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# Cancel culture and due process of law
# The use of social media against constitutional rights

## “Cancel culture” und das Recht auf ein faires Verfahren: Der Einsatz sozialer Medien gegen die Grundrechte

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**Abstract:** The paper aims to analyse the practice of judicialisation of cancel culture in Chile. Particularly, it tackles the recent boost of constitutional litigation regarding fundamental rights – honour and privacy – allegedly affected by online publications in cases related to sexual offenders. In so doing, it explores and enquires about the possible affectation of the due process of law and the consequences of massive social network denunciationsand its impact in court litigation.

**Zusammenfassung:** Der Artikel analysiert die Praxis der Verrechtlichung der Cancel Culture in Chile. Insbesondere befasst er sich mit dem jüngsten Anstieg der verfassungsrechtlichen Streitigkeiten über Grundrechte – Ehre und Privatsphäre – die angeblich durch Online-Veröffentlichungen in Fällen von Sexualstraftätern beeinträchtigt wurden. Dabei untersucht und hinterfragt der Artikel die mögliche Beeinträchtigung des rechtlichen Gehörs und die Folgen massiver sozialer Netzwerkdenunziationen und deren Auswirkungen auf Gerichtsverfahren.

**Keywords:** Cancel culture, human rights, constitutional litigation

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## Cancel Culture: general background

In a global social context and, particularly, a hyperconnected and instantaneous culture associated with social media and universal mobile internet devices (Castells & Cardoso 2005: 11), the phenomenon of cancellation, which is conceptually said to be a sort of social exclusion of determined people from public life by a planned boycott, based on a "certain series of their biographies or certain unacceptable behaviour" (Vukčević 2022: 72)[1] has arisen, or to a certain extent, has gained visibility and become a mass movement on the internet. Substantially, cancel culture cannot be categorised as new, for it is an ancient practice of any society towards what it considers to be incorrect or inappropriate in a certain moment of social evolution. As noted by Norris (2020: 2), cancellation "is defined broadly as an attempt to ostracise someone for violating social norms"[2]. However, the widespread and mass use of it can only be linked to smartphones and social networks, and with the fact that the democratisation of the internet provides an immediate connection and instantaneous redistribution of the content (Clark & Meredith 2020: 90).

Accordingly, these platforms and social interaction means have allowed to raise attention to and draw awareness of, multiple vindications of social significance (Vukčević 2022), especially to minorities and justice-related causes, such as discrimination and phobia towards the LGBTI+ community, racial issues, gender and sexual violence and social injustice (Sailofsky 2022: 736).

However, some scholars have stated that cancel culture is nothing new, and that it encompasses several historical practices of relatively modern societies towards what is considered beyond the boundaries of what is acceptable at the time (Adorno & Horkheimer 1985). Moreover, it could be said that cancelling certain persons, events, or social movements has been used since the very beginning of time as a manner of shaping history, using it to impose a version of past events by those in power positions.[3]

Even more, cancellation has been an attitude against new and even revolutionary ideas in science, art, technology, and culture, where those entitled to judge feel somehow questioned (Galileo could provide a life–or–death example). A remarka-

**1** These practices can lead to "doxing" (public provision of personal information via internet), a more intense way of cybernetic harassment (MacAllister 2017; Ng 2022).

**2** Some authors have stated that cancel culture is a reversal of "who has the power to hold others accountable for their acts" (Clark 2020: 90), a subversion of those that throughout history have been marginalised and silenced, therefore cancelled (Sailofsky 2022).

**3** See, for example, what Panaro (2020) suggests: "our history textbooks and school curriculum are disproportionately filled with accomplishments of white men. They ignore, significantly minimise, or even distort the presence of just about everyone else, often for the benefit of the reputation of those in power".

ble quote can be attributed to Max Planck (1950: 33) when he said, "a new scientific truth does not triumph by convincing its opponents and making them see the light, but rather because its opponents eventually die, and a new generation grows up that is familiar with it".

From another perspective, cancellation can be related to the appearance of massive reproductive technical devices, whereby an event can be recorded and distributed, as it happened since the beginning of the past century with music and film. Thus, culture could emancipate from the elite spaces commonly designed for them, such as museums or concert chambers – usually reserved for those in economic or social advantage positions – and be distributed and participated by the masses (Pastoriza 2018). In the same way, the current access to all the information imaginable on the internet and the disposal of a high-resolution camera on our hands through our cell phones enables people to record events and situations and to denounce them and spread them instantaneously on social media, empowering them as creators of content and trends, as it happens with viral videos and publications.

