



Legislative Observatory on Freedom of Expression in Peru

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Executive Summary

This article reviews the last twenty years of lawmaking and the last five years of bills related to the exercise of freedom of expression, including the following topics: offenses of expression (insult, slander and defamation), dissemination of false information or fake news, 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], bans on spreading certain types of public or private information, violence in the expression (especially on the Internet), the crime of terrorism and the crime known as *apología* [defense or praise of criminal acts], and the liability of intermediaries or Internet platforms for the contents disseminated by their users.

The author critically analyzes the main laws and bills presented during this period and, although he discards the possibility of producing a clear and thoughtful tendency on the part of Peruvian legislators, he questions the ease with which regulations that criminalize or aggravate penalties applicable to different forms of expression have arisen, especially those that provide less favorable conditions for expression on the Internet.

I. Introduction

Can you find a pattern in movements that are so hesitant - if not erratic - like a spinning top, a drunkard dancing or a loose leaf blowing in the wind?

Trying to write about a thoughtful and determined legislative trend in terms of freedom of expression in Peru in the last 20 years presents the same difficulty as identifying any legislative inclination in any matter. It simply does not exist. This is so because the Peruvian Congress, in the last 25 years, lacked both consistency and long-term vision. Without these two components, it is difficult to talk about legislative trends. This does not prevent, of course, pointing out that the Legislative Branch has accompanied the evolution of time with initiatives of regulations and laws influenced by circumstances. But the anecdotes also depend on the circumstances.

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The absence of a clear legislative direction on freedom of expression and, more importantly, the lack of a holistic appreciation of this fundamental right and the impact rules may have on it, is not an obstacle to undertaking the crucial task of compiling in a legislative observatory the norms that affect (positively or negatively) freedom of expression in Peru.

This article presents the results of a review of the past 20 years (1997-2017) of legislative work, meaning the rules with the force of law under Peruvian law. This includes laws and legislative resolutions issued by the Congress of the Republic (in a single chamber since the Political Constitution of Peru was enacted in 1993). It also includes the norms with the rank of law issued by the Executive Branch under the Constitution (legislative and emergency decrees). Similarly, legislative initiatives (bills) submitted to the Congress for the past five years (2012-2017) are also taken into consideration.

In most cases, the legislative efforts were linked to a combination of factors and circumstances or media events, such as a public demonstration, a television report or a journalistic publication.

In Peru there is no coherent and organized legislative path. Therefore, trying to produce an exclusively chronological exposition of the normative findings would probably harm the reader who is trying to form an idea of the regulation of freedom of expression in the country. Consequently, we have opted for a thematic distinction in seven chapters, in each one there will be an exposition of the laws and legislative projects on the subject. However, each chapter follows a chronological order that illustrates the main changes that the national order has experienced.

The first chapter examines the typical offenses of expression foreseen in the criminal legislation: insult, slander and defamation and the rules on the right of rectification passed during the time studied.

The second chapter deals with regulation regarding false or fake news, a topic more relevant on an international level, which however, has received little attention at the local legislative level. The third chapter reviews the brief legislation on 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 dissemination of certain types of public and private information and, more specifically, the existence of prohibitions on the disclosure of this information is examined in the fourth chapter. Violence in speech is addressed in the fifth chapter, emphasizing rules which regulate discrimination in a general sense, bullying and those that seek to protect minors in the Internet and the circulation of pornography.

The sixth chapter is dedicated to terrorism and, in particular, to the crime known as *apología*, the defense or praise of criminal acts, which Peruvian legislation considers an autonomous crime.

Finally, the last chapter addresses an issue that merited more attention from some administrative authorities (in consumer protection and personal data protection, for example) than from local legislators: the liability of intermediaries for the dissemination of content made by users of their services or platforms.

II. Classic crimes: insult, slander and defamation

When speaking about the regulation of speech and freedom of expression in legislation, the laws that quickly come to mind are those that sanction damage, honor or reputation. We refer to the laws that deal with insult, slander and defamation, which in Peru are of a criminal nature (Criminal Code of 1991).

Insults, or actionable words, in Peru are envisaged as the less serious offense and is considered to occur essentially through insulting another person with words and gestures.² Slander, on the other hand, means the false attribution of a crime to another person³. Thus, while insult implies the imputation of any wrongdoing, slander requires a qualified attribution: a crime. The crime of slander requires that the imputed crime be false, but this is not so in the case of insults. There is a paradox here, because while the Peruvian criminal law does not condone the offensive attribution even when it has real sustenance (insult), it does when this accusation is that of a crime (slander).

The third crime is defamation. In this case, the content of the offensive speech is interpreted in broader terms: “Any person that (...) attributes to a person a fact, a quality or a conduct that could harm their honor or reputation”.⁴ The widely accepted legal principle in criminal law interpreted this generality to admit that both an insult (any offense that does not qualify as a crime) and a slanderous attribution (the false imputation of a crime) may be subject to defamation⁵. What will distinguish then this crime from the previous two is the channel of expression. Defamation - unlike insult and slander - requires that the attribution be made “before several people, reunited or separated, but in a way that the news can spread”⁶.

As in many other legal systems, Peruvian legislation also includes proof of veracity or *exceptio veritatis*. Surprisingly, the Peruvian Code has provided for this exception in an article (134) that makes cross reference to the article that typifies the crime of defamation (132) and not to those of insult and slander. Although the latter, certainly, would not require it since the crime of slander necessarily requires as an element that the attribution of a crime be false. That is to say, an exception of veracity operates in practice.

The criminal regulation of these crimes was not completely peaceful in Peru and there have been proposals both to toughen these penalties and to decriminalize the crimes of expression. During the period in question, two bills have been submitted to remove the prison sentence in this type of crimes, although maintaining them as non-punishable acts in the Criminal Code⁷; and another one that, notwithstanding, toughened the penalty when defamation occurred through the “Internet or virtual media via blog and / or social web pages”. Although, in fact,

² Art. 130 *Código Penal* [Criminal Code] .- Anyone who offends or insults a person with words, gestures or hostilities, shall receive a penalty of ten to forty days community service or a fine of sixty to ninety days.

³ Art. 131 Criminal Code.- Any person who falsely attributes a crime to another shall receive a fine of ninety to one hundred twenty days.

⁴ Art. 132 Criminal Code.-Any person who, before several people, reunited or separated, but in a way that the news can be spread, blames another person of a fact, a quality or conduct that could harm their honor or reputation, shall receive a penalty of less than two years' imprisonment and a fine of thirty to one hundred and twenty days.

If the defamation refers to the event provided for in article 131, the penalty shall be of one to two years' imprisonment and a fine of ninety to one hundred twenty days.

If the crime is committed through a book, the press or other means of social communication, the penalty shall be of one to three years imprisonment and a fine of one hundred twenty to three hundred sixty-five days.

⁵ According to Bramont-Arias and García Cantizano: “From the definition of defamation it is deduced that, in reality, it is an insult with a special characteristic: the dissemination of the news.” Bramont-Arias, Luis and García Cantizano, Carmen. *Manual de Derecho Penal*, [Criminal Law Handbook] Lima, Editorial San Marcos, 4th ed. 1998, p. 141. Likewise, Chirinos Soto points out that: “As in slander and especially in insult, there must be in defamation a specific purpose of damaging the honor and reputation of the victim”. Chirinos Soto, Enrique. *Criminal Code*, Lima, Editorial Rodhas, 2nd ed., 2005, p. 283.

⁶ There are certain non-punishable behaviors expressly provided for in the Criminal Code (articles 133 and 137) that have to do with offenses in the circumstances of a legal trial, literary, artistic or scientific criticisms, and assessments or information made by public officials in compliance with their duties, or the oral offenses that are uttered in the middle of an altercation.

⁷ One of these was Bill No. 1,599 of 2012, presented by representative Mauricio Mulder of APRA, which proposed changing all sanctions of imprisonment to the crime of defamation for community services for up to one hundred and fifty-six days or a three hundred and sixty-five days-fine. The other was Bill No. 1,622 (2012) of the nationalist representative Santiago Gastañadú, who also proposed eliminating any reference to custodial sentences in the crime of defamation.

the law already provides that aggravating circumstance in a more broad manner with the generic reference to “other means of social communication”⁸.

However, the only bills that have prospered on this subject in the last 20 years were related to procedural aspects of these crimes, which do not affect the regulation of the content of speech.

Although the regulation of the offense (in the broad sense) did not merit major legislative changes since the Criminal Code of 1991, the mechanism of private satisfaction, better known as the right of rectification (referred to in subsection 7 of Section 2 of the Constitution of 1993), was enacted in 1997.

In general, Law No. 26,775, April 1997, as amended within three months by Law No. 26,847, establishes the mechanism by which a person aggrieved or affected by inaccurate information could request its rectification to the director of a means of communication⁹.

III. False or fake news

Peru has not been oblivious to the phenomenon of the circulation of false or fake news. The underlying concept of this term is the deliberate propagation through news platforms of false information - or, at best, without corroboration - with the purpose of causing damage to the image or reputation of a politician or an institution. This behavior seeks to generate a negative impact that cannot be counteracted by the dissemination of correct information or the rectification of information due to the multiplying effect of dissemination, especially in times of the Internet.

