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Trends in freedom of expression in Argentina

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Executive Summary

The evolution of legislation on freedom of expression in Argentina in the last twenty years can be considered positive. Notwithstanding this, there are several pending reforms to continue moving in the right direction in the traditional freedom of expression agenda and regarding the considerable impact that Internet regulation can have on this critical subject. There are several laws that were adopted from 2005 onwards aimed at regulating Internet activities, many of which affect the circulation of content and expression. In addition, many of the bills reviewed in recent years suggest that, in many cases, Internet regulation is not regarded as connected with the freedom of expression agenda: bills that impose some kind of obligation on intermediaries on the Internet have multiplied and criminalization persists among a big part of Argentine society and its representatives. This article reviews and highlights parliamentary activity regarding freedom of expression and circulation of discourse both online and offline. It includes a series of recommendations for the different actors involved in the debate to achieve a renewed agenda in this matter in the future and to promote legislation that respects the right to freedom of expression.

I. Introduction

For the last two decades, parliamentary activity on freedom of expression has been particularly relevant. Following the decriminalization of 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] in 1994, the 2009 Kimel Law modified the legal descriptions in the codes for slander and insults in favor of freedom of expression and supporting the circulation of discourse. For its part, Law 26,032 of 2005 explicitly stated that the search, reception and dissemination of information on the Internet is included in the constitutional right to freedom of expression. In this way, the law recognized the application and validity of the standards developed up to that moment related to the Internet.

In addition, throughout these years, some laws were passed to guarantee freedom of expression and access to information for people with disabilities and, after two decades of debate, the law of access to public information was sanctioned recently.[2]

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The full document was translated by María Soledad Vázquez.

[2] Law 27,275, retrieved from: http://bit.ly/2lpCfVR.

Notwithstanding legislative progress, there are many issues still pending resolution in Argentine legislation. The Criminal Code was reformed but the legal descriptions of slander and insults are still penalized; since 2009 there were few concerted efforts to advance in this matter. On the contrary, new crimes were created that criminalize expression from other perspectives,[3] and in some cases there was even a call for increasing sentences for crimes related to expression or dissemination of content in the Internet. Furthermore, there have been no breakthroughs in sanctioning a law on liability of intermediaries despite the numerous debates and broad participation and discussion generated by the various bills on the subject. This resulted in countless different and even contradictory court judgments.

With the growth, development and popularization of the Internet there seems to be a new legislative regulatory movement. There are several laws that were adopted from 2005 onwards aimed at regulating Internet activity, many of which affect the circulation of content and expression. In addition, the bills surveyed in recent years suggest that in many cases the regulation of Internet is not regarded as something related to the agenda of freedom of expression: bills that impose some sort of obligation to Internet intermediaries have multiplied and a desire to criminalize persists in an important part of Argentine society and its representatives.

This article reviews and highlights parliamentary activity regarding freedom of expression and circulation of discourse both online and offline. The first section describes the current legal framework on freedom of expression, the second deals with the criminalization of expression, the third section analyzes other laws and bills that affect - or could affect - the expression and circulation of online content in order to identify - if any - a legislative trend in this matter and, finally, some conclusions are drawn and recommendations are made.

1. Constitutional and conceptual framework of freedom of expression in Argentina

The right to freedom of expression in Argentina is guaranteed both in the Constitution, in sections[4] and 32[5], and in domestic statutory laws. In addition, freedom of expression is enshrined in various international treaties that acquired constitutional status in the country with the 1994 reform[6], including the American Convention on Human

[3] One example of this is the case of the terrorism law, enacted in 2007 and modified in 2011 precisely because of the problems that the original wording envisaged for the exercise of freedom of expression. Or the law on Grooming (Law 26,904) that, in the eagerness to protect minors in the face of possible sexual abuse, creates an exclusive crime for Internet communications with vague wording, not very specific and not very adequate for reality.

[4] Constitution of Argentina, Section 14: "All the inhabitants of the Nation are entitled to the following rights according to the laws that regulate their exercise; namely: to work and perform any lawful industry; to navigate and trade; to petition the authorities; to enter, remain in, travel through and leave the Argentine territory; to publish their ideas through the press without prior censorship; to make use and dispose of their property; to associate for useful purposes; to freely profess their religion; to teach and to learn."

[5] Constitution of Argentina, Section 32: "The Federal Congress shall not enact laws restricting the freedom of the press or establish federal jurisdiction over it."

[6] Constitutions of Argentina, Section 75, subsection 22: "... The American Declaration of the Rights and Duties of Man; the Universal Declaration of Human Rights; the American Convention on Human Rights; the International Pact on Economic, Social and Cultural Rights; the International Pact on Civil and Political Rights and its empowering Protocol; the Convention on the Prevention and Punishment of Genocide; the International Convention on the Elimination of all Forms of Racial Discrimination; the Convention on the Elimination of all Forms of Discrimination against Woman; the Convention against Torture and other Cruel, Inhuman or Degrading Treatments or Punishments; the Convention on the Rights of the Child; in the full force of their provisions, they have constitutional hierarchy, do no repeal any section of the First Part of this Constitution and are to be understood as complementing the rights and guarantees recognized herein.

They shall only be denounced, in such event, by the National Executive Branch of Government after the approval of two-thirds of all the members of each House. In order to attain constitutional hierarchy, the other treaties and conventions on human rights shall require the vote of two-thirds of all the members of each House, after their approval by Congress."

Rights. With the reform, the treaties became a complement of the dogmatic part of the National Constitution and conditioned the exercise of all public power to fully comply with these instruments.

Both the constitutional law and international treaties recognize that the right to freedom of expression is not an absolute right and requires compliance with certain requirements for its restriction. According to judicial precedents, both at a local and regional level, limitations on freedom of expression are analyzed in the light of a three-part test: 1) they must be established by law, in precise terms; 2) they have to pursue a legitimate goal; and 3) they must meet the requirements of necessity and proportionality in a democratic society. Furthermore, as freedom of expression has a fundamental value in a democratic society and thanks to its instrumental nature for the exercise of other rights, the Supreme Court of Justice of the Nation maintains in its rulings that limitations on freedom of expression must be interpreted restrictively.[7]

In Argentine legislation, freedom of expression finds restrictions in both the Civil and Commercial Code of the Nation [8] as in the Criminal Code of the Nation.[9] The last 20 years had particular relevance in this matter; during that time important reforms were achieved in laws that constituted obstacles to the free circulation of expression. Many other reforms, however, were left out, and are still pending.

II. Persistence of criminalization

Following the European tradition, in Argentina and many other Latin American countries there are numerous crimes related to expression. In addition to the express prohibition and criminalization of child pornography[10], where there is a worldwide consensus, the Criminal Code guarantees the protection of honor through the crimes of slander and insults [actionable words][11] and public safety[12], among others. Cybercrimes are also in this area, they were included in 2008 and some laws, such as Law 11,723 that describes crimes against intellectual property.

