

**PRIOR RESTRAINTS IN VENEZUELA'S SOCIAL
RESPONSIBILITY ON RADIO AND TELEVISION ACT:
ARE THEY JUSTIFIED?***

ANGEL LUIS OLIVERA SOTO**

The right to express one's thoughts and opinions, in writing, or by any other way, is the first and most appreciated thing a man of society can own. The Law could never prohibit it, but it will have the power to set just limits, making responsible of its prints, words, and writings, those persons who abuse such liberty, and dictating proportional penalties against such abuse.***

Simón Bolívar, August 7, 1819

I. INTRODUCTION

In recent years, freedom of expression in the media has become a controversial issue in the South American nation of Venezuela. The first event to draw attention to this issue was the enactment of a controversial statute that regulates the content of radio and television programming. Then came two highly criticized judicial decisions issued by Venezuela's highest court. Most recently, the Venezuelan government has demonstrated an unwillingness to renew the broadcasting license of the country's longest running private channel, Radio Caracas Televisión. All of these events have

* Submitted to the Faculty of The George Washington University Law School in partial satisfaction of the requirements for the degree of Master of Laws.

** LL.M. 2007, The George Washington University Law School; J.D. 2006, Pontifical Catholic University of Puerto Rico; B.S. 2003, Inter-American University of Puerto Rico. Many thanks to Jerome A. Barron, Maribel Sierra Belén, Lauren Briggerman, Natali Fani, David Fontana, Nancy Hoffman, Margarita Escudero León, Ana Cristina Núñez Machado, Hector Luis Acevedo Pérez, Gregorio Igartúa De la Rosa, Marjorie Rosenfelt, Nikhil Arun Shimpi, and Luke Wilson for their support on this project. All views and mistakes are my own. Comments or suggestions may be sent to: oliverasoto@gmail.com.

*** Author's literal translation of: "El derecho de expresar sus pensamientos y opiniones de palabra, por escrito, ó de cualquier otro modo, es el primero y más estimable bien del hombre en sociedad. La misma Ley jamás podrá prohibirlo, pero tendrá poder de señalar justos límites, haciendo responsables de sus impresos, palabras y escritos, a personas que abusaren de esta libertad, y dictando contra este abuso penas proporcionales." Simón Bolívar, *CORREO DEL ORINOCO*, Aug. 7, 1819, at 4 (internal quotations omitted). *See also* Luis Miguel Valbuena Villalobos, *La Opinión Pública, a través del Periodismo y la Libertad de Prensa* [Public Opinion through Journalism and Freedom of Press] (July 29, 2008), <http://www.monografias.com/trabajos62/opinion-publica-periodismo-libertad-prensa/opinion-publica-periodismo-libertad-prensa2.shtml?monosearch>.

made it to front pages, news headlines, and editorials around the world.

This Article will discuss the “content law” officially known as the Social Responsibility on Radio and Television Act (RESORTE)¹ and determine whether its polemical provisions constitute any type of prior restraints or excessive restrictions on the right to freedom of expression. In effect, this Article concludes that various provisions of RESORTE severely limit freedom of speech. Additionally, this Article will analyze the reasons provided by the Venezuelan government for the restrictions, such as national security, the protection of children, and public health concerns, to determine whether the restrictions on speech are justified.

Part I provides a general historical background on Venezuela and the political and economic situation that eventually led to the enactment of RESORTE. Part II provides the constitutional framework of the right to freedom of expression as established in the 1999 Constitution of Venezuela, and evaluates applicable judicial decisions issued by the Constitutional Chamber of the Venezuelan Supreme Tribunal of Justice. Part III analyzes the several controversial provisions of RESORTE, including those considered by many as prior restraint mechanisms. Additionally, Part III mentions the international and domestic reactions to RESORTE as well as the judicial challenges to it. Part IV analyzes the reasons given by the government regarding such restrictions, and whether those reasons justify limiting freedom of expression. Finally, Part V concludes that due to Venezuela’s contemporary political situation, most of the restrictions contained in RESORTE are justified on the grounds of national security, protection of children, and public health.

II. BACKGROUND ON VENEZUELA

In recent decades, Venezuela has been one of the strongest examples of democracy in Latin America.² Its adherence to demo-

1. Ley de Responsabilidad Social en Radio y Televisión [Social Responsibility on Radio and Television Act], La Gaceta Oficial N° 38.081 [Official Gazette No. 38.081] (Dec. 7, 2004) (Venez.) [hereinafter Social Responsibility on Radio and Television Act]. This law is often referred to as RESORTE Act, based upon its Spanish language acronym; any references hereinafter to RESORTE Act are to the Social Responsibility on Radio and Television Act.

2. *See generally* THE VENEZUELA READER: THE BUILDING OF A PEOPLE’S DEMOCRACY (Olivia Burlingame ed., 2005).

cratic principles has resulted from several factors.³ A gentlemen's agreement known as the Punto Fijo pact between the two principal political factions to respect the country's democratic institutions and electoral processes set the standard for peaceful rule of the country.⁴ In addition, the subordination and unquestionable loyalty of the armed forces to the president of the Republic undoubtedly helped prevent overthrows of governments that have frequently occurred in that hemisphere.⁵ Finally, an increase in exports of oil has provided the financial means to develop a healthy and prosperous economy.⁶

A. *Political and Economic Crisis*

In the 1980s, Venezuela's economic situation started to deteriorate. On February 18, 1983, a date commonly known as "Black Friday," a sudden devaluation of the local currency caused by the government's heavy foreign debt and a decrease in oil prices brought economic chaos to the country.⁷ During subsequent

3. See Mario J. Garcia-Serra, *The "Enabling Law:" The Demise of the Separation of Powers in Hugo Chavez's Venezuela*, 32 U. MIAMI INTER-AM. L. REV. 265, 267 (2001) ("This stable socio-political system was essentially founded upon three key elements: a professional military subservient to civilian authority, an understanding between the major political parties to collaborate and respect elections, and a high growth oil export economy.").

4. In January 1958, a general uprising and riot in the streets resulted in the ousting of dictator Marcos Pérez Jiménez, who left the country. See *id.* at 268. Comité de Organización Política Electoral Independiente [COPEI], Unión Republicana Democrática [URD] and Acción Democrática [AD], the political parties of Venezuela, formed a pact to peacefully rule the country. See *id.* (describing the obligations inherent in the pact). The pact was called the Pact of Punto Fijo, meaning fixed point, in reference to the name of the residence of former President Rafael Caldera, where the leaders of the political parties convened to create the pact. See Juan Pablo Lupi & Leonardo Vivas, *(Mis) Understanding Chávez and Venezuela in Times of Revolution*, 29 FLETCHER F. WORLD AFF. 81, 90 n.34 (2005) ("The *Punto Fijo* regime evokes the long-standing coalition rule established in Venezuela beginning in 1958, which included the main political parties . . . that helped to oust the last dictator Marcos Perez Jimenez.").

5. For a general discussion on the several political conflicts in Latin America during the second half of the twentieth century, see Dawn Bennet-Ingold, *Latin American Democracy: Flourishing or Floundering?*, 28 GA. J. INT'L & COMP. L. 111, 111-17 (2000) (discussing military coups and constitutional crisis in Latin America and the Caribbean during decades past); Thomas C. Wright, *Human Rights in Latin America: History and Projections for the Twenty-First Century*, 30 CAL. W. INT'L L.J. 303 (2000).

6. See generally Elisabeth Eljuri, *Corporate Structuring of Oil and Gas Projects in Venezuela: Views from the North and South*, 18 J. ENERGY NAT. RESOURCES L. 53 (2000) (illustrating how Venezuela enjoyed economic prosperity as a result of its oil exports for decades).

7. Margarita López Maya, *Venezuela 2002-2003: Polarization, Confrontation, and Violence*, in THE VENEZUELA READER: THE BUILDING OF A PEOPLE'S DEMOCRACY, *supra* note 2, at 9, 10 ("In 1983, Venezuela lived through its own 'Black Friday' as the government declared a moratorium on its debt payments. Venezuela became the fourth most indebted country

years, the economic situation worsened, resulting in the end of the “Venezuela Saudita” days.⁸

In 1989, Carlos Andrés Pérez, president during the prosperous 1970s, created hope for economic recovery when he successfully ran for office. Days after taking office for his second term, President Pérez announced a series of economic measures that the International Monetary Fund required as a condition to refinancing Venezuela’s external debt.⁹ The implementation of these measures, scheduled to go into effect on February 27, 1989, would cause the price of Venezuelan petroleum to increase 100 percent, and consequently raise the price of gasoline.¹⁰

On the morning that Pérez’s economic policies went into effect, commuters found on their way to work that the price of public transportation had skyrocketed.¹¹ In response, thousands of poor and angry workers stormed the streets of Caracas to protest the increase.¹² The “Caracazo,” as the event was called, spread around the country and turned into riots that lasted more than six days.¹³ The government responded by establishing curfews and suspending constitutional guarantees during the state of emergency.¹⁴ According to estimates, over 250 people died during the Caracazo uprisings.¹⁵

The Caracazo, in addition to causing popular dissatisfaction and economic decline,¹⁶ led a group of young military officers to

on the continent, and economic stagnation and disorientation were accentuated in a crisis that persists today.”).

8. See Miguel Tinker-Salas, *Fueling Concern: The Role of Oil in Venezuela*, HARV. INT’L REV., Winter 2005, at 56, 56, available at <http://www.harvardir.org/articles/1296/1/> (“By the mid-1970s, oil profits allowed Venezuelans to enjoy one of the highest standards of living in all of Latin America and the people became known as the ‘Venezuela Saudita,’ or the Saudis of the region.”); Garcia-Serra, *supra* note 3, at 267 (“Most Venezuelan’s living standards were affected detrimentally and the flow of ‘petro-dollars’ that had financed generous social policies and helped to maintain the political patronage machines of the two major political parties began to recede. The days of ‘Venezuela Saudita,’ as the oil rich nation had come to be known, were over.”).

9. Garcia-Serra, *supra* note 3, at 268-69 (describing the events leading up to and comprising the Caracazo).

10. *See id.*

11. *See id.*

12. *See id.*

13. See RICHARD GOTT, HUGO CHÁVEZ AND THE BOLIVARIAN REVOLUTION 43-48 (2005) (describing the events of the Caracazo).

14. *See* Del Caracazo v. Venezuela (Merits), 1999 Inter-Am. Ct. H.R. (ser. C) No. 59, ¶ 37 (Nov. 11, 1999), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_58_ing.pdf.

15. *See id.*

16. *See* Bernardo Álvarez Herrera, *A Benign Revolution: In Defense of Hugo Chávez*, 85 FOREIGN AFF. 195, 198 (2006) (“In the wake of the structural reforms instituted in 1989, the

engage in a revolt against the government. On February 4, 1992, Army Lieutenant Colonel Hugo Chávez launched an attempt to overthrow the Pérez regime.¹⁷ But his attempt failed due to poor planning, lack of direct popular support, and the withdrawal of several supporters within both the armed forces and the government.¹⁸ Colonel Chávez was convicted of conspiring to overthrow the government and imprisoned as a result; but two years later, Rafael Caldera, the new president, pardoned him.¹⁹ Later that year in November 1992, Navy Admiral Hernán Grüber Odremán staged a second coup against the Pérez government, but Odremán's coup suffered the same fate as Chávez's.²⁰

Although Venezuela once was an oil power, it has become poorer, and its economy has suffered more than any other country in the region.²¹ The country witnessed no significant improvement during the 1990s.²²

B. *Chávez's Rise to Power*

After nearly two decades of political and economic chaos in Venezuela and generations of extreme poverty and other social ills caused by corrupt high-level officials and failed economic policies, the marginalized poor population of Venezuela began to see the opportunity for a real change, led by former coup leader Hugo Chávez. His Bolivarian Revolution, inspired by the South American liberator Simón Bolívar, created a sense of national pride and hope among the impoverished communities of the country.²³

percentage of Venezuelans living in extreme poverty jumped from 43.9 percent to 66.5 percent in a single year.”).

17. See GOTT, *supra* note 13, at 63-70 (describing the events of the 1992 coup).

18. See *id.*

19. President Carlos Andrés Pérez was forced to resign after allegations of corruption surfaced during his administration in June 2003. Ramón Velásquez served for the remainder of the presidential term. Former president Rafael Caldera was elected subsequently, in the December 1993 elections. See *id.* at 119-20.

20. See *id.* at 71-75 (describing the events of the November 1992 failed coup attempt by Navy Admiral Hernán Grüber Odremán).

21. See Lupi & Vivas, *supra* note 4, at 83 (“Venezuela is the fifth-largest oil producer in the world and has the largest reserves of oil and gas outside the Middle East; however, per capita income from oil has consistently diminished since the mid-1980s.”); Michael Shifter, *In Search of Hugo Chávez*, 85 FOREIGN AFF. 45, 47 (2006) (“During the 1980s and 1990s, no South American country deteriorated more than Venezuela; its GDP fell some 40 percent.”).

22. See Lupi & Vivas, *supra* note 4, at 83.

23. See Shifter, *supra* note 21, at 47 (“His fierce indictment of the old political order – and his promise of a ‘revolution’ in honor of South America’s liberator, Simón Bolívar – held wide appeal among poor Venezuelans.”); Lupi & Vivas, *supra* note 4, at 84 (“He is perceived as the leader of an authentically popular democracy that is finally taking care of

The rise of Chávez to power is seen as a consequence of the Caracazo²⁴ and the poor majority's disenchantment with the Venezuelan government. Despite his low probability of winning the presidency without the support of an established political party, Chávez created the Fifth Republic Movement and was able to obtain over fifty-six percent of the votes in the 1998 presidential election.²⁵

C. 2002 Coup d'État

In early 2002, political turmoil revisited Venezuela and ended in a brief but successful overthrow of democratically elected president Hugo Chávez.²⁶ After months of strikes by employees of the government-owned Petroleum Company (PDVSA) and labor unions, the president's opposition scheduled a giant march on the eastern part of Caracas for April 11 with the purpose of demanding the president's resignation.²⁷ Private television networks continuously provided plenty of media coverage and publicity.²⁸ Meanwhile, the president's supporters planned a counter demonstration for the same day in the vicinity of the Presidential Palace.²⁹ Later that afternoon, however, the opposition march changed its course and decided to walk across town to the Presidential Palace.³⁰ This

millions of people condemned to poverty and exclusion by previous administrations and 'neoliberal' economic policies in Latin America.”).

24. See Kenneth Maxwell, *The Long Shadow of Hugo Chávez: A Sympathetic Book Defends Venezuela's Strongman*, 79 FOREIGN AFF. 118, 120 (2000) (“Chávez's rise to power [is seen] as a direct result of the violent rebellion in Caracas in February 1989, the *Caracazo*.”).

25. See HAROLD TRINKUNAS & JENNIFER MCCOY, THE CARTER CTR., OBSERVATION OF THE 1998 VENEZUELAN ELECTIONS 49 (1999), available at <http://www.cartercenter.org/documents/1151.pdf>.

26. For detailed information on the 2002 overthrow of the Chávez government, see GREGORY WILPERT, COUP AGAINST CHÁVEZ IN VENEZUELA: THE BEST INTERNATIONAL REPORTS OF WHAT REALLY HAPPENED IN APRIL 2002 (2003); Luis Britto García, *Investigación de unos medios por encima de toda sospecha*, ANALITICA, June 2003, http://www.analitica.com/biblioteca/britto/investigacion_mediosb.asp; Stephen Lendman, *Venezuela's RCTV's Acts of Sedition*, RENSE, Jan. 25, 2007, <http://www.rense.com/general75/ene.htm>.

27. See López Maya, *supra* note 7, at 14-16.

28. See López Maya, *supra* note 7, at 16 (“[I]n the same way the media might announce a concert or a pop festival, television stations ran continuous unpaid ads asking all Venezuelans to participate in this insurreccional activity.”); see also GOTT, *supra* note 13, at 223.

29. See López Maya, *supra* note 7, at 14-16.

30. See GOTT, *supra* note 13, at 224 (“Early on Thursday morning, a large crowd began marching from Parque del Este, in the east of Caracas, to the main offices of the oil company in the city centre. There they were addressed by Ortega who called on them to continue their march to the Miraflores palace, urging them ‘to expel the man who has betrayed the Venezuelan people’”); Julio Bardavid, *La Sentencia de los Militares: A Look at Venezuela's Supreme Court Ruling that Made a “Coup” Legal*, 10 SW. J. L. & TRADE AM. 219, 221

resulted in a difficult situation for the public authorities with the two crowds confronting each other and presenting a grave threat to public order and safety.³¹

Riots and looting rapidly developed in the area surrounding the Presidential Palace. The clash between the two opposing groups claimed victims from both sides. Eighteen people were killed and sixty-nine were wounded³² by alleged sniper fire from surrounding buildings.³³

Amidst the chaos, the high command of the armed forces asked the president for his resignation as a measure to avoid more bloodshed.³⁴ The generals threatened to bomb the palace if Chávez refused their demand.³⁵ In response, President Chávez agreed to step down from the presidency, but only if the people of Venezuela demanded it and followed the constitutional succession process.³⁶ The military officers, however, wanted an unconditional abdication from Chávez.³⁷

After the president refused to resign, the military detained him, transported him to a prison on a military base, and held him in custody until his rescue by loyal soldiers three days later.³⁸ During this period, the people of Venezuela were led to believe that the

(2004) (“On April 11, 2002, marchers and strikers organized at Parque del Este, and began their march to the lobby of the PDVSA. Once they reached the PDVSA, the leaders of the march ‘spontaneously’ decided to continue the march to the Palacio de Miraflores (‘Presidential Palace’) to solicit the renunciation of President Chávez.”).

31. See López Maya, *supra* note 7, at 14-16.

32. See *Cinco años del golpe que no tumbó a Chávez*, EL PAIS, Apr. 11, 2007, http://www.elpais.com/articulo/internacional/anos/golpe/tumbo/Chavez/elpepuint/20070411elpepuint_5/Tes (reporting that the April 2002 events resulted in eighteen deaths and sixty-nine injuries).

33. See Eva Golinger, *The Media War against the People: A Case Study of Media Concentration and Power in Venezuela*, in THE VENEZUELA READER: THE BUILDING OF A PEOPLE'S DEMOCRACY, *supra* note 2, at 82, 95 (“[D]emonstrators ducked down, and tried to find cover from the deadly bullets as their fellow pro-government protestors began to fall – many of the shots being headshots. The culprits behind the attack: snipers and Metropolitan Police officers who supported the opposition.”).

34. See GOTT, *supra* note 13, at 228-30.

35. See *id.* at 228 (“Under threats that tanks and planes would attack the Miraflores palace at dawn, Chávez agreed to go to Fuerte Tiuna, knowing that he would be detained on arrival.”).

36. See *id.* at 229 (“Chávez then reiterated that he would only sign a letter of resignation if they agreed to the four conditions that he had made already put forward. The generals made no reply.”).

37. See *id.* at 228 (“General Rosendo called the Miraflores palace from Fuerte Tiuna to announce that the coupmakers had accepted the conditions Chávez had proposed. Then, almost immediately, he rang again to say that they had been rejected. Chávez would have to resign unconditionally.”).

38. See *id.* at 228-30 (describing the detainment, transport, and holding of President Chávez).

president had in fact resigned his position. Pedro Carmona, a businessman, had established and led a transitional government.

During his hours as president of Venezuela, Carmona dissolved the National Assembly, the Supreme Tribunal of Justice, the National Elections Council, and the Office of the Attorney General, among other institutions.³⁹ The Carmona Decree, as it became known, was a move to gain the support of those sectors that helped end the Chávez government, including dissenting military officers, political opponents, and wealthy business owners such as electronic media proprietors.⁴⁰

The media's coverage of the plot against Chávez was so skewed against him that people began to view it as the first "media coup" of the twenty-first century.⁴¹ For example, private media stations persistently refused to broadcast the multiple protests taking place on the streets of Caracas, particularly those in the immediate vicinity of the Presidential Palace, and instead broadcast cartoons and other programming unrelated to the historic episode taking place in the city.⁴²

After three days of political uncertainty and growing popular disenchantment with Carmona, several officers loyal to Chávez improvised and successfully executed a counter-coup to bring the Chávez government back to power.⁴³ This popular uprising, however, never found its way to the airwaves of the private media.⁴⁴ Andrés Izarra, a former news director for Radio Caracas Televisión (RCTV) who later became the minister of communication and

39. See López Maya, *supra* note 7, at 16.

40. See RICHARD LAPPER, COUNCIL ON FOREIGN REL., *LIVING WITH HUGO: U.S. POLICY TOWARDS HUGO CHAVEZ'S VENEZUELA* 8 (2006) ("[B]y closing the National Assembly and dissolving the Supreme Court, Carmona alienated many opposition politicians and soldiers who had originally supported the coup.").

41. See GOLINGER, *supra* note 33, at 96 ("[T]he world was witness to the makings of the first media coup d'état in history."); see also GOTT, *supra* note 13, at 245-47.

