copies. The telephonic interception will be registered by means of a tape-recording or other similar analogue technical resources that guarantees the fidelity of the recording, and kept under seal and custody and the conservation of the originals by the Public Ministry, to whom it will be directly handed. The Public Ministry will be able to mandate the written transcription of the recording by a public servant, which will act as certifying officer for the purposes of its accuracy.
- g. The inclusion to the oral trial of the results will be carried out in a manner decided by the court at the corresponding procedural occasion, reserving for itself the power of summoning the persons in charge of carrying out the proceedings as witnesses. The irrelevant communications, will be given to those affected by the measure and every transcription or copy will be destroyed by the Public Ministry, unless they contain relevant information for other procedures on crimes that deserve punishment.
- h. Notification to the person affected. The intrusive measure will be notified to the person affected after its realization, if permitted by the investigation, and if were not to put the life or physical integrity of a third party at risk. Otherwise, the provisions of the article 182 of the Code of Criminal Procedure shall apply, these regulate the confidentiality of the acts of investigation.
- i. Prohibition to use the measure's outcome. The outcome of the telephonic interception will not be allowed to be used, in case it took place outside the circumstances envisaged by the law or when failing to comply the requirements of the article 222 et seq., on the Interception of Telephonic Communications, that was previously referenced.
- j. Other technical resources of investigation. In the cases during which the procedure had as objective of investigation a crime with penalty, the Constitutional Judge at request from the Public Ministry, will be able to order other technical resources of investigation regulated by the articles 222 et seq., consisting of photography, filming, and other means of reproduction of images conducive towards the elucidation of the incidents.
- k. Other laws that consider the interception of communications are: the Penal Code; the law on the system of intelligence of the State; the law that defines terrorist behavior and determines its penalties; the Law No. 20.000 on drug trafficking; and, the Law Decree that sets regulations for the defense of free competition.

3.2. Entry and search

The articles 204 et seq. from the Code of Criminal Proceedings, determine the procedure of entry and search in public, closed, special, those benefiting from diplomatic inviolability, and consular places.

- a. Places of free access to the public. The search for the accused against whom the order of detention was dispatched, or of foot-prints or traces from the act investigated or means that could be used as confirmation of the same, may be carried out by Carabineros de Chile and Policía de Investigaciones.
- b. Enclosed areas: It must be distinguished the case of acceptance of entry for the realization of proceedings of investigation of the case of rejection.
 - The owner or person in charge accepts. The building or enclosed area can be entered and registered with the express consent of the owner or person in charge relating the practice of the proceeding whenever it were presumed that the accused or any means of verification were found in the place. The officer must identify himself and make sure the proceeding is carried out causing the least amount of damage and inconveniences to the occupants, and to proceed the submission of a certificate attesting the act of register, the identification of the officers and of whom ordered it.
 - The owner or person in charge refuses. If there is no express consent from the owner or person in charge, the police will adopt measures tending towards avoiding the escape of the accused and the prosecutor will request to the judge the authorization to carry out the procedure. The entry and register will be carried out without consent, nor authorization or previous order, whenever the calls for help from the persons inside or any other evident signs were to indicate that within the premises a felony is been committed. It must be immediately communicated to the prosecutor of the procedure and prepare and file the corresponding report within the following 12 hours with copy to the owner or person in charge.
- c. Special enclosed places. The special places considered by law are: the religious sites and buildings within which there is a public authority or military premises. In order to go into them, the following formalities shall be carried out: the prosecutor must notify in writing with at least 48 hours of anticipation a communication to the authority in charge of the place; the communication will contain clues as to what would be the objective of registration, unless there were reason to believe that the notice could somehow frustrate the proceeding; it shall be indicated to the persons

that will accompany him during the registration; and; the invitation to the authority or person in charge of the place to witness the act or to designate a person to attend. There must also be made express mention in case of requiring examination of documents or of places in which the information and documents secret in nature are found, awareness of which could affect the national security, and the authority in charge of the place will be responsible to inform the Minister of State, who, in the case of deeming it appropriate, will notify the prosecutor stating his opposition.

