Bogotá, October 17, 2017

Honorable Magistrates
Constitutional Court
Sixth Constitutional Rights Review Court

Ref.: *Amicus curiae* in the nullity suit against judgment T-063A of 2017. File T-5,771,452

Catalina Botero Marino and Carlos Eduardo Cortés Castillo, identified as it appears by our signature, expressing our deep respect for the decisions of the honorable Constitutional Court, submit this *amicus curiae* within the proceedings referred above. This brief is intended to assist in the request for annulment initiated against the aforementioned decision.

The fundamental reason that leads us to present this brief refers to the structural impact that this sentence may have on the exercise of the right to freedom of expression on the Internet. On the one hand, this decision supposes a substantial break with the precedents -subject to international law- that the Court itself had been constructing on various issues, including those related to the role of intermediaries on the internet. On the other hand, the sentence compromises the right to due process for the Internet's end users. The most important reason for this brief, however, is that the ruling fails to account for fundamental definitional issues, and, in consequence, it has serious and structural effects for the functioning of the Internet.

As is shown throughout this document, if this decision is set as precedent - contrary to the previous precedents of the Court - any person could request any Internet intermediary to censure, without a court order, negative information whose author is not fully identified. For example, a politician offended by the cartoons drawn by a person like “Vladdo", could demand that all intermediaries (Google, Yahoo, Twitter, Facebook, and even media blogs such as La Silla Vacía or El Tiempo) censor the columns signed with this pseudonym, without a court order.

If this ruling were to be upheld, the intermediary would have the obligation to proceed immediately with the removal of that information from the public sphere. And in this as well as those where this precedent begins to apply, society as a whole will lose, since it will not have access to legitimate, and often essential information. The author is harmed, for not being allowed to exercise the right to defend his freedom of expression. It also harms democratic deliberation

by breaking those principles that structure the open, neutral and global functioning of the Internet in accordance with international standards.

1. Initial considerations

1.1. Origin of this citizen intervention in the nullity suit against the constitutional rights ruling and content of this brief

As recognized by the Constitutional Court, some of the grounds for nullity of a constitutional rights sentence include disregard of the jurisprudence established by the Court's Plenary Chamber, violation of due process, and the inconsistency between the motivating portion and the operative portion of the sentence that "*creates uncertainty regarding the scope of the sentence"*.[1] For the Court, this inconsistency also occurs when a decision is "*completely lacking in rationale*"[2] or when it arbitrarily refrains from analyzing *"transcendental matters for the meaning of the decision"*.[3]

On the other hand, the Constitutional Court has accepted that in annulment proceedings, citizen interventions are welcome in support of the request when they contribute to the court's analysis:[4]

> In the absence of a constitutional or legal provision that prevents or limits the intervention, we must accept that it extends to all those actions that take place in the proceeding, including those that may arise after the ruling that concludes it, as, for example, nullity claims due to issues related to procedural irregularities (...).[5]

Ruling T-063A of 2017 ignores the jurisprudence established by the high court regarding freedom of expression, compromises due process and raises an inconsistency between the motivating and the operative portions in relation to the responsibility of Internet intermediaries vis-a-vis expressions by third parties. In addition, the ruling as a whole fails to analyze important matters that, if attended to, would necessarily change the meaning of the decision.

1.2. Delimitation of the issue

In the last two decades, technology has advanced at a speed that is hardly matched by legislation. Therefore, the role of the courts in the regulation of the Internet is particularly notorious. The democratic governance of the Internet today depends on judges - and especially constitutional

[1] Constitutional Court, Order 410 of 2015.
[2] See, Constitutional Court, orders 019 of 2000, 082 of 2002 and 165 of 2008.
[3] Constitutional Court, Order 003 of 2011.
[4] See, for example, Constitutional Court, Order A072 of 2011.
[5] Constitutional Court, Order A035 of 1997.

courts - adopting decisions that take into account the principles that have allowed the web to be a truly free, neutral, and global discussion space.

The technical issues surrounding the Internet are often of enormous complexity for those who are not specialists in the field. In some cases, this has caused regulatory bodies and constitutional judges to adopt decisions that, unknowingly, have a very serious collateral impact. For those who have not specialized in the subject, these effects are difficult to foresee at first sight. This is the case for this ruling. With the clear intention of protecting fundamental personal rights, the Court changed its precedents and issued a decision that deserves to be revised in order to avoid serious negative impacts on the entire workings of the web.

The Constitutional Rights Court changed the existing judicial precedents -consistent with consolidated international standards- and imposed on Internet intermediaries, through a particular case, the general obligation to monitor and eliminate contents by third parties, without even allowing the latter to defend judicially their right to freedom of expression.

The judgment under appeal considers it particularly problematic that the negative statements subject to the constitutional rights suit were made anonymously. However, it ignored one fundamental point: the Blogger.com platform has a registry of user data, through which it could have notified the provider of the information about the judicial challenge that had occurred in relation to what had been published. The fact that the publication of the blog did not have at first sight information that fully identified the author does not mean that he or she was not willing to defend the veracity of his or her statements in court. In this sense, the Court violated the due process of that person in addition to their freedom of expression.

Likewise, the Court created a kind of presumption of guilt against publications that are anonymous or where the author is not fully identified with their personal data. This poses two problems: on the one hand, the intermediary is faced with the disproportionate task of determining the authorship of third party content, also going against the very terms of service agreed with its users. On the other, such restrictive environment can easily lead to a system of prior censorship by users who do not use their real name to express themselves online, but do so through pseudonyms, parody names, or artistic names.

Finally, on the essential elements that the sentence fails to account for and that would have changed the meaning of the decision, it is necessary to add one additional point. In the opinion of the Constitutional Rights Court, the companies Google and Google Colombia [6] provide telecommunications services and, therefore, must observe all the obligations assigned to this type of services, including registering in the Registry of the Ministry of Information and

[6]This brief understands that the intermediary that manages the platform is Google Inc. -whose name was recently changed to Google LLC-. In this way, whenever the word 'Google' appears in this brief by itself, it must be understood that it refers to the latter.

Communication Technologies (ICT). This decision omits and departs from all regulations on the matter, and the reasons why the specialized authorities themselves have excluded social networks, video services, online shopping platforms, search engines and blogs, among others, from that registry and from related legal obligations imposed on telecommunications services providers.

Imposing these obligations on Google presupposes that they will have to be extended to other types of services and applications online, both domestic and international. Twitter, Facebook, YouTube or Amazon would end up covered by this regulatory framework, as well as start ups that are just beginning to consolidate, such as Tappsi, Rappi, VueltaAp, and in essence all the projects in the Apps.co initiative, would be similarly covered. Adding them to the ICT Ministry registry would give this ministry the power to regulate them, which would generate an inhibitory effect on innovation and open a door for censorship through the administrative control of content.

In general, the jurisprudential rules that the judgment in question establishes encourage intermediaries to censor any information that may cause them later problems; it prevents people from freely exercising their freedom of expression on the Internet without the risk of being silenced; it limits the democratizing and innovative potential of the web, and eliminates the conditions that make possible the most important space for deliberation hitherto known by humanity.

