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FREEDOM OF EXPRESSION IN LATIN AMERICA: THE STRUGGLE CONTINUES IN THE DIGITAL ENVIRONMENT

J CARLOS LARA AND GISELA PÉREZ
DE ACHA, DERECHOS DIGITALES

INTRODUCTION

The human rights system is meant not only to recognise certain minimum conditions for life in society with dignity, equality and liberty, but also to provide the powerless with the tools to achieve and re-establish such conditions when affected or threatened by states and governments and by private actors and corporations. This last point is key in the globalised capitalist economy, where power structures are not strictly confined to states. Private companies and multinationals have an important role to play: they too hold power, and thus they must also be held responsible for it.

This is true also in the digital environment, where power tensions between companies and individuals are more acute. Individuals depend on technologies owned or controlled by corporations to be able to access the internet, and internet companies usually have powers over the activities of populations well beyond the borders of nation states. They are enablers and amplifiers of our expressions, but paradoxically, we have few tools to hold them accountable when they actively or passively act as a tool for censorship.

As we will see, new tools to oppress dissent replicate, in the digital environment, practices thought to be left in history. First, we will define and map censorship cases in Latin America, either through blocking and filtering, or through full internet shutdowns. Most of these acts involve administrative orders with no judicial oversight. Still, in the region, the fact that such actions could be supervised by courts does not necessarily guarantee the proportionality and protection of human rights. Second, we will see how existing copyright mechanisms have been used by Latin American presidents and authorities to take down criticism from social network platforms. In both cases, we can see an exaggeration of 'private' prerogatives to censor and impede a free and open internet.

In this scenario, three questions linger: what is the responsibility for corporations that collaborate in such acts of censorship? How could they be sanctioned? And what is the role of civil society?

CUTTING THE CORD: SHUTDOWNS IN LATIN AMERICA

One way to stop speech from disseminating is to stop the channels through which expression transmits. This can be done in several ways, including full internet shutdowns and content filtering. These kinds of measures have been adopted by governments in Latin America, sometimes with the cooperation of private intermediaries. They usually [lack transparency](#) and are rarely ordered by a court. But within the region, even those cases ordered by courts have posed serious threats to the freedom of expression and the free flow of information.

The strongest measure is to cut internet communications altogether. An [internet shutdown](#) is defined as an intentional disruption of internet or electronic communications, making them unusable, for a specific population or within a location, often to exert control over the flow of information. Such actions interfere with the entire range of rights exercised through the internet, such as the freedom of speech and access to information, but also the right to association and protest, especially if they are adopted during elections or politically sensitive times. According to the [2011 Joint Declaration on Freedom of Expression and the Internet](#) issued by the special rapporteurs of several international organisations, this can never be justified, even if the reasons are argued in terms of public order or national security.

The blocking and filtering of information are also used as technical means to restrict the free flow of information online. Technology is used to block access to certain websites, applications and protocols on the basis of their perceived connection to content deemed inappropriate or unlawful.¹ The difference between blocking and shutdowns is a matter of scale and degree, but for the purpose of this discussion we will refer to them as equal. The previously referenced Joint Declaration states that:

“Content filtering systems which are imposed by a government or commercial service provider and which are not end-user controlled are a form of prior censorship and are not justifiable as a restriction on freedom of expression.”

Both technical measures have been applied in Latin America, in democratic contexts borne out of authoritarian pasts. An internet shutdown was seemingly adopted by the government of [Venezuela](#) on election day in 2013. The entire internet was shut off, preventing citizens from expressing their views and accessing information at a crucial time. After a hacking wave involving the Twitter accounts of the presidential candidate and then interim President Nicolás Maduro, the internet across the country was down for about 20 minutes according to users and “no more than three minutes” according to the authorities. The vice president stated that the internet had been blocked for a few minutes to avoid a

¹ Although there are specific differences between one and the other, for the purpose of this discussion we will treat them jointly.

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hacking attempt on the National Electoral Council site. According to him, the website was made inaccessible for users outside the country to prevent further distributed denial of service (DDoS) attacks after it had been under fire for more than a day.

The Venezuelan shutdown was carried out by CANTV, the state-owned internet service provider (ISP), leaving [over 90 per cent](#) of the population without broadband service at a crucial time in national politics. Even if limited in time and scope, the shutdown showed the capabilities of the state, an especially worrying matter if we take into consideration that in Venezuela, the physical infrastructure of internet access – the cables and wires that allow us to connect – are controlled directly by the central government. More recently, the Maduradas.com website, which is critical of the government, was reported as being [blocked](#) in several cities in Venezuela. It is hard to measure the extent to which similar practices continue to happen with other websites, and to distinguish these from challenges arising from technical failures.

