



Freedom of expression online in Ecuador: legislative development over the last two decades

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I. Executive Summary

In recent years, Ecuador suffered a continuing invasion and restriction of spaces that are protected *ab initio* by the right to freedom of expression. Through provisions that sanction slander, insults and the offense known as *desacato* [threatening, insulting or in any way offending the dignity or decorum of a public official due to the exercise of their duties], the intention was to silence critics of the current government, hindering freedom of expression. Furthermore, the *Ley Orgánica de Comunicación* [Organic Communication Law] established a set of rules that allows the government to disproportionately control and limit both offline and online media content. Due to the excessive legal consequences imposed on people and the media who were making legitimate use of their right to express themselves freely through traditional media, the most heated public debate shifted to social networks. In response, new bills were introduced with the aim of providing the Executive branch with greater control over the ideas and information that are transmitted in the digital environment through the imposition of excessive obligations on Internet intermediaries.

II. Introduction

Ecuadorian constitutionalism is characterized by its constant volatility: the current Constitution is the twentieth² in the country. The constitutions of 1998 and the current one of 2008, known as the Constitution of Montecristi, recognize and guarantee the people under the jurisdiction of the Ecuadorian state “the right to express their opinions and express their thoughts freely and in all its forms and manifestations”³. Regarding the collective dimension of this right, both constitutions expressly recognize the access, exchange and dissemination of information under principles such as plurality, the prohibition of prior censorship, subsequent responsibility and general

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² Constitutions of 1830, 1835, 1843, 1845, 1851, 1852, 1861, 1869, 1878, 1884, 1897, 1906, 1929, 1938, 1945, 1946, 1967, 1979, 1998 and 2008. Some authors consider that the Constitution of 1998 was limited to reforming the one of 1979, and for this reason they consider the Constitution of 2008 the number nineteen. The Quito Constitution of 1812 and the Constitution of Cucuta of 1821 are not taken into account in this number because they did not govern Ecuador as an independent republic.

³ Section 22.5 Constitution of 1997; Section 23.9 Constitution of 1998 (there is no online document from an official source); Section 66.6 Constitution of 2008, retrieved from: <http://bit.ly/1oWrdBW>

interest, among others⁴.

By express constitutional provision, Ecuador included international human rights treaties as part of its legal system. The Magna Carta of 1998 eliminated the restriction for the application of international treaties when they opposed the Constitution and Ecuadorian laws and recognized the rules of international treaties as part of the legal system and its prevalence over laws and other subordinated rules (Section 171). The 2008 Constitution enshrines the principles of *pro personae*, non-restriction of rights and direct applicability (Section 417)⁵; that is to say, the rules contained in international treaties have a privileged hierarchy and are applicable even over the Constitution in the event that they are more favorable for the protection of rights. Moreover, some sections of the Constitution not only refer to the direct applicability of treaties but also of international human rights instruments, which would include the Declaration of Principles on Freedom of Expression (2000) or the Joint Declaration on Freedom of Expression and the Internet (2011).

At first glance the constitutional framework seems favorable. However, the text of the Constitution protects the right to freedom of expression and information only when the information is “truthful, verified, timely, contextualized, plural, and free of prior censorship about the facts, events and processes of general interest” (section 18). In this way, in order to enjoy constitutional protection, information is previously conditioned, expressly contradicting Principle 7 of the Declaration of Principles on Freedom of Expression of the Inter-American Commission on Human Rights (IAHR Commission).

In addition to this incoherent constitutional framework, as of 2007, the state set out policies to battle the media, as well as any other form of criticism or dissidence. The latter is verified, for example, in the promulgation of the *Ley Orgánica de Comunicación* [Organic Law of Communication] (hereinafter LOC for its Spanish acronym) and the control exercised over the media, and in the use of both the previous Criminal Code and the current Comprehensive Organic Criminal Code (hereinafter COIP for its Spanish acronym) to repress the criticism that is not favorable to the interests of the government. The same intentions are behind the bills that seek to disproportionately restrict the dissemination of content in the digital environment, such as the Bill for the Organic Law on the Protection of Rights to Privacy and Confidentiality of Personal Data and the Bill that regulates Acts of Hate and Discrimination in Social Networks and the Internet. Both were presented by the ruling party.

The purpose of this work is to review the legislative development regarding freedom of expression and opinion in Ecuador, with the intention of identifying the national legislation that had an impact on the free and effective exercise of this right, particularly in relation to the content and expression that are accessed and disseminated through the Internet.

⁴ Art. 81 Constitution of 1998: The State will guarantee the right to access sources of information; to seek, receive, know and disseminate information which is objective, truthful, plural, timely and without prior censorship, of events of general interest, that preserve the values of the community, especially by journalists and social communicators; Art. 18 Constitution of 2008: All persons, individually or collectively, have the right to: 1. Search, receive, exchange, produce and disseminate truthful, verified, timely, contextualized, plural information, free of prior censorship about the facts, events and processes of general interest, and with subsequent liability.

⁵ In addition to the incorporation of international human rights treaties that Ecuador had voluntarily accepted, other international human rights instruments are added to the Constitution through the body of Constitutional law [rules and principles which, although not appearing formally in the text of the Constitution, are understood to form part of the Constitution by a mandate of the Constitution itself] and the rules that establish the hierarchy of rules. It is the recognition of the value and direct application of declarations, rules, principles, guidelines and other documents with different denominations issued at a universal or regional level. Salazar Marín, Daniela, “La acción por incumplimiento como mecanismo de exigibilidad de sentencias e informes de organismos internacionales de derechos humanos en Ecuador” [Action for noncompliance as a mechanism for enforceability of judgments and reports of international human rights organizations in Ecuador], in: *Iuris Dictio Magazine*, 2013.

To achieve this objective, different examples of expression will be addressed whose regulation in Ecuador affected the exercise of freedom of expression. Namely: slander, insults and *desacato*; the crime known as *apología* of a crime [the defense or praise of a crime] and terrorism; online violence; the responsibility of Internet intermediaries; the protection of personal data; and, finally, copyright. For each regulation, it will be analyzed if the restrictions can be considered legitimate according to international standards on the subject⁶. Finally, any trends found throughout the legislative study and what is expected in the near future from the existing bills will be presented.

Although this work focuses primarily on the development of laws related to online freedom of expression, it should be clear that the freedom to express and disseminate information, ideas and opinions in Ecuador was not limited exclusively by laws but by a climate of permanent aggression and threats against journalists and opponents. Undeniably, during the last ten years, the speeches and pronouncements of the highest authorities of the state, including the President of the Republic, created an environment of intolerance and polarization that does not lend itself for public debate and that became incompatible with the exercise of freedom of expression as a condition of any democracy.

We should also mention that legislative production in Ecuador is scarce compared to other countries in the region. This happens not only because Ecuador is not a federal government, but also because during the last ten years -which correspond to the government of the “*revolución ciudadana* [citizen revolution]” - most of the laws passed by the legislative branch responded to projects that came from the executive, according to official figures⁷. Although some legislators presented bills, in practice the executive branch became the main legislator. Due to the overwhelming majority of the governing party in Congress, as a rule the opposition bills did not become laws. Although the laws passed are not many, they were effective in inhibiting free and vigorous debate on topics of public interest. That situation explains the absence of other bills.