Such is the magnitude of the impact of this ruling and, for that reason, we support the request for nullity so that the Court itself can review it. Below, we move on to develop the arguments of this *amicus curiae*.

2. Deviation from precedents regarding the role of intermediaries and omission of key matters whose examination would have had a substantial impact on the judicial decision that is being challenged.

2.1. Scope of the sentence regarding Google's liability as an intermediary

In August 2016, the Twenty-First Civil Municipal Court of Bogotá denied the constitutional rights suit case because it considered that Google was not competent nor responsible for the correction, elimination or complementation of the information uploaded by users. With good judgment, the ruling affirms that Google "*" acts solely as processor of a tool, whereby it dictates policies for users, but does not manage or produce contents".*

The intermediary, in any case, was not refusing to remove the challenged content, but claimed that it was not its duty to determine what information may or may not remain public. In its opinion, this decision corresponded to a judge. However, the decision by the constitutional rights section of the Constitutional Court did not agree, and stated in the preamble:

> However, the Court deems it pertinent to warn Google Inc. that, while not regulating the subject of anonymous blogs with defamatory, disproportionate, slanderous or abusive content in the content policy of its tool "Blogger.com", in cases where the person affected by this type of blog demonstrates not having the possibility of defending him or herself, challenging or rectifying on equal terms the information contained therein due to the anonymous nature of the publication, Google Inc. must proceed to eliminate challenged content without requiring a prior court order (underlined).

Subsequently, in the second subparagraph of the second paragraph of the operative part, the Court decides:

> In addition, whenever a new anonymous blog is created in the "Blogger.com" tool, with the same characteristics, against the same person and in the same or similar slanderous and dishonorable terms, Google Inc. shall proceed as ordered in this sentence.

In these sections, the Court orders Google to remove anonymous and offensive or slanderous content without there being a prior court order. It is probably a decision that seeks immediate action and seeks to avoid congestion of the judicial system. However, this decision is based on several assumptions about the intermediary: (i) that it is able to identify who is using a name other than their legal name, and whether that name is a known pseudonym or is a way to remain anonymous; (ii) that has the technical capacity and legal clarity to identify and differentiate without risk the cases in which these users make statements *" in slanderous and dishonorable terms"* from those in which they make statements that are legitimate for public debate -such as those that may refer to human rights violations or acts of corruption-; and (iii) that it has the technical capacity to do this monitoring in real time.

In sum, the Court assigns the intermediary the responsibility of monitoring contents in order to establish those cases in which information must remain in the public sphere and those in which it must be excluded or censored. Additionally, by granting Google the power to remove libelous publications that are also "anonymous", the Court is giving it powers that generally reserved for a judge, consisting of resolving a conflict between fundamental rights and deciding whether speech may or may not remain in the public sphere. In short, the ruling is creating a strong incentive for the company to resolve any such request in a manner that goes against freedom of expression in order to avoid being sued and to be held liable for third party content.

However, as is clear when comparing the two texts cited above, while the sentence's preamble states that Google must create a private mechanism for removing disproportionate, offensive or libelous "anonymous" publications, the operative part obliges it to do so only with respect to publications related to the case. The implementation either measure would entail different obligations for this intermediary, and would also different effects in terms of freedom of expression. However, will be explained, both scenarios disregard the national jurisprudence and the international standards that these precedents had incorporated.

The Constitutional Court has consistently referred to the jurisprudence of the Inter-American Court, the doctrine of the Inter-American Commission on Human Rights, and the reports of the Office of the Special Rapporteur for Freedom of Expression as a relevant doctrine to interpret Article 13 of the Inter-American Human Rights Convention, which form part of the constitutionality block.[7]

In particular, the Constitutional Court has expressly used the doctrine of international human rights protection bodies regarding the role of intermediaries on the Internet. As will be further explained, the sentence being challenged, disregards these international standards and the reiterated jurisprudence that incorporated them.

2.2. National jurisprudence and international standards on the role and responsibility of intermediaries

Internet intermediaries are actors - usually private - that in one way or another determine and enable online interactions. There are different types of classifications, but in general terms they are divided between those that provide the connection or a related technical service, and those that host content or provide a service. The Organization for Economic Cooperation and Development (OECD) offers the following classification, to which we add examples in parentheses:[8]

- Internet Service Providers. The company that provides the connection (Claro or ETB).
- Website Hosting Providers (GoDaddy).
- Search engines (Google or Yahoo!)
- Electronic commerce intermediaries (Amazon).

[7] On the constitutionality block, see, among others, Constitutional Court, sentences C-010 of 2000, C-370 of 2006, C-442 of 2001, C-715 of 2012 and C-327 of 2016.
On the incorporation of the doctrine of the Inter-American Commission on Human Rights and the Office of the Special Rapporteur for Freedom of Expression, other than issues related to the Internet and explained in this document, see, among others, sentences T-256 of 2013 and C-467 of 2017.
[8] See, OECD, The Economic and Social Role of Internet Intermediaries. April 2010.

- Online payment systems (PayPal).
- Service platforms and social networks (Facebook, YouTube or Blogger).

The regulation of intermediaries defines and delimits the responsibility they have for the content published by third parties on their platform. Regarding allegedly offensive information, in the United States, Section 230 of the *Communications Decency Act* establishes that no provider of an electronic interactive service can be treated as the publisher or author of information provided by a third party. This last option is called full immunity.

In similar vein, the Internet Civil Framework of Brazil (Law 12,965 of 2014) -the most advanced standard in the hemisphere in terms of Internet regulation- states:

> Article 19. Aiming to ensure freedom of expression and prevent censorship, Internet application providers may only be held liable for damages arising from content created by third parties if, after a specific court order, it fails to take steps to, within the scope of the technical limits of its service and within the allotted time, make the content specified as infringer unavailable, except for those legal provisions to the contrary (underlined).

Despite the clarity of the Civil Framework, in an electoral reform issued at the beginning of October, the Brazilian Congress unexpectedly included an article that openly disregards it: according to the proposed article, social media platforms were obligated to remove, within 24 hours and without a court order, false or offensive content against candidates or parties. If any user reported any content through the service's reporting mechanisms, the company had to evaluate it and make a decision.[9]

The Brazil office of the international organization *Article 19*, that defends freedom of expression and access to information, categorically rejected the reform for violating the Civil Internet Framework and constituting a "*Legal measure that can cause more censorship on the public debate, especially at the current moment of political crisis that crosses the country*".[10] On account of pressure from civil society and the media, President Michael Temer vetoed the amendment.[11]

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[9]See the final text of the law, prior to presidential sanction, in http://legis.senado.leg.br/sdleg-getter/documento?dm=7219617&disposition=inline.
Article 57B states: "§ 6º A denúncia de discurso de ódio, disseminação de informações falsas ou ofensa em desfavor de partido ou candidato, feita pelo usuario de aplicativo ou rede social na internet, por meio do canal disponibilizado para esse fim no próprio provedor, implicará suspensão, em no máximo vinte e quatro horas, da publicação denunciada até que o provedor certifique-se da identificação pessoal do usuário que a publicou, sem fornecimento de qualquer dado do denunciado ao denunciante, salvo por orden judicial".

