The Role and Importance of Online Regulation Reforms in Armenia

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Internet content regulation is a global challenge for governments, private internet intermediaries and internet users. Although digital technologies can help bolster individual freedoms, the effective exercise of fundamental human rights, and democratic governance, they can also pose significant dangers to human dignity and safety, public order, national security and other legitimate public interests that the state is obligated to protect under the constitution. A delicate balance between individual rights – such as the freedom of imparting and receiving information and ideas – and legitimate public interests – such as those mentioned above – is needed. In Armenia, in order to strike and maintain that balance, it is paramount to enact a legal framework for online content regulation in line with the Constitution of Armenia and Armenia’s international obligations before the UN, the Council of Europe (CoE) and the European Union (EU).

Legitimate Concerns

Currently, no specific law or distinct online content regulatory framework exists in Armenia. The legislation, except for procedural laws, does not provide for any rules for content moderation, including the blocking or removal of harmful content. The codes of criminal and civil procedure establish rules for imposing restraint orders and injunctions on online content during a criminal investigation or trial. In these cases, the principles of freedom of information and freedom of speech are not considered to be relevant. There are no comprehensive legal frameworks that prevent the spread of harmful content by private stakeholders such as domain regulators, network operators, and end users. There are general norms, such as those against discrimination, which one can perceive as preliminary measures to prevent the spread of harmful content. However, such norms are stipulated among licensing, broadcasting, media, and telecommunication law and as such do not constitute a distinct framework for online content moderation.

The Current Legal Framework

The normative legal instruments used for online content regulation within all spheres of public and private relations should be reviewed to add effective content regulation norms. This includes legislative acts, government resolutions, internal agency codes adopted by public institutions, public and civil servant codes of conduct, the ethics codes of professional unions, sport associations, and media self-regulatory bodies, as well as professional guides used by regulatory bodies.
(such as the Commission on Television and Radio), and by law enforcement bodies for the investigation of crimes online, including the binding caselaw of the superior courts.

 Paramount among the laws that need review are the Civil Code and the Civil Procedure Code, which govern wider legal relations, encompassing the laws that govern specific areas such as the Law on Audiovisual Media, the Law on Electronic Communications, and the Law on Mass Media. These three laws govern content regulation in the spheres of broadcasting, telecommunication, and media reporting. Special attention should be paid to civil legislation that governs legal issues between private content regulators – such as the Internet Society NGO, the main operator of the “.am” and “.huj” domains – and several dozen domain registrars (or private organizations that sell domain addresses to users via civil contracts). The laws that govern legal relations between internet users and internet intermediaries such as network operators and internet service providers (ISPs) should also be considered and reviewed as the relations between them, and internet users are governed by civil contracts while the ISPs and network operators operate under a state license.

 Content is also regulated by public bodies such as state bodies that license network operators and ISPs to provide telecommunication services. As they pertain to government licenses, such relations are regulated by the Law on Administration and Administrative Proceedings, the Law on Licensing, and the Law on Administrative Violations. After the Civil Code and Civil Procedure Code, legal reforms on content regulation should also be applied to these legislative codes as licenses are considered effective tools for content regulation through network operators and ISPs.

 Finally, legal reforms on content regulation should consider the criminal legislation that governs the rules of online surveillance by law enforcement and intelligence bodies, including the rules and grounds of content blocking, removal, or filtration during criminal proceedings. To that purpose, the codes of interest are the Criminal Code, the Criminal Procedure Code, and the Law on Operative and Search Measures. The proposed reforms should also address sub-legislative acts that establish standards governing the authorization and execution of internet surveillance operations by law enforcement and intelligence agencies through collaboration with network operators and/or ISPs.

 Definitions of Online Content and Harmful Content

 Legislation should provide clear and narrow definitions of “online content” and “harmful content” to meet the general requirement of legal certainty. There are no comprehensive and uniform definitions of the above in international law. There are, however, sources in UN, EU, CoE and OSCE legal documents that provide valuable guidance such as section 2 of Article 2 of the Digital Content Directive (EU) 2019/770 of the European Parliament that defines internet content as digital data produced and supplied in a digital form. This short definition is in fact a rather broad description of online content as it embraces both internet-generated and user-generated content. It is important for the proposed legislation to establish a clear definition of online content as it outlines the scope of cyberspace that the law should regulate.