The origin of cancel culture and the mere act of cancellation is usually traced back to the U.S "Black Twitter" movement in the past decades, whereby Twitter became a space for complaints, accusations, and denunciation of the Afro-American collectivism alerting about the violence and discrimination suffered by their communities (Roos 2020: 3),[4] in an effort to bring together people from around the country, sharing their experiences and seeking for redress for what Alperstein (2019) names as "virtual collective consciousness".

As a consequence, it has proposed that the cancellation of an individual or a company/business is a manner of protest by the members of a certain community on social media that occurs when – according to them – the subjects of cancellation have developed an activity, said or done something, commented a particular situation or committed an act that is considered to be opposed or contrary – whether partially or completely – with their belief system, social causes or against the dignity of a specific person or group/community (Clark 2020: 88–90).

Similar to a boycott, the underlying idea of cancellation is to expose the individual actions considered to be inadequate, fostering a digital general rejection of him/her, aiming for a social sanction that will affect mostly the person's reputa-

**4** However, the very first blueprint of the phenomenon could be traced back to 2005, as Keller et al. (2016: 4) point out. In that case "New Yorker Thao Nguyen snapped a photo of a man masturbating while sitting across from her. After taking the photo to the police (who ignored her), Nguyen uploaded it onto the popular photo-sharing site Flickr to warn the public and shame the perpetrator". A few weeks later that publication led to the spring of the Hollaback! Movement on the web (way before Twitter and hashtags even existed).

tion – their honour – and will lead to a general discredit of his/her public image and negative economic consequences (Vukčević 2022: 70).

When the cancellation affects a company – or more specifically a certain brand – the reasons are likely to be the same, strongly related to a particular cultural agenda, and connected to what consumers and users consider social justice, such as racial and gender issues.[5] The causes being the same, the purpose could differ. According to a recent study, most of the people who have cancelled a brand within the last 12 months, have declared to have an intention for the company to change and improve its ways "either reversing its stance on an issue or committing to making improvements internally" (Novelli 2021: 134), and slightly less people stated that they were aiming for a change of the companies in political involvement. However, a quarter of the "cancellers" declared that they wanted the company to be held accountable and demanded retribution and punishment for a particular individual being part of the organisation for specific actions.

Overall, the public perceives social media as a way to interact and engage with companies, having a voice against enormous corporations that, until not so very long, were not being scrutinised (Novelli 2021).

## *Funas* and Criminal Law

The common practice of publicly exposing people for their misbehaviour can be found in Latin America's post-dictatorship context in the 80s and 90s (1983 Argentina, 1990 Chile) (Schmeisser 2019). The main idea was to uncover and denounce former military members and State personnel involved in State terrorism, torture-enforced disappearances, and crimes against humanity that had not been judged nor convicted by criminal courts upon democracy restoration (Stern 2010). Thus, the practice known as "funa" in Chile,[6] began to be displayed mostly by families and relatives of the victims and consisted of street protests, whistling, and naming former criminals in their private context, such as offices, workplaces, homes, etc.

**5** According to Novelli's (2021) complete study on brand and companies' cancellation, 70 % of the public would cancel a brand due to racial issues, 69 % for women´s rights issues, and almost 61 % if the companies' policies or statements go against people´s personal believes regarding religion and immigration.

**6** The term "funa" comes from the Mapudungun (indigenous language of "Mapuches" in Chile) which means something rotten or putrefied (Schmeisser 2019; Fuentes & Parada 2020).

In Argentina, it is called "escrache",[7] and entails a punitive practice of stigmatisation aiming for social condemnation, originally infringed in and over private or public spaces strongly related to people, practices, or institutions associated with the military dictatorship in Argentina. It emerged in the mid–1990s connected to the human rights movement H.I.J.O.S (*hijos por la identidad y la justicia contra el olvido y el silencio*),[8] formed by families of murdered, tortured, and exiled opponents of the *de facto* regime (Antonelli 2003).

Moreover, the protesters would organise several of these actions as a manner of letting society know – small communities and neighbourhoods – that someone guilty (or at least related to the crimes as an accomplice) of state terrorism, rape, and torture was actually living among them,[9] pointing at them seeking for social reproval and disrepute (Peters-Little 2022).

From a sociological perspective, the motivation has been approached as a commonly shared feeling of impunity, lack of reparation, and overall, denial of justice. As Peter Read has pointed out, it entails a further motivation: "for as long as there is no justice carried out by the state, then there is the funa of the people" (Read 2009: 47). In fact, the organisers would march under the statement "Si no hay justicia, hay funa/escrache" ("If there is no justice, there is funa/escrache") (Gahona 2003: 4).