- d. If the entity has constitutional autonomy, said communication must be sent to the corresponding superior authority; if the prosecutor were to consider the realization of the act indispensable, he will send the background information to the regional prosecutor, who, if sharing the appreciation, will in turn request to the Supreme Court to resolve the controversy. As long as the decision is still pending, the prosecutor decree seal and protection to the place target of the proceedings.

In the case of places that enjoy diplomatic inviolability, the chief of the corresponding diplomatic mission must be notified through the Ministry of External Affairs for a period of 24 hours, requesting in case of silence or refusal, the management of solutions and the adoption of measures of surveillance. If it is about urgent and serious cases, it will be allowed to request it directly to the chief of the diplomatic mission of the State.

3.3. Physical and medical examinations

Regarding this matter the following is worth noting:

- a. Physical examinations. The realization of physical examinations to the accused or the victim of the crime is appropriate to confirm circumstances of relevance to the investigation, as long as it were not of any damage to the health or dignity of the petitioner. Such examinations are not exhaustively detailed in the law, but it is noted that they can consist of biological tests, blood draws or analogous. The person subject to the test, may or may not consent to its realization. In the first case, the prosecutor or the police will order their practice without further formalities; in the case refusal, the corresponding judicial authorization will be requested, explaining to the judge the reasons for the refusal, being the Constitutional Judge who will authorize the practice of the proceedings prior compliance of the corresponding guarantees.
- b. Medical examinations and tests. In relation to the examinations

and tests related to the crimes of rape, statutory rape, incest and other sex crimes considered in the articles 361 to 367, and 375 of the Penal Code, the healthcare centers must perform checkups, examinations and conducive tests in order to confirm the crime and the identification of the participants in its commission.

- c. Medical examinations and autopsies. In order to determine a crime, the prosecutor will be able to order them to be carried out by the Legal Medical System (LMS) or any other medical service.
- d. Examinations and DNA tests. Examinations and DNA tests will be able to be conducted by technical professionals working in the LMS or in establishments accredited for that effect by said service.
- e. Bodily injuries. The persons in charge of a public or private health-care center, are obligated to report to the prosecutor of the registration of any individual with significant bodily injuries indicating the state of the patient, the exposure of the persons on the origin of the injuries and the place and state in which it was found. The incompleteness of this obligation is considered a penalty, subject to a fine. Thus, the examination is constituted as a step prior to the criminal investigation as such.

3.4. Exhumation

Whenever, at the discretion of the prosecutor, the exhumation of the body is considered is useful to the investigation because it provides relevant information for it, a judicial authorization can be requested, whichever decision the court deems convenient, prior citation to the spouse or the relatives closer to the deceased.

3.5. Handwritten analysis (graphology)

With the purpose of carrying out calligraphic tests necessary for the investigation, the Prosecutor will be able to request to the accused to write in its presence words or sentences. In case of refusal, the constitutional judge will be able to deliver the corresponding authorization. This method of examination is revealed as possible affectation to the private life of the person examined, given that the calligraphy is able to identify a person with a high degree of certainty, in addition of revealing its connection with other documentation or written correspondence.

3.6. Confiscation of objects and documents

The confiscation of objects and documents prior to a judicial order is appropriate over those related to the incident being investigated and could be objective of punishment of seizure and those that could be useful as means of evidence,

whenever they are not voluntarily handed or when the communication puts at risk the success of the investigation.

3.7. Seizure and confiscation of correspondence

Procedure

The judge will be able to authorize at the prosecutor's request and by resolution founded in the utility of the investigation, the confiscation of "postal, telegraphic or any other kind" of correspondence and the shipments directed to the accused or sent by him using his real name, his assumed name and those that due to the circumstances were presumed to emanate from him or could be the consignee of. The copies or backups of the electronic correspondence directed to the accused or emanated from him could be object to same examination. The correspondence or the shipments that do not have relation with the investigated incident will be returned to the consignee, to some member of the family, to its legal representative or communication services, depending on the case.