III. The normative framework that regulates freedom of expression in Ecuador

1. Slander, insults and crimes of *desacato*

Before the enactment of the LOC, criminal legislation was the main tool to repress expressions that were annoying to public officials. Until 2014, criminal legislation in Ecuador was regulated by a code that was enacted in 1971 and which during the following years underwent reforms and modifications to adapt to the new legal requirements. One of the main problems of the previous Criminal Code was, precisely, in its provisions on insults, slander and *desacato*. These laws limited expression because they penalized expressions that offended, insulted or

⁶ The international protection agencies have established that under certain circumstances the right to freedom of expression may be subject to restrictions that to be considered legitimate must be previously established according to law, be necessary, proportional, and seek to achieve a legitimate objective in a democratic society. The Inter-American Court of Human Rights has implemented a three-part test, for example, in IACHR, “The Mandatory membership in a professional association for the practice of journalism (Articles 13 and 29 of the American Convention on Human Rights)”, Advisory Opinion AO-5/85 of November 13, 1985, Series A No. 5, ¶ 36; and in IACHR, “Case of Herrera Ulloa v. Costa Rica”, judgment of July 2, 2004, Preliminary Objections, Merits, Reparations and Costs, Series C, No. 107, ¶¶120-121. In addition, it has used as a basis the judicial precedents of the ECHR, for example, of ECHR, “Handyside v. The United Kingdom”, judgment of December 7, 1976, ¶ 49, retrieved from: <http://bit.ly/2F2tebC>

⁷ In the last decade there were a total of 858 bills submitted (on all matters), of which 160 became laws published in the Official Registry. 108 were sponsored by the Executive Branch.

threatened a public official in the performance of their functions. The rule was openly contrary to the Inter-American standards expressed in the precedent of the Inter-American Court of Human Rights (IACHR), as well as in Principle 11 of the Declaration of Principles on Freedom of Expression, according to which “laws that penalize any offensive expression directed to public officials (...) restrict freedom of expression and the right to information”⁸.

Article 230 of the previous Criminal Code established that the person “... who, with threats, intimidation or insults, offends the President of the Republic or the person who exercises the Executive Powers, will be repressed with six months to two years in prison and a fine of sixteen to seventy-seven dollars ...”⁹. According to international standards on the subject, the laws that silence unpopular ideas and opinions, repressing the debate necessary for the effective functioning of democratic institutions, infringe on the right to freedom of expression and opinion¹⁰. In this way, any speech that was shocking to a public official was penalized, which was not compatible with Article 13 of the American Convention because it imposed unnecessary further responsibility in a democratic society.

This norm was harshly criticized and it was even demanded that it be declared unconstitutional, without the Constitutional Court having pronounced itself in this regard. Concerns about the validity of this rule were radicalized in 2011 when former President Rafael Correa filed a criminal complaint against a journalist and three executives of the newspaper *El Universo* following an opinion article referring to a police revolt that occurred on September 30, 2010. The National Court of Justice confirmed the sanction of three years of imprisonment to the journalist, sentenced the three defendants to a payment of 30 million dollars and another of 10 million dollars from Compañía Anónima El Universo¹¹.

Thus, while several countries in the region progressively decriminalized *desacato* laws, in Ecuador they were used as the main tools to intimidate the media and generate an inhibiting effect, indirectly restricting freedom of expression.

Regarding the use of criminal law mechanisms to sanction expressions on issues of public interest or on public officials, the Inter-American Court determined that the right to freedom of expression is not absolute, but in cases where the public officials’ actions are being debated this right must prevail. That is why *desacato* laws that provide a higher level of protection to public officials than the rest of the citizens are contrary to the fundamental principle of a democratic system that promotes the scrutiny of issues of public interest.¹²

With the promulgation of the COIP in February 2014, several of the *desacato* crimes, including non-slanderous insult, were repealed. However, the Ecuadorian criminal law maintains the classification of the crime of slander that may result in a penalty of up to two years in prison to the person who “by any means” makes a “false accusation of a crime against another” (article 182). The sanction corresponds to what in other countries is known as *injuria judicial* [actionable insults]. The law is characterized by its scope when considering the means by which the accusation is made, and it does not take into account the necessary distinction with respect to information that can be regarded as public interest. As the crime is legally classified, there are several behaviors that could respond to the criminal description. A person who files a complaint against a public official in the framework of their official duties which is finally dismissed for lack of evidence could be prosecuted for slander.

⁸ Declaration of Principles on Freedom of Expression, IHR Commission, 2000, principle 11.

⁹ In turn article 231 described the same crime when it was against public officials when they were in office, or because of the exercise of their duties, and imposed a prison sentence of fifteen days to three months and a fine of eight to forty-seven dollars.

¹⁰ Commission on Human Rights, Report on the compatibility between “*desacato* laws” and the American Convention on Human Rights, OEA / Ser. L / V / II.88, Doc. 9 rev., February 17, 1995, ¶¶197-212.

¹¹ National Court of Justice, “Judgment No. 840-2011 MV”, judgment of February 27, 2012, retrieved from: <http://bit.ly/2szKa6U>

¹² IACHR, “Palamara Iribarne v. Chile Case”, judgment of November 22, 2005, Merits, Reparations and Costs, Series C, No. 135, ¶¶79- 95.

In Ecuador, the law has already been applied in an abusive manner to restrict freedom of expression. For example, nine members of the Civic Commission against Corruption who had asked the Office of the Prosecutor to investigate overpricing in a refinery project, a complaint which accused the Comptroller of failing to carry out his duty, were criminally sued by the latter and sentenced to one year prison for the crime of slander¹³.

Recently a journalist was criminally prosecuted for voicing an opinion which bothered former President Correa. The defendant was the journalist Martín Pallares - who was eventually acquitted - of “4 Pelagatos”, a digital media site of political news, commentaries and satires. Former president Rafael Correa filed a claim against him not for insults, as in the case of “El Universo”, but for “expressions of discredit or dishonor”, a misdemeanor described in article 396.1 of COIP¹⁴.

The Inter-American Court of Human Rights held that the use of criminal law to protect the honor of public servants in the face of complaints related to the exercise of their functions was disproportionate¹⁵. However, in Ecuador, criminal offenses continue to be used with effects similar to *desacato* laws to silence the public debate and obstruct the citizen’s oversight of the actions of authorities¹⁶.

2.The crimes of apología and terrorism

Criminal law has also classified *apología* of crime and terrorism as crimes which would not be a problem if their description was not so broad as to generate a conflict between freedom of expression and the guarantee of public order.

The Criminal Code of 1971¹⁷ established only a pecuniary penalty to the person who “... made publicly and by any means *apología* of crime or of a person convicted of an offense, by reason of the act” (article 387). Whereas the current COIP includes the criminal offense as a misdemeanor against public order and also punishes the expression with a prison sentence of fifteen to thirty days (article 365)¹⁸.

The previous Criminal Code also included sanctions against the media that committed *apología* of sexual crimes and human trafficking, which could lead to the closing and reversion of frequencies or authorization for their operation; and imprisonment of three months to a year for the members of the public force for *apología* of the crime of sedition¹⁹.

¹³ Criminal Judicial Unit based in the Ñaquito municipality of the Metropolitan District of Quito, Pichincha Province, Process No. 17294-2017-00080, withdrawal dated August 17, 2017, retrieved from: <http://bit.ly/2Er1mgn>. At the request of the newly elected President Lenin Moreno, the Comptroller withdrew the complaint and the judge had to extinguish the action. However, the criminal precedent remained intact with all its inhibitory effects. Months later, the Comptroller fled the country when evidence appeared that implicated him in corruption, as denounced by the members of the Commission.

¹⁴ Misdemeanor Judicial Unit with headquarters in the Metropolitan District of Quito, Criminal Misdemeanors Court No. 1751-2017-00262 filed by Rafael Vicente Correa Delgado against Juan Martín Pallares Carrión, judgment dated March 7, 2017, retrieved from: <http://bit.ly/2Er1mgn>

¹⁵ IACHR, “Uzcátegui et al. v. Venezuela”, judgment of September 3, 2012, Fund and Reparations, Series C, No. 249, ¶¶ 188 and 191.

