



# Internet regulation and its impact on freedom of expression in Latin America

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## Introducción

There have been radical changes over the past two decades regarding expression and dissemination of information and ideas both in our region and in the world. In addition to obvious scientific and technological changes, the last twenty years have been particularly relevant in Latin America for the development and strengthening of democracy that characterized this period in most countries, accompanied by an increase in legislation regarding freedom of expression. Some things worth mentioning are the proliferation of laws on access to public information, 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 a majority of the countries of the region, and the strengthening of the doctrine of public interest as a decisive factor in the criminalization of slander and insults.

Since 2013, however, with the increasing penetration of the Internet, the mass use of social networks and the transfer (to a greater or lesser extent according to the country) of the public debate to the Internet arena, issues that at the regional level had been settled seem to return to the agenda. Bearing this thesis in mind, the Center for Studies on Freedom of Expression and Access to Information (CELE) proposed the creation of a Regional Legislative Observatory on Freedom of expression in order to clearly identify the status of legislation in America and verify as much as possible which trends seem to anticipate the future. This exercise suggests to systematize rules and create a repository of laws and bills that allow the unification of access to documents, facilitating the development of comparative studies and enabling the monitoring of regional trends.

This document describes the methodology of the Observatory and summarizes some of the main conclusions regionally.

### **1) About the universe being analyzed:**

Napoleon once claimed that there were so many laws that no one was safe from hanging. The phrase comes to mind when we look at the legislative map on freedom of expression in at least three of the four countries analyzed. This map includes different types of laws, including National Constitutions; criminal, civil, administrative and tax laws; legislative decrees and emergency decrees that together constitute the normative framework that, in these countries which favor civil law, the state “assumes” that citizens know and can guide them in their actions.

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<sup>1</sup> This article was written by Agustina Del Campo, director of the Center for Studies on Freedom of Expression and Access to Information (CELE) of the Universidad de Palermo for the Legislative Observatory of CELE.

The full document was translated by María Soledad Vázquez.

This study only included legislative initiatives, bearing in mind that one of the requirements for the legitimacy of restrictive measures of freedom of expression, in accordance with international rules, is compliance with the requirement of legality.

While not all rules in Argentina, Ecuador, Mexico and Peru limit expression (there are several that promote it), those which do restrict expression are often so broad that group together many different types of behaviors and iterations. In this true tangle of laws and rules, determining what is forbidden in order to act in an allowed manner can become a challenging task.

The Legislative Observatory identified and analyzed a total of 93 laws that were adopted in the four countries studied between 1997 and 2017. The goal was to identify the main laws that affect, either in a positive or in a negative way, the circulation of discourse, both *online* and *offline*. The rules were chosen by specialists in the field in each of their countries.<sup>2</sup> The selection of time frames responded to a great extent to the thesis used as a starting point, which was described in the introduction.

In addition, 283 bills submitted to the Legislative Branch (or within it) in the four countries between 2012 and 2017 were identified and analyzed, following similar selection criteria. The time frame established to analyze the bills responded to practical issues: on the one hand, the large number of bills introduced in 5 years; on the other, the fact that many of the discussions that affect the regulation of discourse and privacy on the Internet acquired relevance and strength only after 2012.

The analysis of the information was made following quantitative and qualitative criteria. Of course, quantitative analysis in this area has limitations: there are very considerable differences between the pace of parliamentary activity in each country, culture and legislative technique. Argentina, for example, has 169 bills on this matter in the period studied, 49 of which refer to the process of adopting the law on access to public information during 2016. However, on some points this analysis provides a glimpse into common concerns that transcend borders or moments for the treatment of certain issues. The qualitative analysis undoubtedly qualifies and complements the quantitative analysis and offers a context and possible explanations for the phenomena that are being shown.

## **2) International legal framework: Article 13 ACHR**

The framework used for analysis in this study is the one provided by the Inter-American Human Rights System. This normative framework groups together the vast majority of Latin American countries and includes both the rules established in the American Declaration of Human Rights and the American Convention on Human Rights (ACHR), its interpretation through jurisprudence and other documents of the Court and the Inter-American Commission on Human Rights.

Article 13 of the ACHR prescribes that everyone shall have the right to “seek, receive and disseminate” information and ideas of all kinds without prior censorship and subject only to subsequent liabilities. It also establishes the permissible limits to this right which of course is not absolute, namely: third party’s rights or reputation, national security, public order or public health or moral principles. Paragraph 3 prohibits indirect restrictions, 4 establishes the exception to prior censorship for the access of minors to public spectacles, and subsection 5 finally establishes unprotected expressions and limits them to *apología* [defense or praise of criminal acts] of racial, national or reli-

<sup>2</sup> Daniela Salazar and Daniel Caballero (Ecuador); Andres Calderón (Peru); and Juan Carlos Arjona (Mexico) the analysis corresponding to Argentina was made directly by CELE, coordinated by Maia Levy Daniel.

