Towards an Internet Free of Censorship:

standards, contexts and lessons from the Inter-American Human Rights System

Agustina Del Campo
Compiler

Faculta de Derecho
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Center for Studies on Freedom of Expression
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Director
Agustina Del Campo

Mario Bravo 1050
(C1175ABW) Ciudad de Buenos Aires
Argentina
Tel.: (54 11) 5199-4500 | cele@palermo.edu
www.palermo.edu/cele

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Foreword

Agustina Del Campo*

In recent years and in light of the rapid and significant developments in technology, we have witnessed the emergence of new developments that challenge and update the debate in the recognition of freedom of expression. Debates have been reopened regarding the power of monopolies in the circulation of discourse, misinformation and false news, the right to privacy and protection of personal data, anonymity, prior censorship, regulation of hate speech and the responsibilities of the private sector, to mention just some of the issues that are currently news in our region and the world. In this scenario, the relevance and validity of the current standards of freedom of expression is put in question and how the challenges of the digital age differ from those that defined the key documents of the inter-American framework.

Advisory Opinion No. 5/85 of the Inter-American Court of Human Rights is perhaps the most relevant document and the one that kick started the work on freedom of expression in the region. The Advisory Opinion emerged as a guide to understand the relevant position of freedom of expression and the fundamental role played by media and journalism and contributed to the inter-American legal framework the first detailed interpretation of Article 13 of the American Convention on Human Rights, which establishes the conditions for any restriction on freedom of expression or the activity of the media to be legitimate and compatible with the Convention. In the Advisory Opinion, the Court highlights the role of journalism and that the regulation of media has to be established under operating conditions that are appropriate to freedom of expression, precisely because they are vehicles or means for exercising that fundamental freedom.

Fifteen years after the Advisory Opinion, the Declaration of Principles on Freedom of Expression, approved by the Inter-American Commission on Human Rights in 2000, summarized in thirteen principles the standards

* Agustina is CELE's Director. She is a lawyer and has an LLM in International Law and Human Rights from American University Washington College of Law. She was a Fulbright Research Fellow at Columbia University in New York (2015) and is member of the expert group of Columbia's Global Freedom of Expression and Access to Information Project. She was a consultant for the Organization of American States and Amnesty International Argentina, among others. Agustina is professor of International Law and Internet & Human Rights.

derived from judicial precedents and doctrinal developments at a regional and comparative level. The Declaration is a fundamental document for the interpretation of Article 13 of the American Convention, a necessary reference for the promotion and safeguarding of freedom of expression and the result of a drafting process that, far from being imposed from the top down, was the result of the path traveled by multiple actors in the continent. The Declaration of Principles of Freedom of Expression is broad in its content and rich for the interpretation and systematization of regional standards in this matter. Jointly, AO 5/85, the Declaration of Principles of 2000 and the American Convention constitute a broad and generous framework of protection for the exercise of freedom of expression in the continent.

The instruments that currently comprise the main standards in the area of freedom of expression in the region were the product of a specific time and historical moment. Currently, and in the context of the debate on freedom of expression in the digital age, it has been argued that AO-5/85 has the same relevance as 30 years ago, while it has been maintained that the standards found in that document could establish a framework too inflexible in the face of technological developments and eventually detract from the freedom they originally wanted to protect.

However, is this frame of reference adequate and sufficient to respond to the challenges that emerge from the digital era? The debate around the need to critically evaluate current standards and re-evaluate the existence of legal gaps in the inter-American system began to circulate in some parts of the continent. During 2017 timid voices emerged that identified the need for new inter-American standards in light of Internet developments and along with some proposals to address them. This paper intends to contribute to this conversation by reviewing the framework in the inter-American system in view of these new problems, assessing the validity and relevance of the standards, verifying their scope and resources, and studying if there are new gaps that should be addressed.

With these questions as a starting point, this new publication of Center for Studies on Freedom of Expression and Access to Information (CELE, by its Spanish acronym) compiles answers from academics in the region who, from different perspectives, critically consider the contribution of documents and standards developed so far and their projection and relevance for the future in different disciplines, including access to information, investigative journalism, constitutionalism, or criminal law.

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Presentation

Catalina Botero Marino*

The parallel development and use of different technologies is radically transforming the world as we know it. The factors of production, access to power and the ability to keep said power, forms of public and private communication are subject to dramatic change processes whose true dimensions we can barely fathom. According to Klaus Schwab, in its scale and complexity, the transformation driven by what has been called the "fourth industrial revolution" will be different from everything humankind has witnessed before.

In particular, in terms of communication processes, the rapid technological evolution cannot be described as simple innovation. It is a paradigm shift. We are facing a new communication model that replaces the principles on which public communication operated up until now and which works with practices that were unthinkable until a couple of decades ago. In fact, from a hierarchical, closed, centralized and localized public communication model, we move on to a model that, at least in theory, is interactive, open, decentralized, global and convergent. The end user of the Internet is, at the same time, the creator, promoter and destination of different kinds of content (voice, sound, images or text), that spreads globally almost instan-

* Catalina is the Dean of Universidad de los Andes Law School, in Colombia. She is a lawyer with a Master's Degree in Constitutional Law from Universidad Carlos III de Madrid (UC3M). She was a Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights between 2008 and 2014. She is one of the founding members of the Center for the Study of Law, Justice and Society (DeJusticia) in Colombia. She is also an advisor to different international entities such as Unesco; and guest expert on several academic projects including Columbia University's Global Freedom of Expression and Information Project, the Knight Center of the University of Texas, and an Associate Professor at American University.

taneously, in the most diverse formats and platforms, with a propensity for permanence. In countries with more or less open democracies, access to a personal computer or smartphone is enough to actively participate in the global information network.

Certainly, as noted by Silvio Waisbord in the article he wrote for this volume, more than half of the world population does not have regular access to the Internet and a big part has a poor quality connection. However, despite these serious problems of accessibility, new forms of communication have democratized knowledge and public conversation as never before in human history, but not only that: this new way of communicating has helped people to organize, come together and partner to generate effective social mobilization and effective forms of collective action. Social networks have strengthened control over abuses of power and new communication technologies have been vital to innovation and the creation of knowledge.

However, the challenges are no less remarkable than the successes. As both Silvio Waisbord and Roberto Saba write in their respective texts, it is urgent to be attentive to the dystopian aspect of the new model. The exercise of freedom of expression on the Internet not only addresses the usual risks that this right faces, such as violence or the use of criminal law to silence dissident expressions. The new and complex ecosystem of information pairs new threats such as, for example, massive forms of surveillance and espionage hitherto unprecedented; stifling invasions of privacy; extraordinary concentration of information flows by a few actors — and, therefore, possibility of moderation — and effective, sophisticated and opaque forms of censorship or manipulation.

In particular, one of the phenomena of utmost concern in the most recent electoral processes has been political manipulation as a result of the deliberately false circulation of information, created and put into circulation with the purpose of deceiving the public or a part of it. If the main function of freedom of expression is individual and collective self-government, the impact of the disinformation phenomena on the Internet should not be minimized. Roberto Saba sums up the two risk factors, according to Cass Sunstein, threatening a real deliberation through the Internet: homophilia and filters. Homophilia is the tendency to seek and disseminate information that reflects our own beliefs or desires. Filters, in turn, limit the information we access and end up creating niches or echo chambers that prevent us from testing our own beliefs or expanding our cultural horizons and critical thought. In this context, it is not difficult for intolerance to increase and those who propose radical and unreflective thinking to be rewarded. It is not just that a sector of the population

is deceived. The problem is that it would seem that they do not care about the deceit just as long as it reflects their convictions.

The generic question here is whether the protection of freedom of expression in the new communication model — in its dual individual and collective dimension — requires new governance rules, or whether the existing rules and principles which were designed for an off-line world are sufficient to protect this right when exercised on-line. In particular, some of the authors wonder how useful were the principles established by the Inter-American system of human rights to protect the right to freedom of expression and whether the Declaration of Principles on Freedom of Expression, which was passed by the Inter-American Commission of Human Rights (IACHR) in 2000 should be updated in accordance with the new challenges.

Issa Luna Plaa wonders in her article about the impact and relevance of the Declaration in the Inter-American system regarding freedom of expression. The author is clear in stating that the purpose of the analysis is the impact the Declaration has had in the decisions of the Inter-American Commission and the Inter-American Court of Human Rights (I/A Court H.R) and not in comparative law. After a reading of legal precedents, the author finds that the Inter-American Commission and Court have only referenced the Declaration in very exceptional opportunities. She is right. The Inter-American Court of Human Rights does not usually cite the Declaration basically because the Court does not usually make explicit reference to this soft law on non-conventional bodies of the Inter-American system. It would be interesting to conduct an investigation that offers explanations for this attitude, but the findings of the author are true. And for this same reason, the I/A Court H.R does not usually expressly cite the Declaration in the claims brought to the Court. It is a matter of strategy.

Now, based on these findings, can a conclusion be drawn of the uselessness of this type of statements in which the Inter-American Commission systematizes the principles that will guide the interpretation of the norms of the Inter-American Convention on Human Rights? I do not think so. And I do not think that this conclusion is derived from the article by Plaa, because — as I have already mentioned — the author herself points out that she will limit her study exclusively to the explicit use of the Declaration in cases decided by the IACHR and the Inter-American Court.

In my opinion, the Declaration has had two main functions: to maintain the cohesion of the Inter-American Commission around the principles that it consecrates and to serve as an instrument of strategic litigation in the various countries of the region. Due to space constraints I cannot explain the

two statements I have just made, and therefore I limit myself to summarily presenting two arguments in their favor. On the one hand, unlike the methodological difficulties of the Court's legal precedents — presented in Alejandra Gonza's article — the IACHR has been consistent in the interpretation of Article 13 of the Convention. Since the approval of the Declaration up to the present, there have been literally dozens of commissioners and not all have been sensitive to the defense of freedom of expression, at least not in the terms of the Declaration. However, in all the cases decided by the IACHR, in the precautionary measures and in the various reports and press releases, the Inter-American Commission has been constant in following explicitly or implicitly the principles enshrined in the Declaration. This consistency is mainly due to the Inter-American Commission's respect for their decisions, including —in a particularly pronounced way— the aforementioned Declaration of Principles on Freedom of Expression. Regarding the use of the Declaration as an instrument of domestic litigation, it is enough to mention that both the Declaration and the reports of the Special Rapporteur for Freedom of Expression approved by the IACHR, that analyze or explain said Declaration, have been cited expressly in decisions of the highest constitutional courts of countries like Colombia, Brazil or Mexico.

In sum, I agree with the author that the Declaration of Principles on Freedom of Expression is a rarely cited document in the cases presented before the Inter-American Court and in their judgments. This would probably help to explain the methodological inconsistencies of the Court that are carefully demonstrated by Gonza in her article. However, this does not discredit the importance of a declaration of principles to guide the interpretation of rights that are formulated in open-ended clauses such as those enshrined in the American Convention and, in particular, Article 13 of the aforementioned Convention.

I do not find, therefore, that a declaration of principles on freedom of expression on the Internet would be innocuous. The question is whether it is necessary and if it is relevant. Is it necessary to make a new declaration of principles to update the current Declaration to face the challenges of the Internet? Are the existing principles sufficient? And, if not, is a new declaration the right instrument to update them?

In his article, Silvio Waisbord explains the reasons why he considers that the new ecosystem of public communication needs to be studied with different instruments that serve to adequately solve the new challenges it poses. The central argument of the article is that "the traditional parameters of the regulation of the press and expression are insufficient to understand the

problems with information ecologies with greater options and new actors and structures". Waisbord considers that the regulatory models were designed in a world of limited options and not in the current — open and messy — system where at least two phenomena that escape such regulation arise: 1) The displacement — at least partial — of traditional media and the emergence of new intermediaries of public expression ("social media" and the "Internet giants"); and 2) the proliferation of platforms that allow individual and collective self-expression without regulation systems (corporate content curation) or institutional regulation. How to deal with these phenomena to genuinely defend the right to freedom of expression and debate as an essential public asset in a democracy is the subject of Waisbord's article. The sharpness of his analysis, in contrast to the speeches that minimize the existing risks, shows that we face meaningful and serious challenges that cannot simply be set aside.

However, the last question concerns how to address these challenges and if a declaration of principles on freedom of expression on the Internet is the best way for the Inter-American system to address them. Roberto Saba's answer to this question is clear and convincing: it does not seem appropriate to try to "codify" principles for challenges that we have not yet understood. It is true, as Saba mentions, that the nature and function of the right to freedom of expression did not change due to the existence of the Internet. Neither the way of understanding freedom of expression nor the old threats to this right seem to disappear in the new communication models. In that sense, the traditional remedies are still important. But the exercise of freedom of expression through the Internet also raises new and serious problems that may even compromise the conditions for the chance of genuine public debate. To address these problems, it is more appropriate to reach a "critical mass" of decisions in national and international law that give us more certainty before reviewing the original Declaration and introducing changes and new rules. I agree with the author when he states that drafting a new statement in the current context of uncertainty about the most appropriate rules for Internet governance can lead to the issuance of a banal document — in the sense that it is nothing more than a repetition of the old principles — or an inconsistent one — which, for example, despite seeking to protect the Internet, ends up compromising its architecture.

The right way is to think about the new problems in the light of the old and new principles, to promote the resolution of cases that allow us to pave the way to finding the best guidance and opening the conversation about Internet governance to all the interested actors. This book is a fundamental contribution to that conversation.

Chapter One

Challenges and opportunities for the development of new rules for freedom of expression on the Internet: the Inter-American System

Agustina Del Campo

I. Introduction

In the last twenty years, we have seen substantial progress in the strengthening of the right to freedom of expression on the continent and in the consolidation of democracies in the region. When the Office of the Special Rapporteur for Freedom of Expression (RELE for its Spanish acronym) was created in 1997, there were laws and practices of direct censorship; criminal law protected public officials from criticism, dishonor and defamation; the right to access to information was not recognized nor was there a social conscience regarding the implications of the murder of journalists. Currently, in the Americas, at least 23 countries have laws on access to public information, many of them have repealed their *desacato* laws [TN threatening, insulting or in any way offending the dignity or decorum of a public official due to the exercise of their duties], and many countries have decriminalized libel and slander — particularly when the expression refers to matters of public interest or public officials.[1] In addition, in response to the recommendations of the RELE, some countries in the region particularly affected by the phenomenon of violence against journalists, adopted protocols for their protection and even established specialized prosecutor's offices to investigate these crimes.[2]

[1] RELE, *Marco jurídico interamericano sobre el derecho a la libertad de expresión* [Inter-American Legal Framework on the Right to Freedom of Expression], OEA/Ser.L/V/II CIDH/RELE/INF, 2/09, December 30, 2009, retrieved from: https://bit.ly/1on89fG, last access: February 12, 2019.

[2] For example: Guatemala, Mexico and Colombia.

Despite these developments,[3] in recent years freedom of expression has suffered major attacks globally and regionally. Freedom House, in 2017, for example, reported that law was at its lowest point in thirteen years[4] mainly due to threats against journalists and the press in democracy, and the pressure on the media in authoritarian regimes.[5] In the Americas, according to the latest reports from the RELE, the current situation is characterized by problems related to impunity, social and political polarization, and inequality. Besides the Latin American countries that already suffered high levels of polarization, recently the United States joined them, as they are witnessing tough debates around the limits of offensive expression, the right to protest, freedom of expression in universities and there are even strong signs of pressures from the executive branch towards the criticism of the press.[6]

The Inter-American System for the Protection of Human Rights (IAHRS) and its Rapporteurship for Freedom of Expression have played, over these years, a relevant role in the promotion and development of the right to freedom of expression and access to information at a local and regional level. This document aims to describe the agenda developed by the Inter-American System over the years and to identify opportunities and challenges in some of the main areas of work linked to this right. In addition, and in direct relation to the subject of this publication, this work describes different instruments through which the IAHRS has developed its rules and its work in this area. The document concludes with some concrete recommendations in order to

[3] At a global level, the UNESCO document on global trends in freedom of expression and the media (2014) revealed similar trends, admitting there was a growth in access to information and in the decriminalization processes of defamation, but warning about the problems in the implementation of these laws and rules and the growing need for follow-up implementations. UNESCO, "Tendencias mundiales en libertad de expresión y desarrollo de los medios" [World trends in freedom of expression and media development], 2014, retrieved from: https://bit.ly/2U7hr6K, last access: February 12, 2019.

[4] Freedom House, "Freedom of the Press Report", 2017, retrieved from: https://bit.ly/2ptfNvD, last access: February 12, 2019.

[5] *Ibid*. Reporters Without Borders in its 2017 report highlighted the "widespread erosion of the conditions for practicing journalism in the world" and "the climate of hostility against the media driven by Donald Trump and [how] restrictive laws in Europe erode the freedom of press in Western democracies" as some of the main conclusions. Reporteros sin Fronteras [Reporters without Borders], "Informe anual 2017. Reporteros Sin Fronteras constata una erosión generalizada de las condiciones para ejercer el periodismo en el mundo" [Annual Report 2017: Reporters Without Borders notes a widespread erosion of the conditions to practice journalism in the world], February 1, 2018, retrieved from: https://bit.ly/2CNOH8y, last access: February 12, 2019.

[6] Further reading material, among others: Freedom House, "Freedom of the Press Report", *op. cit*.

encourage the debate about the future of the regional agenda for freedom of expression in the digital era.

II. Some history: elaborating the agenda of the Inter-American System on freedom of expression

The Inter-American System's agenda on freedom of expression and access to information was based on the analysis of individual petitions presented by the victims, the hearings on this issue and on the *in loco* visits carried out by the Special Rapporteurs and the Inter-American Commission on Human Rights (IACHR). The comparative agenda, the political circumstances and the financing — in addition to the interests of those who have held the position of Rapporteur — have been and continue to be the fundamental motors behind the cases resolved by the System, its standards and its practices. Various tools and instruments illustrate the progress in the matter: court rulings and recommendations resulting from the analysis of cases by the Inter-American Commission on Human Rights (Commission or IACHR) and the Inter-American Court of Human Rights (the I/A Court H.R), advisory opinions, the Declaration of Principles of the year 2000, the RELE's annual and thematic reports and joint declarations from the special rapporteurships in the regions and the United Nations.[7]

The regional history of protecting the right to freedom of expression is rich and widespread. One of the first and most important milestones in the subject was Advisory Opinion 5/85 on journalist's mandatory membership to a professional association for the practice of journalism, requested by the State of Costa Rica after having litigated a case on the subject before the IACHR.[8] Within the scope of the Commission, one of the first and most important milestones was the 1994 report on the compatibility of the offense known as *desacato* with the American Convention (ACHR), the product of a friendly settlement in a case brought against the Argentine State.[9] Another milestone was the adoption of the Declaration of Principles of 2000, which summarizes the Inter-American rules developed up to that time.

From the perspective of litigation, the list of cases heard by the Inter-American Court of Human Rights shows a clear development and progres-

[7] See http://www.oas.org/es/cidh/expresion, last access: February 12, 2019.

[8] I/A Court H.R, AO5-85, November 13, 1985, retrieved from: https://bit.ly/2KlEVAt, last access: February 12, 2019.

[9] See IACHR, Annual Report 1994.

sive strengthening of regional law. The first judicial case to reach the I/A Court H.R was the case of "The Last Temptation of Christ" (Chile), which deals with prior censorship and dates back to 2001.[10] Thereafter, the cases referred to indirect restrictions (2001)[11] and criminal defamation (2004, 2008, 2009, 2011)[12] mainly. In 2005, the Court ruled on the first case of *desacato*,[13] and in 2006 the first case on access to public information.[14] In 2009, the first case on the responsibility of public officials regarding their expressions was heard.[15] The first cases of violence against journalists and media workers did not emerge until 2010[16] and those on privacy and freedom of expression, in 2011.[17] In 2014, the Court heard the first case on social protest[18] and in 2015, the Court ruled on the use of state power to regulate

[10] I/A Court H.R, case "La Última Tentación de Cristo (Olmedo Bustos y otros) vs. Chile", Merits, Reparations, and Costs, judgment of February 5, 2001.

[11] I/A Court H.R, case "Ivchar Bronstein vs. Perú", Merits, Reparations, and Costs, judgment of February 6, 2001. Also, see, I/A Court H.R, case "San Miguel Sosa y otras vs. Venezuela", Merits, Reparations, and Costs, judgment of February 8, 2018.

[12] I/A Court H.R, case "Herrera Ulloa vs. Costa Rica", Preliminary exceptions, Merits, Reparations, and Costs, judgment of July 2, 2004; case "Ricardo Canese vs. Paraguay", Merits, Reparations, and Costs, judgment of August 31, 2004; case "Kimel vs. Argentina", Merits, Reparations, and Costs, judgment of May 2, 2008; case "Tristan Donoso", Merits, Reparations, and Costs, judgment of January 27, 2009; "Usón Ramírez vs. Venezuela", Merits, Reparations, and Costs, judgment of November 20, 2009, although this case has all the elements of *desacato*, the Court analyzed it as a case of defamation and slander towards the armed forces; I/A Court H.R, case "Mémoli vs. Argentina", Preliminary Exceptions, Merits, Reparations, and Costs, judgment of August 22, 2013.

[13] "Palamara Iribarne vs. Chile", Merits, Reparations, and Costs, judgment of November 22, 2005.

[14] I/A Court H.R, case "Claude Reyes y otros vs. Chile", Merits, Reparations, and Costs, judgment of November 22, 2006. Case "Gomes Lund vs. Brasil", Merits, Reparations, and Costs, judgment of November 24, 2010. Case "I.V. vs. Bolivia", Merits, Reparations, and Costs, judgment of November 30, 2016.

[15] I/A Court H.R, case "Ríos y otros vs. Venezuela", Merits, Reparations, and Costs, judgment of January 28, 2009. And "Perozo y otros vs. Venezuela", Merits, Reparations, and Costs, judgment of January 28, 2009.

[16] "Cepeda Vargas vs. Colombia", Merits, Reparations, and Costs, judgment of May 26, 2010. In addition, this was followed by the cases "González Medina y familiares vs. República Dominicana", Merits, Reparations, and Costs, judgment of February 27, 2012. "Vélez Restrepo vs. Colombia", Merits, Reparations, and Costs, judgment of September 3, 2012. "Uzcategui vs. Venezuela", Merits, Reparations, and Costs, judgment of September 3, 2012. I/A Court H.R, case "Herzog y otros vs. Brasil", Preliminary Exceptions, Merits, Reparations, and Costs, judgment of March 15, 2018. I/A Court H.R, case "Carvajal Carvajal y otros vs. Colombia", Merits, Reparations, and Costs, judgment of March 13, 2018.

[17] I/A Court H.R case "Fontevecchia D'Amico vs. Argentina", Merits, Reparations, and Costs, judgment of November 29, 2011.