 Legislation should also provide a clear definition of “harmful content” as a form of speech prohibited in the meaning of Article 17 (the concept of the prohibition of hate) of the European Convention of Human Rights (ECHR). Though the Criminal Code provides effective definitions of criminal hate speech (article 329 and 330), it does not exactly match – and may even contradict – the definition put forth by the General Policy Recommendation (GPR) No. 15 of the European Commission of Racism and Intolerance (ECRI). Furthermore, the concept of “harmful content” is not confined to hate speech only.

 As the Law on Electronic Communications was adopted in 2005, it is already outdated and fails to meet the present demands. At the time of its adoption, many current and contemporary internet technologies such as social networks had not yet been invented. Additionally, the law does not consider a user-generated internet, the idea of which became more prominent in the years after 2005.

 Regulation, Self-regulation or Co-regulation

 Regarding legislative reform of online content regulation, there are three possible paths forward: state regulation, self-regulation, or co-regulation. Choosing the correct one is critical to ensuring that a fair balance is established between the private and public interests discussed above. A balancing test should be applied in the meaning of article 10(2) of the European Convention of Human Rights (see below).

 The state should neither be afforded complete control over online content regulation, nor should it be wholly separate from the process. If given a decisive role in online content regulation, the state is afforded the opportunity to interfere significantly with freedom of speech and jeopardize the free flow of information necessary for democratic governance and the fundamental right to impart and receive information. It should not hold the exclusive mandate to regulate content through moderation, monitoring, and decision-making in the processes of content-removal and blocking. Direct censorship, the gathering of dossiers and other surveillance of political opponents, propaganda and other measures would disrupt the delicate balance between public interest and fundamental individual rights. Internet intermediaries such as operators and ISPs, including the domain registrars, have always spoken out against broader state interference such as content moderation, arguing that state regulation should confine itself to the technical maintenance of telecommunication networks. The
Committee of Ministers of the Council of Europe underlined in the Recommendation Rec(2001)8 that the member states should thus favor self-regulation or co-regulation regarding online content rather than state regulation.

Although network operators and ISPs in Armenia operate according to a license issued by the Public Service Regulatory Commission (PSRC), the oversight of this state licensing body is confined to monitoring the technical aspects of the networks and electronic communications with no interference in the flow of content delivered to end-users. State regulation should end here, as the licensing body should not carry the authority to remove, block, or otherwise surveil content. Moreover, network operators have always claimed publicly that they do not control the flow of information.

While recent global trends point to an uptick in more involved state regulation, over the last two decades, self-regulation has consistently served as a popular approach in regards to online content, ensuring the free flow of information with minimal control by the state. There are even media self-regulatory frameworks – such as the Media Ethics Observatory (MEO), which unites 81 media entities operating in Armenia under its umbrella – that operate completely independently of the state. In recent years, this framework has established a working relationship with the Commission on Television and Radio (CTR) to provide expert opinions to specific administrative proceedings involving harmful online content, among other issues. In several instances, the CTR has asked the MEO for an expert conclusion on specific media disputes that involved the spread of defamatory content by media. Although the MEO's findings are non-binding and consultative in nature, the CTR occasionally refers to them as an expert consultant in its legally binding decisions. Cooperation between the two bodies is not mandated by law, but rather was fixed in a simple memorandum of cooperation signed between the parties in February 2022. This model of cooperation between the state and a private self-regulatory body, though newly formed and in its initial stage of operation, demonstrates a co-regulation framework that unites the two bodies towards a common goal through the division of duties and authority.

Armenia will soon see even further co-regulatory cooperation, if the draft law that amends the Mass Media Law of Armenia should come into effect. Its authors – a working group of media professionals and members of the Ministry of Justice – offer to create a new media self-regulatory body called the Media Council, which will hold broader authority under law than the current MEO and which will work in close collaboration with the state on a wide variety of media self-regulatory issues, including the moderation of online media content.

