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Private regulation and its impact on freedom of expression

por los Derechos Civiles

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Executive summary

The prevailing approach on freedom of expression online has focused on the attempts of the State or private entities to interfere in the dissemination of contents within internet. This way, rejecting filtering and blocking orders or requesting a judicial order to take down content have proven to be remarkable steps in the fight for freedom of expression. The goal was to protect platforms and search engines from external behaviors that could motivate them to remove content.

Although this matter still is greatly important, there has emerged, in parallel, a phenomenon that also poses plenty of challenges for online freedom of expression: the removal of content by intermediaries, not due to external pressure, but on their own initiative. By applying their internal rules, the main social network and search engine companies have turned into institutions which exercise an effective control over online content. Considering that the internet has been the subject of continuous public debate, it is necessary to ensure that private sector policies respect fundamental rights. This report strives to justify, from a legal standpoint, the need for regulations based on human rights when it comes to the private governance of speech on the internet.

The peculiarities of the internet

Laws cannot rule technology. This is a cliché heard in several debates about the internet. Many of us will notice its enormous popularity. It is stated by the businesswoman who wants to avoid a loss of profits by means of a law restricting free trade. It is upheld by the woman advocate of human rights who fears that legal tools may be used to allow an authoritarian government to control the internet. It is also said by the technician who use her knowledge on network architecture to criticize the authority of those who did not study her subject area. And, finally, its popularity has also been internalized by the politician who, after listening to all these opinions, prefers to adopt a cautious attitude.

This overlapping consensus means that any attempt to regulate the digital realm will be deemed suspicious. Every time we hear –or read– the words "state" and "internet" in a not so long time –or space– interval, the alarm goes off. In this context, self-regulation tools become quite relevant. "Self-regulation by default", hence, is the starting point for addressing the solution to problems caused by the power of digital technologies.

In this context, it is necessary to consider the eccentricity of this phenomenon. If we think about the economic, social and cultural activities that are part of our lives, we will see that all of them are shaped by regulations. For example, health service providers must comply with a Mandatory Medical Program (PMO, in Spanish), which establishes the provision of minimum services for their members. On the other hand, culture is promoted by public institutions, which offer access to films, music shows, and theatre plays for free or at a low price for those people who lack resources. So, on and so forth.

Then, what is particular about the internet for it to require a different treatment? There are multiple answers, but here are the most adequate ones for the purposes of this document.

• **The historical explanation:** the internet is a recent phenomenon. Its massive use begins in the 90s. In Latin America, it becomes popular in mid-2000. In terms of our individual lives, it may be a long time. Maybe this is the reason why the use of the term "new technologies" to refer to this phenomenon has fallen into disuse. However, from a historical viewpoint, the internet is definitely something new. And as such, it con-

tinues to cause perplexity among decision-makers. Their bewilderment turns into caution when having to decide whether to regulate or not.

• **The geographical explanation:** the internet was born in the United States. This is not good or bad. After all, everything must begin somewhere. But knowing where an institution was born helps to understand the principles driving it. According to the American scholar Jack Goldsmith, the internet agenda of the US government was influenced since the late 1990s by the "commercial non-regulation principle".[1] Based on this standard, markets, individual choice and competition should be the ones guiding the development of the internet. When formal governance is needed, it should be supplied by "private, nonprofit, stakeholder-based" institutions. This way, traditional government regulation would apply in specific cases (to protect intellectual property laws, for example), but would otherwise be strongly disfavored.[2]

• **The jurisdictional explanation:** the internet is global, and states are national. Even though the network was born in the US, it soon expanded and is now used worldwide. As a result, there arose doubts which challenged the traditional regulatory model. Firstly, there was the question as to the legitimacy of the State to impose its decisions on actions occurring in other countries. Secondly, there was a concern about a potential "race to the bottom" regarding the protection of rights, given that the State with the worst background in terms of freedoms could eventually impose its laws on the rest of the world. Thirdly, the difficulty of locating users and the different countries where data is stored on the internet makes any attempt to apply regulations tricky. Finally, the goal of an open, free and inclusive network could be put at risk with laws threatening to transform it into a bordered network that changes depending on the place from where we access to it.[3]

• **The legal explanation:** one of the great promises of the internet was allowing human beings to freely exchange ideas, information, opinions and any other type of speech. The internet was an open and decentralized network, and as such, it was democratic too. As it became a big contemporary threat to authoritarian governments, it was necessary for internet communications to enjoy a strong legal protection. Thus, freedom of expression became the backbone of the internet. This approach also involved imposing strict limits on state action. Historically, freedom of expression has always required minimum state intervention, as the greatest threats to such rights came from governments, such as political

persecution, censored critical press, closed newspapers, etc. These have been common actions carried out by state power. For this reason, any government regulation in this field is filled with suspicion.