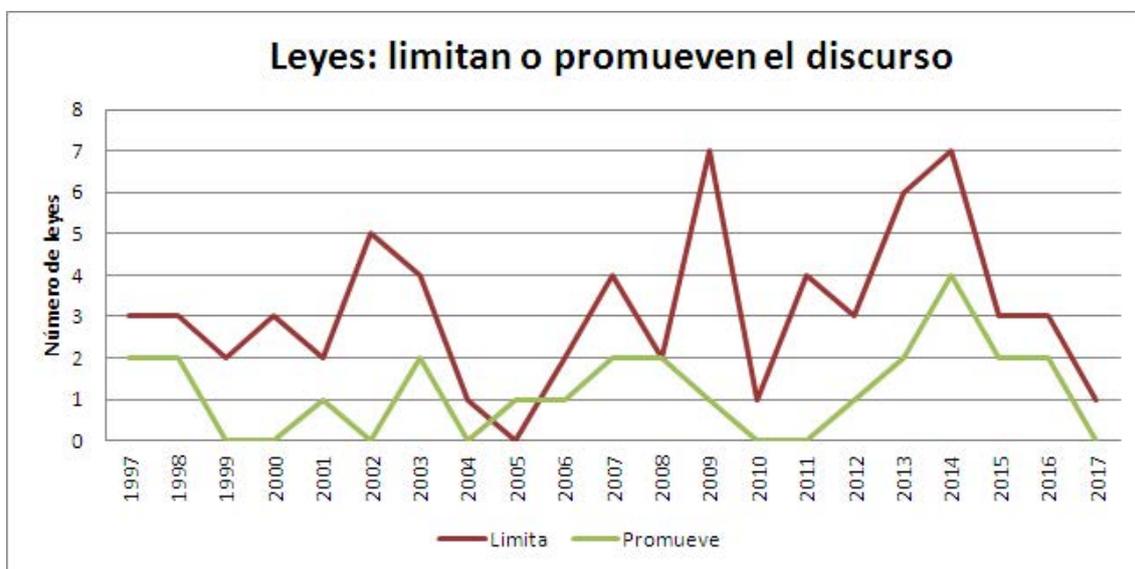
gious hatred, which also constitutes incitement to violence or similar action.<sup>3</sup>

Restrictions on freedom of expression must comply with a three-part test: legality; necessity and proportionality; and legitimate objective. The first establishes that the restrictions are determined by law with clarity and specificity; the second demands that the means are suitable and proportionate with respect to the ends pursued; the third, that the restrictions must respond to a legitimate objective among those explicitly mentioned in Article 13 of the Convention.

The member states of the American Convention are compelled under Article 1 of the ACHR to guarantee the exercise of the rights contemplated in the document. This obligation supposes abstaining from doing something (not violating rights) and positive obligations (or obligations of doing). In addition, Article 2 of the Convention forces states to adapt their legislation to the obligations assumed with the adoption of the Convention.

### 3) What can be learned from the state of the current regulation?

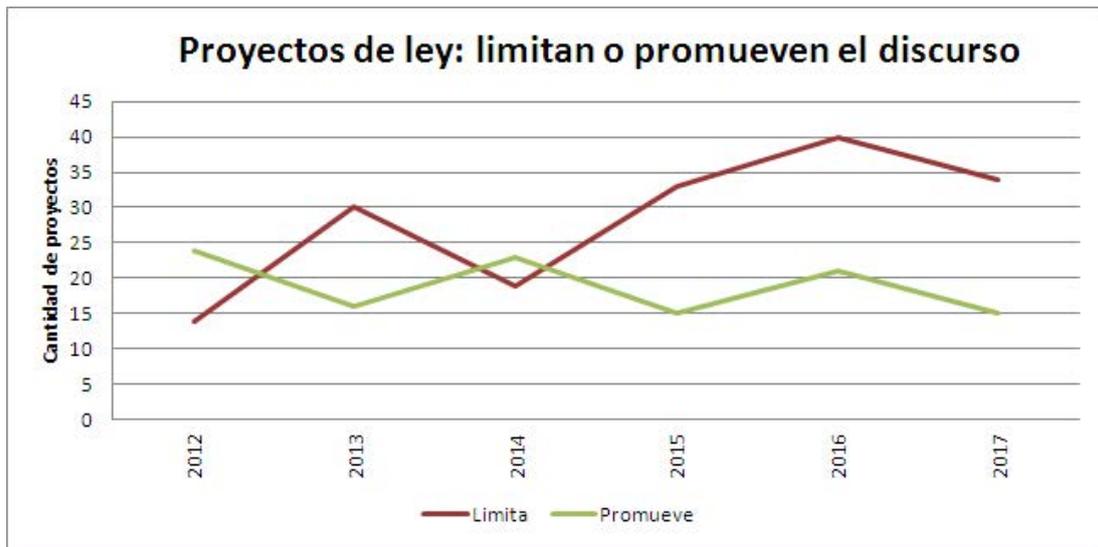
In general, the regional aggregate of all laws and bills shows an interesting outlook in terms of freedom of expression. In the four countries analyzed, this right is recognized in the Constitution, although with different nuances. Thus, in Ecuador, for example, the Constitution qualifies the right to freedom of expression and sets as conditions for such expression and information for them to be true and neutral.<sup>4</sup> Furthermore, in the four countries during the last two decades, insult was decriminalized and in many cases, as in Ecuador, the criminal offenses of libel and slander were also eliminated. In all four countries there has also been great parliamentary activity in terms of freedom of expression (both to promote it and to restrict it), sometimes resulting in multiple laws, others through collective legislation such as criminal codes, civil codes, or organic laws.