42. See SAURO GONZÁLEZ RODRÍGUEZ, COMM. TO PROTECT JOURNALISTS, *REPORTAJE ESPECIAL: VENEZUELA* (2002), http://www.cpj.org/Briefings/2002/ven_aug02/ven_aug02_sp.html (describing the role of private media during the April 2002 coup).

43. See GOTT, *supra* note 13, at 234-35 (describing actions taken by various senior military officers to make a counter-coup).

44. See Bernardo Álvarez Herrera, *War and Freedom of Expression: Political Conflict and freedom of Expression in Venezuela*, 12 *ILSA J. INT'L & COMP. L.* 565, 567 (2006) ("As President Chávez was returned to office amidst widespread protests against the emerging dictatorship, newspapers and television stations remained absolutely silent – news of the return to constitutional order was only disseminated by CNN, word of mouth and online journalists."); see also GOTT, *supra* note 13, at 235 ("The private television channels that day, on instructions from their owners, had refused to show coverage of the shanty town dwellers seizing the city, and had entirely abandoned their morning news coverage. Only cartoons and movies were on show.").

information, revealed that he had received clear instructions not to broadcast any pro-Chávez information.⁴⁵ When Chávez finally returned to the Presidential Palace on April 13, RCTV broadcast movies and cartoons.⁴⁶

D. *Post-Coup: The Media War*

After the coup, the Chávez government realized the media's tremendous power to change the course of history. It also perceived the media's potential as an efficient tool for controlling the masses. Consequently, the Chávez government allocated more resources to the poorly funded government-owned television station.⁴⁷

For the next two years, the battle intensified between the government and the private media.⁴⁸ The private media accused Chávez of turning into a dictator, while the government countered by denouncing the private media as violators of the Constitution of Venezuela for disseminating false information.⁴⁹ In December 2002, opponents of Chávez staged another strike with the purpose

45. See GOLINGER, *supra* note 33, at 98 ("Izarra confirmed that on the day of the coup, RCTV had a report from a U.S. affiliate that Chávez had not resigned, but had been kidnapped and jailed, yet the station refused to report the story.")

46. See Naomi Klein, *Venezuela's Media Coup*, NATION, Feb. 13, 2003, at 10, available at <http://www.thenation.com/doc/20030303/klein> ("When Chávez finally returned to the Miraflores Palace, the stations gave up on covering the news entirely. On one of the most important days in Venezuela's history, they aired *Pretty Woman* and Tom & Jerry cartoons."); see also GOTT, *supra* note 13, at 235.

47. See *Venezuela: An Opposition Gagged*, ECONOMIST, June 2, 2007, at 57, available at http://www.economist.com/displayStory.cfm?story_id=9257733 ("When Mr. Chávez came to power in 1999, the government owned a poorly funded television station called Venezolana de Televisión (VTV), a news agency and a national radio network. That began to change after the events of 2002 showed it to be disadvantaged in media power.")

48. See *Venezuela: Freedom to Agree*, ECONOMIST, Feb. 22, 2007, at 52, available at http://www.economist.com/world/la/displaystory.cfm?story_id=874307 ("Venezuela's four privately owned national TV channels showed bias in their coverage of the country's bitter political conflict of 2001-04. They supported a coup attempt that briefly ousted the president in 2002, and notoriously failed to cover demonstrations calling for his return."). The media war has been recently reignited as a result of a controversy surrounding the government's refusal to renew RCTV's broadcasting license. See Bart Jones, *Chávez Didn't Start This Media War*, L.A. TIMES, May 30, 2007, at A21, available at <http://articles.latimes.com/2007/may/30/opinion/oe-jones30>; Human Rights Watch, *Venezuela: TV Shutdown Harms Free Expression*, May 22, 2007, <http://www.hrw.org/english/docs/2007/05/22/venezu15986.htm>.

49. See Álvarez Herrera, *supra* note 44, at 567 ("[The media organizations] have accused President Chavez of plotting assassinations and bombings, sponsoring foreign terrorist organizations and leading anti-democratic movements across the hemisphere, and commanding an army of clandestine guerilla groups and slum militias. The lack of evidence rarely detracts from the publication of many of these fabrications, though the government is often forced to defend against them.")

of demanding, once again, the president's resignation.⁵⁰ Again, the private media provided extensive press coverage and anti-government messages.⁵¹

The private media again played the role of a partisan referee during the 2004 recall referendum,⁵² invoked by the opposition as a tactic to oust Chávez.⁵³ As a consequence, the Venezuelan government began to regulate the content of media programming in order to protect the government's constitutional order and to avoid another media coup.⁵⁴ Yet despite the tensions in the country, Human Rights Watch described the situation as one with few government restrictions of the freedom of expression on the outspoken private media.⁵⁵

III. FREEDOM OF EXPRESSION: VENEZUELA'S CONSTITUTIONAL FRAMEWORK

Among the electoral promises made by presidential candidate Hugo Chávez during the 1998 campaign was a new constitutional drafting that would mark a new period in Venezuela. Shortly after arriving to power, Chávez directed his efforts toward giving the people a new supreme document.

On February 2, 1999, exactly seven years after his failed coup, President Chávez signed a decree authorizing a referendum to ask

50. See HUMAN RIGHTS WATCH, VENEZUELA COUNTRY REPORT 2003: CAUGHT IN THE CROSSFIRE: FREEDOM OF EXPRESSION IN VENEZUELA 2 (2003) ("In early February 2003, an unlimited national strike against the government of President Chávez was called off without achieving its objective of forcing him to resign before completing his term.").

51. See *id.* ("Venezuela's private television networks bombarded viewers with coverage of the marches and carried opposition political messages free of charge in place of commercial advertising. This intense exposure of the protests contrasted sharply with the media's failure to report . . . when, on April 13, 2002, the armed forces reinstated Chávez . . .").

52. For a discussion on the 2004 recall referendum, see generally Jennifer McCoy, *The Referendum in Venezuela: One Act in an Unfinished Drama*, 16 J. DEMOCRACY 119 (2005).

53. See generally LUIS BRITTO GARCÍA, LOS MEDIOS CONTRA EL ÁRBITRO ELECTORAL [THE MEDIA AGAINST THE ELECTION REFEREE] (2005) (describing the actions against the government undertaken by the private media during the recall referendum of 2004).

54. Although a bill that intended to regulate the content of messages transmitted by radio and television had been introduced at the National Assembly before the April 2002 events, the coup immensely influenced the enactment of Social Responsibility on Radio and Television Act. See ASDRÚBAL AGUIAR, LA LIBERTAD DE EXPRESIÓN DE CÁDIZ A CHAPULTEPEC [THE FREEDOM OF EXPRESSION FROM CÁDIZ TO CHAPULTEPEC] 125-27 (2002) (stating that decisions from the Constitutional Chamber of the Supreme Tribunal of Justice, dealing with the events of the coup, influenced the enactment of the RESORTE Act).

55. See HUMAN RIGHTS WATCH, VENEZUELA COUNTRY REPORT 2003, *supra* note 50, at 2 ("There are few obvious limits on free expression in Venezuela. The country's print and audiovisual media operate without restrictions. Most are strongly opposed to President Chávez and express their criticism in unequivocal and often strident terms.").

the people of Venezuela whether they wanted to convene a Constitutional Assembly to draft a new constitution.⁵⁶ After a judicial challenge to the legitimacy of the President's authority to convene a Constitutional Assembly, the first of three referenda revealed that ninety-two percent of participants in the referendum wanted Chávez to draft a new constitution, despite criticism from the opponents of the process.⁵⁷

The second step toward a new constitution was the election of Constitutional Assembly delegates. On July 25, 1999, with fifty-three percent voter abstention, one hundred thirty-one members, most of whom were Chávez sympathizers, were elected throughout the country.⁵⁸

After months of debate,⁵⁹ the proposed text of the new constitution was submitted as a final referendum for popular approval on December 15, 1999.⁶⁰ As expected, a supermajority of the participants voted in favor of the new document.⁶¹ Days later, on December 20, the government officially adopted the constitution of the

56. El Decreto N° 3 [Presidential Decree No. 3], La Gaceta Oficial N° 36.634 [Official Gazette No. 36.634] (Feb. 2, 1999) (Venez.).

57. See ALLAN R. BREWER-CARÍAS, LA CONSTITUCIÓN DE 1999: DERECHO CONSTITUCIONAL VENEZOLANO [The 1999 Constitution: Venezuelan Constitutional Law] 83 (4th ed. 2004) (stating that the outcome in the referendum was not representative of the population because only 4,137,509 out of 11,022,939 registered voters participated, which signaled sixty-two percent voter abstention).

58. See *id.* at 111 (criticizing the fact that a supermajority of the elected members of the Constitutional Assembly was pro-Chávez, therefore precluding any possibility of the Assembly serving as an instrument of dialogue, negotiation, or political conciliation); see also Allan R. Brewer-Carías, *Centralized Federalism in Venezuela*, 43 DUQ. L. REV. 629, 633 (2005) ("The constitutional process of 1999, in fact, served to facilitate the total takeover of all the branches of government by a new political group . . .").

59. For a more detailed discussion on the process of the Constitutional Assembly, see Argenis S. Urdaneta, *Convocatoria de la Asamblea Constituyente* [Convocation of the Constitutional Assembly], 57 REVISTA DE LA FACULTAD DE DERECHO (UNIVERSIDAD DE CARABOBO) 15 (2000); BREWER-CARÍAS, *supra* note 57, at 33-125; Ricardo Antela Garrido, *La transición constitucional (o cómo la Asamblea Nacional Constituyente se transformó en un poder suprapopular)* [The Constitutional Transition (or How the National Constituent Assembly it Transformed itself into a Super Popular Power)], 2 REVISTA DE DERECHO CONSTITUCIONAL 19 (2000); José E. Molina & Carmen Pérez Baralt, *Procesos Electorales. Venezuela, abril, julio y diciembre del 1999* [Electoral Process. Venezuela, April, July and December of 1999], 22 BOLETÍN ELECTORAL LATINOAMERICANO 61 (2000); María Auxiliadora Bonnemaïson, *El proceso constituyente de 1999: Punto final a Punto Fijo* [The Constituent Process of 1999: Final Point on Punto Fijo], 22 ANUARIO DEL INSTITUTO DE DERECHO COMPARADO (UNIVERSIDAD DE CARABOBO) 9 (1999); Bennet-Ingold, *supra* note 5, at 137-38.

60. See GOTT, *supra* note 13, at 144 ("Finally, in December 1999 a second referendum ratified the new constitution drafted by the Constitutional Assembly: 71 percent voted Yes and 28 percent voted No.").

61. See *id.*

newly renamed Bolivarian Republic of Venezuela.⁶² The process marked an unprecedented political event in the country's history. For the first time since obtaining its independence in 1811, Venezuela had the opportunity to vote in a series of referenda to adopt its Magna Carta.⁶³

A. *Freedom of Expression*

This new supreme document introduced numerous changes to the Venezuelan constitutional order,⁶⁴ including changes related to the freedom of speech. The 1961 Constitution contained just one article on the freedom of expression, which guaranteed the right to express thoughts either orally or in writing without prior censorship.⁶⁵ Expression, however, was subject to subsequent punishment if it constituted a criminal offense under the laws of the Republic.⁶⁶

The new constitutional canon reaffirms the traditional right to freedom of expression adopted by most modern democracies around the world.⁶⁷ It guarantees every person the right to freely

62. Constitución de la República Bolivariana de Venezuela, Gaceta Oficial No. 36.860, 30/12/1999, translated in Official English Language Text, Constitution of the Bolivarian Republic of Venezuela, http://www.constitucion.ve/constitucion_view_en/view/ver_arbol.pag [hereinafter VENEZ. CONST. (1999)].

63. See BREWER-CARÍAS, LA CONSTITUCIÓN DE 1999, *supra* note 57, at 14-15, 34-35 (explaining why all previous Venezuelan constitutional processes were the product of popular rebellion or overthrown governments, whereas in 1999, people democratically elected members of the Constitutional Assembly).

64. Among the most significant changes brought by the 1999 Constitution was the creation of the Supreme Tribunal of Justice, divided into several chambers including: Constitutional, Political-Administrative, Electoral, Civil Cassation, Social Cassation, and Criminal Cassation. See VENEZ. CONST. (1999), *supra* note 62, art. 262. The 1961 Constitution did not specify the number or the competence of its chambers; instead, it provided for a Supreme Court of Justice divided into several chambers as established by law. Constitución de la República de Venezuela [Constitution of the Republic of Venezuela] art. 212 (1961) [hereinafter VENEZ. CONST. (1961)]. See generally Lauren Castaldi, Note, *Judicial Independence Threatened in Venezuela: The Removal of Venezuelan Judges and the Complications of Rule of Law Reform*, 37 GEO. J. INT'L L. 477 (2006); HUMAN RIGHTS WATCH, RIGGING THE RULE OF LAW: JUDICIAL INDEPENDENCE UNDER SIEGE IN VENEZUELA (2004), available at <http://www.hrw.org/reports/2004/venezuela0604/>. Another important change was the abolishment of the bicameral legislative system, which previously consisted of a Congress with a Senate and a House of Deputies. Compare VENEZ. CONST. (1961), *supra*, art. 138 with VENEZ. CONST. (1999), *supra* note 62, art. 186 (establishing a unicameral system).

65. VENEZ. CONST. (1961), *supra* note 64, art. 66.

66. See *id.*

67. See *id.*; see also Rafael Ortíz Ortíz, *La Libertad de Información, Democracia y Constitución. Introito a la Constitución venezolana de 1999* [The Freedom of Information, Democracy and Constitution. Introit to the Venezuelan Constitution of 1999], 5 REVISTA DE DERECHO CONSTITUCIONAL LATINOAMERICANO 1, 39 (2003), available at <http://www.conhist.org/journal%20la%20revista%20v%205.htm> (stating that the 1961 Constitution only contained a provision

express thoughts, ideas, or opinions through any form of expression.⁶⁸ The 1961 Constitution, however, only provided for the right to freely express thoughts. Therefore, the new constitutional norm expanded the freedom of expression to include the right to freely express ideas and opinions.

The new constitutional framework contained in Articles 57 and 58 of the 1999 Constitution guarantees five basic rights related to freedom of expression.⁶⁹ These five guarantees can be summarized as follows: (i) the right to freely express thoughts, (ii) the right to communicate or obtain information, (iii) the right to establish and develop communicational media, (iv) the right to receive timely, truthful, and impartial information without censorship, and (v) the right to reply to adverse information expressed against oneself.⁷⁰

B. *Limitations on Freedom of Expression*

The modern tendency around the world has been to decrease limitations on the freedom of expression and to allow a greater flow of ideas.⁷¹ Nevertheless, it is widely accepted that this freedom, as with most constitutional rights, is not absolute and may be limited when it collides with rights of others in society.⁷² Limita-

relating to freedom of expression without making any reference to the right to obtain information).

68. See Ortíz Ortíz, *supra* note 67, at 39.

69. See Allan R. Brewer-Carías, *La libre expresión del pensamiento y el derecho a la información en la Constitución venezolana de 1999* [*The Free Expression of Thought and the Right to Information in the Venezuelan Constitution of 1999*], 2002 ANUARIO DE DERECHO CONSTITUCIONAL LATINOAMERICANO 267, 267-68 (2002) (noting that there are five basic rights contained in articles 57 and 58 of the 1999 Venezuelan Constitution).

70. See *id.* at 267-76 (discussing each of these five rights); see also Allan R. Brewer-Carías, *La libertad de expresión del pensamiento y el derecho a la información y su violación por la Sala constitucional de Tribunal Supremo de Justicia* [*Freedom of Expression of Thought and the Right to Obtain Information and its Violation by the Constitutional Chamber of the Supreme Tribunal of Justice*], in LA LIBERTAD DE EXPRESIÓN AMENAZADA. SENTENCIA 1013 [FREEDOM OF SPEECH THREATENED. JUDGMENT 1013] 17, 23-31 (Allan R. Brewer-Carías ed., 2001).

71. See Rafael J. Chavero Gazdik, *Intolerancia suprema. La sentencia 1.942 y sus implicaciones en el derecho a la libertad de expresión* [*Supreme Intolerance. Judgment 1.942 and its Implication in the Right of Freedom of Expression*], in SENTENCIA 1.942 VS. LIBERTAD DE EXPRESIÓN 21, 23-24 (2003) (stating that more and more countries have been decreasing limitations on free speech).

72. See Stephen Gardbaum, *The Commonwealth Model of Constitutionalism*, 49 AM. J. COMP. L. 707, 747 (2001) (“Constitutional rights are rarely absolute, whether or not express limitations are contained in the text.”); Jo M. Pasqualucci, *Criminal Defamation and the Evolution of the Doctrine of Freedom of Expression in International Law: Comparative Jurisprudence of the Inter-American Court of Human Rights*, 39 VAND. J. TRANSNAT’L L. 379, 392 (2006) (“Freedom of expression is not absolute. It must be balanced against the rights of others and the welfare of society.”); see also VENEZ. CONST. (1999), *supra* note 62, art. 20 (“Every-

tions on this freedom, however, are not to be done arbitrarily. The Inter-American Court of Human Rights⁷³ has established certain requisites that would allow a restriction on freedom of expression.⁷⁴ According to the Court, a restriction on the right to freedom of expression must (i) be prescribed by law, (ii) satisfy a legitimate purpose, and (iii) be necessary in a democratic society.⁷⁵ States must meet the Court's conditions when enacting legislation that restricts freedom of expression.⁷⁶

Moreover, the American Convention on Human Rights⁷⁷ provides for several specific permissible limitations on freedom of speech. These limitations may be summarized in two main ideas: moral protection of children and adolescents, and war propaganda or hate speech based on religious, racial, and moral grounds.⁷⁸ Other transnational human rights conventions, such as the International Convention on Civil and Political Rights⁷⁹ and the Euro-

one has the right to the free development of his or her own personality, subject only to the limitations deriving from the rights of others and public and social order.”).

73. The Inter-American Court of Human Rights is an autonomous judicial institution established in 1979 by the American Convention on Human Rights composed of seven judges who are elected to six-year terms. Together with the Inter-American Commission on Human Rights, it makes up the human rights protection system of the Organization of American States, which serves to uphold and promote basic rights and freedoms in the Americas. The Court is based in San José, Costa Rica. For a brief background on the Inter-American Court of Human Rights within the framework of the American Convention and Charter of the Organization of American States, see generally Carlos Alberto Dushee de Abranches, *The Inter-American Court of Human Rights*, 30 AM. U. L. REV. 79 (1980).

74. See Pasqualucci, *supra* note 72, at 393 (citing *Herrera Ulloa v. Costa Rica*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 107, ¶ 120 (July 2, 2004)).

75. See *id.* (“The State must choose the least restrictive position available to limit a protected right.”) (citing *Herrera Ulloa*, 2004 Inter-Am. Ct. H.R., ¶ 121).

76. See *id.*

77. The American Convention on Human Rights (also known as the Pact of San José) is an international human rights instrument adopted by the nations of the Americas meeting in San José, Costa Rica, on November 22, 1969. The Pact came into force after the eleventh instrument of ratification (that of Grenada) was deposited on July 18, 1978. Venezuela is one of the original signatory States and ratified it on June 23, 1977. See generally COMISIÓN INTERAMERICANA DE DERECHOS HUMANOS, ORGANIZACIÓN DE LOS ESTADOS AMERICANOS [INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, ORGANIZATION OF AMERICAN STATES], INFORME ANNUAL DE LA COMISIÓN INTERAMERICANA DE DERECHOS HUMANOS 1977 [ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1977] (1978), available at <http://www.cidh.org/annualrep/77sp/sec.1.htm>.

78. See Claudio Grossman, *Freedom of Expression in the Inter-American System for the Protection of Human Rights*, 7 ILSA J. INT'L & COMP. L. 619, 636 (2001); see also Pasqualucci, *supra* note 72, at 415-16.

79. International Covenant on Civil and Political Rights, G.A. Res. 2200(A) (XXI), art. 19(3)(b), U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/63616 (Dec. 16, 1966), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) (“For the protection of national security or of public order (ordre public), or of public health or morals.”).

pean Convention on Human Rights,⁸⁰ allow restrictions on freedom of expression based on national security related concerns. The respective bodies for these two treaties have developed jurisprudence under which governments must satisfy the same requirements adopted by the Inter-American Court.⁸¹

Based on the American Convention on Human Rights, the Venezuelan government may legitimately legislate to limit the right to freedom of speech if it is done within the Inter-American Court framework.⁸² The 1999 Constitution of Venezuela, however, contains provisions that restrict free speech without strictly meeting the Inter-American Court's conditions; such provisions include subsequent liability, prior restraints, the requirement that all information be timely, true, and impartial, and the right to reply or correct.⁸³

1. Subsequent Liability

The 1999 Constitution also significantly modified the *responsabilidad ulterior* or subsequent liability doctrine. Under the prior norm, a person was liable only for expressions that constituted a criminal offense in accordance with the law.⁸⁴ In theory, civil liability was virtually unavailable because derogatory or disrespectful comments made by one person against another did not carry any liability unless it amounted to defamation, libel, or hate speech under the Penal Code of Venezuela or other special criminal statutes. As a result, the victim lacked a monetary remedy for defamatory speech.

