INTERNET PLATFORMS AND
FREEDOM OF EXPRESSION

Social networks, digital platforms and freedom of expression: obligations of non-state actors

Damián M. Loreti,
diciembre 2021

FES COMUNICACIÓN

OBSERVACOM
Observatorio Latinoamericano
de Regulación de Medios y Convergencia

FRIEDRICH EBERT STIFTUNG

Damián M. Loreti

Law graduate from the University of Buenos Aires (UBA); Ph.D. in Information Sciences from the Complutense University of Madrid; Tenure Professor of Right to Freedom of Expression and Information of the Faculty of Social Sciences at UBA. •

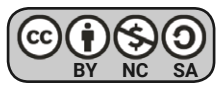
It is a publication
from OBSERVACOM
Observatorio Latinoamericano
de Regulación,
Medios y Convergencia

Gral. César Díaz 1239/101
Montevideo, Uruguay
www.observacom.org

With the support of the Media and Communication Program for Latin America and the Caribbean of the Friedrich-Ebert-Stiftung.

FES Comunicación
Calle 71 # 11-90
Bogotá D.C, Colombia
https://fescomunica.fes.de

Design: Valentina Galacio



INTRODUCTION

It is almost unanimously agreed at the present time to maintain that the general conditions of public debate have deteriorated. Various initiatives in the context of the COVID-19 pandemic have highlighted the concern about issues such as the "Infodemic",[1] reflections on the impact on the economy of surveillance and the practices of profiling carried out by platforms during electoral processes.[2-3-4] This includes considerations of content moderation as one of the problems to which local legislation has not identified a solution and, adjacently, the proposal for regional regulations. At the same time, the declarations of the Rapporteurs for Freedom of Expression of the different regional systems for the protection of human rights have underlined such concerns since 2017.

These new issues are reflected in an already old setting that, in a few words, can be expressed as the struggle between editorial freedom and the right to information. That is, how the universal right to receive information, opinions and ideas is satisfied as a human right that must be protected; versus the right to freedom to broadcast. And it is not (just) a problem of adjudicating liability for non-compliance.

But let's take a few steps back. There are those who take sides for a position referred to as autonomist, that protects the individual right to freedom of expression as a means of personal fulfilment, associated

1 World Health Organization, 2020, Situation Report 13, issued on 2 of February 2020. Available at: www.who.int/docs/default-source/coronaviruse/situation-reports/20200202-sitrep-13-ncov-v3.pdf?sfvrsn=195f4010_6

2 European Parliamentary Research Service (EPRS), 2021, Briefing EU Legislation in Progress - Digital services act. Available at: https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/689357/EPRS_BRI(2021)689357_EN.pdf

3 Office of the Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights (SRFE), 2019, Guide to guarantee freedom of expression against deliberate misinformation in electoral contexts. Available at: publications.parliament.uk/pa/cm201719/cmselect/cmcumeds/363/363.pdf

4 House of Commons, 2018, Disinformation and 'fake news': Interim Report. Fifth Report of Session 2017–19, of the 29 of July 2018. Available at: publications.parliament.uk/pa/cm201719/cmselect/cmcumeds/363/363.pdf

with the classic doctrine of freedom of expression. [5] From this perspective, the State fulfils its obligations by refraining from censorship. These are known as negative state obligations. In the best of cases, and with respect to broadcasting, it is a matter of ordering transmissions by allocating frequencies according to free market rules. In this scheme of things, concentration, eventually, is a problem of free competition and not of pluralism in favour of public opinion. And in general there is no obligation on the part of non-state actors. Otherwise, there would be no prevalence in the search for personal fulfilment as a purpose of protecting freedom of expression.

Other positions appear in different sources, but mostly they can be noted with the same type of conclusion: non-state actors do not have obligations to satisfy the right to information of the people nor do they have obligations with respect to pluralism.

These lines of thought have been opposed by other views, and with different outcomes depending on the regional and/or local regulations. One of these is based on another paradigm resulting from the implementation of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the European Convention on Human Rights, the American Convention on Human Rights or the African Charter on Human and Peoples' Rights. Although multiple differences exist between these instruments, they are united by the concept of the right to freedom of expression as a universal right, which guarantees the freedom to receive, disseminate and investigate information, opinions and ideas.

Another possible view is based on what was known as the "doctrine of equity", which opened up the possibility of debate within the media. If before the freedom of expression of a speaker on a street corner was protected, today such street corners are no longer the basis of support from which such expression is constructed. Consequently, authors such as Owen Fiss[6] began to point out that the media represents, at the same time, street corners and speakers. But then the problem becomes more complex.