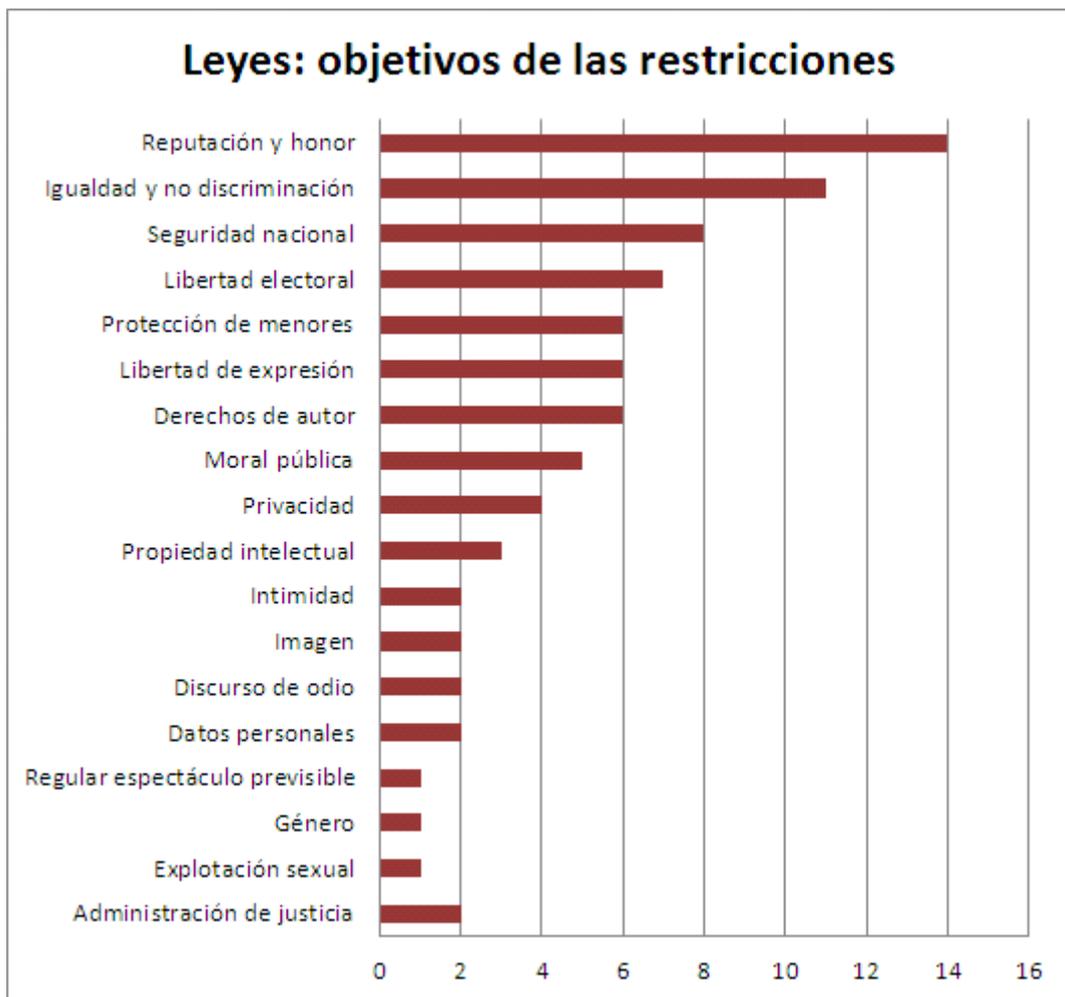
60 laws of the 93 surveyed limit the circulation of discourse; 17 promote it and 8 promote and limit (collective laws, for example, comprehensive reforms to the Criminal Code). Regarding bills, 170 limit and 114 promote freedom of expression.