Locally, the discussion about the falsehood of news focused mainly on the reactions and criticism of media coverage by politicians and political parties. However, the only legislative provision that is specifically related to the dissemination of false news within the legislative period considered for the present investigation can be found in Law No. 30,076 of 2013.

This law was passed in the context of a series of actions to combat insecurity. Among several amendments that this law brought to the Criminal Code - most of them linked to common crime -, a new crime was created called

⁸ Bill No. 4,833 of 2015, presented by the representative Wilder Ruiz Loayza of Dignidad y Democracia.

⁹ With good judgment, article 5 of the law contemplated some situations in which rectification is not applicable, as, for example, when the request for rectification is not related to the disseminated facts (that is to say, an irrelevant request), or when what is intended to be rectified are opinions or judgments of value and not facts. The latter is so because only objective data (and not subjective assessments) are subject to a judgment of truth and therefore can be rectifiable. Palma Fernández stated that “The object of rectification is the group of facts that are considered contrary to the truth, but not opinions, judgments or subjective assessments. Rectification must be limited to the facts of the information that is to be corrected.” Palma Fernández, José Luis. “*Derecho de rectificación: opinión vertida en un blog por su autor*” [Right of rectification: opinion expressed in a blog by its author] “, Lexology, December 13, 2013, <http://bit.ly/2scylDt>.

Other provisions in which rectification is not applicable are not as clear or appear to start from an incorrect premise. Article 5 of the law of rectification establishes, for example, the possibility of rejecting the request when “it is injurious or contrary to the laws or good customs” or “when it refers to another person without just cause”. This is a wrong solution, in our opinion, because the offense to a third party (which could be omitted by the media) does not eliminate the need for original rectification. In other words, the media outlet can fulfill its duty of rectification by correcting the facts reported even when it does not follow the exact terms stated by the petitioner.

“serious disturbance of public order” in article 315-A of the aforementioned code¹⁰.

Actually, it is a variation of the crime of “public disorder” provided for in article 315 of the Criminal Code¹¹, focused on the attack on the physical integrity of persons or an act of violence that cause “serious damage to public or private property” in the context of turmoil, as in the case of vandalism.

On the other hand, article 315-A supposes another type of threat to public order. The typical behavior described in the first paragraph of this article is not clear; since it stipulates that serious disturbance of the public order can occur “using any reasonable means capable of producing alarm”.

The ambiguity of the punishable behavior reflects the first problem presented by the wording of this article, which is contradictory to the standards of classifying criminal acts that are required in criminal matters. The second paragraph of this article tries to correct this, developing the concept of serious disturbance

any act to disseminate or bring to the attention of public authority, means of social communication or any other with the capacity of disseminating the news massively, an imminent false or non-existent fact or situation, related to damage or potential damage to the life and integrity of people or public or private property.

It is therefore another subset of the crimes of expression. In this case, the expression can be punished if it is about a false or non-existing fact or situation and it has a connection with a potential or real damage. Typical examples could be the propagation of information about a natural disaster, a major accident or a public danger

¹⁰ Law No. 30,076, “Law that modifies the Criminal Code, Code of Criminal Procedure, Code of Criminal Enforcement and the Code of Children and Adolescents and Creates Records and Protocols with the aim of combating the lack of public safety” Official Registry of 09/19/2013.

Article 2. Incorporation of articles to the Criminal Code

Incorporate articles 45-A, 196-A, 207-D and 315-A into the Criminal Code, in the following terms:

Article 315-A. Crimes which seriously disturb public order

Anyone who seriously disturbs the public order using any reasonable means capable of producing alarm will be punished with a penalty of imprisonment of three to six years.

A serious disturbance is any act to disseminate or bring to the attention of public authority, means of social communication or any other with the capacity of disseminating the news massively, an imminent false or non-existing fact or situation, related to damage or potential damage to the life and integrity of people or public or private property.

If the agent is acting as a member of a criminal organization that, to achieve its ends, whatever they may be, threatens to commit the crime of terrorism as a means, they shall be punished with a prison sentence of six to ten years”.

¹¹ Art. 315, Criminal Code, modified by laws 27,686 (2002), 28,820 (2006), 30,037 (2013) and Legislative Decree 1,237 (2015),

Article 315.- Public Disorder

Anyone who, in a tumultuous meeting, violates the physical integrity of persons and / or through violence causes serious damage to public or private property shall be punished with imprisonment of six to eight years.

The same penalty shall be applied when the acts described in the first paragraph occur on the occasion of a sports event, or in the area of influence of sports events.

The following constitute aggravating circumstances:

1. If in the commission of these acts the perpetrator improperly wears garments or distinctive symbols of the Armed Forces or of the National Police of Peru, the penalty of imprisonment shall be of eight to ten years.
2. If the attack on the physical integrity of the persons causes serious injuries, it shall be punished with the penalty of eight to twelve years imprisonment.
3. If the attack against the physical integrity of the persons causes death, it shall be punished with the penalty of up to fifteen years imprisonment.

(for example, an act of vandalism, looting or terrorism). It is understood that this dissemination could endanger a significant number of people unjustifiably.

Although it is possible to make a connection between the dissemination of “dangerous” information and the risk that is to be avoided (disturbing public order), the legal description of this behavior is also criticized¹².

In the first place, when the only requirement is that the information should be false, there is no distinction between the innocent dissemination of information that is incorrect and malicious dissemination, knowing that it is false. It could be argued that, under Peruvian criminal law, any crime - in the absence of contrary foresight - requires the subjective element of *mens rea* or actual malice. However, *mens rea*, in this case, would require only awareness and will in the dissemination of information and not in the falsehood of the information to be disseminated. In any case, the lack of clarity in this aspect constitutes one of the questionable aspects of the legislative technique used.

Another problem with the configuration of this crime is the appropriate causality between the dissemination of false information and the damage (potential or real) that this action may cause. In fact, depending on the content of the false information or the context in which it is disseminated, it may be unsuitable to alter public order. Several factors may come into play: the credibility of the person who disseminates the information, the likelihood of the facts or situations that are reported and their severity. For example, announcing a zombie apocalypse or broadcasting an instant messaging audio with incorrect information or data with little credibility could hardly resemble the classic example of falsely shouting “fire” in a crowded theater¹³.

In recent months, reference was made to this offense to discourage the spreading of false and alarmist information through social networks and instant messaging systems¹⁴.

IV. *Desacato*

The crime of *desacato* was contemplated in the Peruvian Criminal Code of 1991, as part of the section on crimes against public administration.

Before its repeal, Article 347 applied a penalty of three years of imprisonment to any person who threatened, insulted or offended a public official in relation to their duties or while performing them¹⁵. It also added that “if the victim is the President of one of the Branches of the State, the penalty shall be from two to four years.”

The repeal of *desacato* in Peru occurred as part of a trend of regional legal reforms caused by a report pub-

¹² Calderón, Andrés, “De Twitter a la cárcel” [From Twitter to prison], *El Comercio*, March 27, 2017, retrieved from: <http://bit.ly/2Eqx9RA>.

¹³ Supreme Court of the United States, “Schenck v. United States”, 249 U.S. 47 (1919).

¹⁴ The Peruvian government launched a media campaign to prevent the spread of false alarms in a context of natural emergencies caused by the phenomenon known as El Niño Costero. Campaigns of the Government of Peru: “Sanctions - One single force”, retrieved from: <http://bit.ly/2BYM4xr>, and website: <http://bit.ly/2GUfHn6>. The Ministry of the Interior, in charge of citizen safety, warned that it had filed criminal complaints against some people who spread information about and incited acts of violence such as looting in these circumstances. “Subjects that incited looting on social networks will be reported to the Prosecutor”, Peru21, March 19, 2017, retrieved from: <http://bit.ly/2C2NZkA>.

¹⁵ **Art. 347, Criminal Code.**- Any person who threatens, insults or in any other way offends the dignity or decorum of a public official because of the exercise of their duties or during their execution, shall be punished with a penalty of three years imprisonment.

If the offended party is the President of one of the Branches of the State, the penalty shall be of two to four years.

lished in 1995 by the Inter-American Commission on Human Rights (IACHR). The document held that *desacato* laws were incompatible with Article 13 of the American Convention on Human Rights and that “it unjustifiably grants [public officials] a right to protection that is not available to other members of society”¹⁶.

In 2001, the Ombudsman submitted a bill proposing to repeal Article 347. In the same way, another six bills with the same purpose were presented by representatives from different parties. Finally, by means of a single article in Law No. 27,975, the crime of *desacato* was repealed in 2003, notwithstanding that it is understood that public officials can also be victims of the crimes of insult, slander and defamation.

V. Dissemination of public and private information

Following the trend of other countries in the region, Peru has had for several years legislation on transparency and access to public information, as well as various rules governing advertising or confidentiality of certain information held by state agencies and private businesses.