5 Loreti, Damián and Lozano, Luis, 2014, The right to communicate. Debates around freedom of expression in contemporary societies, Siglo XXI editores, Buenos Aires.

6 Fiss, Owen, 1997, Libertad de Expresión y estructura social (Freedom of Expression and social structure). Ed. Coyoacán, Mexico; and Fiss, Owen, 1999, La ironía de la libertad de expresión (The irony of free speech), Gedisa, Mexico.

However, it is no longer a matter of the State having to guarantee freedom of speech on the street corner, but rather how it guarantees the multiplication of these corners - the media outlets known to exist- and that more people have access to them. Other obligations then appear and not only regarding the abstention from censorship.

The different perspectives are based on philosophical, political and legislative issues and the regional or local scope of regulations. And what occurs is that non-state actors appear that are positioned beyond the jurisdictions of the nation-states. In relation to these particularities, this article aims to contribute to the understanding of the complexity of the problem, in the conviction that many of the current debates seem to dispense with an already existing state of the art, to which these pages attempt to contribute.

Of course, these discussions have been settled over the last three decades through regulations and judicial decisions. However, and with respect to what interests us in this article, we will address the issue of obligations towards peoples' freedom of expression with respect to the operators of the communications media. •

THE NORTH AMERICAN TRADITION WITH RESPECT TO THE CHALLENGE OF COMMUNICATIONS PLATFORMS

A relevant precedent in the debate: managerial censorship

More than 20 years ago, when no one had yet dreamed of platforms, Owen Fiss offered us a startling warning: it is not only the States that censor. In Fiss's words, "Traditionally, one of the greatest of such threats has been "state censorship"--attempts by governmental actors to limit, directly or indirectly, the information and variety of opinions available to the public. The threat of state censorship is always present, and it has received a fair amount of attention from the Supreme Court, past and present. Moreover, he also warned about what he refers to as "managerial censorship", a form of censorship in which the censor is not the State, but "an actor within the television industry itself". In this regard, he warns that "whereas the Court's decisions concerning state censorship have extended a well-established tradition, its engagement with managerial censorship has represented a striking new development in the law and posed challenges of a wholly different order."[7]

The same author also indicates that "The managerial censorship model is predicated on a more nuanced understanding of the relationship between the media and the state than that hypothesized by the state censorship model and, more generally, by classical liberal theory. Rather than assuming that there is always and everywhere an antagonism between the state and the media, the notion of managerial censorship recognizes that in fact, every media organization receives significant benefits from the state. Some such

7 Fiss, O., 1999, "The Censorship of Television", Faculty Scholarship Series. Paper 1318, p. 4-5.

benefits can be found in the laws of contract, property, and corporations, and in the provision of services such as police and fire protection that are generally available to all citizens. In addition, the government has played a leading role in the development of television technology, and it continues to provide distinct benefits and privileges to the various entities within the television industry."[8]

When Fiss wrote the above, only 20 percent of the US population had access to the Internet.

The obligations of non-state actors under the First Amendment

Given that the main operators of electronic communications media have their headquarters somewhere in the United States, and that the companies that carry out this activity state that it is this country's legislation or jurisdiction that must be used to resolve problems with their contractors, users or intervening parties in what we refer to as "terms and conditions" or "terms of service", it is necessary to take into account why things seem to be the way they are. And the same applies to news channels that are transmitted via satellite.

For various decades, U.S. case law has indicated that, in terms of freedom of expression, and for an individual to make a claim, it is necessary to demonstrate that there is an action of the State involved. This is sometimes not even enough in terms of the property of the concerned media platform.

In Manhattan Community Access Corp. et al v. Halleck et al,[9] the United States Supreme Court reversed a ruling favourable to the plaintiff establishing, or rather, ratifying, that non-state actors are not bound by First Amendment obligations. In a divided vote of five to four – which was not necessarily due to the composition of the current Court - the issue was resolved in a matter related to the obligations of a private party that operated the transmission signal for New York City.

8 Op. cit., p. 10.

9 Manhattan Community Access Corp, *et al.* v. Halleck *et al*, 587, U.S., Docket No. 17-1702 (2019).

The case, in synthetic terms, was linked to the fact that New York state law requires cable operators to reserve channels on their systems for public access. These channels are used by the cable operator unless the local government decides to operate the channels itself or designates a private entity to operate said channels.

New York City had designated a private, non-profit body, the Manhattan Neighborhood Network (MNN), to operate public access channels on the Time Warner cable system in Manhattan. In this context, DeeDee Halleck and Jesús Papoleto Meléndez produced a film criticizing MNN to be broadcast on MNN's public access channels. The cable TV service provider broadcast the film, but subsequently suspended Halleck and Meléndez from all company services and facilities.