In 2016, Ecuador Transparente revealed a similar case had happened in Ecuador. The [Associated Whistleblowing Press](#) and the Ecuadorian whistleblowing platform [Ecuador Transparente](#) published a Telefónica document that [confirmed](#) that Google and YouTube were inaccessible for several minutes in 2014 due to the Association of Internet Providers of Ecuador (AEPROVI) “[blocking access](#) to certain Internet websites by request of the National Government.” The act was performed in compliance with a government request, issued [allegedly](#) because someone hacked the official Twitter account of President Rafael Correa and posted personal emails from the country’s spy chief on a Google-hosted blog, along with a YouTube video. It seemed that the government’s reaction was to block both platforms for a period of time.

This case offers merely one example of the lack of transparency that surrounds these actions, even when they affect large parts of the population. Without the Ecuadorian whistleblowing platforms, we would have probably never come to know about such blockings.

The cases in Venezuela and Ecuador involved administrative authorities carrying out shutdowns or content filtering, with no oversight over the impact of those decisions on human rights, as would occur if judicial reviews were held. Nevertheless, the fact that such actions could be supervised by courts does not necessarily guarantee the proportionality and protection of human rights.

In the last couple of years, WhatsApp, the private messaging application for mobile phones owned by Facebook, was three times blocked entirely from use in Brazil. The first instance came in [December 2015](#), when a lower criminal court ordered internet service providers to deny connection to WhatsApp for 48 hours as a sanction for the company’s failure to comply with two judicial rulings to share information in a criminal case. An upper court revoked this resolution, but still WhatsApp was blocked for two entire days. Then, in [May 2016](#), for similar reasons, another court ordered the blocking of the service for 72 hours, along with the detention of Diego Dzodan, Facebook’s vice president for Latin America. Most recently, in [July 2016](#), WhatsApp was blocked again in all Brazilian territory because the company was not willing to surrender information to collaborate with another criminal investigation. This would have required the company to break their promise of end-to-end encryption. They were threatened with a daily fine of 50,000 reais (around US\$15,000) for not doing so.

The Brazilian case illustrates a challenge that keeps arising in terms of public policy, not only in Latin America, but around the globe: the need to educate public officials about technology issues. Likewise, the incident [highlighted](#) growing international tensions between technology companies' privacy concerns and national authorities' efforts to use social media to recover information on possible criminal activities. Yet the impact goes well beyond considerations over service, when we understand that communication channels, particularly those most widely used, are key tools for the exercise of rights in a democratic society.

From the examples offer above, we can conclude that the blocking of communications, apps and websites is not an uncommon phenomenon in Latin America. Given the political contexts in which these activities occur, the vast majority of situations impact negatively on the freedom of speech and access to information, among many other rights. But they are far from the only interferences with online expression.

CONTENT TAKEDOWNS: REMOVING CRITICISM FROM SIGHT

While blocking, filtering and shutdowns restrict access to all of the internet or certain platforms, the effect of content removals or 'takedowns' is that one or several pieces of expression, the 'content' itself, no longer exist online, because they are [removed](#) from the server where they are stored. Information disappears from sight, something that poses a very direct threat to the freedom of speech and access to information. Many different forms of content takedown exist, but they mostly rely on the law and questionable service agreements that classify certain critical speech as illegal or offensive, to the convenience of power structures.

In [Mexico](#), a particularly alarming case of content takedown affected 1dmx.org, a protest site. The site's name made reference to the day when Enrique Peña Nieto took the oath as president in December 2012. A series of [protests](#) erupted that day, with excessive police repression the response. Dozens of students and protesters were illegally [detained](#), and one demonstrator died days after being hit in the head by a projectile that came from the police.

The website was created to document acts of police brutality. One year later it was shut down. It turned out that GoDaddy, the site's hosting service, received a request from the US Department of Homeland Security to [suspend](#) the site. They told its owners that the site was taken down "as part of an ongoing law enforcement investigation." There was enough evidence that pointed to a Mexican government agency having made a request for a takedown to the US Embassy, which in turn notified GoDaddy. Once again, this is an example of governmental censorship carried out with the cooperation of a private internet company.

Copyright mechanisms are also being abused to censor political speech in the region. Specifically, there is the Digital Millennium Copyright Act (DMCA), a US copyright law that [establishes](#) that internet service providers are not responsible for copyright infringement by third parties on their platforms providing that they didn't know about the existence of the infringing material, and upon obtaining knowledge of it, act expeditiously to remove, or disable access to, the material. In other words, if platforms such as Google, YouTube, Twitter or Facebook know about material that

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infringes copyright on their platforms, and do not remove it, they become liable for the violation along with the person that posted it. This creates an incentive for intermediaries to monitor content that could possibly infringe copyright, and can also foster censorship of valid content for fear of being held responsible. Content is being removed from the internet because of alleged copyright violations, without any review or proper analysis of conflicting rights.