¹⁶ Finally, the journalist was acquitted, in part thanks to an environment of greater judicial independence that has existed since former President Rafael Correa left office. But the inhibitory effects of criminal prosecution do not disappear, even if it does not end in a conviction.

¹⁷ The previous criminal law was a legacy of the dictatorship in the country and, as such, its application was anachronistic and contrary to international standards regarding the principle of legality.

¹⁸ Art. 365, COIP 2014, retrieved from: <http://bit.ly/1oWrdBW>. Apología. - The person who by any means defends or praises a crime or a person convicted of a crime will be punished with imprisonment of fifteen to thirty days.

¹⁹ Unnumbered article 19 after Article 520 and Unnumbered article (602.5), Criminal Code 1971 (there is no online document from an official source).

The legal classification of this crime seeks to protect public order and the internal security of a certain state, avoiding conducts that suppose an exaltation or incitement to illicit acts or advocating for persons condemned for these crimes. However, the ambiguity of the criminal classification in the regulations facilitates a broad interpretation that may entail the sanction of behaviors that would not necessarily be harmful. In possible cases of incitement to violence - when understood as the incitement to the commission of crimes, the disturbance of public order or national security - there is a presumption of a current, certain, objective and conclusive proof that the person was not expressing an opinion, however harsh, unfair or disturbing, but that there was a clear intention to commit a crime and the current, real and effective possibility of achieving this objective²⁰. The Ecuadorian criminal regulations do not conform to this standard.

Something similar happens with the way in which the crime of terrorism was classified in the code. Both the previous Criminal Code and the current one recognize many acts and alleged intentions, which means that any political act of a group of people can fit in the legal description of this crime. Article 160-A²¹ of the previous Code included several instances of vagueness that allowed the judicial authority to complete the subjective and objective elements, as well as the governing verbs of the description of the crime. So broad was the wording of this ruling that the criminal description included five times the words *et cetera*, which demonstrated its ambiguity and opened the door to broad interpretations.

In this regard, both the Inter-American Court of Human Rights and the IHR Commission determined that "... legislators must observe the strict requirements of criminal classification to satisfy the principle of legality and consequently ensure that criminal offenses are formulated in an express, precise, prior and exhaustive manner, thus providing legal security to the citizen"²². The criminal description is so broad that it was used in Ecuador to prosecute hundreds of people in the last decade, especially indigenous leaders in the context of social protests. One of the emblematic cases of abusive use of this criminal rule occurred when it was applied to condemn ten young people known as the 10 of Luluncoto, whom the police investigated as a result of publications on social networks that included phrases such as "the violence generated by those on top" or "the people must conquer power". Based on that evidence, the young people were detained in an apartment located in Luluncoto, a neighborhood in the south of the capital. In addition to posts in social media publications they took other evidence such as cell phones, cosmetic bags, banknotes, coins, a folder of the *Grupo de Combatientes Populares* [Popular Combatants Group] (GCP), red "Che" Guevara t-shirts, records with protest music and rubber boots. Those were evidential elements so that, without having carried out any act, they were prosecuted and sentenced to prison for the crime of attempted terrorism²³.

Currently, the COIP corrects much of the vagueness of the previous criminal description and redefines terrorism as the conduct that causes or maintains "... in a state of terror all or part of the population, through acts that endanger the life, physical integrity or freedom of the people..." Although there is no internationally accepted definition of terrorism, the current criminal description still maintains a loose and generic structure that allows certain activities of information dissemination or social protest to be considered terrorism.

²⁰ IDH Commission, Office of the Special Rapporteur for Freedom of Expression. Inter-American Juridical Framework on the Right to Freedom of Expression, 2010, ¶ 58; IACHR, "The Compulsory Association of Journalists ..." supra note 4, ¶ 77.

²¹ Unnumbered article added after Article 160 by Supreme Decree No. 1273, published in Official Registry 705 of December 19, 1974, Criminal Code 1971.

²² IACHR, "Kimel v. Argentina", judgment of May 2, 2008, Merits, Reparations and Costs, CI Series No. 177. ¶ 63; IAHR Commission, "Criminalization of Human Rights Defenders", Doc. No. OEA / Ser.L / V / II. Doc. 49/15, December 31, 2015, ¶ 57.

²³ Tenth Court of Criminal Guarantees of Pichincha, Judgment No. 17260-2012-0570, Appeal to trial on July 25, 2012, retrieved from: <http://bit.ly/2Er1mgn>

In this regard, the Inter-American Court established that

the legal description [of the crime of terrorism] implies that the incriminated conduct is delimited in the clearest and most precise way possible. In this description, the special intention or purpose of producing fear in the population in general is a fundamental element to distinguish terrorist behavior from non-terrorist conduct and without which the behavior would not be considered part of the legal definition²⁴.

Otherwise, the principle of legality enshrined in Article 9 of the American Convention would be infringed.

In the same sense, the Human Rights Council established that crimes classified as terrorist acts must have a definition with transparent and predictable criteria²⁵ so as not to hinder the full exercise of freedom of expression, association and peaceful assembly. Ecuador still needs to adapt its domestic criminal law on terrorism to meet these standards.

3. Online violence: discrimination, hate speech and child pornography

Regarding regulation of the Internet and online violence, Ecuador is still in its early stages. For this reason, the criminal legal descriptions in the code that sanction discrimination, hate speech or child pornography were regulated in the same criminal regulations. For example, both the previous Criminal Code (1971) and the current COIP (2014) describe the crime of discrimination without distinguishing the means by which it is committed²⁶. In the same way, the LOC (in its articles 61 and 62) prohibits the dissemination of discriminatory content through traditional media.

Although the current legislation expanded the categories of discrimination without limiting it to “race or ethnic origin” as the previous one, the criminal description in the COIP as well as the administrative prohibition of the LOC remain such that they could allow the sanction of other types of behaviors or expressions. In this regard, the IACHR has determined that these criminal offenses must be expressed “... without ambiguities, in strict, precise and explicit terms, that clearly define penalized conducts as punishable offenses, establishing precisely what their elements are and the factors that distinguish them from other behaviors that do not constitute crimes”²⁷. The same standard should apply for administrative sanctions.

In the case of hate crimes, the previous Criminal Code defined both incitement to hatred and acts of moral or physical violence of hatred “... on account of skin color, race, sex, religion, national or ethnic origin, sexual orientation or identity, age, marital status or disability”²⁸. The current COIP unifies these crimes and also adds other

²⁴ IACHR, “Norín Catrimán et al. (Leaders, members and activist of the Mapuche Indigenous People) v. Chile”, judgment of May 29, 2014, Merits, Reparations and Costs, Series C, No. 279, ¶ 171.

²⁵ UN, General Assembly, Human Rights Council, Protection of human rights defenders, A / HRC / RES / 22/6, p. 3.

²⁶ Art. 212-A, Criminal Code 1971: Any person who acts in the following manner will be punished with imprisonment from six months to three years: 1) any person who, by any means, disseminates ideas based on racial superiority or racial hatred [...]; Art. 176, COIP 2014: Discrimination.- The person who, except in the cases provided for as affirmative action policies, propagates practice or incites any distinction, restriction, exclusion or preference based on nationality, ethnicity, place of birth, age, sex, gender identity or sexual orientation, cultural identity, marital status, language, religion, ideology, socioeconomic status, migratory status, disability or health status with the aim of nullifying or undermining the recognition, enjoyment or exercise of rights in conditions of equality, will be sanctioned with imprisonment of one to three years.

²⁷ IACHR, “Criminalization of Human Rights Defenders”, OEA / Ser.L / V / II. Doc. 49/15, December 31, 2015, ¶ 243.

