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INFORMATION AND HUMAN RIGHTS

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Aaron Swartz and the Battles for Freedom of Knowledge

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Towards an Internet Based on Human Rights

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PRESENTATION



SUR 18 was produced in collaboration with the organizations **Article 19** (Brazil and United Kingdom) and **Fundar** (Mexico). In this issue's thematic dossier, we have published articles that analyze the many relationships between information and human rights, with the ultimate goal of answering the questions: What is the relationship between human rights and information and how can information be used to guarantee human rights? This issue also carries articles on other topics related to today's human rights agenda.

Thematic dossier: Information and Human Rights

Until recently, many human rights organizations from the Global South concentrated their activities on the defense of freedoms threatened by dictatorial regimes. In this context, their main strategy was whistleblowing, closely linked to the constant search for access to information on violations and the production of a counter narrative capable of including human rights concerns in political debates. Since they found no resonance in their own governments, the organizations very often directed their whistleblowing reports to foreign governments and international organizations, in an attempt to persuade them to exert external pressure on their own countries.*

Following the democratization of many societies in the Global South, human rights organizations began to reinvent their relationship with the State and with the system's other actors, as well as how they engaged with the population of the countries where they were operating. But the persistence of violations even after the fall of the dictatorships and the lack of transparency of many governments from the South meant that the production of counter narratives continued to be the main working tool of these organizations. Information, therefore, was still their primary raw material, since combating human rights violations necessarily requires knowledge of them (locations where they occur, the main agents involved, the nature of the victims and the frequency of occurrences etc.). Their reports, however, previously submitted to foreign governments and international organizations, were now directed at local actors, with the expectation that, armed with information about the violations and endowed with voting power and other channels of participation, they themselves would exert pressure on their governments. Furthermore, after democratization, in addition to combating abuses, many human rights organizations from the Global South aspired to become legitimate actors in the formulation of public policies to guarantee human rights, particularly the rights of minorities that are very often not represented by the majority voting system.

In this context, the information produced by the public authorities, in the form of internal reports, became fundamental for the work of civil society. These days, organizations want data not only on rights violations committed by the State, such as statistics on torture and po-

lice violence, but also activities related to public management and administration. Sometimes, they want to know about decision-making processes (how and when decisions are made to build new infrastructure in the country, for example, or the process for determining how the country will vote in the UN Human Rights Council), while at other times they are more interested in the results (how many prisoners there are in given city or region, or the size of the budget to be allocated to public health). Therefore, access to information was transformed into one of the main claims of social organizations working in a wide range of fields, and the issue of publicity and transparency of the State became a key one. This movement has scored some significant victories in recent years, and a growing number of governments have committed to the principles of Open Government** or approved different versions of freedom of information laws.***

This legislation has played an important role in the field of transitional justice, by permitting that human rights violations committed by dictatorial governments finally come to light and, in some cases, that those responsible for the violations are brought to justice. In their article **Access to Information, Access to Justice: The Challenges to Accountability in Peru**, Jo-Marie Burt and Casey Cagley examine, with a focus on Peru, the obstacles faced by citizens pursuing justice for atrocities committed in the past.

As the case of Peru examined by Burt and Cagley demonstrates, the approval of new freedom of information laws no doubt represents important progress, but the implementation of this legislation has also shown that it is not enough to make governments truly transparent. Very often, the laws only require governments to release data in response to a freedom of information request. They do not, therefore, require the State to produce reports that

**The Open Government Partnership is an initiative created by eight countries (South Africa, Brazil, South Korea, United States, Philippines, Indonesia, Mexico, Norway and United Kingdom) to promote government transparency. The Declaration of Open Government was signed by the initial eight members in 2011, and by the end of 2012 the network had been joined by 57 nations (Available at: <http://www.state.gov/r/pa/prs/ps/2012/09/198255.htm>). The initiative takes into account the different stages of public transparency in each of the member countries, which is why each country has its own plan of action for implementing the principles of open government. More information on the initiative is available at: <http://www.opengovpartnership.org>.

***In 1990, only 13 countries had some form of Freedom of Information legislation (Cf. Toby Mendel. 2007. Access to information: the existing State of affairs around the world. In VILLANUEVA, Ernesto. *Derecho de la información, culturas y sistemas jurídicos comparados*. México: Universidad Nacional Autónoma de México). By 2010, however, approximately 70 countries had adopted such a law. (Cf. Roberts, Alasdair S. 2010. A Great and Revolutionary Law? The First Four Years of India's Right to Information Act. *Public Administration Review*, vol.70, n. 6, p. 25-933.). Among them, South Africa (2000), Brazil (2012), Colombia (2012), South Korea (1998), India (2005), Indonesia (2010), Mexico (2002) and Peru (2003).