Therefore, whether it is a matter of technological, jurisdictional, geographical or legal principles, it seems that government regulations must be kept to the minimum.

Clearly, this description is a general account of a complex issue. As such, there are some aspects which exceed the scope of this work. On the other hand, there is a growing concern about the inefficacy of self-regulation systems to address current issues. However, this perspective is still influential in two meaningful ways.

Firstly, the self-awareness of the internet community is still bound to the previous moment. This shouldn't come as a surprise. When a set of practices begin to challenge a given worldview, some time must go by before the principles influencing our behaviors commence to prevail in society's mindset. The divine right of the king as a source of his political power was challenged much earlier than 1789. Yet, not until the French Revolution did the concept of popular sovereignty become the common sense prism through which to see political and social phenomena.[4] Likewise, the acknowledgement that self-regulation has failed in some cases does not mean that the idea behind it is no longer applicable.

Secondly, there are still some areas where the idea of regulation continues to be distrusted. Freedom of expression is the best illustration. Historical examples of gag laws or criminal reforms criminalizing political opinions add up to other current restrictions such as web blocking or attempts to prohibit anonymity, among others. These cases warn us against accepting state intervention, as it may favor the interests of the government in power.

Approaches to freedom of expression

One way of escaping this predicament is looking at the approaches underlying freedom of expression. This analysis will help us understand that there are additional alternatives to the recently discussed dichotomy. Besides, the distinction among the main outlooks will allow us to choose the best alternative to attain the ideals we want as a democratic society.

According to constitutionalist lawyer Roberto Gargarella,[5] there are three major perspectives when it comes to regulating freedom of expression, each one of them having different implications.

1. The authoritarian perspective: based on this approach, the State is entitled to regulate contents so as to protect certain moral and political ideals, typically consistent with those of the government in power. Ideology is a contingent matter, evidenced by the fact that there are examples of left-wing and right-wing authoritarianism. In this sense, there is a lack of willingness to accept alternative points of view and allow critics and political dissidents to spread their messages.

2. The liberal perspective: as opposed to the authoritarian approach, its fundamental principle is that all ideas are equally legitimate to be expressed publicly. Hence, the role of the State is actually having no-role: it should not interfere with deciding which speech is worth sharing and which one is not. Political ideology is not essential either, as there are examples of this philosophy on both the left and the right. In this case, what counts the most is the willing to accept that the best way for our opinions to prevail is discussing them and show their strength.

Given the first two alternatives, one is clearly more attractive than the other. The liberal perspective is better at preserving the values of diversity and pluralism, which are key to the development of a democratic society. However, paradoxically, this conception is often jeopardized by the very same policies supported by the liberal thought. In fact, the lack of state intervention prevents governments in power from manipulating speech in their favor. Simultaneously, the absence of public regulations results in the concentration of media in the hands of a few companies and it is these companies that decide what contents can be accessed and what voices will be heard. Faced with this phenomenon, traditional liberalism has no answers to offer and therefore is not even capable of fulfilling their own ideal.

Due to these restrictions, a new vision regarding freedom of expression has begun to gain prominence.

3. The deliberative-republican conception: this perspective shares some of the tenets of the liberal conception but proposes that in order to comply with them, it is necessary to adopt a completely different role regarding public regulation. Instead of distrusting the role of the State, it

considers that there are ways of state intervention that may enrich the debate instead of stifling it. In this respect, it resorts to two classic tenets of the liberal tradition.[6]

The first tenet is the so-called "free market of ideas". According to liberalism, in order to reach the truth or the most worthwhile ideas, they must compete among themselves for people's support. No opinion should be censored. However, they may be refuted or exposed for their erroneous nature, malice or dishonesty.

The second tenet is known as "uninhibited, robust and wide-open" public debate. Based on this tenet, it is necessary to promote the diversity of ideas, which must be conveyed to as many people as possible. The quality of the democratic discussion weakens when we only consider a single viewpoint; when there is only one single source of information or when the voices of the minority remain unheard.