²⁸ Unnumbered articles, Chapter ... Hate Crimes, Criminal Code 1971.

categories of discrimination²⁹. In this sense, the first case of hate crime that has been brought before the national courts was the Arce Case, in which an Afro-Ecuadorian who entered a military academy was discriminated and the acts of violence of which he was a victim, due to their seriousness, were configured as a hate crime³⁰.

In relation to the regulation of both crimes in the digital environment, one day before leaving the presidency, former president Rafael Correa sent to Congress a Bill that regulates the Acts of Hate and Discrimination in Social Networks and the Internet. The bill does not create new crimes, it is based on those classified in the COIP³¹, but it establishes an excessive burden of irrational obligations on social networks and Internet providers.

One of the worrying aspects is that the project encourages companies to remove or block access to content that is clearly illegal within 24 hours of receipt of the claim, without allowing users control over these content removal mechanisms (Article 5, numeral 2).

It is clear that the person who drafted the bill does not know the original architecture of the Internet, which is based on several guiding principles such as: free access, pluralism, non-discrimination, privacy and, particularly, net neutrality. It grants users the freedom to access, use, send, receive or offer any content, application or legal service through the Internet, without being conditioned, directed or restricted by blocking, filtering or interference measures³².

Regarding the blocking measures, the Rapporteurs for Freedom of Expression in their recent Joint Declaration on Freedom of Expression and “Fake News”, Disinformation and Propaganda reiterated that

the blocking of entire websites, IP addresses, ports or network protocols provided by the state is an extreme measure which can only be justified when stipulated by law and is necessary to protect a human right or other legitimate public interest, which includes that it must be proportionate, there are no alternative less restrictive measures that could preserve that interest and that respect the minimum guarantees of due process³³.

On this issue, the IACHR determined that it is essential to evaluate the proportion of a restriction on freedom of expression on the Internet in a digital systemic perspective. This means that the impact (or cost) that this could

²⁹ Art. 177, COIP 2014: Acts of hate.- The person who commits acts of violent physical or psychological hate against one or more persons by reason of their nationality, ethnicity, place of birth, age, sex, gender identity or sexual orientation, cultural identity, marital status, language, religion, ideology, socioeconomic status, immigration status, disability, health status or HIV status ...

³⁰ National Court of Justice, Specialized Court of Criminal, Military Criminal, Police and Traffic Matters, Judgment No.17721-2014-1331, judgment of July 15, 2016; Provincial Court of Pichincha of Ecuador, Criminal Court, Judgment No. 17124-2014-0585, judgment of March 9, 2017, retrieved from: <http://bit.ly/2Er1mgn>

³¹ Article 2 of the Bill states that the intention is to regulate the actions of intermediaries for the treatment of content or information that constitutes acts of discrimination or hatred in accordance with articles 176 and 177 of the COIP.

³² Joint Declaration on Freedom of Expression and the Internet, Special Rapporteur of the United Nations (UN) on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Representative on Freedom of the Media of the Organization for Security and Co-operation in Europe (OSCE), Special Rapporteur on Freedom of Expression of the Organization of American States (OAS), and Special Rapporteur on Freedom of Expression and Access to Information of the African Commission on Human and People's Rights (CADHP), June 1, 2011, Item 5 (a).

³³ Joint Declaration on Freedom of Expression and “Fake News”, Disinformation and Propaganda, Special Rapporteur of the United Nations (UN) on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Representative for the Freedom of the Media of the Organization for Security and Cooperation in Europe (OSCE), Special Rapporteur on Freedom of Expression of the Organization of American States (OAS), and Special Rapporteur on Freedom of Expression and Access to Information of the African Commission on Human and People's Rights (ACHPR), March 7, 2017, Item 1.f; Joint Declaration on Freedom of Expression and the Internet, supra note 28, Item 3.a.

have on the overall functioning of the network and on the freedom of expression of all the users must be weighed in every way, beyond its result and the point of view of the affected individuals³⁴.

Likewise, it is alarming that the adoption of this type of measures set forth in the bill is not controlled by users through minimum due process guarantees such as the transparency of the measure and counter-notification mechanisms. Private actors also have the obligation to be transparent with the measures they adopt and to establish systems that allow users to apply internal security mechanisms and access effective remedies; otherwise, the measure will constitute a form of prior censorship and, as such, would be an unjustified restriction on freedom of expression³⁵.

If the user directly affected by the measure or all the users directly affected by the application of this type of measure do not know [1] which expression was deleted; [2] what was the mechanism used; [3] what is the justification for the measure; and [4] what counter-notification measure is available, they cannot exercise final control over the decisions of intermediaries and consequently counteract any discriminatory action³⁶. The project also omits an essential principle for online content that may be shocking or disturbing to a particular sector of society but as such does not deserve to be blocked or deleted from the web. While the collection of online expressions and discourses is not verified as openly illicit speech such as hate speech, war propaganda, direct incitement to genocide and child pornography, self-regulation is one of the most effective tools to address any insulting expression³⁷. Only the competent authority can impede the *ab initio* coverage of an expression through the current, certain, objective and conclusive evidence³⁸.

Finally, in relation to child pornography, it is prohibited by the Code of Childhood and Adolescence (hereinafter CNA, by its Spanish acronym) and defined in the COIP as a form of exploitation of the crime of human trafficking³⁹. In the administrative sphere, the LOC establishes a prohibition of any type of advertising or propaganda of child pornography in the media⁴⁰.

The CNA determines that child pornography "... is all representation, by any means, of a child or adolescent in explicit, real or simulated sexual activities; or of their genital organs, in order to promote, suggest or evoke sexual activity"⁴¹.

Taking into consideration that the Human Rights Council has stated that "the same rights that people have

³⁴ IACHR. Office of the Special Rapporteur for Freedom of Expression. *Freedom of Expression and the Internet*, 2013, ¶ 53.

³⁵ Joint Declaration on Freedom of Expression and the Internet, *supra* note 28, Point 3 (b); Joint Declaration Joint on the Internet and Anti-terrorism measures, Special Rapporteur of the United Nations for Freedom of Opinion and Expression, Representative of the Organization for Security and Cooperation in Europe for Freedom of the Media Communication and Special Rapporteur on Freedom of Expression of the OAS. December 21, 2005; Joint Declaration on Wikileaks, United Nations Special Rapporteur for the Protection and Promotion of the Right to Freedom of Opinion and Expression and Special Rapporteur on Freedom of Expression of the Inter-American Commission on Human Rights. December 21, 2010, Item 5.

³⁶ United Nations. General Assembly. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue. A / HRC / 17/27, May 16, 2011, ¶ 76; Nunziato, Dawn Carla. "Preserving freedom on the Internet in the Americas." CELE. *Towards an Internet free of censorship Proposals for Latin America*, University of Palermo, Buenos Aires, 2012, p. 20.

³⁷ Joint Declaration on Freedom of Expression and the Internet; *supra* note 28, Point 1 (e).

³⁸ United Nations. Human Rights Council. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue A / HRC / 17/27, *supra* note 31, ¶ 70; Court HR, "Mandatory membership in a professional association for the practice of journalism ..." , *supra* note 4, ¶ 77.

³⁹ Art. 91, COIP, *supra* note 14.

⁴⁰ Art. 94, LOC 2013, retrieved from: <http://bit.ly/1oWrdBW>

⁴¹ Art. 69, Código de la Niñez y Adolescencia 2003, retrieved from: <http://bit.ly/1oWrdBW>

offline must also be protected online ...⁴², in the case that concerns us, the rights to the personal integrity of children and adolescents, it is possible to state that the broad coverage established by the CNA to any means used to commit a crime, also covers digital media.