[18] I/A Court H.R, case "Norín Catriman y otros (dirigentes, miembros y activistas del pueblo

frequencies as an indirect censorship mechanism, and referred to the issue of diversity and pluralism in broadcasting.[19] Furthermore, in 2015, it ruled on the use of ambiguous figures and the state's disciplinary power to silence employees and public officials — in this case, justices who opposed the current government.[20] More recently, the Court also referred to cases of freedom of expression in the workplace.[21] The vast majority of the cases of both the Court and the Commission, with rare exceptions, are built on the previous ones, showing through judicial precedents the evolution process of the right to freedom of expression in the region.[22]

Inter American Court on Human Rights judicial cases by year and topic														
TOPICS	**2001**	**2004**	**2005**	**2006**	**2008**	**2009**	**2010**	**2011**	**2012**	**2014**	**2015**	**2016**	**2018**	**Total**
Access to information		1		1			1							2
Defamation and slander		2			1	1								4
Prior censorship	1													1
Duty to guarantee						1								1
Desacato			1			1								2
Freedom of expression of Public Officials											1			1
Privacy and freedom of expression								1						1
Social protest										1				1
Indirect restrictions	1										1			2
Violence / Impunity						1	1		2				3	7
Persecution / Duty of guarantee									1					1
Access to information / Informed consent												1		1
Art. 13.5		1												1
Total	**2**	**3**	**1**	**1**	**1**	**4**	**2**	**1**	**3**	**1**	**2**	**1**	**3**	**25**

indígena Mapuche) vs. Chile", Merits, Reparations, and Costs, judgment of May 29, 2014.

[19] I/A Court H.R, case "Granier y otros (Radio Caracas Televisión) vs. Venezuela", Merits, Reparations, and Costs, judgment of July 22, 2015.

[20] I/A Court H.R, case "López Lone y otros vs. Honduras", Merits, Reparations, and Costs, judgment of October 5, 2015.

[21] I/A Court H.R, case "Lagos del Campo vs. Perú", Merits, Reparations, and Costs, Preliminary Exceptions, judgment of August 31, 2017.

[22] Unlike what Gonza proposes in the article written for this publication, the cases Mémoli v. Argentina and Usón Ramírez v. Venezuela (I /A Court HR) are, in my view, a deviation in the judicial precedents of the Court — wrong decisions — but they do not post any danger for the rest of its principles and judicial precedents.

The work carried out by the IACHR in matters of litigation has also been relevant, as it heard a larger amount of cases and their thematic agenda is, therefore, also broader. In general, the judicial precedents of both bodies are aligned.

RELE's thematic reports by year and topic																					
TOPIC	1982	1984	1996	1997	1998	1999	2004	2005	2006	2007	2008	2009	2010	2011	2013	2014	2015	2016	2017	2018	Total
Access to information						1		1						1							3
Censorship			2				1	1									1	1		1	7
Freedom of expression and freedom of association			1											1							2
Academic freedom												1									1
Freedom of expression and public officials																1	1				2
Persecution			1			1			2												4
Privacy and freedom of expression													1								1
Social protest													1	1							2
Indirect restrictions	1				1										1						3
Violence / Impunity			1	1	1	2				2	3	1	3	1			1	1			17
Right to the truth					1																1
Compulsory registration of journalists		1																			1
Criminal defamation / *Desacato*										2	1			1							4
Civil defamation											1										1
Total	**1**	**1**	**5**	**1**	**3**	**4**	**1**	**2**	**2**	**4**	**5**	**2**	**5**	**5**	**1**	**1**	**3**	**2**	**0**	**1**	**49**

The litigation agenda, although it has become significantly richer in recent years, does not reflect the richness of the RELE's own agenda. To date, there is still a significant gap between the level of specialization achieved by the RELE in the IACHR and the level of specialization and thematic diversity of Inter-American judicial precedents in this area, particularly in the Court. Due to the political situation, the diversity of the region and the technological changes, the RELE's agenda currently includes long and short-term issues, persistent problems such as violence against journalists or concentration of the media, and new issues such as the liability of intermediaries or the already notorious issue of "disinformation". This abundance is seen most clearly in the thematic reports, the studies carried out and the annual reports, supplemented by the Joint Declarations from Rapporteurs of different regional and global systems.

RELE's thematic reports by year and topic																	
TOPIC	**1998**	**2000**	**2001**	**2002**	**2003**	**2004**	**2005**	**2008**	**2009**	**2010**	**2012**	**2013**	**2014**	**2015**	**2016**	**2018**	**Total**
Access to information			1		1	1	1		2	2	2		1	1	1		13
Access to information and violence against women																1	1
Desacato and defamation	1	1		1		1											4
Hate speech						1								1			2
Internet												1			1		2
Women and freedom of expression				1													1
Poverty and freedom of expression				1													1
Electoral processes							1										1
Social protest							1										1
Official advertising					1					1							2
Broadcasting									1								1
Indirect restrictions						1											1
Transition and digital TV													1				1
Violence against journalists								1				1			1		3
General				1					3		2				1		7
Ethics and media				1													1
Compulsory registration of Journalists	1																1
Total	**2**	**1**	**1**	**5**	**2**	**4**	**3**	**1**	**6**	**3**	**4**	**2**	**2**	**2**	**4**	**1**	**43**

As with the cases, the list of thematic reports also allows us to see the construction and growing complexity of the issues of freedom of expression at a regional level. Among the reports, it is worth mentioning those dedicated to the diagnosis, the identification and monitoring of rules that have proliferated in the agenda based on the regional regulatory evolution in this subject.

The Joint Declarations of the Rapporteurs of different regions and of the United Nations allow us to link the regional agenda with comparative and global agendas in this subject and they contribute to create a baseline of rules common to all the regions. Since the first Joint Declaration in 1999, there has been increasing dialogue and collaborations between the different regions and a multiplication of Joint Declarations, as well as the development of statements, visits or joint consultations that have recently been promoted. Some positive outcomes in this area are: the practice initiated in 2010 by the Offices of the Special Rapporteur of the IACHR and the United Nations with a visit to Mexico and a new visit to that country that took place in November of 2017; the joint consultation that the Rapporteurs made in

December 2016 on the Internet and freedom of expression;[23] and the joint presentation they made to the Federal Communications Commission (FCC) in the United States on net neutrality.[24]

Declaraciones conjuntas por año y tema																					
TOPIC	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	Total
Access to information and secret						1															1
Attack on human rights defenders																	1				1
Government media control					1																1
Disinformation and propaganda																			1		1
Diversity and broadcasting									1												1
Violent extremism and freedom of expression																		1			1
Independence of the media	1																				1
Internet and terrorism							1														1
Freedom of expression in armed conflict																1	1				2
Freedom of expression and political parties											1										1
Freedom of expression on the Internet			1									1	1	1							4
Religious freedom, freedom of expression and terrorism										1											1
Media and internet																				1	1
Social protest															1						1
Digital terrestril transition															1						1
Universality of freedom of expression																1					1
Surveillance and freedom of expression															1						1
Violence against journalists		1		1			1	1						1							5
WikiLeaks												1									1
Total	**1**	**1**	**1**	**1**	**1**	**1**	**2**	**1**	**1**	**1**	**1**	**2**	**1**	**2**	**3**	**2**	**2**	**1**	**1**	**1**	**27**

The Office of the Special Rapporteur's role in the development and promotion of prior, concurrent and post-litigation instruments has strengthened the protection of the right to freedom of expression beyond litigation,

[23] Consultation held within the framework of the Internet Governance Forum of the United Nations held in December 2016 in Mexico. The consultation was co-organized by the Rapporteurs, artículo 19 and CELE.

[24] See RELE's website for further information on this issue, retrieved from: http://www.oas.org/es/cidh/expresion/index.asp, last access: February 12, 2019.

and has facilitated the implementation of rules developed by the System. Thus, for example, the RELE developed four thematic reports on criminal defamation and the offense known as *desacato* between 1998 and 2004, in addition to the 1994 report of the IACHR on this subject, accompanying the development of Inter-American judicial precedents in this regard. Likewise, in terms of access to public information, the RELE published four reports between 2001 and 2004 — before its jurisprudential recognition in 2006 —, and eight subsequent ones, developing specific aspects of the law — for example, the report on access to judicial information and women of 2015, or the report on access to information on human rights violations in 2010 — and accompanying the law-making process that the region has experienced since then. The development of a specific report on the Inter-American Juridical Framework on freedom of expression, approved by the IACHR in 2009, is another very good example of the standardization promoted by the Office of the Special Rapporteur and how the mechanisms used in the system complement one another to consolidate rules and promote freedom of expression in the region.

Nevertheless, one of the first challenges to the future that is clearly exposed in this first section is the consolidation in the judicial precedents of the rules developed so far by the RELE and the IACHR on issues that have not yet been addressed by the Court and the regional casuistry. A standout among these issues is the lack of judicial precedents regarding the Internet and freedom of expression.

III. Possible aspects to think about the regional agenda on freedom of expression in the digital future

Up to this point, we have briefly shed light on the progress and growth of the IAHRS agenda from 1998 to the present. Notwithstanding other issues that may be relevant, some substantial aspects are identified below in the RELE's current agenda that present opportunities and challenges for the future, emphasizing those linked to the digital agenda in view of its relevance in the regional legislative agenda.[25]

1. Public / political discourse and democracy

[25] See data and analysis of the Legislative Observatory CELE, retrieved from: http://www.observatoriolegislativocele.com, last access: February 12, 2019.

The relationship between democracy and freedom of expression has a strong basis in the Inter-American System's normative and interpretative development and is an aspect that currently requires some continuity. The foundational stones include, among other documents, the Advisory Opinion 5/85 on the compulsory membership of journalists in an association prescribed by law, the Declaration of Principles on Freedom of Expression of 2000 and the judicial precedents of both the Commission and the Court. This connection is also reflected in the publication of the Inter-American Democratic Charter on Human Rights and in the analysis of the Inter-American Court in the first cases of censorship, criminal defamation and indirect restrictions, where the special protection due to public discourse and particularly to political discourse is explained, the adoption of the standard of real malice to protect the press against erroneous, inaccurate or false information, and the recognition of the right to access to public information. All these norms derived from the Convention had a basis intimately linked to the role of freedom of expression in a democratic society. Moreover, many of the cases heard, especially among the first ones, are centered on expressions related to public officials in close relation to their performance.[26]

Looking ahead, some challenges linked to this issue deserve particular attention. The shift of public discourse to the digital domain is now a fact. While the Internet is not the only means to dialogue on issues of public or political interest, the truth is that the relevance of this medium is growing exponentially and for several years it has been a central aspect, for example, for electoral campaigns in the region.[27] In this context, some regulatory challenges have arisen both at a regional and global level. Some issues such as slander and insults towards candidates and disinformation in electoral campaigns have returned, as well as the liability of Internet companies regarding the publication or dissemination of content from third parties.

Another issue that has appeared in this context is the attempt to regulate "offensive" expressions that affect public officials or candidates for elective office. The bills on these issues in Brazil, Paraguay and Venezuela include the regulation of offensive content. This content includes that which refers to candidates for public office or political parties in electoral periods, esta-

26 See I/A Court H.R, cases "Herrera vs. Costa Rica", "Canese vs. Paraguay", "Palamara Iribarne vs. Chile", *op. cit.*, and others.

27 See examples of Brazil or Mexico. In Argentina, the 2015 presidential campaign was already intense in social networks, and this year the current government has already acquired software to develop its campaign not only in open networks but also in WhatsApp.

blishing in some cases obligations to remove such content from the Internet and in other cases the criminalization of discourse under the pretext of promoting a "civilized" debate in democracy.

Through the "regulation of intermediaries" or even the threat of regulation in some cases, some states are promoting the direct and private elimination of content and the determination of the legality and illegality of expressions on the Internet. The bills that have been presented in Brazil, Ecuador, Venezuela and Paraguay are the last four representations of a phenomenon that has also been seen in Mexico, Peru and Colombia among other countries of the Americas[28] and the world, and that does not seem to distinguish political parties or ideologies. There are similar initiatives and pressures in Europe, for example, linked to discriminatory discourse, the growth of the extreme right and terrorism and radicalization.[29] These types of regulations, in addition to others such as the Digital Millennium Copyright Act (DMCA),[30] establish incentives for private companies to remove content on request, without notifying the author and without due process.

In addition to all of the above, there are "new" phenomena such as "misinformation", particularly infamous since the presidential elections of 2016 in the United States, the Brexit campaign in the United Kingdom and the peace agreement referendum in Colombia, and that — due to the global consequences — may require particular monitoring. Some of them are:

1) A growing request to regulate / monitor expression, particularly in

28 See bill that regulates acts of hatred and discrimination in social networks and the Internet (2017), retrieved from: https://bit.ly/2OGdDDp, last access: February 26, 2019; Bill against hate, intolerance and for a peaceful coexistence (2017), retrieved from: https://bit.ly/2uGqrRg, last access: February 26, 2019.

29 The G7 release at the end of October, which requested that measures be adopted and mechanisms developed to eliminate terrorist contents within the hour of having been uploaded, is a clear example of this phenomenon. See release: G7 Italy, "Fight Against Terrorism and Violent Extremism: Turning Commitments into Action", October 19-20, 2017, retrieved from: https://bit.ly/2ME7QRr, last access: February 12, 2019. See also the NetzDG Act of Germany, entered into force in 2018, which imposes severe fines on intermediaries who do not remove or block illegal content under German law.

30 The DMCA is a US rule that provides a type of immunity for Internet companies, which establishes a "safe harbor" system: companies will not have civil liability for the publication and dissemination of copyrighted content unless they receive a specific notification to remove said content and they do not remove it from circulation. To see more about the issue and the problems related to its implementation in Latin America: Bertoni, Eduardo and Sadinsky, Sophia, "El uso de la DMCA para limitar la libertad de expresión" [The use of DMCA to limit freedom of expression], *Internet y derechos humanos II*, Buenos Aires, CELE, 2016.

electoral periods.

2) Increasing pressure for intermediary companies to take measures to detect and limit the circulation of supposedly false information, to mitigate the impact of this news on the networks and / or to eliminate accounts linked to the phenomenon. There are already numerous initiatives in different media and platforms to combat fake news and many others are being evaluated and developed.[31]

Many academics also warn us that users and governments are inciting and pressuring companies to restrict content through their terms and conditions of service. UNESCO[32] stressed that the global trend is towards the outsourcing of decisions regarding the censorship and removal of content that are no longer carried out by the states but delegated to private companies, whose obligations in terms of human rights is, to date, the object of strong debates.

To deal with these issues there are already some principles and rules within the framework of the IAHRS that seem to apply directly or by analogy. The RELE reports in this subject have contributed significantly to apply these rules to new contexts and realities, including the speed and reach of dissemination, the permanence of online expression and the decentralization that characterizes this media.

2. Criminalization of speech: hate speech and other offensive expressions

During the 1990s and 2000s, regional efforts within the framework of the IAHRS were mainly aimed at decriminalizing *desacato* and defamation and slander. These were two of the main problems that afflicted the press, journalism and those who were part of the public debate in the region (politicians, candidates, celebrities, etc.). Several countries were able to decriminalize defamation, but it was not possible to eliminate it. Currently, there is an increasing trend towards the criminal regulation of discriminatory discourse and hate speech, particularly on the Internet.

Hate speech and incitement to violence and discrimination, which are

31 See, Cortés, Carlos and Isaza, Luisa, *Noticias falsas en internet: la estrategia para combatir la desinformación* [Fake news on the Internet: the strategy to battle misinformation], Buenos Aires, CELE, 2017, retrieved from: https://bit.ly/2D7dDJ1, last access: February 12, 2019.

32 UNESCO, "Tendencias mundiales en libertad de expresión y desarrollo de los medios" [World Trends in Freedom of Expression and Media Development], *op. cit*.

not something new, acquired a central role in the public agenda in recent years.[33] Partly due to its diffusion through the Internet, but undoubtedly also due to a generalized awareness around the issue (for example, the numerous regional and global conventions that include content on the need to combat discrimination and violence against women, people of African descent, indigenous people, people with disabilities, etc.). Within the framework of the IAHRS, two new conventions were adopted in 2013: one on racial discrimination — effective as of 2017 — and another one on tolerance.[34] These conventions are added to others on people with disabilities, indigenous people and women, with similar wording.[35]

Although there are judicial precedents on discrimination and the right to equality in the IAHRS, there is no precedent regarding Article 13.5 of the Convention. In concrete and restrictive terms, that article establishes the type of discourse that should be prohibited within the states and limits it to the one that also incites violence. Unlike the Court, the RELE has developed the subject in some reports, in the Inter-American Legal Framework of 2009 and in Joint Declarations (Joint Declaration on Defamation of Religions, and Anti-Terrorism and Anti-Extremism Legislation, 2008; Joint Declaration on Freedom of Expression and Countering Violent Extremism, 2016). More recently, the joint report of the RELE with the LGBT Rapporteurship of 2015 constitutes an important and cross-sectional contribution, incorporating and harmonizing the interpretation of the rules in this subject from the

33 Bertoni, Eduardo, *Libertad de expresión en el Estado de Derecho* [Freedom of expression in the rule of law], 2nd ed., Buenos Aires, Editores del Puerto, 2007.

34 Inter-American Convention Against All Forms of Discrimination and Intolerance (A-69), retrieved from: https://bit.ly/1HO2jNB, last access: February 12, 2019; Inter-American Convention Against Racism, Racial Discrimination and Related Forms of Intolerance (A-68), retrieved from: https://bit.ly/1HO0iRn, last access: February 12, 2019. Article 4: These states undertake to prevent, eliminate, prohibit, and punish, in accordance with their constitutional norms and the provisions of this Convention, all acts and manifestations of racism, racial discrimination and related forms of intolerance, including: i. Public or private support provided to racially discriminatory and racist activities or that promote intolerance, including the financing thereof.

ii. Publication, circulation or dissemination, by any form and / or means of communication, including the Internet, of any racist or racially discriminatory materials that:

a. Advocate, promote, or incite hatred, discrimination, and intolerance. b. Condone, justify, or defend acts that constitute or have constituted genocide or crimes against humanity as defined in international law, or promote or incite the commitment of such acts.

35 Both texts contemplate the obligation to "prevent, eliminate, prohibit and punish (...) "the publication, circulation or dissemination, by any form and / or means of communication, including the Internet" of expressions that "defend, promote or incite hatred, discrimination and intolerance."

perspective of two relevant rapporteurships.

The Legislative Observatory of CELE has surveyed multiple bills in recent years aimed at criminalizing and / or "eradicating" discriminatory or offensive discourse, defining it in a broad, vague and ambiguous manner[36] and generating serious threats to freedom of expression due to its scope, which invites unrestricted intervention and abuse. In addition to the phenomena described above, there are also intense pressures against anonymity, which compromise freedom of expression and privacy, particularly for those most vulnerable. The bills that emerged in Argentina, Brazil, Venezuela and Paraguay are recent expressions of this phenomenon that is not only local but also regional. The trend is particularly concerning because of the relevance of the issue not only at a regional level but globally. Although this is not something new — UNESCO shed a light on the trend as early as 2014— it is particularly alarming the persistence of criminalization as a response against offensive and even abusive expressions and the lack of specificity in the legal description of the crimes that are being proposed and considered. Perhaps the litigation of individual and concrete cases will render greater granularity concerning the obligations and limits of the state when regulating this type of expression and thus consecrating with judicial precedents the rules that the Rapporteurship has already developed. Undoubtedly, the continuous work of the Rapporteurship on this issue, addressing alternative proposals to criminalization, has been and will be decisive.

3. Self-regulation

One of the fundamental premises of the protection of freedom of the press in the region was to promote the principle of self-regulation of the press in terms of quality control and content ethics. AO-5 directly addressed this point based on the question that was being asked. In that document, one of the possibilities discussed was establishing a compulsory membership in an association prescribed by law for the practice of journalism, similar to that governing the practice of other professions such as medicine or the legal profession. The Court, following pre-existing rules and principles, declared this compulsory association incompatible with the exercise of the journalistic profession, because it recognized that, unlike other professions, freedom of expression is the raw material of journalists. Journalists are those

[36] See http://www.observatoriolegislativocele.com.

who professionally exercise their freedom of expression, stated the Court.[37] The regulation of the journalist profession and the press is intimately linked with editorial freedom and the risks of regulating it exceed the benefits.

On the other hand, the state obligation to regulate monopolies was established also to guarantee — through positive actions — the plurality of the media to avoid the prior exclusion from the debate of certain voices or sectors. These positive obligations in the Inter-American framework involve addressing not only state restrictions but also private restrictions when they have similar impacts to government decisions. The examples in the IAHRS are mainly analogical and relate, for example, to the distribution of newsprint.[38]

Looking to the future, the development and interpretation of Inter-American rules for the Internet context acquire special relevance. Since 2016, particularly, we have been witnessing a series of "scandals" linked to the private regulation of content by Internet companies such as Facebook, Twitter or YouTube. These social networks, which originally hoisted the banner of freedom of expression and non-censorship, in recent years, have developed complex codes to govern the circulation and dissemination of content on their platforms. Among other things, they have their own definitions of "hate speech", threats, vulnerable people, incitement to crime, discrimination, etc. At present, they already have complex technologies that allow them not only to remove reported content under terms and conditions of service, but also to previously detect and even filter some of these categories of expressions (for example, images of nudism).[39] They have also developed complex and secret algorithms to determine the levels of visibility and diffusion of certain contents and their prioritization with respect to others.[40] What do the positive obligations of the state to promote freedom of expression in this area mean? What do these obligations imply in terms of the cross-jurisdictional nature that characterizes these platforms? What due process requirements should these companies guarantee with regard to their own users? What constitutes

[37] I/A Court HR, AO-5/85.

[38] See text of article 13.3 ACHR.

[39] UN SRFOE, "Report on Content Moderation", June, 2018, retrieved from: https://bit.ly/2VpUgV8, last access: February 12, 2019.

[40] United Nations, General Assembly, "*Promoción y protección de los derechos humanos: cuestiones de derechos humanos, incluidos otros medios de mejorar el goce efectivo de los derechos humanos y las libertades fundamentales*" [Promotion and protection of human rights: human rights issues, including other means of improving the effective enjoyment of human rights and fundamental freedoms], August 29, 2018, retrieved from: http://undocs.org/es/A/73/348, last access: February 12, 2019.

proportional and necessary measures in this new ecosystem? All of these questions are currently on the agenda and are debated globally, regionally and locally. The challenge becomes even more complex if we look at these companies' global levels of market concentration.

On the other hand, experts in freedom of expression are starting to consider the transparency of intermediaries in the prioritization of information through algorithms that allow access to information in the network another relevant phenomenon. The last report of the Special Rapporteur for Freedom of Opinion and Expression of the United Nations, which dealt precisely with this issue, addressing the challenges to freedom of expression posed by artificial intelligence, in a broad sense, is a first approach to the subject.[41] It is important to follow these conversations closely and start discussing these issues regionally.

4. Freedom of expression and privacy

Both globally and at an Inter-American level, the first rapporteurs to deal with the Internet and human rights issues were those of freedom of expression. However, within the framework of the United Nations, the agencies and experts that eventually took on the subject were different and diverse.[42] In addition to the Rapporteurs, the Human Rights Council has two resolutions directly addressing the recognition of all human rights on the Internet (A/ HRC/ 32 /L.20, 2016; A/ HRC/ 20 /L.13, 2012).