Regarding media independence, self-regulatory mechanisms continue to serve as the best model to provide a fair balance between freedom of speech and the general interests of the community, especially as it concerns the media – which is inextricably linked to any democratic society. Still, as digital technologies continue to advance, there has been an increased desire over the last decade for the state to be afforded greater involvement in online content regulation where constitutionally bound, in light of legitimate concerns, to address specific public policy issues while respecting individual rights. The European Court of Human Rights has stated that self- and co-regulatory mechanisms may be acceptable on the condition that they include effective guarantees of rights and effective remedies for violations of rights. The Council of Europe recommends that all regulatory frameworks of internet intermediaries, including self- or co-regulatory approaches, are acceptable as long as they provide effective mechanisms to guarantee the fundamental rights and effective redress mechanisms, including that they ensure grounds and procedures that do not lead the state, directly or indirectly (through intermediaries) to general content monitoring.

In view of the above and considering the existing regulatory frameworks alongside major public security concerns in Armenia today, the best path forward for online content regulation is co-regulation.

Co-regulation of Online Content

The concept of co-regulation provides that private content regulation stakeholders cooperate with the state. In practice, the state would set and enforce regulatory standards without getting involved in content moderation, while private stakeholders and internet intermediaries would be vested with the authority of monitoring content. Private stakeholders and internet intermediaries would monitor content by, for example, taking down or blocking inappropriate content as defined by the standards set by the state; this concept is otherwise known as “regulated self-regulation” or “self-regulation in regulation”. It is crucial that any responsibility of private stakeholders defined in the law is confined solely to civil or administrative liability; including criminal liability for stakeholders under such a framework could have a detrimental effect on the freedom of intermediaries and, by extension, the free flow of information.

In Armenia, internet communication services are provided under two frameworks. The first is operated by two groups of stakeholders, the network operators that provide high-bandwidth internet communication service (such as, for example, mobile operators Viva-MTS, UCOM, Beeline) and the ISPs that provide internet access services to end-users. Operations under this framework are licensed by the PSRC. Given the nature of this body and its procedures, the PSRC is regulated mostly by administrative legislation and partially by civil legislation. Hence, this framework is completely regulated by the state. The second framework is operated by internet domain registrars and administrators. The domain framework is self-regulatory as it is regulated by private stakeholders, such as the Internet Society NGO – the main operator of the “.am” and “.huy” domains – and a few dozen private registrars that sell domain addresses to users. This framework is regulated by civil legislation, mostly by regular contract law. Hence, the state plays no role in this form of regulation.
Both frameworks lack content regulation, moderation, and monitoring mechanisms. Any reform measures using the co-regulation model should enhance the mechanisms of these two communication frameworks. Specific remedial mechanisms should be developed in the civil, criminal, and administrative legislation governing the activities of domain operators and network operators. Some examples of such remedial mechanisms are content blurring, content removal, “notice and action” or “notice and takedown action” procedures, requiring appropriate notices to be placed on false text, and making a public statement on the distribution of harmful content.

The main actors of the co-regulatory mechanism should be the PSRC for network operators, the Internet Society NGO for domain operators, and the Internet Governance Council (IGC) for the state. The latter is an inter-agency body created by decree of the Prime Minister and constitutes representatives of different government branches, private internet actors, civil society, and professional media organizations. The webpage of the IGC provides that the goal of the Council is “to find solutions for emerging challenges of internet governance in the country”.

In view of the above, it is presumed that the IGC will act as a standard-setting state body that will develop moderation rules, norms, and procedures as well as dispute resolution mechanisms for bodies operating at the primary level, such as network operators, domain managers like the Internet Society NGO, and at a secondary level – content moderators such as domain registrars and domain owners (users).

The Balancing Test of Article 10 of the ECHR

The balancing test of Article 10 of the European Convention on Human rights (ECHR) provides that the measures of interference with the right to freedom of imparting and receiving information shall be balanced with the rights and interests of others and of the general public, and that the grounds of regulatory interference shall be relevant to the preservation of an inclusive, democratic society.

It is paramount that the balancing test of Article 10 of the ECHR be inherently modeled in the co-regulatory framework. Internet freedom is equally important to individuals and the wider public. Hence, in exercising their co-regulatory powers, all stakeholders must be mindful of the necessity to fairly balance the rights and interests of society with the rights and interests of individual internet users when choosing the ways and methods of interference, such as removing or monitoring content, and stricter measures such as applying administrative or civil liability.