4. Liability of intermediaries on the Internet

Ecuadorian legislation did not expressly regulate the presumed liability of intermediaries for online content. However, LOC and its Regulations enabled to hold media responsible for third-party content, including what they disseminate through their web sites.

The regulation of opinion is among the most questioned aspects of the LOC. In its articles 3 and 17, the *Ley de Comunicación* [Communications Law] grants a Superintendence control over opinions produced, received, disseminated and exchanged through the media. This legislation is so incompatible with a democratic society that it was even applied to punish cartoon artists⁴³.

This is aggravated by the questionable definition of prior censorship contained in the LOC, whose article 18 includes as a form of prior censorship the deliberate and recurrent omission of the dissemination of information classified as being of public interest and imposes an administrative sanction. The rule was widely used as a basis to prosecute media outlets that did not cover matters of interest to the government party or one of its officials, as well as to force the media to disseminate exclusively the official “truth”.

In addition, in its article 26, the LOC prohibits the dissemination of information that, directly or through third parties, is produced in a concerted manner and published repeatedly through one or more means of communication for the purpose of discrediting a person or legal entity or to reduce their public credibility, a behavior dubbed “media lynching.”

The validity of the LOC gave the executive branch broad powers to limit the expressions which were critical of its management and generated enormous pressures in the media, in some cases compromising its survival.

Although the LOC expressly states that “... it does not regulate information or opinions that are personally issued through [the web]” (article 4), it does warn that the contents of the media “can be generated or replicated by the means of communication through the Internet” (article 5). This provision was broadened by its general regulation that recognized as media the electronic platforms in which information is disseminated “...that distributed information and opinion contents” (article 3).

Regarding the obligations of the media and their Internet sites, the law establishes a conditioned liability regime with respect to the comments of users on said pages⁴⁴, which finally translates into a regime of strict liability.

⁴² Human Rights Council, *The promotion, protection and enjoyment of human rights on The Internet*, A / HRC / 32 / L.20, June 27, 2016, point 1.

⁴³ Superintendence of Information and Communication, Procedure No. 002-INPS-DNJPO-SUPERCOM-2014 against Rodrigo Xavier Bonilla Zapata (“Bonil Case”) *El Universo* Journal, January 10, 2014.

⁴⁴ Art. 20, LOC, *supra* note 36: [...] The comments posted under publications in legally constituted web pages of mass communication will be personal responsibility of those who wrote them unless the media outlet failed to comply with the following conditions: 1. Clearly informing the user about their personal liability regarding the comments issued; 2. Setting up mechanisms for the registration of personal data which allow the user’s identification such as name, electronic mail, personal identity document number, or; 3. Designing and implementing self - regulating mechanisms that avoid publication, and allow reporting and eliminating any content that harm the rights enshrined in the Constitution and the law. [...]

It establishes that the comments of the users of the site are directly attributable to the content provider, even when the latter has not participated in them, when it fails to comply with the following obligations: (i) clearly inform the user about their personal responsibility with respect to the comments issued, (ii) generate mechanisms for the registration of personal data that allow their identification, or (iii) design and implement self-regulating mechanisms that avoid publication and allow the reporting and elimination of content that harms the rights enshrined in the Constitution and the law.

At first glance, the first obligation does not seem disproportionate since this type of disclaimers and warnings just allow the web site to explain to their users that they will be held responsible for their comments on the site. However, regarding the second obligation, it is absurd to think that the web site can generate a mechanism that allows it to identify and in turn ensure that the person behind the comment is the same person who records their personal data. Clearly this provision ignores the original architecture of the Internet and also the possibility of its anonymity as protection for people to avoid being disturbed because of their opinions and to be able to seek, receive and disseminate information and ideas of all kinds⁴⁵. The current Special Rapporteur for Freedom of Expression, David Kaye, expressed concern about the provisions of the LOC affirming that "... this responsibility of the intermediaries will result in policies for the registration with real names, which undermines the anonymity or will end in the total suppression of publications on websites that cannot afford to implement control procedures, which would damage the independent and smaller media outlets"⁴⁶.

The third obligation is even more alarming since by requiring the media to design and implement self-regulating mechanisms that prevent the publication and allow the reporting and elimination of contents that infringe any right, it demands from the intermediary an excessive legal capacity to weigh rights and interpret the law. In this regard, the previous Rapporteur Frank La Rue determined that even in the case that intermediaries have the operational and technical capacity to review the contents published by Internet users, "... they do not have, nor do they have any obligation of having, the legal knowledge necessary to identify in which cases a content can effectively produce an unlawful damage that must be avoided"⁴⁷.

Even in the criticized ruling of the ECHR in the case of the Estonian news site "Delfi" it was established that the private actor would be obliged to adopt mechanisms to remove comments without delay only in cases where the content provider is considered an active intermediary, that is, it is the only one that has the technical means to modify or eliminate the comments of the users; and when the form of comments represent serious and imminent harm through hate speech or direct threats against the physical integrity of people⁴⁸.

In addition we can also find the aforementioned bill to regulate content in social networks where the intention is to hold these platforms liable for not immediately deleting allegedly unlawful content. As we will see, the Bill for the Regulation of Acts of Hate and Discrimination in Social Networks and the Internet imposes an excessive burden of obligations on social networks. In the first place, it is clear that the person who wrote and submitted the project

⁴⁵ United Nations, Human Rights Council, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye, Human Rights Council, United Nations, May 22, 2015, A / HRC / 29/32, ¶ 1.

⁴⁶ *Ibid.* ¶ 54.

⁴⁷ United Nations, Human Rights Council, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, A / HRC / 17/27, supra note 31, ¶ 42.

⁴⁸ The Delfi news site was considered an example of an active intermediary because, [1] it created content for its users to respond to; [2] once a response to the content was uploaded by a user, the actual authors of the comments could not modify or delete their comments; and [3] only the site had the technical means to modify or eliminate the comments posted on it. See ECHR, "Delfi AS v Estonia", judgment of June 16, 2015, ¶¶ 144, 145, 159; See ECHR, "Lehideux and Isorni v. France", judgment of September 23, 1998, ¶¶ 47 and 53; "Pavel Ivanov v. Russia", judgment of February 20, 2007, retrieved from: <http://cmiskp.echr.coe.int/>

has a great ignorance about the way in which intermediaries operate on the Internet. Not only does it impose excessive control on these actors, but it confuses the Internet service providers into a single category misnamed “social network service providers” (Article 2), Internet service providers (known as ISP) and social network platforms.

Although different agencies have classified web intermediaries differently⁴⁹, there are big technical differences between those who guard the physical infrastructure necessary to access all of the contents, services and applications on the Internet (ISP) and private actors, also called web 2.0 applications whose main characteristic is to encourage people to connect and interact with other users and share content online⁵⁰.

The following are requirements found within the set of unreasonable obligations that the project aims to impose on the “social network service providers”: (i) the establishment of an effective procedure to resolve complaints or reports on illegal content (article 5), (ii) the preparation of a quarterly report in relation to the management of these claims or reports (article 3), and (iii) the appointment of an internal agent with permanent residence in Ecuador to comply with these obligations (article 7).

In addition to pretending that these “service providers” become custodians of all digital content, the project places an excessive responsibility on them by forcing them to examine the alleged illegality of all content reported online, when the intermediary is not - nor should it be - in a legal position to have to make decisions on the legality or illegality of the contents uploaded to the network⁵¹. Precisely because of this lack of legal capacity, most states impose responsibility when these private actors do not remove the content after receiving a court order. In this regard, the IACHR, citing point 2.b of the Joint Declaration on Freedom of Expression and the Internet, determined that

When it comes to Internet intermediaries, it is conceptually and practically impossible without undermining the entire web architecture, to maintain that intermediaries have the legal duty to review all content flowing through it or reasonably assume that, in all cases, it is under their control to avoid the potential damage that a third party may generate using their services. In this regard, it is clear that intermediaries should not be subject to obligations of supervision of the contents generated by users in order to stop and filter illicit expressions⁵².