[10] 'ARTIGO 19 repudia emenda que legaliza censura nas eleições brasileiras', 6 de octubre de 2017. Informal translation Available at: http://artigo19.org/blog/2017/10/06/artigo-19-repudia-emenda-que-legaliza-censura-nas-eleicoes-brasileiras/.

[11]See, 'Michel Temer veta emenda que buscava censurar a internet', October 6, 2017. Available at: http://www.carlostrentini.com.br/2017/10/06/michel-temer-veta-emenda-que-buscava-censurar-a-internet/.

The fact that intermediaries do not have to answer legally for third party contents and do not have the obligation to remove them before receiving a court order, is considered a guarantee for the exercise of freedom of expression online and against censorship. It is not a matter of defending intermediaries. As all the literature on the matter shows, this rule has been built especially at the request of civil society organizations and human rights defenders to defend critical speech against censorship that companies could impose on them if their liability were compromised.

This means that objective liability regimes or those assigning liability to an intermediary for third-party content should be ruled out outright, since "*[on the one hand, it] entails imposing diffuse obligations on [intermediaries], beyond those that could actually be met. On the other, it would result in greater restrictions for Internet users, contrary to fundamental rights and guarantees.*"[12]

It is then disproportionate to hold the intermediary liable for third party information that may harm an individual, even more so if that private actor must start assessing whether the supposedly offensive content was produced by a person who is not fully identified by the public. The disproportion does not only refer solely to the work that the company will have to carry out, but also -and above all- to the harm for the public, who will depend on the intermediary's decision rather than a judge's as to what information can remain public.

Faced with the position of power held by intermediaries, international standards have sought to prevent them from being given the mandate to censor information or to create regulatory systems that incentivize them to do so - as the contested sentence would. For this purpose, international law and the most advanced regulatory regimes have freed Internet intermediaries from any liability, "*provided they do not specifically intervene in content generation or refuse to comply with a court order that requires its removal*."[13] In other words, intermediaries are only liable if they have contributed content or if they refuse to obey the court order to remove it.

For United Nations Rapporteur David Kaye, "*Private intermediaries usually do not have sufficient means to determine the illegality of contents*."[14] By not having the capacity to weigh the rights at stake, private actors obliged to implement out-of-court notification and removal regimes end up removing legitimate content and violating the freedom of expression of their users. It is in this sense, then, that the immunity of intermediaries results in a protection of public

[12] Cortés, C. 'Las llaves del ama de llaves: la estrategia de los intermediarios en Internet y el impacto en el entorno digital'. In: Internet y derechos humanos. Aportes para la discusión en America Latina. Bertoni, E., compiler. University of Palermo, 2014, p. 87

[13] Op. Cit., Special Rapporteur for Freedom of Expression. Freedom of Expression and the Internet, Report 2013, para. 518

[14] Op. Cit., Human Rights Council, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, para. 44

debate. The "Manila Principles" are geared towards the same goal, proposed by civil society as a frame of reference and good practices in the matter.[15]

For all the reasons mentioned above, the four United Nations freedom of expression rapporteurs, the Organization for Security and Cooperation in Europe, the Organization of American States and the African Commission on Human and Peoples' Rights, declared in 2011:

> a. No one who simply provides technical Internet services such as providing access, or searching for, or transmission or caching of information, should be liable for content generated by others, which is disseminated using those services, as long as they do not specifically intervene in that content or refuse to obey a court order to remove that content, where they have the capacity to do so ('mere conduit principle').
>
> b. Consideration should be given to insulating fully other intermediaries, including those mentioned in the preamble, from liability for content generated by others under the same conditions as in paragraph 2(a). At a minimum, intermediaries should not be required to monitor user-generated content and should not be subject to extrajudicial content takedown rules which fail to provide sufficient protection for freedom of expression (which is the case with many of the 'notice and takedown' rules currently being applied).[16]

To reiterate: in cases where there is a claim against certain content that does not violate the intermediary's terms of service, such claim cannot be excluded from public deliberation until an order is issued by an independent and impartial judge who, after respecting all due process guarantees and giving fair consideration of the rights in conflict, makes that decision. The intermediary must then proceed to remove that content from the Internet, and will be liable only in case of disobeying the order given.

Sentence T-277 of 2015 - mentioned by the contested ruling - cites the declaration and adds:

> That is to say that [international law] tends to provide Internet intermediaries with some immunity, in such a way that they are not held liable for the contents and activities of the system's users. The above is explained because ascribing responsibility to those who provide these services, usually private actors, could affect the neutrality of the Internet and

[15] See, https://www.manilaprinciples.org/principles.
[16] Joint declaration on freedom of expression on the Internet. Issued by the Special Rapporteur of the United Nations (UN) for Freedom of Opinion and Expression, the Representative for the Freedom of the Media of the Organization for Security and Cooperation in Europe (OSCE), the Special Rapporteur of the Organization of American States (OAS) for Freedom of Expression and the Special Rapporteur on Freedom of Expression and Access to Information of the African Commission on Human and People's Rights (ACHPR). June 1, 2011.

> its principles of non-discrimination and equal access, by turning intermediaries into censors that would control the content and type of information shared by users.
>
> The existing relationship between the free traffic of ideas online and freedom of expression derives from the fact that this right not only empowers people to express their ideas and opinions, and to transmit information, but also protects process by which the expressed content is disseminated and reaches others. Given this state of affairs, imposing responsibilities on Internet intermediaries for the content transmitted would significantly limit the dissemination of ideas through this means of communication, as it would give them the power to regulate the flow of information on the web. Regarding those who create the information, the Rapporteur for Freedom of the Press has indicated that the subsequent responsibilities can only be imposed on the authors of what is expressed on the Internet, that is, those who are directly responsible for the offensive speech. (underlined)

In a previous ruling - T-040 of 2013, also cited in the contested judgment, albeit incompletely - the Court raises the same argument regarding the liability of intermediaries:

> Finally, the Court warns that in the specific case, the person responsible for the information published, and thus for its possible rectification, is the media company that collected, analyzed, processed and disseminated the news, that is, *El Tiempo* publishing house, through its official website. Thus, any rectification, if necessary, corresponds is to this entity. On the contrary, for the Appeals Court, Google Colombia S.A. is not responsible for the news item "Los hombres de la mafia en los llanos" because, as explained by this company in its response, Google provides a search service for the information that exists throughout the web, and is not the creator or publisher of such information, rather a simple search engine that cannot be attributed the responsibility for the veracity or impartiality of a given article, news item or column that appears in its search results. (underlined)

The rules developed by these judgments, which correctly incorporate international standards, can be summarized as follows:

- To guarantee freedom of expression online and to prevent prior censorship, it is necessary to provide Internet intermediaries with immunity for the contents that third parties (Internet users) disseminate through their platforms.
- Attributing responsibility to intermediaries for the actions of third parties creates a regime that encourages censorship. To evade this responsibility, intermediaries would be forced to implement content filtering or automatic removal systems based on keywords, for example, to avoid having speech that may seem offensive or negative to anyone.