The absence of balancing tests is widespread in court decisions and administrative bodies dealing with internet freedoms in Armenia. The main exception would be court practices and case laws concerning defamation. Here the civil courts have developed a consistent body of laws balancing the competing legitimate interests of victims and civil defendants in dealing with defamatory or harmful internet content. However, balancing tests are completely absent in criminal proceedings where law enforcement bodies request that network operators provide access to online platforms such as search engines, marketplaces, social media, online financial systems, and informative websites. This also includes the physical and virtual property of web providers, ISPs or operators. An example would be the seizure of a computer running the server of an internet provider.

The mechanisms of the balancing test should be incorporated in the Law on Electronic Communications, the Law on Licensing, the Code of Administrative Violations, the Law on Audiovisual Media, and the Criminal Procedure Code.

Good Practices of EU Co-regulatory Mechanisms

While Germany’s Network Enforcement Act (NetzDG) has been criticized by various groups for undermining freedom of expression, it can also serve as an example of a co-regulatory framework which successfully combats hate content on the internet. The law establishes two types of responsibilities over social networks: the obligation to submit a report to a public authority on the handling of complaints regarding specific contents and the obligation to ensure effective and transparent complaint processing procedures on the network. The first requires social media operators that receive more than 100 hate speech complaints annually to provide semi-annual reports on how they handled said complaints on illegal content. These reports should contain, for example, a description of the complaint filing mechanisms, criteria for deciding whether to delete or block content, the number of complaints leading to the removal or blocking of materials, and other parameters. The second stipulates that these operators handle these complaints and exercise content removal mechanisms effectively and with transparency. Failure to act expeditiously in handling the complaints and taking action over specific content could result in huge administrative fines by authorities. This law was criticized by civil society, media organizations, and human rights watchdogs as undermining freedom of expression and inciting unwarranted censorship over concerns that granting social media operators the power to decide what was hate content could have a detrimental effect on online freedom of information. Further, critical groups claim that the law does not allow for judicial review of the decisions taken by network operators.

To prevent and counter the spread of illegal hate speech online in the territory of the European Union, the EU came to an agreement with Facebook, Microsoft, and Twitter (now called X) in May 2016 called the “Code of Conduct on Countering Illegal Hate Speech Online”. Under the code, the EU sets standards that participating companies should implement while operating in EU territory and establishes periodical reporting procedures whereby companies report to the EU on the application of those standards, for example, by reporting the number of times
hate content has been removed, the dissemination of public apologies, the use of moderating mechanisms, and the use of notice-and-takedown actions.

In October 2022, the Digital Services Act (DSA) was codified into law, which sets up complex obligations for internet intermediaries for prevention of illegal and harmful activities and the spread of disinformation online. Those obligations include transparent reporting of criminal activities to national bodies, following instruction issued by national authorities (such as the blocking or removal of content), establishing notice and action mechanisms, maintaining complaint and redress mechanisms, and other obligations towards users, the EU, and the national authorities. Those obligations, which came into effect in February 2024, stipulate that affected intermediaries make systemic and structural changes to their platform guidelines and administration practices.

In France, a new co-regulatory framework was introduced by the "Law to Fight Against Manipulation of Information" adopted in December 2018, which sets a general obligation for online platforms to take measures to fight online disinformation. It obligates online platforms with visitation rate exceeding 5 million per month to set up "an easily accessible and visible device allowing their user to report false information likely to disturb public order or alter the authenticity of the vote, in particular when they come from content promoted on behalf of a third party". The law vested France's broadcasting regulatory body – the Higher Audiovisual Council – with the power to issue recommendations to private online platforms. In turn, the online platforms are required to publish periodical reports to the Council on the implementation of the recommendations and efficiency of the measures adopted by the platforms.

In February 2023, the Republic of Ireland implemented the "Online Safety and Media Regulation Act of 2022" (the "OSMR Act") which established a new public regulatory body, the Media Commission, and granted it wider authorities than its predecessor, the Broadcasting Authority of Ireland. Under the act, the Commission will establish a set of online safety codes for online service providers and network operators by which specific standards and measures will be stipulated relating to content moderation, specific requirements for assessment of harmful online content by service providers, requirements for service providers to submit periodical reports to the Media Commission, and for establishing complaints mechanisms to handle feedback and complaints from service users.