According to the republican conception, this would be possible as long as all voices can be expressed equally. A competition where only some voices are can be heard is unfair. For this reason, there must be some regulation which ensures equal treatment of all opinions so that people can access all speeches and make their decisions unbiased. Hence, if "free market of ideas" means *laissez faire, laissez passer* ("let do and let pass"), the idea of a "uninhibited, robust and wide-open" public debate turns almost impossible.

Now that we have established the different views on freedom of expression, we must determine which one best suits our legal system. Before deciding on the most appealing approach, we should consider which one is better embraced by the Argentine Constitution and the Inter-American Human Rights System. Then let us have a look at the doctrine most favored by our system:

Uninhibited, robust and wide-open

The letter of the Argentine Constitution of 1853/60 seems to favor the liberal perspective. Article 32 establishes that "the Federal Congress shall not enact laws that restrict the freedom of the press or that establish federal jurisdiction over it". The implication underlying this article is that state intervention is negatively viewed, as it is deemed a threat to freedom of

expression. The classic saying “the best law is that which does not exist” accurately reflects this position. Thus, the idea of public regulation would seem inapplicable in view of the constitutional limits forbidding it.

However, the ratification of various international treaties on human rights with constitutional status demands a broader perspective. One of the most important treaties is the American Convention on Human Rights, as its doctrine and case law are broadly used by Argentinean courts. Article 13, section 4, of the document establishes that “the right of expression may not be restricted by indirect methods or means, government or private controls over newsprint (...) or equipment used in dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions”. This provision is central if we are to come up with a new approach, as it recognizes that the threat to freedom of expression does not only come from the State. The abuse of private controls “tending to impede the communication and circulation of ideas and opinions” are denounced by the Inter-American System as an element that disrupts the idea of a uninhibited, robust and wide-open debate. Thus, the liberal conception of freedom of expression is complemented with the deliberative-republican perspective, which warns us that the lack of public regulation may end up legitimatizing an ecosystem that is governed by a few actors.

This conclusion is also supported by case law. Let us consider two noteworthy examples.

The first one is a ruling of Argentina’s Supreme Court on Argentina media law.[7] In 2013, the highest national court rejected a declarative action initiated by Grupo Clarín seeking the unconstitutionality of Law No 26.522 on Audiovisual Communication Services (LSCA, in Spanish). An analysis of the ruling would be outside the scope of this work, as it involves a complex resolution and an ample number of arguments and conclusions expressed in justices’ votes. However, for the purposes of this subject, it is convenient to review the following considerations.

Firstly, the Court underscored the importance of the principles of diversity and pluralism for freedom of expression. According to the Court, democratic debate “requires greater pluralism and the broadest opportunities for expression by the diverse representative sectors of society. Otherwise,

there would be no true exchange of ideas, which may lead to the impoverishment of public debate and affect the decisions made collectively." (Conclusion 22)

Secondly, it established that the pluralism and diversity we find in our societies lead to a multiplicity of opinions that "should find a media outlet where they can be expressed". In this sense, the Court considers it mandatory to have an information ecosystem that promotes the exchange of different opinions and avoids the emergence of dominant viewpoints.

Finally, the court considers that for the purposes of complying with these principles, the State may strive to "promote real opportunities of expression for citizens and strengthen public debate" (conclusion 25). Clearly, for the Court, public regulation is not necessarily the enemy of freedom of expression. As long as state intervention seeks to ensure plurality, it can be used as a useful tool to correct market distortions.

The case law of the Inter-American System presents a similar position. In 2015, the Inter-American Court of Human Rights (IACHR) issued a judgment in the case "Granier and others (Radio Caracas Televisión) v. Venezuela"[8] and determined that the government's refusal to renew the license of the station violated freedom of expression. The refusal by the government was justified, among other reasons, on the need to promote a greater pluralism among media in Venezuela.

Despite what it seems, the IACHR did not reject the idea of public regulation per se. On the contrary, justices expressly declared that the government's goal to democratize radio frequency spectrum was consistent with pluralism. The protection of such value is not only legitimate but also essential for a democratic society (conclusion 188). However, in the case under study, the court rightly explained that by using this excuse, the government was in fact concealing its intention to silence a voice that was critical of it in order to replace it with another akin to official discourse. Far from embracing pluralism, state intervention was seeking to establish a hegemonic discourse. This is the authoritarian conception of freedom of expression, which, as we have seen, conflicts with the ideals of a democratic society.