In practice, a social network such as Facebook, Instagram, or Twitter that receives hundreds or thousands of comments and publications in a single day, should have a numerous technical staff specialized in the determination of illegal content to monitor each complaint about a specific content. “The decision to eliminate contents expressed by third parties through the Internet would require a very specialized legal knowledge to clearly identify the cases of contents that are really unlawful or discriminatory, capable of causing damage or infringing on rights that the media is forced to avoid”⁵³.

⁴⁹ Article 19 distinguishes between Internet service providers, web hosting, social media platforms and search engines; Former Special Rapporteur Frank La Rue identified ISPs, search engines, blogging services, online communities and social media platforms; in contrast, the OECD identified data processors, e-commerce intermediaries, online payment systems and interactive network platforms as relevant Internet intermediaries.

⁵⁰ Article 19, Internet Intermediaries. Dilemma of Liability, 2013, p.6; Mackinnon, Rebecca and others, Fostering Freedom Online. The Role of Internet Intermediaries, UNESCO, 2013, p. 22

⁵¹ United Nations. General Assembly. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue A/HRC/17/27, *supra* note 31, ¶ 42.

⁵² IACHR, Office of the Special Rapporteur for Freedom of Expression, Freedom of Expression ... *supra* note 30, ¶ 96.

⁵³ Salazar, Daniela. “El Impacto de la Ley Orgánica de Comunicación en Internet” [The Impact of the Organic Law of Communication on the Internet], *Regulación de Internet y Derechos Digitales en Ecuador*, Quito, 2016, p. 142.

Faced with such strict standards, given the uncertainty about an eventual responsibility for controversial or shocking content, and the high cost of having the legal capacity to objectively analyze the illegality or not of online content in an unreasonable time, it is logical that a social network platform prefers to remove presumably illicit content rather than risking any possible liability, which in practice turns out to be a strict liability.

Failure to comply with any of the aforementioned obligations may represent administrative penalties ranging between one hundred and five hundred unified basic salaries. It is clear that the intention and strategy of the Ecuadorian state is to use intermediaries as control points to finally progressively minimize the space for debate in the digital arena. Finally, states find it easier to identify and coerce private actors rather than those directly responsible for online content, both because of the difficulty of identifying them and because of the possibility that they may be in different jurisdictions, either physically or because they act through a server with a simulated IP address. In this sense, the IA-CHR highlighted that “there is a greater economic incentive to seek the responsibility of an intermediary than to seek the responsibility of an individual user”⁵⁴ which clearly is verified by the considerable administrative sanction that a dependency of the executive branch can impose. In this attempt to regulate, by any means necessary, the expressions disseminated in the web, it would be absurd to think that Ecuador could actually apply a regime of administrative sanctions in other territories and, in addition, impose a series of obligations on private actors that are out of its jurisdiction.

Undoubtedly, both discrimination and online hate speech deserve to be fought in the web and, consequently, companies must be required to act with due diligence in the face of human rights. However, this private actor should not be held responsible unless the intermediary Internet company specifically intervenes in the illegal content or refuses to comply with a court order that requires its removal⁵⁵. In the current terms, the bill translates into a dangerous incentive for private censorship, as has already happened with the provisions of the LOC that impose similar obligations on the media outlets that provided sections for online comments.

In this scenario, both the responsibility that the LOC imposes on media sites and the responsibility that the Bill aims to impose on social media platforms violates the mere conduit principle, recognized both in the Manila Principles on Intermediary Liability (hereinafter Manila Principles) as in the Joint Declaration on Freedom of Expression on the Internet (hereinafter Joint Declaration).

The Manila Principles state that “[t]he intermediaries should not be liable for third-party content in circumstances where they have not been involved in modifying that content” (principle 1.b). For its part, the Joint Declaration determines that

[N]o one who simply provides technical Internet services such as providing access, or searching for, or transmission or caching of information, should be liable for content generated by others, which is disseminated using those services, as long as they do not specifically intervene in that content or refuse to obey a court order to remove that content, where they have the capacity to do so (point 2.a).

5. Protection of personal data and the “right to be forgotten”

The protection of privacy and personal data began to be formally debated in Ecuador through a bill in 2010. It sought to guarantee the protection of the rights to privacy and confidentiality through the regulation of the

⁵⁴ IACHR. Office of the Special Rapporteur for Freedom of Expression, Freedom of Expression ... supra note 30, ¶ 93.

⁵⁵ Joint Declaration on Freedom of Expression and the Internet, supra note 28, Point 2.

handling of personal data accessible to third parties by virtue of technological expansion⁵⁶. Although the bill was dismissed in the first debate because it lacked the status and hierarchical scope of an organic law⁵⁷, in July 2016, another similar bill was presented called the *Proyecto de Ley Orgánica de Protección de los Derechos a la Intimidad y Privacidad sobre Datos Personales* [Organic Bill of Law for the Protection of the Rights to Privacy and Confidentiality of Personal Data].

This bill presents several worrying aspects that, though it may seem contradictory, were part of the set of the objections that had the first bill dismissed. For example, it establishes the unnecessary creation of an administrative-bureaucratic body for the imposition of sanctions present in the country⁵⁸. Two things stand out in the bill: [1] the possibility of the executive branch to temporarily or permanently block computer systems, websites, and blogs or similar in the name of personal data protection, and [2] the proximity to the “right to be forgotten” through the suspension of content that is totally or partially inaccurate.

One of the points of lively debate during the first bill was the creation of an administrative body for the protection of personal data handled by third parties, due to the broad powers it would hold both of control and supervision and the imposition of civil sanctions. However, the second bill once more includes a National Authority for the Protection of Personal Data as an organ of the executive branch (Article 11), with powers that should be reserved to a judicial authority. In the current bill, in addition to establishing the responsibilities of noncompliance of the law, the administrative body has the power to impose sanctions that could be disproportionate and excessive. The Office of the Special Rapporteur for Freedom of Expression of the IACHR had already made a statement on the matter when it analyzed the LOC. It questioned Ecuador arguing that, “the establishment of administrative instances, with authority to establish controls, limits and sanctions that may substantially affect the exercise of [I] (...) right to freedom of expression [...], is problematic from the perspective of Articles 13, 8 and 25 of the American Convention”⁵⁹, even more so when it is an agency attached to the Executive branch of government.

In addition to the lack of autonomy of the administrative body, the power of the “National Authority” to temporarily or permanently block is alarming given that this power is not limited exclusively to the data bases but it also affects the totality of the information systems (article 12.3). Furthermore, the aforementioned power is stated in broad terms, without determining the enabling cases or exceptions, such as speeches of public interest and other protected expressions. Nor does the law establish a sanctioning procedure, but it is left in the hands of the administrative authority, which opens the door to possible bias (article 28). Given that blocking measures may affect other rights such as access to information of public interest, in their Joint Declaration on Freedom of Expression and the Internet, the Rapporteurs have established that this restriction will only be exceptionally admissible under the strict terms of Article 13 of the ACHR⁶⁰. In this regard, the Special Rapporteur of the IACHR has established that these measures must have safeguards to prevent abuse by the authority, such as “transparency regarding the contents whose removal has been ordered, as well as detailed information about their necessity and justification. In turn, (...) it must only be adopted when it is the only measure available to achieve a mandatory purpose and

⁵⁶ Bill of Law on Protection of Privacy and Personal Data 2010, retrieved from: <http://bit.ly/1oWrdBW>.