The relation between access to public information and freedom of expression is very close. Information freedom is nurtured and sustained thanks to the collection and dissemination of public information. And the more transparent a society is, the more it progresses in the discussion and learning of issues of national relevance. However, for the purposes of this work we will limit ourselves to the study of those rules that, whether or not they have any foresight about the access and collection of information, specifically regulate the dissemination of information. That is, those laws which limit or favor speech because of the nature of the information it contains.

In 2002 Law No. 27,806 was enacted, the *Ley de Transparencia y Acceso a la Información Pública* [Law on Transparency and Access to Public Information]. This law underwent several modifications but it still constitutes the general framework that guides the actions of Public Administration entities¹⁷. It determines what information citizens have the right to access as a general rule¹⁸, what the procedure to access that information is, what information can be declared reserved and what is the process for this.

Article 15 of Law No. 27,806, modified by Law No. 27,927 in February of 2003, establishes the exceptions to the right of access to public information, distinguishing between secret information¹⁹, reserved information²⁰ and confidential information²¹; and imposes on public officials the obligation not to disclose this information. However, it does not establish any limitation or liability for any citizen or means of communication that, having had access to said infor-

¹⁶ Inter-American Commission on Human Rights, Annual Report, OEA / Ser.L / V / II.88.Doc.9.rev. February 17, 1995, p.218.

¹⁷ Also including private corporations “who manage public services or exercise administrative functions of the public sector”, by virtue of article 9 of the law.

¹⁸ According to Article 3 of the Law, “all information held by the State is presumed to be public, but for the exceptions expressly provided for in Article 15” of the same law.

¹⁹ In article 15 of the Law: Information referring to military defense plans, intelligence operations, military information, war material, among others.

²⁰ In article 15-A of the Law: Information referring to national security, military defense plans, criminal investigations, international negotiations, among others.

²¹ In article 15-B of the Law: Information protected by secrecy of some kind whether banking, tax, commercial, industrial, technological or stock exchange secrecy, information on the exercise of the sanctioning power of the state, personal data whose advertising would violate personal privacy and family, among others.

mation, proceeds to disclose it. Nonetheless, this did not prevent some public entities from unlawfully reporting those persons who, without having an obligation to protect it, have divulged reserved, secret or confidential information.²²

Something similar happens with the laws that provide protection for informants or those who collaborate with the detection of crimes and administrative offenses, whose identity is protected by law through penalties for disclosure or dissemination to those who have a duty to guard this information, but not -and rightly so- for third parties or social media that may have access to such information²³.

However, in 2011 a law was passed that regulated the type of information that could be used and that represented a dangerous limitation for information freedoms. We are referring to Law No. 29,733, Law of Personal Data Protection. Following the European model, this law included one of the most questionable provisions due to its lack of pragmatism and its harmful effects for acquiring and sharing information: the general obligation of prior consent for any use and dissemination of all types of personal data. Article 5 of the law establishes, in a generic way, that “For the use of personal data there should be consent of the owner”, regardless of the type of treatment, its purpose or the type of data.

Based on this norm, harshly criticized by journalists and lawyers²⁴, some complaints were raised against news media and portals for public information dissemination with the aim of limiting the right to disseminate informa-

²² “Ministry of Defense justified this complaint against Panorama”, *El Comercio*, June 30, 2016, retrieved from: <http://bit.ly/2nK7cD9>.

²³ See: Law No. 27,378 (article 22) that lists benefits for effective collaboration in the field of organized crime that establishes the reservation of the identity and personal data of the collaborator, Law No. 29,452 (article 9) that protects the informant in the administrative sphere and the effective collaborator in the criminal sphere, establishing the confidentiality of their identity and the information provided, as well as attributing responsibility to the officials who handle the information provided by the informant, Law No. 30,077 (Article 15) against organized crime, which states that the duty of confidentiality was applicable also to persons and corporations of the private sector who are collaborating with the delivery of information, when this is required. Legislative Decree 957, the new Code of Criminal Procedure, approved in 2007, establishes similar confidentiality obligations for authorities, witnesses and collaborators involved in investigative actions, but not - and rightly so- for third parties or social media.

Other laws set limitations on disclosure of information by public entities: Law No. 30,076 (Article 1) that provides for the cancellation of criminal, judicial and police records of those who have served the sentence imposed and prohibits any record or annotation from being communicated, except at the request of the Public Ministry or a judge, Legislative Decree 1,182 (Article 7) that establishes the obligation of secrecy from operators of public telecommunications services and public entities involved in obtaining and providing location and geolocation data from mobile phones and electronic devices for police investigation purposes, and Legislative Decree 1,218 (articles 13 and 17) that establishes the obligation of secrecy and confidentiality for any person who works in a public or private entity and has access to the recordings of video surveillance cameras in public properties, public passenger transport service vehicles and commercial establishments open to the public.

²⁴ Zegarra, Gonzalo, “Law on personal data: between the public and the private sector”, *Semana Económica*, March 31, 2015, retrieved from: <http://bit.ly/2FOLEfh>.

“Editorial: Lo que la ley esconde” [What the law is hiding], *El Comercio*, May 13, 2015, retrieved from: <http://bit.ly/2nJ0ltu>.

“Council of the Press concerned about the Personal Data Law”, *El Comercio*, August 24, 2016, retrieved from: <http://bit.ly/2GUg9Sk>.

tion and the citizen's right to access it²⁵.

Even more seriously, through an administrative ruling in 2016, the administrative office in charge of the enforcement of protection of personal data derived from it the controversial "right to be forgotten", by forcing the search engine Google to block the results that appear with the name and surname of a citizen who claimed such right and who wanted to eliminate all journalistic pieces that were made regarding a criminal proceeding against them. This ruling was also widely criticized, although to date there is no new case in which the "right to be forgotten" has been claimed."²⁶

In response to the large number of criticisms received by this law and its application by the administrative authority for the protection of personal data, in 2017 an exception to the obligation to obtain consent was added. Thus, it was decided that it was not necessary "when the use of personal data is done during the constitutionally valid exercise of the fundamental right to freedom of information"²⁷. The generic wording and the inclusion of the adjective "valid", however, did not completely eliminate the risks that this law entails.

In a different area, the protection of minors, there is a limitation to the dissemination of certain types of information specifically applicable to social media. They cannot communicate the identity of children and adolescents that are within the scope of Legislative Decree No. 1,297 (of December 2016), which regulates the protection of minors who are in vulnerable situations or at risk of losing parental care²⁸. In the same way, Legislative Decree No. 1,348 of January 2017, which passed the Code of Criminal Responsibility of Adolescents, provides that judicial and fiscal proceedings concerning the determination of the responsibility of said minors are confidential as well as the data that allow the identification of the adolescent, their family or personal circumstances²⁹. Article 18 of that law

²⁵ The first effective sanctions under the Law of Protection of Personal Data were those that fell on the website "datosperu.org". In 2014, the General Directorate for the Protection of Personal Data (GDPPD) addressed the complaint of two citizens and fined the website 60 UIT [reference value that is used in Peru to determine taxes, infractions, fines or other tax aspect] (approximately S 228 thousand / US \$ 78.6 thousand) for having disseminated personal data that had been previously published in the official newspaper El Peruano and for not agreeing to the request to cancel. Resolution 074-2014-JUS / GDPPD of October 24, 2014 and Resolution 075-2014-JUS / GDPPD of October 24, 2014.

Other procedures have been processed against news media, such as:

- GDPPD, "Unidentified v. / El Comercio", Resolution 061-2014-JUS / GDPPD of August 1, 2014 and Resolution 070-2014-JUS / GDPPD of October 3, 2014.

- GDPPD, "Unidentified v. / Grupo La República", Resolution 062-2014-JUS / GDPPD of August 1, 2014 and Resolution 069-2014-JUS / GDPPD of October 3, 2014.

- GDPPD, "Unidentified v. Diario El Trome, Compañía Peruana de Radiodifusión and Compañía Americana de Radiodifusión," Resolution 015-2016-JUS / GDPPD of February 10, 2016 and Resolution 033-2016-JUS / GDPPD of April 12 of 2016.

²⁶ Calderón, Andrés, "Para el olvido" [Achieving Oblivion], El Comercio, June 23, 2016, retrieved from: <http://bit.ly/2BJSLLr>.

Sifuentes, Marco, "Traición y olvido" [Treason and Oblivion], El Comercio, July 1, 2016, retrieved from: <http://bit.ly/2FSt7Pe>.

Morachimo, Miguel, "¿Por qué se ha sancionado a Google en Perú?" [Why was Google sanctioned in Peru], Blog Hiperderecho, June 21, 2016, retrieved from: <http://bit.ly/2FSyTl>.

Borgioli, Martín, "Google es sancionado por primera vez en Perú por desconocer el Derecho al Olvido" [Google is sanctioned for the first time in Peru for ignoring the Right to be Forgotten], Hiperderecho Blog, June 21, 2016, retrieved from: <http://bit.ly/2BZd2EZ>.