The producers then filed a lawsuit, alleging that MNN had violated their right to free speech under the First Amendment by restricting their access to public access channels due to the content of their film. The District Court rejected the lawsuit on the grounds that MNN is not a state actor and therefore is not subject to the First Amendment limitations of its editorial discretion. The Second Circuit Court of Appeals partly reversed the decision, holding that MNN is a state actor subject to First Amendment restrictions.

It was then that the Supreme Court intervened, which upheld that MNN is not a state actor subject to the First Amendment and that this clause only prohibits governmental restriction, and not private restriction of expression. "The doctrine [stated the Court itself] of this court distinguishes the government from individuals and private entities."[10] At the same time, this highlights that a private entity can be classified as a state actor when it exercises powers traditionally reserved for the State. And that this is limited because very few functions fall into said category.

In this specific case (and this is particularly to do with how to approach the problem of censorship on platforms according to U.S. law) the relevant function —i.e. the exploitation of public access channels in a cable network system— has not been traditionally and exclusively performed by the government. And with greater emphasis it should also be noted what was said by the U.S. Court in

10 Op. cit., p. 4.

terms of: “Providing some kind of forum for speech is not an activity that only governmental entities have traditionally performed. Therefore, a private entity who provides a forum for speech is not transformed by that fact alone into a state actor.”[11]

The role of platforms

For its part, the United States Supreme Court dealt for the first time with the constitutionality of the legal limitations on access to social networks in the case of “Packingham v. North Carolina”,[12] where it declared that a state law that prohibits access to those networks to people convicted of sexual crimes is contrary to the First Amendment.

The key element here is that this amendment continues to be interpreted as a barrier against attacks against freedom of expression on the part of public powers. This previous rule determines that the State should not take sides by repressing expressions, no matter how hateful, unless there is a direct and immediate incitement to violence.

In the words of the U.S. Supreme Court: “A fundamental principle of the First Amendment is that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more. The Court has sought to protect the right to speak in this spatial context. A basic rule, for example, is that a street or a park is a quintessential forum for the exercise of First Amendment rights. See Ward v. Rock Against Racism, 491 U.S. 781, 796, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989). Even in the modern era, these places are still essential venues for public gatherings to celebrate some views, to protest others, or simply to learn and inquire. While in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace — the “vast democratic forums of the Internet” in general, Reno v. American Civil Liberties Union, 521 U.S. 844, 868, 117 S.Ct. 2329, 138 L.Ed.2d

11 Op. cit., p. 12.

12 Packingham v. North Carolina, 137 S. Ct. 1730, 1737 (2017).

874" (1997), and social media in particular. Seven in ten American adults use at least one Internet social networking service."[13]

For our state of the art, the Supreme Court affirms that in this interconnected world the answer is clear. It is no longer difficult to identify the most important place (i.e. territory) for the exchange of ideas, information and opinions. However, non-state actors do not necessarily have, under the rules of the jurisdiction through which 90 percent of the communications of the American continent pass, obligations consistent with their power.

This approach can serve to reflect on the various cases that involved former President Donald Trump. One of these included blocking journalists on his Twitter account and others were the decision of three TV networks to interrupt his speeches in the last weeks of his mandate. In this context, it was debated whether the platforms could not only "flag" his declarations (that is, warn about the veracity of their content in the pertinent publications), but also directly cancel his accounts.

Thus, and even assuming that Trump's tweets did not represent the danger that Twitter seemed to attribute to them, the "sanction" imposed by the platform is framed in the clauses of a private contract, not in the rule approved by a public authority, and that seems to preclude the application of the First Amendment. •

13 Op. cit., p. 1.

ARE THE NETWORKS THE SQUARES AND THE STREET CORNERS?

As previously stated, it is still not settled that squares and street corners are in the hands of private parties who cannot be required to respect human rights as well as state actors. In the case of "Davison vs. Randall",[14] the United States Court of Appeals for the Fourth Circuit confirmed the decision of the District Court when considering that the Facebook page of the president of the Loudoun County School Board (LCSB), Phyllis Randall, represented a public forum. Randall had deleted the comments Davison posted on her Facebook page as chair of the School Board, which included allegations of corruption and conflicts of interest at the LCSB. She subsequently banned Davison from the Facebook page for 12 hours.

The Court found that, by discriminating the point of view on her Facebook page, the chair of the School Board had violated the plaintiff's free speech rights under the First Amendment. Furthermore, she found that Randall had no right to block the plaintiff or any citizen from commenting on her Facebook page.