<sup>3</sup> For a detailed analysis of each of these exceptions and their interpretation in the Inter-American System see: RELE, Inter-American Juridical Framework, 2009. Retrieved from: <https://bit.ly/1on89fG>.

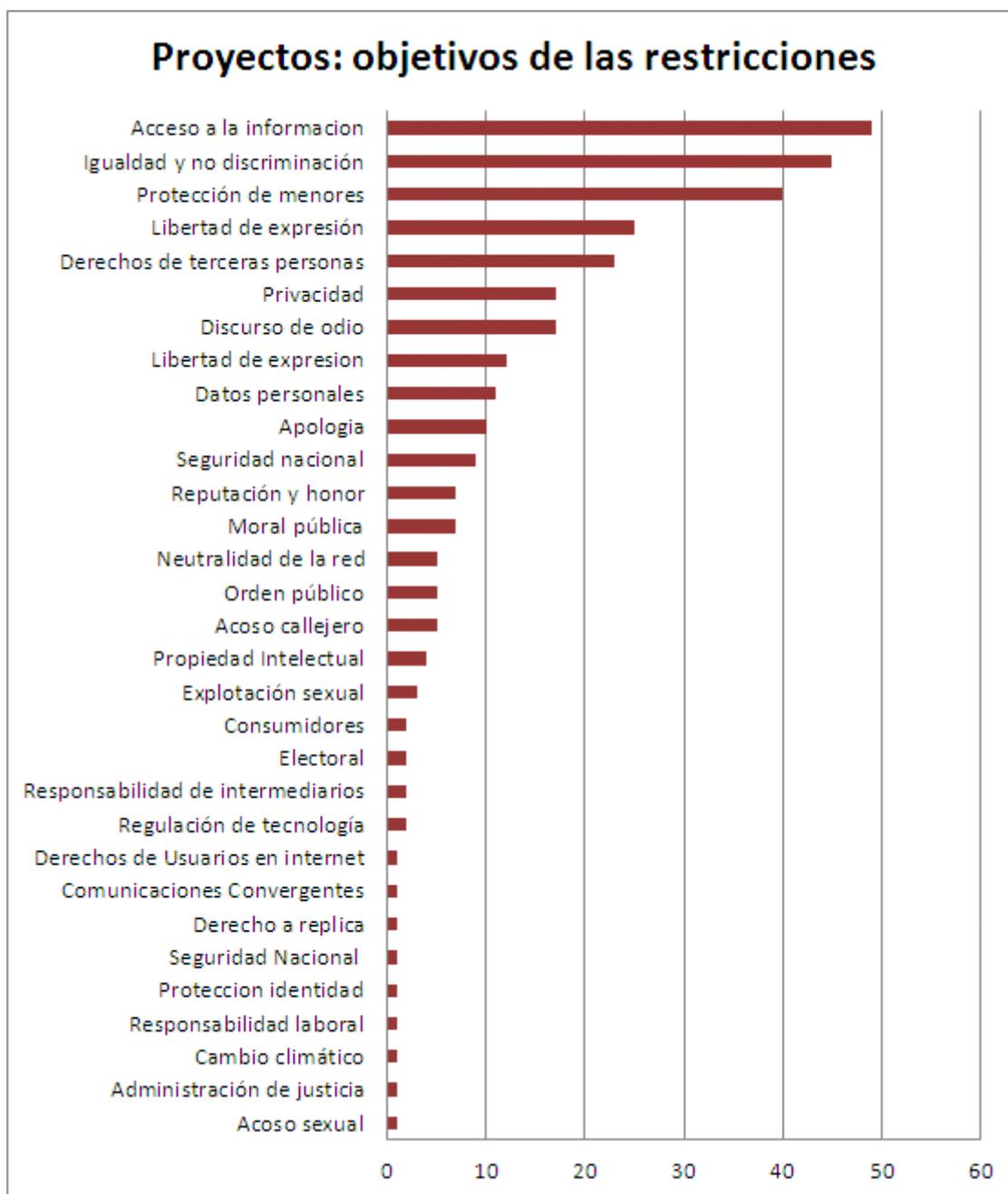
<sup>4</sup> See article by D. Salazar and D. Caballero.