*K. Sikkink coined the term "boomerang effect" to describe this type of work by civil society organizations from countries living under non-democratic regimes.

make the existing data intelligible, nor to release the information on their own accord. The problem is exacerbated when the State does not even produce the data that is essential for the social control of its activities. Another area in which transparency is deficient is information on private actors that are subsidized by public funding, such as mining companies, or that operate public concessions, such as telecommunications providers.

Many organizations from the South have spent time producing reports that translate government data into comprehensible information that can inform the working strategies of organized civil society or the political decisions of citizens. Human rights organizations have also pressured their governments to measure their performance against indicators that can help identify and combat inequalities in access to rights. This is the topic of the article by Laura Pautassi, entitled **Monitoring Access to Information from the Perspective of Human Rights Indicators**, in which the author discusses the mechanism adopted recently by the Inter-American System of Human Rights concerning the obligation of States-Parties to provide information under article 19 of the Protocol of San Salvador.

The relationship between information and human rights, however, is not limited to the field of government transparency. The lack of free access to information produced in the private sphere can also intensify power imbalances or even restrict access to rights for particularly vulnerable groups. The clearest example of this last risk is the pharmaceutical industry, which charges astronomical prices for medicines protected by patent laws, effectively preventing access to health for entire populations. The privatization of scientific production by publishers of academic journals is another example. The issue gained notoriety recently with the death of Aaron Swartz, an American activist who allegedly committed suicide while he was the defendant in a prolonged case of copyright violation. Sérgio Amadeu da Silveira opens this issue of SUR with a profile of Swartz (**Aaron Swartz and the Battles for Freedom of Knowledge**), linking his life to the current struggles for freedom of knowledge given the toughening of intellectual property laws and the efforts of the copyright industry to subordinate human rights to the control of the sources of creation.

Since the internet has taken on a crucial role in the production and dissemination of information, it is natural for it to have become a battleground between the public interest and private interests, as illustrated by the Swartz case. On this point, civil society and governments have sought to adopt regulations intended to balance these two sides of the scale, such as so-called Internet Freedom, the subject of another article in this issue. In **Internet Freedom is not Enough: Towards an Internet Based on Human Rights**, Alberto J. Cerda Silva argues that the measures proposed by this set of public and private initiatives are not sufficient to achieve their proposed goal, which is to contribute to the progressive realization of human rights and the functioning of democratic societies.

The importance of the internet as a vehicle of communication and information also means that internet access is now a key aspect of economic and social inclusion. To correct inequalities in this area, civil society organizations and governments have created programs aimed at the so-called "digital inclusion" of groups that face difficulty accessing the web. Fernanda Ribeiro Rosa, in another article from this issue's dossier on Information and Human Rights, **Digital Inclusion as Public Policy: Disputes in the Human Rights Field**, defends the importance of address-

ing digital inclusion as a social right, which, based on the dialogue in the field of education and the concept of digital literacy, goes beyond simple access to ICT and incorporates other social skills and practices that are necessary in the current informational stage of society.

Non-thematic articles

This issue also carries five additional articles on other relevant topics for today's human rights agenda.

In **Development at the Cost of Violations: The Impact of Mega-Projects on Human Rights in Brazil**, Pétalla Brandão Timo examines a particularly relevant contemporary issue: the human rights violations that have occurred in Brazil as a result of the implementation of mega-development projects, such as the Belo Monte hydroelectric complex, and preparations for mega-events like the 2014 World Cup.

Two articles address economic and social rights. In **Land Rights as Human Rights: The Case for a Specific Right to Land**, Jérémie Gilbert offers arguments for the incorporation of the right to land as a human right in international treaties, since to date it still only appears associated with other rights. In **Reaching Out to the Needy? Access to Justice and Public Attorneys' Role in Right to Health Litigation in the City of São Paulo**, Daniel W. Liang Wang and Octavio Luiz Motta Ferraz analyze legal cases related to the right to health in São Paulo in which the litigants are represented by public defenders and prosecutors, in order to determine whether the cases have benefited the most disadvantaged citizens and contributed to the expansion of access to health.

Another article looks at the principal UN mechanism for the international monitoring of human rights. In **The United Nations Human Rights Council: Six Years on**, Marisa Viegas e Silva critically examines the changes introduced to this UN body in the first six years of its work.

In **Human Rights, Extradition and the Death Penalty: Reflections on the Stand-Off between Botswana and South Africa**, Obonye Jonas examines the deadlock between the two African nations concerning the extradition of Botswana citizens who are imprisoned in South Africa and accused in their country of origin of crimes that carry the death penalty.