- Intermediaries do not have the legal knowledge, the context or the technical capacity to adequately evaluate what should be censored and what should be free to circulate in virtue of matters of veracity or reputation.
- Attributing responsibility to intermediaries for the actions of third parties means giving them the attribution to control the flow of content, that is, to decide what can and cannot circulate online. This ends up giving them exorbitant powers of censorship.
- Subsequent responsibilities can only be imposed on the authors of the questioned expressions. The intermediary is not the one who writes the information, and to that extent it cannot answer for the veracity or impartiality of its contents.
- The intermediary must proceed to remove the content whenever an impartial and independent judge, after an appropriate weighting of fundamental rights, decides that the information should be excluded from the public sphere.

In addition to the rulings outlined in our Constitutional Court, these rules have been collected by comparative law in several cases in the region. Among others, there is the case against Google and The Clinic in Chile, where the Supreme Court of that country considered that it was impossible to attribute a duty of supervision to the intermediary for the contents of a third party; the case of Belén Rodríguez against Google in Argentina, where the Supreme Court ruled out a regime of strict liability for intermediaries, and the case of the state of Espirito Santo in Brazil, where the Supreme Court of that country upheld the standard according to which Internet intermediaries are not responsible for content that is not of their authorship.[17] Likewise, as mentioned, in the United States, pursuant to Section 230 of the *Communications Decency Act* previously mentioned, the Internet intermediary has been judicially protected for third party speech on several occasions.[18] The Internet Civil Framework of Brazil, for its part, requires a court order so that an intermediary can proceed to remove information simply because a third party is offended.

Similarly, several of the rulings involving Google and cited by the challenged ruling to support its decision, argue instead for the need to limit the liability of Internet intermediaries, or simply do not apply to the facts of this case.

In the case of Tamiz vs. Google Inc. the European Court of Human Rights rejected the suit initiated by a local politician against the United Kingdom who considered that his reputation was harmed by statements made in a Blogger blog. The Court of the United Kingdom had previously dismissed the plaintiff's suit. The European Court considered this decision by the UK judge to be

[17]Supreme Court of Chile, judgment issued December 6, 2016 (Protective Action 88729/2016); Supreme Court of Argentina, judgment issued October 28, 2014, R. 522. XLIX; Supreme Court of Brazil, decision Rcl. 18685-ES issued August 2014.
[18]See, for example, Global Royalties, Ltd. v. Xcentric Ventures, LLC, 544 F.Supp.2d 929 (D. Ariz. 2008) and Batzel v. Smith, 333 F.3d 1018 (9th Cir. 2003).

just, and reiterated " *the important role that ISSPs such as Google Inc. perform in facilitating access to information and debate on a wide range of political, social and cultural topics"* .[19] For the high European court, in addition, the affected party could have initiated other actions to seek protection of the right allegedly violated.[20] It is clear that this precedent goes in the opposite direction of the sentence that concerns us.

In turn, the case of Pia Grillo vs. Google Inc. refers to Google as a provider of the Google Street View service rather than as a blogging platform. Despite the fact that liability was determined against Google, the facts are very different from the case that was analyzed by the appeals court in Colombia in the challenged decision. On this occasion, the Court determined that there was a violation of the private life and the image of a woman for images published in said service. In the images the plaintiff appeared in front of her house, her face blurred, while her body was seen clearly and you could see her chest. The images had been captured by the company. It is, therefore, a matter relating to the disclosure of intimate images without the consent of the affected party, which, moreover, were obtained by the same company without due authorization.

Finally, the case of Yeung vs. Google Inc. refers to the role of Google as a search engine and, in particular, the appearance of certain words in the autocomplete function and in the appearance of content in response to search terms made by the plaintiff. However, it should be noted that this is a decision in which matters related to jurisdiction are analyzed, not to the liability of Google. This ruling does not set the liability of intermediaries, much less establishes a precedent that supports the challenged judgment.

2.3. The ruling disregards the jurisprudence of the Constitutional Court and does not take into account central aspects that have been exposed in the previous section and that have a decisive impact on the decision.

The challenged sentence is right to argue that this is the first case that the Constitutional Court addresses in terms of information published in a blog by a person who uses a pseudonym or who is not fully identified to the public. However, this circumstance does not constitute a substantial difference when applying the jurisprudential rule that has been mentioned above.

The fact that the person who created the disputed content uses a pseudonym or fails to provide their real name, does not imply that he or she cannot be notified of a judicial proceeding or,

[19] European Court of Human Rights (First Section), sitting on 19 September 2017. Application no. 3877/14. Para. 90.

[20] See, ibidem, paragraph 82: "the Court notes that this is not a case in which no measures were in place to enable the applicant to protect his Article 8 rights. On the contrary, following publication of the impugned comments on the "London Muslim" blog,. he had at least three options available to him to protect any perceived damage to his reputation. First of all, he could have brought libel proceedings against the authors of the comments. While this option would not have been without its difficulties, as the authors were unlikely to be readily identifiable, there was the possibility of making a *Norwich Pharmacal* application to seek disclosure of their identities from Google Inc.".

possibly, identified. As mentioned before, to use the services of Blogger.com - like most online platforms - the user must register with some basic data and provide an associated email. This means that the service provider, after a court order, can notify that user of the existence of the judicial proceeding so that he or she may exercise, if he or she wishes, his or her defense of the right to freedom of expression.

On the other hand, in exceptional situations - such as cases of terrorism or the possible commission of a serious crime, a criminal conviction or civil liability compensation - the intermediary may provide information to help identify a user (for example, supplying the IP address of their connection). In those cases, "*the judicial authorities would be authorized to take reasonable measures intended to discover the identity of the source of prohibited conducts in order to apply the response provided by the legal system*".[21]

In either case, Google offers avenues to report illegal content (sexual exploitation of minors, for example) or to send a court order, and states that "*it may send the original notification to the alleged offender*".[22] This type of actions, which stem from the platform's terms of service, are not a simple unilateral gesture by the company. The multiple stakeholders in Internet governance - civil society, international organizations, companies and governments - have maintained a constant dialogue with Internet intermediaries so that their terms of service are in line with the general framework for the protection of human rights. In this regard, the Office of the Special Rapporteur of the Inter-American Commission on Human Rights stated:

> (...) private actors must establish and implement service conditions that are transparent, clear, accessible and adhered to international standards and principles in the area of human rights, including the conditions in which interference with the right to freedom of expression or the privacy of users may occur. In this sense, companies should seek that any restriction derived from the application of the terms of service does not illegitimately or disproportionately restrict the right to freedom of expression.23

The sentence is then mistaken in stating that the offended person is defenseless. Just as the intermediary must respect the right of the user who is not fully identified, it must also offer

[21] Cfr. Op Cit., Inter-American Commission on Human Rights, "Annual Report of the Inter-American Commission on Human Rights, 2013, para. 135.
[22] See, 'Removing content from Google' in: https://support.google.com/legal/troubleshooter/1114905?hl=en#ts=1115645%2C3331068%2C1115795. 'Submit a court order to Google' at: https://support.google.com/legal/contact/lr_courtorder?product=blogger&uraw=. 'Report other legal removal issue' at: https://support.google.com/legal/contact/lr_legalother?product=blogger&uraw=.
[23] Op. Cit., Special Rapporteur for Freedom of Expression. Freedom of Expression and the Internet, Report 2013, para. 112

options to the user who considers that his or her rights have been violated.[24] And, in any case, judicial authorities always have the power to order an intermediary to remove content - as was done in this case and whereby which Google complied.