Role of the telecommunication companies

The Constitutional Judge at the request of the prosecutor, will be able to authorize the providing on the part of the companies of communications transmitted or received by them. In this sense, the Decree 142 from 2005, regulates the interception and recording of communications and other means of telecommunications by the providers of the services.

In agreement to the procedure established in the regulations, the window of action of said companies is referred to the notice issued by the court aware of the case. The company will have to have the necessary technical means for the realization of the proceedings. In terms of privacy, it is noted that "the required providers will have to look after the execution of the interventions in order to protect the privacy and security of the communications that were not authorized to be intercepted or recorded, having to avoid any type of interference on them. In addition, they must adopt the necessary measures so that there are no alterations to the service, that could alert the persons whose communications have been ordered to intercept and record; and, to count with an updated list of their authorized range of IP addresses and a register, of no less than six months, of the IP numbers of the connections carried out by their subscribers. Additionally, they must provide the necessary assistance to carry out the interventions ordered, subject to the respect of the prescribed in the 2nd article of the present guidelines".

Objects and documents excluded from the confiscation

The confiscation or submission cannot be decreed over the communications between the accused and the persons that could abstain to testify as witnesses established in law and their notes on communications confided by the accused or over any other circumstance to which the faculty of refraining from testifying is issued; and, of other objects and documents, even the results of the examinations and diagnoses related to the health of the accused, to which it were naturally issued the faculty to refrain from testifying.

Control of legality of the judge

The objects and documents confiscated will be at the judge's disposition, without any prior examination from the prosecutor or the police. The prosecutor will be the one in charge of deciding the legality of the measure, ordering its immediate return if they are excluded during the confiscation.

Inventory and custody

On any procedure of this nature an inventory will be made according to the general rules. The person in charge will submit a detailed account of the confiscated objects and documents, which will be sealed and put under the custody of the Public Ministry.

3.8. Identity check

The article 85 of the Code of Criminal Proceedings decrees that the police officers will, without previous judicial order, be able to request the identification of the persons in the cases in which there exist sufficient indication that they committed or tried to commit a crime, simple misdemeanor or offence; were to commit it; or could provide useful information; or if he or she attempts to hide their identity by means of a hood or something on their mouths.

3.9. E-mail and its use during trial

There isn't in the Chilean legislation a concept of the electronic mail that allows to analyze the elements and suffices as supporting documentation during trial. Without prejudice to this, there are regulations to establish an analogous judgment and inclusion as means of evidence, which characteristics are relevantly manifested in the next three points:

- a. Law No. 19.799, on electronic document, electronic signature and services of certification of said signature. The article 2 letter a)

defines “electronic” as the characteristic of the technology with electrical, digital, magnetic, wireless, optical, electromagnetic or other similar abilities.

- b. The law No. 19.799, also establishes the “equivalence of formats”, which means that the documents that have been signed by means of an electronic signature are equivalent to those in paper format.
- c. The Code of Criminal Proceedings establishes on the means of evidence not expressly regulated that cinematographic movies, photos, recordings, videotaping and other systems of reproduction of the image and the sound, shorthand versions, and, in general, any means suitable as certification, will be admitted as evidence.

In Chile, the use of the e-mail as evidence during a trial, is closely linked to the due process and the illegal evidence, due to its particular characteristics and the way it is obtained.²⁹ Thus, the protection of the electronic mail has been dealt with in different areas. The Council for the Transparency³⁰ has considered that the article 19 number 5 of the Constitution gives protection to the electronic mails. In terms of labor, where the jurisprudence and the doctrine have been more abundant and emphatic, it has been determined that “the inviolability equally regulates every way of private communication, that is to say, the transmission of written signals, visual or audiovisual, made by means of a common code to the sender and the receiver and destined only to their knowledge and not to the public or third parties much more restricted”.³¹

On the recurring conflict, that confronts the faculties of the employer and the

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29 Regarding this matter, we found an interesting sentence in a labor protective procedure referred to the evidence obtained in an illicit manner by means of the intromission to the electronic mail of the worker, in the decree captioned as “Gastch con Red Capacita S.”, RIT T-12-2009, from the 2nd Labor Court of Santiago, in which the Court decreed that the receipt for professional fees issued by the worker constituted illicit evidence, obtained through the non-authorized access to his business e-mail.