As can be seen in this judgment, the options are not binary. We can do more than just choose a no-intervention approach or succumb to the authoritarian temptation. There is an alternative path which involves the

use of regulations for strengthening a pluralism and diversity that are often eroded by a few actors who control the dissemination of information. This conception is not only advocated by our legal system, but it is also deemed necessary if we wish to enjoy the right to freedom of expression. Now that the conception guiding our analysis has been established, it is necessary to apply it to the issues that result from the exercise of freedom of expression on the internet. In this case, we will focus on the role of a key actor: private intermediaries.

Private actors and governance of online speech

Internet intermediaries are those in charge of allowing speech to disseminate on the web. As such, they are responsible for bringing together individuals imparting information or an opinion with the recipients who are willing to listen to what the former have to say. This definition is broad enough for various internet actors to be considered intermediaries, despite the multiple functions they may serve. Internet and hosting service providers or domain name registrars mediate between us and the information we access through the internet. However, the analysis will focus on a special type of intermediary: those curating contents. This category involves platforms (Facebook, YouTube, Instagram or Twitter) and search engines (Goggle, Yahoo)[9] and their role deserves our attention due to the following reasons.

First, they have gained great power when it comes to the exercise of freedom of expression. If the internet is essential for the dissemination of information and ideas, the role these actors play in making it possible must be considered essential too. The possibility to reach people massively worldwide –one of the internet's remarkable features– is facilitated mainly by these companies. Initially, internet communications were made via forums, chat rooms or blogs. Currently, most of our communications are made through one of these services.

Secondly, we must consider the dominant nature of these actors within the digital ecosystem. Companies perform their roles as intermediaries in different ways. The activity carried out by a search engine will differ from that carried out by a platform. In terms of platforms, a microblogging platform will differ from a platform that allows us to share photos or from one that serves both functions. In this context, the companies have spe-

cialized in each function and have left their competitors far behind. Hence, today discussions about the internet depend on a few actors.

Thirdly, the combination of the precedent factors has resulted in these actors becoming the owners of private governance of online speech.[10] In fact, the way these companies curate contents clearly echoes the elements used by States to regulate people's behavior in their territories.

In the world of content curators, laws are referred to as *terms of service*, a set of guidelines and codes of conduct that users must respect when using their services. These rules determine which content can remain in the platform and which content will be removed due to the violation of some company policy.

On the other hand, these platforms have a team of individuals in charge of analyzing controversial contents who determine if such contents comply with their internal rules. In this sense, the platforms act as if they were a justice system. The task is not carried out manually. It is also done by specially designed algorithms that help deal with the immense traffic in their webs.

Finally, there are penalties for those who have breached the guidelines. The first and most obvious sanction is taking down the content. Depending on the severity of the violation and its frequency, users could receive warnings and their accounts may be suspended or cancelled. These sanctions are applied by platforms when they consider that their rules have been infringed.

As a result, there has been a change regarding the role these actors play in the digital ecosystem. They keep on being intermediaries in the sense that they continue fulfilling a key role for the dissemination of information on the internet. But nowadays they are more than just that: they have become governors of online speech.[11] And as such, they also play a central part in avoiding the dissemination of information on the internet.

To illustrate the problem, we will give two examples of striking cases at a national and regional level, respectively.

María Riot is an Argentine porn actress and sexual worker who, in August 2017, posted a picture of an artistic session with other sexual workers in her Facebook account. A few moments later, the post was removed by

the social network, as it violated the community rules of the platform. Besides, Riot's account was suspended for a month. Faced with this situation, as an activist of sexual workers' rights, the actress claimed being a victim of a censorship case. In addition, she argued that Facebook's terms of service are arbitrary and discriminatory, as they censor the female body while they allow hostile and hateful comments to circulate freely on the platform.[12] For the purposes of remedying an unfair situation, Riot resorted to the Argentine courts and sued the company. The case came under the spotlight, leading Facebook to overturn its decision before a judgment was issued. The company admitted having made a mistake, apologized for the inconveniences caused and reposted the picture.[13]

Another example comes from Brazil. In April 2015, the Ministry of Culture held a photo exhibition about indigenous peoples. The event was advertised in the ministry's Facebook Fanpage with a picture of a man and woman of Botocudo People with their naked torsos. The publication was removed immediately, as it also violated the community rules of the company.[14] As a result, the government of Brazil threatened to sue the company. The ministry declared that Facebook's decision was made unilaterally and that it did not observe the laws of the country and neither did it respect the culture of indigenous peoples. As with the Riot case, the company apologized and reposted the picture.[15] However, the Brazilian government denounced this situation before the Inter-American Commission on Human Rights (IACHR) in order to draw attention on the dangers that platforms' internal rules represent for freedom of expression and other rights.[16]