⁵⁷ National Assembly. Permanent Specialized Committee of Justice and State Structure, Report for the second debate of the Bill of Law of Protection of Privacy and Personal Data, May 7, 2012.

⁵⁸ *Ibid.*

⁵⁹ IACHR, Office of the Special Rapporteur for Freedom of Expression, Letter to Ecuador of June 28, 2013, p. 3, retrieved from: <http://bit.ly/2BZrLnO>.

⁶⁰ Joint Declaration on Freedom of Expression and the Internet, supra note 28, Point 3 a)

be strictly proportionate to the achievement [of said purpose]⁶¹. Finally, although the condition of the blocking mechanism is based on the existence of a “certain risk of affecting the constitutional rights” (Article 12.3), this results in an ambiguous statement that can be given to a broad interpretation by the administrative authority, violating the collective dimension of freedom of expression.

Similarly, the regulatory framework of the bill opens up the possibility for a person to directly request to whom-ever is responsible for the storage of information to suppress certain content that is totally or partially inaccurate (article 8), that is, it allows the incorporation of the deindexation of data or the “right to be forgotten”. This legal concept, which was formally introduced through the Court of Justice of the European Union (hereinafter CJEC), establishes the obligation of the search engine to remove links to web pages from the list of results obtained by looking up a person’s name, even on the assumption that this information is not deleted prior to or simultaneously from these sites and, if applicable, even if the publication on said pages is in itself lawful⁶². In the face of the increasing significance of the personal data protection law and in an attempt to guarantee effective and complete protection of the right to privacy, this mechanism has been used as a means to illegitimately restrict access to information in the public domain⁶³. On this issue, the Rapporteur for Freedom of Expression, David Kaye stated that

the scope and application of the [right to be forgotten] highlights issues of how to strike the right balance between the right to privacy and the protection of personal data, on the one hand, and the right to seek, receive and disseminate information that incorporates that type of data, on the other⁶⁴

Additionally, it is important to consider how several Latin American countries have tried to replicate the decision of the CJEC, where the threat lies in the removal of information considered as personal or private that is of public interest⁶⁵. For example, in 2015, the *Instituto Nacional de Transparencia, Acceso a la Información y Protección de Datos Personales de México* [National Institute of Transparency, Access to Information and Protection of Personal Data of Mexico] (INAI for its Spanish acronym) ordered Google to remove a link from a magazine that connected a businessman to acts of corruption. Furthermore, in June 2016, the *Dirección General de Datos Personales de Perú* [General Directorate of Personal Data of Peru] ordered Google to deindex certain results related to a criminal accusation and set a fine for the refusal. Similarly, the Supreme Court of Chile ordered the removal of news of a criminal act published more than a decade ago from the search engines of a media outlet⁶⁶. A common denominator of these cases is the lack of understanding of the concept and the effects of the application of the

⁶¹ IACHR. Office of the Special Rapporteur for Freedom of Expression, Freedom of Expression ... supra note 30, ¶ 87.

⁶² CJEC, “Google Spain S.L., Google Inc. v. Agencia Española de Protección de Datos (AEPD), Mario Costeja González”, judgment of May 13, 2014, ¶ 88, retrieved from: <http://bit.ly/1fPvM8J>

⁶³ Article 19, *Freedom of expression and the private sector in the digital age*, 2016, p. 9.

⁶⁴ United Nations. General Assembly. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye, A / HRC / 32/38, May 11, 2016, ¶ 42.

⁶⁵ Simon, Farith et al., “Observaciones al Proyecto de Ley Orgánica de Protección de los Derechos a la Intimidad y Privacidad sobre los Datos Personales” [Observations on the Organic Law Project for the Protection of the Rights to Privacy and Confidentiality of Personal Data] in: *Regulación de Internet y Derechos Digitales en Ecuador*, Editorial USFQ - Iuris Diction Collection, 2016, p. 261

⁶⁶ R3D (Network in defense of Digital Rights), “Ganamos! [We Won] Court annuls INAI’s resolution on the false “right to be forgotten”, R3D Mexico, August 24, 2016, retrieved from: <https://r3d.mx/2016/08/24/amparo-inai-derecho-olvido/>; Díaz, Marianne, “Derecho al olvido” en *Latinoamérica: un paso hacia delante, dos pasos hacia atrás* [Right to be forgotten” in Latin America: a step forward, two steps back], *Derechos Digitales*, August 25, 2016, retrieved from: <http://bit.ly/2Cka9ig>; Judicial Branch of the Republic of Chile, “Corte Suprema aplica Derecho al Olvido y ordena a medio de comunicación eliminar registro de noticia” [Supreme Court applies the Right to Oblivion and orders the media to eliminate news registration], *Noticias del Poder Judicial*, January 22, 2016, retrieved from: <http://bit.ly/1KQGVYa>

so-called “right to be forgotten”, which was used as a commercial tool to remove “uncomfortable” information of public people⁶⁷.

Because of the manner in which the norm is drafted in the bill and considering the Ecuadorian context, a public person that wants to eliminate or deindex information in defense of the protection of honor (a right enshrined in the Constitution), could use this reason to request the withdrawal of opinion columns or news that could be content of public interest. Finally, it is reasonable to ask if the incorporation of this figure is necessary. The right to privacy or confidentiality could be protected through less restrictive measures, avoiding unnecessary suspension in the digital environment that would end up violating the principle of net neutrality.

The protection of personal data is a necessary tool for the promotion of technological progress, the development of online content and electronic commerce, but it can become an instrument that discourages the development of the digital industry due to the restrictions, controls and requirements that the regulation could demand⁶⁸.

6. Protection of copyright

Finally, Ecuador kept a silent legislation regarding the regulation of intellectual property: there has been no need to demand its use to analyze alleged copyright violations. For the most part, the investigations have been in application of Section 512 of the Digital Millennium Copyright Act⁶⁹ (DMCA), which marked the beginning of the government’s⁷⁰ constant demands for the removal of online content that was disagreeable.

The regulations for matters related to intellectual and industrial property in Ecuador have been the repealed *Ley de Propiedad Intelectual* [Intellectual Property Law] (1998) and the current *Código Orgánico de la Economía Social de los Conocimientos* [Organic Code of the Social Economy of Knowledge] (2016), known as the *Código de Ingenios* [Code of Intellectual Property].

In relation to the digital environment, the Intellectual Property Law regulated the right of reproduction, in which the print or dissemination of the work was included by any means or procedure “... known or unknown” (Article 21). The law not only included reproduction through digital media but it also recognized technology yet to be developed. Article 83 of the Law established 11 cases through which a work protected by copyright could be used without the authorization of the owner⁷¹. While these exceptions could be likened to the rule of fair use, it goes beyond an exhaustive list and further establishes valuation parameters to determine whether the use of copyrighted material is lawful or it incurred in a violation⁷². For this reason, the law was insufficient since it did not provide evaluation criteria that could be applied to several premises of the fair use doctrine, but it was limited to exhaustive exceptions.

⁶⁷ See, CSJN, “María Belén Rodríguez v. Google Inc”, judgment of October 28, 2014; CNCiv ., “Da Cunha , Virginia v. Yahoo of Argentina SRL and other “ , judgment of August 10, 2010.

⁶⁸ Simon, Farith et al., “*Observaciones al Proyecto de Ley Orgánica de Protección de los Derechos a la Intimidad y Privacidad sobre los Datos Personales*” [Observations on the Organic Law Project for the Protection of the Rights to Privacy and Privacy of Personal Data] *supra* note 60, p. 261.