Within the framework of the Inter-American System, up until now the RELE has been dedicated and specialized in the study of this subject. From the perspective of freedom of expression, it has delved on diverse and profound issues, including privacy, economic, social and cultural rights, rights of association and assembly, and even human rights and companies. These issues and the RELE share some common ground, which has even been

[41] United Nations, "Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression", A/73/348, August 29, 2018, retrieved from: https://bit.ly/2G8OAX9, last access: February 26, 2019.

[42] The report of the United Nations Special Rapporteur on the rights to freedom of peaceful assembly and association (2015) is very relevant, retrieved from: https://bit.ly/2uQOYDf, last access: February 26, 2019; and so is the one from the Special Rapporteur on violence against women, causes and consequences of online violence against women and girls from a human rights perspective (2018), retrieved from: https://bit.ly/2UGtmrC, last access: February 26, 2019; as is the one from the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms in the fight against terrorism, who has already issued reports that refer to the exercise of rights linked to its area of incumbency on the Internet.

reflected in the brief pages of this document. The Inter-American Court has also established the undeniable link between freedom of expression and privacy in several of its cases and it would even be useful if the Court could study these cases further in the light of technological developments.[43]

The privacy agenda linked to the right to freedom of expression includes surveillance (massive and directed), integrity of communications, and data protection, including data retention, biometrics, cross-border data transfer, among other details and aspects. As the ability to capture, store, analyze and process data grows thanks to the development of technology, there is an increase in the risks associated with both state and private interference in people's private lives.

In 2016, it was announced that several countries in the region had purchased surveillance software from Hacking Team or had started conversations with that company to acquire it behind their citizens' backs. At the beginning of 2017, a group of organizations denounced that the Mexican government was spying on journalists, human rights defenders, etc., using the "Pegasus" malware.[44] In 2016, the Electronic Frontier Foundation (EFF) released its report "Unblinking Eyes",[45] exposing the state of surveillance in twelve countries in the region and concluding that laws and practices in many of the countries in the region require greater specificity and update due to the considerable increase in surveillance capacity currently held by states. The goal of the laws that are being adopted is often to legitimize preexisting practices and to expand the powers of state surveillance, for example, through laws on data retention.

In addition to state surveillance, which raises numerous problems, the way in which the Internet works and the role of intermediary companies in the different layers that make the Internet, there are key questions surrounding the protection of privacy against private companies. The growing capacity for acquiring, processing and aggregating data of Internet companies, in non-transparent conditions of operation and use, generates special concerns about the users' right to privacy. This concern also applies to the security of such data whereas private, belonging to the state itself or third parties. The

[43] I/A Court H.R, "Tristán Donoso vs. Panamá", Preliminary exception, Merits, Reparations, and Costs, judging of January 27, 2009.

[44] R3D: Red en Defensa de los Derechos Digitales, "#GobiernoEspía: vigilancia sistemática a periodistas y defensores de derechos humanos en México" [SpyGovernment: systematic surveillance of journalists and human rights defenders in Mexico], June 19, 2017, retrieved from: https://bit.ly/2laSlwk, last access: February 12, 2019.

[45] Rodríguez, Katitza, "Ojos que no parpadean: El estado de la vigilancia en América Latina" [Unblinking Eyes: The State of Communications Surveillance in Latin America], https://bit.ly/2KCmxSy, last access: February 12, 2019.

development of things related to the Internet, of artificial intelligence, smart cities, etc., in turn, expand the universe of issues that emerge as alarming within a vast agenda that is undoubtedly in full development.

IV. Specific challenges of the digital agenda

The architecture and functioning of the Internet depend largely on its governance structure and for its understanding require, in many cases, high levels of specialization and specificity. In the same way that, at the time, technical knowledge of the operation of media, licenses or frequencies was required, there is currently a need for another type of knowledge, enhanced by the continuous and permanent technological development.

Furthermore, the Internet transversely affects all issues on the freedom of expression agenda. Due to its global and open nature and its particular structure of governance, there are two developments in this framework that present important challenges in terms of resources and methodology for the future that should be mentioned. The first is the multiplication of forums where issues related to freedom of expression and privacy on the Internet are debated: the Internet Governance Forum of the United Nations is only one of such forums and it is joined by regional Internet governance forums (LAC IGF) and national ones.[46] In addition to these, there are international forums such as the International Telecommunications Union, the World Trade Organization, the UN General Assembly, UNESCO, the Office of the United Nations High Commissioner for Human Rights, and its various working groups and Rapporteurs, the Internet Corporation for the Assignment of Names and Numbers (ICANN), the Internet Engineering Task Force, etc.

A second challenge that deserves attention is the growing focus on security of the debate around the Internet and communications.[47] Because of the increase in concerns regarding digital security and communications, both for the people and for infrastructure, the involvement of the state in Internet debates has increased from the perspective of national security, intelligence and defense. The concern about "security" affects different aspects of the

[46] See Aguirre, Carolina, "Redes de gobernanza de internet a nivel nacional. La experiencia de casos recientes en América Latina", *Hacia una internet libre de censura II*, Buenos Aires, CELE, 2017, p. 11, retrieved from: https://bit.ly/2w04CMu, last access: February 12, 2019.

[47] Puddephatt, Andrew and Kaspar, Lee, *Advancing Human Rights in the Evolving Digital Environment,* 2017.

right to freedom of expression, including access to information and the broadening of the national surveillance agenda. There are new regional and global spaces devoted to the cyber security debate, for example, where regulations and conditions are discussed that will affect the exercise of human rights on the Internet, incorporating the right to freedom of expression.

Finally, the increase of spaces with digital content also constitutes a major challenge. As technology develops and becomes more pervasive, the distinction between the exercise of online and offline rights is dissipating. In this context, the topics and actors that debate about the digital dimension of different human rights are various and there is an increase in the specialization necessary to contribute substantially in the search for consensus and agreements.[48] The digital agenda, due to the characteristics of the Internet, in many cases requires joint work with other Rapporteurs and groups, from other regions and from the United Nations. Thanks to the experience in the region and the Inter-American System and its rules, which are broader and more protective than others, the RELE and the IAHRS have the opportunity and challenge to act jointly with other Special Rapporteurs and experts from other regions, distinguishing, protecting, disseminating and thinking about viable solutions for the most important issues of the moment.

V. Possible conclusions towards a digital agenda

The purpose of this publication was precisely to invite a series of academics versed in the Inter-American System for the Protection of Human Rights and in matters of freedom of expression to reflect on the needs the region is facing after the advent of the Internet. This document summarizes a large part of the work and strategies used up to now by the IAHRS to deal with traditional and new problems linked to freedom of expression and access to information in different media. Moreover, it succinctly identifies some of the main challenges that have arisen in the global and regional agenda. A first lesson learned from this study is the need to look to the past and use those foundations to plan and build for the future: from this review, it becomes clear that there is a rich baggage of rules, principles, and interpretations, embodied in statements, judicial precedents, advisory opinions, friendly settlements, and reports. Many of them are already moving forward on issues that are currently back on the agenda and it is necessary to re-float them, others have laid the foundations

[48] *Ibíd*.

that will probably allow for the construction of the interpretations and rules of the future. This must be a collective exercise, carried out both within the IAHRS and among those of us who work with it.

On the other hand, it is clear from this study that the issues are multiple and diverse, that not all of them have the same level of prior development or local or comparative analysis, and that, like expression on the Internet, they will remain for a long time. They require constant attention, not only in the development of rules but in their interpretation, implementation and supervision over time.

The reading of the document also shows that there is no single "manner" or "way" to achieve the implementation of changes in legal frameworks and solutions from the IAHRS. Over time, different strategies have been used, in response to different issues, regional political situations, members of the RELE, the IACHR and the Court, etc., which have tended to complement each other. A reading of the historical survey of the work carried out certainly suggests the need to consolidate the judicial precedents of the thematic and substantive development of the RELE, particularly with respect to digital issues and what they imply: decentralization, speed, diffusion and permanence, digital press, hate speech, discrimination, polarization, surveillance technologies and new concentration formats — not in the media but regarding global Internet companies and jurisdiction.

The litigation of cases before the System contributed to the development of important changes in the region. These changes have affected the history of many of our countries. The cases in Peru where amnesty for crimes against humanity were declared incompatible come immediately to mind. Another example is the "Simón" case in Argentina that citing conventional judicial precedents declared unconstitutional the laws known as *punto final and obediencia debida* [Full stop law and Law of Due Obedience]. In addition, although the IAHRS has not always been consistent in its reasoning, with its decisions it has confirmed or refuted existing rules, contributing to solidifying lasting consensus.[49]

The permanent monitoring and follow up of the states in the implementation of Inter-American rules for freedom of expression and access to infor-

[49] Obviously, it has also been useful to curb initiatives and processes such as the decriminalization of expression for defamation and slander, or to stop the debate around the need for specific civil laws regarding reparation for abuses in the exercise of a right. See Del Campo, Agustina, *Calumnias e Injurias: La situación en el fuero civil después de la ley 26.551*, [Defamation and Slander: The situation in civil law after law 26,551] Buenos Aires, CELE, 2013, retrieved from: https://bit.ly/2uXvYCS, last access: February 26, 2019. That is why it is even more necessary to think about a litigation strategy in order to move forward safely on issues of high volatility and permanent change.

mation is particularly important at this moment, where globally there seems to be a setback in the protection of freedom of expression and a contraction in the rules for its promotion and protection. The technological changes that brought a broad democratization, decentralization and access to public debate also generated, more recently, an environment prone to restriction, the reopening of certain debates and reconsidering established rules.

The level of specialization acquired by some discussions and the thematic expansion of certain issues poses challenges in the prioritization and distribution of resources, as well as important challenges related to the strategy. Ironically, in some subjects, the "urgency" regarding their approach clearly contrasts with the instability and volatility of the field of study, characterized by speed and constant development. This contradiction must be taken into account when choosing strategies, frameworks and mechanisms when the intention is to build consensuses and agreements that can last as long as those that historically characterized the work of the IAHRS.

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Chapter Two

Reflections on freedom of expression, judicial precedents of the Inter-American Court and the challenge of the Internet[1]

Alejandra Gonza*

I. Introduction

The Inter-American System has established generous standards for the protection of freedom of thought and expression through the interpretation of Article 13 of the American Convention on Human Rights.[2] The Convention includes a broad concept of the law that protects opinions, dissemination and reception of all types of information and ideas — which also covers the right to access information[3] — and there is a consensus that restrictions must be exceptional, expressly permitted by the Convention and interpreted

* Alejandra is the Director of the Human Rights Clinic at University of Washington School of Law in Seattle. She is a lawyer from Universidad Nacional de Tucumán, in Argentina, and has a Master's Degree in European Studies and Human Rights from Universidad Pontificia de Salamanca, in Spain. She was a visiting researcher at University of Notre Dame Law School. She served as a senior attorney at the Inter-American Commission and the Inter-American Court. Her human rights practice and research focus on freedom of expression, forced disappearance, arbitraty detentions, indigenous rights, migrants among others.

[1] In these reflections, I apply the general recommendations in relation to article 13 developed with the co-author of the book: Antkowiak, Thomas M. and Gonza, Alejandra, *The American Convention on Human Rights*: Essential Rights, Oxford, Oxford University Press, 2017.

[2] *Ibid*.

[3] The Inter-American Court interpreted that the verb "seek" in the text of article 13 implies the right to access information in the hands of the State. I/A Court HR, case "Claude Reyes y otros vs. Chile", Merits, Reparations and Costs, judgment of September 19, 2006, Series C, No. 151.

restrictively.[4] The legal precedents set by the Inter-American Court of Human Rights have taken the idea of other courts and academics on the importance of freedom of expression as a pillar of democracy and a free society [5] and it has made it clear that in the Inter-American System this Court is comparatively the most protective of international treaties.[6]

However, and although the Convention protects expressions of all kinds, spread by all means of circulation and it is widely accepted that this protection reaches the Internet,[7] there is still no clarity in the region about how to face the challenges brought by "the network of networks". Several proposals are being debated by civil society and academic circles. On the one hand, various actions have been suggested such as creating new principles of freedom of expression in the Inter-American System, requesting a new advisory opinion on freedom of expression on the Internet from the Inter-American Court, or promoting resolutions of the Organization of American States to address the issue in a general manner.[8] On the other hand, other strategies have been evaluated, like using the power of strategic litigation and acknowledging the relevance of working more effectively in the nomination of candidates for the bodies of the Inter-American System favoring the

[4] I/A Court H.R, *La colegiación obligatoria de periodistas* [Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism], note 2, § 65; I/A Court HR, case "López Lone y otros vs. Honduras", Preliminary exceptions, Merits, Reparations and Costs, judgment of October 5, 2015, Series C, No. 302, § 172.

[5] See, for example, "New York Times Co. vs. Sullivan", 376 U.S. 254, 271, 1964, that reads: "Despite the likelihood of excesses and abuses, these freedoms are, in the long term, essential for informed opinions and appropriate behavior on the part of citizens of a democracy". See also: "Handyside vs. the United Kingdom", Eur. Ct. H.R., App. No. 5.493 / 72, 1976, § 49, that reads: "freedom of expression constitutes one of the essential pillars of such a society, one of the basic conditions for its progress and the development of every person". Another case in which the Court states that freedom of expression is necessary to discover the truth is "John Stuart Mill, On Liberty and Considerations on Representative Government", 1859, 14-15.

[6] I/A Court H.R, *La colegiación obligatoria de periodistas* (Articles 13 and 29 of the American Convention on Human Rights) [Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism], Advisory Opinion AO-5/85 of November 13, 1985, Series A, No. 5.

[7] Office of the Special Rapporteur for Freedom of Expression (RELE) of the Inter-American Commission on Human Rights (IACHR), *Estándares para una internet libre, abierta e incluyente* [Standards for a Free, Open and Inclusive Internet], OAS / Ser.L / V / II, IACHR / RELE / INF.17 / 17, March 15, 2017; Antkowiak and Gonza, supra note 1; and Kaye , David, *Informe del Relator Especial sobre la promoción y protección del derecho a la libertad de opinión y expresión*, [Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression], UN Doc. A / HRC / 32/38, May 11, 2016, § 6.

[8] On this subject, see article included in this publication prepared by CELE.

entrance of judges and commissioners with specific knowledge in freedom of expression and the Internet.

But to establish future work it is important to emphasize that the Inter-American System is not starting from scratch. The Office of the Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights (RELE, by its Spanish acronym) has issued thematic reports, held public hearings and participated in joint declarations with other international rapporteurs and experts [9] which include the Internet domain in the direct application of the principles already developed in the field of freedom of expression for all media[10]. The Office of the Special Rapporteur has also recommended the consideration of the United Nations Guiding Principles on Business and Human Rights which analyses the role of the private sector in the matter.[11]

However, the thematic positions of the Office of the Special Rapporteur can differ substantially with the criteria of legal precedents set forth in the case system developed by both the IACHR and the Inter-American Court. On many occasions, and in the absence of Inter-American judicial precedents, the Office of the Special Rapporteur has constructed positions by taking as a reference the decisions of the European Court.

The reality of our continent shows that there is still a tendency to react with the use of criminal law or with the most harmful means of civil sanctions to resolve conflicts arising from the exercise of freedom of expression,[12]

[9] "*Declaración conjunta sobre la independencia y la diversidad de los medios de comunicación en la era digital*" [Joint Declaration on Media Independence and Diversity in the Digital Age], 2018; "*Declaración conjunta sobre libertad de expresión y 'noticias falsas' (fake news), desinformación y propaganda*" [Joint Declaration on Freedom of Expression and "Fake News", Disinformation and Propaganda], 2017; "*Declaración conjunta sobre libertad de expresión e internet*" [Joint Declaration on Freedom of Expression and Internet], 2011.

[10] RELE, *Estándares para una internet libre, abierta e incluyente* [Standards for a Free, Open, and Inclusive Internet], *supra*, note 3, § 82, note 7; Kaye, David, *Informe del Relator Especial sobre la promoción y protección del derecho a la libertad de opinión y expresión*, [Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression] U.N. Doc. A / HRC / 35, 2018, §§ 6-8.

See also, Chang, Brian, "From Internet Referral Units to International Agreements: Censorship of the Internet by the UK and EU", in: *Columbia Human Rights Law Review*, Vol. 49, No. 2, New York, 2018.

[11] RELE, *Estándares para una internet libre, abierta e incluyente* [Standards for a Free, Open, and Inclusive Internet], *supra*, note 3, § 115, note 7.

[12] CELE, *La regulación de internet y su impacto en la libertad de expresión en América Latina* [Internet regulation and its impact on freedom of expression in Latin America], p. 10, retrieved from: http://observatoriolegislativocele.com, last access: January 21, 2019.

which shows an inclination to protect power and privilege.[13] This trend is heightened when discussing the harmful potential of the Internet.

This article aims to include in the discussion on freedom of expression and the Internet the challenges presented by the judicial precedents in contentious cases of the Court. Recent judicial precedents on freedom of expression of the Inter-American Court — especially after the case "Kimel vs. Argentina" in 2008 — require a further consideration to understand the current situation. Acknowledging present weaknesses will allow us to advance strategically to a work program that is a true reflection of our region.

To this end, the first task will be an analysis of some of the methodological problems in the contentious jurisdiction of the Inter-American Court[14] that prevent a greater conceptual clarity about the limits to freedom of expression set by the state and, where appropriate, by companies. Secondly, there is a need to clarify the concept of "specially protected discourses" and the consequences of such designation for the analysis of cases. In the third place, the challenges of an absolute prohibition of censorship in the systems of liability of Internet intermediaries will be discussed. Fourth, there has to be an examination of the need to study European judicial precedents before transferring them. Finally, some recommendations will be outlined.

[13] To analyze the reality of crimes against honor after partial decriminalization see: Del Campo, Agustina, *Calumnias e Injurias. A dos años de la reforma del Código Penal Argentino* [Slander and insults. Two years after the reform of the Argentine Penal Code], Buenos Aires, Centro de Estudios en Libertad de Expresión (CELE), Universidad de Palermo, September, 2012; and Del Campo, Agustina, *Calumnias e injurias. La situación en el fuero civil después de la Ley 26.551* [Slander and insults. The situation in the civil jurisdiction after Law 26,551], Buenos Aires, Centro de Estudios en Libertad de Expresión (CELE), Universidad de Palermo, 2013. In turn, an example of a judgment of the Supreme Court of Argentina, after being heard by the Inter-American Court on different occasions, continues to limit expression to protect public officials from insults: Canicoba Corral, Rodolfo Aristides el Acevedo, Sergio Edgardo y otros sin daños y perjuicios, August 14, 2013.

[14] To see the challenges of protecting the right to freedom of expression through precautionary and provisional measures in the Inter-American system: Rapido Ragozzino, Martina, *La inexistencia del requisito de daño irreparable para que se otorguen medidas de protección respecto al derecho a la libertad de expresión en el Sistema Interamericano* [The non-existence of the requirement of irreparable damage for protection measures to be granted with respect to the right to freedom of expression in the Inter-American System]. *Reflexiones sobre el derecho a la libertad de expresión* [Reflections on the right to freedom of expression]. Quito, Editora Jurídica Cevallos, February, 2018.

II. Methodological problems in the interpretation of the Inter-American Court

Freedom of expression is not an absolute right. In the last decade, the Inter-American Court has defined the possible limitations on the right to freedom of expression in specific cases. In this exercise, the Court has, in principle, ratified the prohibition of prior censorship, and has confirmed the application of the three-part test of legality, legitimacy and proportionality when studying the subsequent liabilities or indirect restrictions.[15] However, if we analyze recent judicial precedents in detail, we find several method deficiencies in the analysis of Article 13 that cause uncertainty about the possibilities of the state — and in the case of the Internet, of companies — to limit freedom of expression.

In the first place, the Court moved away from its initial jurisprudence that refused to transfer to Article 13 limitations enshrined in another section of the American Convention or in other international treaties.[16] Consequently, it gradually incorporated restrictions adopted in the judicial precedents of the European Court and added, as legitimate reasons to limit freedom of expression, some restrictions not expressly established in the Convention, but in domestic law, such as the criminal protection of honor in the Armed Forces,[17] by distancing itself from a direct reproach of the offense known as *desacato* [TN threatening, insulting or in any way offending the dignity

[15] Antkowiak and Gonza, *supra* note 1.

[16] I/A Court H.R, *La colegiación obligatoria de periodistas* [Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism], note 2, §§ 51 and 65. The Inter-American Court held that the only possible limitations on freedom of expression were those expressly enshrined in Article 13. If a restriction does not fit into article 13, even if it is one that is found in the American Convention in another article, or in the European Convention, for example, it could not be accepted as legitimate, adopting a position that minimizes the causes of restriction to the right. However, for example, in the case "Usón Ramírez vs. Venezuela", Preliminary exceptions, Merits, Reparations and Costs, judgment of November 20, 2009, Series C, No. 207, the Inter-American Court accepts as a legitimate objective the Armed Forces protection of honor, although it is not expressly stated in the American Convention, it is found in domestic law, §§ 62-66.

[17] I/A Court H.R, case "Usón Ramírez vs. Venezuela", Preliminary exceptions, Merits, Reparations and Costs, judgment of November 20, 2009, Series C, No. 207, § 66.

or decorum of a public official due to the exercise of their duties].[18]

Second, since 2006, the Court has found autonomous violations to clause 1 or general rule of Article 13, without identifying or clearly classifying the type of restriction set by these acts or omissions considered contrary to the Convention.[19] The cases resolved involved persecution and violence against journalists,[20] human rights defenders[21] or political leaders[22] by state agents or individuals. Clearly, these cases could be interpreted as instances of censorship or subsequent liabilities contemplated in article 13.2, indirect restrictions established in 13.3, speech that affects children and adolescents regulated by article 13.4 or hate speech and incitement to violence found in Article 13.5. The content of each of these sections can outline both the permitted limitations and those not allowed.

Third, the Court has always used the balancing of rights approach, which gives all rights equal conventional protection, instead of — in certain cases — giving preferential rights to freedom of expression.[23] The judicial precedents that accept criminal law as a legitimate means to limit freedom of expression because, in and of itself, it is the most severe and aggressive means are particularly alarming given that the state has other alternative means which are less harmful. The most explanatory cases are those in which the Court analyzed the use of criminal law to protect the right to honor and

[18] For information on the IACHR's work on the decriminalization of *desacato*, see: IACHR, *Informe Anual* [Annual Report] 1994, "*Capítulo V: Informe sobre la Compatibilidad entre las leyes de desacato y la Convención Americana sobre Derechos Humanos*" [Chapter V: Report on the compatibility of "*desacato*" laws with the American Convention on Human Rights], OAS / Ser. L / V / II.88. Doc. 9 rev., February 17, 1995, pp. 210-223; IACHR, "Verbitsky vs. Argentina", case No. 11.012; report No. 22/94, friendly agreement, 1995.

[19] Antkowiak and Gonza, *supra*, p. 234, note 1; I/A Court HR, case "López Álvarez vs. Honduras", Merits, Reparations, and Costs, judgment of February 1, 2006, Series C, No. 141, § 174.