Under the current rule, whoever exercises their right to freedom of expression assumes full responsibility for all expressions made.⁸⁵

80. Convention for the Protection of Human Rights and Fundamental Freedoms, art. 10(2), Nov. 4, 1950, Europ. T.S. No. 5, 213 U.N.T.S. 221 (articulating that protected freedoms, including the freedom of speech, can be subject to formalities and restrictions prescribed by law and necessary to democratic society and its interests).

81. See Pasqualucci, *supra* note 72, at 411 (explaining that both judicial bodies consider the same three elements put forth by the Inter-American Court with respect to freedom of expression restrictions).

82. See *id.*

83. See VENEZ. CONST. (1999), *supra* note 62, art. 57 (affecting the subsequent liability doctrine and the doctrine of prior restraints); *id.* art. 58 (establishing a right to reply and the right to obtain timely, truthful, and impartial information).

84. VENEZ. CONST. (1961), *supra* note 64, art. 66 ("All persons have the right to express their thoughts by the spoken word or in writing and to make use of any means of dissemination, without prior censorship; but statements which constitute offenses are subject to punishment, according to law.") (author's unofficial translation).

85. See VENEZ. CONST. (1999), *supra* note 62, art. 57 ("Everyone has the right to express freely his or her thoughts, ideas, or opinions . . . and no censorship shall be estab-

This new approach, characterized by the “full responsibility” doctrine, allows for both civil liability and criminal sanctions as remedies for intentionally misleading or defamatory speech.

The government, however, should be cautious when establishing the reasons for triggering subsequent punishment due to the thin line between subsequent liability and prior restraints.⁸⁶ Thus, an “exaggerated degree” of subsequent liability, such as extremely long prison sentences or revoking broadcasting license without due process, could result in endangering freedom of expression.⁸⁷ To prevent the potential abuse of subsequent liability mechanisms, the American Convention on Human Rights and its jurisprudence have established various requirements.⁸⁸

2. Prior Restraints

The language selected in the 1999 Constitution to prohibit censorship also demonstrates a change from the 1961 Constitution. Unlike the 1961 Constitution, which simply prohibited prior censorship, the 1999 Constitution prohibits *any* censorship including not only prior restraints but also all types of restraints or censorship against the right to freedom of expression.⁸⁹ However, the 1999 Constitution, like the 1961 Constitution, contains a notable contradiction—although it expressly prohibits any censorship, it lists several types of messages that are not constitutionally protected and consequently subject to subsequent liability.⁹⁰

The 1961 Constitution prohibits anonymous expressions of any kind, along with war propaganda and speech that would tend to

lished. Anyone making use of this right assumes full responsibility for everything expressed.”).

86. See Christine C. Peaslee, *Action for Children's Television v. FCC: Indecency Fines and the Broadcast Medium—When Subsequent Punishments Become Prior Restraints; A Subsequent Restraint Review*, 20 W. NEW ENG. L. REV. 241, 272 (1998) (“The line between subsequent punishments and prior restraints can be difficult to determine and is often blurred.”).

87. See Grossman, *supra* note 78, at 638 (“The Inter-American System’s prohibition on prior censorship does not exclude the subsequent imposition of liability. But when subsequent liability is of an exaggerated degree, it effectively ‘gags’ individuals faced with the threat of danger that is inherent in freedom of expression.”).

88. See *id.* at 638-42 (discussing each of these requirements as per the American Convention and the Inter-American Court of Human Rights jurisprudence: legality, democratic legitimacy, necessity, proportionality, subjective content, differentiation between opinions based on facts and value judgments, preclusion of liability for reproduction of information, and incompatibility with contempt laws).

89. VENEZ. CONST. (1999), *supra* note 62, art. 57 (“[N]o censorship shall be established.”).

90. *Id.* (“Anonymity, war propaganda, discriminatory messages or those promoting religious intolerance are not permitted.”).

offend public morals and encourage disobedience of the law.⁹¹ The 1999 Constitution similarly views anonymous expressions and war propaganda as speech unworthy of constitutional protection.⁹² Furthermore, the 1999 Constitution added discriminatory messages and the promotion of religious intolerance as expressions constitutionally unprotected.⁹³

The traditional Venezuelan notion of prior censorship has been that expression was not to be prevented under any circumstance, regardless of its content. Thus, the legal community has always viewed the above-mentioned prohibitions on speech as a warning to speakers of which expressions are subject to subsequent liability or punishment. This notion was further supported by the American Convention on Human Rights, which prohibits prior restraints, but allows subsequent liability or punishment for expression that would jeopardize the security of the nation, public order, or public health or morals.⁹⁴

Nevertheless, the Constitutional Chamber of the Venezuelan Supreme Tribunal of Justice interprets Article 57 to mean that there are exceptions to the prior restraint doctrine despite its prohibition in the Constitution.⁹⁵ The Court expressly established that there may be situations where circumstances would permit the government to prevent the transmission of a message if its content

91. VENEZ. CONST. (1961), *supra* note 64, art. 66 (“Anonymity is not permitted. Likewise, propaganda for war, that which offends public morals, and that for the purpose of inciting disobedience of the laws shall not be permitted, but this shall not preclude analysis or criticism of legal precepts.”) (author’s unofficial translation).

92. VENEZ. CONST. (1999), *supra* note 62, art. 57.

93. *Id.*

94. Organization of American States, American Convention on Human Rights, art. 13.2, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (“The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure: (a) respect for the rights or reputations of others; or (b) the protection of national security, public order, or public health or morals.”) [hereinafter American Convention on Human Rights]. *But see* Grossman, *supra* note 78, at 634 (“[J]ustifications like ‘national security,’ ‘morality,’ or ‘good habits’ are easily used as pretexts to eliminate or seriously limit the free expression of ideas.”).

95. Sentencia 1942, N° Expediente 01-0415 [Judgment 1942, File 01-0415], Sala Constitucional, El Tribunal Supremo de Justicia [Constitutional Chamber, Supreme Tribunal of Justice] (July 15, 2003) (Venez.) [hereinafter Rafael Chavero Case]; *see also* Comunicado de la Sala Constitucional [Official Notice of the Constitutional Chamber], *En Relación a la sentencia 1942 [In Relation to Judgment 1942]*, Sala Constitucional, El Tribunal Supremo de Justicia [Constitutional Chamber, Supreme Tribunal of Justice] (July 17, 2003) (Venez.), available at <http://www.cajpe.org.pe/rij/bases/juris-nac/comunicado.htm> [hereinafter *In Relation to Sentence 1942*] (stating that constitutional article 57 contains an inherent contradiction, because it prohibits prior censorship but at the same time prohibits war propaganda, discriminatory messages, and messages that promote religious intolerance).

would tend to violate other constitutional norms.⁹⁶ Accordingly, prior restraints are permissible under the new Venezuelan constitutional order.

a. Anonymous Expressions

The 1999 norm maintains the prohibition of anonymous expression.⁹⁷ Moreover, the government adopted a rule under the Code of Ethics of the Venezuelan Journalist prohibiting anonymous reporting or the use of pseudonyms that would not permit the recipient to identify the journalist.⁹⁸ These provisions have raised strong opposition from Venezuelan journalists, specifically those who have to publish anonymously or use pseudonyms in order to protect their lives or those of their sources.⁹⁹ The government justified the restriction as part of its obligation to guarantee as true all information that the media transmits.¹⁰⁰ Therefore, the government considers anonymity to be unnecessary because those who speak the truth should have nothing to fear.

Ironically, neither the American Convention on Human Rights nor the International Covenant on Civil and Political Rights (both ratified by Venezuela) prohibit anonymous speech of any kind. This total prohibition on anonymous speech could potentially affect Venezuela's democracy.

b. Public Officials

Despite the explicit prohibition of any type of censorship by the 1999 Constitution, Article 57 emphasizes the prohibition of a specific category of censorship—censorship of public officials.¹⁰¹ The purpose of this prohibition is to allow and encourage public officials to make expressions regarding their official duties, such as denouncing any illegal acts observed during the discharge of their

96. See Rafael Chavero Case, *supra* note 95.

97. VENEZ. CONST. (1999), *supra* note 62, art. 57.

98. Código de Ética del Periodista Venezolano [Code of Ethics for the Venezuelan Journalist] art. 9, La Gaceta Oficial N° 4819 [Official Gazette No. 4819] (Dec. 22, 1994) (Venez).

99. See CARLOS CORREA & ANDRÉS CAÑIZÁLEZ, ESPACIO PÚBLICO, INSTITUTO PRENSA Y SOCIEDAD, & FUNDACIÓN KONRAD ADENAUER, INFORME 2004 VENEZUELA: SITUACIÓN DEL DERECHO A LA LIBERTAD DE EXPRESIÓN E INFORMACIÓN [REPORT 2004 VENEZUELA: SITUATION OF THE RIGHT TO FREEDOM OF EXPRESSION AND INFORMATION] 206-07 (2005), available at http://www.ipys.org.ve/informes_ipys/informe_2004.pdf.

100. See Interview with Natali Fani, Associate Director, Venezuela Information Office, in Washington, DC (June 1, 2007).

101. VENEZ. CONST. (1999), *supra* note 62, art. 57 ("Censorship restricting the ability of public officials to report on matters for which they are responsible is prohibited.").

official duties, without being censored by higher public authorities.¹⁰² This right applies equally to civil servants as it does to military officers. Nevertheless, national security concerns and state secrets may justify limits on this newly added constitutional right.¹⁰³

3. Article 58

The 1999 Constitution adds a second article relating to freedom of expression.¹⁰⁴ This new article begins by reaffirming the legal duties and responsibilities that accompany the right of the citizenry to freely communicate.¹⁰⁵ Article 58 establishes three main rights: (i) the right to reply or correct, (ii) the right to obtain timely, truthful, and impartial information, and (iii) the right of children and adolescents to receive adequate information for their “integral development.”¹⁰⁶

a. Right to Correct or Reply

A significant addition in the new text is the right to correct or reply.¹⁰⁷ Under this right, any person who is adversely affected by negative or erroneous expressions made by someone else has the

102. For a U.S. comparative perspective, see *Pickering v. Board of Education*, 391 U.S. 563, 574 (1963) (establishing that if a government employee speaks as a citizen on a matter of public concern, such speech is constitutionally protected); *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006) (“[W]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline”).

103. For a comparative perspective, see ERIC BARENDT, *FREEDOM OF SPEECH* 494-96 (2005) (discussing speech by members of the armed forces in Europe and the United States).

104. VENEZ. CONST. (1999), *supra* note 62, art. 58.

105. *Id.* (“Communications are free and plural, and involve the duties and responsibilities indicated by law.”).

106. *Id.* (“Everyone has the right to timely, truthful and impartial information, without censorship, in accordance with the principles of this Constitution, as well as the right to reply and corrections when they are directly affected by inaccurate or offensive information.”).

107. For a Latin American comparative perspective, see Jairo E. Lanao, *Legal Challenges to Freedom of the Press in the Americas*, 56 U. MIAMI L. REV. 347, 371-72 (2002) (briefly discussing the right to correct or reply in Argentina, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Panama, Paraguay, Peru, Uruguay, and Venezuela, and noting the absence of this right in Canada, Jamaica, Nicaragua, Puerto Rico, and the United States). For an overview of the U.S. perspective on the right to reply, see Jerome A. Barron, *The Right of Reply to the Media in the United States-Resistance and Resurgence*, 15 HASTINGS COMM. & ENT. L.J. 1 (1992); Jerome A. Barron, *Rights of Access and Reply to the Media in the United States Today*, 25 COMM. & L. 1 (2003); Richard Donnelly, *The Right of Reply: An Alternative to an Action for Libel*, 34 VA. L. REV. 867 (1948); John Hayes, *The Right to Reply: A Conflict of Fundamental Rights*, 37 COLUM. J.L. & SOC. PROBS. 551 (2003).

right to either reply or correct such assertions.¹⁰⁸ The insertion of the right to correct or reply in the Venezuelan constitutional order in effect expands and solidifies the country's freedom of speech regime. Theoretically, the right to reply or correct is a significant advance in the field of Venezuelan constitutional law.

The insertion of the right to correct or reply in the Venezuelan constitutional order is based on Article 14 of the American Convention on Human Rights, which provides for the right to reply or to make a correction using the same communications outlet as the one used to make the initial expression.¹⁰⁹ Furthermore, Venezuela's Implementing Statute of the Convention adopts the exact language of the American Convention in terms of making the "same outlet" provision part of Venezuelan municipal law.¹¹⁰ Nevertheless, the Constitutional Chamber limited the right to reply in its controversial decision, Judgment No. 1013.¹¹¹

(i) *Judgment No. 1013 (The Elias Santana Case)*

In September 2000, President Chávez made some comments about Elias Santana, a columnist and civil leader, during his radio show *Aló Presidente*.¹¹² Santana requested that the director of the National Radio of Venezuela (NRV) give him ten minutes during the president's show to reply to the president's comments.¹¹³ The director granted the request, but not during the president's show.¹¹⁴ Santana rejected the proposal, stating that it violated his constitutional right to reply using the same media outlet that was used to express the adverse comments against his person.¹¹⁵ Consequently, relying on the "same outlet" clause of the Implementing Statute of the American Convention on Human Rights,¹¹⁶ Santana

108. VENEZ. CONST. (1999), *supra* note 62, art. 58.

109. American Convention on Human Rights, *supra* note 94, art. 14.

110. *See id.* ("Anyone injured by inaccurate or offensive statements or ideas disseminated to the public in general by a legally regulated medium of communication has the right to reply or to make a correction using the same communications outlet, under such conditions as the law may establish."); *see also* Ley Aprobatoria de la Convención Americana sobre Derechos Humanos [Law Approving the American Convention on Human Rights] art. 13.3, La Gaceta Oficial N° 31.256 [Official Gazette No. 31.256] (June 14, 1977) (Venez.) [hereinafter Implementing Statute].

111. Sentencia 1013, N° Expediente 00-2760 [Judgment 1013, File 00-2760], Sala Constitucional, El Tribunal Supremo de Justicia [Constitutional Chamber, Supreme Tribunal of Justice] (June 12, 2001) (Venez.), *available at* <http://www.tsj.gov.ve/decisiones/scon/Junio/1013-120601-00-2760%20.htm> [hereinafter *Elias Santana Case*].

112. *See id.*

113. *See id.*

114. *See id.*

115. *See id.*

116. *See* Implementing Statute, *supra* note 110, art. 13.3.

filed suit petitioning the court to order the NRV director to permit him response time during *Aló Presidente*.

The Court held that both the 1999 Constitution and the Implementing Statute provide for the right to reply or correct to anyone who is adversely affected by comments or opinions made against him.¹¹⁷ Nevertheless, the Court concluded that members of the media do not enjoy this right to the same degree as private citizens do.¹¹⁸ In particular, the Court reasoned that the same outlet clause does not apply to the media because they would always have an available forum to reply to the opinions of others.¹¹⁹ Consequently, the Court held that Santana did not have a right to reply on *Aló Presidente* because he could respond to the president's comments through his weekly radio talk show and weekly column in a nationally distributed newspaper.¹²⁰

Thus, the right to reply is only available to persons who are affected by expressions made in the media but lack access to the media in order to provide their position. Furthermore, the forum to reply does not necessarily need to be the one where the adverse expression was made.¹²¹

The Court added that although the 1999 Constitution guarantees the people access to the media, certain restrictions, such as time and space limitations, must be taken into consideration.¹²² Consequently, it would be up to the director of a communication medium to determine the time and the ideas to be transmitted in order to provide access to an individual person. Here, in effect, the Court affirmed a type of prior restraint by giving the network directors discretion to filter media content.

117. See *Elias Santana Case*, *supra* note 111.

118. See *id.*

119. See *id.*

120. See *id.*

121. See *Grossman*, *supra* note 78, at 644 (stating that since there are numerous ways to make an expression, requiring that a correction or reply be made through the same mean as the original message constitutes an inappropriate method of protecting freedom of expression); INTER-AMERICAN COMMISSION OF HUMAN RIGHTS, OFFICE OF THE SPECIAL RAPPORTEUR FOR FREEDOM OF EXPRESSION, VENEZUELA 2003, ¶ 437 (2004), available at <http://www.cidh.oas.org/countryrep/Venezuela2003eng/toc.htm> (indicating that public access for comment and commentary would discourage media outlets from publishing pieces on controversial issues because such access would erode editorial control of media outlets over their publications); see also Rafael Chavero Gazdik, *Un buen comienzo: Sentencia 1.013 de la Sala Constitucional y el derecho de réplica y rectificación* [A Good Beginning: Judgment 1.013 of the Constitutional Chamber and the Right to Reply and Rectify], in LIBERTAD DE EXPRESIÓN AMENAZADA. SENTENCIA 1013, *supra* note 70, at 197, 204-232.

122. See *Elias Santana Case*, *supra* note 111.

Finally, the Court concluded that the right to reply or correct applies only to information, not opinions.¹²³ The Court's rationale for this restriction was that providing a right to reply for comments or opinions, which by definition need not be truthful, would have the effect of filling the airtime with counter-opinions and destroying the objective of the media, which is to inform society.¹²⁴

Due to the Court's controversial reasoning, its decision has been highly criticized by scholars and nongovernmental organizations.¹²⁵

b. Right to Obtain "Timely, Truthful and Impartial" Information

The 1961 norm did not mention the right to obtain information. The current norm adds such a right but it requires information to be timely, truthful, and impartial before its dissemination. Scholars have construed the government's requirement that all information be timely, truthful, and impartial as a form of prior restraint.¹²⁶ Pro-free-speech organizations denounced this potential censorship mechanism.¹²⁷

123. *See id.*

124. *See id.*

125. *See* AGUIAR, *supra* note 54, at 118-19 (arguing that the Court's decision in Judgment No. 1013 is inconsistent with articles 13 and 14 of the American Convention and with the Declaration of Freedom of Speech). *See generally* Asdrúbal Aguiar, *En defensa de la libertad de expresión y del derecho a la información: A propósito de la Sentencia 1013 de la Sala Constitucional del Tribunal Supremo de Justicia de Venezuela [In Defense of Freedom of Expression and the Right to Obtain Information: The Purpose of Judgment 1013 of the Constitutional Chamber of the Supreme Tribunal of Justice of Venezuela]*, 5 ANUARIO IBEROAMERICANO DE JUSTICIA CONSTITUCIONAL 361 (2002) (criticizing the Court's decision); LA LIBERTAD DE EXPRESIÓN AMENAZADA. SENTENCIA 1013, *supra* note 70 (presenting criticism of various aspects of the decision by a number of scholars).

126. *See* BREWER-CARÍAS, *supra* note 57, at 567 (highlighting the long polemic during the debates in the National Constitutional Assembly over the adjectives timely, truthful, and impartial, and the argument that solidified these requirements in the Constitution which might permit the government to establish controls to determine what is truthful, timely and impartial, and therefore establishing an official truth).

127. *See* MARYLENE SMEETS, COMM. FOR PROTECTION OF JOURNALISTS, RADIO CHÁVEZ: PREOCUPACIÓN POR RETÓRICA DE PRESIDENTE VENEZOLANO CONTRA LA PRENSA [RADIO CHÁVEZ: CONCERNS ABOUT THE VENEZUELAN PRESIDENT RETHORIC AGAINST THE PRESS (2001)], available at http://www.cpj.org/Briefings/2001/Ven_feb01/Ven_feb01Sp.html (stating that several organizations were alarmed after the decision to include the 'timely, truthful and impartial' term in the new constitution because it could serve as a form of prior restraint); *see also* Human Rights Watch, *Venezuela's Implementation of the International Covenant on Civil and Political Rights*, http://www.hrw.org/background/america/venezuela_un.htm (criticizing Venezuela's implementation of article 19 of the International Covenant on Civil and Political Rights through article 58 of the Constitution because it could potentially lead to censorship or legal reprisals against media, including journalists, who publish information deemed by the authorities not to be impartial, opportune or true); INTER-AMERICAN COM-

During the debates of the Constitutional Assembly, disagreement arose among several members regarding the inclusion of the timely, truthful, and impartial requirement in the constitutional text. Assembly members who did not agree with including such terms argued that requiring all information to be disseminated to comply with such requirements might give the government prior control over what information would be timely, truthful, and impartial.¹²⁸

Additionally, there was great concern about who would determine what information constitutes the truth.¹²⁹ Furthermore, allowing the government to judge what information is true would result in a potentially dangerous sort of “official” truth doctrine.¹³⁰ Ultimately, the progovernment supermajority prevailed,¹³¹ and the timely, truthful, and impartial term became part of the 1999 Constitution.

In the aforementioned Judgment 1013, the Constitutional Chamber decided that the timely, truthful, and impartial requirement would only apply to concrete information such as events, news, and facts, and not to opinions.¹³² Consequently, an opinion or idea does not have to be true before it is expressed, while facts or news must be true.¹³³

c. Children’s Right to Receive Adequate Information for their “Integral Development”

Finally, Article 58 states that children and adolescents have the right to obtain adequate information that would contribute to

MISSION OF HUMAN RIGHTS, *supra* note 121, ¶¶ 467-470 (stating that requiring journalists to verify the truthfulness of all information to be reported would be a type of prior censorship if such information is impossible to verify).