The gathering of people marching to a particular location while charting and singing chants is described as a sort of religious ritual, closely connected to a catholic procession, where the presence of the "funado" might be even necessary for the success of the act (Read 2009: 50). Thus, it is an act of public performance and a manner of feeling justice through a "ceremonial delivery", undertook as a "collective experience" (Koselleck 1993). Similarly, the quest for social condemnation as a spectacle could be rooted in what Foucault describes as one the main forms of "tactic punishment", whereby the public sanction resembles stigmatisation and marking the "condemned" as stained or damaged for his or her actions publicly and infamously (Foucault 1991: 27–30).

As years went by, the *funa* and *escrache* mechanism expanded, as Antonelli points out, to other aspects of social life, particularly toward an economic situation

**7** It is a word derived from "lunfardo," a slang language in Argentina. Among its various meanings is that of a "photographic shot" in which the person being photographed was exposed in some hidden disqualifying trait or gesture that the resulting image made evident, noticeable, and visible (Vezzetti 1999).

**8** Translates as "sons for identity and justice, against forgetting and silence".

**9** A very common exhortation would be "Alerta, Alerta Vecino, al lado de su casa vive un asesino" which can be translated as "Beware Beware Neighbours, beside your house works an assassin" (Read 2009: 49).

or commercial scandals where the people tended to consider a certain behaviour of a company outrageous or abusive (banks, airlines and retail), and the action of institutional justice rather incompetent or inexistent (Antonelli 2003: 337).

This phenomenon expanded through social media and was even recognised and replicated in Spain, during the 2010–2015 housing crisis. The emergence of the "platform for those affected by mortgages" (PAH, n.d), incorporated *escrache* or *funa* tactics to their protests and manifestations against banks, bankers, brokers, and financial institutions, and, to a certain extent it was a precursor for the movement of the 15-M "indignados" against government austerity during the crisis (Flesher & Montañes 2014: 21), where the common perception of the participants was that of of a lack of access to proper responses by the central State, and a general sensation of mistrust and injustice (Flesher & Montañes 2014: 21).

## Cancel culture and gender violence

As discussed above, the cancellation of alleged criminals is nothing new in Latin America. Additionally, the use of digital platforms and social media as the main framework for cancel culture within the last five years had come to be a somewhat common practice. This has its reason in the further possibilities related to the massification of internet and smartphones access in Latin America, and what mass media communication entails due to the fact that social media allows the general public to create content and express opinions and personal experiences as active users and not merely passive audiences.[10] However, a critical step forward in the cancel culture occurred with movements against sexual harassment, rape culture, abuse, and sexualisation of women such as #Metoo in 2017 (Roos 2020). Originally stated as a protest related to the cinema and showbusiness industry, whereby actresses and female workers related to Hollywood denounced sex offenders and predators (like the former producer Harvey Weinstein) and several other endemic gender-related practices and abuses, eventually became a global, and survivor-led, movement against sexual violence (Gutierrez 2021).

In this context, #Metoo has intensified the debates concerning the role and value of criminal law (McGlynn 2022: 2; Hörnle 2021). Particularly, it has revived the debate between carceral and anti-carceral feminism. Carceral feminism consists of "pro-criminalisation feminist social movement strategies" (Kim 2018: 225), that is, using criminal responses to address domestic and sexual violence, a position that, it

**10** For the Chilean case see Schmeisser (2019) and Leguina (2020), for a broader Latin American context see Bravo (2012).

has been argued, has the risk of favouring punitive, neoliberal uses of criminal law by politicians and governments (Bernstein 2012: 235). Anti-carceral feminism, by contrast, rejects the use of criminal justice systems because they are part of the law system that has a masculine bias leading to several forms of oppression. Moreover, there is distrust towards the well-functioning of the system, which is disrespectful to the victims' rights, and imprisonment is considered a source of violence and injustice (McGlynn 2022: 2–3). Nevertheless, even if the #Metoo movement was first thought of as part of anti-carceral feminism, it has also been considered an expression of punitivism, that may imply even a greater potential "punishment" to the offender. Thus, on the one hand, "cancel culture may rectify over- and under-enforcement" and stand for a noble form of accountability, and on the other, it may be a "dangerous brand of 'mob justice'" that may also result in mass incarceration (Koh 2022: 82–3).

The cancellation related to criminal offenders transitted from the street to social media, growing exponentially in coverage and mass reach (Gutierrez 2021). Furthermore, gender violence victims commonly point out that the structural bias of criminal justice against women (De Masi 2020), which undermines their credibility, leads to a problem in access to justice and effective convictions.

Fotopoulou (2016) points out that in recent years political discourses have shifted to internet platforms, shaping the concepts of "cyberfeminism" and "network feminism" characterised by their "unprecedented speed and immediacy" in the transfer of information and the framing of collective opinions.