Finally, Antonio Moreira Maués, in **Supra-Legality of International Human Rights Treaties and Constitutional Interpretation**, analyzes the impacts of a decision in 2008 by the Supreme Court on the hierarchy of international human rights treaties in Brazilian law, when the court adopted the thesis of supra-legality.



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ABSTRACT

Technological development provides new opportunities for the progress of humanity as well as for the realization of human rights, although, at the same time, it also creates new risks for these rights. In recent years, public-private initiatives have advanced the need to promote and preserve freedom on the Internet as an essential assumption for the progress towards the realization of human rights and the functioning of a democratic society. One of these is called Internet Freedom.

In this article, the author maintains that the focus of Internet Freedom is, however, limited, because it provides a skewed view of the relevance of human rights in the online environment. After noting these limitations, the author suggests elements that should be integrated in an Internet approach sustained by a comprehensive focus on human rights for the Internet.

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KEYWORDS

Internet Freedom – Human rights – Digital citizenship – Internet governance – Corporate responsibility



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INTERNET FREEDOM IS NOT ENOUGH: TOWARDS AN INTERNET BASED ON HUMAN RIGHTS

Alberto J. Cerda Silva

1 Introduction

The Internet has burst into our lives. Since the late Sixties, when it was just a network of interconnected computers at a handful of universities to share computing resources, until today, when one in three people on the planet is a user, the Internet has permeated virtually every facet of our work. Now we connect not only for a couple of minutes a day. Many of us are permanently connected. We not only receive and send e-mails, but also form social networks, shop online, interact with government offices, and even unwind on the network.

Over the years, the myth of an Internet exempt from regulation has given way to an Internet subject to regulation. Powered by its decentralized structure, cross-border communications, and virtual anonymity, the Internet tried to resist the regulatory attacks of the 1990s, without success (BARLOW, 1996). Today, the Internet is a space in which state regulations are superimposed on cybercrime, consumer protection, personal data, electronic commerce, and so on. And it is a setting in which human rights are fully applicable.

The Internet has positively contributed to the defense of human rights. It has helped activists circumvent state censorship in China, has allowed the denunciation of repression against indigenous communities in Latin America, has facilitated access to public information in Mexico, and has contributed to political accountability in the Arab world. Rightly, it has been said that today our fundamental rights can be read in a technological lens (ÁLVAREZ-CIENFUEGOS SUÁREZ, 1999, p. 15-22), since the Internet facilitates their realization, as evidenced by online education initiatives, telemedicine, and electronic government. Recently, a proposal has been formulated an international human rights instrument for the

Notes to this text start on page 30.

online environment.¹ Whatever the real need for such an instrument, it makes clear the enormous synergistic potential of the Internet and human rights. The same can be said of the controversy surrounding establishing Internet access as a human right (CERF, 2012).

The Internet has also contributed to the violation of human rights, however. It has facilitated the identification of political dissent in Iran, intensified state surveillance in the United Kingdom, increased the threat to the linguistic and cultural identity of individuals, and broadened everywhere the gap between those with access and those without. And the potential of the Internet and new technologies to erode our rights will increase, as more and more elements of our lives take place in an online setting. This possibility has already provoked some initial reactions, one of which has been associated with the concept of Internet Freedom.

2 Internet Freedom

Internet Freedom designates a series of public-private initiatives which intend to confront government demands to implement systems of censorship and surveillance of people through the Internet (CLINTON, 2010). These initiatives have in common the aim to avoid state censorship, protect the privacy of individuals online, and prevent any measure restricting the free flow of information.

The Internet fosters freedom of expression, as each user can potentially reach a wide audience, as well as gain access to a plurality of content. But that freedom can be uncomfortable for some governments, which have been implementing technological and legislative measures to silence dissenting discourse. Internet Freedom rejects such governmental influence and advocates for the preservation of freedom of expression in the online environment.

The Internet facilitates the violation of the right to privacy, as each time a user connects to the network, his or her identity and online behavior can be monitored. The information gathered through monitoring mechanisms would allow government repression of dissent and thus the abolition of political and religious freedom, among others. Internet Freedom repudiates the government surveillance practices aimed at repressing the network users.

The Internet is the paradigmatic example of globalization, which has allowed for information to circulate globally, overcoming many of the obstacles to its flow that were imposed by analog media. Unfortunately, some governments have imposed technical and policy measures that hinder the dissemination, access, and data traffic across the network. Internet Freedom rejects the claim of those who want to change the structure of Internet governance to restrict the free flow of information.