[20] On obstruction of journalistic work of television reporters by individuals see: I/A Court HR, case "Perozo y otros vs. Venezuela", Preliminary exceptions, Merits, Reparations and Costs, judgment of January 28, 2009, Series C, No. 195, § 118; I/A Court HR case "Ríos y otros vs. Venezuela", Preliminary exceptions, Merits, Reparations and Costs, judgment of January 28, 2009, Series C, No. 194, § 107. On attacks by state agents to journalists see: I/A Court HR, case "Vélez Restrepo y familiares vs. Colombia", Preliminary exceptions, Merits, Reparations and Costs, judgment of September 3, 2012, Series C, No. 248.

[21] On threats, harassment and criminal defamation claims against defenders see: IACHR, case "Uzcátegui y otros vs. Venezuela", Merits, Reparations and Costs, judgment of September 3, 2012, Series C, No. 249.

[22] On murder see: I/A Court H.R, case "Cepeda Vargas vs. Colombia", Preliminary exceptions, Merits, Reparations and Costs, judgment of May 26, 2010, Series C, No. 213.

[23] *Ibid*.

reputation against specially protected discourses, such as newspaper articles or books that denounce human rights violations[24] or corruption.[25] Therefore, by not giving them preference or considering them as a legitimate exercise of the law, the Court simply takes stock of rights, and bases specific violations of freedom of expression on the breach of the requirement of proportionality, as the criminal sanction is excessive.

Fourth, the Court has loosened up on the categorical rejection of the Office of the Special Rapporteur on Freedom of Expression on vague legislation that sanctions expression[26] when affirming that "many laws are formulated in terms that, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice".[27]

Finally, in some cases the Court has left to the national courts the final determination of whether certain expressions questioned in the international arena are of public interest or not.[28] On the contrary, it would be desirable that, after years of international litigation, the bodies of the Inter-American System determine whether the expressions are specially protected, particularly when the subsequent liability imposed in a case is the most severe of the range of options available for a particular state. Therefore, transferring international standards without correcting methodological deficiencies in the interpretation of the American Convention could generate a fertile ground to increase leeway in the decision of cases, which affects freedom of expression.

[24] I/A Court H.R, "Kimel v. Argentina", Merits, Reparations and Costs, judgment of May 2, 2008, Series C, No. 177; I/A Court H.R, case "Usón Ramírez vs. Venezuela", Preliminary exceptions, Merits, Reparations and Costs, judgment of November 20, 2009, Series C, No. 207.

[25] See, for example, I/A Court H.R, case "Herrera Ulloa vs. Costa Rica", Preliminary exceptions, Merits, Reparations, and Costs, judgment of July 2, 2004, Series C, No. 107; case "Ricardo Canese vs. Paraguay", Merits, Reparations and Costs, judgment of August 31, 2004, Series C, No. 111.

[26] Special Rapporteur for Freedom of Expression (RELE), *Una agenda hemisférica para la defensa de la libertad de expresión* [A hemispheric agenda for the defense of freedom of expression], OAS / Ser.L / V / II, CIDH / RELE / INF.4/09, February 25, 2009, §§ 53-73; IACHR, Report No. 27/18, Case No. 12.127. Merits (Publication). "Vladimiro Roca Antunez y Otros. Cuba", February 24, 2018.

[27] I/A Court H.R case "Fontevecchia D'Amico vs. Argentina", Merits, Reparations and Costs, judgment of November 29, 2011, Series C, No. 238.

[28] I/A Court H.R, "Mémoli vs. Argentina", Preliminary exceptions, Merits, Reparations and Costs, judgment of August 22, 2013, Series C, No. 265.

III. The need to clarify conventional concepts to protect freedom of expression on the Internet

Closely related to the methodological deficiencies in the interpretation of article 13 of the Convention is the need to clarify the conventional concepts about specially protected expressions and the consequences that this should bring. In turn, what kind of expressions should have less protection needs more clarity and understanding, and a justification.

1. Specially protected discourses

Article 13.1 establishes that every person has "the right to freedom of thought and expression. This right includes the freedom to seek, receive and disseminate information and ideas of all kinds." The different bodies of the system have interpreted that "of all kinds" encompasses all kinds of expressions, even those that offend, collide, disquiet, are ungrateful or disturb the state or any sector of the population, since this is required by the principles of pluralism and tolerance of democracies.[29] At first glance, it seems to grant broad protection for freedom of expression in the face of state interference. The Office of the Special Rapporteur on Freedom of Expression states that there is a presumption of protection of all expression in Article 13.[30]

The Inter-American Court has not made a clear-cut separation between protected and not protected speech in the American Convention. There are no judicial precedents on "clearly illicit" speech, like in its European counterpart.[31] It has only placed in a "specially protected" category opinions, expressions and information of public interest in a broad sense,[32] as well as

[29] I/A Court H.R, case "Herrera Ulloa vs. Costa Rica", § 113;I/A Court H.R, case "Ivcher Bronstein vs. Perú", Merits, Reparations and Costs, judgment of February 6, 2001, Series C, No. 74, § 152; case "La Última Tentación de Cristo (Olmedo Bustos y otros) vs. Chile", § 69.

[30] RELE, *Marco jurídico interamericano sobre libertad de expresión*, [Inter-American Legal Framework on the Right to Freedom of Expression] OAS / Ser.L / V / II CIDH / RELE / INF, December 30, 2009, § 232. Since 2009, the Office of the Special Rapporteur in an effort to provide clarity on this matter, based on the judicial precedents of the Court made reference to three types of discourses that would fall into the category of specially protected: the discourse which is political and on matters of public interest, the discourse on public officials in the exercise of their functions and on candidates to occupy public office and the speech that constitutes an element of identity or dignity of the person who is expressing themselves. Actually, I think there are only two.

[31] ECHR, case "Delfi As vs. Estonia", judgment of the Grand Chamber, June 16, 2015.

[32] Antkowiak and Gonza, *supra*, p. 238, note 1.

expressions that carry an aspect of "identity and dignity" for the issuer.[33]

The Court has dealt with cases of classic censorship, subsequent liability for criminal or civil defamation and indirect restrictions imposed by the states on offensive expressions of public interest, political discourse, newspaper articles, and editorial lines criticizing the government or state or religious institutions.[34] According to the ruling of the Court, many of the expressions that generated restrictions to this right should have taken place without any state interference as they were legitimate exercises of the right.

Hence, the Inter-American Court considers certain type of discourses specially protected, but does not endow them with immunity from state action, which allows cases to be tried for years that should not, in my opinion, occupy the time of the national courts. In my assessment, expressions that rely on the intentional dissemination of false information or information about the private life of others should be excluded from specially protected discourse, as they are not of public interest and the person has not voluntarily come forward for a public debate.[35]

2. Discourses with less protection: the need to eradicate criminal responses

The Inter-American Court does not have a list of clearly illicit expressions. Setting itself apart from the Court, the Office of the Special Rapporteur on Freedom of Expression considered that there are certain types of discourses that are "excluded from the scope of protection of the right to freedom of expression": 1) war propaganda and hate speech that constitutes incitement to violence; 2) direct and public incitement to genocide; and c) child pornography. This list does not arise from decisions of specific cases nor does the Office of the Special Rapporteur takes it to its maximum consequence in practice, because when it analyzes the restrictions on these expressions it applies the

[33] López Álvarez has a different position from that of the Court regarding the protection of expression on sexuality and gender identity. RELE, *Una agenda hemisférica para la defensa de la libertad de expresión* [A hemispheric agenda for the defense of freedom of expression], supra, § 21, note 26.

[34] For more specific details on these cases see: Antkowiak and Gonza, supra, p. 238, note 1.

[35] The opposite happened in: I/A Court H.R case "Fontevecchia D'Amico vs. Argentina", Merits, Reparations and Costs, judgment of November 29, 2011, Series C, No. 238.

three-part test as a way to safeguard freedom of expression.[36] For its part, the United Nations Rapporteur, instead of considering certain expressions outside conventional protection, indicated that they are in fact subject to the conditions of legality, necessity and legitimacy[37] and must be strictly defined to avoid an expansive view of the criminalization of expression.[38]

The list of "clearly illicit" expressions seems to arise more from the judicial precedents of the European Court of Human Rights in some of its cases in which it denies the protection of Article 10 because they are behaviors aimed at the destruction of some of the other rights enshrined in the Convention.[39] In this category, the European Court deals with cases of expressions that deny the holocaust, that justify pro-Nazi policies, that link Muslims to serious acts of terrorism, or that describe Jews as the source of evil in Russia.[40]

Leaving "undesirable" content outside the conventional protection, when defining restrictively the scope of protection of international instruments, concern some academics[41] and can lead to fertile grounds for censorship.

The Inter-American Court has not echoed these "exclusions" from the scope of protection, perhaps because the cases analyzed so far have not contained the speeches to which the Convention itself seems to grant a lesser degree of protection. The Inter-American Court has not ruled on truly problematic speeches such as hate speech or incitement to violence, or information whose circulation would damage or seriously endanger the life or integrity of people. There are no judicial precedents of the Court that develop paragraphs 4 and 5 of Article 13 of the American Convention.[42]

The lack of a clear development of conventional concepts may affect

[36] RELE, *Una agenda hemisférica para la defensa de la libertad de expresión* [A hemispheric agenda for the defense of freedom of expression] Chapter 3 "*Discursos no protegidos*" [Speech that is not protected], *supra*, pp. 20-21, note 26.

[37] Kaye, David, *Informe del Relator Especial sobre la promoción y protección del derecho a la libertad de opinión y expresión*, U.N. [Report of the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression] Doc. A / HRC / 35, 2018, § 8.

[38] Kaye, *supra* note 7.

[39] Chang, *supra* note 10.

[40] ECHR, "Delfi vs. Estonia", § 136.

[41] Nowak, 361.

[42] I/A Court HR, case "Perozo y otros vs. Venezuela", Preliminary exceptions, Merits, Reparations and Costs, judgment of January 28, 2009, Series C, No. 195; I/A Court HR case "Ríos y otros vs. Venezuela", Preliminary exceptions, Merits, Reparations and Costs, judgment of January 28, 2009, Series C, No. 194. In the judgment "Perozo y otros y Ríos y otros vs. Venezuela", the Court did not rule on incendiary statements made by several public officials. These statements identified media outlets and part of their personnel as enemies of the Venezuelan people who planned subversive actions.

freedom of expression on the Internet if a system of obligations and liabilities for companies is first envisioned and a regime of intermediaries' liability for third-party content is developed,[43] following the principles already established by the European Court, without addressing those of the region.

The only judicial precedents where the Court seems to rebuke some kind of expression have been within the framework of the protection of the rights to honor and reputation, through the legal concepts of insults and slander,[44] or the right to privacy through civil sanctions,[45] allowed so far by the interpretation of article 13.2. These precedents would raise concern if they were transferred directly to the online discussion. The Internet is a space where anyone can share their comments, opinions and feelings and, if current jurisprudence on freedom of expression where to be directly applicable, it would be open, or its intermediaries, to a criminal penalty for offensive speech. Unfortunately, some experiences in the area of intolerance to criticism or reference to criminal[46] or civil law[47] by public officials paint a discouraging picture for the development of consensus on the subject.[48]

The judgment in the case "Mémoli vs. Argentina" is the most difficult precedent in terms of defamation when it comes to vehemently supporting the direct application of Inter-American standards to protect freedom of expression on the Internet. On the one hand, the Court not only considered legitimate the use of criminal law to protect honor and reputation, but also deemed it a positive obligation of the state. Some of the facts are related to some expressions by journalists Carlos and Pablo Carlos Mémoli which took place in public, administrative and criminal allegations about the management of a mutual fund. The Court — with three dissenting votes — considered that these were matters that are not of public interest. The Court found it particularly serious that the expressions referred to private persons as possible perpetrators

[43] RELE, *Estándares para una internet libre, abierta e incluyente* [Standards for a Free, Open, and Inclusive Internet], *supra*, note 3, § 104, note 7.

[44] I/A Court H.R, "Mémoli vs. Argentina". Preliminary exceptions, Merits, Reparations and Costs judgment of August 22, 2013, Series C, No. 265. Only case that acknowledges that there is no violation of freedom of expression.

[45] I/A Court H.R case "Fontevecchia D'Amico vs. Argentina".

[46] To analyze the reality of these crimes after partial decriminalization see: Del Campo, Agustina, *Calumnias e Injurias. A dos años de la Reforma del Código Penal* [Slander and Insults: Two years after the Reform of the Criminal Code], supra note 13.

[47] Del Campo, *Calumnias e injurias. La situación en el fuero civil después de la Ley 26.551*, [Slander and insults. The situation in the civil jurisdiction after Law 26,551] *supra* note 13.

[48] See also Canicoba Corral, Rodolfo Aristides el Acevedo, Sergio Edgardo y otros sin daños y perjuicios [without damages], August 14, 2013. Judgment of the Supreme Court of Argentina, protecting public officials from insults.

or concealers of crimes, or describing them as "criminals", "unscrupulous", "corrupt" or that "they act with underhanded tricks", among others. The Inter-American Court considered that the authors of the expressions should have found it sufficiently foreseeable that these expressions could give rise to a legal action for allegedly affecting the honor or reputation of the complainants,[49] a position that currently even the European Court considers a perspective that requires an excessive and impracticable foresight capable of undermining the right to impart information on the Internet.[50]

The Inter-American Court stated that the criminal sanction against the journalists was proportionate and did not examine whether the state had used the least harmful restriction, or whether other elements established in international law had been corroborated, such as the intentionality and falsehood of the information. In addition, it did not criticize the use of a class of offense which the Court itself had demanded be modified in a previous sentence, for not complying with the principle of legality. This position is contrary to the views of many experts who argue that criminal sanctions paralyze freedom of expression and weaken democracy by protecting power and privilege.[51]

On the other hand, this ruling confirmed something that had been perceived since the decision of the "Kimel" case, in the sense that there is no immunity from state interference on opinions, and developed in more detail the "great responsibility" of the media and journalists, demanding truthfulness and impartiality from them, contrary to the Principles of Freedom of Expression of the IACHR.[52] In this way, there is an extensive specially protected category in the Inter-American Court that includes public discourse and speeches based on identity and dignity, and, on the other hand, less protection for expressions that affect honor, reputation and privacy, but without precision about the different consequences of one category or the another.

[49] I/A Court H.R, "Mémoli vs. Argentina", § 137.

[50] Bange, Amalie, "Case Law from the European Court of Human Rights in 2016", in: *National Law Review*, June, 2017, retrieved from: https://bit.ly/2IpWcWR, last access: January 21, 2019.

[51] Lisby, Gregory C., "No Place in the Law: The Ignominy of Criminal Libel in American Jurisprudence", in: *Communication Law and Polity*, Vol. 9, No. 4, 2004, pp. 433-438. See also: Emerson, Thomas I., *The System of Freedom of Expression*, New York, Random House, 1970; García Ramírez, Gonza and Ramos Vásquez, 58-59. Some authors defend a partial decriminalization of expression. See, for example, Villanueva, Ernesto, *Derecho de la información* [Right to information], México D.F., H. House of Representatives, LIX Legislature, Universidad de Guadalajara, Miguel Ángel Porrúa, 2006, p. 351; Bertoni, Eduardo, *Libertad de expresión en el Estado de derecho* [Freedom of Expression in the Rule of Law] Buenos Aires, Del Puerto, 2008, pp. 7-10.

[52] Antkowiak and Gonza, supra, p. 241, note 1.

IV. Prior censorship: current regulations regarding the problem of the state blocking and filtering content

It will be difficult to directly apply the current regulations on censorship to expressions on the Internet. Article 13.4 of the Convention absolutely prohibits prior censorship except for "public spectacles (...) with the sole purpose of regulating access to them for the moral protection of childhood and adolescence." The prohibition of prior censorship is unique in the American Convention, when compared to other human rights treaties. The Principles of the Inter-American Commission even require states to prohibit censorship by law.[53] In principle, both the state and Internet companies should not censor and should allow the dissemination of information of all kinds.

The Court has not carefully defined what prior censorship means nor established in detail which forms of state controls are categorically prohibited.[54] Many cases that could be seen as prior controls by the state have been analyzed under the perspective of subsequent liabilities or indirect restrictions.[55] There also has not been jurisprudence on the scope of censorship that the state can exercise in the only exception allowed by Article 13.4 of the American Convention mentioned above.

This article would need more development to be applied to the Internet. It has the potential to open the door to the regulation of access to content for the protection of children and adolescents, which could invite to treat by law, for example, the problem of child pornography, of particular concern to the Special Rapporteur. To interpret the American Convention in terms of "permissible censorship", a better understanding of the concept of "public spectacles" and "moral of childhood and adolescence" is required. But for this exception of limited censorship, the Court has been emphatic in stating that in "all other cases"[56] expression may be subject only to subsequent liabilities, but not to censorship.

According to the Inter-American Court's strict interpretation of article 13, the Convention would not allow prior censorship even on expressions discouraged by article 13.5 that imply "Any propaganda in favor of war and any defense of national, racial or religious hatred that constitutes incitement to violence or any other similar illegal action against any person or group of

[53] Article 13.5.

[54] Antkowiak and Gonza, *supra* note 1.

[55] *Ibid*.

[56] I/A Court H.R, case "La Última Tentación de Cristo (Olmedo Bustos y otros) vs. Chile", Merits, Reparations and Costs, judgment of February 5, 2001, Series C, No. 73, § 70.

persons, for any reason, including those of race, color, religion, language or national origin". According to the Convention, this expression "will be prohibited by law" but, until the moment, it is not subject to the censorship of the state, but to subsequent liabilities determined by that law.[57] In practice, this conclusion would lead to confirming the right to publish for one time only all kinds of contents without control by the state or affected companies, which is always subject to the system of subsequent liabilities after dissemination.

The Office of the Special Rapporteur seems to respond to this dilemma by distinguishing contents with presumed conventional coverage from those without that coverage, including subsection 13.5 within expressions without coverage.[58] Those which have presumed coverage, that is, which are clearly protected by the American Convention, and which are not hate speech, cannot be subject to *ex-ante* filtering of content by governments or companies.[59] However, the Office of the Special Rapporteur understands that this presumption may be nullified by the competent, independent and impartial authority, and, once nullified, it may be subject to exceptional blocking and filtering measures. But maximizing this premise would be very difficult in practice.

The Office of the Special Rapporteur has taken the step of admitting the adoption of mandatory blocking and filtering of specific contents when these are "openly illegal". These measures should be restricted only to illegitimate content, without affecting other content, and they should comply with a strict condition of proportionality. These conclusions of the Office of the Special Rapporteur lead us back to the need to distinguish serious crimes from the legitimate exercise of freedom of expression.

The most difficult problem to solve is that the standards establish that the determination of the illicit nature of content must come from a judicial decision. Transferred to the Internet, this process does not correspond with the reality that nowadays both companies and online news agencies are working on content moderation, filtering and blocking, without being totally clear if moderation on their part can be understood within conventional limits.

[57] Antkowiak and Gonza, *supra* note 1.

[58] RELE, *Estándares para una internet libre, abierta e incluyente* [Standards for a Free, Open, and Inclusive Internet], *supra*, note 3, § 91, note 7.

[59] *Ibid*, § 91.

V. The need for a careful study of European jurisprudence

Although freedom of expression has been understood as a primarily negative freedom[60] where the best law is the one that does not exist, the Inter-American Court has developed the concept of positive obligations that generates requirements to regulate the right to freedom of expression. Among other positive obligations, the Court has made it clear that states must guarantee the plurality and diversity of points of view in the media,[61] allow peaceful protests, protect journalists at risk[62] and require public officials to reasonably verify the veracity of the facts on which their opinions are based.[63] Many of these obligations have an impact on the Internet, but the Inter-American Court has not resolved the level of regulation allowed in relation to third-party intermediaries. In this context, the European Court can become a point of reference as it has developed jurisprudence and the Inter-American Court has been more open to incorporating it in its decisions.

In its report on Freedom of Expression and the Internet, the Office of the Special Rapporteur advises[64] that the subsequent liabilities be imposed only on the authors of the expressions, not on the intermediaries and accepts that a system of immunity of intermediaries' liability for acts of third parties be established. However, the jurisprudence of the European Court is extremely demanding regarding Internet pages that facilitate the distribution of content and news.

The case "Delfi v. Estonia" decided by the European Court marks the way for an Internet with strong censorship power wielded by states and companies. In this case, the Grand Chamber of the European Court established a series of extremely strong obligations for news portals with commercial purposes, due to the third-party comments published in response

[60] Barendt, Eric, *Freedom of Speech*, Oxford, Oxford University Press, 2007, pp. 100-103; Aguiar Aranguren, Asdrúbal, *La libertad de expresión*. *De Cadiz a Chapultepec*, [Freedom of expression. From Cadiz to Chapultepec] Caracas, SIP, 2002; Gros Espiell, Héctor, *La Convención Americana y la Convención Europea de Derechos Humanos. Análisis comparativo* [The American Convention and the European Convention on Human Rights. Comparative analysis], Santiago de Chile, Editorial Jurídica de Chile, 1991, p. 102.

[61] I/A Court H.R, case "Granier y otros (Radio Caracas Televisión) vs. Venezuela", Preliminary exceptions, Merits, Reparations and Costs, judgment of June 22, 2015, Series C, No. 293 §§ 143 -145.

[62] Antkowiak and Gonza*,* supra, p. 233, note 1.

[63] I/A Court HR, case "Perozo y otros vs. Venezuela", note 33, § 151.

[64] RELE, *Estándares para una internet libre, abierta e incluyente* [Standards for a Free, Open, and Inclusive Internet], *supra*, § 82, note 7.

to its content. The European Court set obligations for companies providing content services to interfere in the free circulation of online comments, even when they do not receive notification from a possible victim or third parties.[65] The Court required companies to respect honor and reputation, to avoid causing damage and prevent the publication of comments with obviously illicit content. The published article was balanced, but the anonymous comments were vulgar, humiliating, defamatory and threatening. From my point of view, the European Court ended up devoting too much attention to hate speech and incitement to violence. The Grand Chamber found the intermediary liable, despite the rapid removal of comments after notification, as well as establishing different moderation systems, together with disclaimers that the comments made did not represent the opinion of the company.[66] In this way, the European Court allows and demands that states impose responsibilities of proactive control of expression on Internet news portals, giving a green light to censorship.

Although in other cases after "Delfi", the European Court tried to balance the burden on these duties of intermediaries by being more permissive about aggressive discourse in comments on news portals, the danger of companies establishing automatic censorship systems online remains impending, due to the lack of a clear line to delimit where hate speech starts.[67] In the case "Tamiz v. The United Kingdom", the European Court took a different position in relation to Internet service providers that are not content managers. In this case, it ruled on Google's possible liability regarding comments made in a blog that used its "Blogger.com" platform. Here, the European Court agreed with national courts by denying Google's liability for third-party comments and that Internet providers could only be liable if they failed to immediately remove or disable access to the platform once they learn of the illegality of those comments.[68] In doing so, the Court made a statement that could invite reflection about what to do with comments made on the Internet. The Court pointed out that potentially injurious comments may, in the context of the Internet, be understood as conjectures that should not be taken seriously,[69] to foster a more tolerant online world.