²⁷ Article 14 of Law No. 29,733, modified by Legislative Decree No. 1,353, *Decreto Legislativo que crea la Autoridad Nacional de Transparencia y Acceso a la Información Pública, fortalece el Régimen de Protección de Datos Personales y la regulación de la gestión de intereses* [Legislative Decree that creates the National Authority for Transparency and Access to Public Information, strengthens the Personal Data Protection Regime and the regulation of interest management], Official Registry of 01/07/2017, Art. 37.

²⁸ Legislative Decree No. 1,297, "Legislative Decree for the protection of children and adolescents without parental care or at risk of losing them", O.R of 12/30/2016, Twelfth Final Complementary Provision.

²⁹ Legislative Decree No. 1,348 "Legislative Decree that passes the Code of Criminal Responsibility of Adolescents", O.R of 07/01/2017, Art. X of the Preliminary Title.

extends the confidentiality requirement stating that “the teenager can never be identified or exposed in the media or be known to others outside the proceedings” and that this secrecy also “should be kept about minors who were witnesses or victims of the act under investigation”.

In the last five years, up to three legislative initiatives related to the diffusion of the identity of minors on online news sites and news feed on social media have been presented, none of which prospered³⁰.

However, no other bill on the dissemination of information in the period under investigation generated as much controversy as Bill No. 4,871 of October 7, 2015, presented by the representative Javier Velásquez-Quesquén of the parliamentary group Concertación Parlamentaria / Apra. The parliamentarian proposed adding a new offense in the Criminal Code, article 162-B, describing as a crime the dissemination of a “recording of a personal conversation, telephone, audiovisual or similar, without the consent of the interlocutor (...) whenever such dissemination affects the honor, personal safety or the right to privacy of the latter or their family, or their estate”³¹. The penal sanction was excluded if the broadcasted recording included content of a punishable act. That is, if the conversation revealed the commission of a crime.

The project generated much debate and harsh criticism from politicians, opinion leaders and the media³², to the point that the project was losing adherents (some representatives even withdrew their signature endorsing the initiative) and after a few weeks the author withdrew his proposal.

Criticism suggested that the proposed rule represented a serious restriction on freedom of information and freedom of the press. In Peru, following the legal precedent of other countries, including the United States,³³ it was understood that illegal access or interception of private communications is to be sanctioned, but not the dissemination by third parties that have not participated in the illegitimate access to said information. It is based on the higher public interest that this information reaches the citizens. Thus, if the person or media outlet that revealed the information had no responsibility in the illegitimate access, they should not be blamed for the dis-

³⁰ Bill No. 1,870, presented in 2013 by the then representative of Fuerza Popular Renzo Reggiardo, enabled, by exception, the dissemination of the image and identity of minors, when they were the perpetrators or participants in a crime of voluntary manslaughter. A similar issue was raised by Bill No. 1,887 presented in 2013 by representative Alejandro Yovera (then parliamentarian of the Acción Popular-Frente Amplio block), to allow the dissemination of images and identity of any minor who has committed *flagrante delicto* and infraction to the criminal law. The initiatives were based on the fight against crime and the growing number of minors that were in the news because they were part of criminal gangs or worked as hired killers. In the opposite direction, in October 2014, Representative Tomás Zamudio proposed to establish administrative sanctions to any media that violated the prohibition of disseminating the identity or image of a minor when they had been involved in a crime.

³¹ The penalty for this alleged crime was between one and six years in prison, and was aggravated to four to eight years if the perpetrator was a public servant, if they disseminated or published the conversation in social media, or if they committed the crime as a member of a criminal organization.

³² Palacios, Rosa María. “¿Qué es lo que no quiere que escuchemos Alan García?” [What is it that you do not want us to hear Alan García?], *Blog, Rosa María Palacios*, October 29, 2015, retrieved from: <http://bit.ly/2nG3Cd1>.

“‘Ley Velásquez’ pone en serio riesgo la libertad de expresión en el Perú” [Velásquez Law’ puts the freedom of expression in Peru at serious risk], *La República*, October 27, 2015, retrieved from: <http://bit.ly/2BbsoJE>.

“Mauricio Mulder pidió a Javier Velásquez retirar proyecto sobre difusión de videos” [Mauricio Mulder asked Javier Velásquez to withdraw project on video broadcasting], *Perú21*, October 28, 2015, retrieved from: <http://bit.ly/2E5QxEf>.

³³ Supreme Court of the United States of America “*Bartnicki v. Vopper*”, 532 U.S. 514 (2001).

semination of this information³⁴.

Finally, in October 2017, the legislator from the Fujimori Party, Hector Becerril, presented a controversial initiative that modifies the Criminal Code to include as an offense the dissemination of emails or instant messages, even when these have been directed to the person who disseminates them³⁵. In addition, the bill proposes a penalty of two years of imprisonment to any person who publishes a telephone communication or a recording of it.

This bill was criticized for the threatening effect it poses for the press, given that in recent years many crimes and matters of public interest were made public thanks to the dissemination of electronic and telephone conversations³⁶. Thus, although the criminal legislation already sanctioned the diffusion of correspondence, this legal description did not have negative consequences in practice, as it was understood at court that the disclosure of private conversations was not punishable if it was done by any person who was part of the conversation, and since physical correspondence is increasingly less common. On the other hand, the diffusion of telephone conversations and electronic messaging is a common practice of the press in the country, when this content is of public interest.

VI. Expressions of violence

Violence in speech was subject to different types of legislative initiatives and laws from perspectives that include sexual and gender discrimination, sexual harassment, racial discrimination, bullying of minors, sexual contents in the Internet and online violence, with some recurrence to criminal punishment as a way to penalize certain types of offensive or aggressive speeches. In order to gain clarity in our exposition, we will analyze the three topics of greatest legislative interest: discrimination, the protection of minors and pornography.

1. Discrimination

Discrimination as an action is proscribed in the Political Constitution of Peru (1993) and is considered a crime since it was incorporated into the Criminal Code in 2000 through Law No. 27,270. However, the discriminatory discourse has only recently begun to receive attention since 2006 when, something very common in Peruvian law-making, it was decided to typify discriminatory speech as a crime through law No. 28,867, which amended article

³⁴ A few years before the bill presented by Velásquez-Quesquén, the Congress had passed a similar law that penalized the dissemination of information obtained from private conversations, which was dubbed a “gag law”. See: “*Bedoya dijo que denominada ‘Ley mordaza’ no es una amenaza a la prensa*” [Bedoya said that so-called ‘Gag Law’ was not a threat to the press], *RPP*, December 16, 2011, retrieved from: <http://bit.ly/2GT92JT>. Godoy, José Alejandro, “*Ley Bedoya: El debate legal y la ética periodística*” [Bedoya Law: Legal debate and journalistic ethics], *Desde el Tercer Piso*, December 16, 2011, retrieved from: <http://bit.ly/2GTqcHj>. On that occasion, however, the then president of the Republic, Ollanta Humala, observed the law precisely because it penalized the dissemination of information that, without revealing any illicit, could be of much interest to the public. See: “*Presidente Ollanta Humala observó anoche polémica ‘ley mordaza’*” [Last night, President Ollanta Humala followed the controversial “gag law”], *El Comercio*, January 13, 2012, retrieved from: <http://bit.ly/2E78HBm>.

³⁵ Bill No. 1,950, October 3, 2017, by Representative Héctor Becerril.

³⁶ “Editorial: Whatsapp malogrado”, *El Comercio*, October 8, 2017, retrieved from: <http://bit.ly/2ELL6au>.

323 of the Criminal Code³⁷.

In 2013, Law No. 30,096, *Ley de Delitos Informáticos* [Computer Crimes Act] added a new aggravating factor to the crime of discrimination: when it is “carried out through information or communication technologies”. Obviously, the object of concern is that of online discriminatory attacks. And in 2014, through Law No. 30,171, it was specified that there is aggravating circumstance if “discrimination, incitement or the promotion of discriminatory acts have materialized in acts of physical or mental violence or through the Internet or other analogous means”.

Legislative evolution in the subject of discriminatory speech seems to be consistent both in the criminal prosecution of this form of expression and in the hardening of the consequences against online expression. However, this position has not been accompanied by evidence that supports the effectiveness of the chosen legislative solution. And, rather, the concern about the censor effect that this legislation could have on the freedom of expression has been revealed in 2017 with the issuance of a new modifying law.

Legislative Decree No. 1,323 promulgated in January 2017 by the Executive Branch introduced some changes to the crime of discrimination. First, the description of typical behavior was made more precise by pointing out that discrimination consists of “acts of discrimination, exclusion, restriction or preference”. New factors of discrimination were added as well: nationality, sexual orientation, gender identity, migratory status and health condition as cause for discrimination. And by using the expression “or any other reason” the possibility of other reasons was left open.

The aggravated crime was also modified in the following terms:

If the person is acting in their capacity of civil servant, or the act is carried out with physical or mental violence, through the Internet or other similar means, imprisonment shall be of two to four years, and disqualification shall apply in accordance with subsections 1 and 2 of article 36.