There are several initiatives that strive for Internet Freedom, but it seems relevant to highlight those carried out by the United States Department of State, which have been incorporated as a component of the country's foreign policy. This has led to the implementation of a comprehensive work program that assists social organizations fighting for Internet access and the free flow of information online,

especially in countries facing adverse situations. A component of the program includes an annual evaluation of other countries in relation to the compliance with Internet Freedom, which focuses precisely on freedom of expression and state surveillance in the online environment. This assessment is published in the Country Reports on Human Rights Practices produced by such Department. The Department of State also supports the Global Network Initiative, which brings together human rights organizations and American companies from the technology sector, generating recommendations on freedom of expression and privacy online.

The Internet Freedom approach is not limited to the United States; other countries have also adopted it. After the unleash of revolutions in Northern Africa and the Middle East known as the Arab Spring, many countries saw the need to prepare their own version of Internet Freedom, with an emphasis on freedom of expression, rejection of government censorship, and an ambiguous role for the private sector. In fact, several European governments implemented Internet Freedom programs, including Germany, France, Holland, and Sweden (WAGNER, 2011, p. 18-19). Similar voices have also been heard in other latitudes.

With the support of the Department of State, and the backdrop of the Arab Spring and the role that the Internet played in it, the Internet Freedom approach has succeeded in defining the role, benefits, and risks that the online environment has on freedom of expression and privacy. And certainly it has contributed, together with a report on freedom of expression developed by United Nations Special Rapporteur Frank de La Rue (NACIONES UNIDAS, 2011), to place the issue on the international agenda and to obtain the adoption of a specific United Nations resolution, which though notoriously late, has recognized the importance of the Internet in relation to all human rights, but particularly to freedom of expression (NACIONES UNIDAS, 2012).

Internet Freedom has helped to highlight the role of freedom of expression, protection of privacy, and the free flow of information online. However, this focus is limited because it provides a biased view of the importance of human rights on the Internet. The following section briefly describes some of these constraints in order to suggest elements that should be integrated into an approach based on a comprehensive view of human rights for the Internet.

3 The limitations of internet freedom

Although Internet Freedom represents progress, it has several limitations that make it inadequate. First, it is an approach that encapsulates concerns and prioritizes topics from a U.S. perspective and therefore lacks comprehensiveness. Second, it presents a narrow view of the relevance and synergies resulting from the interaction between the Internet and human rights. Third, it ignores that the Internet is an essentially private environment and therefore demands greater accountability from the private sector. Fourth, it ignores Internet governance. Fifth, it prioritizes market needs rather than the respect for human rights. In the next sections, each of these objections shall be briefly reviewed.

3.1 A local approach

Internet Freedom emerges as an approach that catalyzes U.S. concerns dating from the middle of the last decade (GOLDSMITH; WU, 2006). Until then, a significant number of companies from the technology sector had been collaborating with the Chinese government in the identification of dissidents and the censorship of online content. This complicity was uncomfortable, especially in the face of an unsuccessful United Nations attempt to adopt an instrument that would make the respect of human rights by transnational corporations enforceable (NACIONES UNIDAS, 2003). It was a necessity to take action on the matter, but it had to be done without reaching the extreme of effectively regulating the technology sector, as suggested by the experience of the European Union. Internet Freedom takes a more restrained gamble, focusing its efforts against repressive governments and advocating voluntary commitments from the private sector in order to protect freedom of expression and the right to privacy without hindering the free flow of goods and information services.

Internet Freedom presupposes a more local than global view of freedom of expression in which the concept of speech is based more heavily on the First Amendment to the United States Constitution than on the concept of freedom of expression defined in international human rights instruments. We are faced with a freedom that is exhausted from the State, which avoids the complications of a system of exceptions and limitations accepted by international law, and that, in turn, feeds from the domestic regulatory framework.² This framework is suitable to deal with China's censorship machine, and even the Arab Spring, but is insufficient to analyze, for example, the criminalization of certain freedom of speech offenses in Latin America and Europe, the persecution of WikiLeaks, or the telecommunications and information technology sector's culpabilities when human rights are violated, not only in complicity with repressive governments but also on its own accord.

The protection of the right to privacy that Internet Freedom espouses is not global; rather, it is particular to the United States. It is essentially the government that is limited by the exercise of this right, but protection is evidently weaker in relation to the private sector, which in only exceptionally circumstances would respect it (CERDA, 2011a, p. 338-340). Thus, Internet Freedom appeals to a kind of corporate social responsibility around their protection and, on the other hand, avoids a regulatory approach, such as the one that exists in the European Union and Latin America, which could raise unnecessary barriers to the free movement of goods and services.