In this context, cancellation appears as a manner of social punishment, yet, even more importantly, as a path toward survivors' community-building, sorority, and awareness (Clark 2020; Jancik 2020). Moreover, it occurs in a context where the institutional response to sex/gender offences is perceived as insufficient, or as Jancik proposes, due to adverse or traumatic episodes of women, "the negative experiences or representations of women regarding punitive state agencies play a significant role in their decision to carry out a public protest (escrache)" (2020: 51).

Thus, the activity of public shaming (*funas*) addresses a system failure that needs a response, as acknowledged by feminist studies, where it forms a reaction to a "system that is sexist, male-centred, and perpetuates injustices" (Vera 2022).

Additionally, the *funa* leads, as asserted by Vera (2022: 7), to an "affective dimension", whereby victims can express collectively pain, hunger, and grief, in a sort of common catharsis. Furthermore, there is a critical difference in the publicity of a *funa* compared to an institutional complaint: the sense of collective support among women, which contrasts with the feeling of loneliness and fear often associated with interactions with state officers. (Jancik 2020: 55). Moreover, the sensation of being supported and the use of hashtags like "I believe you" and "you are not alone" encourages other victims to participate whether by adding information to the social

media denunciation or simply by spreading the publication (Khomami 2017), contributing to its "viral" distribution.

In general, according to Parada and Fuentes (2020), the act of cancelling someone related to gender/sex violence displays some common practices:

a) Accusation of a sexual offence that is understood as a crime;
b) The accusation is made in a public access scenario, mostly on social networks;
c) The denouncement is not taken to the formal institutions entitled for that purpose, such as the police or criminal courts.

Trebisacce (2018: 79) suggests that this practice proposes "a proto-judicial scenario (composed of victim, perpetrator, and virtual tribunal)" conducted through a public shaming scheme of mass media and spectacularisation of the alleged aggression.

## Fundamental rights issues and cancel culture

Cancel culture through social media has renewed the debate regarding the collision between, on the one hand, freedom of expression and, on the other hand, the right to honour and private and family life. This is far from being a new topic. One of the most contentious debates regarding constitutional rights consists of the extension of freedom of speech and the perils of both placing too many restrictions or not setting any boundary (Brown 2017a; Browns 2017b; Waldron 2010). The novelty lies in the intermediation of technology since the ideas and opinions are delivered through digital platforms, open to the public, and with a far-reaching scope (massive and instantaneous).

From a legal point of view, the traditional question refers to the content and extension of freedom of speech. In general terms, the question that arises is if we are authorised to hold opinions, and to say or to write publicly whatever we want to express, without any private or public interference and regardless of the consequences that speech can cause in others. For some authors, freedom of expression should be limited only in a few and extreme cases (such as, for example, hate speech), since it is a basic right for the construction of democracy and of pluralistic societies (Contreras & Lovera 2021). *Prima facie*, accordingly, it seems that freedom of expression takes priority over the right to honour. Nevertheless, and as we will see, the case law tends to show the opposite.

In his discussion on the justification underlying freedom of speech theories, Howard (2024: 6–22) identifies mainly four groups that claim the central value protected by freedom of speech to be: a) the respect for citizens' capacities and autonomy to listen (for example, preventing censorship by public authorities); b) the protection of the speakers' interests and self-expression; c) democracy, insofar

as it is based on the respect of free and equal moral agents as democratic citizens; and d) toleration and self-restraint in exercising this freedom.

Regarded as one of the most important fundamental rights, the central question is when, or under what conditions, restrictions to freedom of speech may be justified (Howard 2024: 22). For this analysis, Schauer (1982: 89) distinguishes among three categories of speech: uncovered speech, speech covered but unprotected, and speech covered and protected. Uncovered speech is speech that does not count as free speech and, hence, falls outside the scope of freedom of expression, as making a threat or proffering insults in a street fight. Covered but unprotected speech is the one that, having real value as free speech, the value is "outweighed by competing normative concerns", such as the substantial harms that can result from speech (Howard 2024: 24). Hate speech, despite its controversial nature, serves as an example. Covered and protected speech, finally, refers to speech immune to restrictions, such as the ability to express political dissent through propaganda or during a demonstration.

The case that interests us here is the second one, which has been studied by the constitutional theory of fundamental rights. The starting point is a simple and evident fact: the recognition that fundamental rights do not collide in abstract, that is, that they coexist without contradictions in the texts that guarantee them, such as constitutions and human rights treaties. Thus, both freedom of expression and the right to honour and the right to private and family life (or right to privacy and, in some legal cultures, personality rights) coexist coherently as valid and general norms of constitutional states. The collision arises in concrete cases, in cases brought forward before courts, when competing interpretations of these constitutional provisions applied to the facts of the case lead to incompatible legal consequences: under a certain interpretation, the case is not considered one of violation of the right to honour, but a legitimate exercise of freedom of speech, and vice versa. In cases like this, courts attribute content and define the boundaries of each competing right, based on how they are enshrined in texts, but also taking into account constitutional doctrine, previous judicial decisions, and the understanding of them in the specific legal culture.