This law was the subject of much controversy at the legislative level and in the public eye, for two reasons. The first was the incorporation of sexual orientation and gender identity as reasons for discrimination. Including these categories generated most of the rejection of the conservative Peruvian society, which found an echo in the majority parliamentary party, Fuerza Popular. Thus, under the argument that Congress had not granted powers to the Executive to legislate on gender identity issues (something that conservative critics called “gender ideolo-

³⁷ Law No. 28,867, “*Ley que modifica el Artículo 323 del Código Penal*” [Law amending Article 323 of the Criminal Code], O.R of 08/09/2006.

Sole Article.- Object of the Law

Amend to Article 323 of the Criminal Code, the text of which will be as follows:

“DISCRIMINATION

Article 323.-Any person who, by themselves or through third parties, discriminates against one or more persons or group of persons, or incites or publicly promotes discriminatory acts, for reasons of race, religion, sex, genetics, filiation, age, disability, language, ethnic and cultural identity, clothing, political opinion or of any kind, or economic condition, in order to nullify or impair the recognition, enjoyment or exercise of the rights of the person, will be punished with imprisonment of two to three years or with community service of sixty to one hundred and twenty days.

If this is done by an official or public servant, the penalty shall be of two to four years and disqualification pursuant to subsection 2) of article 36 shall apply.

The same penalty of imprisonment will be applicable if the discrimination has materialized through acts of physical or mental violence.”

gy”), Congress passed in May 2017³⁸ the partial repeal of Legislative Decree No. 1,323, restoring the validity of the wording of Article 323 of the Criminal Code prior to the last amendment, although this repeal has been observed by the Executive and has not yet come into force.

The second point of controversy was adding discrimination as an aggravating element, incorporated by Legislative Decree No. 1,323 in the part which states: “or the act is carried out with acts of physical or mental violence, through the Internet or other similar means.”

There are two ways to understand this ruling prediction. One way is to accept the existence of aggravating elements only when the acts of physical or mental violence (understanding them as synonyms of discrimination) are carried out through the Internet or other similar means. The other way of understanding this is to consider that the aggravating circumstance applies both when there is physical or mental violence involved in the act of discrimination, as well as when using the Internet or similar means to carry out an act of discrimination.

Although we have been critical of the ambiguity of this law that would allow to consider online discriminatory expression as an aggravated crime in itself³⁹, the first interpretation is also a viable, where discrimination is considered to have a violent component (such as harassment or psychological abuse). Then, the violent act will only be considered an aggravated offense when it takes place on the Internet or similar means. It should be noted, however, that the wording of the same aggravating element in Law No. 30,171 of 2014 (already commented) is closer to the second reading, which distinguishes between acts of violence and acts of online discrimination.

In any case, the concern remains that any discriminatory expression could be considered an act of punishable violence. That situation would leave little room for discrepancy around the permitted or forbidden factors of social differentiation. With this approach, a single discrepant expression, not accompanied by a material act, could be considered discriminatory and criminal by itself.

As previously noted, the Peruvian Congress approved the repeal of the amendment to Article 323 of the Criminal Code, although there are currently four bills pending in Parliament proposing amendments to this crime⁴⁰.

³⁸ The partial repeal of Legislative Decree No. 1,323 was approved by the full Congress of the Republic on May 4, 2017 with 66 votes in favor and 29 against.

³⁹ Calderón, Andrés, “*Gracias, Tamar Arimborgo*” [Thank you Tamar Arimborgo], *El Comercio*, June 12, 2017, retrieved from: <http://bit.ly/2GRk5Dc>.

⁴⁰ These are the following initiatives:

- Bill No. 1,199, from April 2017, presented by the Fuerza Popular representative Nelly Cuadros, excludes the categories of gender identity and sexual orientation from the crime of discrimination.

- Project No. 1,209, from April 2017, presented by representatives Miguel Castro and Leyla Chihuán of Fuerza Popular -with the notorious support of representative Kenji Fujimori from the same Party which got a lot of attention from the media-, which proposes a legislative text of similar content to that of Legislative Decree No. 1,323.

- Project No. 1,378, from May 2017, presented by the representatives Alberto De Belaunde and Carlos Bruce, and the members of Frente Amplio Indira Huilca and Marisa Glave, which proposes to reinstate the grounds for discrimination (discrimination due to gender, sexual orientation, among others) of the Legislative Decree No. 1,323 on the crime of discrimination. It also establishes civil and administrative penalties for this type of discrimination in the areas of consumer contracting and hiring of workers.

- Project No. 1,598 from June 2017, presented by representative César Segura of Fuerza Popular, which includes more reasons for discrimination to article 323 of the Criminal Code on the crime of discrimination (nationality, migratory status, surname, work activity, opinion, socio-economic level, political affiliation, clothing, etc.), but not the categories of gender identity and sexual orientation.

Project No. 1,687, presented by Rosa Mavila of the parliamentary group Acción Popular-Frente Amplio (former member of Gana Peru) should be added, due to its relevance, although it was filed away during the last legislative period, which proposed sanctioning with a prison sentence of three to six years any person who incited discrimination, specifically, any person who “publicly or by any means suitable for public dissemination, incites hatred, *desacato*, or any form of moral or physical violence against one or more persons.”

Outside of the generic type of discrimination, other laws that address the issue were passed and they include articles that are applicable to the discriminatory expression, such as Law No. 27,942 (2003) on the prevention and punishment of sexual harassment, originally aimed at punishing sexual harassment in the context of authority relations or dependency⁴¹, although it was later extended to acts of harassment regardless of hierarchy, position or function⁴². There is also Law No. 30,314 (2015) to prevent and punish sexual harassment in public spaces, which includes verbal expressions of sexual connotation (obscene gestures, comments and sexual innuendos) when the victim does not wish or rejects these behaviors.

2. Protection of minors

During the period under review, two kinds of laws were passed related to speech and the protection of minors: laws on bullying and laws on access to Internet and child pornography.

Regarding the first kind, in 2011, Law No. 29,719 was passed, “which promotes coexistence without violence in educational institutions” and expressly prohibits bullying “committed by students among themselves, which causes violence and victims”⁴³. It is a law that, essentially, intends for educational institutions and parents to adopt measures to prevent and correct acts of “intimidation, harassment, discrimination, defamation” among students, through “telephone, electronic or computer means”.

In relation to the second kind, criminal laws have been issued that punish the exhibition or dissemination of pornographic or “obscene” information to minors (article 183 of the Criminal Code) and that use minors in pornographic content (article 183-A of the Criminal Code)^{44,45}, with the aggravating element of pornographic material being disseminated through information or communication technologies⁴⁶. Regarding to this last offense, special crimes have also been incorporated (Law No. 28,251 of 2004) that punish the promotion and enabling of child sex tourism “through any written means, pamphlet, print-out, visual, audible, electronic, magnetic media or the Internet”, and also punish managers or persons responsible for publications and mass media who “publicize child prostitution, child sex tourism and trafficking in minors”⁴⁷.

Outside the criminal sphere, the Peruvian legislature also adopted rules to limit the access of minors to certain content considered “harmful” on the Internet. Thus, it barred access of minors to pornographic websites (Law No. 28,119

⁴¹ Law No. 27,942 “*Ley de Prevención y Sanción del Hostigamiento Sexual*” [Law on the Prevention and Punishment of Sexual Harassment], O.R dated 2/27/2003, Art. 1.

⁴² Ley No. 29,430, “*Ley que modifica la Ley N° 27.942, Ley de Prevención y Sanción del Hostigamiento Sexual*” [Law amending Law No. 27,942, Law of Prevention and Punishment of Sexual Harassment], O.R of 08/11/2009, Art. 1.

⁴³ Law No. 29,719, “*Ley que promueve la convivencia sin violencia en las instituciones educativas*” [Law that promotes coexistence without violence in educational institutions], O.R of 06/25/2011, Art. 2.

⁴⁴ In 2004, Law No. 28,251 expressly stated that the promotion or dissemination of punishable child pornography can be manifested “by any means including the Internet”.

⁴⁵ In 2014, Law No. 30,171 created a new special crime in article 183-B of the Criminal Code, consisting of soliciting minors to perform sexual acts (it is understood that the offer in itself is punishable) or to obtain pornographic material from the minor.

⁴⁶ Law No. 30,096, “*Ley de Delitos Informáticos*” [Computer Crime Law], O.R of 10/22/2013, Fourth Complementary Modifying Provision.

⁴⁷ Law No. 28,251, “*Ley que modifica los artículos 170, 171, 172, 173, 174, 175, 176, 176-A, 179, 180, 181, 182, 183, 183-A (...)*” [Law amending articles 170, 171, 172, 173, 174, 175, 176, 176-A, 179, 180, 181, 182, 183, 183-A (...)], O.R dated 08/06/06 2004, Art. 2.

from 2003)⁴⁸ and to “conversation channels or any other form of communication online with pornographic content and / or information”. It also specified that public places with Internet access in private booths must install filtering software and block these contents (Law No. 29,139 from 2007)⁴⁹. This law also prohibited minors from entering public Internet booths during school hours⁵⁰. But during the legislative period under revision there were other initiatives that sought to further limit the time minors could access Internet booths and expand the content filters on the Internet also to those which “promote or incite extreme violence, the commission of punishable acts, the use and consumption of cigarettes and derivatives of tobacco, alcoholic beverages, narcotics and psychotropic substances”⁵¹.