The contingent element of possible anonymity cannot be a factor in determining what kind of responsibility the intermediary should assume. According to the aforementioned international standards which were collected by Colombian constitutional jurisprudence, the intermediary is legally responsible, exclusively, when it fails to comply with a judicial order and not when the publication being challenged does not allow the full, public and immediate identification of its author.

The fact that it is an anonymous publication does not detract from the intermediary's protection; the fact that it is not responsible for the veracity of the contents that it hosts also includes those contents that do not have an identified or identifiable author. What the precedent of intermediary protection seeks is to maximize freedom of expression and the free flow of information, not to condition it to certain types of expressions, in certain formats, or with requirements that aren't provided by law nor by jurisprudence.

Also, that both precedents of the Colombian Constitutional Court refer to Google as a search engine and not as a blog platform -Blogger.com-, does not imply that the precedent will no longer apply to this case. In fact, in the constitutional rights claim the plaintiff starts by mentioning the blog but ends up referring to the search engine, and the contested ruling does not make an express distinction that justifies taking a decision against the precedent.

From all of the above, it is clear that the general rule derived from the contested sentence is contrary to the existing precedent -and international standards- since it forces the intermediary to remove, without a court order, content that may be offensive and where its author is not fully identified publicly. As the Court provides in this judgment, if the intermediary does not immediately and proactively remove any information similar to the one whose removal is ordered, it incurs liability for violation of the personal rights of the plaintiff.

The idea that the intermediary should remove contents by unidentified authors is, in addition to violating the precedent, disproportionate and inapplicable in practice. Worse still if the court adds the task of proactively removing offensive content. To illustrate this point we allow ourselves a couple of examples:

[24] It is worth mentioning that, in any case, if within a service such as Facebook or Blogger a community decides to create a different space (such as a group or a fan page), it can be subject to additional rules of service, coexistence and behavior so that this place conforms to the rules that govern the community to which it belongs.
For example, it could be for the purpose of preventing bullying or discrimination. In that case, the administrator or moderator can (and sometimes must) remove content without a court order, although this action may be subject to eventual constitutional review.

- "Tola and Maruja" have an account in the social micro blogging network known as Twitter (@tolaymaruja) where they caricature national events and make fun of public figures. Is this then an anonymous account? Should Twitter evaluate if a tweet that makes fun of the President or a Minister is offensive?
- "Bacteria" and "Matador" have blogs on Blogger.com.[25] Although many Colombians may know what their real names are, for a platform they are simply two blogs where content is published under pseudonyms. If the company removes their contents because someone reports them as offensive, does it not violate the freedom of expression of these cartoonists?
- There is a blog on Blogger.com dedicated to the department of Caquetá.[26] It is a space *"Aimed for children of primary school age, and to make the Colombian Amazon Region better known (...).*" For all purposes, it is an anonymous blog, since it does not identify an individual or legal person. In compliance with the order of the sentence in question, should Google review a publication that talks about, for example, the furniture sold in Caquetá? How can the intermediary know that it is the department and not the company that the sentence seeks to protect?

In short, the specific order in the sentence would oblige the intermediary to implement a proactive monitoring system, where it not only identifies expressions that may violate the rights of a private individual, but also removes contents based on a private, subjective and non-transparent evaluation. In a scenario in which fulfilling such an obligation was possible, it would create, by virtue of a judicial order, a prior censorship body, which, for the Inter-American Commission of Human Rights constitutes *"the prototype of extreme and radical violation of the freedom of expression, since it entails its suppression*".[27]

The United Nations Special Rapporteur accurately summarizes how these schemes end up severely damaging the functioning of democracy:

> The work of private censorship is complicated by the sheer volume of complaints and flagged content that intermediaries identify on a daily basis. Large platforms may also outsource content moderation, creating even more distance between content moderators and internal policymaking decisions, and exacerbating inconsistencies in enforcement. Intermediaries that operate in a diverse range of markets inevitably face "complex value

[25] See, https://matadorcartoons.blogspot.com.co/ and https://bacteriaopina.blogspot.com.co/.
[26] See, https://visitandoelamazonas.blogspot.com.co/p/department-del-caqueta.html.
[27] Op. Cit. Inter-American Human Rights Commission. "Inter-American legal framework on the right to freedom of expression", para. 146 "It takes place when means are established through public authority to impede in advance the free circulation of information, ideas, opinions or news, by any means that subjects the expression or dissemination of information to State control—for example, through the prohibition or seizure of publications, or any other procedure with the same aim".

judgments", issues with cultural sensitivity and diversity, and "difficult decisions about conflicts of law".[28]

None of this supposes that the statements that were studied in the concrete case do not merit constitutional analysis. What we are trying to affirm is that (i) the judge could have requested the participation of the content provider in the process in a different way; (ii) if the user had decided not to defend himself, it would have been for the Court to determine whether the information in the specific case violated fundamental rights; (iii) the Court's consideration that intermediaries must constantly monitor and proceed to withdraw certain information without prior judicial order, under penalty of being held liable, violates the constitutional precedent, assigns intermediaries the function of censorship and compromises international standards.

A final point is the technical complexity entailed by the order in the sentence and how it alters the role that intermediaries have on the Internet. Being an order that refers to statements, meanings and contexts, the company cannot simply detect and cancel what is supposedly a violation, because it would end up producing an infinite number of "false positives" and removing from the public debate any information that may offend a person and where its author has not fully identified with his or her official name (or as it appears on his or her citizenship card).

Another option would be to use a huge team of people to monitor whether the author of the information is fully identified; if that corresponds to the person's official identification - wherever they may be in the world - and whether the information is offensive without there being a reason that justifies it. This is not only a task that corresponds to a judge, but in many cases is technically impossible to perform and, in any case, there would be countless errors.