Fundamental rights are generally recognised as a special type of legal norms, referred to as "principles". Since a famous article by Dworkin (1967), the debate distinguishing between principles and rules has focused precisely on the characteristics of principles, which possess a greater degree of indeterminacy, in the sense that their structure is not conditional, and the legal provision does not identify the cases or factual assumptions to which it applies. To these features, Alexy adds the following concerning human rights: "Human rights are, first, moral, second, universal, third, fundamental, and, fourth, abstract rights that, fifth, take priority over all other norms" (2014: 58). It is precisely their abstract nature that leads to collisions

with other human rights or with collective goods. This is why they "stand in the need of balancing" (Alexy 2014: 58).

The following step in Alexy's theory of fundamental rights consists of defining principles as "optimisation requirements" and proposing a thesis according to which there is a necessary connection between principles and proportionality, as a specific technique of solving collisions among principles. Proportionality, says Alexy, "consists of three sub-principles: the principles of suitability, of necessity, and of proportionality in the narrower sense. All three sub-principles express the idea of optimisation. Principles *qua* optimization requirements require optimization relative both to what is factually possible and to what is legally possible. The principles of suitability and necessity refer to optimisation relative to the factual possibilities. The principle of proportionality in the narrower sense concerns optimization relative to the legal possibilities" (Alexy 2014: 53).[11]

One famous example that, according to Alexy, shows the collision between freedom of expression and personality rights is the *Titanic case*: a German satirical magazine "described a paraplegic reserve officer who had successfully carried out his responsibilities, having been called to active duty, first as a "born Murderer" and in a later edition as a "cripple"" (Alexy 2003: 137). The case arrived at the Federal Constitutional Court, which had to decide to protect the freedom of expression of the magazine's personnel or the officer's personality right, including the right to honour. Briefly speaking, the Court drew a distinction between "satire" and "insult" and said that the expression "born Murderer" was part of the satirical gender of the magazine, while "cripple" was an insult, a humiliating term, a serious and deliberated offence that violates the right to honour. Alexy's analysis of this and other cases has been criticised, arguing that it is not clear how balancing differs from classic methods of interpretation and subsumption, nor that there is a necessary connection between proportionality and principles (Ratti 2023, García Amado & Antonio 2011, Schauer 2009).

Regarding the right to honour, there has been an expansion of its scope of application. As Diggelmann and Cleis (2014) content, the "'right to privacy' was recognised as an international human right before it was included in any state constitution", in the post-II World War scenario, and then stepped in at the national legal systems.[12] While there is no complete coincidence in the way privacy is drafted in

**11** See also Alexy 2002: 66–69; Alexy's theory of proportionality or balancing has been influential both in common law and civil law countries. See, for example, Menéndez & Ericksen 2006; Kumm 2012; Jackson & Tushnet 2017. For the special traits of constitutional reasoning, see Dyevre & Jakab 2013.

**12** These international instruments are: art. 12, Universal Declaration of Human Rights; art. 17, International Covenant on Civil and Political Rights; art. 8, European Convention of Human Rights; art. 11, American Convention on Human Rights.

international human rights law, there are also competing ideas concerning what privacy comprises or should comprise, as a sphere of legal protection. There are two basic ideas: privacy as freedom from society and privacy as dignity. In the first case, privacy "is about creating distance between oneself and society, about being left alone" and in the second case, privacy is "about protecting elemental community norms concerning, for example, intimate relationships or public reputation" (Diggelmann & Cleis 2014: 442). These dimensions can be both protected by a specific domestic or international rule. Still, a precise determination will be needed in a concrete case to which a competing principle could be applicable.

In Chile, the "right to honour" is based on the protection of privacy as dignity. Furthermore, human dignity is recognized in Article 1 of the Chilean Constitution[13], and has been characterized by the Chilean Constitutional Court as the cornerstone of the fundamental rights that emanate from human nature (Wiegand 2023). As a fundamental right, it has the typical open structure of principles, being comparatively more general and vaguer than rules. Indeed, art. 19 nº 4 of the Constitution prescribes that every person has the right to the respect and protection of their privacy, the right to their honour and their family's honour, together with the right to the protection of personal data. Besides its broad definition, the Chilean Constitutional Court (ChCC) has ruled that it is a liberty right that arises from dignity and that implies the protection of reputation ("buen nombre") and prestige. It is a right, according to the ChCC, of a shifting and indeterminate geometry, that varies according to the particular features and social position of individuals (STC Rol 2513–2013, 16/04 2014, cons.11). Scholars have added the idea of ethical qualities that produce esteem from others as a content of the right to honour (Cea 1998; Nogueira 2004). More broadly, there is also consensus to include the right to self-image as an implicit right covered by this constitutional clause (Ferrante 2017; Larraín 2017; Aillapán 2016).