3. Pornography on the Internet

Beyond the prohibitions related to the access of minors, online pornography was not a matter of legal regulation to date.

However, during the current legislative period, two initiatives on the subject were put forward. The first one was linked to the dissemination and access to any pornographic content online. The second one is related to the dissemination of sexual content by those who agreed to it within the framework of an intimate or trusting relationship, a phenomenon known as “revenge pornography”.

In the first case, Representative Yonhy Lescano from Acción Popular presented Bill No. 825 in December 2016, which aims to establish a general and absolute prohibition of the dissemination of pornography on the Internet, arguing that all pornographic information “affects the mental health and sexual education of the people” and “represents a factor that encourages sexual crimes”.

Under this initiative, the companies providing Internet service would be required to install filters that prevent the display of sites with pornographic content. This bill has been fiercely criticized in the media and in the public opinion for lacking any support in relation to its statement on the harmful effects of pornography on the adult audience. In addition, it represents a paternalistic meddling in the freedoms of adults. So far, this project has not gained an agreement from any of the parliamentary committees to which it was derived (transport and communications, and women and family).

The second legislative proposal we mentioned is No. 1,669 of July of this year, presented by the Fuerza Popular representative José Marvin Palma and signed by parliamentarians from three other parties. The project incorporates a new offense into the Criminal Code in the following terms:

Article 154 – B. - Dissemination of intimate material in a non-consensual manner

⁴⁸ Law No. 28,119, “Ley que prohíbe el acceso de menores de edad a páginas web de contenido pornográfico y a cualquier otra forma de comunicación en red de igual contenido, en las cabinas públicas de internet” [Law that prohibits the access of minors to websites with pornographic content and any other form of communication in the same network, in public Internet booths], O.R of 12/13/2003, Art. 1.

⁴⁹ Law No. 29,139 “Ley que modifica la Ley N° 28,119, Ley que prohíbe el acceso de menores de edad a páginas web de contenido pornográfico” [Law that modifies Law No. 28,119, Law that prohibits the access of minors to websites with pornographic content], O.R 01/12/2007, Art. 1.

⁵⁰ Article 6 of Law No. 28,119, incorporated by Article 2 of Law No. 29,139 “Ley que modifica la Ley N° 28.119, Ley que prohíbe el acceso de menores de edad a páginas web de contenido pornográfico” [Law amending Law No. 28,119, Law that prohibits the access of minors to websites with pornographic content], O.R 01/12/2007.

⁵¹ Bill No. 919 of March 21, 2012, by representative Jaime Delgado.

Any person, who, without consent and deliberately, disseminates, threatens to do so or makes available images, audio-visual material or audio, with sexual content of an individual with whom he or she has maintained or maintains an intimate or trustworthy relationship shall be punished with imprisonment of three to six years.

The explanatory statement of this bill expressly refers to this form of dissemination of pornography as “revenge pornography” and indicates that it is a manifestation of “psychological violence, domestic violence and even a form of sexual abuse”.

There are two interesting aspects to highlight in this bill. The first is that this type of dissemination is interpreted as a form of violence; that is to say, an aggravated form of expression that, as such, would be object of less protection. The second is that the punishment is not applicable to any person who, without consent, disseminates images, audios or videos of erotic content of a person, but only to those who have maintained or maintain an intimate or trustworthy relationship with such person; that is, a couple or former sexual or sentimental partner. This assertion is important because it removes liability from third parties who, without having any contact with the affected person, have accessed and disseminated said material. However, it would have been relevant to specify that the qualified author of the crime had to have had access to the intimate content on the occasion of the sexual or sentimental relationship. In this case, they could not claim to be in the place of the third party who accesses and disseminates the material without knowing that it was obtained without consent. The bill is currently under revision in the parliamentary commission of Justice and Human Rights.

VII. Terrorism and *Apología* [Defense or Praise of Criminal Acts]

1. Anti-terrorist legislation

Legislation on terrorism in Peru has existed since the 1980s. However, the regulations in force date back to 1992 by enacting the laws that would repeal and replace Chapter II of Title XIV (Crimes against Public Peace) of the Criminal Code (Legislative Decree No. 635).

The basic legal description of the crime of terrorism is the one in article 2 of Decree Law No. 25,475:

Article 2. - Legal description of the crime.

Any person who provokes, creates or maintains a state of apprehension, alarm or fear in the population or in a sector of it, carries out acts against the life, body, health, personal liberty and security of people or against their estate, against the security of public buildings, roads or means of communication or transportation of any kind, power or transmission towers, industrial facilities or any other good or service, using weapons, materials or explosive devices or any other means capable of causing havoc or serious disturbance of public tranquility or affect international relations or the security of society and the State, shall be punished with imprisonment of not less than twenty years.

Unlike other countries, the crime of terrorism in Peru is essentially one that requires a guilty act. Although it was later modified to include some expressive forms (such as incitement or collaboration), in Peru, expressions that favor or vindicate criminal acts were considered an autonomous offense, and in particular those of terrorism: the crime of *apología* [defense or praise of criminal offenses].

Other articles of Decree Law No. 25,475 included other criminal offenses such as collaboration with terrorism, instigation of terrorism and affiliation with terrorist organizations⁵².

Nonetheless, the anti-terrorist legislation - which was supplemented by Decree Laws No. 25,659; 25,806 and 25,087-were declared unconstitutional by the Peruvian Constitutional Court in 2003 (Tineo Silva Case), due to the introduction of several restrictions on the right of defense and due process⁵³.

Regarding the crimes of expression by their very nature, *apología* was included in the Criminal Code with crimes against public order, the same title that described the crimes of terrorism. The original article 316 of the Criminal Code defined the crime of *apología* in these terms:

Article 316.- *Any person who, publicly, makes an apología [defense or praise of a crime] or of the person who has been convicted as its author or participant, shall be punished with imprisonment of one to four years.*

If the defense or praise is made of a crime against public safety and order, against the State and national defense, against the branches of government and the constitutional order, the penalty shall be of four to six years.

Since its conception, the crime of *apología* has been controversial due to the difficulty in defining the context within which an expression can be considered in support of a criminal act and illicit.

Thus, the different degrees of expression that could fit within the figure of *apología* were discussed. To a lesser degree we find the justification of the convicted person or the criticism of the sentence that condemns them. A greater intensity in the expression would be the exaltation or glorification of the convicted criminal or of the behavior that earned them the sentence. And at an even higher level we find the incitement to the commission of actions that qualify as crimes, or to repeat the acts of those who have already been sentenced.

Chirinos Soto considers that the figure in Article 316 of the Criminal Code is disproportionate: “We do not see, for example, how the defense or praise of an act of defamation or its author can, somehow, compromise the collective peace. Therefore, the rule has an excessive reach”⁵⁴.

In 1992, Decree Law No. 25,474 included the specific offense *apología* in its article 7, in terms quite similar to the first paragraph of article 316 of the original Criminal Code:

⁵² Decree Law No. 25,475 “*Establecen la penalidad para los delitos de terrorismo y los procedimientos para la investigación, la instrucción y el juicio*” [Establishing the punishment for the crimes of terrorism and the procedures for investigation, investigation and trial], O.R of 06/05/1992, Arts. 4 to 8.

⁵³ Constitutional Court, “Action of unconstitutionality filed by Marcelino Tineo Silva and 5,000 citizens”, sentence of January 3, 2003, Exp. No. 010-2002-AI/TC, retrieved from: <http://bit.ly/152rllz>.

Ruling of the CC of January 3, 2003, unconstitutionality action filed by Marcelino Tineo Silva and more than five thousand citizens, with signatures duly certified by the National Registry of Identity and Civil Status, against the Decrees Laws Nos. 25,475, 25,659, 25,708 and 25,880, as well as its complementary and related rules. EXP. No. 010-2002-AI/TC.

⁵⁴ Chirinos Soto, Enrique, *Criminal Code*, Lima, Editorial Rodhas, 2nd ed., 2005, p. 685.

Article 7.- Apología

Any person who publicly through any means makes an apología of terrorism or of a person who committed terrorism shall be punished with a penalty of imprisonment of six to twelve years. Any Peruvian citizen who commits this crime outside the territory of the Republic, in addition to the imprisonment sentence, shall be sanctioned with the loss of Peruvian nationality.

This article was the subject of an unconstitutionality lawsuit that culminated with the aforementioned ruling of the Constitutional Court (CC) in the Tineo Silva case.

On that occasion, the CC declared the unconstitutionality of the aforementioned article together with article 1 of Decree Law No. 25,880 that described the crime of *apología* by a teacher⁵⁵. After recognizing that freedom of expression is not absolute and may be limited, the CC considered that the generic and aggravated legal descriptions of *apología* “do not describe with precision the object of the *apología* and what should be understood by this offense”⁵⁶. In this way, the crime of *apología* “is not, by and of itself, unconstitutional” provided that the criminal repression of the expression is carried out “in such a way that its intimidating effects do not end by denying or unreasonably obstructing the exercise of this preferred freedom”⁵⁷.