[65] ECHR, "Delfi vs. Estonia", Grand Chamber, June 16, 2015.

[66] *Ibid*, § 159.

[67] In "Magyar Tartalomzolgáltatok Egyesuelete and Index.hu Zrt vs. Hungary" there are attempts to make a difference by noting that in that specific case it was not about hate speech or incitement to violence.

[68] "Tamiz vs. The United Kingdom", § 84.

[69] *Ibid*.

These experiences show that it is not advisable to transfer European jurisprudence directly to our own: we need to discuss whether it is necessary to establish a presumption of non-liability for any intermediary that can be overcome on certain occasions, or to set as a principle a staggered system of obligations of intermediaries that depend on their relationship with the content they publish or facilitate.

VI. Recommendations for protecting freedom of expression on the Internet in the Inter-American System

In accordance with the chapters developed in this article, I believe that at the moment it is not appropriate to make abstract statements on freedom of expression and the Internet in the Inter-American System, especially by the Inter-American Court in its advisory jurisdiction. The Office of the Special Rapporteur has already developed thematic work and it is time to expand regional legislative studies and to analyze the policies of companies that generate the most controversies in our continent. In this manner, the Inter-American System needs to identify the current gaps, by generating a discussion through public hearings and meetings between sectors. To achieve this it would be important to:

a) *Acknowledge the need to reverse certain judicial precedents of the Inter-American Court* to promote the decriminalization of all expression, in order to prevent the transfer of the difficulties brought by the methodological problems in the interpretation of the Inter-American Court of Article 13 of the American Convention. In this process, both civil society and the Inter-American Commission should avoid only focusing on *obiter* developments that have an appearance of broad protection of freedom of expression and alert the Court about the harmful effects of its permissive jurisprudence on the use of criminal law to sanction expression.

b) *Build a differentiated identity of the Office of the Special Rapporteur on Freedom of Expression in relation to the Inter-American Court* and return to the broad definition of expressions specially protected by the Convention, including opinions, expressions of public interest or those referring to issues of public interest and give them immunity.

Only in cases of serious intentional defamation by spreading false information[70] or information on private life, should the Office of the Special Rapporteur resort to civil damages, with special protections for journalists and strict requirements of proof for the complainant: a) knowledge of the falsehood of the information disseminated or negligence to discover the truth, and b) concrete damages. When broaching the subject of expressions that, although they have some protection in the Convention, are not specially protected, there must be an approach from a strict interpretation of the American Convention and avoid including legitimate expressions in that group. With this interpretation, some expressions may arise that may affect the rights of children and adolescents protected in Article 13.4 and hate speech and incitement to violence reproached by Article 13.5.

c) *Support initiatives to carry out regional studies on legislation tending to regulate the Internet and current business policies*, in order to complete the analysis of the *status quo* as soon as possible,[71] by engaging in a dialogue with states and companies on the need to standardize the regulation of the subject based on human rights principles.

d) *Contribute to the regional discussion on effective alternative mechanisms* for the resolution of conflicts between rights, other than criminal response and the abusive use of the civil right of damages: mediation, apologies, replies, corrections, retractions to protect other rights,[72] press councils or multi-sector initiatives.

e) *Integrate freedom of expression in the international business and human rights agenda*. The steps to take in the future cannot be separated from the development of the United Nations agenda of Business and Human

[70] IACHR, principle 10 of the Declaration of Principles of Freedom of Expression.

[71] Supporting projects tending to this instead of duplicating them in the organs of the system is a good practice. See: CELE, Legislative Observatory on Freedom of Expression, which has the reports for the first four countries monitored: Argentina, Ecuador, Mexico and Peru, retrieved from: http://observatoriolegislativocele.com, last access: January 22, 2019; Centro de Estudios en Libertad de Expresión (CELE) [Center for Studies on Freedom of Expression and Access to Information], Universidad de Palermo, *La regulación de internet y su impacto en la libertad de expresión en América Latina* [Internet regulation and its impact on freedom of expression in Latin America], Buenos Aires, CELE, UP, March, 2018.

[72] Milo, Darío, *Defamation and Freedom of Speech*, Oxford, Oxford University Press, 2008, pp. 256-279.

Rights. Various initiatives in the universal sphere have given concrete content to the obligations on the part of states and companies since the adoption of the United Nations Principles on Business and Human Rights in 2011. In order to keep pace with the rapid evolution of responses by states, companies and international organizations, we must avoid duplicating the work done by experts, analyze it critically and identify any gaps. Likewise, to give content to the obligations of due diligence established in the Guiding Principles of the United Nations on Business and Human Rights, we have recent guidelines issued by the Organization for Economic Co-operation and Development (OECD)[73] and by the United Nations Working Group on the issue of human rights and transnational corporations and other companies.[74] These reports contain recommendations relevant to our region.

f) *Increase the diversification of the participants in round tables, discussion events, official consultations of the different universal and regional human rights mechanisms*, to achieve greater understanding of the suggested standards. Evaluate the progress and challenges of inter-sector initiatives. This can be achieved by generating adequate mechanisms that get the official participation of executive directors and relevant legal departments in the consultative processes. Recently, the United Nations Rapporteur on Freedom of Expression presented a report on the obligations of the information and communication technology sector, for which different companies were visited. It is a good starting point to establish the framework of the discussion. However, we must generate discussion forums where human rights sectors and companies engage in honest dialogues, provide official positions and nurture the strengths of each sector. In this sense, the Rapporteur's report only had the response of one company, although he personally visited several.[75]

[73] OECD, *OECD Due Diligence Guidance for Responsible Business Conduct*, May, 2018.

[74] United Nations (UN), "*Informe del Grupo de Trabajo de Naciones Unidas sobre medidas adoptadas por las empresas y los Gobiernos para avanzar en la aplicación de la diligencia debida de las empresas en materia de derechos humanos"* [UN Working Group Report on measures adopted by companies and governments to advance the application of due diligence of companies in the field of human rights], UN A / 73 / 163, July 16, 2018.

[75] Kaye, David, *Informe del Relator Especial sobre la promoción y protección del derecho a la libertad de opinión y expresión*, U.N. [Report of the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression] Doc. A / HRC / 35, 2018.

g) *Work with governments in the process of nominating members for the bodies of the system* and promote the appointment to the system's bodies of members prepared to meet the challenge of the Internet, with an extensive knowledge of alternative mechanisms that are less harmful.

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Chapter Three

Eighteen years of the Declaration of Principles on Freedom of Expression: What will its future be after what we have learnt?

Issa Luna Pla*

Summary

This paper argues that the Declaration of Principles on Freedom of Expression, adopted by the Inter-American Commission on Human Rights in the year 2000, is a political instrument created under certain contextual elements. However, in practice and in the field of social sciences the conceptual assumptions were surpassed and there are no great expectations to generate a regulatory impact. This paper describes the background of the Declaration, the discourse and narratives given by the writers of the time are analyzed from the perspective of human rights. Furthermore, empirical academic literature that criticized the premises and the narrative is presented and the validity of the assumptions is discussed. The article concludes with an analysis of the future of the Declaration as an instrument to defend freedom of expression.

I. Introduction

In the region, the Inter-American system protects the guarantee of human rights between member states of the American Human Rights Organization.[1]

* Issa coordinates the Information Law Area of the Institute of Legal Research at National Autonomous University of Mexico. She has a Master's Degree in Human Rights from the London School of Economics, and has been a researcher in the Program of Comparative Media Law and Policy at Oxford University. She has specialized in media and democracy issues, as well as freedom of expression and information.

[1] To learn about the Inter-American System and the Inter-American Commission on Human Rights, see: http://www.oas.org/es/cidh/mandato/documentos_basicos.asp,

This system is composed of two key institutions in the protection of rights: the Inter-American Commission on Human Rights (based in Washington D.C., USA) and the Inter-American Court of Human Rights (headquartered in San Jose, Costa Rica). Both institutions apply and interpret the main instrument of regional international law in the hemisphere: the American Convention on Human Rights, also known as the Pact of San José, which dates back to 1969.[2]

In the year 1997, the Commission established by agreement of the member states the Special Rapporteur for Freedom of Expression as a permanent office in charge of promoting the defense of freedom of expression and information under Article 13 of the American Convention on Human Rights.[3] As part of its advocacy work, the Special Rapporteur promoted in the year 2000 the Declaration of Principles on Freedom of Expression, signed by several heads of member states as a manifestation of political commitment to respect freedom of expression in the countries of the region.

Eighteen years after the publication of the Declaration of Principles on Freedom of Expression, the publishers of this book open a pertinent revisionist debate: how effective and useful has this Declaration been in the Inter-American System? Is it right to assert that the Declaration generated a "standard" in the region? Did the Declaration become a means for the interpretation of the Convention and an instrument for the defense of freedom of expression and information as was intended?

This article offers some answers to the questions set forth. While a comprehensive analysis to answer the questions of the use and validity of the Declaration of Principles should include the study of the regulatory frameworks of the member states and the judicial precedents in their constitutional courts, this article focuses exclusively on the work and the judicial precedents set forth by the institutions of the Inter-American System. The analysis is presented both at a normative level, that is, the impact on judicial precedents and the number of times that the Declaration of Principles has been mentioned in the decisions of the Inter-American Commission and Court, as well as at the discursive level of the Declaration of Principles, as

last access: January 18, 2019.

[2] American Convention on Human Rights, retrieved from: https://www.oas.org/dil/esp/tratados_b-32_convencion_americana_sobre_derechos_humanos.htm, last access: January 18, 2019.

[3] For further information on the origin of the Office of the Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights, see: https://bit.ly/2MDidVJ, last access: January 18, 2019.

a text with policy making goals, aimed at defending and promoting freedom of expression in the region.

II. Contextual elements of the Declaration of 2000

The turn of the century witnessed important moments for many democracies in the region. The feeling of leaving behind past authoritarian and oppressive regimes in several countries grew with the idea of evolution, of economic progress and the guarantee of civil liberties. The end of the 90s had debates and powerful social movements defending freedom of expression and protests, which originated in the reminiscences of the political turbulence of the three preceding decades. Said era came to an end with the regional consensus on the creation of the Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights (IACHR). But the structure for the application of the regional legal framework, and the structure for the Special Rapporteur, was made based on consensus manifested in the declarations of commitments and admissible principles in the new democratic realities.

The Chapultepec Declaration in 1994, the Declaration of Santiago in 1998 and finally the Declaration of Principles of Freedom of Expression in 2000 evidence the activity between social and political actors on an international level. For the first time in the history of the Inter-American system, the member states and civil society met with the specific agenda of a single right within the extensive catalogue of the American Convention on Human Rights, to design efficient mechanisms for the surveillance and international coordination for safeguarding freedom of expression. And, like any social movement of human rights, it also derives from conflict, abuses and the situation which was out of control regarding respect for the guarantees of freedom of expression shared by the Governments of the countries of the region.[4]

The Inter-American Press Association (IAPA) was a very active organization of journalists at the time and, in the absence of the organization of audiovisual media, the written press set the tone of the requirements and demands for guarantee of freedom, thanks to its collective experience with

[4] Ishay, Micheline R., *The History of Human Rights. From Ancient Times to the Globalization Era*, Oakland, University of California Press, 2004. Robertson, A.H. and Merrills, J.G., *Human Rights in the World. An Introduction to the Study of the International Protection of Human Rights*, New York, Manchester University Press, 1996. Rorty, Richard, "Human Rights, Rationality and Sentimentality", in: Shute, Stephen and Hurley, Susan (eds.), *On Human Rights. Oxford Amnesty Lectures 1993*, New York, Basic Books, 1993, pp. 112-134.

the hardships newspapers suffered from the ravages of the Governments. In March 1994, IAPA, along with various heads of state, adopted the Chapultepec Declaration in the framework of the Hemispheric Conference on Free Speech held in Mexico City.[5] The First Principle of said Declaration states that "No people or society can be free without freedom of expression and of the press. The exercise of this freedom is not something authorities grant; it is an inalienable right of the people." This principle, at the top of the list, strengthens the liberal narrative tone of the era: societies have the rights to civic liberties guaranteed by Democratic Governments. The discourse of the declaration supports the emphasis on the obligations of the Governments regarding freedom of expression, and implies the demand for a new relationship between "governments and citizens", leaving behind the old idea of "governments and governed".

The priorities expressed in the principles of the Chapultepec Declaration constitute guarantees of freedom of expression, freedom of the press and the right to information. At this time, in the countries of the hemisphere, the nineteenth-century conception of freedom of expression had been broadened, which privileged the protection of the issuer of information. It was significantly modified in the second half of the 20th century to expand its scope and content in such a way that today it also includes the recipients of information.[6]

The Declaration of Santiago was signed at the Second Summit of the Americas in April 1998 in Santiago, Chile.[7] In this summit, the countries recognized the obstacles in the region to guarantee freedom of expression and the press and at the same time saw the need to create a Special Rapporteur. The new Rapporteur, Santiago Cantón, admitted in his annual report

[5] The Declaration was ratified by Heads of State and Government of: Argentina, Bolivia, Belize, Brazil, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Grenada, Guatemala, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Puerto Rico, Uruguay, the United States of America and the Dominican Republic.

[6] López Ayllón, Sergio and Luna Pla, Issa, "*Comentario artículo 6º constitucional*", in: Ferrer McGregor Pisot, Eduardo and Guerrero Galván, Luis René, *Derechos del pueblo mexicano. México a través de sus Constituciones*, Chamber of Senators of the Honorable Congress of the Union, Mexico DF., Miguel Ángel Porrúa, 2016. Luna Pla, Issa, *Movimiento social del derecho de acceso a la información en México*, Mexico D.F., National Autonomous University of Mexico, 2013. Abramovich, Víctor and Courtis, Christian, *El acceso a la información como derecho*, Buenos Aires, Centro de Estudios Sociales y Legales [Center for Legal and Social Studies], 2000.

[7] "Declaración de Santiago", Second Summit of the Americas, in: *Documentos oficiales del proceso de cumbres de Miami a Santiago*, Vol. I, Summit of the Americas Implementation and Follow-up System, The Organization of American States, Santiago de Chile, April 18-19, 1998.

of 1999 that freedom of expression and information in the hemisphere had "notably improved" compared to past decades, "when the dictatorial and authoritarian regimes" restricted it heavily.[8] Certainly, the creation of the Special Rapporteur in this context was already in itself an evidence of improvement and progress in recognition of the abuses perpetuated by the governments and the commitment to build institutions that prevent regressions. However, the same Rapporteur declared that the first problems that the Office recorded in its almost two years of existence were serious. In its 1999 report the Office of the Special Rapporteur for Freedom of Expression documented that in several countries practices of prior censorship were widespread, there were many murders, threats and attacks on journalists, and legal proceedings against journalists were backed up by the existence of laws regarding the offense known as *desacato* [TN: threatening, insulting or in any way offending the dignity or decorum of a public official due to the exercise of their duties].[9] The conditions and political forces rallied in other attacks on the media in this era, these required new demands, limits and control mechanisms for power, demands of freedom, and as in the policy statements of Chapultepec and Chile: the creation of new principles (or values) to protect freedom of expression.

Unlike previous statements, driven exclusively by groups of journalists and victims of abuses, on this occasion the Special Rapporteur recognized "the pressing need to develop principles to strengthen the democracies in the hemisphere." The Declaration protects not only journalists but also the media, since the latter acted as intermediary in the theoretical model of citizens-governments.

In October 2000, the IACHR passed the Declaration of Principles on Freedom of Expression prepared by the Office of the Special Rapporteur for Freedom of Expression. The objective behind this declaration was to establish the framework for the development of legislation on freedom of expression, as a guide to the interpretation of Article 13 of the American Convention on Human Rights. The Special Rapporteur also justified the declaration citing the presumption that it would serve as a major instrument in the hemisphere for the defense, promotion and protection of the right to freedom of expression.[10] The reasons for the existence and creation of

[8] Annual Report for the Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights, 1999, p. 15, retrieved from: https://bit.ly/2UlqBwq, last access: January 18, 2019.

[9] *Ibid.* p. 7.

[10] Annual Report for the Special Rapporteur for Freedom of Expression of the

the principle are set apart from earlier statements by two purposes: a) the creation of standards, models representing the ideal guarantee of freedom of expression to be emulated by member states, and b) the political (and legal) use of the Declaration to defend this right and as a mechanism for expanding the interpretation of the Convention.[11] This last point opened an important academic debate about the strength and validity of the document within the international legal system, in its intent to develop an interpretation of freedom embodied in Article 13 of the American Convention on Human Rights.[12] Eighteen years after the publication of the Declaration of Principles, is it correct to say that the Declaration set a "benchmark" in the region? Did the Declaration become a mechanism of interpretation of the Convention and a tool for the defense of freedom of expression and information?

III. Judicial application of the Declaration of Principles

The Declaration introduces the 21st century with various dilemmas, paradigms and prayers, and lays certain expectations in this instrument to schedule and resolve them. The strategies for defending the Declaration bet on the creation of regional standards that define common values and become instruments to be used by other advocacy groups in their arguments and legal allegations against the judicial authorities and the oppressing Governments. In this section we analyze the use that the Declaration has had by the institutions of the Inter-American System and the normative impact which can be seen.

In the year 2000, the situation of freedom of expression in the region was properly evaluated thanks to the coordination of institutions and organizations

Inter-American Commission on Human Rights, 2000, p. 4, retrieved from: https://bit.ly/2KWqR0R, last access: January 18, 2019.

[11] "After an extensive debate with various civil society organizations and in support of the Office of the Special Rapporteur for Freedom of Expression, the Inter-American Commission on Human Rights adopted the Declaration of Principles on Freedom of Expression during its 108th regular session in October 2000. This declaration constitutes a fundamental document for the interpretation of Article 13 of the American Convention on Human Rights. Its approval is not only a recognition of the importance of protecting freedom of expression in the Americas, but it also incorporates international standards for a more effective defense of the exercise of this right to the inter-American system." See: *Interpretación de la Declaración de Principios de Libertad de Expresión* in: https://bit.ly/2fls1iP, last access: January 18, 2019.

[12] Stainer, Henry J., Alston, Philip and Goodman, Ryan, *International Human Rights in Context. Law, Politics, Morals*, 2nd ed., Oxford, Oxford University Press, 2000. Klabbers, Jan, *An Introduction to International Law*, Cambridge, Cambridge University Press, 2002.

of civil society and its long history of defense. One of the problems identified was the use of judicial systems to limit freedom of expression and the informative tasks of journalists and the media. Judicial actions against freedom of expression were permitted through the laws known in this hemisphere as *desacato*.[13] The first to use the Declaration as an instrument of persuasion was the Office of the Special Rapporteur for Freedom of Expression and did it against *desacato*. In its annual report of the year 2000, the Rapporteur called the Governments to amend their domestic laws within the parameters of the American Convention and the new parameters of the Declaration.[14] However, the contentious cases that arrived at the Inter- American Commission on Human Rights and the Inter-American Court barely used and cited the Declaration of Principles of Freedom of Expression of 2000.

Of the 21 judicial cases on freedom of expression and information which were heard by the Inter American Court in the past eighteen years, only three direct references to the Declaration of Principles were made. At first, only the expert reporters and the representatives of the victims referenced the Declaration in the allegations, specifically in two cases: "Ricardo Canese v. Paraguay" judgment of August 31, 2004[15] and in "Palamara Iribarne v. Chile" judgment of November 22, 2005.[16] During the first years of existence of the Declaration of Principles only those close to the Inter-American System who asked for international justice knew the document, which shows that the Declaration did not work as a large-scale standard and a legal defense instrument as was expected.

At a second point, the Inter American Court itself referenced at the end

[13] During the year 2000, the Rapporteur received information on approximately sixty complaints of legal actions against journalists and the media. The Rapporteur conducted a study on existing legislation on freedom of expression and has confirmed that in several States *desacato* laws still exist and are applied to silence the criticism directed towards public officials. Annual Report of the Office of the Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights, supra, p. 4 and 5, note 10.

[14] "The Special Rapporteur recommends that the member states adapt their internal legislation in accordance with the parameters established in the American Convention on Human Rights, and be fully compliant with the provisions of Article IV of the American Declaration of the Rights and Duties of Man. It also recommends that member states consider adjusting their domestic legislation and practices according to the parameters established by the Declaration of Principles on Freedom of Expression. The Special Rapporteur recommends that the member states repeal the laws that include the concept of *desacato*, since they restrict public debate, an essential element of democratic activity and are also contrary to the American Convention on Human Rights. Annual Report of the Office of the Special Rapporteur on Freedom of Expression of the Inter-American Commission on Human Rights, *supra*, p. 180, note 10.

[15] Retrieved from: https://bit.ly/2G7XAvA, last access: January 18, 2019.

[16] Retrieved from: https://bit.ly/2G93ooE, last access: January 18, 2019.

of its judgment the Declaration of Principles in the section on general standards on the right to freedom of expression in the case "Granier et al. (Radio Caracas Television) v. Venezuela." The Court referenced this Declaration to explain the scope of the right to freedom of expression against the various forms of indirect restrictions, as well as monopolies and allocation of radio and television licenses, given the merits of the case.[17] It is possible to observe that the Inter American Court itself did not use the text of the Declaration of Principles to consider it as standard interpretation of the Convention rather than on a single case ("Granier et al.") and fifteen years after its publication.

Other contentious cases that were heard by the Court for infringing Article 13 of the American Convention on Human Rights prior to the three mentioned above did not reference the Declaration of Principles ("Olmedo Bustos et al. v. Chile" in 2001; "Ivcher Broinstein v. Peru" in 2001; "Herrera Ulloa v. Costa Rica" in 2004). In addition, in these previous cases, the Inter-American Commission did not reference the Declaration of Principles as standard and in any case, at the time the cases were heard, this instrument did not yet exist. The only case where the Commission did reference the Declaration of Principles was the case "Granier et al." in the merits report of the case (No. 112/2) February 2013.[18] Furthermore, the Inter American Commission also referenced the Declaration in another merits report. Besides the Granier case, it did so in the analysis of the Stat's compliance with obligations to guarantee the life of Monoel Leal de Olivieira and its interpretation of Article 13 of the American Convention, as stated in report No. 37/10 Case No. 12.308.[19]

The Declaration studied here was an instrument signed by the leaders of the member states of the Inter-American system, but, since its creation, the Office of the Special Rapporteur for Freedom of Expression promoted and participated in various joint declarations signed between international organizations, civil society organizations, experts, journalists and activists in the field. For example, in the same year 2000 the Joint Statement between the Special Rapporteur for Freedom of Expression for the United Nations, the representative for OSCE on Freedom in the Media and the Special Rapporteur was signed.[20] Like this joint declaration, there are others that deal with

[17] Case "Granier y otros (Radio Caracas Televisión) vs. Venezuela", §§ 143 y 163, judgment of June 22, 2015, retrieved from: https://bit.ly/1hRj7cs, last access: January 18, 2019.