30 Council for the Transparency. Protection role C406-II from the year 2012. http://extranet.consejotransparencia.cl/web_scw/Archivos/C406-II/C406-II_decision_web.pdf

31 José Luis Cea. Derecho Constitucional Chile Tomo II. Ediciones Universidad Católica de Chile.

business e-mail, is established that the employer “can regulate the conditions, frequency and occasion for the use of the electronic mails of the company, but in no case will have access to the private electronic correspondence sent and received by the workers”.³² Additionally, the Constitutional Court³³ has resolved in relation to the Law of Access to the Public Information, that the messages sent through the institutional electronic mail are not public information, but constitute classified information protected by the articles 19 No. 4 and 5 of the Constitution, being the considerations of the court relevant.

3.10. Reiterative testimony: the re-victimization

Among the rights of the victim, characterized as the person offended by the crime, there exists the possibility to be heard if requested before the prosecutor asks or resolves the termination of the procedure; and, before pronouncing on the temporary or definitive dismissal or the judgment of acquittal. The previous, with the objective of presenting eventual objections, based in the interest to achieve sentence in certain crimes in which the testimony of the victim can be key for the elucidation of the incidents.

From these rights derived from the possibility of elucidation of the incidents and collaboration in the process, the re-victimization can be characterized as the repetition of the specific incident in which a person has become the victim, moments after it has happened. That is to say, there where a person is obligated (for the investigation) to recount the situation where he or she is the victim, the psychological effects may well be reiterated, or new ones may appear product of the exposure before third parties.

In matters of criminal procedure, two aspects are relevant: the possibility that the victim acts as witness; and, the re-victimization of the most vulnerable subjects of the process. On the first subject, it is possible to note that the quality of victim does not prevent it from acting as a witness, presenting in this case a double possibility of re-victimization. This, in certain cases the victim will have to participate as such in the description of the incidents, and will also have the duties of every citizen, including those of appearing and testifying because

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32 Labor Department. Ordinance no. 2210/035. <http://www.dt.gob.cl/legislacion/1611/w3-article-96717.html>

33 Constitutional Tribunal Court. “Ministerio Secretaría General de la Presidencia y otro c. Consejo para la Transparencia”. September 11th, 2011. <http://www.tribunal-constitucional.cl/wp/ver.php?id=2537>

of not being legally excluded,³⁴ second subject of interest, it is necessary to point out, that the law looks to reduce the negative effects that the reiterative statement of the incidents of the case for the one affected by the crime, or at least witness, produces.

In this sense, the law 19.628 created by the family courts, protects the witnesses qualified as boys, girls and teenagers, noting that they will only be interrogated by the judge, having the parts to direct their questions through him. Exceptionally, the judge will be able to authorize the direct interrogation of the boy, girl or teenager, when, due to their degree of maturity, it is considered that it will not affect them as a person.

Additionally, the UNICEF,³⁵ has established guidelines to reduce the re-victimization of the persons under the age of 18 in legal processes establishing the characteristics this must have. Which include: promptness in the criminal process and the best interest of the child; privacy in the proceedings and expert advice; interrogation with clear questions, simple structure, in a comfortable place and ensuring they do not repeat; specialized professional assistance; and, the statement of the child as first proceeding of the trial or in an effective manner, as evidence produced before trial.