Over the years, some of the crimes were subjected to tough criticism for their possible effect on freedom of expression. Many of them restrict this right and they have an excessively vague or ambiguous description, in contrast to Inter-American standards. While judicial precedents lead to a narrower legal framework and interpreted criminal offenses in a restrictive way, that interpretation does not always succeed in preventing proceedings: they

7 See, for example, CSJN [Supreme Court of the Nation], judgments "Rodríguez, María Belén v. Google Inc. on damages," "Sujarchuk, Ariel Bernardo v. Warley, Jorge Alberto on damages," "Roviralta, Huberto v. Editorial Tres Puntos SA on damages," "Ponceti de Balbín, Indalia v. Editorial Atlántida SA on damages."

8 Civil and Commercial Code of the Argentine Nation, Title V - Chapter 1 - Section Ninth - Special cases of liability, article 1770 and article 1771 , retrieved from: http://bit.ly/2sbQYYh

9 Criminal Code of the Argentine Nation, Second Book - Of the offenses, Title II, Articles 109 to 117 bis, Law 11 179, September 30, 1921, published in the Official Registry No. 8300 of November 3, 1921, p. 1, retrieved from: http://bit.ly/2gH2pl5

10 Title 3 on "Crimes against sexual integrity" of the Argentine Criminal Code.

11 Title II on "Crimes against Honor".

12 Title 8, Chapter I on "Instigation to commit crimes", Chapter III on *"Apología of crime"* [defense or praise of criminal acts], and Chapter IV on "Other crimes against public order", including insults towards the national flag.

often reach the stage of having to determine criminal responsibility in court.[13]

Although there is a long list of crimes affecting freedom of expression and circulation of discourse, more bills continue to emerge designed to criminalize expression. Among them is the bill presented at the beginning of 2017 to create a new specific crime known as *apología* [defense or praise of a crime] for the crime of State terrorism,[14] the multiple and diverse bills on discriminatory acts that create new criminal offenses or raise penalties on existing crimes, or the new crimes that are being debated in the framework of the reform of the intellectual property law.

Finally, although sporadic, some bills persist aimed at increasing penalties for Internet expressions or behaviors in relation to those that take place offline[15]. This trend is verified despite the development of international and regional guidelines that recommend otherwise.

Although many bills respond to a combination of factors and circumstances that occur at a particular time and may not have support or consensus to be passed, the persistent criminalizing reaction that is seen not only as a national phenomenon but regionally is of great concern. According to The Legislative Observatory of the Center for Studies on Freedom of Expression and Access to Information (CELE for its Spanish acronym), 19.5% of the Argentine bills that in some way affect freedom of expression criminalize expression.[16] 40% of the projects that penalize create new crimes.

Despite the numerous cases at a national, regional and international level regarding freedom of expression and criminalization, there does not seem to be a substantive and honest debate in the Congress about the appropriate, necessary and adequate means to regulate unwanted behavior. Nor is there any proof, actual or empirical, proving the effectiveness of criminal law against other alternatives and, in many cases, the perspective of freedom of expression in the analysis prior to the adoption of these measures is not taken into account. For example, the package of laws on cybercrimes passed in 2008, the bill on non-consensual dissemination of private images (which is ready to be voted in a plenary session in the House of Representatives) or the project on discriminatory acts with preliminary approval in the House of Representatives were not turned over to the Freedom of Expression Committee, but to the general criminal or human rights committees.

In Argentina, the Committee for the Reform of the Criminal Code of the Nation was created in 2017, within the scope of the Ministry of Justice and Human Rights. The purpose of this Committee is to prepare a bill for the reform and updating of the Criminal Code of the Nation within one year from the date of its creation and it may constitute an exceptional opportunity to review the criminal offenses that affect the circulation of discourse, such as the crime of insults and slander or incitement to violence. Furthermore, it may be essential to review some crimes that were created as a result of technological advances and that, given the speed with which they were voted, do not meet the requirements of legitimacy, necessity and proportionality (for example, the case of the crime of grooming).

Below are some of the main areas that account for the trends.

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[13] For example, the case of incitement to crime. See F. Requejo, Criminal Code with comments, *Pensamiento Penal* [Criminal Law Thoughts] retrieved from http://bit.ly/2FSwvJH. CNFed. [National Federal Court of Appeals for Criminal and Correctional Matters] Courtroom I, 27/05/06, La Ley, 2006-E-46.; CNCrim y Corr [National Court of Appeals for Criminal and Correctional Matters], Courtroom VII, 03/03/2006, Case number 28.363, PJN Intranet [Intranet, Judiciary, Argentina]; WebRubinzal ppypenal60 1.r2; Court of Appeals. Courtroom III, 29/03/2001 "A. D. on Appeal to the Criminal Cassation Court" Record of final judgment-105-1.

[0] It came as a result of the controversy provoked by the expressions of public officials of the government who questioned the number of forced disappearances during the last military dictatorship. The issue was also raised by some provincial legislatures, including the legislature of the province of Buenos Aires that actually passed a law prohibiting public officials to question the number of disappearances which was symbolically established to be 30,000.

[15] See files No. 1311-D-2013, 0759-D-2015 and 2537-D-2017, House of Representatives.

[16] In whole numbers, 33 bills from a total of 169 surveyed bills.

2. Bills on acts of discrimination and non-consensual pornography

The debate on the different bills against **discriminatory acts** is very interesting to analyze since it is a current discussion both locally and regionally. In Argentina, of the 169 bills that impact the right to freedom of expression surveyed by the CELE, 33 (15%) set forth regulating or directly modifying the regulation of discriminatory acts, besides the initiatives that regulate specific aspects of the discrimination phenomenon, which would add as many more bills.

The country has a law against discrimination, **Law No. 23,592**[17], from 1988. The law provides a definition of discriminatory act and creates crimes to address the problem of discrimination.[18] Around 2007, Congress began debating bills that attempt to replace or modify the then-current law against discriminatory acts[19] and towards 2012 they gain traction in the parliamentary debate. Despite its implications and that many of them explicitly refer to the permissible limits to discriminatory speech, the projects on discriminatory acts were not turned over to the freedom of expression committees but to the committees for criminal law or human rights in general and some reluctance to debate from this perspective could be perceived.[20]

In terms of freedom of expression, the main discussion focused on the readiness to criminalize, the extent of

[17] See Law 23,592 (1988), retrieved from: http://bit.ly/2rcZdRP

[18] Law 23,592: Article 1 - Any person who arbitrarily prevents, obstructs, restricts or in any way undermines the full exercise on equal basis of the rights and fundamental guarantees recognized in the Constitution, will be obliged, at the request of the injured party, to restrain from continuing the discriminatory act or cease its actions and to repair the moral and material damage caused. For the purposes of this article, the discriminatory acts or omissions to be taken into account shall be the ones determined for the following reasons: race, religion, nationality, ideology, political or union opinion, sex, economic position, social condition or physical characteristics.