[18] Retrieved from: https://bit.ly/2JvlSn1, last access: January 18, 2019.

[19] Case Manoel Leal de Oliveira, March 2010, retrieved from: https://bit.ly/2JvlSn1, last access: January 18, 2019.

[20] Retrieved from: https://bit.ly/2DgRw2b, last access: January 18, 2019.

the most important regional problems, such as anti-terrorism (in broadcasting and the Internet), diversity in broadcasting, defamation of religions, and violence against journalists or the fight against violent extremism.[21] Unlike the Declaration of Principles on Freedom of Expression of the year 2000, the joint statements did not have the agreement of the member states, but followed the same defense strategy: creating regional protection standards and an interpretation of Article 13 of the American Convention.

Achieving other statements promoted by the Office of the Special Rapporteur on Freedom of Expression, linked to human expression and its effects against Governments, shows that the Declaration of 2000 was general in its wording and alluded to problems that were soon eclipsed by new ways to threaten this freedom. One way to explain this is because its political regulatory power did not last long and had little influence in regional law, since it did not enjoy the expected regulatory force in the judicial precedents of the Inter American System, and the Office of the Special Rapporteur for Freedom of Expression together with organizations close to the Inter-American System, used the same formula in their defense strategies through new declarations.

Of course, it should be analyzed whether the Declaration of Principles, as a standard, had an impact on national law through laws and judicial precedents in the constitutional courts, to determine more precisely if its power as a standard has been evident. Such analysis would merit reviewing the validity or constitutional status that each member state of the Inter American System assigned to the American Convention on Human Rights, and then discuss this applied to a political document as the Declaration of Principles. This allows us to notice that the member states hardly appropriated this Declaration, because as a political document not approved by two thirds of the representatives of the people, its normative validity is debatable. At best, the Declaration of Principles impacted the discourse among those defenders par excellence of freedom of expression: associations, journalists and the Office of the Special Rapporteur for Freedom of Expression, and this will allow us to analyze its significance after 18 years.

IV. Discursive level of the Declaration of Principles

The argument on which I will focus in this section is that the normative-political effects of the Declaration, together with other elements, depend on the discourse and narrative on which it was based. The Declaration of

[21] See all in: https://bit.ly/1Q50WzX, last access: January 18, 2019.

Principles of Freedom of Expression of the year 2000 inherits from the previous century the high expectations established by new democracies in Latin America, based on the idea of a relationship between citizens and governments in non-dictatorial regimes.

On the one hand, there are many liberal preconceptions about the role and relevance of ensuring this freedom in the face of modern Governments, and secondly, beliefs about the impact and effects of freedom of expression in the government-citizen relationship become more widespread. In this section, we identify some preconceptions and beliefs, while debating them and comparing them to empirical studies of a scientific nature.

It is worth noting that the Declaration as an instrument with a political-legal objective does not start from empirical premises which are well explained and demonstrated. It merely states and describes qualities and conceptual categories typical of discourse. For this reason, it neglects to explain how its objectives and expectations will be achieved, and in what aspects and under what circumstances and contexts the guarantee of freedom of expression (as legislation) can achieve those goals.

1. Freedom of expression for the strengthening of democracy

The Declaration incorporates the classical philosophical *motto* that links and justifies freedom of expression with the "form" of democratic government, which gradually established in the hemisphere. The discourse that it incorporates implies support for the press as a perfect means of critical expression and as "an essential instrument for the functioning of a representative democracy, through which citizens exercise their right to receive, disseminate and seek information."

Likewise, the Office of the Special Rapporteur for Freedom of Expression in its Interpretation of the Declaration, where it elaborates on the relation between freedom of expression and democracy, adds the belief that this relation is functional. This interpretation ensures that: "Respecting and protecting freedom of expression becomes a crucial function, since without it the development of all the elements for democratic strengthening and respect for human rights is impossible".[22] Although freedom of expression has a genuine function of denunciation and criticism through the media, the

[22] Interpretation by the Office of the Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights, retrieved from: https://bit.ly/2fls1iP, last access: January 22, 2019.

Declaration of Principles and its interpretation presuppose that the effects of these accusations have an impact on strengthening the form of government and respect of human rights. In this same line it is logical to assert that in practice (and in all cases) the fact that Governments respect criticism and accusations makes them more democratic, but this could not be scientifically tested in an institutional level regarding guarantee of human rights, since all cases are of conceptual categories (strengthening democracy, respect for human rights and the protection of freedom of expression).

In the last century, the social sciences have sharply placed significant findings on their viability and impact in the conceptual debate of democracy. Some empirical academic studies focus on contrasting reality with some aspects of the dialectic of the democratic idea, understood as discussion generated by the opening of information.[23] Information has rules that depend on variables to be open or closed to the public; the presence of informed opinions does not necessarily lead to choosing better and less corrupt rulers; freedom of expression is exercised through the media and the latter depend on an economic model incompatible with the schemes of the democratic narrative; denouncing human rights violations and abuses of power in the media does not lead to a link between accountability and its effects on institutional and democratic strengthening; and ultimately in relation to information technologies, the written press, radio and television ceased to be the means of communication with most influence over political power, which changes its place in history for the future.

2. Freedom of expression for citizen participation

Citizen participation is one of the components of democracy in liberal philosophy. Hence, the ideological link between freedom of expression and citizen participation is in the same argumentative line. The Declaration of Principles of Freedom of Expression states that, when the free debate of

[23] Hood, Christopher and Heald, David (eds.), *Transparency. The Key to Better Governance?* Oxford, Oxford University Press, 2006. Curtin, Deirdre and Meijer, Albert Jacob, "Does Transparency Strengthen Legitimacy? A Critical Analysis of European Union Policy Documents", in: *Information Polity*, Vol. 11, Amsterdam, IOS Press, 2006, pp. 109-122. Bovaird, Tony, "Beyond Engagement and Participation: User and Community Coproduction of Public Services", in: *Public Administration Review*, Vol. 67, No. 5, September-October, 2007, pp. 846-860. Bovens, Mark, "Information Rights: Citizenship in the Information Society", in: *The Journal of Political Philosophy*, Vol. 10, No. 3, Utrecht, February, 2003, pp. 317-41. Stasavage, David, "Polarization and Publicity: Rethinking the Benefits of Deliberative Democracy", in: *The Journal of Politics*, Vol. 69, No. 1, Chicago, February, 2007, pp. 59-72.

ideas and opinions is hindered, "Freedom of expression and the effective development of the democratic process are restricted". We have no elements to know exactly which aspects of the democratic process are affected without freedom of expression, which could well be political and proselytizing ideas that affect political competition or the right to information so that citizens exercise an informed vote. However, in its interpretation the Special Rapporteur explains that, for this to happen, freedom of expression must empower the citizens: "Through social communicators, citizens acquire the power to participate and/ or control the actions of public officials".[24] Apparently, the language of the Declaration must be interpreted as protecting the issuers of information, and its effects benefit the citizen's right to information.

Like some other terms of the time, the use of the term "social communicators" to refer to the issuers is noteworthy, as it is a term that alludes to the communication model that prevailed until the last decades of the last century, based on the classic communication between citizens -government. Twenty years later, any person (whether or not a citizen of a country) with access to the Internet is a "communicator" or information issuer who can participate and influence any of the Governments or Democracies of Latin America.

The following interesting hypothesis in the text of the Declaration of Principles is that with information, citizens can participate in democracy. The narrative of the Declaration studied here does not define what information, at what point it should be received, and under what rules and context would it be useful when Government allows participation. Likewise, the further we move away from the date on which the Declaration was approved, the more the concept of "citizens" is divided into individuals and groups with multiple interests and levels of information, education and sufficient knowledge to participate (in the idea of democracy).[25]

And to close the discursive circle, the interpretation of the Declaration asserts that: "The inclusion of all sectors of society in the processes of communication, decision and development is fundamental so that their

[24] *Interpretación de la Relatoría Especial para la Libertad de Expresión de la Comisión Interamericana de Derechos Humanos* [Interpretation by the Office of the Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights], *supra* note 22.

[25] Fung, Anchon, Graham, Mary and Weil, David, *Full Disclosure. The Perils and Promise of Transparency*, Cambridge, Cambridge University Press, 2007. Luna Pla, Issa and Juárez Vicente Gámiz, Julio, *La otra brecha digital. La sociedad de la información y el conocimiento*, collection Los mexicanos vistos por sí mismos, Mexico D.F., National Autonomous University of Mexico, 2015. Anheuer, Helmut, Marlies, Glasius and Kaldor, Mary, "Introducing Global Civil Society", Chapter 1, *Global Civil Society 2004/5*, London, Sage, 2006.

needs, opinions and interests are taken into account in the design of policies and decision-making".[26] This idea evolved and probably became more elaborate in the last ten years by movements such as the so called open Government. This unleashed in its decline a serious reflection on the real possibilities of the civil society organizations that participated to influence public policy decisions. At least, we can conclude that the challenges in the debate identified weaknesses in the sustainability of partnerships between government and society, and serious doubts about the impact and the real change driven by social organizations in the development of policies, with few success stories to add to the list.

3. Freedom of expression and information for administrative transparency

The Declaration of Principles of Freedom of Expression of the year 2000 states that, by guaranteeing the right to access to information held by the state, "a greater transparency of Government acts can be obtained, thus achieving the strengthening of democratic institutions". The open nature of information through the laws of access to information in the same narrative leads to a greater transparency (understood as open access) of information about acts of Government, and this is probably true in many cases.[27] However, the text is ambiguous when it states that transparency strengthens democratic institutions, which could have multiple meanings and clearly does not explain in which way.

Finally, in the interpretation of the Office of the Special Rapporteur for Freedom of Expression, the right to access information held by the state is linked to a direct impact on the fight against corruption, just as "Guaranteeing access to information held by the state helps to increase the transparency of the actions of Government and the consequent decrease in corruption in state management."[28] This hypothesis was refuted a few years later with the

[26] *Interpretación de la Relatoría Especial para la Libertad de Expresión de la Comisión Interamericana de Derechos Humanos* [Interpretation by the Office of the Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights], *supra* note 22.

[27] Michener, Gregory, "Policy Evaluation via Composite Indexes: Qualitative Lessons from International Transparency Policy Indexes", in: *World Development*, Vol. 74, 2015, p. 196.

[28] *Interpretación de la Relatoría Especial para la Libertad de Expresión de la Comisión Interamericana de Derechos Humanos* [Interpretation by the Office of the Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights], *supra* note 22.

experience of implementation of transparency laws and access to information in countries such as Brazil, Peru, Mexico, Colombia and Chile. The first relation established was that, with the approval and implementation of transparency regimes, these countries continued to appear at high rankings in the Corruption Perceptions Index of Transparency International (and some countries have also experienced actual cases).[29]

V. Contemporary problems: Towards a new Declaration?

Context, thinking, societies, communications and technology have drastically changed after the adoption of the Declaration of Principles of Freedom of Expression in the year 2000. This should not be the main reason to think that said document is anachronistic or has ceased to make sense in the first two decades of the century. There are other instruments of international law such as the classic Universal Declaration of Human Rights, written in 1948 or the International Covenant on Civil and Political Rights of 1966. The purpose of an analysis of this kind should focus, on the one hand, on its legal nature and, on the other, on its persuasive capacity in the face of changing societies.

The regulatory level of the Declaration of Principles, as has been said before, is very debatable. Due to the way in which it was approved and the lack of a formal mechanism to connect its content to national law, it can be inferred that this soft law instrument was born with a limited shelf life. Its promoters made the risky gamble of developing international law through the adoption of a declaration of principles based on one right, and hoping to be an instrument of interpretation of the American Convention on Human Rights. As analyzed in this article, the impact of the Declaration of Principles regarding the judicial precedents of the Inter-American System has been insufficient and has helped little to strengthen the defense of freedom of expression. Like any instrument of politics and diplomacy, the Declaration is not capable of transforming realities and changing the forces of political and economic power in which the media and human acts of expression are presented.

[29] Islam, Roumeen, "Do More Transparent Governments Govern Better?", Policy Research Working Paper No. 3.077, Washington, D.C., The World Bank, World Bank Institute, Poverty Reduction and Economic Management Division, June, 2003. Meijer, Albert, "Understanding the Complex Dynamics of Transparency", in: *Public Administration Review*, Vol. 73, No. 3, 2013, pp. 429-439.

In an argumentative level, the Declaration of Principles does not contain a persuasive narrative for the reality of this hemisphere. All discourse is questionable and susceptible to manipulation, and this one in particular has had to face contemporary problems, including sophisticated ways of restricting freedom of expression by Governments and private companies, as well as the lack of a rule of law in various countries of the region where impunity reigns. While many of the policy assumptions intended to limit the Declaration of Principles can be narrowed down to contemporary problems and new forms of communication and expression, as defense mechanisms, the Declaration is fragile compared to complex problems and conflicts.

Therefore, the subject deserves a profound reflection about the social phenomena that threaten and strengthen freedom of expression in contemporary social and political use, which would accurately identify the causes and the origins of the challenges of protecting this freedom. It is important to reconsider the new political instruments, the tools and the strategies of defense of freedom of expression in light of the findings of the study of social phenomena. These views, supported by science and empirical thought, could determine elements of political discourse and workable legal strategies to promote a conceptualized law in the 19th century for companies and Governments of the 21st century.

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Chapter Four

Responses to the dystopias of contemporary public communication: the unlikely commitment to corporate self-regulation and digital literacy

Silvio Waisbord*

Summary

The traditional parameters for the regulation of the press and expression are insufficient to understand the problems with information ecologies with greater options and new actors and structures. Regulation, in its multiple manifestations and incarnations, was understood and discussed in a world of limited options for expression, where the press was a relatively homogeneous institution in terms of normative and legal frameworks. This core model is still important, but not complete when facing two phenomena that disrupt the regulation of expression. One is the emergence of new actors that dominate public expression, specifically the so-called "social media" and the giants of digital communication. These companies are not on par in quality when compared to the press as vehicles for public expression. The other challenge is the proliferation of platforms that permit individual and collective expression without corporate curation of contents or institutional regulation, which allows the circulation of false, abusive and offensive information. In this article I discuss the problems in light of the historical tensions regarding to journalism as an intermediary of public expression and the limitations of self-regulation to confront the dystopias of contemporary communication.

* Silvio is a professor in the School of Media and Public Affairs at George Washington University. He is past editor-in-chief of the Journal of Communication and the International Journal of Press/Politics. He holds a Sociology Degree from University of Buenos Aires and Ph.D. in Sociology from the University of California, San Diego.

I. Introduction

There is no doubt that the digital revolution profoundly transformed public communication. Contemporary global society is a communicative chaos generated by the earthquake caused by the digitalization and multiplication of spaces, platforms and applications. We are no longer in a society with limited opportunities for public expression, exchange of ideas and disseminating news and opinion. In a society of abundance in communication, at any moment audiences consume and produce exorbitant quantities of information.

This does not mean that the Internet is a paradise of absolute equality of opportunities for expression. More than half of the world's population still does not have access to the Internet and a good part of it lacks regular and fast access. The digital giants, with their ability to accumulate audiences and advertising investments nationally and globally, wield an unprecedented power in the history of mass media. The explosion and constant multiplication of opportunities to communicate and inform came hand in hand with the gradual corporate concentration of the Internet.

It has been rightly stated that the Internet has revolutionized everything we knew about structures and dynamics of the public sphere, from the institutions that occupied a dominant position in the production of information (governments, corporations, public relations, advertising, journalism) to the ways of accessing, consuming and using data, observations, ideas, images and everything that circulates in the global network. The proliferation of platforms and of opportunities for public expression caused a number of recent developments such as new forms of expression and accumulation of personal information, sophisticated forms of manipulation and surveillance, modes of citizen participation articulated by digital networks and the consolidation of new forms of massive influence.

Some of the most important transformations are the repositioning of the press as a political institution, journalism as an occupation, and the news industry as a corporation. Nothing will be like it was before after the digital revolution — the press is not the presumed unified institution with common goals and ideals, journalism is not an occupation with professional ambitions, and the news industry does not remain unchanged.

Within this process, an important issue to analyze is the place of journalism in the circuit of daily news and information in a digital society. During the heyday of the modern era of mass communication, journalism occupied a dominant position in the production and circulation of news, information and opinion. It was the central arbiter of news and mass circulation of informa-

tion. It remained in a privileged position at the top of the mass information pyramid as a determinant intermediary (a gatekeeper) in a relatively limited world of news flows. This privileged position was due to the existence of considerable barriers to access the media market, added to the technological limitations of the analogue era that favored a small number of producers.

Journalism does not hold the same position in a saturated and disorganized information ecology with multiple actors (governmental, corporate and civil society organizations), which constantly produce and distribute information and do not need to channel their activities through the press. This does not imply that the possibilities of taking part in communication have leveled out or that journalism is a secondary actor in the contemporary communicative scenario or that its ability to influence is insignificant or smaller. These are topics on which there is no consensus in the rich academic literature. The greater complexity of communicative flows does not imply equal conditions of expression or incidence in the public agenda. However, journalism is no longer the only actor with an influential position in public expression. In an unlimited information ecology, journalism of the traditional press and anchored in the news industry is no longer the only institution that determines the daily flow of news, opinions, testimonies, statistics and information. What is usually information, whether produced or consumed, goes beyond what journalism decides in its editorial diversity, financing models and public users. Certainly, it is naive and wrong to discard its validity since it persists as an important institution in the public sphere, in the circulation of daily information; in defining news agendas, in producing original information, and in attracting huge audiences daily in diverse written, broadcasting and digital platforms.

These monumental changes present new challenges for the freedom of expression enshrined in Article 13 of the American Convention on Human Rights. The argument of this article is as follows: the traditional parameters of the regulation of the press and expression are insufficient to understand the problems with information ecologies with greater options and new actors and structures. Regulation, in its multiple manifestations and incarnations, was understood and discussed in a world of limited options for expression, where the press was a relatively homogeneous institution in terms of normative and legal frameworks. This core model is still important, but not complete when facing two phenomena that disrupt the regulation of expression. One is the emergence of new actors that act as intermediaries in public expression, specifically the so-called "social media" (Facebook, YouTube) and the giants of digital communication (Apple, Google, Microsoft). These companies do

not have the same level of quality as the press as vehicles for expression. The other challenge is the proliferation of platforms that allow individual and collective expression without corporate curation of contents or institutional regulation. Faced with these challenges, it is necessary to rethink regulation and its possibilities, especially in the light of challenges arising from experiences of press regulation and self-regulation in journalism.

II. "Digital journalism" and communication chaos

Nowadays, traditional journalism is part of a broader phenomenon — "digital journalism" meaning the network complex that produces, distributes and consumes information about public affairs. In this case, "digital" does not mean technology, but it is understood in terms of the configuration of intervention and action through complex communication networks. Digital journalism refers to questions of structures and network dynamics rather than a specific type of technology or hardware.

The reconfiguration of what is understood as journalism, news and information has substantial consequences for understanding the present situation of public communication. The journalistic assets that fed public opinion, considered key to democratic life, are no longer the absolute property of modern "industrial" journalism. Nowadays, there are multiple actors in journalisms that produce, circulate, share, use, comment and dispute news and information, which define criteria of existence, meaning and validity. In principle, anyone with access to the Internet participates in different ways, whether by producing, consuming, sharing, modifying and commenting on information. Citizens and specialized companies verify information and statements from politicians and corporations. Public relations and marketing companies perfect the science of creating viral content and "native" advertising. Ministries and other government offices flood the platforms with data, information and press releases. Civil society organizations and activists distribute information to influence both public and political decisions. Chat sites circulate information. Networks of journalists collaborate in investigative reporting. The algorithms of social platforms determine available news and comments on sites, prioritizing and sequencing contents according to business calculations.

The rapid rise of journalistic content produced by this variety of actors modifies the traditional division of labor between producers and consumers of information and opinion: journalists and the rest of society. Certainly, purists doubt the statement "we are all journalists" in the sense that "professional

journalism" continues to work according to certain principles and standards and are employed and economically compensated. However, regardless of who produces data, the origin and legitimacy of sources, or the attributes of the news, the fact is that the information not produced by newsrooms acquires the character of "news" in different contexts.[1] This is evidenced by the phenomenon of fake news, new types of propaganda and other types of information circulating on the Internet. The public, and not only journalists, define what is news as well as their data, facts and truth. In digital journalism, the notions of journalism and news-information are subverted. Limits are erased in the typical disorder caused by the endless flow of daily information. "Social media" mix information and advertising, information from traditional media and versions from multiple sources. There is no common logic of newsworthiness, credibility, authenticity or facticity in the digital information ecology.

III. The complexities of public communication

A fundamental consequence of the strengthening of multiple, superimposed and parallel communication networks is the reformulation of the gatekeeping structure. This is important as the approach of traditional regulation assumed, with good reason, the preponderant role of the press as a gatekeeper. The consolidation of digital journalism introduces new complexities and poses new challenges for freedom of expression. What happens when the gatekeepers multiply and there are no firm barriers for expression, as suggested by the phenomena of junk news and new forms of propaganda and misinformation? How to regulate communicational ecologies without unique, firm and constant filters that determine contents?

The diagnosis and analytical parameters prevailing during the modern order continue to be valid as old problems, whether forms of state censorship of public expression and the limited pluralism of traditional media, remain crucial. However, the analytical framework and the solutions proposed in the past are too limited to understand and confront the dystopias of digital journalism — which are communication phenomena contrary to the democratic ideology of public opinion based on reliable information, the public use of reason, respect and tolerance, and the collective search for the truth. These are necessary conditions for the existence of a political order based

[1] Waisbord, Silvio, "Truth Is What Happens to News: On Journalism, Fake News, and Post-Truth", in: *Journalism Studies*, Vol. 19, No. 13, 2018, pp. 1-13.

on public opinion and access to information.

During the period of "limited" information, from the origins of the modern press to the rise of mass media at the end of the 20th century, the problem of public expression posed two main challenges.

The first challenge is state censorship in order to silence dissent and criticism of political power. Faced with this problem, the response was to limit the arbitrary and biased interference of the government in the public sphere in order to guarantee a system of rights that promote and protect citizen expression. This is the long and inconclusive succession of battles in favor of individual expression and the "freedom of the press" that runs through modern Western history, as part of the development of liberal democracy. This journey has been guided intellectually by the original diagnosis of modern liberal thought according to which the state is the central origin of the main problems for expression. From a perspective that assumes that power naturally tends to secrecy and control of information, this position focused on the state as responsible for the limits to expression since it tends to apply various forms of censorship in order to protect power when faced by criticism. This position assumed a posture of "negative freedom" focused on limiting the state's power to censor or influence the expression of the press (and citizens). The core idea is that freedom of expression depends exclusively on limiting the state's power of censorship. According to the libertarian doctrine, a state with limited power to intervene in matters of public expression is necessary to increase and strengthen public expression.