Considering the structure of these two models, Armenia could create a co-regulatory mechanism by which the Internet Governance Council sets the standards and the private stakeholders (internet communication operators, ISPs, or domain registers acting under the Internet Society NGO's authority) use those standards to define hate speech, monitor traffic, and notify users to remove hate content. Furthermore, the registers and the Internet Society NGO should periodically report back to the state on the methods of those standards. Should end users fail to remove hate content after receiving notice from the registers, those registers will have the authority to terminate the civil agreement made with the user allowing them to use their domain name.
Recommendations:

1. The “Internet Governance Council (IGC) should be legally recognized as a co-regulatory platform between the state and private internet stakeholders and users in the framework of internet governance, providing for status, functions and financial independence. The format of the Council’s work should be changed from ad hoc to a permanent body. The IGC is capable of convening stakeholders (The Internet Society NGO, the registrars, the internet service providers, telecom operators, etc.) on a contractual or membership-based legal basis.

2. Explore the possibility of forming a partnership between the Internet Governance Body as a standard setting public body and the Internet Society NGO, other domain registrars, ISPs, and network operators. Discussion should be facilitated between these bodies which allows them to get acquainted with the already evolving international practice.

3. Explore the possibility of involving in the above partnership the current Media Observatory or the soon-to-be Media Council, the new media self-regulatory body proposed in the draft amendments to the Media Law. Given the former’s partnership and the future Council’s expected partnership with the Commission on Television and Radio, the presence of the above would be an important contribution to the establishment of a framework for online content moderation by media outlets.

4. Explore the possibility of involving the PSRC in the above plan, including whether it would be feasible to enhance the role of the PSRC as a licensing body for establishing complaints and reporting mechanisms for ISPs and/or network operators as part of their general obligations under license. This is a policy issue for the state that may require change of concepts and development of a new policy.

5. Add hate speech provisions following sections 2 and 3 of article 1087.1 of the Civil Code of Armenia.

6. Add provisions of misdemeanor in the Code of Administrative Violations for spread of hate speech and hate content in public, including by means of social networks and through other online platforms, including for facilitating the spread of hate speech by platforms or for failure to act with due diligence by platforms. To define the provisions of hate speech in the Civil Code above and in the Administrative Violations Code, GPR no. 15 of the ECRI of the Council of Europe should be used as guidance.

7. Add provision(s) in the Law on Electronic Communications about what constitutes online harmful content. Corresponding changes should also be made also in the procedural codes of administrative, civil and criminal laws.

8. Explore the possibility of adding a provision in the rules of licensing by the PSRC for mobile operators and ISPs that licensees should ensure that they have hate content prevention mechanisms in place as a condition of license.

9. Add a provision under article 5 of the Law on Electronic Communications according to which the National Regulator would be authorized to set a general requirement for licensees to define hate speech provisions in their civil contracts with their consumers. These rules may prohibit incitement to hatred, suspension, or termination of service, and blocking of an IP address, including minimum rules for notification of illegal content and content moderation.
Endnotes

1 https://www.isoc.am/
4 Recommendation REC(2001)8 of the Committee of Ministers to Member States on Self-regulation concerning cyber content self-regulation and user protection against illegal or harmful content on new communications and information services.
5 https://ypc.am/self-regulation/media-self-regulation-initiative/
7 Recommendation CM/Rec(2018)2 of the Committee of Ministers to member States on the roles and responsibilities of internet intermediaries (Adopted by the Committee of Ministers on 7 March 2018 at the 1309th meeting of the Ministers’ Deputies), par. 1.1.3.
8 Par. 1.3.5.
9 Self-regulation, Co-regulation, State Regulation. Hans J. Kleinsteuber The Internet between Regulation and Governance, Par. 3.1.
10 The term used by the author of this paper.
11 https://igc.am/en/home/
12 https://en.wikipedia.org/wiki/Network_Enforcement_Act
13 Recommendation no. 2019-03 of 15 May 2019 of the Conseil supérieur de l’audiovisuel to online platform operators in the context of the duty to cooperate to fight the dissemination of false information. Par. 1. Available at: https://tinyurl.com/mrytrk7

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