In effect, it is worth noting that one of the specific guidelines from UNICEF regarding the children victim and witness to crimes, refers to the right to be treated with dignity and compassion, expressly noting “(c) The interference to the private life of the child must be limited to a minimum while at the same time keeping a high standard in the gathering of evidence to guarantee a fair and equitable result of the process of justice.”³⁶ From the transcribed, it is simple to observe the existing relation between re-victimization and the private life in the specific case of the minors involved in criminal processes, aspiring towards

34 In this regard, María Inés Horvitz in “Estatus de la víctima en el proceso penal. Comentario a dos fallos de la Corte Suprema.” Revista de Estudios de la Justicia No. 3, year 2003. http://www.derecho.uchile.cl/cej/recej/recej3/archivos/Estatus%20de%20la%20victima%20en%20el%20proceso%20penal_I3_.pdf

35 UNICEF. National Commission for the improvement of the Administration of Justice. Guidelines to reduce the re-victimization of minors in criminal procedures. Costa Rica. 2004. <http://www.poder-judicial.go.cr/ninnos/images/libros/007b.pdf>

36 UNICEF. <http://www.unicef.org/co/Ley/AI/I3.pdf>

a balance that's hard to get when in addition it is expected that the criminal prosecution pays off.

4. Jurisprudence and relevant issues

The experience in Chile has expressed scarce concern for the questioning, by means of judicial proceedings, of the problems of affectation to the private life in the context of the investigation and the criminal prosecution. Documents such as the present try to gather information that allows that, in the future, any action from the entities of investigation and prosecution that may attempt against the private life, the intimacy, or the illegal processing of personal and sensible data of the persons, gets a complaint not only from the judgment of the public interested or specialized, but a clear manifestation by the courts of justice. The situations described below allow to shed a light on the state of the practice in Chile, regarding the appreciation of the private life linked to the exercise of public authorities of investigation and prosecution of crimes.

4.1. The preventive surveillance

The sub secretary of prevention of crimes is currently promoting a plan of surveillance destined to the 100 criminals most likely to fall back into crime in Chile.³⁷ The initiative consist in the identification of the persons with the biggest percentage of relapse, for the subsequent monitoring carried out by the specialized police staff. The main objective consisting of the prevention of the reiteration of crimes,³⁸ understanding that the preventive labor includes the whole series of events of the crime: the measures for the anticipation of a crime and the creation of tools and technologies to improve the work of prosecution. In addition to the existence of complementary systems already implemented in the country, such as, the Tactical System of Analysis of a Crime,³⁹ as the premise

37 El Mercurio. "Grupo policial especial vigilará a los 100 delincuentes que más reinciden en Santiago". Monday, 29th of July, 2013. <http://diario.elmercurio.com/detalle/index.asp?id=%7B6fd8f5c9-fdf0-4965-alc7-7176905c57b5%7D>

38 In this regard, the Fundación Paz Ciudadana framed in the VIII National Congress of Investigation on Violence and Delinquency noted that the 65% of the reoffenders are because of the same crimes. <http://www.pazciudadana.cl/wp-content/uploads/2013/08/Jorge-Fabrega.pdf>; the same information is found in the publication "La reincidencia en el Sistema penitenciario chileno", available at: http://www.pazciudadana.cl/wp-content/uploads/2013/07/2013-03-21_reincidencia-en-el-sistema-penitenciario-chileno.pdf

39 The Tactical System of Analysis of Crime consistst in the focused work of the po-

of this new system. This without prejudice to the role of the Public Ministry and the assistance provided to the administration of justice by the police.

The criticism to this plan of surveillance has aroused due to the misunderstanding of roles between the police and unlawfully hold the criminal prosecution, that is to say, the Public Ministry, since it is understood that the role of the police is limited to the prevention of the crime, not to the creation of procedures to proceed to the detention in flagrante delicto. Additionally, it is considered that the faculties of the Sub-secretary of the crime established in law⁴⁰ are limited to the immediate collaboration from the Home Secretary “in all those matters relating the elaboration, coordination, execution and evaluation of public policies destined to prevent crime, and to rehabilitate and socially reintegrate the offenders of law...”

Beyond the questionings within the field of competence of the public organizations and institutions, it is remarkable to establish, publicly, a system to select certain persons with the purpose of making them the target of surveillance, in the eventuality of the commission of a new crime. It constitutes a way of exercise of the public legal authority at odds with the sole idea of the due process, of the presumption of innocence, of the honor, and of course, of the freedom of movement. Even at a public space, it is ostensibly threatening against the free to grow and develop one’s own personality, including the aspects belonging to the private life, being under surveillance, with no founded judicial order to allow and justify it.