A second challenge is the existing inequalities in the public sphere that limit the diversity of expressions. This diagnosis starts from the premise that the problems for expression are not only the result of power without state control, since there are structural inequalities in the market and in society that cause great distortions and inequities in public expression. The fact that certain ideas have a greater presence in the mass media, over other many ideas, is not purely or mainly a problem of unlimited state intrusion, but is the product of inequalities anchored in the structures of the market. In the mass society of the last century, public expression was generally dominated by a small number of actors with resources and power to determine the flow of information. Markets with a concentrated structure are contrary to the pluralism of expression as they favor certain ideas and information according to economic and political calculations. The limits to expression are determined by mercantile structures and dynamics, not only by the actions of the state. Faced with this problem, inequalities cannot be solved simply by limiting the state's power to intervene in public expression. On the contrary, it is

necessary to adopt a notion of "positive freedom" that aims to strengthen mechanisms that support different types of expression — like forms of intervention in the structure of public communication to diversify both access and content. Scaling down the legal power of the state to intervene in the public sphere is insufficient to guarantee the broad expression of citizenship.

In short, while one position assumes that "more limits to the state imply a greater freedom of expression," the second endorses (virtuous) forms of state intervention to promote greater pluralism and diversity in profoundly unequal markets. The first outright rejects the possibility that the state can make positive contributions through various forms of regulation. The reason is simple: the state is seen as the primary origin of the problems of expression in modern societies. On the other hand, the second position endorses forms of state intervention aimed at improving diversity through different instruments such as content quotas, funds for the promotion of underrepresented expressions and others. It is a form of "positive" intervention in the market of ideas tending to correct problems created by policies that favor minority interests.

In the current era of abundance in communication, characterized by permanent flows of expression, it is necessary to reevaluate regulation since both the challenges and the options for promoting democratic discourse surpass the classic options. Both classic positions were obviously focused on the role of the press (and the media in general) as central actors in the mediation of news, information and other content. In contrast, nowadays, the system and the intermediation dynamics are absolutely different. There are multiple levels of intermediaries of information that do not fit in the paradigm of unidirectional flow from the press to the public. There is a huge variety of possibilities and actors of expression. The dominant intermediaries are Google, YouTube, Facebook, Snapchat and other "platforms", a concept that needs to be put in quotation marks as it is misleadingly used by companies to create the perception that they are neutral channels without private interests.[2] These actors have an unprecedented power in that they determine the rules of operation of the massive "public town square" for digital expression. They are the new gatekeepers that attract huge audiences and resources. They have the discretionary power to define the type and sequence of content through algorithms

[2] Gillespie, Tarleton, *Custodians of the Internet: Platforms, Content Moderation, and the Hidden Decisions that Shape Social Media*, New Haven, Yale University Press, 2018; Napoli, Philip M., "Social Media and the Public Interest: Governance of News Platforms in the Realm of Individual and Algorithmic Gatekeepers", in: *Telecommunications Policy*, Vol. 39, No. 9, 2015, pp. 751-760.

that function as editors and censors.[3] They make whimsical decisions to curate content, as evidenced by Facebook's prohibition of art with nudes and the photography of the "girl with napalm". These platforms operate according to corporate designs rather than in accordance with principles of free expression or considerations related to democratic communication. They appear to be "public" spaces of relatively free access, but they operate according to private criteria. They are governed by interests aimed at maximizing commercial revenue, user traffic and publicity, and gathering detailed information about the public — objectives divorced from any idea of democratic communication and formation of public opinion. Hence, the importance of demanding intermediaries that have clear and consistent rules and use "objectively justifiable criteria" in the selection of content.[4]

The consolidation of these new intermediaries poses qualitatively different challenges. Their business model violates classic conceptions of privacy as the business model is anchored in the collection of detailed information from users. Digital giants control sophisticated systems to extract, analyze and exchange information. Their decisions are obscure insofar as they do not disclose the mechanisms to obtain, analyze, use and sell personal data.

What is the problem? The collapse of traditional barriers facilitated the huge number of forms of expression contrary to fact, tolerance, dialogue and collective reasoning. Three phenomena are particularly alarming given their harmful consequences for democracy: insidious forms of propaganda linked to governments and other political actors such as terrorist groups and lobbies; the wide circulation of misinformation in different formats such as fake and junk news and covert advertising; and the discourse of hatred and intolerance.

First, disinformation operations are not limited to the traditional actions of states and corporations, as it was in the past. Contemporary propaganda is also directed by a diversity of groups interested in manipulating public opinion for political and economic purposes, be they lobbies, civil society organizations or groups of citizens through multiple channels: email, chat applications or social media. Second, the publication of wrong information

[3] Zittrain, Jonathan L., Faris, Robert, Noman, Helmi, Clark, Justin, Tilton, Casey and Morrison-Westphal, Ryan, *The Shifting Landscape of Global Internet Censorship*, Harvard Public Law Working Paper No. 17-38, Cambridge, Berkman Klein Center Research Publication, 2017.

[4] Organization of American States, "*Declaración conjunta sobre libertad de expresión y 'noticias falsas' ('fake news'), desinformación y propaganda*" [Joint Declaration on Freedom of Expression and "Fake News", Disinformation and Propaganda], 2017, retrieved from: https://bit.ly/2lP3ncc, last access: February 3, 2019.

(without deliberate intention of mass persuasion such as propaganda) reinforces misconceptions about a myriad of topics and feeds fallacies and conspiracy theories. "Bad" information circulates outside of journalism, as confirmed by the recent panic about fake and junk news and other types of untruthful information. Finally, the collapse of modern content filters allowed the propagation of hate speech and intolerance linked to the recrudescence of tribal, nationalist and xenophobic spirits in the globalized world. This discourse is present on countless platforms, whether they are curated / filtered, like newspaper sites and social media, or others that lack content regulation such as discussion forums.

There is no doubt that these forms of expression have historically existed in the public sphere of any society. The big difference is that they no longer need journalism to reach mass audiences as they did when the press occupied a central place in the circulation of information. In times of limited information, undemocratic flows of information, intended to persuade or simply express ideas, mainly turned to the press to reach public opinion. Nowadays, on the other hand, this type of information goes beyond the traditional barriers of access to public expression. The greater possibilities of digital expression have brought back phenomena which are opposed to the vision of democratic communication oriented according to norms of civility, tolerance and dialogue.

It is clear that the innocent and interested optimism of Silicon Valley about the consequences of the digital revolution, which was forged as a legitimating mark of the industry from its beginning, is anachronistic and absurd. Likewise, the absolute libertarianism in terms of the industry's expression, which boasted of being neutral and of being part of the "extreme wing of the free speech party," according to Tony Wang, the then general manager of Twitter, contrasts with its current wide held image of arbiters of public expression.[5] The changes are remarkable. Today, pessimism dominates over the possibilities of democratic life in communication environments that facilitate practices and dynamics contrary to the modernist-democratic ideology of the use of public reason. These companies admit to censoring content and have even recognized the problems for democracy unleashed by the digital revolution. In addition, these are global developments that exacerbate the historical tensions between different conceptions of freedom of expression in various regions of the world.

[5] Halliday, Josh, "Twitter's Tony Wang: 'We Are the Free Speech Wing of the Free Speech Party'", in: *The Guardian*, 2012, retrieved from: https://bit.ly/2GfgDEt, last access: February 3, 2019.

This package of dystopian phenomena poses a gigantic challenge for democracy as a political system based on public opinion and the access and exchange of information and ideas. The blurring of the limits between truth and lie in addition to the massive and constant influx of harmful discourses corrodes the formation of public opinion. This is not a purely novel problem — it is essentially as old as public communication and rhetoric. The difference is the ability of sophisticated forms of persuasion and disinformation to achieve massive presence, with no interest in the search for truth, equality and transparency.

In this scenario, there are no simple choices to sustain a public communication anchored in democratic values that promote both the right to expression and tolerance. The state regulation of public discourse exercised with social responsibility does not cease to be problematic even in contexts of high quality of governance and respect for the legal order, which are few in a global reality of regression of liberties and reduction of civil rights. Furthermore, it reintroduces classic problems about the role of the state in determining contents, discriminating between truths and lies, and prohibiting expressions defined as contrary to peaceful coexistence. The situation is especially difficult in countries with a long tradition of ample state latitude, low standards of respect for individual and collective rights, and abuses of intervention in public expression.

IV. Corporate self-regulation and its problems

So far, the dominant alternative is self-regulation by the dominant companies in digital expression: the "new governors" of public communication.[6] This situation takes place in a regulatory limbo and in the midst of rejuvenating the old debate between maximalist views ("publishing without concern for consequences") and positions in favor of the "social responsibility" of freedom of expression ("balancing the right of expression with other democratic rights and values"). Business self-regulation is not completely new. In democracies, traditional media and broadcast media have generally self-regulated content according to a mixture of business considerations and promises to protect the public interest. In the best case, corporate autonomy in matters of regulation did not solve chronic problems of freedom of ex-

[6] Klonick, Kate, "The New Governors: The People, Rules, and Processes Governing Online Speech", in: *Harvard Law Review*, Vol. 131, Cambridge, 2018.

pression in the usual practices of editorial curation. At worst, and depending on the national context, the promises of self-regulation proved to be fragile, and fluctuated between corporate apathy and state inaction to force the media to comply with certain restrictions.

In the current debate there are two main fronts: the regulation (and the absence of it) of the corporations that dominate the Internet and self-regulation by the companies themselves. Content curation by digital giants renewed a long global discussion in the context of different legal and regulatory traditions. There is no unanimous opinion on the limits of expression, but a permanent debate with huge legal and ethical gray areas. There is also no consensus over whether companies should be regulated as essential service providers ("public utilities") and, therefore, they should be compelled to follow certain regulations, or as "information" companies according to the North American model of the press and broadcasting rooted in the First Amendment. The traditional solutions for the old school print media and broadcasting are not automatically applicable in part because of the particular characteristics of being content "platforms" (and not producers of original content) and the global nature of the Internet.

These companies basically chose to define basic rules of operation (with which any user must agree) and to apply regulatory actions in response to complaints about abuses of their rules and controversial decisions about types of expression published and the filters used.[7] This is evidenced by the actions of several companies which selectively remove content. In Latin America, Twitter's recent decisions to ban public information about former president Rafael Correa, YouTube's choice to remove a critical documentary about President Nicolas Maduro's government made by Deutsche Welle, and Facebook's removal of content that goes against its rules in Brazil reflect precisely the excessive and obscure power of the great digital intermediaries. Likewise, both their power and the ambiguities of their decisions are manifested in dozens of cases of censorship on a variety of issues: the removal of pro-Nazi and conspiracy material, documents on war crimes and police violence, anti-racist and pro atheist messages, pictures of women giving birth and breastfeeding, and images of trans activists. There are no common criteria in these actions. They are the result of the attempt to please different audiences simultaneously, whether governments with different legal systems or activists of multiple causes in a broad ideological range. They are ad hoc decisions instigated by

[7] Observacom, "Concentración y pluralismo en internet: viejos y nuevos gatekeepers" [Concentration and pluralism on the Internet: old and new gatekeepers], 2017.

the eternal objective of increasing audience and profits, without offending certain audiences, especially those with power and a voice.

The case of Facebook is particularly significant not only because of the scale of its operations but also because it is indicative of general positions in the industry. Their curation of content continues to be a project in constant dispute and renewal, pledging allegiance to balance and neutrality as central principles of self-regulation, but making decisions that do not fit perfectly with such principles. That its users generally see information from other users with similar ideas is a deliberate strategy to minimize exposure to content that they criticize or is very different from their preferences. Its refusal to be considered an information organization clearly responds to the intention not to enter fully into the slippery slope of content regulation. Facebook continues to frequently be the target of flares of criticism accusing the company of carrying malicious political propaganda, collaborating with governments in monitoring critical and activist content, publishing content that rejects consensus of experts on history and science, allowing conspiracy theories, and tolerating racist expressions and various forms of "hate speech".[8] Other companies have also been criticized for various decisions, either YouTube for facilitating terrorist positions in order to increase the use of the platform or Twitter for using different standards to determine if the content complies with its rules according to politicians or common citizens.

These companies have room for maneuver to make decisions on a wide range of central issues of public expression: images, words, content, objectives, tone and style of discourse. Before the scandals, the company responded with specific actions to avoid negative publicity and a public relations crisis, rather than with clear, coherent and consistent guidelines of curation and censorship. It hired companies to verify the information, increased the number of employees that operate as content publishers and implemented software to detect controversial and false materials. This is a typical case of corporate glocalization, a global strategy sensible to local demands of different types, adapting decisions and content to meet the requirements of governments and groups with power in different countries.[9] In several sensitive issues related to religion, politics and culture Facebook chose to avoid inconveniencing powerful actors to consolidate their market position.

[8] Vaidhyanathan, Siva, *Antisocial Media: How Facebook Disconnects Us and Undermines Democracy*, New York, Oxford University Press, 2018.

[9] Kozlowska, Hanna, "These Are the Countries where Facebook Censors the Most Illegal Content", in: *Quartz*, 2018, retrieved from: https://bit.ly/2Kc1Due, last access: February 3, 2019.

In hindsight, it is clear that Facebook decided on the spot how to overcome the classic tension between freedom of expression and discourses which are toxic to democracy. They changed positions and placed patches when they considered it necessary. In some cases, Facebook avoided "prior censorship" as a default principle, whether for legal or logistical reasons, and decided to eliminate inconvenient contents that brought public relations turbulence. In other cases, Facebook decided to "over- censor" contents in case they generated criticism and scandals. Obviously, neither of the two positions is optimal: the refusal to "preemptively curate" certain contents allows the publication of potentially toxic ideas for democracy and prohibiting potentially controversial content is very close to prior and indiscriminate censorship.

V. Self-regulation in "social media" and journalism

Both the fervent defense of self-regulation and the ambiguous positions against maximalism and social responsibility of the dominant companies on the Internet are similar to the old debates about the press, besides the big differences between both types of companies and information contexts.

In modern democracies, journalism took self-regulation seriously in order to preserve the margins of autonomy against interference and state regulation and, to some extent, the purely commercial interests of companies. The system of self-regulation, which was reflected in editorial codes of ethics and informal standards of work, expressed the professional aspirations of journalism to be an institution, like other professions, in line with public interest and common values and to distance itself from purely state or market interests and thus generating trust and social legitimacy.[10] We are well aware that such a vision, which was adopted by newsrooms or permeated their professional conscience, was not always effective. Beyond its noble promises, self-regulation inspired by public service principles was not regularly the normative objective of daily journalistic practice. There have been several reasons for this which depended on political, social and economic contexts: vulnerability to editorial and commercial interests, the weight of the state in both the press economy and the production of information and the lack of a common work ethic within journalism.

The similarity between Facebook's justification discourses and professional journalism with higher standards is remarkable even though they are "a

[10] Waisbord, Silvio, *Reinventing Professionalism: Journalism and News in Global Perspective*, Cambridge, Polity, 2013.

whole different animal" — one a United States company with approximately two billion users in the world that does not produce content and dominates the Internet, and the other an occupation with great internal differences in terms of contexts and conditions of practice, with the task of producing news and various types of information. Beyond the differences, both constantly make countless decisions about the publication of content. Both Facebook and "professional" journalism declare vague support for impartiality and the suppression of subjectivity as strategies to legitimize their decisions. The expected legitimacy is based on their commitment to equanimity.

However, in reality such an abstract commitment faces constant challenges since any organization has to take into account different principles. For example, the reaction of journalism after it opened its contents to comments from readers shows precisely these tensions. There were different positions within journalism: some newsrooms opted to not offer opportunities for comments, others to do it occasionally and with internal moderation pre and post publication, and others allowed comments without any filter. The reasons for these reactions range from interest in protecting the journalistic content from various types of expression (especially insulting comments or those that go against decency norms and other issues) to the intention of enriching information and promoting public participation for journalistic and commercial reasons. When newsrooms curate reader comments, the vision of responsible expression against absolute libertarianism prevails, as in the case of European media that eliminate "hate content" according to current laws that prohibit such expressions and principles of journalistic ethics.

Just as Facebook manages to minimize the profile of human editors and the technical reasons for curating content, journalism argued that it uses "methods" to limit or eliminate personal biases. The "method" applied by Facebook (and other companies) is closely protected against public scrutiny. Journalism used methodological "realism" to determine what constitutes a piece of news, its informative angles, selection of sources and other elements. The process in both has been a tightly kept secret. Both "social media" and journalism rarely reveal their decision-making process as it opens the floodgates to scrutiny and criticism. What is selected and with what criteria is never clear or unobjectionable. Both "social media" and newsrooms face similar and chronic problems in content definition. What content is violent, pornographic or terrorist is not obvious. Does any idea deserve space on a global platform? What criteria are used to make decisions? Are there consistent and transparent decisions? Are they incurring in a "false equivalence" by giving equal weight to ideas with different social presence and relationship with reality and truth? Can

one be unbiased in polarized societies? Does objectivity stifle any ideas and actors which are controversial outside of the consensus? Where should the line that separates what is controversial be drawn? Addressing these issues is inevitably linked to subjective and philosophical issues as well as business and institutional estimations. Therefore, equanimity as a justification to aspire to obtain legitimacy is a poor guideline for behavior that leaves questions without clear or consistent answers.

The debate about corporate curating of digital content reminds us that journalism did not have (or has) clear, coherent and consistent answers to similar challenges. This was due not only to the obsession with protecting its "professional secrets", but also because it faces situations on a daily basis and makes multiple decisions where the contours of freedom of expression are drawn. In fact, it constantly has to harmonize the sacrosanct ideal of "expression with no restrictions" from the liberal dogma with other principles — truthful information, security, privacy, honor, and other fundamental considerations for public life. While journalism took upon itself the banner of free speech, it always had to adjust to other expectations and respect for several rights.

This tension resurfaces constantly in many cases where the visibility of certain expressions, in the name of freedom without barriers, collides with other democratic rights and values. This was demonstrated during the heated debates about the attacks on Charlie Hebdo[11] and with Edward Snowden's disclosures regarding the operations of the National Security Administration in collusion with the giants of telecommunication.[12]

When considering the great difficulties journalism faces to answer these questions, it is doubtful that the corporations that dominate the Internet have more luck or find any infallible formulas. This is particularly worrisome when taking into account that they are neither destined to serve the public interest nor do they have firm agreements with society and the state to exercise their role with a sense of social responsibility.

An important lesson learned from the experience of journalism is that the secretive nature of decisions does not align itself with public interest,

[11] Parmar, Sejal, "Freedom of Expression Narratives after the Charlie Hebdo Attacks", in: *Human Rights Law Review*, Vol. 18, No. 2, 2018, pp. 267-296, retrieved from: https://doi.org/10.1093/hrlr/ngy003, last access: February 3, 2019; Wessler, Hartmut, Rinke, Eike Mark and Löb, Charlotte, "Should We Be Charlie? A Deliberative Take on Religion and Secularism in Mediated Public Spheres", in: *Journal of Communication*, Vol. 66, No. 2, 2016, pp. 314-327.

[12] Kunelius, Risto, Heikkilä, Heikki, Russell, Adrienne and Yagodin, Dmitry (eds.), *Journalism and the NSA Revelations: Privacy, Security, and the Press*, London, Tauris, 2017.

especially if these are private corporations with a huge presence in the public sphere. Therefore, continuing the debate on forms of corporate accountability to society is essential; in addition to the possibility of interacting with public institutions and users in order to generate a collective responsibility that is not reduced to corporate decisions.[13] That content exposure and sequence should be ordered according to democratic goals and not exclusively according to corporate objectives is also a key question, which demands lengthy debates and political actions above the usual purely technological recipes and self-regulation enshrouded in secrecy preferred by Silicon Valley. Another lesson is that neither the libertarian maximalism that defends the right of individual expression against state censorship, nor the approaches tending to promote diversity in limited information systems offer sufficient answers to face the risks of the expansion of public expression and the proliferation of antidemocratic discourses on digital platforms.

VI. The commitment to digital literacy

The challenges of contemporary regulation do not stop at issues regarding external or internal regulatory engineering of the "social" platforms that function as the leading gatekeepers on the Internet. A central area of attention is the public itself given the huge opportunities for uncensored expression and state or corporate filtering. Much has been said recently about this, especially around junk news and disinformation campaigns channeled through "social media."

Notably, a consensus emerged among governments, digital corporations and civil society actors on the importance of providing digital literacy opportunities to the public and about educational efforts in general to understand the meanings of freedom of expression. Literacy appears as a way to promote individual and collective self-regulation in order to reduce the potentially negative effects of the abundance of information. These actions are necessary given the constant challenges of the ever changing information ecology. In any democracy, citizens need tools to navigate the Internet, especially in the face of the proliferation of past fictions such as news and information, propaganda maneuvers, widespread ignorance about the functioning of

[13] Helberger, Natali, Pierson, Jo and Poell, Thomas, "Governing Online Platforms: From Contested to Cooperative Responsibility", in: *The Information Society*, Vol. 34, No. 1, 2017, pp. 1-14.

traditional media and social media, and the dominant presence of digital journalism in daily life. Knowing how to obtain and interpret information in the complex digital architecture, its operation, interests, limitations — how to be digital citizens — is imperative. Likewise, citizens must be equipped to understand and act on matters related to the sense and the purpose of freedom of expression.

However, such ambitions on digital literacy face problems without easy solutions. On the one hand, it is not clear with what content and values digital education should be promoted, considering the tensions between libertarian ideals and aspirations of social responsibility in public expression. Which are the goals of alphabetizing? To promote expression without taboos or filters or worries about its consequences? To educate for self-regulation according to considerations such as respect and tolerance for others and their differences? To help to distinguish between facts, truths, lies and manipulation? To understand how to reconcile different rights to expression in everyday communication? These are important questions especially given two circumstances in the contemporary political and social context.

In the first place, there are the persistent and abysmal differences of power — the ability to have a voice and an audience on the Internet means that there are no level spaces for expression. Individual self-regulation of expression is more complex than it seems especially when there is no horizontal equity for expression. For example, certain forms of expression can be considered "offensive", such as *escrache* [TN public shaming], civic disobedience, or turning away from a public speech, but they are also necessary and democratic. The present debate on the merits and problems of the expression "civic" reflects these difficulties. While the doctrine of literacy ponders "civic discourse" as a virtue of democratic expression, it is not obvious that it is always virtuous to achieve democratic ends. Certain forms of offensive discourse can have democratic value as they criticize power and expose inequalities in the conditions of expression; others, on the other hand, threaten public life.

Likewise, the fact that the libertarian interpretation of the right to expression has become a banner for xenophobic, racist and misogynist groups suggests big complexities on the content of literacy as an effective mechanism for self - regulation. Certainly, this interpretation, presumably utterly in favor of the unlimited freedom of expression of right-wing extremism, is used when these ideas are suppressed by traditional media and Internet giants. Instead, this extremism takes a completely different position in favor of censorship when companies decide to eliminate critical media with

proto-fascist positions or progressive voices exercise the right to expression.