128. See BREWER-CARÍAS, *supra* note 57, at 567.

129. See Debates de la Comisión Legislativa Nacional y la Asamblea Nacional Constituyente [Debates of the National Legislative Commission and the Nacional Constitutional Assembly], Sesión Ordinaria de 23 de octubre de 1999 [Ordinary Session of Oct. 23, 1999] (Venez.), available at <http://web.archive.org/web/20050928213749/http://www.asambleanacional.gov.ve/ns2/constituyente.asp?id=41>.

130. See Interview with Margarita Escudero León, Professor, Universidad Católica Andrés Bello, in Caracas, Venez. (May 7, 2007).

131. See Rafael Ortíz Ortíz, *Las implicaciones jurídico positivas del derecho a la información y la libertad de expresión en el nuevo orden constitucional* [The Positive Juridical Implications of the Right to Obtain Information and Freedom of Expression in the New Constitutional Order], 1 REVISTA DE LA FACULTAD DE DERECHO (UNIVERSIDAD DE CARABOBO) 6, 42 (2002) (noting that most of the majority members were aware of the potential problem that could arise with the inclusion of the phrase “timely, truthful and impartial” in the Constitutional provision).

132. See Elias Santana Case, *supra* note 111.

133. See Ortíz Ortíz, *supra* note 131, at 12 (arguing that opinions are essentially subjective in nature while information must be objective).

their “integral” development.¹³⁴ This article basically gave constitutional status to a provision contained in the Children’s Protection Act of 1998.¹³⁵

4. Concentration of Media Ownership

Another element that affects freedom of expression is the concentration of media ownership in a few entities.¹³⁶ The phenomenon represents a global threat to freedom of speech and consequently to any democratic order.¹³⁷ Media owners have used their resources to influence governments or to broadcast partial views of a story.¹³⁸ Moreover, the access to the media by minorities is severely restricted due to their lack of economic and political power.¹³⁹ Venezuela is not the exception, as approximately 80 percent of radio stations and 75 percent of regional television channels are controlled by or closely associated with groups owned by a few families.¹⁴⁰

134. VENEZ. CONST. (1999), *supra* note 62, art. 58.

135. Ley Orgánica para la Protección del Niño y del Adolescente [Organic Law for the Protection of the Child and Adolescent] art. 68, La Gaceta Oficial N^o 5.266 [Official Gazette No. 5.266] (Oct. 2, 1998) (Venez.) [hereinafter Organic Law for the Protection of the Child and Adolescent].

136. See Grossman, *supra* note 78, at 622 (“Freedom of expression is also seriously diminished by . . . public and private monopolies in information media.”); Pasqualucci, *supra* note 72, at 430 (“The concentration of media ownership into the hands of a few individuals or companies threatens the fabric of democracy.”).

137. See *id.*; see also BARENDT, *supra* note 103, at 447 (stating that if pluralism is not guaranteed, commercial television might be dominated by a handful of media corporations).

138. See Chappell Lawson, *How Best to Build Democracy: Laying a Foundation for the New Iraq*, 82 FOREIGN AFF. 206, 209 (2003) (“In most emerging democracies, mass media are controlled by politicized state monopolies . . . or private oligarchs who trade favorable coverage for political influence (as in Latin America). The result in both cases is a systematic bias in favor of incumbents and the wealthy, inadequate scrutiny of official misconduct, a dearth of civic and popular voices and an absence of public forums where political options can be peacefully debated.”); John Weeks, *Wages, Employment and Workers’ Rights in Latin America, 1970-98*, 138 INT’L LAB. REV. 151, 165 (1999) (“Throughout [Latin America], capital has been free to organize itself into associations, to employ its resources to influence government policy and, through ownership of the media, to present its views to the public.”).

139. See Jonathan Graubart, *What’s News: A Progressive Framework for Evaluating the International Debate Over the News*, 77 CAL. L. REV. 629, 661 (1989) (“[M]ost of Latin America has private ownership of the press which has resulted in severe concentration of ownership. Due to the great poverty there, the nonelite have too little capital and political power to obtain even the limited alternative media . . .”).

140. See GOLINGER, *supra* note 33, at 90-91 (discussing concentration of media ownership in Venezuela); see also DANIEL HERNÁNDEZ, LIBERTAD DE EXPRESIÓN: VOCES DIVERSAS Y CONCIENCIAS CRÍTICAS O HEGEMONÍA MEDIÁTICA [FREEDOM OF EXPRESSION: DIVERSE VOICES AND CRITICAL CONSCIENCE OR HEGEMONIC MEDIA] 35-38 (2005) (discussing concentration of media ownership in Venezuela); Álvarez Herrera, *supra* note 44, at 566 (“Large corporate

C. *International Human Rights Law as Domestic Constitutional Law*

International human rights law plays an important role in the new Venezuelan constitutional order. Human rights treaties signed and ratified by the Venezuelan government acquire constitutional rank¹⁴¹ and consequently become part of its municipal law, as long as the rights guaranteed therein are more favorable than those established by the Constitution and the laws of the Republic.¹⁴² If this “favorability” requirement is met, then the treaty is judicially enforceable as soon as it is ratified.¹⁴³

1. Judgment No. 1942 (*The Rafael Chavero Case*)

The Constitutional Chamber of the Supreme Tribunal of Justice of Venezuela modified this legal device that incorporates international human rights norms in yet another highly controversial decision.¹⁴⁴ Petitioner Rafael Chavero challenged the constitutionality of several criminal provisions of the Venezuelan Penal Code, including those that punish with imprisonment any offensive or disrespectful expression made about public officials or state institutions.¹⁴⁵

Chavero argued that these insult laws contravened a report issued by the Inter-American Commission on Human Rights in 1994 recommending the elimination of such laws because they

groups or families own the country's primary newspapers and television stations, which allow them substantial power in shaping public perception of events.”); ERICK RODRÍGUEZ MIERES, PSICOTERRORISMO MEDIÁTICO: UNA AMENAZA A LA SOBERANÍA NACIONAL [MEDIA PSYCHO-TERRORISM: A THREAT TO THE NATIONAL SOVEREIGNTY] 16 (2005). See generally Richard Gott, *Venezuela's Murdoch*, 39 NEW LEFT REV. 149 (2006), available at <http://newleftreview.org/?page=article&view=2622> (discussing the problem of concentration of media ownership in Venezuela).

141. See JESÚS MARÍA CASAL, LOS DERECHOS HUMANOS Y SU PROTECCIÓN (ESTUDIOS SOBRE DERECHOS HUMANOS Y DERECHOS FUNDAMENTALES) [HUMAN RIGHTS AND ITS PROTECTION (STUDIES ABOUT HUMAN AND FUNDAMENTAL RIGHTS)] 46-49 (2006) (discussing the applicability of international human rights treaties in the Venezuelan domestic legal framework).

142. VENEZ. CONST. (1999), *supra* note 62, art. 23 (“The treaties, pacts and conventions relating human rights which have been executed and ratified by Venezuela have a constitutional rank, and prevail over internal legislation, insofar as they contain provisions concerning the enjoyment and exercise of such rights that are more favorable than those established by this Constitution . . .”).

143. *Id.* (requiring that such treaties and conventions “be immediately and directly applied by the courts and other organs of the Public Power”).

144. See Rafael Chavero Case, *supra* note 95.

145. Código Penal de la República Bolivariana de Venezuela [Penal Code of Venezuela] arts. 148-52, 223-27, La Gaceta Oficial N° 5.494 [Official Gazette No. 5.494] (Oct. 20, 2000) (Venez.), available at <http://www.mintra.gov.ve/legal/codigos/penaldevenezuela.html> [hereinafter Venezuelan Penal Code].

were violations of the right to freedom of speech and prejudicial to any democratic regime.¹⁴⁶ Accordingly, relying on Articles 23¹⁴⁷ and 31¹⁴⁸ of the 1999 Constitution, Chavero requested the Court to adopt the recommendations made by the Commission in its 1994 report, and consequently to invalidate the aforementioned articles of the Penal Code.¹⁴⁹

The Constitutional Chamber decided that only international human rights treaties would acquire constitutional rank under Venezuelan law and not reports or opinions issued by international organizations, including international courts.¹⁵⁰ Although Article 31 of the 1999 Constitution clearly establishes that the government shall adopt the necessary measures to comply with decisions issued by international human rights organizations, the Court opted to reject the Inter-American Commission on Human Rights report, holding that under the 1999 Constitution, the Court has a sovereign right to determine which international human rights legal instrument is necessary to enforce the decisions emanating from international organizations.¹⁵¹

The Court based its reasoning on the grounds that automatic adoption of rights contained in an international human rights treaty ratified by Venezuela, without proper judicial safeguards, would have the illegitimate effect of amending the Constitution in a way not allowed by the text itself.¹⁵² Additionally, the displacement of a constitutional right by an international norm would be a

146. See Organization of American States, Inter-American Commission on Human Rights, *Report on the Compatibility of "Desacato" Laws with the American Convention on Human Rights*, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1994, Ch. V (1995), available at <http://www.cidh.org/annualrep/94eng/toc.htm>.

147. VENEZ. CONST. (1999), *supra* note 62, art. 23 ("The treaties, pacts and conventions relating human rights which have been executed and ratified by Venezuela have a constitutional rank, and prevail over internal legislation, insofar as they contain provisions concerning the enjoyment and exercise of such rights that are more favorable than those established by this Constitution and the laws of the Republic, and shall be immediately and directly applied by the courts and other organs of the Public Power.")

148. *Id.* art. 31 ("Everyone has the right, on the terms established by the human rights treaties, pacts and conventions ratified by the Republic, to address petitions and complaints to the intentional organs created for such purpose, in order to ask for protection of his or her human rights. . . . The State shall adopt, in accordance with the procedures established under this Constitution and by the law, such measures as may be necessary to enforce the decisions emanating from international organs as provided for under this article.")

149. See Rafael Chavero Case, *supra* note 95.

150. See *id.*

151. See *id.*

152. See *id.*

clear violation of the supremacy clause,¹⁵³ which sets the Constitution at the top of the Venezuelan legal hierarchy.¹⁵⁴

As with the *Elias Santana Case*, the *Rafael Chavero Case* raised public criticism.¹⁵⁵ The negative comments about the decision were of such magnitude that two days after its decision, the Supreme Tribunal of Justice *en banc* issued a press release to clarify its ruling.¹⁵⁶ The issuance of the press release was an extremely rare and unexpected action, and one which certainly is not a frequent procedural practice in other countries' courts.

IV. SUBSTANTIVE OVERVIEW OF RESORTE

A. *Overview and Purpose of RESORTE*

RESORTE was part of an effort to reform the existing regulation scheme of telecommunications, which dated back to 1940.¹⁵⁷ Some scholars argue that RESORTE “fills one of the most important gaps” in Venezuela’s media law,¹⁵⁸ while others argue that its

153. *See id.* *But see* BREWER-CARIAS, *supra* note 57, at 131-32 (arguing that it would not be a violation to the supremacy doctrine because the Constitution itself provides for the adoption of international human rights as domestic law as long as certain requisites are met).

154. VENEZ. CONST. (1999), *supra* note 62, art. 7 (“The Constitution is the supreme law and foundation of the legal order. All persons and organs exercising Public Power are subject to this Constitution.”).

155. *See* IJCSL Staff, Case Comment, *Venezuela's Supreme Court Upholds Prior Censorship & "Insult" Law*, 1 INT'L J. CIV. SOC'Y L. 79 (2003) (“This decision not only erodes important free speech protections in the Constitution of Venezuela, it is also inconsistent with the American Convention on Human Rights.”); Human Rights Watch, *Venezuela's Supreme Court Upholds Prior Censorship and "Insult" Laws*, July 18, 2003, <http://hrw.org/english/docs/2003/07/18/venezu6239.htm> (characterizing and criticizing the court's decision as “a major setback for freedom of expression” because it “uphold[s] prior censorship”); INTER-AMERICAN COMMISSION OF HUMAN RIGHTS, *supra* note 121, ¶¶ 406-37 (analyzing the decision of the Supreme Court of Justice and articulating why the decision is contrary to the American Convention); Pablo Aure Sánchez, *Libertad de expresión y democracia* [*Freedom of Expression and Democracy*], 27 ANUARIO DEL INSTITUTO DE DERECHO COMPARADO (UNIVERSIDAD DE CARABOBO) 2, 19 (2004) (concluding that Judgment 1942 could result in a suspension by the government of the rights guaranteed in the 1999 Constitution and the American Convention, namely the right to freedom of expression and the right to obtain information). *See generally* Judith Useche, *Análisis de la sentencia 1942 de fecha 15 de Julio de 2003, dictada por la Sala Constitucional del Tribunal Supremo de Justicia* [*Analysis of Judgment 1942 dated July 15, 2003 Issued by the Constitutional Chamber of the Supreme Tribunal of Justice*], 26 ANUARIO DEL INSTITUTO DE DERECHO COMPARADO (UNIVERSIDAD DE CARABOBO) 16 (2003) (analyzing Judgment 1942).

156. *See In Relation to Judgment 1942*, *supra* note 95.

157. *See* Ley de Telecomunicaciones de 1940 [Telecommunications Act of 1940], La Gaceta Oficial N° 20.248 [Official Gazette No. 20.248] (Aug. 1, 1940) (Venez.) [hereinafter *Telecommunications Act of 1940*].

158. *See* José Ignacio Hernández González, *Ámbito de Aplicación y Principios Generales de Ley de Responsabilidad Social en Radio y Televisión* [*Ambit of Application and General Principles of*

purpose is to modernize the country's communications structure.¹⁵⁹

Despite the long needed update on media law, regional commentators argued that the political tension in the country and the hostile relationship between the government and the private media did not create an appropriate environment for the enactment of the statute.¹⁶⁰ Indeed, members of the private media feared that the government would use the bill as a repressive tool to restrict them.¹⁶¹

To make matters worse, President Chávez threw more fuel into the fire just days before signing the bill by stating that he would sign it to combat "media terrorism."¹⁶² Additionally, there was great concern among scholars that the recent controversial judicial decisions would, as they eventually did, influence and consequently restrict the right to freedom of expression.¹⁶³

In enacting RESORTE, the Venezuelan National Assembly looked abroad for guidance. The Assembly studied legislation from seven countries as well as international human rights conventions containing freedom of expression and children rights provisions during the drafting period.¹⁶⁴ Numerous working groups

the Law of Social Responsibility on Radio and Television], 35 COLECCIÓN TEXTOS LEGISLATIVOS 51, 53 (2006) (stating that that Social Responsibility on Radio and Television Act has come to fill the most important gap in Venezuelan media law).

159. See Mateo Jarrín, *Venezuela's Law of Social Responsibility in Radio and Television*, in THE VENEZUELA READER: THE BUILDING OF A PEOPLE'S DEMOCRACY, *supra* note 2, at 72 (arguing that the Social Responsibility on Radio and Television Act "would constitute a building block to the modernization of the country's communication's sector").

160. See Luis Alberto Hueca Guerrero, Comisión Andina de Juristas [Andean Commission of Jurists], *El debate sobre la regulación de la televisión en la región Andina* [*The Debate about Regulating Television in the Andean Region*], Feb. 2004, <http://www.cajpe.org.pe/Publicaciones02.htm> (stating that the Commission considers that the climate of tension in Venezuela between the government and the media is not conducive to issuing a legal norm of this nature).

161. See Andrés Cañizález, *Venezuela: una ley punitiva* [*Venezuela: A Punitive Law*], 89 REVISTA LATINOAMERICANA DE COMUNICACIÓN CHASQUI 5, 5 (2005) (stating that the bill could be a politically retaliatory measure against private media).

162. See CORREA & CAÑIZÁLEZ, *supra* note 99, at 34 n.26 (referencing and explaining President Chávez's statements, as reported in *El Carabobeño* and *Últimas Noticias* newspapers).

163. See AGUIAR, *supra* note 54, at 118-19 (stating that the government used Judgment No. 1013, issued in June 2001 by the Constitutional Chamber of the Supreme Tribunal of Justice, to enact the RESORTE Act).

164. See Jarrín, *supra* note 159, at 72-73 (describing how the Venezuelan Legislative Assembly studied legislation from Argentina, Canada Colombia, France, Mexico, Spain, Switzerland, United States, and United Kingdom, in addition to the American Convention of Human Rights, the International Covenant on Civil and Political Rights, and the Convention on Children Rights).

distributed drafts of the bill throughout the country and debated them openly.¹⁶⁵ The first draft of the law consisted of more than 150 articles.¹⁶⁶ However, due to pressure from various sectors, the approved bill contained only thirty-five articles containing essentially the same major provisions as the earlier version.¹⁶⁷

RESORTE is characterized by its vague language,¹⁶⁸ overbroad regulation of content of expression, and excessive sanctions for noncompliance.¹⁶⁹ In general, RESORTE regulates the content of all images and sounds transmitted through radio and television originating in the country or overseas but intended to reach Venezuela.

In particular, RESORTE mandates transmission of messages of “public interest” made by the president of the Republic or any other high ranking official, and allots ten minutes daily for cultural messages from the minister of communication and information.¹⁷⁰ Furthermore, RESORTE requires that a certain quantity of television hours be dedicated to nationally produced programs,¹⁷¹ and that a minimum radio time play Venezuelan music.¹⁷² RESORTE also reserves a certain number of hours of daily programming for educational, informative, and children’s programming.¹⁷³ Non-

165. *See id.*

166. *See id.*

167. *See* INTER-AMERICAN COMMISSION OF HUMAN RIGHTS, *supra* note 121, ¶ 397 (stating that, although the original bill was modified, such changes are not sufficient because the Inter-American Commission on Human Rights and the Special Rapporteur noted that the provisions which were maintained could suppress the right to freedom of expression of Venezuelans); *see also* Asdrúbal Aguiar, *Hacia el Dominio Estatal de la Personalidad Humana (Análisis crítico de la Ley de Responsabilidad Social en Radio y Televisión ó Ley de Contenidos de Venezuela)* [Towards State Dominion of the Human Personality (Critical Analysis of the Law of Social Responsibility on Radio and Television or Law of Contents of Venezuela)], 35 COLECCIÓN TEXTOS LEGISLATIVOS 9, 22 (2006) (noting that, in substance, there were no changes from the original draft of the bill, and that the reduction in the amount of articles was simply the product of edits that united several articles into just a few).

168. While some provisions of RESORTE are ill-defined, others are extremely narrow and regulate technical aspects in a very specific manner. For example, Article 4 requires radio and television broadcasters to maintain the same volume intensity throughout their transmissions in accordance with regulations by the National Telecommunications Commission. *See* Social Responsibility on Radio and Television Act, *supra* note 1, art. 4. Arguably, it is odd for such an important law to regulate such a technical factor as the intensity of the volume.

169. *See* Interview with Margarita Escudero León, *supra* note 130.

170. Social Responsibility on Radio and Television Act, *supra* note 1, art. 10.

171. *Id.* art. 14 (establishing that a minimum of seven hours of daily programming must be national productions, four of which must come from independent national producers).

172. *Id.*

173. *Id.*

compliance with any of the provisions contained in the law results in severe sanctions, including the revocation of one's broadcasting license.¹⁷⁴

RESORTE states that its purpose is to guarantee freedom of speech without any restraints as per the Constitution and human rights treaties ratified by Venezuela, and to promote the effective exercise and respect for human rights.¹⁷⁵ Nevertheless, its provisions suggest that the real objective behind this legislation is to strictly regulate the content of all messages transmitted by radio and television, which in conjunction with its vague language and excessive sanctions, results in the establishment of prior restraints and self-censorship.¹⁷⁶ This section will discuss those provisions of RESORTE that represent prior restraints and may potentially serve as government censorship devices.

B. *RESORTE Provisions Criticized as Potential Prior Restraints*

1. Rating System

The rating system created by RESORTE has various aspects. The first component is the division of airtime into three blocks.¹⁷⁷ The second one is the classification of programs based on the language, health, sex, and violence contained in a television program.¹⁷⁸ Additionally, the program must fall within one of the following categories: cultural and educational,¹⁷⁹ informative,¹⁸⁰ opinion or editorial,¹⁸¹ recreational or sports,¹⁸² or mixed.¹⁸³ Finally, the type and elements of a program or infomercial must be clearly announced at its beginning.¹⁸⁴

174. *Id.* art. 28, 29.

175. *Id.* art. 1.

176. *But see* Hernández González, *supra* note 158 (stating that RESORTE regulates the content of the messages in order to impose on broadcasters a responsibility to society).

177. Social Responsibility on Radio and Television Act, *supra* note 1, art. 7.

178. *Id.* art. 6.

179. *Id.* art. 5(1).

180. *Id.* art. 5(2).

181. *Id.* art. 5(3).

182. *Id.* art. 5(4).

183. *Id.* art. 5(5).