Art. 2 .- The penalty of any crime repressed by the Criminal Code or any complementary laws shall be increased in a third to half of its total when it is committed by persecution or hatred of a race, religion or nationality, or with the object of destroying in whole or in part a national, ethnic, racial or religious group. In no case may the maximum of the penalty corresponding to the crime in question be exceeded.

Art. 3. - Any person who participates in an organization or spreads propaganda based on ideas or theories of superiority of a race or of a group of people of a certain religion, ethnic origin or color, whose purpose is the justification or promotion of racial or religious discrimination in any form will be repressed with imprisonment of one month to three years.

Those who by any means encourage or initiate persecution or hatred against a person or groups of people because of their race, religion, nationality or political ideas shall receive the same penalty."

[19] Organizations that work on issues of discrimination and on the protection of the rights of LGBTI persons have pressed for all these years to obtain the approval of some of the bills presented. In some cases, they obtained the sanction in one of the Chambers of the National Congress, but without passing the law. These organizations have argued that it is necessary to add categories of discrimination (such as age, for example) and eliminate others (such as race). Likewise, there have been debates in favor of increasing the penalties established in the law as a means to dissuade discrimination.

[20] In one of the last meetings of advisers, CELE expressed an interest in submitting comments to the bills, but the organizing committee responded that it was not an issue related to the right to freedom of expression.

the terms used and the number of categories that might be added to the definition of discrimination.[21] In some cases, and in spite of the need for specificity of the crime, these motives are not even exhaustive, but rather the description remains open to add more motives.[22] Throughout the process, the feasibility of distinguishing between expressions made online and offline as elements of the legal description of the crime was also discussed.[23]

The debate was put on hold after many interventions from general public organizations, companies and Internet specialists,[24] but the precedent was set and in 2016 there were isolated attempts to retake it.[25] The initiative approved by committees in 2016 provides for the amendment of the law of discriminatory acts in questionable terms, but there is still no necessary consensus to gain a favorable vote in the House of Representatives, much less the Senate.

With a similar treatment, in 2016 the issue of **non-consensual pornography** was incorporated to the parliamentary debate. Non-consensual pornography is the circulation of private images without the consent of one party. The phenomenon affects particularly women, which gives the issue a gender angle that is not being fully

[21] See the presentation of comments by CELE dated June 24, 2016 before the Human Rights Commission of the House of Representatives: http://bit.ly/2nIufOA For example, one of the bills presented (File No. 2709-S-2016 of the Senate) defines as discriminatory *"... those acts, actions or omissions that have as their object or result to prevent, obstruct, restrict or in any way arbitrarily, temporarily or permanently, impair the equal exercise of the rights and guarantees recognized in the Constitution, laws of the Nation that in consequence are dictated by the Congress, Treaties and International Conventions of human rights, and the laws dictated in consequence, to people or groups of people, under the pretext of ethnicity, nationality, color of skin, birth , national origin, language, or dialect, religious or philosophical convictions, ideology, political or trade union opinion, sex, gender, gender identity and / or its expression, sexual orientation, age, marital status, family situation, work or occupation, physical appearance, disability, health condition, genetic profile, socioeconomic status, social condition, social origin, social or cultural habits, place of residence, criminal situation, criminal record and / or any other personal, family or social, temporary or permanent condition or circumstance. Any action or omission that through stereotyped patterns, insults, ridicule, humiliation, disqualification, messages, values, icons or signs transmit and / or reproduce domination, inequality and discrimination in social relations, naturalizing or promoting exclusion or segregation under discriminatory pretexts, will also be considered as discriminatory behaviors according to this law. Likewise, any behaviors that tend to cause emotional damage or diminished self-esteem will be considered discriminatory, harming and / or disrupting full personal development and / or identity, degrading, stigmatizing or any other conduct that causes harm to the psychological health and self-determination of people under any discriminatory pretext."*

[22] See, for example, bill of law No. 0608-S-2015. Retrieved from: http://bit.ly/2BdJert

[23] Some bills (2015) included specific articles that regulated discriminatory acts on the Internet, establishing special measures and higher penalties when this was the means used to express and disseminate such expressions. The bills were grouped into one, which obtained an approval from the Constitutional Affairs Committee of the House of Representatives. Article 21 of the bill, entitled "Promotion of non - discrimination on the Internet," stated that: *"Administrators of Internet sites that have platforms that admit content and / or comments uploaded by users are required to: a) publish terms and conditions that contain the information in Annex II of this law, in order to report on the discriminatory nature of any content and current legislation in this regard; b) provide and make public a communication channel for users to denounce and / or request the removal of material that infringes this law. The media, news agencies, online newspapers and electronic journals that have platforms that admit content generated by users must, in addition to the obligations provided above, have the information provided in paragraph a) of this article through the automatic activation of a window whose terms must be accepted by the user before agreeing to comment or uploading any content, and adopt the necessary measures to avoid dissemination of discriminatory content."*

[24] Civil society organizations, especially those who defend freedom of expression, spoke out against this type of regulation because it violated the right to freedom of expression. Among them were the *Asociación por los Derechos Civiles* [Association for Civil Rights] (ADC) and CELE. The ADC, for example, stated that "... the National Bill of Law against Discrimination, which aims to regulate comments on the Internet, among other objectives, is contrary to the National Constitution: it violates the principle of legality, the principle of freedom of expression on the Internet, limits public debate, is not suitable to solve the problem it addresses and offers little precision in positive action measures." See full ADC presentation dated July 22, 2015, retrieved from: http://bit.ly/2salDoP

[25] Both in this particular point and in the discussion of the law in general, the opinion of civil society organizations is divided between those that work on issues of freedom of expression and organizations that work specifically on discrimination. Furthermore, this last group also has internal divisions, with some organizations that, for example, oppose the criminalization of discriminatory acts. See http://bit.ly/2BYS9Ke

addressed in the debate. [26] The various bills[27] that were discussed in 2016 not only try to define the legal concept, but also impose prison sentences for the perpetrator of the conduct. In general terms, some bills include lengthy prison sentences (for example, from 6 months to 4 years, similar to the sentence foreseen for the crime of grooming) and another includes monetary penalties.[28] The bill that sets the highest penalties was the one that obtained preliminary approval from the Senate[29] and will possibly be debated in the House of Representatives in 2017 or early 2018. All the bills, including the one passed by the Senate, contemplate a broad legal description of the crime, corresponding to any person "who is in possession of images of total or partial nudity and / or videos with sexual or erotic content of one or more persons, made public or disseminated by any means" without express consent.[30] None of the bills include any public interest exceptions, despite including not only sexual images that might escape any consideration of public interest but any other type of less explicit images.