In this sense, we should not think about the role of these companies from a one-dimensional perspective. They serve an important function for freedom of expression as they facilitate the dissemination of information in their role as intermediaries. But they may also be an obstacle to the enjoyment of such right if they abuse their curatorship and moderation powers. This double facet must be distinguished in order to properly address the different challenges both functions entail. If we use the same logic when treating both, we will continue having an ecosystem that is inconsistent with the demands of a democratic society. The discussion over the failed attempt to establish a legal framework for intermediaries in Argentina gives us some food for thought in this regard.

The bill

In November 2018, the Communications and IT Commission of the Chamber of Deputies, decided not to consider the bill on intermediary liability previously passed by the Senate of the Nation in 2016. As a result, the initiative was finally abandoned and the attempt to establish a legal framework for intermediaries failed. Nonetheless, legislators expressed their intention to continue working on a new bill in order to gain the necessary consensus for it to become law.[17] This is an excellent case to analyze how the different conceptions of freedom of expression tend to overlap. Likewise, it is also useful to study how the awareness of some sectors of the community influenced the attention given to certain aspects of the bill to the detriment of others. The goal is to profit from the lessons learned. In this way, when the matter is discussed again, we will be able to capitalize on the wise decisions made, correct detected flaws and avoid the implementation of measures that may signify a regression in terms of human rights standards.

The bill[18] provided that intermediaries would not be held liable for users' contents unless they had received a court order requesting them to remove or block contents and failed to comply with such order under the established terms (art. 4). For this order to be issued, the affected person had to file a claim before a federal judge (art. 6). Private or administrative notices would be insufficient.

This provision was key to prevent public or private authorities from becoming involved in indirect censorship on the internet. The reason is that liability rules aimed at intermediaries –instead of content producers– may lead to situations where free dissemination of speech is threatened. A scheme like this can be used by the government or private entities to force intermediaries to adopt mechanisms of removal, censorship or blocking or some other form of speech control, under the threat of suffering economic damages. In addition, it is not even necessary for authorities or individuals to display an active behavior for this situation to materialize. Having a legal system of this nature would lead intermediaries to remove any content that may be called to question. In this sense, the principle established in the bill was a defense against any attempt of indirect censorship and at the same time provided a legal mechanism for individuals with a legitimate claim.

Clearly, the regime under consideration was not perfect. On the one hand, the need to obtain a court order to remove content implied that the affected persons would have to initiate court proceedings. As any person barely experienced in court proceedings knows, trials are long, even in the case of precautionary measures, where several months may go by before they are granted. This delay would make it impossible for an unfair situation to be remedied effectively in the internet environment, characterized by the speed with which contents go viral.

On the other hand, the bill did not contemplate exceptional cases seen in similar experiences abroad, which are an illustration of regulations protecting rights. For example, in Brazil, the Civil Rights Framework for the Internet[19] requires a legal notice for content to be removed. However, it exceptionally permits private notices to be delivered in those cases where intimate images are disseminated without consent (art. 21).

Yet, the system established by the bill was a strong stimulus for the exercise of freedom of expression on the internet. After all, no law is perfect and after balancing all the considerations, the lawmaker had decided to avoid the consolidation of mechanisms that would lead to abuses against the dissemination of information and ideas.

The bill faced opposition mainly from print media[20] and from the copyright industry,[21] which claimed that the proposal affected copyrights. The main critic was against the need to obtain a court order to remove certain contents. According to these sectors, big intermediaries gain plenty of economic benefits from the contents circulating in their platforms without assuming liability for the damages that such contents may cause.

In this way, the debate focused on the role of platforms as intermediaries. “Court order, yes” and “court order, no” was the dichotomy dividing the sectors participating in the discussion. However, this was not the only issue the bill sought to solve. There was another important aspect underlying the provisions under discussion which had to do with the role of platforms in the governance of online speech. This issue did not have as many repercussions as the former one and yet it was the weakest part of the project in terms of freedom of expression.

Article 7: “No article in this law should be construed as a limitation to the capacity of Internet Service Providers to freely decide upon self-regulation systems”. The wording of the article left no room for doubts. The bill

granted platforms the right to design their internal rules without restrictions. This had already been happening, but by legally recognizing an existing situation, the State was legitimizing this practice without properly analyzing the consequences of such a decision. On top of that, it failed to consider various reasons that pointed to the need of being more prudent.