Content moderation in Internet companies is usually carried out by employees or even external teams trained in a general way to apply the platform's rules. They do not have - nor could they have - a deep knowledge of each country. Thus, in the event that a person from a company such as Google, Facebook or Twitter had to apply the ruling, they would consider the pseudonym "Vladdo" - returning to the previous example - as false as any other. Therefore, all information that may come from this author and eventually offend a third person, would be immediately removed from the web. All of the above, notwithstanding the fact that this rule would not be scalable to services that reach billions of users (Facebook, for example, has more than two billion).

Faced with an order such as the contested ruling, the only option for the intermediary would be to modify the structure of its service, the relationship with the user and the set-up of the

[28] United Nations A/HRC/32/38 General Assembly, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, May 11, 2016. Para. 54

ecosystem it offers: from an open service it would pass to an architecture of absolute control, where only previously approved users would be accepted, whose full identity was public and corresponded to their official identification. These users would have to accept onerous conditions so that the intermediary could offer them the service. The platform would become a club and the democratizing effect of the web would have been extinguished.

This precedent would involve removing from the Internet any information that a user could consider negative, which would reduce the number of available voices. In this sense, the decision "purifies" the Internet, depriving it of a deliberation that, in some cases, is indispensable to curb cases of corruption or human rights violations. This decision would do away with the conditions that make it possible for the web to operate as a free, open and global space for deliberation on matters of public interest, restricted only by that which the law or the judiciary may legitimately and proportionately impose after the weighted assessment of the concrete case. All of the above in violation of the long-established jurisprudential rule, according to which the doctrine and international jurisprudence in matters of freedom of expression must be considered by the constitutional judge before adopting a certain decision.[29] If the rule studied changes the precedent and becomes generalized, the Internet will forever cease to be as we know it today.

In this sense, another one of the aforementioned causes of nullity takes shape, since it not only disregards the precedent in terms of sources, but the international responsibility of the State may also be compromised, which would not have happened if the Court had had the opportunity to know the elements herein.

3. Disregard for the precedents established in matters of freedom of expression

3.1. Weighting with the right to one's honor and good name

The analysis made by the contested judgment on the violation of the plaintiff's honor and the good name, in his capacity as owner of a business establishment, flagrantly disregards the established constitutional precedent on the scope of protection of the right to freedom of expression. In particular, the ruling deviates from the duty to weigh the rights in conflict and the standards of veracity and impartiality.

[29] In this regard, the following judgments of this court can be consulted: T-1319/01, T-213/04, T-679/05, T-1025/07, T-391/07, T-681/07, C-491/07, T-049/08, T- 1037/08, T-298/09, T-218/09, T-219/09, C-417/09, C-575/09, T-439/09, T-260/10, T-714 / 10, T-1037/10, T-511/10, T-263/10, T-327/10, T-043/11, C-442/11, T-949/11, T-325/11, T-550/12, C-592/12, T-040/13, T-088/13, T-256/13, T-904/13, T-608/13, T-139/14, T- 135/14, T-541/14, T-277/15, T-015/15, SU-626/15, T-110/15, T-731/15, T-312/15, T-688 / 15, C-634/16, C-221/16.

According to the sentence, the violation of the rights to honor and good name takes place for the following reason:

> (...) to the extent that the accused blog makes a series of statements (as seen in the facts of the case) accusing the plaintiff of committing the crime of fraud, without such allegations having been reported and proven in a criminal or administrative process related to the protection of consumer rights, thus violating the right to the presumption of innocence of the plaintiff (Article 29 above). In effect, disregard for these rights is compounded when the facts that affect the prestige and reputation of the person are not proven or are false (numeral 6.7).

In other words, for the sentence, the statements in the blog constitute a violation of the fundamental rights of the affected party as it is a matter of factual accusations that are not accompanied by criminal or administrative charges. This argument contradicts the constitutional precedent that clearly and precisely has established that offensive or disturbing expressions do not need to be covered by judicial or administrative decisions to enjoy constitutional protection, and even that in some cases such expressions can be protected despite that there is a judicial decision to the contrary.

According to reiterated jurisprudence by the Court, to determine whether apparently offensive or slanderous information does not enjoy constitutional protection - meaning that it is not protected by freedom of expression - it is indispensable to test the veracity of the information.

In this sense, the Court has considered that failing to provide proof of a fact "*does not mean that it is false (...) or that [the expression is] a crime, because it is possible that even if the truth of the claim is not demonstrated, such [expression] is protected by the Constitution."*[30]

In resolving a conflict between the fundamental right to one's good name and the dissemination of information, the Court considers that a *truth test* must be applied, which is the proof of the *verisimilitude* of the offensive speech. In order to advance this judgment, the Court takes into account the context in which the information is produced and the totality of the information that has been produced rather than simply the isolated expression.[31]

[30] See, Constitutional Court, judgment C-417 of 2009.
[31] See, for example, judgment T-066 of 1998. On the application of international doctrine and jurisprudence that require a tripartite test to identify the legitimacy of a freedom of expression claim see, among others, the aforementioned judgments. In this regard, the following judgments of this court can be consulted: T-1319/01, T-213/04, T-679/05, T-1025/07, T-391/07, T-681/07, C-491/07, T-049/08, T- 1037/08, T-298/09, T-218/09, T-219/09, C-417/09, C-575/09, T-439/09, T-260/10, T-714 / 10, T-1037/10, T-511/10, T-263/10, T-327/10, T-043/11, C-442/11, T-949/11, T-325/11, T-550/12, C-592/12, T-040/13, T-088/13, T-256/13, T-904/13, T-608/13, T-139/14, T-135/14, T-541/14, T-277/15, T-015/15, SU-626/15, T-110/15, T-731/15, T-312/15, T-688 / 15, C-634/16, C-221/16.

Judgment SU-1723 of 2000 states that while the dissemination of opinions does not have limits in principle, the dissemination of information must be subject to the standards of truthfulness and impartiality. For the Court, this standard means analyzing, in particular, how much the information differs from reality and how possible it is to determine exactly what happened.[32] In no way, must a complaint be accompanied by a judicial or administrative decision to be protected by freedom of expression. It is the specific weighting, which allows determining if there is a violation of the right to one's good name. In any case, the Court has indicated that the application of this standard seeks to create a space in which there can be a vigorous and open debate and to eliminate the barriers that arbitrarily inhibit public debate.[33]

In the case herein, the Court did not apply that test and considered, flatly and without permitting the right of defense of freedom of expression, that the information was slanderous. The sentence studied changes the jurisprudence of the Court by omitting the aforementioned weighting and demanding that the complaint be protected in a judicial or administrative proceeding. As stated, the established constitutional precedent requires carrying out a detailed analysis of the factual assumptions included in the blog - which could only be done with the publication's author and not with the intermediary that hosts it. Only in the event that the author of the information could not be located or had waived his right to defense, the Court could proceed outright, evaluating without further elements the literal content of the information.