The ruling held that there was a credible threat to free speech because Randall testified that she believed she could bar Davison and others from the board chair's Facebook page "based on their opinions without affecting the First Amendment", as if it were a personal page.

To underscore the potentially chilling effect of Randall's actions, the Court cited City of Lakewood v. Plain Dealer Pub. Co., 486 U.S. 750, 757 (1988), which found that "The mere existence of the licensor's unfettered discretion, coupled with the power of prior restraint, intimidates parties into censoring their own speech, even if the discretion and power are never actually abused."[15]

14 Davison v. Randall, No. 17-2002 (4th Cir. 2019).

15 Op. cit., p. 16-17.

The Court of Appeal then assessed whether the District Court was wrong to conclude that Randall had acted legally in banning Davison. The ruling claimed that Randall created and administered the Facebook page "as a tool of government."[16] In this sense, it stated that it was designated as the official government page. All contact information related to the page refers to Randall's county office and her official email address. In addition to contact information, the page includes link columns for navigating the site and a large central column that functions as a news feed for city information and citizen posts. Based on related case law (Rossignol v. Voorhaar, 316 F.3d 516, 523 (4th Cir. 2003); Martínez v. Colon, 54 F.3d 980, 986 (1st Cir. 1995)), the Court found that there was sufficient evidence that the page was used for official purposes and that the restriction was made in an official capacity with the intention of suppressing criticism of the School Board on a matter of important public concern.

The Court of Appeals also reviewed the legal question of whether the Chair's Facebook page constituted a public forum under traditional First Amendment law. The Court began by noting that it had long been established that "government entities are 'strictly limited' in their ability to regulate private expression in public forums."[17] There are two categories of public forums recognized by the Supreme Court, the traditional public forums or the limited ones. A traditional public forum encompasses parks, sidewalks, and streets, that is, government property that has been presented by the government as a public forum.

A limited public forum is a forum offered by the government but limited to specific groups, as long as the limitation is point-of-view neutral and reasonable. An example would be a school classroom open only to school groups for meetings.

The Court observed that, although there was no established case law on whether and how a Facebook or other social media page can constitute a public forum, Randall's page of the board chair presented the characteristics of a public forum, in the terms defined by the Supreme Court in the aforementioned Packingham v. North Carolina.

16 Op. cit., p. 19.

17 Op. cit., p. 22.

In this respect, the Court of Appeals rejected Randall's argument that the Facebook page was a private website and, therefore, constituted private property. Citing Facebook's terms of service, according to which users are the owners of the content they produce, the Court observed that it could be argued that content produced by public officials in the exercise of their official functions could constitute government property, which it stated following Supreme Court and lower court case law that held that tangible and intangible property can constitute a public forum if the government or its representatives maintain substantial control over the property, as Randall did in this case.

On this point, Davison had argued that Loudon County's selection of Facebook as a public forum could violate the First Amendment, as Facebook's terms of service allow private users to restrict access to their posts on the virtual public forum site. Judge Barbara Milano-Keenan, in a concurring opinion, said the Supreme Court needed to consider the scope of the First Amendment in the context of social media and study the scope of the authority of public officials like Randall to open a public forum on such networks of their own free will.

Milano-Keenan pointed out that there is no precedent that establishes that all or some of the individual public officials acting in their capacity as legislators qualify as a unit of government or a governmental entity for the purpose of creating a public forum, even taking into account the precedence of the Knight First Amendment Inst. at Columbia Univ. v. Trump,[18] raising the question of the President's authority to direct government affairs and establish official policy unilaterally through the use of his Twitter account.

Milano-Keenan further notes that the lines of responsibility for restricting speech are blurred between the private companies that own the social media platforms and the government that hosts the virtual public forums. She poses a scenario in which hate speech posted on a government-owned page could not be restricted by the government, but could be restricted by the platform for violating community guidelines, thereby circumventing the protections of the First Amendment. This significant paradox was exacerbated by the attitudes of former President Donald Trump.

18 Knight First Amendment Inst. at Columbia Univ. v. Trump, No. 1:17-cv-5205 (S.D.N.Y.), No. 18-1691 (2d Cir.), No. 20-197 (Supreme Court).

At the time of writing this article, the aforementioned case brought by the Knight First Amendment Institute against the former president has been closed by the U.S. Supreme Court for being considered moot (by virtue of the termination of Trump's term in office). The Supreme Court had to decide on the decision of a court of appeals of the second circuit of the United States that upheld the ruling of a lower court according to which, President Trump incurred in the unconstitutional discrimination of views after blocking users of his Twitter account for posting comments he didn't like.