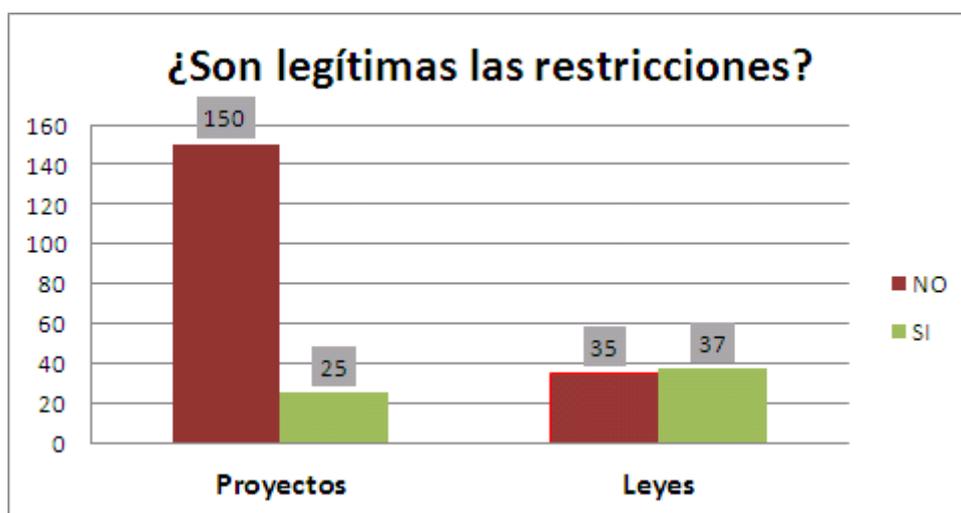
Most laws passed in this period were aimed at addressing issues related to the protection of honor and reputation, and ensuring equality and non-discrimination. The regulation of terrorism also brought with it regulations that affect the circulation of discourse in different countries, including Argentina, Mexico and Peru.



The table shows the goals pursued when restricting freedom of expression during the period analyzed by the laws adopted in the four countries. As can be seen, these are many and varied. However, they constitute only a reasonable part of those enunciated in bills of recent years.



As can be seen in the table, the goals pursued by the restrictions of both the bills and the laws studied seem legitimate; however, the rules which limit freedom of expression are in some cases excessively broad or disproportionate to the declared objective.



According to the opinion of the experts from the Observatory, about 50% of the laws that limit the circulation of discourse have shortcomings when fulfilling the three-part test.<sup>5</sup> The percentage is much higher and worrisome around the bills that have been presented during the last 5 years, where the percentage of those which do not meet the test is 86%. Of the 25 bills that set forth legitimate restrictions according to the test, 12 are from Argentina, which has 169 bills out of the 283; another 12 are from Mexico, which has 69 of the 283 and 2 from Ecuador. Many of the laws and bills lack in specificity, ambiguity and scope. Some examples of this are those referring to hate speech, discrimination, terrorism (in some cases), but also others linked, for example, to the maintenance of social order (Peru and the case of fake news).<sup>6</sup>

#### 4) Freedom of expression versus Internet regulation

At the end of the 2000s, the Economic Commission for Latin America and the Caribbean (ECLAC) conducted a study on the outlook of information technology law in Latin America. The study concluded that “there is a wide variety of crimes and at the same time many legal interests that these rules are looking to protect. There are cases of crimes against somebody’s estate, crimes against property (physical or intellectual), crimes against persons (against privacy, the right to one’s own image and the inviolability of domicile), crimes against the national public treasury that have been treated by different regulations, sometimes with reforms of the criminal codes, sometimes with *ad hoc* laws, ultimately even with electronic commerce laws.”<sup>7</sup>

Since 2011 there has been an increase in the development of rules tending to regulate the Internet. The increase of Internet penetration in the region<sup>8</sup>, the Snowden revelations and the acceleration in the European regulation of

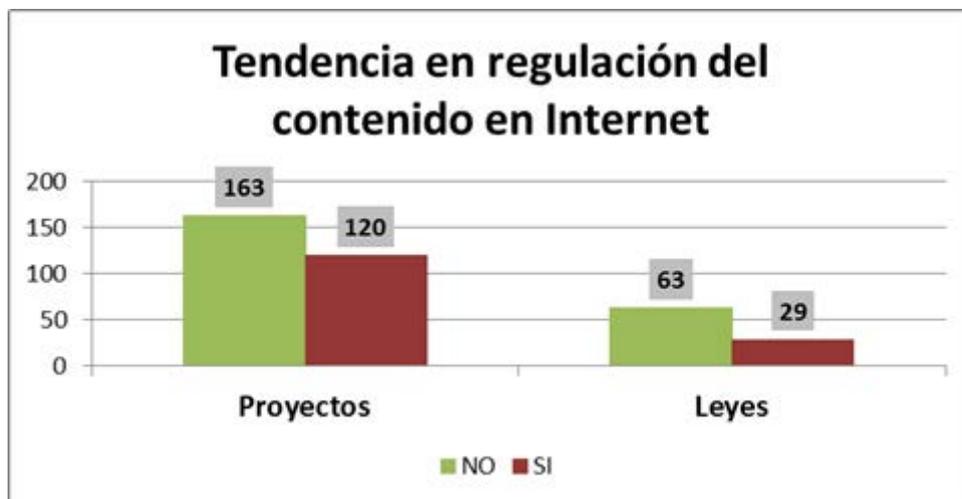
<sup>5</sup> Of the laws that restrict or limit freedom of expression, 31 do not comply with the three-part test of the inter-American human rights system, which proposes to evaluate the legality, necessity and proportionality of laws. Including those that limit and promote not complying with the three-part test.