## Constitutional Litigation and "Constitutional Protection Action" in Chile

In Chile, cancellation practices through social networks have led to the use of judicial proceedings as a means of protection of fundamental rights. Judicialisation has followed, mainly, two paths: on the one hand, the "cancelled" (i. e., the subject publicly shamed or *funado*) files a criminal complaint (defamation) against the author

**13** Art. 1 Chilean Constitution read: "The people are born free in dignity and rights".

of the publication, if known; on the other hand, the cancelled asks for the judicial protection of their fundamental rights (right to honour, right to personal image, personal data).

Under the 1980 Chilean Constitution currently in force, there is a procedural institution named "Acción Constitucional de Protección" – Constitutional Protection Action – that allows any person, even not under rigid procedural schemes, to concur to the Court of Appeal as a remedy-seeker and claim that there has been – or currently is– a violation, perturbation or threat to the legitimate exercise and enjoyment of a constitutional right (Lerturia 2018). Among the protected rights under the scope of the action, we can name – for the sake of this essay – freedom of expression, honour, private life, and psychic integrity (Art. 20 of the Chilean Constitution).

The action engenders an interim measure-like proceeding, enshrining an urgent remedy to the violation of a constitutional right, whose contravention or non-observance could have been carried out whether by the State itself or any other citizen or private group (Palomo 2003). It has been enacted as a manner of enshrining the interest of the state in individuals' autonomy and self-determination, according to the idea of personality development under a democratic scheme whereby the State reaffirms the defence and promotion of human (or fundamental) rights. Thus, this judicial action becomes a guarantee for the actual enjoyment of those rights.

From a jurisdictional perspective, the Courts of Appeals in Chile are superior Courts, ranked below the Supreme Court (the highest court in the nation) but above the lower tribunals (first instance courts), typically serving as appellate courts to their civil and criminal cases.

The constitutional protection action must be issued or filed at this Courts of Appeal, because of the importance of the rights at stake, and the necessity for a quick response by the judiciary. Moreover, throughout the past 40 years of the Constitution in force, this action has become the main litigation tool for constitutional matters due to the rapid response and the lack of barriers established to the commencement of the proceedings.

The Protection Action must be issued at Court with a 30-day limitation term once the facts on which it is based have occurred, enabling the Court of Appeal to undertake any urgent measure that is to be considered necessary for the vindication of the constitutional right affected, including innovative orders and interim measures.

In this context, regarding *funas* and cancellation, the claimant or *funado* who states that the online publication violates his or her constitutional rights, commonly privacy and honour, begs for a resolution by the Court, asking for an order that could lead to the actual or further inhibition of a publication on the social network, decreeing that the post or publication must be taken down, prohibiting its re-up-

loading. That order entails the possibility of forcing the digital platform to comply under a contempt of court charge. The Supreme Court acts as a court of appeals to the Court of Appeals' judgment on the matter regarding this constitutional action, pronouncing the final decision.

## The criminal and civil procedure paths

In addition to constitutional litigation, it is very common for publicly shamed persons to consider undertaking criminal proceedings on the matter. As it happens in several continental-law tradition jurisdictions, an offence to someone's honour or public reputation could lead to traditional civil and criminal action.

For the civil branch, the *funado* could claim the compensation to which he or she expects to be entitled due to the defamation, in accordance with the general rules of tort law (arts. 2314 and 2329 Chilean Civil Code), bearing the burden of proof about the tort itself, the damages, and the causation between them. However, the general civil proceedings in Chile face two undermining features: firstly, it is neither designed nor commonly used to put a stop to a social media post or publication; rather, it is applied to obtain monetary and economic compensations. Secondly, its structure, writing and over formal XIX-century design make it delaying, time-consuming, and consequently, untimely.