The aforementioned Court of Appeals found that there was "overwhelming evidence"[19] that the account was used for official purposes and that the blockade was a government restriction, rejecting the assertion of the then president who maintained that his Twitter account was personal.

The Court found that the interactive features of Twitter, such as replying, retweeting, and "liking", were forms of expressive conduct that allowed individuals to communicate not just with the president, but with thousands of other people as well. It further established that the Twitter account was a public forum as it was controlled by the government, and the interactive features of Twitter made it accessible to the public without limitations.

The Court of Appeals rejected the government's argument that the activity taking place on the account was government speech, holding that Trump's individual tweets were such speech, but that messages posted by users were private speech. Therefore, the Court found that President Trump violated the First Amendment when he blocked the plaintiffs for posting messages critical of him and his policies.

The promoters of the action sued the then president for violating their First Amendment rights after he blocked access to his Twitter account for users having published critical comments. The individual plaintiffs were Rebecca Buckwalter, Philip Cohen, Holly Figueroa, Eugene Gu, Brandon Neely, Joseph Papp and Nicholas Pappas. Columbia's Knight Institute of the First Amendment was not blocked, but did join the case claiming the right to hear the opinions of blocked individual plaintiffs. The defendants included,

19 Op. cit., p. 51.

in addition to Trump, Daniel Scavino, the White House's director of Social Media and assistant to the president, and Sarah Huckabee Sanders, a former White House press secretary.

Trump set up his Twitter account in 2009, when he was a private citizen, but it was then registered in his name in his official capacity as 45th President of the United States. At the time of the lawsuit, the account had more than 50 million followers, generating thousands of responses to Trump's tweets and hundreds of thousands of follow-up messages in comment threads. Both parties agreed that the account was used as a channel to communicate and interact with the public with regard to his administration.

The individual plaintiffs were blocked in May and June 2017 after posting critical messages. From that moment onwards they could not see the president's tweets, nor respond directly to said tweets, nor use the @realDonaldTrump website to view the comment threads associated with the president's tweets.

On 23 May 2018, the United States District Court for the Southern District of New York ruled that the account's interactive space is a public forum and that exclusion from that space was unconstitutional discrimination from this point of view. Following the District Court ruling, the defendants unblocked the individual plaintiffs' accounts, but the voluntary cessation of alleged illegal activity did not nullify the lawsuit.

The defendants appealed and the case was declared moot by eight votes with a lone intervention by Judge Clarence Thomas, which has been seen as a nod for social media and platforms to be regulated by Congress. This dissenting vote is based on different aspects, but fundamentally maintains that, just as telecommunications companies do not have the right to exclude users from their services, neither does (in this case) Twitter.

"If part of the problem is private, concentrated control over online content and platforms available to the public, then part of the solution may be found in doctrines that limit the right of a private company to exclude," said the judge in this case.

According to the judge, there are at least two legal doctrines that limit the possibility that companies exclude. On the one hand, Thomas

claims that lawmakers could use the scale and public nature of platforms like Twitter to justify new moderation rules, similar to the way the Telecommunications Act prevents phone companies from blocking specific people from the telephone service. Otherwise, lawmakers could craft a statute similar to the public establishments' clause of the Civil Rights Act, which prevents hotels and restaurants from banning the service on the basis of race or creed.

For freedom of expression experts, Thomas' declaration suggests that the private content moderation policies of platforms violate the First Amendment and regulating them so that they do not exclude people from public debate would be a way to guarantee rights. This once more brings to the centre of this debate the issue of whether individuals are bound by First Amendment obligations. •

THE RETURN TO HUMAN RIGHTS PRINCIPLES

In this context, it is essential to incorporate into the discussion the progress made in the area of international human rights law.

In particular, reference should be made to the Guiding Principles on Business and Human Rights,[20] which are a useful starting point for identifying private responsibilities for information and communications. Likewise, there are other projects that have formulated proposals for human rights principles applicable to the sector.

The Guiding Principles on Business and Human Rights. The Ruggie Report

In 2005, the United Nations Human Rights Council made a request to the United Nations Secretary-General to appoint a Special Representative (SRSG) to investigate a number of important business and human rights issues. The mandate of the SRSG arose, a year earlier, from the inability of the Council to adopt a document known as the United Nations Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights. The person designated as SRSG - Prof. John Ruggie from Harvard University - conducted extensive research on this issue. In April 2008, the proposed framework was published to impose human rights responsibilities on private companies. The Special Representative attached the Guiding Principles to his final report. Following the "Ruggie Report", the Human Rights Council endorsed the Guiding Principles in Resolution 17/4 of 16 June 2011, entitled "Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework".