Finally, taking elements from the anti-discrimination bills and others from non-consensual pornography bills, in 2017 a bill was presented to incorporate a new legal concept to the Argentine Criminal Code stating that:

> *Any person that disseminates or discloses visual or audiovisual material or sensitive data about the preferences or sexual life of an adult, in digital format and through any means of data processing without their authorization or consent, shall be punished with imprisonment from 6 months to 2 years even if said material was taken with consent in private." The penalty will be imprisonment of 1 to 3 years when the distribution is made using false identity, homonyms of the affected person or fake profiles*[31]

The bill also includes the crime of virtual harassment:

> *Any person who carries out acts of stalking and / or persecution by any means of data processing of a person of legal age, making or not use of anonymity, in a way that compromises sensitive information about their preferences or sexual life, and / or seriously alters the development of their daily lives shall be penalized with imprisonment of 6 months to 3 years.*[32]

Despite not having prospered in the parliamentary debate, the project raises concerns about the extent and vagueness of its terms. In addition, the bill gives a particularly negative connotation to the use of tools such as anonymity or pseudonym, which are so necessary sometimes for the protection of the most vulnerable people.

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[26] See CELE, La regulación de la pornografía no consentida en Argentina, [Regulation of non - consensual pornography in Argentina] Buenos Aires, December, 2015, retrieved from: http://bit.ly/1Z9WJvx

[27] The bill of File No. 2119-S-2016 of the Senate of the Nation includes a law to the Argentine Criminal Code that establishes: *"ARTICLE 155 BIS: Any person who is in possession of images of total or partial nudity and / or videos of sexual or erotic content of one or more persons, and makes them public or disseminates them through electronic communications, telecommunications, or any other means or technology of data transmission, without the express consent of the person in the images to do so, even if there has been an agreement between the parties involved for procuring or supplying those images or video shall be punished with imprisonment of six (6) months to four (4) years. The convicted person will be obliged to arbitrate the necessary mechanisms to remove from circulation, block, eliminate or suppress the material in question, at their own expense and within a period of time to be determined by the judge."*

[28] File No. 5893-D-2016 of the House of Representatives, retrieved from: http://bit.ly/2FUdOpf

[29] See http://bit.ly/2EnYRyw

[30] For example, would penalties be applicable for people who forwarded a photograph or video to their contacts privately?

[31] File No. 3862-D-2017 of the House of Representatives, retrieved from: http://bit.ly/2BGZwKx

[32] *Ibid.*

Undoubtedly, in these cases, the bills have laudable goals such as protecting privacy or protecting against discrimination and abuse. However, they reveal problems which are common to other processes, such as the lack of analysis of bills from the perspective of freedom of expression and the tendency towards criminalization. Furthermore, the latest example reveals a lack of knowledge about how the Internet works and the extent of the personal information in each person's contact list, which is not defined or contained in the books of authority or the judicial precedents. The bill also expresses a lack of knowledge of international standards that indicate the means used for expression, in this case the Internet, should not be part of the criminal elements or an element for increasing penalties.

*2. Cases of **apología**, incitement and instigation*

In Argentina, recently the crimes of incitement, *apología* [defense or praise of criminal acts] and instigation[33] were in the center of the scene, following some prominent cases that shed a new light on the debate on the criminalization of expression. The first case involved Gustavo Cordera, singer of the rock band Bersuit Vergarabat, who stated in an interview at TEA journalism school that "there are women who need to be raped to have sex."[34] The second case was that of the public statements made by officials of the executive branch of government questioning the amount of forced disappearances during the last military dictatorship in Argentina.[35] Another case related to this issue is the one of the forensic doctor Oscar Roo, who was prosecuted for the crime of *apología* on his Facebook wall. Finally, the case of the wave of suicides in the world as a result of the game called "The Blue Whale Challenge."

Gustavo Cordera was prosecuted for incitement to violence in 2016 when a student posted Cordera's expressions on his Facebook wall. The case started an interesting debate, even within organizations dedicated to the defense and promotion of women's rights around the usefulness and effectiveness of the criminalization of this type of expression. The cause advances and even an agreement was rejected which was being negotiated between the defense and prosecution to postpone the judicial proceeding in exchange for Cordera's performance in two concerts to benefit two children's hospitals and "Ni una Menos" (a group against gender violence), and attending a class on gender violence. The judge in the case presented the charges of gender violence and the proposed probation could not be accepted due to Argentina's international commitments in this matter. Beyond his reprehensible comments, it is not clear how the legal elements of the crime are being analyzed or how the statements constitute incitement, particularly when all the reactions, including the ones from his direct audience, were manifestly and publicly condemnatory.

In the second case, following the statements of some officials of the executive branch questioning the amount of

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[33] Although in Argentina these three concepts have been used indistinctly, each one arises from different rules of the Argentine Criminal Code and are defined separately:

"ARTICLE 209. - Any person who publicly instigates the commission of a specific offense against a person or institution shall be punished, on the sole instigation, with imprisonment of two to six years, depending on the seriousness of the crime and the other circumstances established in article 41."

"ARTICLE 212. - Anyone who publicly incites collective violence against groups of persons or institutions, by the mere incitement, shall be punished with imprisonment of three to six years."

"ARTICLE 213. - Any person who publicly and by any means commits *apología* of a crime or of a convicted person for a crime shall be punished with imprisonment from one month to one year."

[34] Gustavo Cordera made statements during a journalism class on violence against women in the world of rock; he spoke out against including the legal definition of the crime of rape in the criminal codes and declared that "There are women who are teases, so they need to be raped." At the time of the completion of this article, the prosecution of Cordera had been confirmed and he will be prosecuted in a Criminal Court. See http://bit.ly/2FQQqc4 and http://bit.ly/2ELepdw

[35] See http://bit.ly/2E6ZNE1; http://bit.ly/2rwHyF9; http://bit.ly/2BZ8O05.

forced disappearances during the military process in Argentina, in 2016 a bill that aims to increase prison sentences for *apología* of a crime when it concerns a crime against humanity was presented *"... and when the act is committed by a public official or an agent of the security forces"*, as well as in the event that the official or agent of the security forces *"... publicly and by any means, approves, denies, justifies or vindicates a crime against humanity."*[36] This national bill was joined by another provincial bill, passed unanimously, which prohibits officials and provincial agencies from questioning the number of 30,000 missing persons stipulated in the "Never Again" report.[37] In this case, not only were there complaints of *apología*, but there were also specific proposals for reforms tending to re-criminalize unwanted and minority expressions, choosing again to restrict the debate instead of developing it.