4.2. Criminal database

In Chile, it is set at the end of the year 2012, the creation of a Unified Database through a framework agreement of collaboration, which would be fully implemented by the end of the following year through an integrated platform of electronic services of the State developed by the Ministry of Economy, and in correspondence with the regulations of the Law No. 19.628 on personal data. The purpose of this platform is to follow-up the pending orders of apprehen-

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lice shared in meetings for the analysis of the most critical aspects in crime rate matters, with the objective of knowing the day and time of the occurrence of the crimes, the gangs behind the crime system and the profile of the criminals.

40 Article 12, Law No. 20.502, Creates the Home Office of Public Security and the National Service for the prevention and rehabilitation from the consumption of rigs and alcohol.

sion, the compliance of the precautionary measures, and the analysis of the procedures, among others.

The information contained in the databases relates: the description of the crime or crimes; the characterization of the people involved; information of the criminal prosecution (the formalization, results of the investigation, precautionary and protection measures), stages of court cases in which the persons involved in the incident are at; types and the duration of the sentences applied to the accused found guilty; duration and the effective compliance to the sentences originally imposed; pending orders of arrest, conditions of current conditional suspension and subject to alternative measures of reclusion.

One of the problems with this initiative consists in the fact that this system could turn into a tool for purely political organizations, such as the Ministry of Foreign Affairs, to have easy access to information that it does not need in order to accomplish its objectives in public politics. Apart from that, its treatments as database of personal information it's still subject to the weak Chilean legislation in this sense, and the temptation will linger to attack political enemies or social actions by using the content of this database, affecting other rights in the process.

4.3. The case of the “Doctora Cordero”

In the case of “María Luisa Cordero Velásquez con Jaime Lara Montecinos y otros”,⁴¹ a group of journalists was punished since, with the purpose of an investigation, they recorded and disclosed on television conversations from the plaintiff in her capacity as a doctor, with the objective of accusing the claimant for writing false prescriptions.⁴² The twenty-second Criminal Court, on its application of the article 161-A of the Penal Code, condemned the authors to a sentence of sixty-one days of minor imprisonment at its minimum grade, a fine of 50 monthly tax units, suspension of position or public office during the time of their sentences plus the payment of the costs from the trials, without prejudice to the benefit of conditional remission of the sentence and the criminal reclusion. In addition, it was condemned in civil matters the solidary payment of \$5.000.000 pesos for the moral damage. The Court of Appeals, confirmed the sentence.

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41 Supreme Court. “María Luisa Cordero Velásquez con Jaime Lara Montecinos y otros”. Role: 8393-2012.

42 22nd Criminal Court of Santiago. “Cordero con Lara y otros”. Role 3913-2003.

The Supreme Court, protected the judicial review at the end, sentencing the replacement thus absolving the accused and rejecting the civil act, arguing the following: the private character disappears when it comes to behaviors of public interest, such as the ethical transgression present in the writing of false prescriptions, it is merit enough to be socialized attending the irregularities in the medical praxis; respecting the person whose incidents of a private character have been revealed, the indiscretion nor the recording can be penalized, excepting the cases of professional secret; and, the situation of not observing fraudulent behaviors to obtain the information, being the title holder of the right who allowed the ingress to her office, with which she “drew back the veil of protection”.

4.4. The “Caso Bombas”

The high-profile “Caso Bombas”, considers in sentence the 13th of July, 2013, reference to the illicit evidence dismissed by the court.

E-mails between the accused are dismissed, because they were not obtained in accordance to the procedure of the article 218 of the Code of Criminal Proceedings referred to the seizure and confiscation of correspondence, that is, previous request from the prosecutor in charge and with the corresponding judicial authorization based on evidence or to appeal to the procedure established in the article 32 of the Law No. 19.974, that is, the use of informers or persons that without being civil servants of an intelligence organization, provide information to execute process of intelligence. None of these conditions are met, such as the resulting evidence, consisting of bank reports, to which it was arrived through the information contained in the e-mails obtained without adherence to the guidelines.