184. *Id.* art. 18.

a. Hour Blocks

RESORTE divides airtime into three user blocks: all-users, supervised, and adult.¹⁸⁵ The messages transmitted during each of these blocks depend on the category and classification of the program.¹⁸⁶

The all-users block runs from 7:00 a.m. to 7:00 p.m.¹⁸⁷ The content during this space must be directed at children and must not require parental supervision.¹⁸⁸ Consequently, this block is the most restricted one. For example, any messages that go against the “integral development” of children and adolescents,¹⁸⁹ or invite gambling, including lotteries, are strictly prohibited during all-users hours. Sexual products or services, except for those that promote sexual health or discuss reproductive problems, are totally forbidden.¹⁹⁰

From 5:00 a.m. to 7:00 a.m. and from 7:00 p.m. to 11:00 p.m., the content of the programming must also be directed at children, but may require parental supervision.¹⁹¹ This block has been denominated the supervised block.¹⁹²

Between the all-user and supervised blocks, networks and stations must aim their messages at children for a total of eighteen hours of their daily programming. Commentators have criticized these provisions as absurd and excessive in assuming that children and adolescents watch television or listen to radio for eighteen consecutive hours.¹⁹³

RESORTE imposes time limitations on popular *telenovelas* or soap operas and the not-so-popular infomercials during the all-user and supervised blocks. The maximum airtime allotted for soap operas is two hours during each block.¹⁹⁴ Infomercials cannot exceed fifteen minutes.¹⁹⁵

The third and less restricted hour space is the adult block.¹⁹⁶ It runs during the rest of the time not covered by all-users and super-

185. *See infra* Annex, Table 2.

186. *See infra* Annex, Table 3.

187. Social Responsibility on Radio and Television Act, *supra* note 1, art. 7(1).

188. *Id.*

189. *Id.*

190. *Id.* art. 7.

191. *Id.* art. 7(2).

192. *Id.*

193. *See* Margarita Escudero León & Ana Cristina Núñez Machado, *Comentarios Críticos a la Ley de Responsabilidad Social en Radio y Televisión* [*Critical Commentaries to the Law of Social Responsibility on Radio and Television*], 35 COLECCIÓN TEXTOS LEGISLATIVOS 109, 114 (2006).

194. Social Responsibility on Radio and Television Act, *supra* note 1, art. 7.

195. *Id.* art. 7.

196. *Id.* art. 7(3).

vised blocks, which is from 11:00 p.m. to 5:00 a.m.¹⁹⁷ Although it has some restrictions, the content of the programming during this block may primarily be directed at an adult audience.¹⁹⁸

b. Types of Programming

RESORTE classifies the types of programs or shows into five different categories: cultural and educational, informative, opinion or editorial, recreational or sports, and mixed.¹⁹⁹

Cultural and educational programs are those aimed at developing “humanist” values and promoting cultural diversity among viewers.²⁰⁰ Informative programs are defined as shows that transmit information about people or events, whether local, national, or international.²⁰¹ As provided in the Constitution and RESORTE itself,²⁰² such information must be timely, truthful, and impartial.²⁰³

Opinion programs are those that expose thoughts or ideas about virtually any subject that the law allows to be broadcast.²⁰⁴ These types of programs, unlike the informative ones, do not need to comply with the timely, truthful, and impartial requirement. It must be noted, however, that any expression made in an opinion program is subject to subsequent liability, either civil or criminal.²⁰⁵

Recreational or sports programs are those intended to entertain the viewer, but do not fall under the definition of the other types.²⁰⁶ This type includes movies and sports events.

The final type is the mixed program, which is a combination of any of the aforementioned types.²⁰⁷

197. *Id.*

198. *Id.*

199. *Id.* art. 5.

200. *Id.* art. 5(1).

201. *Id.* art. 5(2).

202. *Id.*

203. Articles 3(3) and 5(2) of the Social Responsibility on Radio and Television Act echo the constitutional provision requiring all information to be timely, truthful, and impartial. *See* Escudero León & Núñez Machado, *supra* note 193, at 122 (arguing that these requirements make the Social Responsibility on Radio and Television Act unconstitutional).

204. Social Responsibility on Radio and Television Act, *supra* note 1, art. 5(3).

205. *Id.* art. 28.

206. *Id.* art. 5(4).

207. *Id.* art. 5(5).

2. Content Restrictions in Each Hour Block

Elements of the content that may or may not be transmitted are divided into four categories: language,²⁰⁸ health,²⁰⁹ sex,²¹⁰ and violence.²¹¹ Each of these categories is subdivided into several types that determine the time at which a program may be broadcast.²¹² The following table attempts to make sense of the vague and complicated language in Article 6 that defines the subcategories within each content category:

TABLE 1: CLASSIFICATION ELEMENTS

Category	A	B	C	D	E
Language	Sounds/images of common use that may be presented to minors without parent supervision.	Sounds/images that, in their common usage, are deemed gross.	Obscene sounds/images that describe sexual organs or practices or eschatological manifestations without educational purposes.	N/A	N/A
Health	Educational sounds/images for alcohol, drug, tobacco, and gambling prevention, and other related activities, which may be viewed by children without parent supervision.	Educational sounds/images for alcohol, drug, tobacco, and gambling prevention, and other related activities, which may be viewed by children with parent supervision.	Sounds/images that: 1) refer directly to the moderate use of alcohol and tobacco without explicitly expressing their negative health effects; 2) refer to the excessive use of alcohol, tobacco, and drugs, and gambling, explicitly expressing their negative health effects.	Sounds/images that: 1) refer directly to the excessive use of alcohol, tobacco, drugs, and gambling without explicitly expressing their negative health effects; 2) link the consumption of alcohol, tobacco, drugs, and gambling to economic, social, or sexual advantages; 3) refer negatively to sobriety or abstinence from engaging in listed activities.	N/A

208. *Id.* art. 6(1).
 209. *Id.* art. 6(2).
 210. *Id.* art. 6(3).
 211. *Id.* art. 6(4).
 212. *Id.* art. 7.

Sex	Sounds/images for sexual education purposes that may be viewed by children without parent supervision .	Sounds/images for sexual education purposes that may be viewed by children with parent supervision .	Implicit sexual sounds/images with no educational purposes, or erotic manifestations that do not include explicit sexual acts or practices.	Images/sounds that include: 1) real or acted sexual practices that do not show sexual organs; 2) explicit sexual messages; 3) nudity; and 4) acted sexual practices considered punishable by law.	Images/sounds that include: 1) real or acted sexual practices that do show sexual organs; 2) sexual practices that violate the right to life, health, and human integrity; and 3) real sexual practices considered punishable by law.
Violence	Educational sounds/images on violence prevention & eradication that may be viewed by children without parent supervision , as long as the violent event or its consequences are not explicit or detailed.	Images/sounds that portray acted violence or their consequences in a non-explicit manner.	Educational sounds/images on violence prevention & eradication that may be viewed by children with parent supervision , as long as they are not an explicit or graphic detailed portrayal of the violent event or its consequences.	Non-explicit images/sounds that portray real violence or its consequences. Or acted violence and its consequences shown in an explicit but not detailed manner.	Sounds/images that show in explicit form 1) physical, psychological, sexual, or verbal violence, or its consequences; 2) violence against the family, children, adolescents, and women; 3) violence that promotes suicide or self-harm.

* Reprinted with permission from source: Venezuela Information Office, Venezuela's Law of Social Responsibility in Radio and Television, <http://www.rethinkvenezuela.com/downloads/medialaw.htm> (last visited May 16, 2009).

The following examples illustrate how these subcategories give rise to subjective interpretation.

The “sex type-C” category, for instance, is defined as implicit sexual sounds or images without any educational purposes, or erotic manifestations that do not include explicit sexual acts or practices.²¹³ This definition raises the issue of what would be classified as an implicit sexual image. But because RESORTE does not answer that question, a television producer may not be certain about what his network may broadcast. As a result, a producer might conclude that a scene of a couple kissing or hugging each other may fall under the type-C category because it could be implicitly understood by viewers that the couple will eventually engage in sexual activity.

Another subcategory that causes confusion is “violence type-D,” which includes non-explicit images or graphic descriptions that portray real violence or its consequences, and “acted” violence and its consequences shown in an explicit but not detailed manner.²¹⁴ Some commentators contend that this definition could include violence in a sports context, such as boxing matches or fights during

213. *Id.* art. 6(3)(c).

214. *Id.* art. 6(4)(d).

an ice-hockey game.²¹⁵ “Acted” violence may include any action movie or superhero cartoons that portray fighting or a violent situation.²¹⁶ Arguably, news of terrorist attacks resulting in loss of life may not be transmitted either because they would be considered consequences of violence.²¹⁷ Therefore, the definition of violence type-D may constitute a severe restriction on what may be broadcast during the day, as violence type-D is prohibited during the all-user block.

Indeed, some critics view the complex yet broad language used to describe the content elements as a type of censorship.²¹⁸ The incomprehensible vocabulary used in Article 6 to classify content confuses programmers about which material is suitable for broadcasting and therefore serves as a “type of self-censorship device legally established by the State.”²¹⁹

3. Restrictions on Commercial Advertisements

Although RESORTE does not expressly mention that commercial advertisement must comply with the requisites of each hour block, Professor Raffalli argues that the content of the commercials needs to be consistent with the rating system, depending on the hour block to be broadcast.²²⁰ Accordingly, it may be concluded that, in addition to specific restrictions on advertisements estab-

215. See Interview with Margarita Escudero León, *supra* note 130; see also Escudero León & Núñez Machado, *supra* note 193, at 113-14 (analyzing the controls and prohibitions on content, including that of violence in sporting events).

216. See Interview with Margarita Escudero León, *supra* note 130.

217. See HUMAN RIGHTS WATCH, VENEZUELA COUNTRY REPORT 2003, *supra* note 50, at 17 (“If these norms were interpreted literally, stations could be penalized for showing news coverage of wars and internal conflicts before 8:00 p.m., making it necessary for them to present a sanitized version of the news during the day.”).

218. See *id.* (“If these norms become law, they could have a strong chilling effect on freedom of expression.”); see also Aguiar, *supra* note 167, at 39 (arguing that articles 6 and 7 establish a prior censorship of the content of the messages to be transmitted because they expressly prohibit the transmission of various language, health, sex, and violence elements that are defined in an indeterminate manner).

219. See Interview with Ana Cristina Núñez Machado, Professor, Universidad Metropolitana, in Caracas, Venez. (May 8, 2007).

220. See Juan Manuel Raffalli, *Tratamiento de la publicidad en la Ley de Responsabilidad Social en Radio y Televisión*, [Treatise about publicity in the Law of Social Responsibility on Radio and Television], 35 COLECCIÓN TEXTOS LEGISLATIVOS 125, 129-30 (2006) (stating that just because RESORTE does not expressly mention that commercial advertisements must comply with the requisites of each hour block, does not mean that advertisements are exempt from compliance).

lished in RESORTE,²²¹ the above-mentioned classification scheme fully applies to commercial advertisements.

The most striking restriction on advertisements in RESORTE is the total prohibition of anonymous announcements or commercials.²²² As discussed in Part II of this Article, this provision is based on a long-standing Venezuelan constitutional norm.²²³

Additionally, the total amount of time allotted to commercial advertising must not exceed fifteen minutes for every sixty minutes.²²⁴ As a way to avoid or limit continuous interruptions during transmissions, RESORTE allows providers to divide the fifteen minutes of commercials into a maximum of five segments.²²⁵ During the transmission of live sporting or artistic events where the provider does not want to interrupt the programming, he may opt to display simultaneously on screen the event and the advertisement as long as the advertisement does not cover more than one-sixth of the total screen area.²²⁶

Infomercials are not to exceed fifteen minutes during all-user and supervised blocks,²²⁷ and no more than ten percent of the total daily broadcasting time.²²⁸ These fifteen minutes of permissible infomercials during all-user and supervised blocks count toward the fifteen minutes per hour of commercial advertisements.²²⁹ Moreover, infomercials may not be interrupted to show other publicity or commercials.²³⁰ During the entire broadcasting

221. Despite all the criticism condemning this article as an excessive regulation, in my opinion, it contains several positive provisions on protection of consumers. For example, if a telephone number is made publicly available, the following must be clearly expressed: the cost of the call (at least fifty percent the size of the phone number text, and if is verbally announced it should be at the same volume intensity), whether the call will be long distance, and a description of the service offered. See Social Responsibility on Radio and Television Act, *supra* note 1, art. 9.

222. *Id.*

223. VENEZ. CONST. (1999), *supra* note 62, art. 57.

224. Public service announcements are not to be counted toward these fifteen minutes. See Raffalli, *supra* note 220, at 133.

225. Social Responsibility on Radio and Television Act, *supra* note 1, art. 8. See also Raffalli, *supra* note 220, at 132 (explaining that the purpose of limiting commercials to fifteen minutes and to a maximum of five segments is to avoid continuous interruptions). It should be noted that this provision is the same as the regulation in force at the time of the enactment of RESORTE.

226. Social Responsibility on Radio and Television Act, *supra* note 1, art. 8.

227. *Id.* art. 7.

228. *Id.* art. 8.

229. *Id.*

230. *Id.*

of infomercials, the word *publicidad* (publicity) must be legibly shown on the screen.²³¹

Based on the government's interest in preserving public order, public health, and personal respect,²³² RESORTE contains a list of eight types of publicity that may not be broadcast at any time.²³³ These absolute prohibitions include the advertising of tobacco products,²³⁴ alcoholic beverages,²³⁵ illegal drugs and substances,²³⁶ gambling,²³⁷ and weapons or explosives including related goods or services.²³⁸

Other bans include the advertisement of services provided by persons who do not possess a required license or do not comply with the necessary legal requisites to provide such services.²³⁹ An example of this would be a law graduate not admitted to the bar who advertises himself as a practicing attorney.

Activities that have been prohibited by the government due to public health concerns are also banned from being commercially advertised.²⁴⁰ Most importantly, any publicity aimed at children or adolescents that utilizes elements of violence that are regulated by RESORTE is strictly prohibited.²⁴¹ An example of this would be advertising a baseball bat for kids by portraying the beating of a person.

Religious messages may not be used for commercial ends.²⁴² Raffalli explains that this prohibition actually refers to the exploitation of religion as a tool for convincing consumers to buy a service or product.²⁴³ Accordingly, the presence of religious elements in commercials is permissible as long as they are used in a reasonable manner.

In order to guarantee that these prohibitions are not advertised under the disguise of similar products, RESORTE also bans the

231. *Id.* art. 18.

232. *See* Raffalli, *supra* note 220, at 135 (listing public order, public health, and personal respect as justifications for prohibitions on commercial advertisements).

233. Social Responsibility on Radio and Television Act, *supra* note 1, art. 9.

234. *Id.* art. 9(1).

235. *Id.* art. 9(2).

236. *Id.* art. 9(3).

237. *Id.* art. 9(6).

238. *Id.* art. 9(8). However, advertisements calling for recruitment into the National Armed Forces are normally broadcast on State-owned channels under the justification of national security and state sovereignty.

239. *Id.* art. 9(4).

240. *Id.* art. 9(5).

241. *Id.* art. 9(7).

242. *Id.* art. 9.

243. *See* Raffalli, *supra* note 220, at 137.

transmission of any “phrases, melodies, images, symbols, emblems, sounds or any other distinctive sign representing a good or service” that is prohibited as per Article 9.²⁴⁴ A recent example of this was the advertising of a non-alcoholic drink by the Polar beverage company using the “Psst” slogan, which has been used for years to promote its beer.²⁴⁵

Not all of these restrictions on commercial advertisements apply to subscription services, such as cable and satellite television. Only those restrictions relating to tobacco, alcohol, drugs, and weapons are fully applicable to subscription service providers.²⁴⁶

4. Spanish Language Provisions

RESORTE designates Spanish as the mandatory broadcasting language of all radio and television programming.²⁴⁷ Nevertheless, there are several exceptions to the language requirement.

For example, all live broadcasts are exempt from the language requirement as long as simultaneous oral translation is provided.²⁴⁸ Words or terms for which a translation is not possible due to their technical, scientific, or artistic character are also exempt from the language requirement.²⁴⁹ Musical events²⁵⁰ and commercial trademarks²⁵¹ are also exempt. Additionally, transmission of messages specifically directed at the indigenous communities of Venezuela is permitted in their respective indigenous dialects.²⁵² Finally, the National Telecommunications Commission reserves the right to authorize a transmission in a language other than Spanish.²⁵³

RESORTE’s language provision is based on the 1999 Constitution, which states that Spanish is the official language of Venezuela.²⁵⁴ The Constitution adds that indigenous languages are also

244. Social Responsibility on Radio and Television Act, *supra* note 1, art. 9.

245. See Eduardo Camel Anderson, *Polar despeja su campaña que despeja su cerveza líder*, ELUNIVERSAL.COM, Mar. 21, 2007, http://buscador.eluniversal.com/2007/03/21/eco_art_polar-despeja-la-cam_219127.shtml.

246. Social Responsibility on Radio and Television Act, *supra* note 1, art. 9. Additionally, subscription service providers shall block any image or sound as defined in element sex type-E. *Id.* art. 11.

247. *Id.* art. 4.

248. *Id.* art. 4(1).

249. *Id.* art. 4(3).

250. *Id.* art. 4(2).

251. *Id.* art. 4(4).

252. *Id.* art. 4.

253. *Id.* art. 4(5).

254. VENEZ. CONST. (1999), *supra* note 62, art. 9 (“Spanish is the official language. The use of native languages also has official status for native peoples, and must be respected

official and must be respected by all because they constitute a cultural patrimony for the nation and humanity.²⁵⁵

Additionally, in order to guarantee the integration of those with hearing impairments into society, the broadcasting of sign language or closed captioning must be provided.²⁵⁶ This requirement is not applicable to public-access and non-profit channels.²⁵⁷

C. *Imposition of State Messages on Private Media*

1. *Cadenas* and MINCI Messages

Article 10 of RESORTE contains two provisions that have generated controversy in the country because of their alleged abuse by the government.²⁵⁸ They are *cadenas* and “MINCI” messages.

Cadenas, literally chains, are free-of-charge, mandatory transmissions of official messages by all private and government channels.²⁵⁹ These live national chains have no time limit and may extend as long as the duration of the message or speech. Furthermore, commercials are prohibited during the transmission of a *cadena*.²⁶⁰

Cadenas are not new to the Chávez government. They have existed since the arrival of television in Venezuela decades ago.²⁶¹ Nevertheless, since 1999 the frequency of their use has grown exponentially from twice a year to twice a week.²⁶² What used to be a Christmas greeting or an emergency address by the president has now turned to the transmittal of virtually every speech made by the

throughout the territory of the Republic, as constituting part of the cultural heritage of the Nation and humanity.”).

255. *Id.*

256. Social Responsibility on Radio and Television Act, *supra* note 1, art. 4.

257. *Id.*

258. See INTER-AMERICAN COMMISSION OF HUMAN RIGHTS, *supra* note 121, ¶¶ 485-88 (arguing that the government has made abusive use of *cadenas*, or blanket broadcasts, considering their frequency, the length of time they have lasted, and the information of low public interest transmitted).

259. See Social Responsibility on Radio and Television Act, *supra* note 1, art. 10(1); see also Ley Orgánica de Telecomunicaciones [Telecommunications Organic Act] art. 192, La Gaceta Oficial N° 36.970 [Official Gazette No. 36.970] (June 12, 2000) (Venez.).

260. Social Responsibility on Radio and Television Act, *supra* note 1, art. 10.

261. See generally Telecommunications Act of 1940, *supra* note 157.

262. See Interview with Margarita Escudero León, *supra* note 130 (stating that *cadenas* are now being used to transmit virtually any message of little or no importance to the nation as a whole); see also Interview with Natali Fani, *supra* note 100 (acknowledging that in effect the *cadenas* have exponentially grown since Chávez became President).

president.²⁶³ Scholars fear that the government will abuse its use of *cadenas*.²⁶⁴

The other provision contained in Article 10 pertains to “cultural, educational, informative or public services messages” to be issued by the Ministry of Communication and Information (MINCI).²⁶⁵ Unlike *cadenas*, which have no time limit, MINCI messages must not exceed fifteen minutes daily or seventy minutes weekly.²⁶⁶

These messages are also mandatory for all government and private media.²⁶⁷ Although subscription service providers are not required to carry *cadenas* and MINCI messages, they nevertheless must not interfere with the transmission of either type of message.²⁶⁸

RESORTE’s rules regarding *cadenas* and MINCI messages have created concern about the amount of airtime that the government has available for disseminating its “official messages.”²⁶⁹ The total weekly time available for government messages on private channels normally amounts to six hours, which includes the seventy minutes of MINCI messages and approximately five hours of *cadenas*.²⁷⁰ Additionally, the President’s show *Aló Presidente*, which runs on government channels and radio stations on Sundays, starts at 11:30 a.m. and lasts for several hours.²⁷¹ Furthermore, the significant

263. See Interview with Natali Fani, *supra* note 100; see also Roger Atwood, *Media Crackdown: Chávez and Censorship*, 7 GEO. J. INT’L AFF. 25, 30 (2006) (“On an almost daily basis, the government requires all stations . . . to break into their regular programming and transmit information as ordered by the government. . . . Sometimes the information has news value, such as a speech by Chávez, but more often it is simply a commercial for a government initiative or event.”).