In 2014 there had already been cases related to *apología* of crimes against humanity, but less significant. Colonel Oscar Roo was prosecuted for *apología* of a crime in Chubut for allegedly wishing the torture and death of the head of Grandmothers of the Plaza de Mayo, Estela de Carlotto, on his Facebook wall.[38] Judge Otranto considered that the Facebook wall is a sufficiently public place to meet the publicity requirement of article 210 of the Criminal Code.[39] However, in its decision there is no mention of the necessity or proportionality of the criminal action, in the case of expressions made with respect to a public person within the framework of a topic of public interest.[40] Curiously, the judge maintains that wishing someone death or torture is a protected expression but since the person it made reference to had been subjected to torture, the case constituted *apología*.

Finally, the third case in question arose as a result of the phenomenon known as "The Blue Whale Challenge", which acquired global public resonance. In 2017, a bill was presented that proposes penalties of imprisonment of two to five years to any person who "instigates another person to commit suicide or helps them to commit suicide, if there was an attempted suicide or it had been committed." [41] The bill modifies the current regulation of the Argentine Criminal Code, increasing the current penalty from one to four years and raising the minimum to two and the maximum to five. In addition, the second paragraph of the bill (which would be added to the current law) increases the criminal penalty by three times the minimum and the maximum in the following cases: "... 2) When the means used are digital social networks, electronic communications, telecommunications, mobile telephone or any other data transmission technology, directly or covertly in messages, applications, games, video games or any

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[36] The bill of File No. 8906-D-2016 increases the penalties from one month to one year to three to eight years in prison and perpetual disqualification to hold a public office in the two possible cases established by the bill.

[37] CONADEP, *Nunca más, Informe final de la Comisión Nacional sobre la Desaparición de Personas,* [Never Again, Report of the National Commission on the Disappearance of Persons] Editorial Eudeba, Buenos Aires, 1984. Report retrieved from: http://bit.ly/29mRHMZ

[38] *"El precio de la estupidez: cesantean e inhabilitan al médico forense que le deseó vía Facebook "un tiro en la nuca" a Estela de Carlotto"* [The price of stupidity: they dismiss and disable the forensic doctor who used Facebook to wish "a shot in the back of the neck" to Estela de Carlotto]. See http://bit.ly/2BHPNn1

[39] See judgment No. FCR 11844/2014 http://bit.ly/2FSrtNu: "Any information that is not transmitted through the modes that the system itself preserves to communicate in private or to restrict its diffusion to a certain group of users (defined friends or groups), should be considered public in the sense that it has been shared with everyone."

[40] Roo's comments on his Facebook page were related to the news about the appearance of Estela de Carlotto's grandson in 2014.

[41] See File No. 2537-D-2017 of the House of Representatives, retrieved from: http://bit.ly/2GU7SxM. Among the legal basis to modify the law on instigation of suicide and create the figure of instigation to self-harm, the author of the bill argues that "... In face of the arrival on social networks of the so-called challenges, games or video games that press users to carry out a series of risky actions, that in many cases have caused death, as it is the case of "The Blue Whale Challenge", "Pedro Responde", "Auditory Drugs" and similar, present us with the need of establishing new normative parameters in defense of the dignity of persons, of their psychophysical integrity and of life, especially when those involved are minors."

other type of tool and data, or hiding the identity of the author...".[42]

The three previous examples show the persistence of applying criminal law against other alternatives to deal with questionable expressions. They also demonstrate how laws and their terms in the Internet and new technologies are being interpreted.

The cases had impact on the public and, despite this, the need to review the constitutionality of the figures of incitement, *apología* or instigation, or their compliance with international laws on freedom of expression was not discussed at a social level. One of them even raises important distinctions between the media as a central element of the crime and to considerably increase the penalties, ignoring the international and regional recommendations on the matter. What all the crimes analyzed and those proposed by the bills have in common is that they are broad and ambiguous, which enables, in short, a very wide discretion in their use by judges and prosecutors.

3. The case of slander and insults: a lost cause

The process of decriminalization of 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], slander and insults began in 1993 with **Law No. 24,198**.[43] As stated in the introduction, the law set a fundamental precedent for freedom of expression in Argentina and Latin America, repealing article 244[44] of the Criminal Code that defined the legal concept of *desacato* in Argentina. Subsequently, and following the judgment of the Inter-American Court of Human Rights (IACHR) in the case **"Kimel v. Argentina"**[45] in 2008, the legislative modification of the crimes of slander and insults in Argentina was advanced. The Argentine Congress then enacted **Law No. 26,551**[46] that reformed the Criminal Code to exclude from the crime expressions of public interest, including those that harm the honor or reputation, and expressions that are not assertive. However, the rule was included in the Criminal Code and pecuniary sanc-

[42] File No. 2537-D-2017 of the House of Representatives. The bill states that *"Any person who instigates or induces self-harm, of any kind, another person, or helps them in their commission shall be punished with imprisonment of one month to one year. The penalty shall increase by three times the minimum and maximum in the following cases: 1) When the victim was less than eighteen (18) years of age. 2) When the means used are digital social networks, electronic communications, telecommunications, mobile telephones or any other data transmission technology, directly or covertly in messages, applications, games, video games or any other type of tool and data, or hiding the identity of the author. 3) When it is addressed to an unspecified person. 4) When the result involves more than one person."*

[43] Bertoni, Eduardo; Del Campo, Agustina; *Despenalización de la expresión: la experiencia argentina,* [Decriminalization of expression: the Argentine experience] in Bertoni, Eduardo; Del Campo, Agustina, Miño Buitrón, María Dolores; *Criminalización de la expresión en América Latina,* [Criminalization of expression in Latin America] La Ley y la Palabra, Fundamedios, Quito, Ecuador, June 2012, p. 130.

[44] This article established: "Any person who provokes a duel, threatens, injures or in any way offends a public official in their dignity or decorum, due to the exercise of their functions or at the time of carrying them out shall be punished with imprisonment of fifteen days to six months. The prison sentence will be from one month to one year if the victim is the president of the Nation, a member of Congress, a provincial governor, a national or provincial minister, a member of the provincial legislatures or a judge."

[45] IACHR. *Kimel v. Argentina.* Merits, Reparations, and Costs. Judgment. Date: May 2, 2008. Series C No. 177, par. 45.