<sup>6</sup> See article by A. Calderón in this collection.

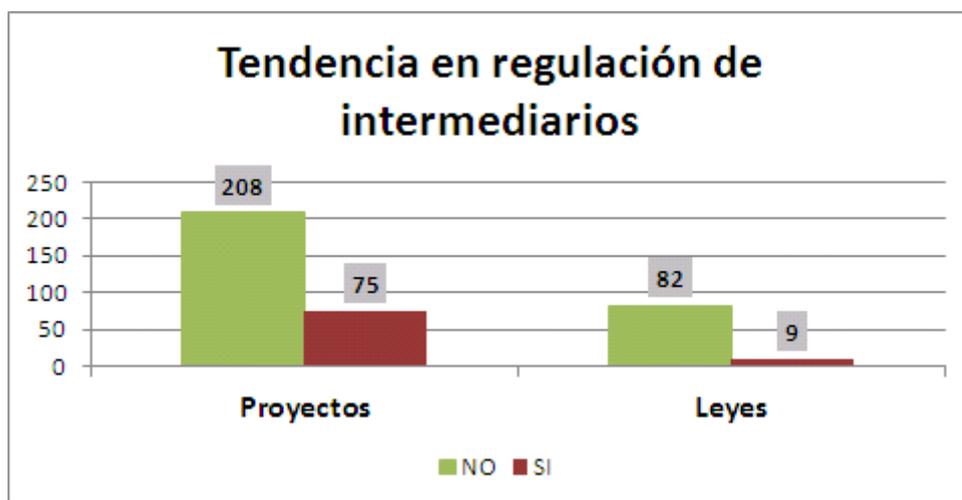
<sup>7</sup> J. Gamba, CEPAL. *Panorama del derecho informático en América Latina y el Caribe* [Current situation of computer law in Latin America and the Caribbean], 2010. Retrieved from <https://bit.ly/2r12brF>, p. 23-24

<sup>8</sup> CEPAL, *Estado de la banda ancha en América Latina y el Caribe 2016* [ECLAC, State of broadband in Latin America and the Caribbean 2016]. Retrieved from: <https://bit.ly/2yqxXQP>.

personal data,<sup>9</sup> or the transfer, in some cases, of the public interest debate to the Internet domain could be some of the reasons for this increase. The negotiation and signing of free trade agreements between some states of the region and the United States of America could also have been an influencing factor given that they contained rules pertaining to some cases of regulation of intermediaries (for example, copyright).<sup>10</sup> Since 2013 there has been an increase in the number of bills intended to regulate content on the Internet, preceded in some cases by processes or judicial rulings that demonstrated the existence of gaps or difficulties to address the new digital reality.<sup>11</sup>



Along the same lines, there is also an increase in bills that attempt to regulate intermediaries on the Internet.



<sup>9</sup> GDPR Timeline of events available at: <https://bit.ly/2HozsXN>.

<sup>10</sup> C. Ruiz Gallardo and J.C. Lara, *Responsabilidad de los proveedores de servicios de internet en relación con el ejercicio del derecho a la libertad de expresión en Latinoamérica*, [Responsibility of Internet service providers in relation to the exercise of the right to freedom of expression in Latin America], in CELE, *Hacia una Internet libre de censura* [Towards an Internet Free of Censorship], 2013, p. 68, retrieved from: <https://bit.ly/1QFZMpg>. The following are mentioned: Chile (2003); Peru (2007); countries of Central America (2003-2006), Colombia and Panama whose negotiation was extended.