264. See Interview with Margarita Escudero León, *supra* note 130 (stating that there is a great concern that the government will arbitrarily block other programming by transmitting *cadenas* as frequently as daily).

265. See Social Responsibility on Radio and Television Act, *supra* note 1, art. 10 (2).

266. See *id.*

267. See *id.* art. 10.

268. See *id.*

269. See Interview with Margarita Escudero León, *supra* note 130 (stating that the government has more than six hours of free airtime on private channels to transmit official messages).

270. See *id.*

271. In January 2007, the *Aló Presidente* show was rescheduled to air on weekday evenings starting at 7:00 p.m. The television version aired on Tuesdays and Thursdays, and the radio version on Mondays, Wednesdays, and Fridays. This change lasted only a few weeks, however, until the show returned to the Sunday schedule, where it is programmed to end by 3:30 p.m., but routinely extends until 4:00 p.m. On August 5, 2007, the *Aló Presidente* show was the longest show to date, lasting more than eight hours. Recorded versions of the program are available at <http://www.alopresidente.gob.ve>.

advertising time on government-owned channels transmits nothing but official messages and propaganda.²⁷²

When asked about the substantial amount of time available to the government to transmit its messages, the Venezuelan Information Office (VIO)²⁷³ in Washington D.C. indicated the reasons behind it. The VIO asserts that due to the private media's persistent refusal to transmit government information, RESORTE takes measures to "create a balance" in the content of the private media's programming.²⁷⁴

2. "TV Guide" as Potential Censorship Tool

Television service providers²⁷⁵ are required to publish weekly programming itineraries prior to its transmittal.²⁷⁶ Such publication must contain the name, type, date, hour, and elements of each show.²⁷⁷ The programs must be broadcast as announced by the programming publication, and they cannot be changed except by *force majeure* or the transmission by the government of a *cadena* or MINCI message.²⁷⁸

This provision provides a potential censoring tool that the government may use to silence unfavorable criticism. For example, the government can simply transmit a *cadena* at the same time that a private network has scheduled a program that would criticize the government. Furthermore, the broadcaster may not transmit the blocked program after the *cadena* because it has to comply with the programming schedule previously published. Therefore, the blocked program may not be transmitted until at least the following week, after it is republished in the provider's "TV Guide." But

272. See Atwood, *supra* note 263, at 31 ("State-run television channels *Venezolana de Televisión* and *ViVe* remain abject propaganda services for the Chávez government, regularly attacking the president's designated enemies and opposition figures in news reports while excluding dissenting opinions.").

273. The Venezuela Information Office is dedicated to inform the United States public about the contemporary issues of Venezuela. It receives its funding from the government of Venezuela, subject to the Foreign Agents Registration Act of 1938, 22 U.S.C. §§ 611-21 (2006).

274. See Interview with Natali Fani, *supra* note 100 (answering questions regarding the Social Responsibility on Radio and Television Act in her capacity as Assistant Director of the Venezuela Information Office).

275. Radio stations are exempt from this requirement. Meanwhile, subscription service providers must have a channel informing its programming, i.e. The Preview Channel. See Social Responsibility on Radio and Television Act, *supra* note 1, art. 18.

276. See *id.*

277. See *id.*

278. See *id.*

again, the government could transmit another *cadena*, thereby furthering the censorship.

Consequently, by combining the *cadena* with the publication requirement, the government has created a prior restraint mechanism that clearly violates both the American Convention on Human Rights and its Venezuelan implementing statute²⁷⁹—provisions that prohibit the restriction of freedom of expression through any direct or indirect means.²⁸⁰

3. Children's Programming

The legislature hides behind the “integral education” and “the protection of the children and adolescents” terms of RESORTE to justify the implementation of these polemical provisions. According to the government, RESORTE's fundamental purpose is to protect “communicational” rights and the development of children and adolescents who constitute the group of society most susceptible to influence by audio-visual messages.²⁸¹

International nongovernmental organizations such as Human Rights Watch expressed concern about the use of such terms to justify the content regulation of media speech. Human Rights Watch stated that phrases like “integral education of the children” are overbroad and therefore suspiciously infringe upon freedom of speech.²⁸²

As stated in the objectives of RESORTE,²⁸³ the government, relying on the Convention on the Rights of the Child,²⁸⁴ seeks to ensure the protection of the integral development of children and

279. See Implementing Statute, *supra* note 110, art. 13.3.

280. See *id.*

281. See MINISTERIO DE COMUNICACIÓN E INFORMACIÓN [MINISTRY OF COMMUNICATION AND INFORMATION], LEY RESORTE PARA TODOS: CONOCIENDO LA LEY DE RESPONSABILIDAD SOCIAL EN RADIO Y TELEVISIÓN [RESORTE LAW FOR ALL: GETTING TO KNOW THE LAW OF SOCIAL RESPONSIBILITY ON RADIO AND TELEVISION] 8 (2005) (explaining that RESORTE's main objective is to protect “communicational” rights of the public) [hereinafter Getting to Know RESORTE]. For an argument supporting regulating advertising, given its impact upon children, see Matt Getz, Note, *Drowned in Advertising Chatter: The Case for Regulating Ad Time on Television*, 94 GEO. L.J. 1229, 1246 (2006).

282. See HUMAN RIGHTS WATCH, VENEZUELA COUNTRY REPORT 2003, *supra* note 50, at 17 (“Some of the other norms regulating protected hours are ill-defined and very broad, such as a prohibition on the transmission of ‘contents that could harm the integral education of children and adolescents,’ or of ‘conduct that if imitated by children and adolescents could harm their personal integrity as well as that of any other person.’ If these norms become law, they could have a strong chilling effect on freedom of expression.”); see also HUMAN RIGHTS WATCH, VENEZUELA: MEDIA UNDERCUTS FREEDOM OF EXPRESSION (2004), <http://hrw.org/english/docs/2004/11/30/venezu9754.htm>.

283. Social Responsibility on Radio and Television Act, *supra* note 1, art. 1.

284. Convention on the Rights of the Child, art. 17, Nov. 20, 1989, 1577 U.N.T.S. 3.

adolescents. In the pursuit of this goal, RESORTE requires a minimum of three hours of daily children's programming.²⁸⁵ These three hours must be transmitted during the all-users block.²⁸⁶

From an economic perspective, this requirement has had a tremendous impact on specialized channels. News, movie, and music channels have been forced to restructure their programming in order to comply with this three-hour requirement.²⁸⁷ As a result, ratings have dropped during the hours now dedicated to children's programming.²⁸⁸ Additionally, specialized channels have had to hire new employees in order to have the proper personnel to produce such programming.²⁸⁹

Another effect of the provisions relating to children's programming is that they violate the right to obtain information, established by the Constitution.²⁹⁰ For example, if an extremely important event of high public interest is taking place during the time allotted to children programming, the channel may not transmit that event because the network is required to broadcast three hours of children programming and is obligated to broadcast what it has previously published. Scholars argue that there should be more flexibility regarding the live broadcast of an event of public interest.²⁹¹ Accordingly, RESORTE should give networks discretion to interrupt their programming in order to broadcast live events of significant importance to the country.

4. Music

RESORTE's regulation of the content of musical works has also been the center of public debate. RESORTE requires that a minimum of 50 percent of the music transmitted be of Venezuelan tra-

285. Social Responsibility on Radio and Television Act, *supra* note 1, art. 14; *see also* Organic Law for the Protection of the Child and Adolescent, *supra* note 135, art. 72.

286. Social Responsibility on Radio and Television Act, *supra* note 1, art. 14.

287. *See* Interview with Margarita Escudero León, *supra* note 130.

288. *See id.*

289. *See id.*

290. VENEZ. CONST. (1999), *supra* note 62, art. 58.

291. *See* Interview with Margarita Escudero León, *supra* note 130; Interview with Ana Cristina Núñez Machado, *supra* note 219.

dition.²⁹² Furthermore, if the state²⁹³ or town from which the music is being transmitted is located near the national border, then the percentage of Venezuelan music must be no less than 70 percent.²⁹⁴

This leaves foreign music with a maximum airtime of 50 percent and 30 percent in the border area. These percentages are further limited by the requirement that 10 percent of it be of Latin American or Caribbean origin.²⁹⁵ Consequently, Asian, European, North-American, and African music have a limited airtime of 40 percent in Venezuela and 20 percent in the border area. This limitation on the type of music aired is contradictory to the preamble and Article 98 of the Constitution, which promotes multiculturalism in Venezuelan society.²⁹⁶

5. Sanctions

The National Telecommunications Commission (CONATEL) has jurisdiction over all matters relating to the enforcement of RESORTE.²⁹⁷ CONATEL's authority includes initiating investigations regarding any violation of RESORTE and sanctioning violators.²⁹⁸ RESORTE imposes a list of more than seventy-five duties which, if breached by a radio or television provider, are punishable by the CONATEL.²⁹⁹ The duties fall under two general sanction regimes consisting of (i) mandatory cession of airtime to the government for the transmission of cultural and educational messages,³⁰⁰ and (ii) the imposition of fines which may amount from one-half to two percent of the station's gross income.³⁰¹

292. RESORTE provides guidance on what would be considered music of Venezuelan tradition. *See* Social Responsibility on Radio and Television Act, *supra* note 1, art. 14 (establishing the following factors to determine whether music would be considered of Venezuelan tradition: (a) the presence of musical genres from the various geographical areas of the country, (b) the use of Spanish or any official Indigenous languages, (c) the presence of Venezuelan cultural values, (d) the authorship or composition by Venezuelans, and (e) the presence of Venezuelan performers).

293. Venezuela is a federal republic politically divided into several states. *See* VENEZ. CONST. (1999), *supra* note 62, art. 16 ("For purposes of the political organization of the Republic, the territory of the nation is divided into those of the States, the Capital District, federal dependencies and federal territories. The territory is organized into Municipalities.").

294. Social Responsibility on Radio and Television Act, *supra* note 1, art. 14.

295. *Id.*

296. VENEZ. CONST. (1999), *supra* note 62, art. 98.

297. Social Responsibility on Radio and Television Act, *supra* note 1, art.19.

298. *Id.* art. 19(11).

299. *Id.* art. 28.

300. *Id.* art. 28(1) & (2).

301. *Id.* art. 28(3) & (4).

RESORTE also provides for the suspension or revocation of a provider's broadcasting license. Service providers who transmit messages promoting or inciting war, public disorder,³⁰² disobedience of the law, or religious intolerance may be suspended from the air for a maximum of seventy-two consecutive hours.³⁰³ Additionally, messages that are of a discriminatory nature or that are contrary to the security of the nation are equally punishable by revocation of one's license.³⁰⁴ Furthermore, stations or channels that are repeat offenders within five years after their first sanction will lose their broadcasting license for a period of five years.³⁰⁵

CONATEL also has the power to dictate, modify, or revoke any cautionary measure contained in RESORTE.³⁰⁶ But that raises the question of what a cautionary measure is. Under Article 33 of RESORTE, CONATEL has authority to order a service provider to abstain from broadcasting at any time the types of messages listed in the previous paragraph as well as anonymous ones.³⁰⁷ Accordingly, if the government has prior knowledge that a network will be transmitting a program, the content of which promotes public disorder, CONATEL can simply order the channel not to broadcast it. If the channel, however, proceeds to broadcast the program, the government can then sanction the channel by either suspending or revoking its broadcasting license, whichever applies.

CONATEL's sanctioning authority has the effect of creating uniform content in programming rather than permitting plurality or diversity.³⁰⁸ Additionally, RESORTE's vague language and excessive sanctions have established a new mode of prior restraint: self-censorship.³⁰⁹ When unsure of whether the content of a program

302. Human Rights Watch requested that the government redefine or clarify this specific phrase to ensure that these terms would not be used to penalize legitimate political criticism and debate. See HUMAN RIGHTS WATCH, *VENEZUELA COUNTRY REPORT 2003*, *supra* note 50, at 6.

303. Social Responsibility on Radio and Television Act, *supra* note 1, art. 29(1).

304. *Id.*

305. See generally Carlos García Soto, *Revocatoria de Concesiones en la Ley de Responsabilidad Social en Radio y Televisión* [Revocation of Licenses in the Social Responsibility on Radio and Television Act], 104 *REVISTA DE DERECHO PÚBLICO* 35, 40-42 (2005) (discussing revocation of a provider's broadcasting license as a sanction for noncompliance with RESORTE).

306. Social Responsibility on Radio and Television Act, *supra* note 1, art. 19 (14).

307. *Id.* art. 33.

308. See Aguiar, *supra* note 167, at 33 (explaining that RESORTE does not allow plurality, diversity, nor the natural segmentation of radio and television to its various audiences).

309. See *id.* at 43 ("The Law of Content creates, certainly, an undisputable framework of self-censorship to the radio and television service providers."); INTER-AMERICAN COMMISSION OF HUMAN RIGHTS, *supra* note 121, ¶ 398 (stating that the rigorous sanctions contained in RESORTE could generate self-censorship resulting in grave damage to the right to freedom of expression); Atwood, *supra* note 263, at 29 ("The law's severe sanctions for

falls under any of the prohibited categories, a broadcaster will opt not to transmit it in order to avoid being sanctioned, resulting in a self-imposed censorship.³¹⁰ The self-censorship tool also has economic consequences. In 2005, this sanctioning system had the effect of reducing by ten hours daily programming of opinion and informative programs in comparison to the previous year.³¹¹

As expected, the enactment of RESORTE has created an intense debate over its potential consequences, with various sectors of the international and local scene supporting it and others opposing it.

D. *International and Domestic Reactions*

Several international organizations have expressed strong opposition to the enactment of RESORTE.³¹² Even before the bill's approval, the Inter-American Commission on Human Rights expressed its concern about the potential self-censorship effects that the bill might have.³¹³ After the bill's approval, the Commission reaffirmed its position by issuing a press release expressing its serious concerns about RESORTE.³¹⁴ The Organization of Ameri-

violators put broadcasters on notice that the government would be watching mass media content carefully and would use all of its legal leverage to influence it.”); *see also* Interview with Margarita Escudero León, *supra* note 130.

310. This concern was raised by Human Rights Watch long before the approval of the bill. *See* HUMAN RIGHTS WATCH, VENEZUELA COUNTRY REPORT 2003, *supra* note 50, at 5; *see also* Human Rights Watch, Letter to President Chávez, *Venezuela: Limit State Control of Media* (June 30, 2003), <http://hrw.org/press/2003/06/venezuela062303-ltr.htm> (urging President Chávez to take steps to address the serious threats to the freedom of expression in Venezuela).

311. CARLOS CORREA & ANDRÉS CAÑIZÁLEZ, ESPACIO PÚBLICO, INSTITUTO PRENSA Y SOCIEDAD, & FUNDACIÓN KONRAD ADENAUER, INFORME 2005 VENEZUELA: SITUACIÓN DEL DERECHO A LA LIBERTAD DE EXPRESIÓN E INFORMACIÓN 10, 15 (2006), *available at* http://www.ipys.org.ve/innformes_ipys/informe_2005.pdf (stating that from September 2004 to September 2005, the amount of informative and opinion programming dropped by a little more than ten hours).

312. *See* INTER-AMERICAN COMMISSION OF HUMAN RIGHTS, *supra* note 121, ¶ 394 n.187 (“Several international organizations have come out against the proposal, including the Committee to Protect Journalists (CPJ), the Inter-American Press Association (SIP-IAPA), the Press and Society Institute (IPYS), and Human Rights Watch (HRW).”). Other organizations that have criticized the RESORTE Act include the International Press Institute, the World Association of Newspapers, the International Association of Broadcasting, and Reporters Without Frontiers. *See* Reporters Sans Frontiers [Reporters Without Frontiers], *Venezuela: Promulgada la Ley de responsabilidad social [Venezuela: Promulgated the Law of Social Responsibility]*, Dec. 7, 2004, http://www.rsf.org/article.php3?id_article=11953.

313. *See* INTER-AMERICAN COMMISSION OF HUMAN RIGHTS, *supra* note 121, ¶ 401 (“The bill still imposes restrictions on the content of radio and television programs, and this, in conjunction with the vague phrasing used in several of its provisions, could also lead to self-censorship by the media . . .”).

314. *See* Press Release No. 25/04, Inter-American Comm’n of Human Rights, The IACHR Expresses its Concern over the Bolivarian Republic of Venezuela’s Passage of the

can States' Special Rapporteur for Freedom of Expression also expressed its opposition to RESORTE.³¹⁵ Human Rights Watch expressed fear that the Venezuelan government was using the "protection of the children" argument to impose "sanitized" programming on the rest of the population.³¹⁶ The South American regional legal organization known as the Andean Commission of Jurists also criticized RESORTE, stating that it would serve as a legal tool to silence dissenting groups.³¹⁷

One of the most criticized provisions of RESORTE has been the controversial *cadenas*. In its 2003 report, Human Rights Watch expressed its disapproval of this feature.³¹⁸ Meanwhile, the Inter-American Commission on Human Rights asserted that the government's abusive use of *cadenas* may impair freedom of speech and serve as a form of prior restraint.³¹⁹

Domestically, one of the most outspoken press organizations has been the *Instituto de Prensa y Sociedad* (IPYS). It has argued against several provisions of RESORTE, including the creation of the Directorate of Social Responsibility,³²⁰ which is the entity responsible for developing the necessary regulations to implement the technical aspects of RESORTE.³²¹ The IPYS also criticized the sanctioning power that Articles 29³²² and 33³²³ give to CONATEL

Social Responsibility in Radio and Television Bill, (Nov. 30, 2004), <http://www.cidh.org/Comunicados/English/2004/25.04.htm>.

315. INTER-AMERICAN COMMISSION OF HUMAN RIGHTS, *supra* note 121, ¶ 405 (opposing strongly the enactment of RESORTE because it represents a danger to the right of freedom of expression).

316. Human Rights Watch, *Essential Background: Overview of human rights issues in Venezuela*, Dec. 31, 2004, <http://hrw.org/english/docs/2005/01/13/venezu9843.htm> ("Under the guise of protecting children from crude language, sexual situations, and violence, the proposed law would subject adults to restrictive and puritanical viewing standards.").

317. Hueca Guerrero, *supra* note 160, (stating that RESORTE is a legal instrument that the government wishes to employ against media that opposes its policies).

318. See HUMAN RIGHTS WATCH, *WORLD REPORT 2003: EVENTS OF 2002* 167 (2003), available at <http://www.hrw.org/legacy/wr2k3/pdf/venezuela.pdf> ("[O]n occasion the government openly interfered with private television programming by forcing private media stations to transmit government-supplied broadcasts.").

319. INTER-AMERICAN COMMISSION OF HUMAN RIGHTS, *supra* note 121, ¶¶ 485-88.

320. Social Responsibility on Radio and Television Act, *supra* note 1, art. 20.

321. See CORREA & CAÑIZÁLEZ, *supra* note 99, at 41 (stating that the directorate will establish and impose sanctions, implying that a state entity may sanction a medium that does not comply with state dictated norms).