Firstly, the bill did not reflect a complete assessment of intermediaries' role as private guardians of online speech. Given the increasing influence of these actors, the regulation of freedom of expression in the digital realm requires further consideration, as the platforms represent the main outlet for messages, opinions, information and any other content circulating on the internet. Hence, our ability to manifest our viewpoint is not only determined by state action but also by decisions platforms make based on their policies, which are often outlined in their internal rules. Platforms apply these private rules by means of moderators and algorithms in charge of deciding important aspects such as what messages remain and which ones are removed and how contents will be shown to users. Therefore, they have developed a dominant role and gained considerable power to influence and shape the public agenda.

In the second place, the bill ignored existing cases where the application of private rules affected the rights of users in the region. The abovementioned cases of María Riot and the people of Botocudo are representative of the many situations where users suddenly notice their content has been removed or their accounts suspended. Even though the decisions were finally overturned in the former cases, we must not overlook the fact that this was due to the initiative of Riot and the Brazilian Ministry of Culture to disseminate the news massively and threat to initiate court proceedings. Besides, in both cases, the aggrieved parties were well-known individuals and had the chance to exert pressure for reversing the sanctions. However, most users do not have the same level of influence, and therefore, they mostly depend on platforms' predisposition to review their decisions.

Thirdly, intermediaries were granted with a power they were not ready to handle. One of the main arguments in favor of legal orders as a means to remove contents at an individual's request is that platforms lack the necessary legal knowledge to assess a request of this nature. The very platforms argue that they cannot perform the role of judges. Now, if this argument is valid when deciding upon somebody else's request, it must also be valid when it comes to autonomous decisions. If I lack the neces-

sary knowledge to solve a mathematical problem, this will not change if I order myself to solve it rather than the teacher asked me to solve it. It is true that in the case of private removals, it is the rules of a private company that are being applied, and not a law. However, this argument once again shows us how complex the issue is. Considering that the internet is the new scenario for public discussions, the fact that these debates are governed by private rules instead of human rights should make us more alert.

In the fourth place, the lack of legal expertise means that platforms' decisions are based on different criteria. As these are big companies, it is reasonable that their decisions are based upon economic incentives. Therefore, their terms of service are designed to maximize profits. This is understandable, considering that if companies did not make any profits, they would surely stop working. However, it is worrying that in their quest for profits, they fail to respect minimum standards. Living in a democratic society means that if any decision violates a right, it should not be implemented, even if it involves an economic gain. Probably, death penalty is more convenient than imprisonment from the point of view of the state budget. Yet, the right to life and human dignity prevents governments from adopting this type of measures. There are no reasons for not applying this logic to private actors, especially those that display a great power and have global impact. In this sense, universal and Inter-American systems of human rights have been advocating the application of human rights standards to companies.[22]

Finally, as is often the case in scenarios where power is concentrated, the chances of minority or disadvantageous groups to express themselves can be seriously hampered.

Platforms do not fulfill the role of editors that work for traditional media. Yet, they moderate content and decide whether to keep it or erase it. In addition, they can also determine the way in which content is privileged or downranked. Surely, their capacity to influence is shaped by most users' preferences. If the goal is for most people to use your platform, it is very likely that you will offer them an environment that is harmonious with their desires. Still, in this kind of situation, dissidents' opinions could not stand the chance of becoming visible and this is a serious problem for a plural and inclusive discussion. Hence, it is necessary to afford special protection to those minority voices.

In conclusion, laws granting unlimited freedom to self-regulation systems call for a more cautious analysis in terms of the impact they may have on human rights. Granting platforms absolute discretion over content circulating on the internet is part of a liberal conception of the 19th century that is inconsistent with the republican-deliberative conception of our legal system. The free market of ideas will work as long as debates are uninhibited, robust and inclusive. If privileged sectors are given legitimate power to control the conditions of such debates, the quality of our democratic societies will be affected, and this will have to be remedied.

The terms of the discussion

The risk of arriving at an authoritarian regulation is always present in this type of discussions. We cannot overlook the fact that on many occasions throughout history, state intervention has been more damaging than beneficial in terms of freedom of expression. On the other hand, the architecture of the internet has some specific characteristics which call for different solutions compared to those needed for more traditional communication markets. For this reason, we must avoid reaching hasty conclusions advocating unrestrictive self-regulation. As was shown, this position quickly shows its limitations once we start to reflect upon the type of ecosystem it would produce (or produces). We must avoid coming up with answers that keep on reinforcing concentrated and non-inclusive debates.