3.2 A partial approach

Internet Freedom is a partial approach to the importance of the network from a human rights perspective, since it is only limited to freedom of expression and the right to privacy. It is implausible to suppose that the contribution and

potential of the Internet for the realization of other human rights could still be disclaimed, but Internet Freedom does not pay attention to more than a couple of them, those that best reflect a nineteenth-century liberal conception of the State.

Internet Freedom does not include any mention of economic, social, and cultural rights. In this way, improving the accessibility for those without access is not a priority for Internet Freedom, even if it contributes to the reinforcement of democracy, individual and collective development, and the realization of other rights. It also omits the Internet's role in the preservation and promotion of cultural and linguistic identities, particularly considering the abrasive effects of the unidirectional flow of information from a small number of countries to many others.

The Internet has facilitated access to information, but Internet Freedom deliberately excludes from its scope a discussion of how the growing protection of intellectual property affects the realization of human rights (CLINTON, 2010). Intellectual property law grants a monopoly of the exploitation of certain inventions and creations. For example, the granting of patents on pharmaceuticals hinders the implementation of programs for universal access to medicine (COSTA; VIEIRA; REIS, 2008), as well as public policy measures that protect the right to health and life (CORREA, 2005; NWOBIKE, 2006).

The Internet promotes free flow of content, but, paradoxically, most of this content is subject to restrictions for use by intellectual property laws establishing copyright, that is, a monopoly on the exploitation of creative works, preventing their use without the owner's permission. This restricts freedom of expression, hampers development (DRAHOS; BRAITHWAITE, 2002), and crushes creative freedom (LESSIG, 2005; TRIDENTE, 2009). Especially in developing countries, copyright affects the realization of the right to education, by preventing the use of content without further authorization and payment to the copyrights holder (BRANCO, 2007).

In recent years, there has been a systematic effort by some developed countries to inspire the adoption of international standards of intellectual property enforcement colliding with the right to privacy by requiring user identification for alleged indiscriminate copyright infringement (CERDA, 2011b, p. 641-643); with due process, to expel the alleged infringers from the Internet without appropriate judicial guarantees (FRANCIA, 2009), and including the limitations for penal intervention imposed by international instruments in matters of human rights, by imposing imprisonment for simple civil debts (VIANNA, 2006, p. 941-942). The Special Rapporteur La Rue himself has called attention to the censorship practices of freedom of expression based on intellectual property protection (NACIONES UNIDAS, 2011, p. 13-15).

The conflict between the rules of intellectual property and human rights is a symptom of the growing inconsistency between the rules of international law applicable to trade and those concerning human rights (DOMMEN, 2005; FORTIN, 2008). But Internet Freedom turns a deaf ear to the excesses of intellectual property and its damaging effects on human rights.

3.3 The role of the private sector

The Internet rests on a massive plot of willpower and private sector efforts. Technical agencies that manage network resources, transatlantic communications providers, telecommunications service providers, corporate network access, content providers and online services. A long list of actors make the Internet an essentially private environment. However, traditionally, human rights catapulted by the atrocities of World War II have centered on state action and, therefore, seem to allow most of what happens in the network to be exempt of control.

The Internet has increased concern about the role that companies have in the violation of human rights in complicity with certain governments. In addition to some operators known for collaborating with political repression in China, there is the supplying of technology for tracking opponents online in Syria and the export of electronic surveillance tools to governments with a questionable commitment to democracy in Latin America. Internet Freedom recognizes this problem and urges the private sector to adopt voluntary guidelines to respect human rights, whose effectiveness is questionable and their results are still precarious.

Internet Freedom disregards the fact that, oftentimes, it is the companies themselves, not in complicity with the state, that violate people's rights. There are many examples of this, including service providers who unduly process users' personal information, surreptitious, online surveillance service providers, and telecommunications operators who interfere with the electronic communications of their customers (NUNZIATO, 2009). As the Internet penetrates deeper into our lives, an approach that minimizes the responsibility of the private sector is insufficient. In fact, to obtain adequate protection for our rights in the online environment, both against the actions of public and private actors, becomes a priority.

3.4 Internet governance

Internet Freedom is nurtured by the false belief that the network was born, has grown and flourished apart from the action of the State, whose interference is strongly rejected (LIDDICOAT, 2011, p. 14). It will be the new citizens of the virtual environment—technical, users, and suppliers – who will define the Internet and those who will adopt self-regulatory standards. It is understandable, then, that Internet Freedom does not question the digital *laissez-faire* assumption, which conceals the total social divestment in the future of the Internet. In fact, network governance is a muted theme in the discourse of Internet Freedom.