322. See *id.* (criticizing Article 29 of RESORTE for being an excessive sanction).

323. See *id.* at 42 (stating that article 33 gives CONATEL authority to dictate cautionary measures that order radio and television service providers to abstain from broadcasting messages that promote or incite war or public disorder, and that such cautionary measure could turn into a prior restraint mechanism).

and denounced those articles as censorship mechanisms. The IPYS's 2005 report discusses additional criticism of RESORTE.³²⁴

Meanwhile, Venezuela's MINCI has undertaken the task of informing people about the benefits of RESORTE and countering these attacks directed at RESORTE.³²⁵ For example, the MINCI minister stated that the purpose of RESORTE is not to infringe the right to freedom of expression or to place prior restraints on speech, but rather to avoid the transmission of manipulated information in accordance with the Venezuelan Journalist Code of Ethics and other international law.³²⁶

Leading Venezuelan scholars are divided in their opinions of RESORTE. Professor Asalia Venegas, director of the School of Social Communication at the Central University of Venezuela, has expressed support for RESORTE and has criticized the position of Human Rights Watch and Reporters Without Frontiers, arguing that such organizations defend transnational interests rather than the people of Venezuela.³²⁷ Professor Jeremiah O'Sullivan of Andrés Bello Catholic University also supports RESORTE, stating

324. See generally CORREA & CAÑIZÁLEZ, *supra* note 311.

325. The Ministry of Communication and Information has published a series of pamphlets known as the Colección Comunicación Responsable [Responsible Communication Collection]. See Getting to Know Resorte, *supra* 281 (discussing basic aspects of RESORTE and countering its critics); MINISTERIO DE COMUNICACIÓN E INFORMACIÓN [MINISTRY OF COMMUNICATION AND INFORMATION], CONOCIENDO LA LEY RESORTE: LEY DE RESPONSABILIDAD SOCIAL EN RADIO Y TELEVISIÓN: PRODUCCIÓN NACIONAL INDEPENDIENTE [GETTING TO KNOW THE RESORTE ACT: LAW OF SOCIAL RESPONSIBILITY ON RADIO AND TELEVISION: NATIONAL INDEPENDENT PRODUCTION] (2005) (Venez.) (discussing the position of the national independent producer); MINISTERIO DE COMUNICACIÓN E INFORMACIÓN [MINISTRY OF COMMUNICATION AND INFORMATION], CONOCIENDO LA LEY RESORTE: LEY DE RESPONSABILIDAD SOCIAL EN RADIO Y TELEVISIÓN: COMITÉ DE USUARIOS [GETTING TO KNOW THE RESORTE ACT: LAW OF SOCIAL RESPONSIBILITY ON RADIO AND TELEVISION: USERS' COMMITTEE] (2005) (Venez.) (discussing characteristics of the committees that users may form); MINISTERIO DE COMUNICACIÓN E INFORMACIÓN [MINISTRY OF COMMUNICATION AND INFORMATION], CONOCIENDO LA LEY RESORTE: LEY DE RESPONSABILIDAD SOCIAL EN RADIO Y TELEVISIÓN: ASPECTOS GENERALES [GETTING TO KNOW THE RESORTE ACT: LAW OF SOCIAL RESPONSIBILITY ON RADIO AND TELEVISION: GENERAL ASPECTS] (2005) (Venez.) (describing general aspects of RESORTE); MINISTERIO DE COMUNICACIÓN E INFORMACIÓN [MINISTRY OF COMMUNICATION AND INFORMATION], APODERATE DE LA LEY RESORTE: LEY DE RESPONSABILIDAD SOCIAL EN RADIO Y TELEVISIÓN [OWN THE RESORTE ACT: LAW OF SOCIAL RESPONSIBILITY ON RADIO AND TELEVISION] (2005) (Venez.) (describing general characteristics of RESORTE).

326. See Cañizález, *supra* note 161, at 9 (quoting Mr. Andrés Izarra, Minister of Communication and Information, regarding the purpose of RESORTE.).

327. CORREA & CAÑIZÁLEZ, *supra* note 99, at 124-25 (detailing the September 9, 2004 issue of Reporte, a newspaper, in which Venegas stated her support and rejected the criticism made by Human Rights Watch and Reporters Without Frontiers as "at the service of transnational interest").

that it is necessary in order to regulate highly sexual and violent content broadcast during the day.³²⁸

Other prominent scholars such as Professors Allan Brewer-Carías,³²⁹ Asdrúbal Aguiar,³³⁰ Margarita Escudero,³³¹ and Ana Cristina Núñez³³² have expressed strong opposition against RESORTE. Similarly, the director of the Communications Research Institute at the Central University of Venezuela has criticized RESORTE.³³³

E. *Judicial Challenges to RESORTE*

Before its approval by the National Assembly, the RESORTE bill was judicially challenged for being “ordinary” in character rather than “organic.”³³⁴ The petitioners argued that Article 203 of the Constitution of Venezuela required RESORTE to be an organic law because it would have the effect of “developing the constitutional right” of freedom of expression.³³⁵ The distinction between ordinary and organic law matters because the legislative enactment process would require a two-thirds rather than simple majority vote

328. See CORREA & CAÑIZÁLEZ, *supra* note 311, at 86 (detailing the October 1, 2005 issue of *La Nueva*, a newspaper, in which O’Sullivan argued for the necessity of promoting educational programming and regulating high content of sexual and violent images transmitted during daytime hours).

329. See Allan R. Brewer-Carías, *La técnica de los conceptos jurídicos indeterminados como mecanismo de control judicial de la actividad administrativa* [*The Technique of Undetermined Juridical Concepts as a Mechanism of Judicial Control over Administrative Activity*], 35 COLECCIÓN TEXTOS LEGISLATIVOS 217 (2006) (criticizing use of vague and overbroad language in RESORTE).

330. See generally Aguiar, *supra* note 167.

331. See Interview with Margarita Escudero León, *supra* note 130; see also Escudero León & Núñez Machado, *supra* note 193, at 109.

332. See Interview with Ana Cristina Núñez Machado, *supra* note 219; see also Escudero León & Núñez Machado, *supra* note 193, at 109.

333. See CORREA & CAÑIZÁLEZ, *supra* note 99, at 67 (referencing the May 1, 2004 issue of *El Nacional*, a newspaper, in which Oscar Lucien, Director of the Institute, strongly criticized RESORTE because it will serve as a political instrument to punish media outlets that oppose the government).

334. See N^o Expediente 03-0516 [File 03-0516], Sala Constitucional, El Tribunal Supremo de Justicia [Constitutional Chamber, Supreme Tribunal of Justice] (Apr. 11, 2003) (Venez.), available at <http://www.tsj.gov.ve/decisiones/scon/Abril/779-110403-03-0516.htm> [hereinafter Gerardo Blyde Pérez Case]; N^o Expediente 03-0473 [File No. 03-0473], Sala Constitucional, El Tribunal Supremo de Justicia [Constitutional Chamber, Supreme Tribunal of Justice] (Dec. 22, 2003) (Venez.), available at <http://www.tsj.gov.ve/decisiones/scon/Diciembre/3745-221203-03-0473.htm> [hereinafter Rodrigo Pérez Bravo *et al.* Case].

335. VENEZ. CONST. (1999), *supra* note 62, art. 203 (“Organic Laws are those . . . enacted to organize public powers or developing constitutional rights Any bill for the enactment of an organic law . . . must first be accepted by the National Assembly, by a two thirds vote of the members present, before the beginning of debate on the bill.”).

for organic bills.³³⁶ Accordingly, RESORTE, which had the support of the simple majority of Assembly members, would have been more difficult to pass had the Assembly made it organic.

The Court, however, rejected those arguments and concluded that the case was not ripe because the bill had not been approved yet.³³⁷ The Court added that it would constitute a violation of the separation of powers doctrine if the Court decided on the merits of the case in order to decide the character of the law because the Court would be intervening in the duties of the National Assembly.³³⁸

After RESORTE's approval by the National Assembly, several of the aforementioned provisions of RESORTE were again judicially challenged on constitutional grounds. In June 2005, Alfonso Marquina Díaz filed a petition challenging the constitutionality of RESORTE, and requested, as a preliminary judgment, that the Court invalidate RESORTE until the Court reaches a final decision.³³⁹ Jorge Kiriakidis filed a similar action³⁴⁰ in July, as did RCTV network in August 2005.³⁴¹ Oscar Borges Prim filed a fourth action of nullity in February 2006.³⁴² In response to a request by the Solicitor General, the Constitutional Chamber consolidated

336. *Id.*

337. See Gerardo Blyde Pérez Case, *supra* note 334; Rodrigo Pérez Bravo *et al.* Case, *supra* note 334.

338. RESORTE was again challenged on these grounds in March 2006. See N^o Expediente 06-0401 [File No. 06-0401], Sala Constitucional, El Tribunal Supremo de Justicia [Constitutional Chamber, Supreme Tribunal of Justice] (Apr. 12, 2007) (Venez.), available at <http://www.tsj.gov.ve/decisiones/scon/Abril/623-120407-06-0401.htm> [hereinafter Corpomedios GV Inversiones, C.A. Case]. The Court consolidated the Corpomedios GV Inversiones, C.A. case brought by the RCTV Network. See N^o Expediente 05-1852 [File No. 05-1852], Sala Constitucional, El Tribunal Supremo de Justicia [Constitutional Chamber, Supreme Tribunal of Justice] (Dec. 8, 2005) (Venez.) [hereinafter RCTV Case]; see Corpomedios GV Inversiones, C.A. Case, *supra* (detailing the combination of the cases).

339. See N^o Expediente 05-1430 [File No. 05-1430], Sala Constitucional, El Tribunal Supremo de Justicia [Constitutional Chamber, Supreme Tribunal of Justice] (Dec. 16, 2005) (Venez.), available at <http://www.tsj.gov.ve/decisiones/scon/Diciembre/5128-161205-05-1430.htm> [hereinafter Alfonso Marquina Case] (detailing the July 30, 2005 filing of the case to invalidate RESORTE).

340. See N^o Expediente 05-1449 [File No. 05-1449], Sala Constitucional, El Tribunal Supremo de Justicia [Constitutional Chamber, Supreme Tribunal of Justice] (Dec. 16, 2005) (Venez.), available at <http://www.tsj.gov.ve/decisiones/scon/Diciembre/5126-161205-05-1449.htm> [hereinafter Jorge Kiriakidis Case] (detailing the July 4, 2005 filing of the case to invalidate RESORTE).

341. See RCTV Case, *supra* note 338.

342. N^o Expediente 06-0072 [File No. 06-0072], Sala Constitucional, El Tribunal Supremo de Justicia [Constitutional Chamber, Supreme Tribunal of Justice] (Feb. 14, 2007) (Venez.), available at <http://www.tsj.gov.ve/decisiones/scon/Febrero/220-140207-06-0072> [hereinafter Oscar Borges Case].

these petitions into File No. 05-1852,³⁴³ and as of the date of this Article, the Court is still deciding them.

In the *Alfonso Marquina Case*, petitioner argued that the *cadenas* were a “legal” method used by the Executive branch to arbitrarily impose upon radio and television operators the obligation to transmit official messages that are not at all of public interest.³⁴⁴ Petitioner made a similar argument to challenge the MINCI messages.³⁴⁵ Petitioner added that this arbitrary imposition of messages by the government on private media is contrary to the freedom of expression of thoughts provided by the 1999 Constitution.³⁴⁶

Next, petitioner asserted that the programming publication requirement in Article 18 of RESORTE establishes a prior restraint because after a channel has submitted its weekly guide, it cannot change the programming except for the reasons stated in the article.³⁴⁷ Furthermore, petitioner asserted that the rating system contained in Articles 6 and 7 of RESORTE violates the right to freedom of expression and constitutes a prior restraint. These articles were also attacked on the grounds of vagueness due to the numerous unclear legal terms used in the legislation.³⁴⁸ Petitioner also argued that the restrictions on commercial advertisements contained in Articles 8, 9, and 14 violate the freedom of expression provision of the American Convention on Human Rights, which establishes that publicity enjoy the same guarantees as any other manifestations of thoughts.³⁴⁹

Additionally, Article 14, according to petitioner, is an example of the government forcing culture on the people and limiting what music people can listen to.³⁵⁰ Because the provision was enacted with the purpose of limiting foreign music in Venezuela, petitioner concluded that the provision discriminates against foreign music.³⁵¹

Other provisions challenged by petitioner included the timeliness, truthfulness, and impartiality requirements contained in Arti-

343. *See id.* (detailing how challenges to RESORTE were combined under the assigned file number 05-1852).

344. *See* Alfonso Marquina Case, *supra* note 339.

345. *See id.*

346. *See id.*

347. *See id.*

348. *See id.*

349. *See id.*

350. *See id.*

351. *See id.*

cles 3(3) and 5(2), as well as the sanctions and cautionary measures in Articles 28, 29 and 33 of RESORTE.³⁵²

In the *Ciro García Moreno Case*, petitioner argued that a 2 percent tax on service providers established by Article 25 to set up a Social Responsibility Fund constitutes a restriction on the right of freedom of expression.³⁵³

The Court declared itself competent to adjudicate these cases, but instructed the parties to follow a procedure established in prior decisions,³⁵⁴ which requires the president of the National Legislative Assembly, the attorney general, and the solicitor general of the Republic to present their arguments.³⁵⁵ As of the summer of 2007, the Constitutional Chamber had not yet reached a final determination in these cases.

Despite all the criticism and judicial actions to invalidate RESORTE, no one has brought a case to the Inter-American Commission on Human Rights directly related to RESORTE.³⁵⁶ One reason for this may be that plaintiffs would rather exhaust domestic remedies before filing claims at transnational courts. Or perhaps they consider their cases not strong enough to warrant the utilization of resources on international litigation. For now, we will just have to wait for the Constitutional Chamber's decision on these cases.

352. *See id.*

353. *See* N° Expediente 05-2352 [File No. 05-2352], Sala Constitucional, El Tribunal Suprema de Justicia [Constitutional Chamber, Supreme Tribunal of Justice] (July 19, 2006) (Venez.), available at <http://www.tsj.gov.ve/decisiones/scon/Julio/1417-190706-05-2352.htm> [hereinafter *Ciro García Moreno Case*].

354. *See* N° Expediente 04-0824 [File No. 04-0824], Sala Constitucional, El Tribunal Suprema de Justicia [Constitutional Chamber, Supreme Tribunal of Justice] (Aug. 19, 2004) (Venez.), available at <http://www.tsj.gov.ve/decisiones/scon/Agosto/1645-190804-04-0824.htm> (holding that in every case where a statute is challenged on constitutional grounds, the President of the National Assembly, the Attorney General, and the Solicitor General of the Republic shall have an opportunity to express their views and arguments regarding the challenged law) [hereinafter *Federal Constitution of the State of Falcón Case*]; N° Expediente 05-0159 [File No. 05-0159], Sala Constitucional, El Tribunal Suprema de Justicia [Constitutional Chamber, Supreme Tribunal of Justice] (July 19, 2005) (Venez.), available at <http://www.tsj.gov.ve/decisiones/scon/Julio/1795-190705-05-0159.htm> (same) [hereinafter *Inversiones M7441, C.A. Case*].

355. *See* Alfonso Marquina Case, *supra* note 339.

356. *See* Ignacio Álvarez, Special Rapporteur on Freedom of Expression, Inter-American Comm'n on Human Rights, Address at International Law Week at the George Washington University Law School: Trends on the Situation of Freedom of Expression in the Americas & the Role of the Inter-American Human Rights Enforcement System (Feb. 7, 2007) (stating that since the enactment of the RESORTE Act there have not been any complaints filed at the Inter-American Commission on Human Rights about violations of freedom of expression in Venezuela).

V. ARE THESE RESTRICTIONS JUSTIFIED?

In response to the high amount of criticism by domestic and foreign sectors, the government of Venezuela has invoked various arguments to justify the restrictions on freedom of expression contained in RESORTE. Relying on the 1999 Constitution and various human rights treaties ratified by Venezuela, the government appeals to the protection of children and adolescents,³⁵⁷ national security concerns,³⁵⁸ public health,³⁵⁹ multiculturalism,³⁶⁰ and moral values.³⁶¹ The issue is whether these arguments are strong enough to justify the restrictions on freedom of expression contained in RESORTE.

This Section analyzes the government's arguments by looking into the unique internal situation of Venezuela. Comparison with other foreign legal systems may be useful to the discussion and to support the conclusion.

A. *National Security*

It is widely accepted that in order to protect the existence of the state, it is sometimes necessary to restrict freedom of speech.³⁶² Examples of this may be found in nearly every country. A recent example comes from the United Kingdom, where the British Parliament enacted anti-terrorism laws with the purpose of discouraging incitement of terrorist activities. The Parliament adopted the Terrorism Act of 2006, which punishes anyone who publishes statements encouraging acts of terrorism with up to seven years of imprisonment.³⁶³

Meanwhile, the Australian government recently detained and later deported peace activist and U.S. citizen Scott Parkin for

357. See VENEZ. CONST. (1999), *supra* 62, art. 78; Convention on the Rights of the Child, *supra* note 284, art. 3; Social Responsibility on Radio and Television Act, *supra* note 1, art. 1.

358. See VENEZ. CONST. (1999), *supra* note 62, art. 15; Social Responsibility on Radio and Television Act, *supra* note 1, art. 1.

359. See Social Responsibility on Radio and Television Act, *supra* note 1, art. 1.

360. See VENEZ. CONST. (1999), *supra* note 62, arts. 99-101.

361. See Social Responsibility on Radio and Television Act, *supra* note 1, art. 1.

362. See Shimon Shetreet, *Introduction to FREE SPEECH AND NATIONAL SECURITY* xix, xix (Shimon Shetreet ed., 1992) ("National security demands, at times, the restriction of freedom of speech, in order to protect the existence of the state and the framework of society.").

363. See Terrorism Act 2006, c. 11, § 1 (Eng.), available at <http://www.opsi.gov.uk/acts/acts2006/60011—b.htm#1>.

speaking at various social fora about “nonviolent direct action.”³⁶⁴ The Australian government’s justification for Parkin’s deportation was that his expressions posed a threat to the national security of Australia.³⁶⁵

Even more striking is the limitation of speech in the German constitutional order. The German Basic Law expressly places the right to freedom of expression second to the right of human dignity and the preservation of its democratic institutions.³⁶⁶ Consequently, when speech conflicts with the dignity of a person or the democratic order, the former must yield.³⁶⁷ Thus, expressions calling for the overthrow of the government are not constitutionally protected.

Ironically, in the United States, where the freedom of speech is considered overprotected in comparison with the rest of the world, its constitutional jurisprudence has long established national security and incitement to violence as exceptions to the prior restraint doctrine.³⁶⁸ Moreover, after the events of September 11, 2001, restrictions on speech on the grounds of national security have become stricter.³⁶⁹

364. For an in-depth presentation of the story of Scott Parkin, see generally Friends of Scott Parkin, <http://www.scottparkin.org> (last visited March 13, 2009).

365. *See id.* For a critique of Australia’s counter-terrorism legislation and its purported infringements of civil liberties and free speech guarantees, see generally Michael Head, ‘Counter-Terrorism’ Laws: A Threat to Political Freedom, Civil Liberties and Constitutional Rights, 26 MELB. U. L. REV. 666 (2002).

366. GRUNDGESETZ [GG] [Constitution] art. 1(1) (F.R.G) (“Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.”); *see also* RONALD J. KROTOSZYNSKI, JR., THE FIRST AMENDMENT IN CROSS-CULTURAL PERSPECTIVE 92-104 (2006) (stating that Germany is a militant democracy where speech that is aimed at destructing democracy has no constitutional protection).

367. *See Id.* at 94 (arguing that when cases present facts in which human dignity and free speech collide, free speech must yield).

368. *See* *Near v. Minnesota*, 283 U.S. 697, 716 (1931) (“The security of the community life may be protected against incitements to acts of violence and the overthrow by force of orderly government. The constitutional guaranty of free speech does not ‘protect a man from an injunction against uttering words that may have all the effect of force.’”) (quoting *Schenck v. United States*, 249 U.S. 47, 52 (1919)).

369. *See* Julie H. Margetta, *Taking Academic Freedom Back to the Future: Refining the “Special Concern of the First Amendment,”* 7 LOY. J. PUB. INT. L. 1, 2-3 (2005) (stating that PATRIOT Act contains provisions that are certain to chill expression of academics and may subject scholars to criminal liability). *See generally* Kathryn A. Ruff, *Scare to Donate: An Examination of the Effects of Designating Muslim Charities as Terrorist Organizations on the First Amendment Rights of Muslim Donors*, 9 NYU J. LEGIS. & PUB. POL’Y 447 (2006) (arguing that prohibition on donating money to Muslim charity organizations that have been designated as terrorist entities by U.S. government constitutes a violation of the right to freedom of speech under First Amendment).

Among the numerous other countries that restrict the right to freedom of expression based on national security concerns, are Canada,³⁷⁰ Israel,³⁷¹ and Singapore.³⁷²

Certainly, every country encounters different situations that endanger its security, and consequently each has its own concept of what constitutes a threat to national security.³⁷³ For instance, a situation that may pose a low threat to the national security of New Zealand could be considered an imminent danger in Israel, where a permanent state of alert has existed since its creation.

The Venezuelan experience has been full of political animosity. After the 2002 media coup that temporarily removed the government from power, an open battle emerged between the private media and the government. Since then, an increasingly outspoken private media has engaged in promoting anti-government messages.

Moreover, various private outlets have echoed the words of Reverend Pat Robertson,³⁷⁴ calling for the assassination of President Chávez. This type of action of merely broadcasting a message urging for the execution of a foreign leader is in complete violation of international conventions.³⁷⁵ Meanwhile, on multiple occasions, President Chávez has publicly denounced various assassination plots against him that have been uncovered.³⁷⁶

370. See generally Ronald G. Atkey, *Reconciling Freedom of Expression and National Security*, 41 U. TORONTO L.J. 38 (1991) (discussing the Canadian legal framework for limitations on freedom of expression by national security).

371. See Mordechai Kremnitzer, *Free Speech and Criminal Code Provisions for the Protection of the State Security: The Israel Case*, in *FREE SPEECH AND NATIONAL SECURITY*, *supra* note 362, at 86-92 (discussing various provisions contained in Israel's Penal Code that limit the right to freedom of speech in order to safeguard the security of the State of Israel).

372. See Internal Security Act, (2005) Cap. 143, pt. III, § 20(1)(a)-(d) (Sing.), available at http://statutes.agc.gov.sg/non_version/cgi-bin/cgi_retrieve.pl?actno=REVED-143 (prohibiting publication of messages that incite violence or disobedience, messages likely to breach the peace, or messages prejudicial to national interest, public order, or security of Singapore).

373. See SHETREET, *supra* note 362, at xix. ("Each state will have its own concept of what constitutes a threat to national security.")