Therefore, state regulation proposals should capitalize on the mistakes found in unrestricted self-regulation experiences and past cases of state censorship. In this sense, the following guidelines may clarify the goals that should guide regulation initiatives.

• **Democratic counterbalance:** public regulation proposals should not aim to completely replace self-regulation systems, but to control and prevent abuses. The complexity of the platforms, the diversity of the activities they carry out and the incessant traffic of internet communications –to name a few– require flexible systems that can deal with daily problems. In this sense, self-regulation may be viable as long as it is driven by goals that do not conflict with the values of a democratic society. For this reason, public regulation should work as a democratic counterbalance to the excesses detected.

• **Determining essential standards:** Supplementary public regulation is needed because self-regulation systems have showed their limitations. The lack of transparency relative to the criteria used to determine which content will be removed; the lack of effective mechanisms to overturn unfair decisions; the cancellation of accounts or withdrawal of material used in a legitimate exercise of freedom of expression, among others, are some of the inconveniences that this type of policies have provoked so far. Faced with this scenario, regulations should establish basic standards based on human rights principles to be observed by platforms. As long as these requirements are met, companies should enjoy the autonomy needed to design their own moderation policies.

• **Diversity of opinions:** legitimate regulations contribute to more voices being heard, not fewer. When a law establishes a scheme of liability promoting the removal of content, it does not satisfy this requirement and, therefore, it cannot be considered a sound measure. On the contrary, if the regulation prevents pictures, videos, comments or accounts from being removed or deleted from the internet at the sole discretion of platforms, such measure should be treated differently.

• **Protection of disadvantageous groups and dissidents:** equitable regulations should pay special attention to groups in vulnerable situations. Minority groups or those sectors which do not have enough power to raise their voice need the support of a regulation that will help them, and their opinions be considered. Hence, initiatives protecting these groups from abusive practices introduced by platforms would contribute to the goal of a vigorous debate.

• **Distinguishing platforms based on their size:** It is reasonable for the regulation to be aimed at platforms with a dominant role and not at small or medium-sized companies if we are to avoid the concentration of power in a few companies. Hence, it is essential for the regulation to distinguish among actors based on their size and avoid the implementation of excessive charges on those who lack the economic or technical resources to face them.

• **Ensure a fair and deliberative process:** debates can be said to be democratic so long as the conditions under which they develop meet the requirements of transparency, accountability and due process. The failures exhibited by platforms with respect to these aspects call for a regulation that promotes more clarity regarding moderators' decision-making pro-

cess; a greater public scrutiny of those decisions and more participation on the part of affected users in proceedings involving the private removal of contents.

Conclusion

The advent of authoritarian ideologies around the world has had repercussions on the internet. There has emerged a conservative narrative linked to practices such as exerting control over social networks and strengthening website-blocking mechanisms. In opposition to that vision, there is an ancient liberal discourse that may be useful to keep government abuses in check, but which fails to do so when it comes to private actors. In the current context of the Internet, this last approach is unsatisfactory too because it does not consider the risks of economic concentration and it overlooks the role of big companies in the governance of online information.

In this context, it is necessary to develop a conception that strives to avoid power abuses by privileged actors –either public or private– and that protects people from decisions that may unfairly affect their right to participate in the new public forum that the internet has turned into. In addition, it should serve as a tool to help disadvantageous groups when their opinions are marginalized to please most users. Finally, it should promote platforms' transparency of their internal decision-making processes to facilitate an effective citizen scrutiny. This conception is not only desirable, but it is also required by our legal system so that freedom of expression can contribute to create a more egalitarian society.

Notes

1 Goldsmith Jack. *The Failure of Internet Freedom.* Knight First Amendment Institute At Columbia University, 2018, available at https://knightcolumbia.org/content/failure-internet-freedom (accessed: 01/05/2019).

2 Idem.

3 Cfr. Goldsmith, Jack and Wu, Tim. *Who controls the internet: illusions of a borderless world.* Oxford University Press, Inc. New York, NY, USA 2006.

4 For an example of how practices precede the formation of a conscious thought about them, see the account on the evolution of pre-modern law into modern law in Atria, Fernando. *La forma del derecho.* Marcial Pons, 2016.