20 A/HRC/14/27, United Nations, 2011, General Assembly, Human Rights Council, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie: Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework.

These Guiding Principles are based on the recognition of the role of companies as organs of society that perform specialized functions and that must comply with all applicable laws in the contexts in which they operate and respect human rights. The Principles call for the adoption of internal policies for protection, evaluation and reparation, including the hiring of experts by the companies. They also require companies to be able to explain to society when violations have occurred, as well as the steps they take to deal with the consequences.

In the same context, in May 2016, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye, stated as follows "The Guiding Principles provide a framework for the consideration of private business responsibilities in the information and communications technology sector worldwide, independent of State obligations or implementation of those obligations. For instance, the Guiding Principles assert a global responsibility for businesses to avoid causing or contributing to adverse human rights impacts through their own activities, and to address such impacts when they occur and seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts (principle 13)."[21]

Likewise, the Special Rapporteur affirms that in the digital environment, "human rights impacts may arise in internal decisions on how to respond to government requests to restrict content or access customer information, the adoption of terms of service, design and engineering choices that implicate security and privacy, and decisions to provide or terminate services in a particular market."

He also points out that the Guiding Principles establish that businesses should be prepared to communicate how they address their human rights impacts externally, particularly when concerns are raised by or on behalf of affected stakeholders. In this respect, the United Nations High Commissioner for Human Rights has also urged information and communications companies to disclose risks and government demands transparently (see A/HRC/27/37).

21 A/HRC/32/38, Informe del Relator Especial sobre la promoción y protección del derecho a la libertad de opinión y de expresión, 11 de mayo de 2016.

In the conclusions of his report, the Special Rapporteur indicates as follows:

> "Among the most important steps that private actors should take is the development and implementation of transparent human rights assessment procedures. They should develop and implement policies that take into account their potential impact on human rights."

In greater detail, the report notes that "that private entities ensure the greatest possible transparency in their policies, standards and actions that implicate the freedom of expression and other fundamental rights. Human rights assessments should be subject to transparent review, in terms of their methodologies, their interpretation of legal obligations and the weight that such assessments have on business decisions. Transparency is important across the board, including in the context of content regulation, and should include the reporting of government requests for takedowns".

The Special Rapporteur concludes his report by stating that "Beyond adoption of policies, private entities should also integrate commitments to freedom of expression into internal policymaking, product engineering, business development, staff training and other relevant internal processes. The Special Rapporteur will aim to explore policies and the full range of implementation steps in a number of ways, including through company visits".

Specific recommendations on content moderation and the expulsion and withdrawal of business accounts

Together with the above, in April 2018, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye, proposed in his Report to the Human Rights Council a series of recommendations related to the moderation of contents and the expulsion and withdrawal of company accounts.[22]

22 A/HRC/38/35, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, 6 April 2018.

For this purpose, the Special Rapporteur indicates different guidelines to take into account, among which is, and firstly, transparency in notifications. A common complaint is that users who post reported content, or people who report abuse, sometimes do not receive any notification of the decision to remove it or other actions taken. For this, the report indicates that "Transparency and notifications go hand in hand: robust operational-level transparency that improves user awareness of the platform's approaches to content removals alleviates the pressure on notifications in individual cases, while weaker overall transparency increases the likelihood that users will be unable to understand individual removals in the absence of notifications tailored to specific cases."

Secondly, the Special Rapporteur refers to the appeals and reparation processes. In more detail, the platforms support the appeal of a series of measures, such as the deletion of a profile, messages, photographs or videos. However, the report notes that "Even with appeal, however, the remedies available to users appear limited or untimely to the point of non-existence and, in any event, opaque to most users and even civil society experts. It may be, for instance, that reinstatement of content would be an insufficient response if removal resulted in specific harm — such as reputational, physical, moral or financial — to the person posting. Similarly, account suspensions or content removals during public protest or debate could have significant impact on political rights and yet lack any company remedy."

At the same time, a group of advocates and academics presented the Santa Clara Principles on Transparency and Accountability in Content Moderation,[23] which recommend a set of minimum standards for transparency and meaningful appeals.