[46] Law Modifying the Criminal Code (Argentina). Law No. 26 551. Date of publication in the Official Registry: November 27, 2009, Article 2.

tions were established in the Argentine Civil Code with respect to other types of expressions.[47]

Slander and insults are still penalized and there is no discriminated regime of civil liability for these crimes within our system.[48] Two reports of CELE of 2012 and 2013 respectively evaluated the application of criminal law and its impact on the litigation of both criminal and civil cases, giving an account of some persistent problems. In the analysis of criminal law, the study concludes that "The data of the lower and federal courts show that, despite the disincentive achieved by the reform, the offenses continue to be filed as criminal complaints. And, more specifically, public officials continue to use the legal concept despite the amending law."[49] In addition, the report on the repercussion of the Kimel law in the civil jurisdiction concluded that "there continue to be cases in which these charges are used as means of intimidation or for silencing the press and critics."[50]

The adoption of the Kimel law in 2009 put an end to the debate that had been taking place in Argentina around the criminalization of expression despite not having managed to eliminate the crimes of slander and insults, and the issue has not been readdressed to date. Nor have there been any parallel changes in the criminal reform promoted by the movement of decriminalization, including the revision of judgments in civil cases for these offenses, with a special need for the proportionality of the compensations. This last issue was addressed by the Inter-American Court in the Fontevecchia case, rejecting the argument. Since then, the Committee for the Reform of the Civil Code in Argentina abandoned that agenda and does not seem to have resumed it since (2011).[51]

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[47] Civil Code of Argentina: **Art. 1071 bis.** *Anyone who arbitrarily interferes in the lives of others, publishing portraits, spreading correspondence, mortifying others in their customs or feelings, or disturbing in any way their privacy, and the act is not a criminal offense, shall be forced to cease such actions, if they have not already done so, and to pay a compensation that the judge will set equitably, according to the circumstances; in addition, the judge may, at the request of the aggrieved party, order the publication of the sentence in a journal or newspaper, if this measure was appropriate for adequate reparation.*

Currently, article 1071 bis was replaced by article 1770 of the new Civil and Commercial Code of the Argentine Nation issued in 2014: **Art. 1770. -** *Protection of privacy. Any person who arbitrarily intrudes on the life of others and publishes images, disseminates correspondence, mortifies others in their customs or feelings, or disturbs their privacy in any way, must be forced to cease such actions, if they have not already done so, and to pay a compensation that the judge must set, according to the circumstances. In addition, at the request of the aggrieved party, the publication of the judgment may be ordered in a journal or newspaper, if this measure is appropriate for adequate reparation.*

[48] Recently, and on the occasion of World Press Freedom Day (May 3), a bill was presented to modify the Civil and Commercial Code (file No. 2935-D-2017, retrieved from: http://bit.ly/2E6JM5f) *"... to limit those expressions that are liable to be considered as arbitrary interference with private life, so that freedom of expression is not impaired."* The proposed reform seeks to incorporate the requirement of real malice to the payment of compensation for insults in cases of public officials and individuals who have voluntarily become involved in matters of public interest, moving forward in the proposed direction previously raised during the decriminalization process. However, the initiative does not seem to have aroused any interest or debate in this matter that suggests its treatment or continuing the discussion.

[49] Del Campo, Agustina and Bertoni, Eduardo, CELE, *Calumnias e Injurias: A dos años de la Reforma del Código Penal* [Slander and Insults: Two years after the Reform of the Criminal Code], September 2012, p. 38. Retrieved from http://bit.ly/2BJPbxl

[50] Del Campo, Agustina, *La situación en el fuero civil después de la Ley 26.551* [The situation in the civil jurisdiction after Law 26,551], p. 36 Retrieved from http://bit.ly/1SJa3lQ.

[51] In 2014, the Civil Code of the Argentine Nation was replaced by the new Civil and Commercial Code, which replaced Article 1071 bis by 1770, according to which *"Any person who arbitrarily intrudes on the life of others and publishes images, disseminates correspondence, mortifies others in their customs or feelings, or disturbs their privacy in any way, must be forced to cease such actions, if they have not already done so, and to pay a compensation that the judge must set, according to the circumstances. In addition, at the request of the aggrieved party, the publication of the judgment may be ordered in a journal or newspaper, if this measure is appropriate for adequate reparation." Furthermore, article 1771 refers to the "slanderous action" and states that "The damages caused by a slanderous accusation only correspond to intent or gross negligence. The complainant or plaintiff is liable for damages resulting from the falsehood of the complaint or the criminal accusation if it is proven that the complainant or plaintiff had no justifiable reasons to believe that the defendant was involved."*

4. Legitimate objectives, vague description of the crime. The protection of minors

Law No. 26,388[52] includes and modifies various rules of the Argentine Criminal Code to add the so-called "computer crimes", whose regulation is of fundamental relevance for freedom of expression. The law adds articles penalizing, among other crimes, child pornography through the Internet or other electronic means; the violation, use and diversion of electronic communications; the interception or capture of electronic communications or telecommunications; the publication of an electronic communication; the disclosure of information recorded in a bank of personal data and computer fraud and computer damage or sabotage.

Law No. 26,904[53] states that "Any person who, through electronic communications, telecommunications or any other data transmission technology, contacts a minor, with the purpose of committing any crime against the minor's sexual integrity shall be punished by imprisonment of six (6) months to four (4) years." While the purpose of the law was to protect minors by creating the crime of grooming, the rule was criticized for various problems regarding the requirements of legality and proportionality. In the first place, grooming is only considered as such when the contact happens on the Internet. How is this behavior different from that of the person who contacts a minor in the park or at the exit of a school? In addition, some groups considered that the crime was inaccurate in that it uses the verb "contact" and that disagrees with the requirement of proportionality of penalties, as the law provides a penalty similar to that of consummated crimes against sexual integrity.[54] When punishing preparatory acts, the penalty should be reduced.[55] As mentioned above, the reform package did not provide an analysis from the perspective of freedom of expression, which would have enabled at least a debate on the possible inhibiting effects of the circulation of content that these laws may have in the future. Currently some discussions are taking place to reform these articles, but they depend on the alleged need to increase penalties and not on the very definition of the typified action.

III. The regulation of the Internet and its impact on freedom of expression

In addition to the laws affecting freedom of expression online and offline, during recent years the number of initiatives to regulate various aspects of the Internet has grown exponentially. This growth is related to increased rates of Internet access in the region and in Argentina in particular, the prevalence of Internet and the rapid development of technologies of knowledge and information. A large number of bills introduced in Congress in recent years regulate - directly or indirectly - freedom of expression in the Internet.[56] There is a surprising change that seems to have come around in how the Internet is perceived from the first laws on the subject to date: from being considered a democratizing tool, it became in many cases a growing threat. The bills on non-consensual dissemi-

[52] See Law 26,388 (2008): http://bit.ly/2EmPX4b

[53] See Law 26,904 (2013): http://bit.ly/2nMpOS6

[54] Centro de Estudios en Libertad de Expresión y Acceso a la Información (CELE), *El delito de "grooming" en la legislación penal actual y proyectada en Argentina* [The crime of "grooming" in current and future criminal legislation in Argentina], March 2016, p. 11.

[55] Garibaldi, Gustavo E. L., *Aspectos dogmáticos del grooming legislado en Argentina*, [Dogmatic aspects of grooming legislated in Argentina] SAIJ Sistema Jurídico de Legislación Jurídica [Legislation Legal System]: NV11208, May 8, 2015, p. 36. Retrieved from: http://bit.ly/2vpfR3A

[56] Out of a total of 169 bills that affect freedom of expression in some way since 2012, 62 projects regulate the Internet. That is 36.7% of the total of the bills.

nation of private images, discriminatory acts or grooming are in this line.