An important precision in this sentence is the distinction that the CC makes between a defense or praise of a criminal act and instigation. The former “does not seek to convince another to decide to commit the crime. (...) in the case of *apología*, there is no specific subject receiving the defense or praise”⁵⁸. Therefore, the reason for sanctioning this crime is in that it legitimizes the criminal action itself through discourse.

In its ruling, the CC also gives parameters to be respected in the description of this offense in the code:

- a) That the exaltation refers to a terrorist act that has already taken place;*
- b) When the apología refers to the person who committed the crime, their sentence must be final;*
- c) That the means used by the person carrying out the apología must be able to achieve the publicity required by the legal description of the crime, meaning that it should be an appropriate way to spread the praise to an indeterminate number of people; And,*
- d) That the exaltation affects the democratic rules of plurality, tolerance and search for consensus*⁵⁹.

While the first two conditions are objective and sufficiently clear, the problem with setting the component parts that make up this particular crime is even greater and the issue is not solved with the last two requirements. In fact, the last one (“that the exaltation affects the democratic rules of plurality, tolerance and search for consen-

⁵⁵ Decree Law No. 25,880, “Any person who using their status as a teacher, influences their students by advocating terrorism, is considered the author of a crime of treason to the country,” O.R of 11/26/1992.

Article 1.- Any person who using their status as a teacher, influences their students by advocating terrorism, is considered the author of a crime of treason to the country, and shall receive the maximum penalty of life imprisonment, and the minimum penalty left to the discretion of the Judge, according to the seriousness of the criminal action. Likewise, the accessory penalty of disqualification pursuant to subparagraphs 2), 4), 5) and 8) of article 36 of the Criminal Code shall apply.

⁵⁶ Constitutional Court, “Action of unconstitutionality filed by Marcelino Tineo Silva and 5,000 citizens”, supra note 85, Legal Basis 88.

⁵⁷ *Ibid.*, Legal Basis 87.

⁵⁸ *Ibid.*, Legal Basis 84.

⁵⁹ *Ibid.*, Legal Basis 88.

sus”) is subjective and makes it difficult for the legislator to draw a clear line.

At the very least, the CC does seem to have concluded that the punishable expression need not be as intense as instigation, but that it would suffice with exaltation or praise. It remains to be defined if other expressions such as criticism, irony, satire or even justification can be considered as corresponding to this crime.

After the ruling, the governments of Alejandro Toledo (Legislative Decree No. 924 of 2003) and Alan García (Legislative Decree No. 982 of 2007) issued regulations contemplating *apología* of terrorism as a special offense in the Criminal Code and even establishing aggravating circumstances for their penalties, but without correcting the vagueness of the legal description of the crime. In the case of Legislative Decree No. 982, one of the aggravating factors included the advocacy of terrorism carried out “through social communication media or through the use of information and communication technologies, such as the Internet or other similar”.

Despite the fact that legislative initiatives on the subject had proliferated over time, new laws on this crime had not been passed until 2017, when a modification of article 316 of the Criminal Code was enacted in mid-June. The context that led to its rapid approval was that of a recent march led by Movadef, the political faction of the terrorist group Sendero Luminoso, through the streets of Lima, the capital of Peru. While some labor unions were peacefully marching on Labor Day, some members of Movadef infiltrated the demonstration with banners allusive to sentenced and imprisoned terrorists, with messages in favor of their amnesty and the resolution of some pending criminal proceedings.

This prompted strong criticism from several political sectors, mainly Fuerza Popular, an opposition party with a vast majority in Congress. The criticism reached the point of summoning for questioning and requesting the resignation of the Minister of the Interior for not having taken immediate action against the demonstrators, such as detaining them, on the grounds that it was a flagrant act of *apología* of terrorism.

Given that the type of message disseminated by members of Movadef was not directly a vindication of those convicted of terrorism or their acts, many experts felt that it was difficult to criminalize this demonstration under the terms of current criminal legislation⁶⁰.

And so this motivated a push in Congress of five recent bills (397-2016⁶¹, 611-2016⁶², 714-2016⁶³, 801-2016⁶⁴ and 1,395-2016⁶⁵). They were referred to the Committee on Justice and Human Rights, which passed by majority a ruling comprehending the proposals of the various bills. On 15 June 2017 the new law was passed in the House of Congress and on July 19 Law No. 30,610 was published.

The first change is that the new law separates into two articles of the Criminal Code (316 and 316-A) the crimes of *apología* of crimes and *apología* of terrorism. It also proposes a more specific wording on what is understood

⁶⁰ “¿Policía podía detener a integrantes del Movadef por marcha?” [Could police arrest members of Movadef for marching?], *El Comercio*, May 2, 2017, retrieved from: <http://bit.ly/2E6M54d>.

Chang, Romy, “¿Delito de apología o libertad de expresión?” [Crime of *apología* or freedom of expression?], *El Comercio*, May 5, 2017, retrieved from: <http://bit.ly/2BcWi09>.

Calderón, Andrés, “Movadef: odio vs. odio” [Movadef: hate vs. hate], *El Comercio*, May 8, 2017, retrieved from: <http://bit.ly/2FR6v1o>.

⁶¹ Presented by representative Octavio Salazar, Fuerza Popular.

⁶² Presented by representative Carlos Tubino, Fuerza Popular.

⁶³ Presented by representative Luciana León, Célula parlamentaria Aprista.

⁶⁴ Presented by representative Edmundo del Águila, Acción Popular.

⁶⁵ Presented by representative Marco Miyashiro, Fuerza Popular.

as *apología*: “Any person who publicly **exalts, justifies or praises** an offense or the person condemned by final judgment as an author or participant ...” (emphasis added). This definition contrasts with that of the previous law in force, which described the legal definition of the crime in vague and circular terms: “Any person who publicly makes a defense or praise of a crime or of the person who has been condemned as its author or participant”.

As can be seen, the third change is that it specifies that the condemned to which the *apología* refers must have a final sentence, which grants greater clarity and legal certainty.

The regulation of the crime of *apología* of terrorism follows the same legislative technique: “If the exaltation, justification or praise is made of the crime of terrorism or of any of its types, or of the person who has been convicted by a final judgment as author or participant”. It also contemplated two aggravating elements in the case of the crime of *apología* of terrorism:

1. When a defense or praise is made through written media or means of communication or by using information or communication technologies (something already stipulated with a different wording in the previous norm).
2. When the *apología* is made as an authority, teacher or administrative staff of an educational institution or in the presence of minors.

Although the new wording gives greater clarity to the outlines of the crime, which represents an important advance in the interests of the principles of predictability and adequacy with the description that is made of it in the criminal code, the new norm entails a great restriction on freedom of expression.

On the one hand, the Peruvian Congress reinforces its position within the countries that penalize this kind of hate speech, even when it does not imply a call to carry out violent or harmful behavior. And, on the other, it reaches the point of not only criminalizing laudatory opinion or praises towards the person who committed a crime, but also the opinion of critics who considered unjust a conviction of a crime.

By including the word “justifies” within the legal description of the crime, the space for critical opinion is excessively restricted. Thus, for example, any person who believes that a conduct qualified as punishable by the justice system is not deserving of such penalty due to its being justified, could fit within the crime of *apología* of a crime because it would be “justifying” the offense or the offender.

The new description of the crime supposes, thus, a disproportionate restriction to freedom of expression and to the right that every citizen has to publicly express their opinion on the running of the State, in particular, of its judicial apparatus.

There were other legislative initiatives associated to the crime of terrorism and expression, which were finally not passed. For example, Bill No. 1,464 of 2012, presented by the government of Ollanta Humala, which sought to incorporate to the Criminal Code the crime of “denial of crimes of terrorism”, and which punished any person who publicly approved, justified, denied or minimized crimes committed by members of terrorist organizations. According to this approach, the denial of these crimes had the effect of “belittling, harassing or offending a social group,” “ennobling those responsible” for terrorism, “encouraging or stimulating terrorist violence” or serving “as a means to indoctrinate for terrorist purposes”. Likewise, Bill No. 1,565 of 2012, presented by Pedro Spadaro of Fuerza Popular, sought to establish the use by public television and radio channels of a news ticker containing messages, videos or photos in order to remind viewers of the harmful effects caused by terrorist organizations to Peruvian society.

VIII. Liability of intermediaries

The possibility that various traditional rights (image, copyright, privacy and property) were violated on the Internet prompted a broad global discussion on the relevance of regulating intermediaries. This includes both the providers of Internet service (ISP) and those who provide intermediary services on the Internet such as hosting, temporary storage, search engines or sites that allow the access to the contents to third parties.

The importance that these platforms have gained for the development of relationships (commercial or personal) on the Internet motivated that this type of services (as well as those of hosting and ISPs) become the subject of attention by legislators around the world who saw in them relevant actors in the control and defense of rights that could be violated on the Internet.