On this point the contested ruling sanctions the use of comments that it considers "*disproportionate, defamatory and slanderous"*, without allowing the person who disseminated this information to defend themselves. With this decision, the ruling disregards the constitutional precedent that protects shocking expressions whenever they may be supported by reasonable elements. According to this precedent,

> constitutional freedom protects both socially accepted expressions and well as those that are unusual, alternative or diverse, which include those that are offensive, shocking, indecent, scandalous, eccentric or simply contrary to majority beliefs and positions, since constitutional freedom protects both the content of the expression and its tone.[34]

[32] For the Court, the elements that must be analyzed in each case are:
" (i) events in which it is clearly determined that the information provided is far from the real facts, (ii) when the information, despite being true, fails to analyze elements that would give it a different sense, and (iii) situations in which it is
impossible to determine the veracity of the information so it is required that the
media outlet has undertaken the necessary efforts to discover the truth." Judgment T-725 of 2016.
[33] See, Constitutional Court, judgment T-298 of 2009.
[34] Constitutional Court, judgment T-434 of 2011.

In the same vein, the Inter-American Court of Human Rights has ruled, for which freedom of expression guarantees both information deemed favorable and information that disturbs or offends a person or part of the population.[35]

By taking distance from the constitutional precedent and considering that expressions constitute *in themselves* the violation of the right to one's honor and good name, the ruling in question is not concerned with evaluating the effective occurrence of harm on account of the dissemination of expressions on the Internet. To make this evaluation, the constitutional judge must take into account the circumstances of the case without making assumptions that have no technical support.[36]

The sentence assumes, wrongly, that the content has a high impact simply because it is available on the Internet. Indeed, if a content is massively shared on social media or many people are directly accessing it, the affected person could be subject to substantial harm and eventually find themselves in a situation of inequality and *defenselessness* to challenge or counteract it.

However, unlike what is inferred from the judgment, such harm or *defenselessness* are not consubstantial to the Internet and must be demonstrated in each specific case. Given the vertiginous amount of information that circulates on the web and the multiple communication channels that exist, it is not unusual to suppose that cases may arise in which negative information available on the Internet can be easily counteracted by other information that circulates through the same medium, without any significant harm or imbalance. Generally two individuals who are in the same social position have access to the same soapbox to express themselves on the Internet.

The aforementioned judgment failed to substantially apply, in this specific case, the veracity judgment and the proportionality test provided by the jurisprudence to resolve this type of problems and imposed a disproportionate requirement for the protection of complaints on the Internet: the existence of a judicial or administrative action that support them.

As explained below, this decision is not only contrary to the settled jurisprudence of the Court, but has a silencing or inhibitory effect that is incompatible with a genuinely democratic society.

In any case, it's worth recalling that the proportionality judgment in these types of cases must include an analysis of the systemic impact that the decision may have on the exercise of freedom of expression on the Internet. It is true that human rights must be protected online and offline, but

[35] See, among others, Inter-American Court of Human Rights, Case of Herrera Ulloa. Judgment of July 2, 2004. Series C No. 107, para. 113; I / A Court HR, Case of "The Last Temptation of Christ" (Olmedo Bustos et al.) Vs. Chile. Judgment of February 5, 2001. Series C No. 73, para. 69

[36] See, Op. Cit. Inter-American Human Rights Commission. Special Rapporteur for Freedom of Expression. Freedom of Expression and the Internet. Para. 71

the weighting must include assessing the impact of any decision in the digital environment and the need to protect the principles that make it a free, open and decentralized environment.

2.2. Weighting with the right to privacy

The contested judgment also considers that the content published on Blogger.com violates the plaintiff's right to privacy: "*(...) for the Court such harm materializes in the publication in the defendant's blog of name of the plaintiff , as well as the addresses and telephone numbers of their factory and company*" (section 6.6, underlined). To justify its position, the Court cites the constitutional precedent of judgment T-787 of 2004, reiterated in judgment T-634 of 2013, according to which privacy guarantees the existence of a private sphere of individual and family life free from state or private interventions. In particular, such protection prohibits the unauthorized disclosure of matters relating to that personal or family life.

The challenged ruling fails to apply the precedent in its entirety. Had it done so, it would have been clear - beyond a reasonable doubt - that in the case herein, according to settled jurisprudence of the Court, there is no violation of the right to privacy.

For the Constitutional Court there are different degrees of privacy: personal, family, social and union.[37] Social privacy, which is of interest for the purposes of this case, "*involves the relations of the individual in a particular social environment, such as, the adherence to labor or public ties derived from the interrelation of people with their peers in that specific social group".*[38] In the social sphere, the protection of privacy is voluntarily restricted, since the individual exhibits information or activities about him or herself that have a social impact, and which may even have public relevance.

This was, precisely, the information that was shared on the often cited blog. The contested judgment disregards the constitutional jurisprudence, arguing that the right to privacy of a merchant is infringed by information that, by the very nature of its activity, is publicly shared voluntarily by the latter. Disclosing the contact information and the name of a merchant does not constitute a violation of that right, much less if what is done is to allude to data that are available in public directories following the proprietor's own wishes, to which the author of the blog makes reference through an external link that the sentence itself quotes.[39]

It is worth mentioning, in addition, that legal persons do not have as such a right to one's good name. Although the Constitutional Court has allowed a protection related to a company's "good will" or reputation, the weighting of rights can not be done in regards to it's family or social life. In one way or another, the case addressed by the contested ruling does not revolve around

[37] See, Constitutional Court, sentence C-489 of 2002 and C-452 of 2016.
[38] See, Constitutional Court, sentence T-787 of 2004.
[39] See section 6.6. and footnote number 79 of that document.

information that should have remained in the private sphere of an entrepreneur or his business. It is a discussion about the public impact that these have, and about which it is of the essence to be able to express opinions and information.[40]

3. Break with constitutional jurisprudence regarding the application of Article 13 of the American Convention and the judgment of necessity that must be made to the orders issued: the judge is obliged to adopt the decision that has the least impact on the digital environment as a means of exercise of freedom of expression.

In sentence T-277 of 2015 the Constitutional Court, following the reiterated jurisprudence on the value of the doctrine and the inter-American jurisprudence, indicates that it is the judge's obligation to adopt that measure that serves to repair the violated right but does not unduly restrict the right to freedom of expression. In the Court's judgment, the judge must "*verify if there are other constitutionally admissible means that are equally suitable for the proposed objective and are less harmful to the right to freedom of expression (...)".*

This analysis also allows identifying the possibilities that the affected person has of finding an effective remedy in the same digital environment where he or she was harmed. In the words of the Office of the Special Rapporteur, "*when establishing the remedy to be used, it is necessary to identify the possibilities within the Internet to immediately and effectively exercise their right of rectification or response*" [41]

In this regard, the contested judgment wrongly states that the options available to the affected party were minimal:

> (...) the only possibility that the plaintiff had to offer a kind of response to the aforementioned assertions, was through a communication entitled "Muebles Caquetá informs the general public. Especially to our customers of more than 30 years in business" in the comments section of the blog in question, which has little visibility on the platform because it remains hidden, and to reach it is necessary to click on the "comments" link.