⁶⁹ House of Representatives, 2281 The Digital Millennium Copyright Act, 1998, §512.

⁷⁰ Directly (through the Secretary of Communication) or by hiring the company “Ares Rights”.

⁷¹ Art. 83, Intellectual Property Law 1998: Provided that they respect honest uses and do not threaten the normal exploitation of the work, or infringe on the holder of the rights, the following acts are lawful, they do not require the authorization of the holder of the rights or are subject to any remuneration [...] (there is no online document from official source).

⁷² 17 U.S. Code § 107 - Limitations on exclusive rights: Fair use.

At this point it is important to highlight that any measure that aims to protect copyright should be strictly defined. It must be used to put an end to the violation committed by a third party, without affecting Internet users who use the services of a provider to legally access the information. Otherwise, the interference would not be justified in light of the objective pursued⁷³. In this regard, the Office of the Special Rapporteur for Freedom of Expression of the IACHR acknowledged that although there is a public interest in the protection of copyright, the singular capacity of the digital environment should not be omitted as a free and open space for promoting, instantly and at a low cost, freedom of expression and access to knowledge and cultural assets⁷⁴.

In turn, the Code of Intellectual Property conceives knowledge, creativity and innovation as a good of public interest and determines, in addition, that knowledge will be freely accessible and will not have more restrictions than those established in the Code, the Constitution, international treaties and instruments and the law; and that its distribution will be done in a fair, equitable and democratic manner (Article 4). With this precedent, the Code already introduces a violation to the moral as well as patrimonial dimension recognized in the previous Law of Intellectual Property, for example, restitution of the authorship of the work and the limitations of its exploitation⁷⁵. Likewise, the Code acknowledges the possibility of holders of copyrights and related rights to establish protection measures against uses not authorized by them, such as encryption (Article 127). Even though this measure could generate a rapid multiplication of protection mechanisms that would restrict access to information, including content of public interest, the Code subsequently recognizes the obligation of the means of nullifying or neutralizing technological measures adopted for users who want to access information in the public domain or who are within the limitations and exceptions of copyright (Article 129). That is to say, the same Code fails to recognize the unnecessary restrictions that would result from the isolated and general application of Article 127, since the filtering mechanisms were already applied in a possibly discretionary manner, violating, for example, the principle of net neutrality and the collective dimension of all the users in the web. In this regard, the Special Rapporteur on Cultural Rights, Farida Shaheed stated that “the exceptions and limitations of copyright [which define the uses governed by copyright] (...) constitute a fundamental part of the balance [that must be achieved] between the interests of the holders in relation to exclusive control and the interests of third parties with respect to cultural participation”⁷⁶.

Even though the current Code includes a rule that recognizes the fair use of a piece of intellectual property under the parameters contemplated in the US law on fair use, it establishes a prohibition similar to the previous Intellectual Property Law, as it “prohibits any act that has a purpose to induce, allow, facilitate or conceal the infringement of any of the rights provided for in this title ...”⁷⁷. In this way, the regulation generates an inhibiting effect on users who intend to exercise legitimate use of online content. Although in Ecuador there has not been an exhaustive regulation on the subject, with the Code of Intellectual Property, some potentially harmful threats appear against a free, open and democratic Internet, since access to legitimate uses is not guaranteed and the use of the Internet for promotion and the exercise of cultural rights and freedom of expression online is disproportionately restricted.

73 CJEC “UPC Telekabel Wien GmbH v. Constantin Film Verleih GmbH”, judgment of March 27, 2014, ¶¶ 56 and 63.

74 IACHR, Office of the Special Rapporteur for Freedom of Expression, Freedom of Expression ... supra note 30, ¶ 76.

75 Arts. 18 y 20, *Ley de Propiedad Intelectual* [Intellectual Property Law], 1998 (there is no online document from an official source).

76 United Nations, Human Rights Council, Report of the Special Rapporteur in the field of cultural rights, Farida Shaheed, Copyright policy and the right to science and culture, A / HRC / 28/57, December 24, 2015, ¶ 61.

77 Art. 128, *Código Orgánico de Economía Social de Conocimiento e Innovación 2016* [Organic Code of the Social Economy of Knowledge and Innovation 2016], retrieved from: <http://bit.ly/1oWrdBW>.

IV. Final considerations

Far from conforming with the Inter-American standards on freedom of expression, legislation in Ecuador has been characterized by a progressive increase in the tools that allow the state to restrict, directly or indirectly, the right to freely express opinions and ideas, as well as searching and disseminating information without restrictions. This distinguishes Ecuador from other countries in the region, where the trends are either not so consistent, or are favorable for the exercise of freedom of expression. The undue restrictions initially affected those who expressed themselves through traditional media, as well as those who made use of the right to protest to question government policies. Nowadays these restrictions are also clear in social networks, as well as in other online spaces of expression. The constitutional rules consecrate the right to freedom of expression and incorporate into the body of Constitutional law the protections offered by international human rights treaties and instruments. However, they have not been effective for the protection of freedom of expression for individuals or society.

A review of the legislative development of the last decades allows us to conclude that, although they are scarce in comparison with other countries in the region, the laws that have an impact on freedom of expression were effective in achieving their objective of illegitimately restricting the exercise of this fundamental right. The validity of provisions of the LOC and COIP that give the government a wide margin of discretion to penalize disproportionately its critics and opponents is alarming.

The validity of these rules that illegitimately restrict freedom of expression had a double effect on the heated public debate: on the one hand, the inhibiting effect and, on the other, it had the effect of transferring such debate to the digital environment. In response, the government sought to adopt regulations that allow those who make use of blogs, social networks and other Internet spaces to express their opinion on topics of public interest or to share information that traditional media refrain from publishing due to the consequences that they face in the light of the LOC. Especially worrisome are the Bill of Law for the Protection of Rights to Privacy and Confidentiality of Personal Data and the Bill of Law that Regulates Acts of Hate and Discrimination in Social Networks and the Internet, both proposed by the ruling party.

Since May 2017, a new president governs Ecuador. Although he is part of the same political party as former president Rafael Correa, Lenin Moreno has sought to differentiate himself from the previous government, at least in terms of tolerance towards criticism. Even though the LOC is not likely to be repealed, since there is a constitutional mandate for the existence of such rule, the current government opened the floor to discuss possible reforms to this questioned law.

Even if the majority of Congress is still of the ruling party, the division between the supporters of Rafael Correa and those of Lenin Moreno strengthened the opposition and diminished the possibilities for the passing of bills such as the protection of personal data or the regulation of social networks and the Internet, at least in their current terms.

Although this paper has focused on the study of Ecuador's legislative framework, it is necessary to point out that the source of the restrictions is not only found in the legislation, however defective, but also in its application by judges and other adjudicatory bodies. In a constitutional state like Ecuador, judges and public authorities have at their disposal enough tools to directly apply the Constitution and international human rights treaties, always favoring the protection of personal rights when interpreting them. The lack of independence of the judges from the executive branch and the unfavorable consequences they face when deciding cases against the government have led to judicial decisions applying the current regulations through interpretations incompatible with international rules and with the effective enforcement of the right to freedom of expression. The climate of intolerance and

polarization, fostered by the highest executive authorities, had a disastrous impact on the effective enforcement of the right to freedom of expression in Ecuador.

Furthermore, there is a lack of knowledge about the functioning and architecture of the Internet from the authorities of the executive, legislative and judicial branches. It is imperative that this arena for the democracy of the word be protected in the face of policies, laws or judicial rulings that tend to restrict, directly or indirectly, the possibilities of a free and lively public debate on the Internet. If we do not start as soon as possible to defend a free Internet, we will have lost this last stronghold for the defense of democracy in Ecuador.

V. Bibliography

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