It is no coincidence, then, that those who advocate for Internet Freedom reject any initiative to adopt a mechanism for global Internet governance. The recent initiative by the International Telecommunications Union, the United Nations specialized agency in the field, to adopt certain rules for the network is proof of this attitude. The media attention ignored its work providing Internet access in developing countries and, instead, focused on underestimating its technical capacity and demonizing their intentions, which were aligned with those of totalitarian regimes. Little or nothing is said about that, even if the agency was not the most

appropriate and had not dealt with many difficulties, it was and is necessary to have some legitimate global governance mechanism for the Internet in order to overcome the evanescence of borders online, facilitate the construction of a space for governmental coordination, and promote democratization and respect for human rights in the Internet.

Some have suggested that Internet governance should take place through a model that brings together all stakeholders, such as and companies that provide services, including social organizations and government, and users. This model, however, does not clarify the decision-making scope of these stakeholders. It is also doubtful that corporate interests would have the same level of legitimacy as those represented by governments, particularly if they enjoy democratic representation. Finally, this model assumes the existence of a strong and vigorous civil society, a quality which few countries can boast, in fact, it is most common that, in the regulation of the Internet, it does not exist or it is co-opted by corporate interests or the contemporary government.

3.5 Prioritizing the market

Internet Freedom demonstrates a commitment to freedom of expression and the right to privacy, but only to the extent that they harmonize with the free flow of information. This last expression has no background in human rights instruments, but it is found in instruments issued in trade forums, from the Organization for Economic Cooperation and Development (OECD), to the Asia Pacific Economic Cooperation Forum (APEC), and more recently in the proposed text of the Department of Commerce of the United States to the Trans-Pacific Strategic Economic Partnership Agreement Treaty that encourages the creation of a free trade area in the Pacific basin.³ In all of these instruments, the free flow of information is used to clarify the degree of protection that will be provided to the right to privacy and personal data protection. In APEC they further require, to recognize that the free flow of information is essential for the development of market economies and social growth.

Internet Freedom, then, prioritizes access and operation of the market for information providers, from the technology and software industries, to the content and entertainment industries. This would explain some of the corporate membership of the Internet Freedom initiative. But it is even clearer when you re-order its components and consider its omissions. Basically, Internet Freedom protects freedom of expression and to a lesser degree the right to a private life, provided they do not impede the compensation of services and the supply of information goods. Of course, information protected by intellectual property rules is deliberately excluded from such free flow. To do so, Internet Freedom rules out government intervention, avoids a global governance system, and ignores the imposition of liability for violation of human rights by the private sector. This ensures the absence of obstacles to the operation of the free market of information online. In sum, the free market can continue to function and the protection of some human rights has been a pretext, perhaps a positive externality, but not the priority.

4 Towards an Internet based on human rights

A recent body of literature explores the progressive inclusion of the African-American population in the United States. Despite having obtained their freedom in 1865, this population was systematically excluded and their aspiration of equality betrayed, even by the government itself (GOLDSTONE, 2011). The doctrine of “Separate but Equal” promoted by the Supreme Court perpetuated segregation and inequality, and made freedom an illusion. This policy caused social damage among the population, but a century had to pass before the doctrine in question was abolished, and civil and political rights were granted to the African-American population. Calling for the construction of a more egalitarian society to deal with the problem, then-President Lyndon Johnson, charged that “freedom is not enough” (PATTERSON, 2010). The same can be said of Internet Freedom.

An Internet policy based on human rights should be sustained on a comprehensive and global view of those rights, including not only freedom of expression and right to privacy, but also social, economic, and cultural rights, including the right to development. The policy should also empower people to effectively exercise their citizenship in the digital setting and to be participants in the governance of the Internet, either directly or through democratic channels. The policy should also establish clear responsibilities for private sector actors, who exercise more control in the structure of the Internet. And, although it does not need to challenge the market, it does require that priority be placed on human rights demands rather than free the market. Let us briefly examine each of these points.

4.1 *A global approach*

The Internet is a global digital communications platform. The aspiration to regulate or deregulate its operation based on a local approach, even if it is consistent with human rights, is insufficient because it disregards the Internet’s trans-boundary nature. It is such evanescence of borders online, which requires not only global coordination, but also that it is produced on the basis of certain, global, consensus-driven values. It is no longer just the local version of certain freedoms or rights, but one based on international human rights law.

It would not be fair to blame a couple or even a group of countries for pushing a reduced rights agenda according to their own interests, but it would be just to criticize those that make their own without criticism, and certainly to criticize ourselves when we shirk the responsibility of contributing to their improvement from our own realities. Even if an agenda is global, its precision and implementation requires locating the priorities (BERTONI, 2012), but without losing sight of a comprehensive approach.