5 Gargarella, Roberto. "Tres concepciones sobre la libertad de expresión". Clarín, September 3, 2013, available at https://www.clarin.com/opinion/concepciones-libertad-expresion_0_rJcycNiPmg.html (accessed: 02/12/2019)

6 Cfr. Gargarella, R., "Constitucionalismo y libertad de expresión"; in *Teoría y Crítica de Derecho Constitucional*, t II., Gargarella R. (compiler), 2008, Abeledo Perrot, pp. 743-778.

7 Supreme Court of Justice. "Grupo Clarín S.A. y otros c/ Poder Ejecutivo Nacional y otros/ acción meramente declarativa", October 29, 2013, available at https://www.cij.gov.ar/nota-12394-La-Corte-Suprema-declar--la-constitucionalidad-de-la-Ley-de-Medios.html (accessed: 02/12/2018)

8 IACHR. Case Granier and others (Radio Caracas Televisión) v. Venezuela, Judgment of June, 22, 2015, available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_293_esp.pdf (accessed: 02/12/2019)

9 Cfr. Balkin, Jack M., "Free speech is a triangle" (May 28, 2018). *Columbia Law Review,* 2018, Forthcoming; Yale Law School, Public Law Research Paper No. 640. Available at SSRN: https://ssrn.com/abstract=3186205 (accessed: 02/12/2019)

10 Cfr. Klonick, Kate, "The New Governors: The People, Rules, and Processes Governing Online Speech" (March 20, 2017). 131 Harv. L. Rev. 1598. Available at SSRN: https://ssrn.com/abstract=2937985 (accessed: 02/12/2019)

11 Ibid.

12 Todo Noticias. "La actriz porno argentina María Riot denunció a Facebook por censura". September 13, 2017, available at https://tn.com.ar/sociedad/la-actriz-porno-argentina-maria-riot-denuncio-facebook-por-censura_820257 (accessed: 02/12/2019)

13 *Clarín.* "Fin de una disputa. Tras la denuncia por censura, Facebook restauró el perfil de la actriz porno María Riot". September 14, 2017 available at https://www.clarin.com/sociedad/denuncia-censura-facebook-restauro-perfil-actriz-porno-maria-riot_0_Sk5UuO_9-.html (accessed: 02/12/2019)

14 *Prensa indígena.* "Brasil: Gobierno denunciará a Facebook por retirar foto de indígenas". April 17, 2015, available at https://www.prensaindigena.org/web/index.php?option=com_content&view=article&id=12215:brasil-gobierno-denunciara-a-facebook-por-retirar-foto-de-indigenas&catid=86&Itemid=820 (accessed: 02/12/2019).

15 *El Comercio.* "Facebook restituye foto de indígena tras amenazas en Brasil". April 18, 2018, available at https://elcomercio.pe/redes-sociales/facebook/facebook-restituye-foto-indigena-amenazas-brasil-353755 (accessed: 02/12/2019).

16 The video of the hearing can be seen in https://www.youtube.com/watch?v=lCoj7dxADZI (accessed: 02/12/2019)

17 *Parlamentario.* "Postergan para 2019 una ley que regule la responsabilidad de proveedores de internet". November 8, 2018, available at http://www.parlamentario.com/noticia-114196.html (accessed: 02/12/2019)

18 Available at https://www4.hcdn.gob.ar/dependencias/dsecretaria/Periodo2017/PDF2017/TP2017/0112-S-2016.pdf (accessed: 02/12/2019)

19 Available at https://www.cgi.br/lei-do-marco-civil-da-internet-no-brasil/ (accessed: 02/12/2019)

20 Association of Argentine Journalistic Entities. "Ley de intermediarios de internet: Adepa expuso en la Cámara de Diputados". November 8, 2018, available at http://adepa.org.ar/ley-de-intermediarios-de-internet-adepa-expuso-en-la-camara-de-diputados/ (accessed: 02/12/2019).

21 *Página/12.* "La honda de Goliat". November 29, 2017, available at https://www.pagina12.com.ar/79222-la-honda-de-goliat (accessed: 02/12/2019).

22 In this sense, previous versions of the bill established that self-regulation mechanisms would be permitted "as long as they do not involve a lower level of protection compared to that afforded by this Law and the consumer protection law" (art. 5 of bill 1508-D-2013, available at https://www.hcdn.gob.ar/proyectos/proyecto.jsp?exp=1508-D-2013)


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