Because the US recognises foreign intellectual property rights through a number of international treaties, foreign individuals can [appeal](#) to the Silicon Valley-based internet platforms to remove material that infringes copyright. Though such moves have been widely used to remove content that could probably fall under fair use provisions in the USA, or which would otherwise still be covered as protected use in other jurisdictions, one of the biggest impacts on the freedom of expression is the use of the mechanism to take down political and critical content. The sitting presidents of Ecuador and Mexico have taken advantage of the US legislation to request removals of critical content, on the basis of copyright infringement.

In Ecuador, US copyright law is used as a means of control of the image and voice of the president for the purpose of restricting access to critical content. In December 2015 Fundamedios, a civil society organisation (CSO) that works for media freedom, received a copyright complaint that had the potential to close its entire website. According to the Committee to Protect Journalists, the complaint, filed on behalf of Ecuador's National Communications Secretariat (SECOM) by a company called Ares Rights, ordered Fundamedios to remove an image of President Rafael Correa from its website.

Since 2011, Ares Rights has filed [74](#) copyright infringement claims on behalf of clients in Ecuador. These include a complaint that resulted in the temporary removal of a video posted on [YouTube](#) called 'How the President Lies', and a complaint about a [documentary](#) critical of Correa by the director Santiago Villa. Ares Rights also used the DMCA against BuzzFeed in 2013 after it published a piece on leaked documents alleging that the country's intelligence agency had purchased surveillance equipment. Then, in March 2016, [eight tweets](#) from an internet policy newsletter, 'Digital Rights Latin America and the Caribbean' that mentioned Ecuador were removed for copyright infringement.

Similarly, in Mexico, the President's Office took down a [YouTube](#) video in which Enrique Peña Nieto mistook a city for a state. This is clearly not simply something to laugh about, but also a matter of public interest: if the smallest actions of a president cannot be subject to commentary, what kind of critical speech is available? And what can be expected when truly important information or criticism inevitably comes to light?

THE STRUGGLE OF CIVIL SOCIETY

Censorship by people in positions of power is a constant in history. On the internet this acquires new shapes and often new actors, but the negative effect on free and democratic societies is the same.

In this sense, and as a response, we have seen how the struggle to safeguard human rights online happens in several arenas: around the political rules on checks and balances and regarding the proper framework for interference with technologies; the technical rules to facilitate the empowering

characteristics of the internet while making each step of digital communication secure; and the practices of those with control over technologies and those who generate acts of expression.

Because struggles evolve and mutate, so the efforts of those in public interest advocacy must address the increasingly complex challenges of free expression and fundamental rights.

This is what happened in the examples above to highlight the actions and impacts of governments and companies. This is what happens daily, including in Latin America, where dozens of civil society groups gather evidence, generate analysis, create public awareness, file suits in court and advocate for change. And it happens locally, as well as in international conferences and venues, where the concept of multi-stakeholder partnership, debated as it is, requires at least a modicum of participation by civil society to assert its representation of the public interest.

The experience of the struggle for the freedom of expression and against its threats has proved particularly difficult when the presence of private companies is one of the driving factors behind those threats: whether as bodies compliant with governments, representatives of private interests above the public good, or vendors of technologies to enable surveillance of the population, companies have become a key player in the global human rights landscape, not unlike governments themselves.

As one may guess, that struggle is strongly connected with the challenge to overcome the power imbalances that make civil society participation needed in the first place. It is experienced not only in the form of blocks to participation or lacks of transparency from governments and companies alike, but also in the constant need for funding for the volume of work and expertise needed to match the complexity of topics and cases. There is also a challenge of bringing attention to the human rights implications of technology: because life also happens online, it is not enough to focus efforts on technology and its rules; there is also a need to examine all aspects of law that may impact on online communications, from infrastructure control to copyright, and from free trade agreements to rules on advertising. These are all, more deeply, struggles for equality and democracy, against often invisible forces that favour neither.

CONCLUSION

There is still work to be done when techniques such as blocking, filtering and taking down content occur. One of the main obstacles is the lack of transparency around these actions. There is also a need to clarify the role of private enterprises in such acts.

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Currently in Latin America, it seems as though there is not a clear framework for sanctioning private enterprises and intermediaries when they act, either by themselves or through governmental requests, to foster online censorship. The UN [Guiding Framework](#) and Principles to Protect, Respect and Remedy are an important starting point, but these have been criticised for providing corporations with the responsibility to respect human rights, but not a true obligation to do so. Indeed, it can be difficult to offer effective sanctions, particularly in weaker countries of Latin America where multinationals can hold [more real power](#) than governments.

In the digital environment, where power tensions between companies and individuals are more acute, we need to think creatively in order to be able to hold the powerful truly accountable. This requires never-ending work to defend and promote human rights, online and offline. But it also requires greater awareness raising about the rights at risk, and the opportunities for speech that exist and that can be under threat.

Censorship is not necessarily a tool of governments, as much as it is a tool of power. Censorship is not only about being silenced by another, but also about being scared into silence, or having one's voice placed outside the space where it must be listened to. CSOs have taken up the struggle, but it must be one that concerns us all. In Latin America, the struggle for free expression is as alive as ever.