

Regulating Communications while moving towards an Information Society, Tendencies and Proposals

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In this brief paper we would like to explore the different tendencies in Latin America concerning regulatory frameworks on communication. Then, we will discuss some elements to be taken into account in the promotion of a legislation on communication focused on citizens' rights, both at national and regional levels.

With this purpose in mind, we will discuss three main aspects:

1. The principles on which legislation should be based, in order to democratize communications practices, their value and exigibility.
2. The general trends, problems and challenges that should be addressed by a legislation on communication.
3. Some concrete proposals that a citizen's right-based legislation on communication should take into account.

In this way, we hope to contribute to enriching the debate about this complex issue.

Principles and basics

It is worth saying that, worldwide, and despite the latest events that question their legitimacy, Fundamental Human Rights Systems have consolidated to protect a set of human rights regardless of identity factors such as country of origin, gender,

race, religion, sexual choice, or age. In other words, the main purpose of these systems is to establish an international standard of respect that allows human existence in terms of dignity, as well as mechanisms for the protection of human rights. All this should be acknowledged through international instruments that are generally at the same hierarchical level as national Constitutions.

Among these there is the so-called Universal System that operates through UNO bodies; at regional level, we find the Inter-American System that works through OAS institutions. Both systems have sufficient regulatory and institutional instruments to guarantee democratic access to communication, specially with respect to community or citizens' media¹. They should be better known and used for democratization purposes.

The world standard protected by these systems is important. The best legitimacy and reference framework is created based on it, in order to demand that communication development processes be subject to specific conditions that guarantee human and community rights concerning communication.

The main rights currently acknowledged in the fundamental instruments (Pacts and Treaties) of each system include:

- Freedom of speech and opinion
- Freedom of Information
- Access to public information
- Right to effectively operate and participate in communication and information media.

Human rights protection is highly valued. In some cases, national and international courts in various countries, as well as some governments at the moment of

¹ For a wider view on the systems, please visit the web site of their instruments and institutions at the Andean Commission of Jurists at: www.cajpe.org.pe, the Legal Information Network (RIJ), and UNO and OAS web sites accordingly.

establishing State regulations and policies, have given to the right to communication a prevailing place over other fundamental rights. Examples of the latter are the right to free business and property (by imposing restrictions to media ownership based on public interest in communication), or the right to intimacy (by stating the prevalence of freedom of speech over public figures' freedom of intimacy), among others.

Likewise, these rights are increasingly applied to communication within regulatory frameworks, so as to create and guarantee appropriate conditions for their effective exercise. For example, there are promotion rules for developing telecommunications and connectivity, and also for ruling the creation of citizen communication media.

Anyway, it should be clear that no particular legislation on communications may ignore the principles established through the human right instruments of these systems, such as the International Pact on Civil and Political Rights —at the level of the Universal System—, and Articles 13 and 14 of the American Convention on Human Rights (ACHR), which guarantee the right to communicate at regional level.

If we compare the Inter-American Convention on Human Rights (IACHR) with the International Pact, we will see that the former develops further the right to communication; the IACHR clearly recognizes both the individual and social dimensions of the Freedom of Speech² by proscribing monopolistic or restrictive practices in media development, such as the use of “indirect means” to restrict communication.

At the Inter-American level, progress has been made in terms of interpreting Art. 13 of the Convention in the light of present conditions. Thus, the Inter-American Commission on Human Rights issued the Declaration of Principles on Freedom of Speech at the end of 2000.

² See the scope of this norm on the 05/85 Consultative Opinion of the Inter-American Court on Human Rights at www.oas.org.

Regarding this Declaration, it is important to point out the following aspects:

Principle One of this instrument declares that “the freedom of speech... is a fundamental and inalienable right, inherent to all individuals. It is also an essential requirement for a democratic society”.

Principle Two reads, “Equal opportunities to exercise the right to information and expression.”

Principle Four expands on the notion of freedom of information by incorporating the right to access information held by the State.

Principle 6 of this Declaration reads, “Every individual has the right to express his/her opinions through any means and manner”.

Principles 10 and 11 state the priority of freedom of information over privacy laws and over the principle of greater visibility and scrutiny of public officers’ actions, respectively.

Principle 12 reads, “Radio and television broadcasting allocations should be based on democratic criteria to guarantee equal information access opportunities to all individuals.”

All these principles are prescriptive. Because they are part of the Inter American System —to which most countries in the region belong—, they should be further developed in internal legislations.