From the criminal proceeding's perspective, those who estimate that their honour has been violated can issue a private criminal action at the criminal court, charging slander or defamation. In Chile, these criminal offenses are regulated in the Criminal Code (arts. 412–431). From a procedural point of view, the trial rules are different from the general rules that regulate public prosecution of criminal offences (arts. 55, 400–405), for it is a shortened version of the oral trial design for crimes of highest penalties and social impact, and there is no public prosecutor intervention, thus, the accusation of criminal charges relies on the victim as a private accuser.[14]

This type of procedure is shorter and significantly faster than civil defamation lawsuits. Additionally, since it falls under the context of criminal law enforcement, it represents a more threatening tool for the person who initiated the cancellation. Ultimately, the goal is for the individual who initiated the cancellation on social media to be convicted of the crimes of slander or defamation and receive a criminal penalty (typically low fines that often do not involve deprivation of liberty).

**14** There are no accessible and confident databases of judicial decisions in this kind of procedures that enable some quantitative and qualitative analysis, or a comparison with constitutional protection action.

However, it is not necessarily the best approach to remove the publication, and although it is relatively fast, the safeguarding of legal guarantees and due process means that it is still a structured and lengthy procedure with an uncertain outcome.

Chile and other countries in the region have been condemned by the Inter-american Court of Human Rights (Corte Interamericana de Derechos Humanos) in some cases precisely for having these kinds of criminal offences that illegitimately restrict freedom of speech (Corte IDH 2021).

## Case law of the Supreme Court on constitutional protection action

As stated above, judicialisation of digital *funas* has expanded in the last 5 years in Chile.[15] Partly, this is due to the rise of the claims of feminist movements and the use of social networks to denounce sexual harassment, even in cases where the conducts denounced are not considered criminal offences ("funas feministas").

Our analysis includes 16 judicial decisions of the Chilean Supreme Court that matched the keywords "funa" and "redes sociales" (appeals of constitutional protection actions requiring the protection of the right to honour)[16]. Most of these cases (11) are "funas feministas" (Errázuriz 2019).

To start with, we will point out two general features of this case law. Firstly, Chilean Supreme and Appeal Courts do not see *funas* with good eyes. For example, the Supreme Court considers that "*funas* are nothing but a call to violence and repudiation, a self-help remedy contrary to legal order" (Corte Suprema, Rol N° 2682–2019). If contrary to the legal order, they cannot be tolerated by Law since they express self-made justice or *de facto* measures.[17] So, in principle, the Supreme Court rejects *funas* because their narrative is oriented to cause social exclusion and repudiation.

**15** There are no systematic studies of funas in our country. Leguina (2020) reports that until 2017, 12 rulings of Courts of Appeals and of the Supreme Court included the Word "funa", while between 2018 and 2020 there were 53. Contreras and Lovera (2021), on the other hand, count 9 Supreme Court rulings issued during 2020 that decide a constitutional protection action promoted by the "funado".

**16** The search used the new database of the Supreme Court, that includes rulings since 2019: At: https://juris.pjud.cl/busqueda?Buscador_Jurisprudencial_de_la_Corte_Suprema (accessed July 3th 2024).

**17** See Corte de Apelaciones de San Miguel, rol N° 13014–2019; Corte de Apelaciones de Valdivia, rol N° 317–2020; Corte de Apelaciones de Valdivia, rol N° 5605–2019.

Secondly, in solving the collision between freedom of speech and the right to honour, the Court privileges the latter. In fact, in the great majority of the cases, the Court upholds the action (that is, it accepts the claim of the persons whose honour has been affected), ordering to remove publications from social networks.

Honour is violated if the *funa* consists of criminal offence charges, or serious, irregular, or illegal actions (SCS N° 72061–2020, c. 10). Public denounces of sexual harassment, using words such as "rapist", "sexual aggressor", "abuser", "sexual offender", "psychopath" are considered offences to the right to honour, regardless of the truth of the facts and of the existence of a criminal trial (Contreras & Lovera 2021).[18]

However, in one case the Supreme Court nuances its negative judgment, stating that in cases of *funas* that had been simultaneously denounced before the *Fiscalía* (public prosecutor) as a sexual criminal offence, the personal account of the facts given by the alleged victim cannot affect the right to honour of the subjects denounced. It is a private life experience that the victim decided to make public and that, as such, is protected by freedom of speech. In other words, to give an account of facts that are currently under criminal investigation cannot constitute a violation of honour.

## Funas, due process of law and trials

Some scholars, as well as fraction of public opinion, claim that *funas* violate the guarantee of due process of law and the presumption of innocence (Leguina 2020). Transgression of these basic criminal procedural clauses would take place in *funas* since the subject of repudiation has no occasion to defend himself nor to be considered innocent.