This consideration is based on the assumption that the only space available to dispute the claims is in the blog itself and that this possibility is insufficient. However, it does not consider whether the affected party could have disseminated information with the same relevance in another blog of the same platform, in a different webpage or on social media. Such an answer would serve the

[40] See, Constitutional Court, T-462 of 1997 and T-094 of 2000.
[41] Op. Cit. Inter-American Human Rights Commission. Special Rapporteur for Freedom of Expression. Freedom of Expression and the Internet, para. 71

merchant as a reply to the opinion of the alleged client, and in any case would not have deprived him of the chance to take legal action against the author.

The brief reference of the sentence to this subject attests to the absence of a true judgment of necessity, in accordance with constitutional doctrine and jurisprudence.

The ruling in question also disregards the precedent of the Court's Plenary Chamber by stating that a citizen cannot express him of herself by the medium of their choice and in the conditions of their choice, because if he or she chooses to express him or herself anonymously or through a pseudonym, their expression would have no protection and he or she will not be called to defend he or herself when discussing whether or not their speech should remain in the public sphere.

But there is another rule that seems to derive from the sentence and that contradicts the Court's jurisprudence on the right to choose the mechanism used for making public complaints. On the one hand, the Constitutional Rights Court considers that the person who wrote on the blog should have used institutional channels to do so; on the other, it implicitly prohibits persons from expressing themselves on the Internet. The sentence affirms:

> (...) the Court must also point out that anyone who wants to express one or several disagreements with a company or with a particular product - such as the anonymous "blogger" in the case sub examine -, under Colombian law, has various legal mechanisms to make a claim or complaint without the need to resort to disproportionate or disgraceful publications; for instance, one can report a case to the Superintendence of Industry and Commerce (consumer protection area) or even resort to the different mechanisms contemplated by Law 1480 of 201187 or "Consumer Statute".

This argument, which supports operative portion of the order issued by the Constitutional Rights Court, contradicts what was stated by the Constitutional Court, among other things in judgment C-442 of 2011. For the Court's Plenary Chamber, "*speech occur through any means chosen by the person expressing him or herself, taking into account the fact that each medium in particular raises its own legally relevant problems and specificities, since constitutional freedom protects both the content of speech and its form and manner of dissemination (...)".*

It is contrary to precedent and in open violation of Article 20 of the Constitution that a citizen is prohibited from expressing dissatisfaction about a public or commercial service due to the fact that there are institutional channels to vent such dissatisfaction. Under that line of utilitarian and anti-democratic reasoning, only expressions that do not already have an institutional mechanism would be allowed. Reviews of books, restaurants or events, which make the Internet a space for the collective construction of knowledge, would not be allowed. Expressing opinions on the vote would be ultimately prohibited.

4. **Disregard for the precedent according to which the judge must opt for the option that least affects the rights in conflict, linked to that according to which *extra-petite* decisions must be closely related to the case studied, must be issued only when necessary in order to protect the fundamental right offended and must not be proffered in violation of due process.**

Leaving aside the order in the ruling that the specific removal of the content was essential, as were subsequent actions of proactive removal, the truth is that nothing contained in the sentence justifies the remaining orders contained in the fourth and fifth paragraphs of sentence. It is, as has been explained before, orders that impose exorbitant obligations on Internet intermediaries (and not only Google) and, however, the ruling does not indicate the reasons why such decisions are essential to protect the actor's right or are necessary to protect fundamental rights. Also, despite the enormous impact these decisions have, they could not be discussed in the course of the proceedings by the multisectoral community that has a direct interest in them. This last circumstance is also an affectation of due process.

Imposing these obligations on Google presupposes that they will have to be extended to other types of services and applications online, both domestic and international. Twitter, Facebook, YouTube or Amazon would end up covered by this regulatory framework, as well as start ups that are just beginning to consolidate, such as Tappsi, Rappi, VueltaAp, and in essence all the projects in the Apps.co initiative, would be similarly covered. Adding them to the ICT Ministry registry would give this ministry the power to regulate them, which would generate an inhibitory effect on innovation and open a door for censorship through the administrative control of content.

According to the judgment, the companies Google Inc. and Google Colombia provide telecommunications services and, therefore, they must comply with all the obligations assigned to these services. This decision departs from all regulations on the matter while making no mention of it, as well as from the reasons why the specialized authorities themselves have excluded social networks, video services, online shopping platforms, search engines and blogs, from that ICT Ministry's registry.

On the other hand, the fifth order of the questioned judgment exhorts,

> (...) the Ministry of Information and Communications Technologies, if it has not done so, to establish a national regulation with a view to achieving the protection of the rights of Internet users, especially in relation to abusive, defamatory, dishonorable, slanderous and insulting publications that harm a person's honor and good name on the Internet, in order to

prevent the repetition of events such as those discussed in this action (...).

The Constitutional Rights Court ignores a fundamental constitutional precedent, as is the law's exclusive reserve when regulating essential aspects of the right to freedom of expression and information. In this regard, judgment C-442 of 2011 states:

> (...) freedom of expression may be subject to limitations, this possibility is clear from Article 13 of the ACHR [American Convention on Human Rights] when it states that its exercise may be the subject of subsequent responsibilities established by law and necessary to guarantee the rights and reputation of others, national security, public order or public morals. In the same sense, Article 19 of the ICCPR [International Covenant on Civil and Political Rights] expressly states that this right may be subject to restrictions as long as they are expressly established by law and necessary to ensure respect for the rights or reputation of others; or the protection of national security, public order, or public health or morals.

5. Disregard for due process

Picking up the issues raised throughout this document, the contested ruling disregards due process of the author of the questioned statements whose expression was considered defamatory. In fact, being able to request Blogger.com to inform the author of the case against him, the Constitutional Rights Court decided to take the decision without having heard him. The seriousness of the decision is not limited to this case. The problem with the precedent is that judges could order the removal of any negative information from the Internet when they consider that the author has not identified him or herself with his or her real name, without investigating the way to ensure his or her right to defense. If providers of valuable information for the public do not publish their personal data together with such information so as to allow their full identification, would not have the right to defend their right to freedom of expression in court. In other words, for this ruling, the right to due process and the right to freedom of expression depend entirely on the fact that the person who publishes any information, from the outset, does so clearly stating his or her real name - without pseudonyms, stage names or any form of anonymity. This decision openly violates the right of defense.

On the other hand, the sentence has an impact that goes beyond ordering the withdrawal of information issued by a third party without allowing him or her to defend him or herself. The ruling orders actions that were not debated during the judicial process and that cause exorbitant burdens, not only for the intermediary that is a party to the proceedings, but for all Internet intermediaries. Given that the reasoning leading to these orders is not clearly established in the judgment and that, in any case, these orders could not be discussed during the proceedings, there

is a second violation of the right of defense enshrined in Article 29 of the Constitution.

* * *

Given the importance of this case for the defense of the Internet as the most powerful space for freedom of expression and democratization of communications known to date, we respectfully request the honorable Constitutional Court to take this brief into account when considering the request for nullity that has been referred.

Of the magistrates with feelings of respect and consideration,

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