374. See Media Matters for America, *Robertson again calls for Chávez's assassination: 'Not now, but one day,' Feb. 3, 2006*, <http://mediamatters.org/items/200602030003>.

375. See American Convention on Human Rights, *supra* note 94, art. 13; International Covenant on Civil and Political Rights, *supra* note 79, arts. 19, 20 (prohibiting the incitement of violence through the media).

376. See, e.g., James Menéndez, *Chávez foils assassination plot*, BBC NEWS, May 9, 2004, <http://news.bbc.co.uk/2/hi/americas/3699245.stm>. See also *Castro reveals 'plot' to kill ally*, BBC NEWS, Dec. 1, 1999, <http://news.bbc.co.uk/2/hi/americas/544552.stm>; *Chávez foils assassination plot*, BBC NEWS, Oct. 20, 2002, <http://news.bbc.co.uk/2/hi/americas/2344973.stm>; *Chávez assassination row erupts*, BBC NEWS, Aug. 23, 2005, <http://>

This array of events has given the Venezuelan government sufficiently valid motives for restricting the content of messages transmitted through the media, whether private or government-owned. At the same time, one would think that Venezuela's government is extremely interested in preserving its constitutional order and avoiding another media coup. Nevertheless, these restrictions may not be so easily understood in politically stable countries, particularly in the United States.³⁷⁷

The restrictions on freedom of expression imposed by RESORTE are justified based on the security of the nation. It is a vital interest of the state to protect its political stability and prevent potential plots to overthrow its democratically elected government, and the political unrest in Venezuela, combined with the antagonistic role the media has played in it, justify the RESORTE restrictions.

B. *Protection of Children*

The second reason the Venezuelan government gives to justify RESORTE's restriction on freedom of expression is the protection of children.³⁷⁸ The idea of the media protecting children is based on constitutional norms and international human rights treaties.³⁷⁹ These legal instruments urge the media to disseminate informa-

news.bbc.co.uk/2/hi/americas/4178608.stm; *Venezuela head in new TV warning*, BBC NEWS, May 29, 2007, <http://news.bbc.co.uk/2/hi/americas/6702965.stm>.

377. Despite its long history of failing to preserve civil liberties when national security is threatened, the United States has not had any recent attempt to overthrow its government, much less an attempt supported or facilitated by the private media. Indeed, if a private media outlet attempted a coup d'état, they would be taken off the air in a matter of hours. Neither the U.S. government nor the American people would tolerate an abuse of First Amendment rights in order to destroy a democratic order. See William J. Brennan, *The American Experience: Free Speech and National Security*, in FREE SPEECH AND NATIONAL SECURITY, *supra* note 362, at 10-20 (describing the United States' "long history of failing to preserve civil liberties" during the Alien and Seditions Acts era, the Civil War, and the two World Wars.); see also David Fontana, *A Case for the Twenty-First Century Constitutional Canon: Scheiderman v. United States*, 35 CONN. L. REV. 35, 65 (2002) (listing "greatest hits" of U.S. wartime constitutional law: *Korematsu v. United States*, 323 U.S. 213 (1944), *Hirabayashi v. United States*, 320 U.S. 81 (1943), *Ex parte McCordle*, 74 U.S. (7 Wall.) 506 (1868), and *Ex parte Quirin*, 317 U.S. 1 (1942), as examples of failure by the U.S. Supreme Court to protect civil liberties).

378. See VENEZ. CONST. (1999), *supra* note 62, arts. 54, 58, 75, 78 (relating to the protection of children and adolescents); Organic Law for the Protection of the Child and Adolescent, *supra* note 135; see also Norma Paz de Henríquez, *Derechos constitucionales de la infancia [Constitutional Rights of the Infancy]*, 25 ANUARIO DEL INSTITUTO DE DERECHO COMPARADO (UNIVERSIDAD DE CARABOBO) 17 (2002) (discussing rights of children contained in the 1999 Venezuelan Constitution).

379. See Convention on the Rights of the Child, *supra* note 284, arts. 13, 17; International Covenant on Civil and Political Rights, *supra* note 79, art. 24.

tion that might result in educational, social, and cultural benefits to children.³⁸⁰ Based on these transnational norms, the government has placed a duty upon the media to serve as an educational tool for society.³⁸¹

In the United States, studies have shown that a child spends an average of three hours a day watching television.³⁸² Considering this substantial number of hours in front of a television set, Congress tried to encourage the use of television as an educational tool for children by establishing the National Endowment for Children's Educational Television³⁸³ and the Children's Television Act of 1990 (CTA).³⁸⁴ Although not as broad as RESORTE, the CTA places restrictions on advertisements during children's programming and requires broadcasters to air programs that benefit children.³⁸⁵ The CTA also warns broadcasters that their compliance with the CTA will be taken into account when they apply to renew their license.³⁸⁶

Before the enactment of RESORTE, most producers did not have children's interests in mind when making their programming. Indeed, Venezuelan networks did not aim their programming as a whole at a young audience, and barely broadcast any children's program.³⁸⁷ Instead, networks produced a significant

380. See Convention on the Rights of the Child, *supra* note 284 ("Parties recognize the important function performed by the mass media and shall ensure that the child has access to information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral well-being and . . . health.").

381. See VENEZ. CONST. (1999), *supra* note 62, art. 108 (stating that the communications media, public and private, must contribute to civil education); see also Organic Law for the Protection of the Child and Adolescent, *supra* note 135, art. 69.

382. See Children's Television Act of 1990 § 202, Pub. L. No. 101-437 (Congressional Statement of Findings) ("[T]elevision is watched by children about three hours each day on average and can be effective in teaching children . . .").

383. National Endowment for Children's Educational Television, 47 U.S.C. § 394 (2006).

384. Children's Television Act of 1990, 47 U.S.C. § 303a.

385. *Id.* § 303a(a) ("The [Federal Communications] Commission shall . . . prescribe standards applicable to commercial television broadcast licensees with respect to the time devoted to commercial matter in conjunction with children's television programming."); *id.* § 303a(b) (requiring such standards "limit the duration of advertising in children's television programming to not more than 10.5 minutes per hour on weekends and not more than 12 minutes per hour on weekdays").

386. *Id.* § 303b.

387. See MINISTERIO DEL PODER POPULAR PARA LA COMUNICACIÓN Y LA INFORMACIÓN [MINISTRY OF COMMUNICATION AND INFORMATION], CONOCIENDO LA LEY RESORTE [GETTING TO KNOW THE RESORTE ACT] (2005), http://www.minci.gov.ve/noticias-ley_resorte/1/925/conociendo_la_ley.html (discussing RESORTE's priority to make more children's programming available).

amount of daily *telenovelas* and other programs, the content of which was often unsuitable for children to watch.³⁸⁸ RESORTE has helped to manage this problem by requiring television networks to devote a minimum of three hours per day of their programming to children's shows.³⁸⁹

One could argue, however, that it is excessive to order every channel to broadcast a minimum of three hours per day of children's programming during the all-user block, considering that RESORTE also requires that the content of all programming during all-user and supervised blocks be directed at children.³⁹⁰ Rather than reaching a fair balance between the various audiences, RESORTE attempts to satisfy the necessities of children and adolescents by significantly neglecting those of adult viewers.

Perhaps a more reasonable and tailored measure would be to require networks to broadcast only two hours of children's programming. These two hours could be broadcast at any time between 3:00 p.m. to 8:00 p.m., when kids are home from school. Additionally, requiring three hours from 7:00 a.m. to 7:00 p.m. results in children's programming during times when kids are in school. Therefore, one could argue that the three-hour requirement does not meet RESORTE's purpose of providing "integral development" to children.³⁹¹

Another problem is that viewers do not have the option of simply changing channels, as the three-hour provision applies to every channel, including specialized ones. Therefore, an adult viewer who does not wish to watch a children's program or sanitized programming may have to wait until 11:00 p.m.

Furthermore, this provision dictates specific content that networks must broadcast. For example, a twenty-four hour news network such as Globovisión had to change its concept aimed at adults in order to comply with this requirement.³⁹² Similar changes have been made by music and movie channels.

388. See Interview with Natali Fani, *supra* note 100; see also Venezuela Information Office, *Venezuela's Law of Social Responsibility in Radio and Television*, <http://www.rethinkvenezuela.com/downloads/medialaw.htm>.

389. Social Responsibility on Radio and Television Act, *supra* note 1, art. 14.

390. See Interview with Ana Cristina Núñez Machado, *supra* note 219.

391. A similar situation occurred in the United States after the enactment of the Children's Television Act of 1990, where children's programming aired at virtually any time, including after midnight, clearly defeating the objective of this legislation. See Diane Aden Hayes, *The Children's Hour Revisited: The Children's Television Act of 1990*, 46 FED. COMM. L.J. 293, 306 (1994).

392. See Interview with Ana Cristina Núñez Machado, *supra* note 219.

Accordingly, given the tremendous impact that television could have on children, the protection of the children constitutes a reasonable justification to restrict the content of the programming, but restrictions should not be imposed on programming during the adult hours or on specialized channels.

C. *Public Health*

There is little doubt that public health is another vital state interest. This interest could be furthered through numerous means, including providing free health care, informing the public about disease prevention, and maintaining a clean environment. RESORTE addresses public health by strictly prohibiting any advertisements of alcohol or tobacco products at anytime on radio and television.³⁹³ Although it may be argued that this total prohibition is excessive because children are not expected to be watching television overnight when programming is aimed at an adult audience, it must be noted that the purpose of the prohibition on tobacco and alcohol advertisement is to protect not only children's health but that of the entire population.

In the United States, advertisements of cigarettes have been prohibited since 1971.³⁹⁴ France and the United Kingdom have adopted a similar approach.³⁹⁵ The European Union tried to expand the ban on tobacco advertising throughout the Continent;³⁹⁶ however, the European Court of Justice³⁹⁷ invalidated that attempt because it contravened the right to freedom of expression contained in the European Convention on Human Rights.³⁹⁸

In 1997 Canada enacted the Tobacco Act, which prohibits advertisement of tobacco products by the media.³⁹⁹ The previous legisla-

393. Social Responsibility on Radio and Television Act, *supra* note 1, art. 9.

394. *See generally* Lorillard Tobacco v. Reilly, 533 U.S. 525 (2001). For the current U.S. prohibition on advertisement, see Federal Cigarette Labeling and Advertising Act (FCLAA), 15 U.S.C. §§ 1331-1350 (2006).

395. *See* BARENDT, *supra* note 103, at 413 (discussing tobacco ban laws in France and the United Kingdom).

396. *See id.* at 413 n.101 (discussing the 1998 European Union directive, which required states to introduce comprehensive bans on tobacco advertising.).

397. Case C-376/98, Germany v. Parliament and Council, 2000 E.C.R. I-8419, ¶ 118 (invalidating Directive 98/43, which banned any advertising or sponsorship of tobacco products in the Community).

398. Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 80, art. 10.

399. *See* Tobacco Act, 1997 R.S.C., c. 13, § 31(1) (Can.), available at <http://laws.justice.gc.ca/en/T-11.5/> ("No person shall, on behalf of another person, with or without consideration, publish, broadcast or otherwise disseminate any promotion that is prohibited by this Part."); *id.* § 31(3) ("No person in Canada shall, by means of a publica-

tion dealing with the advertisement of tobacco products was held to violate the free commercial speech doctrine.⁴⁰⁰

Under Singapore law, a person may be fined or imprisoned if convicted of participating in the publication of any advertisement that contains "any express or implied inducement, suggestion or request to purchase or to smoke any tobacco product."⁴⁰¹ The law goes further by banning any mention or illustration of the name, brand, or image commonly associated with tobacco products.⁴⁰² The prime minister, however, has discretion to authorize advertisement that mentions the brand name or persons associated with the tobacco industry for the purpose of activities unconnected with any tobacco product.⁴⁰³

Due to the devastating consequences of tobacco and alcohol consumption on the Venezuelan population's health, the government's approach has been to prevent such problems by simply limiting access to such malign products. In order to achieve this end, the government has totally prohibited the commercial advertisement of tobacco and alcohol products on radio and television. The only permissible broadcast of image or sounds relating to tobacco and alcohol is for educating the public about their dangers to health and consequently discouraging their use.⁴⁰⁴

The total prohibition on advertising tobacco and alcohol products is an efficient approach to avoiding serious public health problems. This is so because viewers, particularly adolescents, are not exposed to the publicity portraying these products as non-harmful. The practical effect would be that this sector of the population is less vulnerable to becoming tobacco and alcohol users, and therefore less probable of acquiring diseases related with these products such as hypertension, diabetes, emphysema, cirrhosis,

tion that is published outside Canada, a broadcast that originates outside Canada or any communication other than a publication or broadcast that originates outside Canada, promote any product the promotion of which is regulated under this Part, or disseminate promotional material that contains a tobacco product-related brand element in a way that is contrary to this Part.").

400. *See* RJR MacDonald Inc. v. Canada, [1995] 3 S.C.R. 199 (Can.) (striking down the Tobacco Control Act, as a violation of the commercial free speech doctrine). *See generally* ROGER A. SHINER, FREEDOM OF COMMERCIAL EXPRESSION 87-93 (discussing the RJR MacDonald case and its aftermath).

401. *See* Smoking (Control of Advertisements and Sale of Tobacco) Act, (2003) Cap. 309, pt. II, § 3(1)(a) (Sing.), available at <http://statutes.agc.gov.sg/>.

402. *See id.* at Cap. 309, pt. II, §§ 3(1)(c)(i)-(iii).

403. *See id.* at Cap. 309, pt. II, §§ 3(2)(a)-(b).

404. *See id.*

and some types of cancer. Accordingly, this restriction on tobacco and alcohol advertisement is fully justified.

D. *Other Sociological Factors*

Another justification given by the government for restricting expression is the multicultural factors present in contemporary Venezuelan society. The idea of preserving the various components of the country's culture has been of utmost importance to the Chávez government as a way to develop a sense of national identity in the public.

Countries around the world have adopted measures to protect a nation's multi-ethnicity and cultural diversity. In Canada, the 1982 Constitution Act contains provisions protecting the French language in those provinces where French is widely spoken and securing rights for the aboriginal people of Canada.⁴⁰⁵ In New Zealand, the government ratified a treaty to give its indigenous communities more autonomy and to provide them with rights unique to their way of living.⁴⁰⁶

In Singapore, a multi-ethnic nation composed of Chinese, Indian, and Malay groups, the constitution establishes four official languages.⁴⁰⁷ It also places responsibility on the government to care for the interests of the racial and religious minorities in the country, specifically those of the Malay minority.⁴⁰⁸

The Venezuelan constitutional order expressly recognizes and protects the various indigenous communities in the country.⁴⁰⁹ The government is highly interested in preserving the indigenous population, as it has decreased in recent decades.⁴¹⁰ But the government also intends to protect the other cultures that make up

405. See Constitution Act, 1982, Schedule B to the Canada Act 1982, ch. 11, pt. II, §§ 16-22 (U.K.), as reprinted in R.S.C., No. 44 (Appendix 1982), available at http://laws.justice.gc.ca/en/Const/annex_e.html.

406. See Geoffrey Palmer, *The New Zealand Constitution and the Power of the Courts*, 15 *TRANSNAT'L L. & CONTEMP. PROBS.* 551, 568-70 (discussing the Treaty of Waitangi, which guarantees aboriginal rights in New Zealand).

407. Constitution of the Republic of Singapore art. 153A(1) ("Malay, Mandarin, Tamil and English shall be the 4 official languages in Singapore.").

408. *Id.* art. 152 ("It shall be the responsibility of the Government constantly to care for the interests of the racial and religious minorities in Singapore. . . . The Government shall exercise its functions in such manner as to recognise the special position of the Malays, who are the indigenous people of Singapore . . .").

409. VENEZ. CONST. (1999), *supra* note 62, arts. 119-25. See also BREWER-CARIAS, *supra* note 57, at 352 (stating that indigenous rights are contained in articles 119-25 of the 1999 Constitution).

410. See MARC BECKER, *Indigenous Rights in Venezuela*, in *THE VENEZUELA READER: THE BUILDING OF A PEOPLE'S DEMOCRACY*, *supra* note 2, at 44-48.

modern Venezuela, such as Caucasian, black, and mixed races.⁴¹¹ Caribbeans and Andeans, in addition to the *llaneros*, live in the lowlands deep in Venezuela's countryside. A considerable Arab population has, for decades, made Venezuela its home. Moreover, a German community on the outskirts of Caracas has settled and proudly preserved its European customs and traditions. Accordingly, Venezuela's cultural diversity merits preservation and protection by the government.

Considering the substantial amount of foreign music that reaches Venezuela, especially in the English language, the government is interested in preventing such music from displacing local music. Thus, at least half of the music radio stations play must be Venezuelan.⁴¹²

The Venezuelan government has also evoked moral concerns to justify restrictions to freedom of speech.⁴¹³ Venezuela, like other Latin American nations, has traditionally been a very religious, conservative, and family-oriented society. This has been one of the central considerations in the creation of RESORTE.

Another consideration may be the interest of the government in providing media access to ethnic minorities. The government calls it "democratization of the media."⁴¹⁴ This concern comes from the fact that in Venezuela, as in the rest of the continent, private media outlets are controlled by a handful of wealthy corporations that look after only their own personal and economic interests. Consequently, non-elite minority groups have very limited, if any, access to private media.⁴¹⁵ Accordingly, to accomplish a more complete protection of Venezuela's multiculturalism, the government has established several measures of constitutional rank: (i) protection of languages,⁴¹⁶ (ii) protection of national ethnic music, (iii) cul-

411. See Interview with Natali Fani, *supra* note 100 (acknowledging the government's interest in protecting Venezuela's modern cultural diversity).

412. See Social Responsibility on Radio and Television Act, *supra* note 1, art. 14.

413. See Interview with Natali Fani, *supra* note 100 (stating that moral issues, as well as national security and public health, are valid reasons to put some restrictions on the freedom of expression as long as they are done with the intention of protecting society as a whole).

414. See Social Responsibility on Radio and Television Act, *supra* 1, arts. 12-18 (discussing democratization of the media and participation of the people).

415. See Graubart, *supra* note 139 ("[M]ost of Latin America has private ownership of the press which has resulted in severe concentration of ownership. Due to the great poverty there, the nonelite have too little capital and political power to obtain even the limited alternative media that nonelite have attained in the United States.").

416. See BREWER-CARÍAS, *supra* note 57, at 189 (discussing the constitutional languages provisions).

tural and patrimonial history,⁴¹⁷ and (iv) cultural and educational rights.⁴¹⁸

Although these sociological factors are important in Venezuela's society, it is questionable whether they are persuasive enough as to restrict freedom of expression.

VI. CONCLUSION

There is no doubt that RESORTE contains several provisions that clearly restrict the right to freedom of expression and may even constitute prior restraints. Considering Venezuela's contemporary political situation, most of the restrictions contained in RESORTE are justified on the grounds of national security, protection of children, and public health, such as the several prohibitions on alcohol, drugs, and tobacco.

Some provisions, however, are either excessive or simply not justifiable. For instance, the prohibition of all anonymous propaganda or publicity is excessive. Also, the vague and over-inclusive language utilized in Articles 6 and 7 is not justified. Thus, I recommend the use of a more comprehensible terminology to describe such important provisions.

The so-called insult laws regarding disrespectful comments about the president, contained in the Penal Code and upheld by the Constitutional Chamber in Judgment 1942, provide for extremely severe punishments. Comments such as accusing the top executive of being a dictator, liar, or murderer are not justified under the national security argument, absent a direct threat to the president's life. I consider these laws to be excessive and inadequate to justify restrictions on freedom of speech.

RESORTE contains many positive provisions, but it needs some adjustments. Hopefully, the Supreme Tribunal of Justice's Constitutional Chamber will be able to make such adjustments as constitutional challenges increase. Meanwhile, we have no other option but to wait for the decision on its pending cases.

417. *See id.* at 352 ("Articles 98 to 191 of the 1999 Constitution establish a set of duties upon the State relating to cultural and historic patrimony.").

418. *See id.*

ANNEX

TABLE 2: PRESENTATION BLOCKS

Block	Time	User
All-Users	7 a.m. to 7 p.m.	Children without parental supervision
Supervised	5 a.m. to 7 a.m. and 7 p.m. to 11 p.m.	Children with parental supervision
Adult	11 p.m. to 5 a.m.	Adults, older than 18 years

* Adapted with permission from source: Venezuela Information Office, Venezuela's Law of Social Responsibility in Radio and Television, <http://www.rethinkvenezuela.com/downloads/medialaw.htm> (last visited May 16, 2009).

TABLE 3: ELEMENTS NOT ALLOWED FOR TRANSMISSION

Block	Language	Health	Sex	Violence	Other
All-User	B, C	B, C, D	B, C, D	C, D, E	Gambling games, lotteries (except non-profit)
Supervised	C	D	D	E	
Adult			E		

* Adapted with permission from source: Venezuela Information Office, Venezuela's Law of Social Responsibility in Radio and Television, <http://www.rethinkvenezuela.com/downloads/medialaw.htm> (last visited May 16, 2009).