In view of this, it is important to remember that there is no single vision of freedom of expression, even among those who fervently defend that right. The current debate on digital expression reminds us of the colossal and persistent differences. Obviously, the question of the purpose of public expression occupies the content of overcrowded book-shelves, magazines and legal documents, which cannot be analyzed in depth in this article. Suffice it to say that what is under discussion is not purely the senses and limits of public expression, but also its purpose in democracy. As Timothy Garton Ash recalls,[14] free expression does not mean expression without limits. The latter is a simplistic and hasty (and interested) interpretation that omits other important issues. As a certain tradition of liberal thought, illustrated by John Stuart Mill and Isaiah Berlin, argues: it is fundamental to harmonize expression with pluralism and rational debate. Freedom of expression is not a blank check for verbal violence and other abuses. It is a fundamental mechanism that must be used responsibly to achieve objectives central to democracy such as better government and critical rationality, in the case of liberal thinking. The agreement on the principle of free speech opens up equally difficult questions: Who does the expression and how are its objectives determined? How is it possible to promote conditions for an open expression with no impediments regarding equal conditions, but at the same time be civil, tolerant and promoting dialogue? What kind of individual and collective self-regulation is desirable? Under what circumstances? These questions are important in order to avoid the libertarian holy mandate about public speech that ignores complex challenges, different philosophical and legal traditions, and political and social contexts.

Why are these questions significant? The ambiguity of the idea and the uses of freedom of expression place digital literacy on a domain where there are no obvious actions or magical recipes to promote self-regulation as a mechanism of social responsibility of citizens. Furthermore, there are issues such as the scope and efficiency of digital literacy that deserve a separate chapter. It is enough to remember that the evidence on its effects is not conclusive enough to firmly believe in the impact of pedagogical attempts to cultivate virtuous behaviors based on the culture of civility and tolerance.[15]

[14] Ash, Timothy Garton, *Free Speech: Ten Principles for a Connected World*, New Haven, Yale University Press, 2016.

[15] Kleemans, Mariska and Eggink, Gonnie, "Understanding News: The Impact of Media Literacy Education on Teenagers' News Literacy", in: *Journalism Education*, Vol. 5, No. 1, 2016, pp. 74-88.

That is to say, there is no reason to assume that educational interventions have great positive results to promote virtuous self-regulation, especially in ecologies of wide communication and information options.

VI. Conclusions

In short, the ever changing context of public communication raises new questions on old dilemmas of freedom of expression and regulation. On the one hand, the new forms of digital journalism bring up a series of questions about the regulation of gatekeepers, both external and internal regulation. Every gatekeeper is, by definition, censor and curator of content since they exercise editorial discretion according to various estimates and interests. There are no neutral arbiters, loyal to abstract and common goods, beyond collective preferences, even when the rhetoric of Silicon Valley is set on reiterating its promises about the common good and the global community. Just as journalism curates content taking several things into account (and not only according to "freedom of expression"), social media and the corporations that dominate the Internet make decisions that are not primarily governed by giving opportunities to citizen voices or facilitating a global community. The problem is that a bunch of new gatekeepers exert an exaggerated power in the intermediation of public communication, in an obscure way and without any evident social responsibilities. This is a problem in situations of both limited and unrestricted options of information, particularly when public expression is mainly conveyed by private platforms-channels that vest themselves with business autonomy to make decisions that affect public communication. If this problem has historically been central to public communication and lacked easy and consistent answers, it is not obvious how to make digital platforms exercise their colossal global power in a responsible and cooperative way with other social actors.[16]

On the other hand, the proliferation of spaces for expression "outside the media" makes it necessary to double down on the commitment to education and democratic "good standards" that strengthen, at best, self-limitation.[17] Beyond its good intentions, the philosophy for a digital citizenship faces se-

[16] Helberger, Pierson and Poell, *supra* note 13.

[17] Steen-Johnsen, Kari and Enjolras, Bernard, "The Fear of Offending: Social Norms and Freedom of Expression", in: *Society*, Vol. 53, No. 4, 2016, pp. 352-362.

veral problems Tension persists between different conceptions of freedom of expression in different political and historical contexts. There are no unique principles that sustain a common list of social norms which are desirable and possible in massive societies. Neither are there infallible actions to form, in a short time and at scale, either a citizenship committed to balancing different democratic rights or one who knows how to distinguish reality from fiction, propaganda information and other noble goals of digital literacy.

These problems are added to the chronic obstacles to public expression, especially the resurgence of different forms of censorship carried out by governments and corporations plus social inequalities in access to information. In the ever changing dark landscape for global freedom of expression,[18] unrestricted state intervention against expression is, without a doubt, a serious problem around the world. There are many examples of states that control and repress expression through various legal and economic strategies. In fact, recent global studies show the worsening of conditions due to the actions of governments committed to eliminating protections and favoring actions to suppress different forms of critical expression. Likewise, some governments have been active or passive accomplices when violence against expression is exercised by state forces or by vigilante and paramilitary groups or illegal groups such as armed gangs and illegal drug dealers. On the other hand, the capture of states by powerful commercial interests threatens the implementation of virtuous policies in favor of pluralism in public expression.

In addition to these classic problems of public communication, there are also the challenges of regulation on the Internet where corporations with a huge capacity to decide content coexist with spaces for expression without moderation or censorship. Regulating communication chaos and promoting good citizenship practices, according to different democratic principles and human rights, is immensely more difficult. It presents several fronts of action that exceed the traditional spaces and responses, whether regulation by the state or business self-regulation according to the commitments with society. Both the particular nature of "social media" and other dominant companies as global "platforms" of content, and the traditional removal of intermediaries of expression, require imaginative thinking of possible alternatives.

[18] Zittrain *et al.*, *supra* note 3.

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Chapter Five

Freedom of expression, the Internet and fundamental principles

Roberto Saba*

Both the American Convention on Human Rights in its Article 13, and the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights, through their rulings, advisory opinions and statements have developed a robust and coherent doctrine about the protection of freedom of expression that has allowed us to determine the scope of the conventional protection of this right. However, in recent years, voices have arisen in the region in favor of a critical analysis of these standards on the basis that they require a revision and an eventual adjustment, especially due to problems and challenges that have appeared since they were written, mainly, as a result of huge technological advances among which the expansion of the Internet stands out. This text is an attempt to respond to those voices.

Unlike the 19th century constitutional texts of most of the countries of the region, Article 13 of the American Convention has taken sides in the debate justifying the protection of freedom of expression, which is essential to identify the scope of the right and the consequent responsibilities of the states. The legal and philosophical documents on the theories of freedom of expression have turned fundamentally around two lines of thought.

Roberto is a lawyer graduated from University of Buenos Aires, Master of Laws from Yale University and Doctor of Law from the same university. He served as Dean of Palermo University Law School and he currently directs its Center for Postgraduate Studies. He was Co-Founder and Executive Director of the Association for Civil Rights (ADC) and Executive Director of Citizen Power Foundation, Argentine Chapter of Transparency International. He is Professor of Constitutional Law and Human Rights of the University of Buenos Aires and Palermo since 1997. He is part of the Board of Directors of Women's Link Worldwide (Bogotá and Madrid), the Board of the Kettering Foundation (Dayton, Ohio, United States) and member of the Expert Advisory Board of Equitas Foundation (Santiago de Chile).

On the one hand, there is a theory of freedom of expression associated almost exclusively with the exercise of personal autonomy or freedom of the individual. This thesis proposes to build a protective wall against any state intervention that could limit that autonomy. The limits to freedom of expression from this perspective are generally associated to the protection of third parties — their confidentiality, privacy, reputation, honor and the protection of minors incapable of making decisions for themselves. From this point of view, the State is always seen as an enemy of freedom of expression and the protection of the law is practically aimed at avoiding state interference, mainly censorship. Phrases such as those which informally state that "the best law on freedom of expression is the nonexistent one" is an eloquent manifestation of this thesis. Therefore, those who hold this view propose the total disregard of the state, both in terms of regulation and regarding the allocation of resources as a necessary condition for the full exercise of freedom.[1] According to this thesis, the only possible and acceptable limit to the exercise of freedom of expression could be, with many conditions, to protect the freedom or autonomy of others, such as children or adults whose rights to intimacy, privacy or honor might suffer as a consequence of others exercising their freedom of expression.

On the other hand, a second doctrine about the justification of freedom of expression links the exercise of this right with the necessary preconditions for the functioning of a democratic system of government.[2] Thus, on the basis of the assumption that this political system rests on the ideal of self-government, and given that this ideal requires citizens to make decisions regarding issues related to the public sphere, it is necessary that, in order to make the best possible decisions, citizens must receive the greatest amount of information. Freedom of expression becomes in this way a necessary condition for the exercise of political rights, and requires the State to ensure and protect the flow of information, both the one in possession of individuals and the one in the hands of the Government itself. The former could be protected not just by avoiding censorship, but also by taking measures to ensure the flow of information, opinions and perspectives.

[1] The dissenting opinion of Oliver Wendell Holmes Jr. in the case "Abrams v. United States" became the paradigmatic manifestation of this thesis. See this decision in 250 US . 616, 630 (1919).

[2] See Meiklejohn, Alexander, *Political Freedom: The Constitutional Powers of the People*, Oxford, Oxford University Press, 1965; Kalven, Harry, "The New York Times Case: A Note on the Central Meaning of the First Amendment", in: *Supreme Court Review*, Vol. 1964, Chicago, 1964, p. 191; Sunstein, Cass, *Democracy and the Problem of Free Speech*, New York, The Free Press, 1995.

The latter, through the protection of free access to public information, understood as the information held by the Government. The State, in this scenario, is perceived as a possible friend of freedom of expression, as guarantor of the proper functioning of the democratic system of government and as a sort of moderator of the public debate, by making sure that everyone can express themselves and find the information they need to make the best possible decisions.

While Article 13 associates the exercise of freedom of expression to a manifestation of personal autonomy — mainly in the first part of the clause — it immediately embraces a perspective that justifies the protection of freedom of expression linked to the thesis that conceives it as a precondition of democracy, specifically when it states that "the right to freedom of expression includes the right to seek, receive and disseminate information". Likewise, the prohibition of censorship by indirect means could also be interpreted as a mechanism to ensure the maximum circulation of information, the possibility of public deliberation and making the best decisions. For its part, the Inter-American Court of Human Rights, through the Advisory Opinion No. 5 (AO-5), has interpreted Article 13 so that it protects freedom of expression in its two dimensions: the individual and social dimensions, and the latter is understood as that which arises from the relationship between freedom of expression, circulation of information and quality of debate, on the one hand, and democratic decisions, on the other. Finally, the Inter-American Commission on Human Rights (IACHR) issued in 2000 a Declaration of Principles on Freedom of Expression that includes the same perspective of the text of Article 13 and AO-5. In sum, freedom of expression as it is protected by the American Convention is based on the democratic ideal of which it is a precondition. This is the ultimate underlying principle of the protected right, together with the notion of freedom of expression as a manifestation of personal autonomy, but the latter is never an obstacle to freedom of expression as a precondition for democracy.

Applying this principle to specific situations has allowed criticism about state intervention or omissions with respect to the validity and the exercise of freedom of expression in the signatory states of the Covenant. It is from the application of this principle that it has been possible to determine in specific cases what the state obligations that derive from the Convention are, such as, for example, the prohibition of censorship by indirect means. While the principle has remained permanent, such is the nature of principles, the social, political and historical contexts that require the issuance of critical judgments based on that principle have changed. The emergence of mass media during the 20th century, such as radio and television, as well as the

evolution of a bureaucratic state with complex and powerful administrative structures, has led to the emergence of specific concerns regarding possible threats to freedom of expression as an individual right, but also and perhaps especially as a precondition for the functioning of the democratic system of self-government. Some of the possible state threats, like restrictions on access to the necessary resources to pursue freedom of expression — radio frequencies, newsprint, money, etc. — have been the subject of specific concern which is why they are mentioned explicitly in Article 13 and in the Declaration of Principles of the IACHR. Some of the potential threats by individuals, such as the creation of information monopolies, have motivated the request for the State to ensure stable regulations that impede the progress of this silencing mechanism and the imposition of sanctions on hate speech that could also operate as a way of silencing minorities, as established in the 5th subsection of Article 13.

The context has changed in the 21st century with the emergence of the Internet. Mass media lose prominence on a daily basis, or at least compete for it with digital media and platforms provided by social networks. This technological development is accompanied by new concerns in terms of freedom of expression, although new hopes also arise for a greater expansion of opportunities to exercise the right. The question we must ask ourselves regarding constitutional law and international human rights law is whether these new technological developments would motivate a revision of the principle, or a review of its possible applications in a new context.

Is this a new conception of freedom of expression in the digital age?

Authors such as Alexander Meikeljohn,[3] Owen Fiss,[4] Harry Kalven[5] and Cass Sunstein[6] have defended throughout the past century and up to the present, with increasingly sophisticated theories, the doctrine of freedom of expression as a precondition of democracy. At the beginning of the 21st century authors, including Jack Balkin as a main voice, have been critical of the validity of this theory explaining that the context that generated it, the

[3] Meiklejohn, *supra* note 2.

[4] Fiss, Owen, *The Irony of Free Speech*, Cambridge, Harvard University Press, 1998. Spanish version, *La ironía de la libertad de expresión*, Barcelona, Gedisa, 1998.

[5] Kalven, *supra* note 2.

[6] Sunstein, Cass, *#Republic. Divided Democracy in the Age of Social Media*, Princeton, Princeton University Press, 2017.

predominance of radio and television in the twentieth century, had become extinct and had given way to one that made it obsolete.[7] Balkin argues that the theory of freedom of expression as a precondition for democracy had been developed as a consequence of the fears caused by the appearance of mass media. Media outlets were seen as possible obstacles to the exercise of freedom of expression and the proper functioning of the democratic system of self-government, but they no longer hold the influence they once had. In that not so distant past, few very powerful players, owners of these powerful communication outlets, were basically the only ones capable of opening or closing the gates of expression. With their editorial decisions, their emphasis on issues or perspectives and the power to make actors or visions of the world invisible, these media outlets would not only operate a kind of de-facto censorship on relevant voices for the public debate, but would distort this debate and make it impossible to reach or approach the ideal of self-government. In addition, the logic of the market and the aspiration to maximize profits and minimize costs would lead to a reduced public debate, as stated by Fiss. Balkin, on the other hand, maintains that these times are over and that, therefore, the consequent concerns should also vanish. The emergence of the Internet put an end to the bottlenecks produced by mainstream media. Fear of the impoverishment of public debate would no longer make sense because everyone has become capable of magnifying their voice through digital media. This somewhat idyllic vision of the new era is what also supports the ideal of web neutrality. Once again, as it happened in the past, the best law to ensure freedom of expression on the Internet would be the one that does not exist, as we are told from the field of the defenders of a totally free Internet.

However, Cass Sunstein sees not only hope on the Internet, but also threats to freedom of expression and, above all, to the fundamental value or idea that justifies its protection which is that of self-government. This author considers that two factors combined constitute a new threat to public debate, which is the main reason why we protect freedom of expression. On the one hand, there is a human factor that was always present but could be exacerbated: homophily. This is people's tendency to look for information where what is said or written resembles what they think. The other factor is the product of the new digital era: filters. These allow us to limit the information we receive in accordance

[7] Balkin, Jack M., "Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society", in: *Faculty Scholarship Series*, paper No. 240, New Haven, 2004, retrieved from: http://digitalcommons.law.yale.edu/fss_papers/240, last access: January 14, 2019.

with the mandates of our will, and if our will is mobilized by the homophily tendency, then new technologies will allow us to narrow more and more the information we receive to the point of listening or reading only that which we already think and with which we obviously agree. These so-called information bubbles are the main threat according to Sunstein to the possibility of public deliberation and, consequently, to citizen self-government.

The comparison with the impact of new trends in urban organization and the possibility of development of a democratic regime based on the deliberation and the enrichment of our decisions as a result of exposure to diversity is a good one. In the context of urban planning theory as defended by Jane Jacobs,[8] the streets of a big city where neighborhoods are not segregated and a person walking through them can be engulfed by the diversity of the world that surrounds them, could be compared, Sunstein says, with "intermediaries" of general interest" — newspapers, for example, or other means of mass communication which appeared during the last century. On these urban sidewalks people are effortlessly exposed to the most diverse realities: poor and rich people of all races and skin colors, all kinds of conversations in bars, parks and public transport. In the same way, these generic intermediaries used to allow people, and still do, to become exposed to information and opinions that do not necessarily coincide with their own, and which would also expand their information horizons.

The second central feature of these means of communication of the twentieth century was the fact that their contents are usually produced by a team of editors, journalists and professional columnists who broadcast a message that is passively received by viewers, listeners and readers. In spite of this, the emergence of social networks and fundamentally those filters that make it possible for people to only interact with the people they want to lead to, as a consequence, the emergence of homophily, which seems to characterize people's decisions,[9] and allows them only to interact with those who resemble them. The exchange of ideas, opinions and information in the public debate were completely transformed. These filters prevent us from encountering the diversity offered by the media that dominated the 20th century. Some even argue that it helps to radicalize positions, although this is more controversial.

[8] Jacobs, Jane, *The Death and Life of Great American Cities*, New York, Random House, 1961.

[9] Sullivan, Andrew, "America Wasn't Built for Humans. Tribalism Was an Urge Our Founding Fathers Assumed We Could Overcome. And so It Has Become Our Greatest Vulnerability", in: *New York Magazine*, New York, September 19, 2017, retrieved from: https://nym.ag/2xWTund, last access: January 12, 2019.

In sum, it follows to ask whether the emergence of the Internet changed our conception of freedom of expression or changed the conditions and contexts where the underlying principle is the protection of law, with the principle remaining unchanged. If this is the case, we should not reword the principle, but we should ask how the old principle, which still has not been disproved, could help us solve new threats to the exercise of freedom of expression and self-government that need this freedom to be exercised. Thus, (relatively) new problems as the phenomenon of fake news, "moderation" on social networks platforms with the consequent prior censorship, defamation, invasion of privacy, etc. should be tackled in a way consistent with how old problems and threats to freedom of expression and self-government were dealt with.

Deciding on the method

The Declaration of Principles of the year 2000 capped a long process of interpreting and applying the principle of freedom of expression. The Declaration did not precede that process. By establishing an analogy with the dominant legal traditions in the West, continental and common law, we could argue that there are two methods for constructing a document that contains a statement of principles regarding the scope of the exercise and protection of a right, recognized in the Convention.[10]

A first approach that we could call "encoder" tries to extract or derive a set of rules from the conventional norm as a new regulatory code of the right in question. This strategy attempts to anticipate future problems related to the specific right or freedom and, using the imagination, arrive at rules that apply the general principle of the convention to particular future cases. The second approach consists of crystallizing in a document with principles and rules the product of medium or long-term interpretative processes that account for new problems and solutions applied by the institutions with jurisdiction to resolve them, such as the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights.

The Declaration of Principles on Freedom of Expression produced by the Commission in 2000 contains a relatively old and coherent interpretation and application of articles of the Convention by these two bodies, particu-

[10] Merryman, John Henry, *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America* (1969), Redwood City, Stanford University Press, 2nd ed., 1985.

larly Article 13. Moreover, this reading of the text has been nourished by the jurisprudence and the legislation of the courts and legislative powers of the signatory states that have fueled the debate regarding the scope of the protection of the right to freedom of expression in the region and that has benefited the work of the two central bodies of the system. Of these two strategies for the production of a new Declaration of Principles on Freedom of Expression, the second is more stable and effective than the first in my opinion. That said, it would be necessary, in order to make a decision in the sense of generating a new document, to gather data and assess whether we have currently reached critical mass regarding national and international decisions, especially jurisdictional authorities, that allow us to be more certain when reviewing the original Declaration and introducing changes and new rules. It is clear that the emergence of the Internet has created new problems and challenges for the enjoyment and protection of freedom of expression. It has also generated new opportunities to exercise the law in a way that was unexpected in the year 2000.

However, from my perspective, these new opportunities and challenges give us no certainty of how to enhance the former and respond to the latter. There have been advances in comparative legislation and some jurisprudence on the national courts, but it still seems to be insufficient to interpret these developments as a tendency or consolidated critical mass of agreements around the applications of the conventional principle in Article 13. The Inter-American Court of Human Rights itself, which has done such a fine job so far by applying that clause in specific cases or by answering questions by some countries regarding interpretive matters, has not advanced similarly around the impact of new technologies of the digital era in a new interpretation of the Convention. In trying to produce a new document that establishes an updated version of the guiding principles of freedom of expression and of a set of rules derived from them — in the abstract and without the vital information provided by the cases that allow us to make the interpretive exercise more precise — there is a risk of developing contradictory principles with unknown effects when applied to specific cases. There is also the danger of succumbing to the temptation of designing these principles in accordance with the pressures and interests at stake of the most powerful and influential actors in the system.

In short, from a methodological perspective there should first be a survey of the law and national legal precedents in the region, as well as of comparative law, in order to reach a conclusion based on the state of progress of these multiple interpretative processes in the context of specific cases resolved by competent bodies. On the other hand, and if it were concluded that we still have not reached critical mass of relevant legal material at a

national and comparative level, which are fundamental inputs to produce a time-resistant document, it would be advisable to allow new cases and new interpretations to play out before writing any kind of code of law.

Finally, the temptation to produce a document that expresses a declaration of principles of freedom of expression on the Internet runs a risk that it would be best to avoid. Firstly, that this statement is banal in the sense that it is no more than an enumeration of the old and established principles merely pointing out that they must also rule on the Internet. These would be, for example, the prohibition of prior censorship, the establishment of subsequent responsibilities or the maintenance of a correct balance between the protection of freedom of expression and the protection of privacy. We do not have Declarations of Principles of Freedom of Expression for each medium in which the exercise of that freedom takes place. This does not mean that the emergence of the Internet does not present new problems and challenges to be solved in order to achieve the broadest exercise of the law. The question is whether this new medium justifies a modification of those principles or the need to think about new solutions based on the old principles. There are two possible positions: either the one defended by authors like Balkin, previously referenced, which argues that this new technological context forces us to modify our understanding of what freedom of expression means, which implies modifying the principles, or the opposite stance which does not consider that the new context alters our understanding of what freedom of expression means.

It is pertinent to recall that Balkin's thesis not only proposes to modify the understanding of the right to freedom of expression, but also requires redefining the relationship between this right and democracy as a political system. Balkin argues that the new relationship should be established between freedom of expression and democracy also requires replacing the conception of this political system by a cultural regime that he rightly calls "democratic culture". While it may be very interesting to rethink the impact that new technologies have on our practices in the exercise of freedom of expression and our behavior as a democratic society — only as a political system — the relevant question is whether this new context changes our understanding of the content and scope of the right. Behind postures such as Balkin's, as this author expressly stated, underlies a "dynamic" conception of the right that forces a new definition of the ideals of justice and the principles derived from them, as well as the rights founded in these ideal, through time and accompanying social changes.

In other words, did the emergence of the Internet modify our conception of what freedom of expression is or did it simply place us before new problems to be solved but with the same idea of freedom of expression? I

favor the second of these two alternatives, since the principle of freedom does not vary with time or with the emergence of new contexts. However, it is correct to declare that this new context imposes complex challenges for the application of those fundamental principles. What has changed is the context, not the principles on which we have built our legal system.

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