4.5. Identity check and detention, and private life

The case “González García con Ministerio Público”,⁴³ an action for annulment was appealed against the sentence of the Criminal Oral Trial Court of Valparaíso that sentenced Treasury to pay 6 monthly tax units,⁴⁴ arguing that there was a violation to the due process, the freedom and the private life of a person.

The case consisted in the police, by proceeding to carry out the identity check
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43 Supreme Court. “González García Aarón David con Ministerio Público”. Role: 1056-2013.

44 The fine here indicated is equal to \$252.312 Chilean pesos, or USD\$ 450 American dollars.

of the person affected, subsequently arresting him, without complying to the hypothesis of precedence from the article 85, at the consideration of the appellant. According to the action of annulment, “the subject did not escape from the police presence and did not hide the bags, because the officers admit that they were in their sight, and approached them the second time they spoke, identifying himself right away by showing his I.D, resulting in an identity check that lacked the typical objectivity that the procedural law demands to validate the police actions”. The Supreme Court estimated that the police intervention did adhere to the legal parameters in the particular case and adding that the faculties of the police are such that do not allow the annulment of the trial because of the argued causals.

4.6. Public servants e-mails

The case “Ministerio Secretaria General de la Presidencia y otro c. Consejo para la transparencia”⁴⁵ represented a questioning before the Constitutional Court of the quality of the private communications of the electronic mails circulating between the public servants and the referred ministry, before the decision of the Council for the Transparency that ordered to submit the content of the institutional electronic mails between the Under Secretary and the Provincial Governor of Melipilla. The requirement of non-applicability for its unconstitutional nature according to the second subparagraph of the 5th article of the Law of Transparency of the Civil Service and Access to the State’s Administration Information⁴⁶ by the ministry, establishes as important points the necessity to carry

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45 Constitutional Court. “Ministerio Secretaria General de la Presidencia y otro c. Consejo para la Transparencia”. September 11th, 2011. <http://www.tribunalconstitucional.cl/wp/ver.php?id=2537>

46 Article 5, Law No. 20.285. “In virtue of the principle of transparency of the public service, the actions and resolutions of the organizations of the Administration of the State, its fundamentals, the documents that serve as support or direction and essential complement, and the proceedings used for its promulgation, are public, apart from the exceptions that this law establishes and the ones expected in others law of qualified quorum. Additionally, it is public the information elaborated with public budget and all the other information that works by the organizations of Administration, whatever form, support, date of creation, origin, classification or processing, unless it is subject to the noted exceptions”.

out a hermeneutical process in order to interpret the inclusion of the e-mails as a way of private communication, according to the constitutional rules that did not expressly consider them.

Thus, it will be considered that the Constitution gathers the inviolability of the conventional communications and the inviolability of the electronic communications. The Constitution refers to the communications extensively as “every way of private communication”, surpassing the restrictive concepts that processed the privacy of the “documents” or simply, the “correspondence”; identifying the private communications as those in which the addresser decided the addresses, situation that interferes the purpose of it being received only by them; it is excluded from the elements to determine the inviolability of the content of the communication, since the message is entirely protected, whether dealing with public or private aspects, important or trivial, that do or do not affect the private life.

Regarding the electronic mails it notes that these were framed within the constitutional expression “private communications and documents”, since they constitute communications transmitted through closed channels and have limited recipients, which constitutes a reasonable expectation that the interference and the knowledge of third-parties, protected by the sole fact of contemplating a closed technical mechanism, without the existence of reasons to leave them aside of the guarantee. Finally, the e-mail must be considered from two perspectives: the transmission and the reception, being these uncontrollable for the addressee (in this case, a public servant), without having obligations related to the receipt.