<sup>11</sup> See E. Bertoni, *La determinación de la jurisdicción en litigios por difamación por contenidos en internet: algunas observaciones para América Latina* [Determining Jurisdiction in Defamation Litigation for Internet Content: Some Observations for Latin America], CELE, in *Hacia una Internet libre de censura* [Towards an Internet Free of Censorship], 2013. Retrieved from: <https://bit.ly/1QFZMpg>. Some examples of this in Argentina are the cases: CSJN, Rodríguez María Belen v. Google Inc. On damages, 2014, Judgments 337: 1174; Da Cunha Virginia v. Yahoo de Argentina SRL and others, National Court of First Instance in Civil Matters N. 75, Buenos Aires, July 29, 2009; in Chile, Court of Appeals of Concepción, ruling on appeal, Paulina Fuentes Almendra and others v. Entel SA; Carmen Gloria Yañez Vargas, record 1223-2003, judgment of December 21, 2007, among others.

The region has a particular outlook regarding the liability of intermediaries, different from that of the US and Europe, though clearly influenced by both. At the moment, very few countries have adopted a liability regime for intermediaries so far, but many are debating it.<sup>12</sup>

In the region, the debate is not entirely aligned with the regulation from the United States of America, such as the Communications Decency Act and / or the Digital Millennium Copyright Act or EU regulation. The Communications Decency Act holds intermediaries harmless for content generated by third parties and the Digital Millennium Copyright Act establishes the exception for contents related to intellectual property, regulated under the Safe Harbor Privacy Principles.<sup>13</sup> And it is not following the regulatory guidelines that are emerging in Europe either, for example, with the German law NetzDG at the forefront.<sup>14</sup> This law proposes to hold the big platforms and intermediaries on the Internet responsible for some contents of third parties if these were not removed in less than 24 hours in some cases and 7 days in others.

Of the four countries studied, Ecuador is the only one that is currently considering a bill that holds intermediary Internet companies responsible for mediating and moderating the content produced by third parties with high fines as penalty.<sup>15</sup> The bill, presented by former President Rafael Correa days before the end of his term, regulates Acts of Hate and Discrimination in Social Networks and the Internet and generates incentives for intermediaries to remove “manifestly illegal” contents in less than 24 hours. A year after the bill was presented, it is unclear how much support it has in the Assembly and the current government appears to have a change of direction in this matter. Other countries that have set forth similar regulations have been Venezuela, where the *Ley contra el Odio, Por la Convivencia Pacífica y la Tolerancia* [Law against Hate, For Peaceful Coexistence and Tolerance] was passed in 2017, which has been severely criticized for imposing sanctions such as blocking any site, refusing renewing licenses, setting exorbitant fines and even holding criminally liable any media and Internet companies that in 6 hours do not download or block contents “manifestly illegal”<sup>16</sup>; and Honduras, where recently a bill was presented against discrimination and hate on the Internet with similar characteristics to the Ecuadorian project.<sup>17</sup>

In terms of equality and non-discrimination, the number of bills tending to reform, complement or replace laws in this area is astounding, particularly in light of the repercussions and implications of this phenomenon on the Internet. In 2015, a joint report by the Office of the Special Rapporteur for Freedom of Expression and the LGBTQI Special Rapporteur issued a warning about the proliferation of bills on this subject matter without adequate consideration of their impact on freedom of expression; including those presented by the groups which themselves were affected by those acts

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<sup>12</sup> Brazil, Federal Law 12,965, April 2014. Chile, Law 20,435 May 2010. Colombia adopted its Lleras law in April 2018 after a process of several years of debate. For more information go to: <https://stanford.io/2qXSYiP>.

<sup>13</sup> This regime generates strong incentives for the private withdrawal of content in the case of allegations of copyright infringement. For more information on this topic, see *Hacia una Internet libre de censura* [Towards an Internet free of censorship], CELE, 2013.

<sup>14</sup> NetzDG is the name of the German law passed in 2017 that regulates the implementation of laws on discrimination and hate speech on the Internet. The law sets for large platforms and social networks fines of up to 50 million euros for those companies that do not block or eliminate content that is manifestly discriminatory or constitutes hate speech and establishes a period of 7 days to eliminate or block any other illegal content. The measure was severely criticized by activists and defenders of freedom of expression for generating strong incentives for blocking and eliminating content on the Internet without proper review or notification. See: <https://bit.ly/2FtYdgE>.

<sup>15</sup> See article by D. Salazar and D. Caballero.

<sup>16</sup> *La Ley contra el Odio, Por la Convivencia Pacífica y la Tolerancia* [Law against Hate, For Peaceful Coexistence and Tolerance] Articles 12, 13, 14 and 22. Retrieved from: <https://bit.ly/2JmkrCf>.