Due process of law or the right to a fair trial has a long tradition in legal theory and procedural law, but basically, in what is of interest here, the guarantee of due process comprises a set of procedural rights that, on the one hand, regulate the characteristics that judges exercising jurisdiction must have (guarantees of judicial organisation), and on the other hand, rule the way in which the judicial process develops (procedural guarantees). Independence, impartiality, and predetermination of the tribunal are guarantees of the first type; public trial, within reasonable time, the right to evidence, the right to a reasoned judgment, are of the second type. Additionally, there are specific rights of the accused, including the presumption of innocence, the right to remain silent, to be informed, to have professional defence, to be present at the trial and the right to personal liberty, among others (Balsamo 2018).

**18** SCS N° 1256–2020, c. 4; SCS N° 58531–2020, c. 11; SCS N° 90737–2020, c. 1; SCS N° 104785–2020, c. 6.

The presumption of innocence, on the other hand, includes treating the accused as innocent during the process, being the burden of proof of the prosecution and the requirement that the conviction is obtained after proving guilt and surpassing the standard of proof "beyond a reasonable doubt"[19]. Indeed, the presumption of innocence is a fundamental principle of criminal law procedures in contemporary procedural systems that pursued the reduction of wrongful convictions and has been considered a key element in fair criminal trials (Balsamo 2018: 114).[20]

In what sense may *funas* violate due process of law and presumption of innocence? The use of criminal procedure language applied to *funas* is not more than a metaphor. If one compares the "procedure of cancelling" and the "criminal procedure", one may identify several "problematic aspects of cancel culture's sanctioning function": inadequate notice, imprecise factfinding, disproportionate punishment, neglect of rehabilitation, and fostering cultural anxiety over human conduct" (Koh 2022: 97). In a similar sense, it has been argued that:

"[B]lame and sanctions can only be morally justified if, first, facts have been established in a comprehensive and fair way; second, the criteria that support the assessment of acts as wrongdoing are well-considered; and third, the relative degree of wrongdoing and thus the appropriate amount of blame are calibrated to arrive at just outcomes" (Hörnle 2021: 834).

These criteria are not met by an "informal system of social control and blame" such as #MeToo or other cancelling experiences (Hörnle 2021: 834).

Nevertheless, we cannot pretend that every public judgement, as an exercise of public scrutiny of private actions or as a social protest, must fulfil the specific requirements of a court-like due process of law. First, due process of law aims at preventing the arbitrary excessive power involved in judicial adjudication. So, it is a guarantee that individuals can use against state power. Second, it only applies *ad intra* of judicial procedures, not to any moral judgement given in the social sphere.

A different question is to analyse, on the one hand, the procedural forms – how they are ruled – that a concrete legal system establishes to protect the fundamental rights of their citizens, including due process of law guarantees and, on the other hand, how they function in practice (i. e., if they are really fulfilling their protective function). Regarding legal design, it seems that the constitutional protection action is unsuitable to mitigate the consequences of *funas* as a social phenomenon. This is

**19** Duff (2013: 171–173) gives a wide concept of presumption of innocence that includes the one that operates in criminal trials and the "civic" presumption of innocence that "protects us against becoming defendants", beyond the confines of criminal trial. The latter case would be, for example, cases in which "an official deals with a citizen as if he was guilty of a crime, or if other citizens exclude him from ordinary civic amenities as being guilty".

**20** These rights are established in arts. 6.1 and 6.2 of the European Convention on Human Rights.

so because it is an informal, urgent, and summary proceeding, where the space of contradiction and proof appears diminished. The local legal culture, additionally, considers that the "precautionary" nature of this action inhibits the discussion on the merits, and that it is only a provisional measure that leaves open other judicial actions and remedies before the courts.

Concerning the practice, the time limitations together with the great volume of protection actions result in rulings with poor argumentation and, in the concrete cases under study, in a superficial treatment of the content of freedom of expression that makes the right to honour to appear as indefeasible. It is also noted that the Supreme Court makes efforts in order to give a general message when deciding the concrete measures to eliminate threats or violations of honour: interferences to privacy: the publication in social media should be removed, and in some occasions, it also orders the abstention of repeating publications, or of circulating and commenting them (a kind of censorship against freedom of speech, according to Contreras & Lovera [2021]). However, the monitoring of these measures is almost impossible. And when the publication has already been removed, the Court's decisions state that the action "has lost opportunity", since, in their opinion, the damage to the honour has stopped.

In syntheses, a judicialisation of *funas feministas* through constitution protection actions seems not to be a satisfactory way to repair the right to honour of the subject. Judicial decisions are unable to stop harmful effects from social networks. Likewise, removing the publication does not solve the problem, because, for example, the screenshot of the publication continues to circulate on different networks and internet platforms.

From the other side of the coin, there is intensive discussion, even inside the feminist movement, concerning digital feminist *funas* and, specifically, if they are justified, if they are a proper means to repair damages suffered by the "victim", and if there is not a kind of penal populism or punitive feminism.

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