4.2 *A comprehensive approach*

The legal declarations and their constitutional recognition initially concentrated on putting limits on state action in order to prevent that the government subjugate the citizens. Thus, by hindering state intrusion in the home, or prohibiting censorship.

However, this view becomes limited because it omits that the state can act as a guarantor of freedom, especially against the impact of the concentration of private power over our freedoms (FISS, 1996). A comprehensive approach to human rights also recognizes such capacity in the State and, indeed, demands the necessary intervention to protect and promote the rights of the people.

A comprehensive approach based on human rights should be extended to all the rights susceptible to Internet technology. Freedom of expression and right to privacy may seem the most obvious, but the Internet's increasing penetration demonstrates its potential risk to the realization of a wide range of civil and political rights as well as social, economic and cultural ones. And of course, the right to development must be included among them, particularly given the widening gap between people and individuals online and those disconnected from the Internet.

An Internet approach based on human rights should not just look at them comprehensively, but it must also articulate a process to identify how the Internet affects those rights so that standards that are specifically applicable can be established. Accurately, it has been suggested that a rights-based approach must emphasize participation, introduce supervision, empower people, avoid discrimination, and connect decisions with accepted human rights standards (LIDDICOAT, 2011, p. 16-17). A human rights-based Internet thus requires expressing human rights standards in its content and in its formulation.

4.3 Corporate responsibility

Unlike other contexts, the Internet puts us in an environment that private actors essentially dominate. Most governments lack the technical and economic capabilities available to many computer or telecommunications businesses in order to condition the operation of the Internet and to eventually infringe the rights of individuals. To pressure these actors to voluntarily comply with standards based on human rights is, even if commendable, insufficient and puts the State itself in breach of its duty to protect people against the violation of their basic rights.

Therefore, an Internet based on human rights cannot avoid the responsibility that the private sector holds in the violation of human rights, not only when it acts in conjunction with the state, but also when it does it on its own accord. This requires us to unambiguously determine permissible behavioral patterns in both the public and private sectors. For example, the European Union sets comprehensive standards that protect people from the unjust treatment of his or her information and the violation of his or her privacy by those who process such information, whether they are public bodies or private sector entities. Similarly when countries in Latin America, and more recently also in Africa, incorporate human rights standards in their constitutions, they must ensure that those standards apply not to only the State but also to the private sector.

Moreover, this responsibility must be protected with effective mechanisms to make it enforceable. This is no longer just a social responsibility, but also a legally enforceable one. Here there is room for significant improvements domestically. The experience of those countries that, in addition to holding

private actors responsible for the violation of human rights, have incorporated specific procedural mechanisms to achieve the effective respect of both the government and the private sector is valuable at this point. This is the case of the constitutional mechanisms used daily in several countries in Latin America to make fundamental rights enforceable. Thus, telecommunications providers have been forced to guarantee the neutrality of the network; credit reports providers have been required to change their personal information processing policies; Internet service providers have been instructed not to snoop on employees' electronic communications, and video surveillance services have been required to make proportionate use of their technology.

However, the protection of human rights offered by local enforcement mechanisms is insufficient, particularly when attempting to apply to those who provide online services from third countries. Thanks to the free flow of information! Thus, some operators can take advantage of the greater flexibility certain countries give with regards to others, in what can be defined as "human rights dumping," which originates from the asymmetries in which human rights are respected from one country to another, such as those who manufacture products in third-world countries under degrading environmental conditions, or those who stock their shelves with goods produced with child labor or under very poor working conditions.

The growing importance of the Internet in our lives, and the privileged role that private actors have in the network, force us to consider their responsibility in relation to the violation of human rights online. However, voluntary mechanisms or local solutions are not fully effective, however. Maybe it is time to revisit the United Nations initiative to establish a treaty which makes the respect of human rights enforceable, not only by states but also by private actors, who today control the Internet.

4.4 Digital citizenship and Internet governance

The absence of an effective international forum for Internet governance perpetuates certain asymmetries of power between those who currently manage it and those who do not. To reject such governance on the basis that the network is outside of governments' reach is a misleading and outdated argument, whereas to advocate for a management system jointly operated by the various stakeholder groups ignores the democratic representation systems and overlooks the virtual absence of an empowered civil society.

In addition to being an open and free space, the Internet establishes a real common patrimony of humanity. Consequently, it should have a system of governance, an international regulatory framework, and institutional operations similar to other goods with common patrimonial interests, such as Antarctica, the radio spectrum, or the High Seas. This is not to discard the participation of various interest groups, which contribute to the analysis of the network's complexities, along with introducing transparency, encouraging public debate and providing improvements to the results.