The first laws incorporated into the legislation of Argentina regarding the Internet were encouraging for freedom of expression and access to information. **Law No. 26,032**[57] from 2005 provides that "The search, reception and dissemination of information and ideas of all kinds, through the Internet service are considered within the constitutional guarantee that protects freedom of expression." This law emphasizes that the right to freedom of expression must also be protected in the Internet, as the Special Rapporteur for Freedom of Expression of the OAS had already established.[58]

In 2014, net neutrality was legally enshrined[59] in **Law No. 27,078**[60] (Argentine Digital Law), which declared "... of public interest the development of Information and Communication Technologies, Telecommunications and their associated resources, establishing and guaranteeing the complete neutrality of the networks." Although the original project did not contain the term, it managed to be incorporated without its own definition and without further debate. The law expressly excludes content regulation, but by guaranteeing the neutrality of the network it protects and encourages the possibility of all people to access all types of content and expressions by determining that all content must move at the same speed through the network.[61] In addition, the neutrality of the network refers to the non-discrimination of contents, the guarantee of non-blocking and the freedom to use devices.[62]

Between 2014 and 2017 other bills were also presented[63] aimed at strengthening the principle of net neutrality, in order to ensure access to the Internet to all people without distinction. Among them is a bill that aims to replicate the Civil Framework of Internet in Brazil,[64] presented in 2014 in the House of Representatives.

At the same time, from 2006 to date, the regulatory framework of the liability of intermediaries is under discussion at the legislative level, which is critical due to its impact on the exercise of the right to freedom of expression on the Internet.[6566] The debate gained momentum in 2012, when a bill that had been presented was criticized severely by civil society organizations who were working on Internet policies. The same author presented a new bill that contemplated the criticisms made. In 2016, a joint bill was completed that got a preliminary approval in the

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[57] See Law 26,032 (2005): http://bit.ly/293NHhT

[58] Joint Declaration on Freedom of Expression and the Internet (2011). Retrieved from: http://bit.ly/1eX83sn; OAS, Report "Freedom of Expression and the Internet," Special Rapporteur for Freedom of Expression, 2013. Retrieved from: http://bit.ly/1WHr6cD; OAS, Report "standards for a free, open and inclusive Internet," Office of the Special Rapporteur for Freedom of Expression, 2016.

[59] According to the Dynamic Coalition on Network Neutrality, net neutrality is "the principle according to which Internet traffic must be treated with equality, without discrimination, restriction or interference regardless of its sender, recipient, type or content," so that the freedom of choice of Internet users is not restricted by favoring or discouraging the transmission of Internet traffic associated with certain content, services, applications or devices." The Spanish version of the document is available here: http://bit.ly/2BZM6F1

[60] See Law No. 27,078 (2014): http://bit.ly/2fDLTfS

[61] Cortés Castillo, Carlos; *La neutralidad de la red: la tensión entre la no discriminación y la gestión,* [Net neutrality: the tension between non-discrimination and management], in "Internet y Derechos Humanos: aportes para la discusión en América Latina" [Internet and Human Rights: contributions for discussion in Latin America], Centro de Estudios en Libertad de Expresión y Acceso a la Información (CELE), Buenos Aires, February 2014, p. 19.

[62] Ibid. p. 32.

[63] See, for example Files No. 8601-D-2014 and 3142-D-2014 of the House of Representatives of Argentina. Retrieved from: http://bit.ly/2EM8nJI; http://bit.ly/2FRb3ot

[64] See file No. 3142-D-2014. Retrieved from: http://bit.ly/2FRb3ot

[65] See, for example, http://bit.ly/2nMsX4o

[66] It should be noted that of the total of 169 bills that affect freedom of expression presented since 2012, 35 regulate the responsibility of intermediaries, which reflects the lack of consensus among legislators when presenting projects on the subject.

Senate and was being considered in the House of Representatives.[67]

Civil society organizations, representatives of the academic and the private sectors were given prominent parts in the discussion of the different bills to date. Nonetheless, it is striking that the bill was not turned over to the Freedom of Expression Committee by the House of Representatives.

The entire itinerary of the bills on the liability of intermediaries coincides with the time of the debate of the case of María Belén Rodríguez before the courts, which adds to the various cases of models, artists and football players who have sued search engines requesting the suspension or blocking of links between their name or image and pages that are defamatory or of sexual content.[68] In 2014, the Supreme Court of Justice of the Nation[69] concluded that search engines do not have objective responsibility for the contents of third-parties that appear in their indexes. They are only liable when there is a reliable notification that generates the obligation to remove content and the breach is verified or when they interfere in the contents they index or host. The ruling was confirmed and then extended and applied to the right to publicity or personality rights and thumbnails in the judgment of the Supreme Court of Justice in the 2017 Gimbutas case[70].

Even as the Internet is recognized as a democratizing tool for freedom of expression and with the express recognition of the validity of the right to freedom of expression in the Internet and net neutrality, since 2008 there have been a series of laws and bills that would suggest a change in how the Internet is perceived by legislators and society in general. In the long list of projects that account for this trend, we can mention the bills against discriminatory acts that we mentioned above in the section of criminalization, the bills on non-consensual pornography, the bills related to harassment, including the new 2017 bill mentioned before and the projects that extend the penalties for cyber-bullying or for grooming. These join the bills that regulate the right to be forgotten, whether it is proposed within the framework of the personal data protection law or within the framework of the intermediaries' liability law.

A good example of this position is the 2016 bill[71] that proposes the creation of a **Department of protection of Digital Content in Social Media.**[72] The mission of this office is to protect**:**

> *the rights of natural persons and legal entities against acts, actions and expressions that cause serious damage to their constitutional rights, through any type of social networks, whether digital, fixed or mobile, in particular the Internet and any other existing data transmission digital platform or to be created in the future*[73]

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[67] Although some previous bills presented different solutions, the joint project approved is in line with what was stipulated by the different rapporteurs of freedom of expression in their joint declaration on freedom of expression and the Internet in 2011 (See point 2 of the joint statement at: http://bit.ly/1eX83sn), as the Manila Principles on Liability for Intermediaries (https://www.manilaprinciples.org/es), agreed by global civil society organizations.

[68] *"Presentan proyecto de ley para regular a proveedores de servicios de internet"* [Presentation of a bill to regulate Internet service providers]. See http://bit.ly/2E8jvPF

[69] See the complete judgment of the Supreme Court of Justice of the Nation of October 28, 2014 at: http://bit.ly/1UGGjrD. See also http://bit.ly/2FR4Ngw

[70] Supreme Court of Justice, "Gimbutas, Carolina Valeria v. Google Inc. on damages," September 12, 2017. Judgment retrieved from: http://bit.ly/2lj65da

[71] See file No. 8542-D-2016 of the House of Representatives of the Nation. Retrieved from: http://bit.ly/2E56Wsp

[72] There is a 2012 precedent that also aimed to create an observatory of social networks, emails and text messages. See File No. 1892-D-2012: http://bit.ly/2E5u1qY

[73] See *supra* note 71.