Application of the tripartite test on Internet companies

In the area of international protection of human rights, a procedure was developed decades ago to analyse whether limitations on freedom of expression are legitimate or not. This is known as the "tripartite test", as it incorporates three conditions that must be fully

23 Available at: santaclaraprinciples.org/

met to affirm that a restriction on freedom of expression does not constitute a violation of human rights. In short, this test indicates that the principle of legality must be evaluated –i.e. any limitation to freedom of expression must have been previously, expressly, exhaustively and clearly foreseen in a law, in the formal and material sense; the principle of legitimacy or a legitimate purpose-. That is to say, any limitation must be aimed at achieving compelling objectives, the protection of the rights of others, the protection of national security, public order, public health or the public moral-; and, finally, the principle of necessity and proportionality - the limitation must be necessary in a democratic society to achieve the imperative ends sought, and which are strictly proportionate to the end pursued, and suitable to achieve the imperative objective that it intends to achieve, requiring the demonstration that there is an imperative or absolute need to introduce limitations.[24]

For its part, the Inter-American Court of Human Rights (hereinafter, "IACHR") concluded in its Opinion Consultation 5/85 that the mandatory membership of journalists is incompatible with Article 13 of the IACHR, insofar as it restricts full access to the media as a vehicle to exercise freedom of expression. In this context, the IACHR restated that Article 13.3 of the American Convention on Human Rights "not only deals with indirect governmental restrictions, but also expressly prohibits" private ... controls "that produce the same result. This provision should be read together with Article 1.1 of the Convention, where the States Parties' undertake to respect the rights and freedoms recognized (in the Convention) ... and to guarantee their free and full exercise to all persons who are subject to their jurisdiction...'. For this reason, the violation of the Convention in this area may be the product not only of a State arbitrarily imposing restrictions aimed at indirectly preventing 'the communication and circulation of ideas and opinions', but also that it has not ensured that the violation does not result from the 'particular ... controls' mentioned in paragraph 3 of article 13."

Following the same line of ideas, the IACHR restated that "the previous analysis of Article 13 shows the very high value that the Convention places on freedom of expression. The comparison made

24 Inter-American Court of Human Rights (2017), International standards of freedom of expression: Basic guide for justice operators in Latin America. Available at: www.corteidh.or.cr/tablas/r37048.pdf

between Article 13 and the relevant provisions of the European Convention (Article 10) and the Pact (Article 19) clearly shows that the guarantees of freedom of expression contained in the American Convention were designed to be the most generous and to reduce to a minimum the restrictions on the free circulation of ideas."

For its part, the aforementioned 2018 report of the United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression indicated that "Companies should incorporate directly into their terms of service and "community standards" relevant principles of human rights law that ensure content-related actions will be guided by the same standards of legality, necessity and legitimacy that bind State regulation of expression."[25]

Bearing this in mind, the report details the legal requirement that "Company rules routinely lack the clarity and specificity that would enable users to predict with reasonable certainty what content places them on the wrong side of the line." For this purpose, the report recommends that companies "supplement their efforts to explain their rules in more detail with aggregate data illustrating trends in rule enforcement, and examples of actual cases or extensive, detailed hypotheticals that illustrate the nuances of interpretation and application of specific rules".

Regarding the standard of necessity and proportionality, the Special Rapporteur points out that "companies should not only describe contentious and context-specific rules in more detail. They should also disclose data and examples that provide insight into the factors they assess in determining a violation, its severity and the action taken in response. (...) Granular data on actions taken will also establish a basis to evaluate the extent to which companies are narrowly tailoring restrictions. The circumstances under which they apply less intrusive restrictions (such as warnings, age restrictions or demonetization) should be explained."

Finally, regarding international standards of non-discrimination, the report indicates that genuine guarantees of non-discrimination would require companies to "transcend formalistic approaches

25 A/HRC/38/35, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, 6 April 2018, par. 45. Own use of italics.

hat treat all protected characteristics as equally vulnerable to abuse, harassment and other forms of censorship." Instead, the Special Rapporteur states that "when companies develop or modify policies or products, they should actively seek and take into account the concerns of communities historically at risk of censorship and discrimination."

The same point is underlined in the Joint Declaration of the Special Rapporteurs on Freedom of Expression of 2017: Joint Declaration on Freedom of Expression and "Fake News", Disinformation and Propaganda.[26] Here, the Joint Declaration states that "Where intermediaries intend to take action to restrict third party content (such as deletion or moderation) which goes beyond legal requirements, they should adopt clear, predetermined policies governing those actions. Those policies should be based on objectively justifiable criteria rather than ideological or political goals and should, where possible, be adopted after consultation with their users."

In this respect, the Rapporteurs indicate that "Intermediaries should take effective measures to ensure that their users can both easily access and understand any policies and practices, (...) including detailed information about how they are enforced, where relevant by making available clear, concise and easy to understand summaries of or explanatory guides to those policies and practices." Similarly, "intermediaries should respect minimum due process guarantees including by notifying users promptly when content which they created, uploaded or host may be subject to a content action and giving the user an opportunity to contest that action, subject only to legal or reasonable practical constraints, by scrutinising claims under such policies carefully before taking action and by applying measures consistently." Note that it does not directly and immediately authorise the deletion of content, but that the notification is timely and calls for a meticulous control prior to the measure.