<sup>17</sup> Like the Venezuelan and Ecuadorian bills, it is based in the protection of persons against discrimination and hatred: <https://bit.ly/2EsNUeU>.

of violence.<sup>18</sup>The question has also been the subject of two bills in recent Inter-American Conventions, which directly address the Internet issue but whose compliance to Article 13 of the American Convention seems at least doubtful: the Inter-American Convention Against Racism, Racial Discrimination and Related Forms of Intolerance of 2013<sup>19</sup> which entered into force in November of 2017<sup>20</sup>, and the Inter-American Convention Against All Forms of Discrimination and Intolerance, also from 2013 but which still does not have the necessary ratifications for its entry into force.

## 5) *Some conclusions common to all the countries analyzed:*

- The seemingly most recurrent issues and therefore those that may be inferred that matter or concern legislators in the region are: discriminatory acts and online violence, national security, and child pornography and the protection of minors in general, among others. Some Internet platforms have also indicated that the issue of the protection of minors on the Internet is one of the most pressing in the region and from which most complaints, bills and opportunities to work together arise<sup>21</sup>. Unlike other legislative moments, where there seemed to be a greater concern for the protection of reputation or honor, currently said objective is not explicit in most bills and laws.
- The bills and laws have, in many cases, problems in the wording and specificity of the restrictions they pose. The established behaviors are not defined precisely and include vague or ambiguous terms. A good example is the case of the bills regarding non-consensual pornography in Argentina or abetting crimes against security in Mexico. Even when in the different countries the legislature seems to have good intentions when introducing bills (for example, eradicating discrimination or child pornography), problems in the texts can result in significant risks for circulation of speech: excessive discretion of judges and prosecutors, over-inclusive interpretations or political persecutions protected by ambiguous laws.
- There continues to be a tendency towards the criminalization of expression in the region. Many of the responses of different countries to the abuses of freedom of expression include the criminalization of unwanted behavior. In addition, existing crimes are not decriminalized. In recent years, some of the bills that in some way affect freedom of expression impose prison sentences and, in many cases, create new crimes (for example, cases of discrimination, non-consensual pornography and hate speech on the Internet, among others).
- In recent years, in the four countries, the number of bills that propose regulating different aspects of the Internet has gradually increased. In Argentina, for instance, the perception of the Internet seems to have changed since the first laws concerning it: it went from being considered a democratizing tool to being perceived in many cases as a growing threat. Andrés Calderón reveals the same in his article about the situation in Peru. In Ecuador, the perception of the negative nature of this medium is manifested, for example, in a recent bill that regulates acts of hatred and discrimination in social networks and the Internet.

<sup>18</sup> IACHR, Report on Violence against Lesbian, Gay, Bisexual, Trans, and Intersex Persons, retrieved from <https://bit.ly/299oL8z>.

<sup>19</sup> OAS, Inter-American Convention against Racism, Racial Discrimination and Related Forms of Intolerance, A-68. The states undertake to prevent, eliminate, prohibit, and punish, in accordance with their constitutional norms and the provisions of this Convention, all acts and manifestations of racism, racial discrimination, and related forms of intolerance, including: ii. Publication, circulation or dissemination, by any form and/or means of communication, including the Internet, of any racist or racially discriminatory materials that: a) Advocate, promote, or incite hatred, discrimination, and intolerance; b) Condone, justify, or defend acts that constitute or have constituted genocide or crimes against humanity as defined in international law, or promote or incite the commitment of such acts.

<sup>20</sup> OAS, Inter-American Convention against Racism, Racial Discrimination and Related Forms of Intolerance, A-69. Chapter III, Art. 4: "The states undertake to prevent, eliminate, prohibit, and punish, in accordance with their constitutional norms and the provisions of this Convention, all acts and manifestations of discrimination and intolerance, including: (...) ii. The publication, circulation or dissemination, by any form and / or means of communication, **including the Internet**, of any materials that: a) advocate, promote, or incite hatred, discrimination, and intolerance; b) condone, justify, or defend acts that constitute or have constituted genocide or crimes against humanity as defined in international law, or promote or incite the commission of such acts (...)"

<sup>21</sup> For example, see the conversation with Monika Bickert, Director of Global Policies of Facebook. Buenos Aires, May 22, 2017.

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- In none of the four countries analyzed there is yet specific regulation on the liability of intermediaries, so it is possible to find difficulties when determining the responsibility of the different types of providers and platforms on the Internet for infractions and damages. In Argentina, the first bills date from the mid 2000s and yet, there is still no pertinent legislation. In Ecuador, the bill presented in 2017 is being debated but the final outcome is still unclear; In Peru, there is a free trade agreement but there is no regulatory framework for its implementation.
  - In some countries (for example, Peru) it is common to find legislative initiatives that set forth the hardening of penalties in case the actions are carried out in the Internet. This also occurs in Mexico and Argentina although to a lesser extent, even with international rules that discourage this type of regulation.