The bill enables network monitoring and grants power to the Department of protection of Digital Content in Social Media to "demand the immediate solution of behaviors that are offensive, aggressive or contrary to human dignity on social networks."[74] In addition, this Department could order by administrative decision to block sites and / or users that incite or disseminate offensive publications[75].

The bill received harsh criticism. The vagueness and scope of concepts such as "offensive", "aggressive" or "contrary to human dignity" or "offensive publication" are against the specificity requirement to be met by restrictions on freedom of expression. They could result in interpretations contrary to this right and enable censorship and the consequence of blocking a site and / or user is disproportionate. Furthermore, the mere existence of such monitoring violates the users' right to privacy and could generate new levels of self-censorship, especially in those who express perspectives which are contrary to the majority, ethnic or racial minorities, or vulnerable people.

In this context, two other bills are currently under discussion: the bill to reform the Personal Data Protection Law and the intellectual property law. In both cases, the main objective is to adapt the texts to the technological advances of recent years. These modifications are necessary. However, the proposed reforms of these two bills seem to add new restrictions to freedom of expression, adopting possibly questionable positions.

Argentina has a **Personal Data Protection Law** of 2000 with the purpose of

> *….. the integral protection of personal data stored in files, registers, data banks, or other technical means of data processing, whether public or private, destined to produce reports, to guarantee the right to honor and privacy of individuals, as well as access to the information registered about them, in accordance with the provisions of section 43, third paragraph of the National Constitution*

The law defines personal information as "information of any kind referring to natural persons or legal entities determined or that can be determined." Taking into account its origins and the regulation of the matter at a regional level, the law appeared, in general terms, as a legitimate, necessary and proportionate regulation. Notwithstanding this, and in light of debates such as the right to be forgotten, arguments arose about the definition of "personal data" because of its size or its applicability to Internet search engines.

Given the significant technological advances since 2000, the law became outdated in different aspects and there is currently a preliminary draft of a bill to amend it. Some of these aspects were included in this preliminary draft developed by the Executive Branch, which has not yet been presented in the Congress. The issue of the right to be forgotten also was subject to various specific bills that were they to advance in the legislative process would complement this law.

Finally, in terms of **intellectual property**[76] the amendments to the laws presented in 1997, 1998 and 2003 extended the protection of authors' rights. For example, the protection was extended up to seventy years after the author's death and intellectual property rights were granted to collaborators in a cinematographic work. In 2017, the national government reopened the debate on this law and presented a document with the purpose of deciding if its reform is necessary and what the changes should be. Even when they agree on the need for a modification and update of the current law,[77] some civil society organizations stated that the document presented by the *Direc-*

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[74] *Ibid*.

[75] See *supra* note 67.

[76] Law 11,723, retrieved from: http://bit.ly/2E5u1Y0

[77] See contributions from the *Asociación por los Derechos Civiles* [Association for Civil Rights] (ADC for its Spanish acronym): http://bit.ly/2BIB7UR

*ción Nacional de Derechos de Autor [*National Directorate of Copyright] has a punitive orientation,[78] which could be alarming for the circulation of expression.

IV. Conclusions

Argentine legislation made important steps towards a full protection of freedom of expression. The process of decriminalization of *desacato* and slander and insults set a crucial milestone for the legislation of other issues. The recognition of the validity of the right to freedom of expression in the Internet also was a meaningful moment, considering that it dates from 2005 and that the UN resolutions in this issue came later. The national judicial precedents, which contributed significantly to this process, also forwarded the recognition of the right to freedom of expression in the Internet and the identification of a regulatory framework for the liability of intermediaries, among others.

Despite this progress, the trend towards criminalization of freedom of expression persists in Argentina and it was particularly heightened by the regulations surrounding the Internet. While there have not been prison sentences for insult and slander, these crimes are still partially in force and others have emerged that affect disproportionately and unnecessarily the free circulation of information. Furthermore, some criminal offenses such as incitement to violence, whose constitutional or international adequacy were not seriously discussed, are still in force. Moreover, more bills have been presented to increase the number of this type of laws.

On the other hand, it is particularly alarming that many bills that are emerging within the framework of Internet regulating do not respect the principles of specificity, necessity and proportionality to be met by restrictions on freedom of expression. Additionally, Congress is too permeable to changing social moods or international trends. Many of the bills, and even the laws, that have been surveyed in Argentina respond to short-term issues and "urgencies", to the detriment of a legal strategy in this matter. Of the 169 bills that affect the circulation of information, 101 were presented by a single representative or senator, which shows a certain lack of consensus or of prior reflection from a bigger group. Moreover, it is striking the different parts played by the civil society, academia and the press associations when creating an agenda for the promotion of the right to freedom of expression in the country.

The analysis of the legislation of the last 20 years makes it possible to see clearly that, according to its nature and its multidimensional character, the legislation on freedom of expression is disseminated throughout multiple and diverse laws and bills. This makes it difficult for many of the bills to be turned over to the committees of freedom of expression in the Senate or the House of Representatives, and the texts are not analyzed from this perspective at any point in the process, despite the implications (in some cases, serious) that these bills could have regarding freedom of expression. This is relevant at the moment of the debate on the effective, suitable and adequate means to limit unwanted behaviors or to balance them with the right to freedom of expression.

V. Recommendations

78 See document prepared by Fundación Vía Libre: http://bit.ly/2FTkdAK

Based on the analysis and conclusions presented, we identified some concrete and relevant recommendations for the future development of the legislation on freedom of expression in Argentina:

Any bill which covers Internet regulation should have a preliminary analysis on the risks or limitations that it poses to the right to freedom of expression and access to information. One of the means to ensure this debate is that the bills go through the freedom of expression committee of one of the chambers of Congress and that experts in freedom of expression are summoned to analyze the bill from this perspective;

Given the risks that the criminalization of behaviors could imply for the circulation of expression, criminal law committees should summon experts in the field of freedom of expression when projects affect or could affect this right. The purpose is to thoroughly discuss the requirements of legality, necessity and proportionality of the proposed criminal offenses, and the results of that debate should be made public.

Criminal law should be considered the last resort. In opting for criminal regulation, the definition of the act when it is against the law must be clear and specific, thus avoiding arbitrariness or discretion in its application or interpretation and the over-criminalization of legitimate expressions that undermine public debate.

Civil society, academia and associations of journalists and the press should work together to develop a concrete agenda for the future in order to strengthen the protections achieved and move forward towards full respect and guarantee of freedom of expression in Argentina. Coordination and joint work (for example, under the new possible reform of the Criminal Code) can be critical to achieving consensus on measures to protect and promote freedom of expression and avoid regressive legislation in this area.