There are millions of potential Internet users who disseminate works protected by copyright, without authorization, trafficking in products that violate trademark rights or infringe on the image of people. As a result, legislators sometimes chose to attribute obligations (and responsibilities) to intermediaries to detect and / or combat these infractions.

At a local level, this issue was subject to limited legislative attention. The United States – Peru Trade Promotion Agreement signed in 2006 and which came into effect in 2009 contains a specific subsection entitled “Limitations on Liability for Service Providers”. This Agreement establishes the obligation of the Peruvian State not to hold intermediaries responsible for infringements of intellectual property rights committed by their users; provided that they comply with certain conditions and that they adopt certain actions of prevention or reaction (safe harbor). Specifically, it demands that the intermediary supplier does not participate directly in the infringing action, does not receive a direct benefit and takes expeditious actions and addresses the problem once it has become aware of the infringement⁶⁶.

Among the local legal scholars, this was understood as an obligation for Peru to adopt a regulation similar to the Digital Millennium Copyright Act (DMCA) of the United States⁶⁷, which establishes the immunity of the ISPs provided that they comply with norms of diligence in the detection of infringements of copyright⁶⁸. Thus, the DMCA incorporates a system of notifications and counter notifications, known as notice and takedown, from which the owner of a copyright right allegedly violated will notify the ISP attaching evidence of the infringement⁶⁹. Following the line of the DMCA, the Peru-United States Trade Promotion Agreement provides that the ISP transfer liability to the alleged offender and, with or without their response, evaluate the case and take action to remove the infringing content and, ultimately, cancel the offender’s service⁷⁰. By virtue of these actions, the ISP would not be held responsible⁷¹.

Notwithstanding the fact that Peru has not yet legally regulated a similar system, the copyright protection authority (Indecopi) has applied Article 39 of Legislative Decree No. 822, Law on Copyright - in force since April

⁶⁶ Montezuma, Oscar. “Responsabilidad de los prestadores de servicios de Internet en derechos de autor” [Responsibility of Internet service providers in copyright], in: Pontificia Universidad Católica del Perú, Masters in Intellectual Property and Competition Law, Commemorative Investigations for the 16 years of the Masters in Intellectual Property Law and Competition. Thesis of students and International Congress, Lima, PUCP, 2016, p. 414

⁶⁷ Digital Millennium Copyright Act. 17 U.S. Code § 512.

⁶⁸ Montezuma, Oscar. “Regulating the intermediary. The regime of limitation of liability for Internet service providers in the Peru-United States Trade Promotion Agreement”, in: *Actualidad Jurídica*, 184, Lima, Gaceta Jurídica, 2009, p. 42.

⁶⁹ Montezuma, Oscar. “The overregulation of copyright on the Internet. How do we get to SOPA, PIPA and OPEN?” in: *Gaceta Constitucional* 50, Lima, Gaceta Jurídica, 2012, p. 401.

⁷⁰ APC Perú – Estados Unidos, Art. 16.11.29(b)(viii).

⁷¹ APC Perú – Estados Unidos, Art. 16.11.29(b)(x).

1996 - , with respect to third parties that have collaborated with the infringement of the patrimonial right of public communication⁷². One of the few cases in which it was preliminarily pointed out that an online platform could be responsible for the unauthorized distribution of works protected by copyright was the registration of the web domain The Pirate Bay in Peru⁷³.

Outside of the legislation of copyright, and without a specific normative provision that regulates the case of intermediaries or online platforms, case law has made liable holders of electronic commerce platforms such as MercadoLibre and Google for the actions of users^{74,75}, and the scope was limited to others like Groupon⁷⁶ and Easy Taxi⁷⁷, due to personal data protection and consumer protection, respectively.

Recently, in June 2017, representative Elijah Miguel Angel Avalos, Fuerza Popular, presented Bill No. 1,505 that seeks to regulate taxi services in technological platforms such as Uber, Easy Taxi, Taxi Beat, among others. The bill sets a series of requirements such as having mechanisms to identify the vehicle and the route it will follow and having an administrative office in the country, a call center. These demands have been criticized for limiting technological innovation and aiming to regulate and limit a constantly changing offer⁷⁸.

Furthermore, the lack of clarity in the wording of this initiative could generate ambiguity between the responsibility of the service provider (the driver) and the platform. In this way, a kind of joint responsibility is established for the infraction of administrative regulations and consumer protection⁷⁹.

⁷² **Legislative Decree No. 822,**

Article 39.- No authority or person or legal entity may authorize the use of a work or any other production protected by this Law, or lend its support to said use, if the user does not have the prior written authorization of the owner of the respective right, except in cases of exception provided by law. In case of non-compliance they shall be jointly and severally liable.

See also: Montezuma, Oscar, *supra* note 134, 2016, p. 411.

⁷³ Copyright Committee of Indecopi, “Ex Officio v. Red Científica Peruana”, Resolution 00601-2013 / CDA-INDECOPI of December 16, 2013.

⁷⁴ DGPDP, “Unidentified v. MercadoLibre Perú”, Resolution 066-2014-JUS/GDPPD August 7, 2014, retrieved from: <http://bit.ly/2Ek-mDvr>, and Resolution 073-2014-JUS/GDPPD October 3, 2014, retrieved from: <http://bit.ly/2BGF64c>.

⁷⁵ DGPDP, “Unidentified v. Google Perú”, Resolution 045-2015-JUS/GDPPD, December 30, 2015, retrieved from: <http://bit.ly/2BeP-7EX>, and Resolution 026-2016-JUS/GDPPD, March 11, 2016, retrieved from: <http://bit.ly/2GVhsR5>.

⁷⁶ Indecopi Consumer Protection Commission 2, “Ministerio de Transportes y Comunicaciones c/ Needish Perú y Globos del Perú”, Final Resolution 482-2013/CC2, May 14, 2013.

⁷⁷ Indecopi Commission for the Supervision of Unfair Competition No. 1 “Ex Officio v. Easy Taxi Perú”, Resolution 099-2015/CD1-INDECOPI, August 19, 2015.

⁷⁸ “Uber y otras apps de taxi afrontarán intento de regulación del Congreso” [Trying to regulate Uber and other taxi apps at Congress], *El Comercio*, June 13, 2017, retrieved from: <http://bit.ly/2rWTJu5>.

⁷⁹ **Bill No. 1,505, Article 3. Intermediation of technology platforms in the private transport service.**

(...)

The offer of private transport service through technological platforms or virtual applications does not exempt the service operator from the responsibilities and obligations established in the Code of Consumer Protection and Defense, nor from the Ministry of Transport and Communications, nor those that are derived in civil or criminal matters as a result of the service.

Article 7. Joint liability of the administrator of the platform.

The administrator of the virtual platform of the private transport service and the driver of the unit that provides the service are responsible for complying with the provisions of articles 4 and 6 of this law, its omission is punishable as provided by the Code of Consumer Protection and Defense.

IX. Conclusion

As we explained at the beginning of this work, the last twenty years of law making and the last five years of bills of the same nature in terms of freedom of expression can be classified as reactions to current events influenced by circumstances, without a clear direction or in favor of this fundamental right.

However, there are some legislative preferences during the observed periods. For example, on this subject there is a particular interest of the Peruvian legislators in the issues of discrimination on the one hand and for the crimes of terrorism and *apología* of terrorism, on the other. Of the 39 bills reviewed, 7 were on discrimination and 11 on terrorism and *apología*. Regarding laws, of the 29 approved in the time period considered, 8 had to do with discrimination and 4 with terrorism and *apología*.

Another clear trend in the national legislators is the constant commitment to criminal laws (instead of opting for alternatives in the civil and administrative fields) to try to solve alleged problems related to expression. 21 out of the 39 bills criminalize expression and five of them propose a new criminal offense. Only 1 bill dealt with decriminalization. Happily, most criminal bills did not prosper. 9 of the 29 laws passed criminalize expression.

The number of bills that regulate speech online has increased. In total, 19 bills were submitted, 8 of which correspond to last year (2017). 14 of these projects make online speech more difficult than offline, either through regulation especially directed at the Internet or through aggravated sanctions for expressions that use information and communication technologies. Regarding passed laws that regulate content on the Internet, there were 8 of them; there has not been a substantial increase in their number in recent years.

Finally, the whole result is not encouraging. The vast majority of legislative actions were intended to limit and not promote expression. In total, 19 of the 29 laws analyzed established additional restrictions on expression and only 8 were able to comply, in our opinion, with the three essential elements of legality, necessity and proportionality. Regarding bills, 34 of the 39 studied proposed additional restrictions on expression. Although the vast majority complied with the requirement of legality (31), only 4 would pass the requirement of proportionality and none that of necessity. And this is explained by the legislator's habit of not even exploring regulatory alternatives and also by their predilection for the most radical response: criminal laws.

While legislative actions were essentially the product of circumstantial reactions and very little thought out, the verified proliferation of initiatives that delve into the criminalization of expression and that harm expression online do not show a very encouraging outcome for legislation on freedom of expression in Peru.