4.7. The “FreeRod” case

In this case, the lawyer Rodrigo Ferrari, was formalized under the charges of “Usurpation of name”, as the supposed author of three Twitter accounts related to the entrepreneur Andrónico Luksic.

The Public Ministry had taken more than two years to get to formulate said accusations which required the “discreet surveillance” carried out by the Police of Investigations to Ferrari, which involved data retention and wrongful access to the information.

Although the accused recognized the authorship of only one of the mentioned accounts -@losluksic-, maintained that it had an evidently parodic nature. As Mister Luksic manifested that the comments made in Twitter ridiculed him, transforming it in a case that dealt with the right to the freedom of expression. Finally the accused was permanently dismissed from the charges by the Seventh Criminal Court of Santiago, without the district attorney’s office being able to

demonstrate any relation between Ferrari and the other two accounts investigated -@andronicoluksic and @luksicandronico.

4.8. Privacy in the Army

The lieutenant of the Army Marisol Vargas was discharged after three officers, coworkers of the affected (Sergio Valenzuela, Sebastián Campos y Viviana Cartagena), accessed her personal computer, without her consent, and removed intimate images of her accompanied by her partner.

The victim decided to report the case, thus commencing the respective proceeding before the Second Military Court, which concluded with the sentence of the three officers of the Army for computer crimes, attending that there had been violation to the intimacy.

Conclusions

In the development of this work, we have specified the study of the problems of privacy that the fight against crime brings out in Chile, through the analysis of the existing criminal procedure system, that is, the relevant guidelines up until today, the court development, and the initiatives for the betterment of the already established system.

The historical study in criminal matters, has necessarily resulted in the development of the criminal prosecution carried out by the Public Ministry. The previous, since the validity of the Code of Criminal Proceedings starting in the year 2000, expounding in normative matters, the existence of a dispersed legislation, which diminishes the possibilities of coherence and juridical systematization.

On its part, in jurisprudential matters there is no relevant development that allows the correlation of crimes relating privacy with occasion of the application of procedures regulated by law. The latter could be explained by the high degree of normative specification that does not allow the neither the interpretation nor the development of a unified criterion in relation to the constitutional guarantees, favoring other legal assets over the private life. To illustrate the latter, suffices to note the possibility of intercepting the telephonic communications even before the commission of a crime, in those case in which there were “well-founded suspicions”, understanding this expression as an standard extremely under protection and open to the discretionary nature of the Prosecutor who will have to order a notification after the conclusion of the application of the measure, if it were not to affect the investigation. Likewise, the jurisprudence has not been able to characterize as illicit the performance of the prosecution organizations, by finding legal protection in law. Thus, it is difficult to describe as illicit the work of the police as an organization that assists the Public Ministry, which prevents the issue of judicial pronouncements in this regard, limiting it to a simple normative remission.

In general terms, it is possible to note the effectiveness of the existence of a system of constitutional guarantees and legal principles tending towards the development of criminal procedures, with respect to the due process, and whose most relevant feature in what concerns to this investigation, is the exclusion of the illicit evidence. As a contradiction to this, the legal normative establishes a high degree of specification, to the point of being meticulous with the development of procedures to each measure, even appealing to the regulations of certain subjects that require to be treated with even further detail, as it occurs in matters such as the telephonic interception.

One of the most important aspects is the establishment at a legal level of aspects opposed to the constitutional regulation. In this sense, we find express

acceptance of intrusive measures based on well-founded suspicions even before the commission of a crime; the notification of the proceedings as long as it does not oppose to the purposes of the investigation; the confiscation of correspondence; the investigation based on circumstantial evidence; among other methods used by law, openly opposed to the constitutional guarantees, but allowed by the figure of the Guarantee Judge and the specific procedural establishment.

Finally, it is precise to understand that the national contingency and the few years since that have passed since the reform, allow the wide debate on some controversial subjects. Thus, a development exists at the level of press on the origin of new institutions, such as the preventive surveillance and the creation of databases of criminals, passing the debate to real initiatives and developing to be implemented promptly, as is the case of the latest case mentioned, whose efficacy and legality shall be analyzed.

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