An Internet based on human rights cannot depart from the assumption that citizens and civil society organizations have established capacities to participate in Internet governance. Quite the contrary. With the exception of a few, most countries lack such capacities, or they are co-opted by the private sector or the government in office. An Internet policy based on human rights should empower people so that they can effectively exercise their citizenship in the digital environment and can to be participants in Internet governance, either directly or through democratic channels.

4.5 First human rights, then the market

To claim that human rights operate in a vacuum would be naïve; they are the result of historical circumstances and their degree of development also rests on the conditions of time and space in which they occur. A certain amount of realism requires paying attention to these circumstances, just as the operation of most of the global economy on the market base. However, considering the market cannot involve yielding to their needs or their efficiency standards, particularly if they involve the erosion of human rights.

A human rights-based Internet must give preference to human rights rather than to the market. So, you cannot advocate for moderation with respect to the right to privacy or any other right, in order to preserve the free flow of wealth. Nor can one exclude the imposition of limitations on intellectual property, or other essentially private interests, when they are necessary to ensure the realization of human rights. Human rights first, the market after.

5 Final Considerations

The Internet each day takes on an increasingly larger role in social life and it is necessary to prepare a clear human rights policy with its regard. This policy cannot, however, be limited to a local and partial approach of only certain fundamental rights that favors market operation, silences the role of the state, and omits the challenges of effective global Internet governance.

An Internet policy based on human rights should be sustained by a global and comprehensive view of these rights, including civil and political rights, as much as social, economic, and cultural rights, including the right to development. This policy should empower individuals to effectively exercise their citizenship in the digital environment and to be able to participate in Internet governance, to establish clear responsibilities for private sector actors and to give preference to human rights over market demands.

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NOTES

1. See Internet Rights & Principles Coalition, Beta Version of the Charter of Human Rights and Principles for the Internet, available at: <<http://internetrighsandprinciples.org/site/charter/>> (Last accessed on: 16 Mar. 2013).
2. The American system establishes a liability for third party intermediates for copyright infringement online and an immunity regime for other content. See, 17 United States Code § 512: Limitations on liability relating to material online, and 47 United States Code § 230: Protection for private blocking

and screening of offensive material.

3. See, Organization for Economic Cooperation and Development (OECD), Recommendation of the Council concerning Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data, adopted for the Council on September 23, 1980 – OECD Doc. C(80)58/Final; y, Asia-Pacific Economic Cooperation (APEC), APEC Privacy Framework, adopted at the APEC 16th Ministerial Meeting, held in Santiago, Chile between November 17th and 18th, 2004.

RESUMO

O desenvolvimento tecnológico oferece novas oportunidades para o progresso da humanidade, assim como para a concretização dos direitos humanos, embora, ao mesmo tempo, também crie novos riscos para estes mesmos direitos. Em anos recentes, diversas iniciativas público-privadas trouxeram à luz a necessidade de promover e preservar a liberdade na Internet, como pressuposto essencial para a progressiva realização dos direitos humanos e o funcionamento de uma sociedade democrática. Trata-se de *Internet Freedom*. Neste artigo, sustenta-se que o enfoque de *Internet Freedom* é, entretanto, limitado, pois oferece uma visão tendenciosa da relevância dos direitos humanos no ambiente *online*. Após constatar essas limitações, o artigo sugere os elementos que deveriam integrar uma abordagem da Internet baseada em um enfoque pormenorizado dos direitos humanos para a Internet.

PALAVRAS-CHAVE

Internet Freedom – Direitos humanos – Cidadania digital – Governança da Internet – Responsabilidade empresarial

RESUMEN

El desarrollo tecnológico ofrece nuevas oportunidades para el progreso de la humanidad, así como para la concreción de los derechos humanos, aunque, a la vez también crea nuevos riesgos para estos mismos derechos. En los recientes años, diversas iniciativas público-privadas han enarbolado la necesidad de promover y preservar la libertad en Internet, como un supuesto esencial para la progresiva realización de los derechos humanos y el funcionamiento de una sociedad democrática. Se trata de *Internet Freedom*.

En este artículo, el autor sustenta que el enfoque de *Internet Freedom* es, sin embargo, limitado, porque brinda una visión sesgada de la relevancia de los derechos humanos en el entorno en línea. Tras constatar dichas limitaciones, el autor sugiere los elementos que debería integrar una aproximación a Internet sustentada en un enfoque comprensivo de los derechos humanos para Internet.

PALABRAS CLAVES

Internet Freedom – Derechos humanos – Ciudadanía digital – Gobernanza de Internet – Responsabilidad empresarial

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