To sum up, and from the reports indicated, it can be concluded that the rules of application of the tripartite test essential for the adoption of restrictions on the exercise of freedom of expression are applicable to non-state actors, in particular to internet companies, both in the terms of article 13.2 of the IACHR, as well as article 19 of the International Covenant on Civil and Political Rights. •

26 Aailable at: www.oas.org/es/cidh/expresion/showarticle.asp?artID=1056&lID=2

CONCLUSIONS

As can be noted throughout this article, it is clear that human rights are involved in the activity of social media platforms. To mention those that are most outstanding: privacy, protection of personal data, freedom of expression, access to information, honor, equality and non-discrimination.

However, there are those who hold opposite positions, just as there are theorists who hold these positions presenting them in terms of aspects of novelty, when in reality they refer to the oldest principles of international human rights law.

The inconsistencies between these principles and the terms of service imposed by the contracts and acceptance obligations by the platforms are part of the significant points on which it is necessary to shed light, although it seems quite clear that no laws are required to proclaim that non-state actors have obligations in this regard.

What this situation does offer is that sometimes it will be necessary for States to adopt measures that are necessary and compatible with international and inter-American standards of freedom of expression and the other human rights concerned, aimed at these enormous non-state actors that cannot avoid complying in practice with their obligations of prevention, reparation and non-repetition, which will lead to guarantees being made of people's rights. •

BIBLIOGRAPHY

A/HRC/14/27, United Nations, 2011, General Assembly, Human Rights Council, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie: Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework.

A/HRC/32/38, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, 11 May 2016.

A/HRC/38/35, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, 6 April 2018.

Inter-American Court of Human Rights (2017), International standards of freedom of expression: Basic guide for justice operators in Latin America. Available at: www.corteidh.or.cr/tablas/r37048.pdf

Joint Declaration of the Special Rapporteurs on Freedom of Expression of 2017: Joint Declaration on Freedom of Expression and "Fake News", Disinformation and Propaganda. Available at: www.oas.org/es/cidh/expresion/showarticle.asp?artID=1056&lID=2

European Parliamentary Research Service (EPRS), 2021, Briefing EU Legislation in Progress - Digital services act. Disponible en: www.europarl.europa.eu/RegData/etudes/BRIE/2021/689357/EPRS_BRI(2021)689357_EN.pdf

Fiss, Owen, 1997, Libertad de Expresión y estructura social. Ed. Coyoacán, Mexico.

Fiss, Owen, 1999, La ironía de la libertad de expresión, Gedisa, Mexico.

Fiss, O., 1999, "The Censorship of Television", Faculty Scholarship Series. Paper 1318.

House of Commons, 2018, Disinformation and 'fake news': Interim Report. Fifth Report of Session 2017–19, del 29 de julio de 2018. Disponible en publications.parliament.uk/pa/cm201719/cmselect/cmcumeds/363/363.pdf

Loreti, Damián and Lozano, Luis, 2014, El derecho a comunicar. Debates en torno a la libertad de expresión en las sociedades contemporáneas (The right to communicate. Debates around freedom of expression in contemporary societies), Siglo XXI editores, Buenos Aires.

World Health Organisation, 2020, Situation Report 13, 2 Feburary 2020. Available at: www.who.int/docs/default-source/coronaviruse/situation-reports/20200202-sitrep-13-ncov-v3.pdf?sfvrsn=195f4010_6

Santa Clara Principles on Transparency and Accountability in Content Moderation (2018). Available at: santaclaraprinciples.org/

Office of the Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights (SRFE), (2019) Guide to guarantee freedom of expression against deliberate misinformation in electoral contexts. Available at:publications.parliament.uk/pa/cm201719/cmselect/cmcumeds/363/363.pdf

Case Law

City of Lakewood v. Plain Dealer Pub. Co., 486 U.S. 750, 757 (1988).

Davison v. Randall, No. 17-2002 (4th Cir. 2019).

Knight First Amendment Inst. at Columbia Univ. v. Trump, No. 1:17-cv-5205 (S.D.N.Y.), No. 18-1691 (2d Cir.), No. 20-197 (Supreme Court).

Manhattan Community Access Corp, et al. v. Halleck et al, 587, U.S., Docket No. 17-1702 (2019).

Packingham v. North Carolina, 137 S. Ct. 1730, 1737 (2017).

OBSERVACOM