Trends, Problems and Challenges:

Traditionally, broadcasting media —radio and television— have been regulated separately from the telecommunications sector. Each telecommunication service has had its own legislation according to the technology used. This has been the tendency in most of the region.

Nowadays, there is tendency to have one single legislation for both sectors; transfer to a common legal framework will be rather slow and complex, though.

Digitalization —the technological process that allows the transmission of data, images and voice through one single channel by changing them into a binary code—, has caused several communication technologies to converge. Before, such technologies used to be offered and regulated separately, and were generally based on different principles or interpretations of general concepts, such as that of public services.

Digitalization and technological convergence are two of the most outstanding features of the current transition towards the so-called Information Society. These two traits require legal frameworks that serve to reduce uncertainty in this cultural and technological transition. These frameworks should, in turn, focus on general principles rather than on the specificities of each technology, as it has been the case until very recently.

Today, technology is constantly renewed and changes rapidly. A more general regulation of services is required, rather than a legislation for specific technologies. This implies that certain basic regulatory principles will prevail when setting up general objectives concerning the use of technology, its application at the service of human development, and technological impartiality.

Since radio broadcasting based on radio-electric spectrum exploitation is rather scarce, its regulatory system has been the trusteeship model. In general terms, in this system, licensees are trustees representing public power in the rendering of

that service under governmental supervision. This practice has given rise to public interest standards that require from the licensee a particular behavior that is coherent with that public interest. Obviously, it restricts somehow the freedom to individual business, in favor of a social development that requires a pluralistic public space.

In many occasions, the government has taken into consideration this idea to operate frequencies. It should be remembered that these frequencies are part of the radio-electric spectrum, and therefore have been recognized as the common heritage of humanity by the Torremolinos Treaty of the International Telecommunications Convention; they are directly administered by the states or through control and supervision agencies.

Another traditional characteristic of radio broadcasting regulation has been the distinction made between two kinds of radio stations: private commercial stations, and public or public service stations (depending on the legislation). All of them are subject to public order requirements, such as the inclusion of certain contents or a minimum amount of cultural programming, or to restrictions about allocation property, such as licensees only being national.

However, the latest tendency has been to dismantle these public order demands in favor of a free competition system.

Besides, private radio station owners have always been reluctant to comply with these requirements and guidelines arguing the restriction of their freedom of expression. This argument has been used to serve the interests of media corporations, but this does not deny the need to exercise this right.

With respect to community media, particularly radio broadcasting, legislation has been mainly restrictive. There has been a contradiction between the principles previously mentioned and legislation. While international instruments and some of

the latest Constitutions clearly set forth the right to communication³, secondary legislation has created a series of obstacles that hinder media allocation and operation, such as restricting funding resources, coverage and power, or hindering legal recognition.

Community radio broadcasters have been harassed everywhere, their equipment confiscated, and operators threatened with prison.

Nonetheless, thanks to a significant social struggle, many countries have begun to acknowledge in their legislation that community or citizen media are a social form of communication that seeks community development; although non-governmental and non-profitable, these media serve public interests and can function as any other private medium to self-support its activities⁴.

In the Inter-American System and since the 2000 Declaration of Principles, the Relator's Office for Freedom of Expression, a specialized body of the System, has repeatedly suggested to several country members that democratic criteria be adopted when allocating frequencies, so that there are equal access opportunities for all social sectors; that minorities sectors (indigenous groups, women, youth and handicapped people) be represented and have access to media; that measures be adopted to enforce anti-monopolistic laws. The Office has also said that frequencies should be allocated not only on the basis of economic criteria, but also of democratic criteria to guarantee equal access opportunities.⁵

³ Article 21 of the 1991 Colombian Constitution can be mentioned. In Ecuador, my country, the 1998 Constitution also acknowledges the *"right to communication and to create social communication media, and to access to radio and television frequencies on equal terms"*. Based on it, an Amendment to the Radio and TV Broadcasting Act was put forward to allow competition by this third media industry on equal conditions.

⁴ See Gómez Gustavo, presentation for the *Lecture on Legislation in Mass Media: Mexican debate and International Experiences*, FES and AMARC, Mexico, Comunicación Comunitaria A. C. , July 2001.

⁵ See several reports of the Office of the Special Rapporteur on OAS Web Site (www.oas.org)

With respect to the telecommunications sector, the latest tendencies can be described with the terms privatization and liberalization. There has been an evolution from a sector that developed through the direct and strong State intervention, to a sector where 74% of the Latin American and Caribbean operators are private companies —the largest percentage as compared to 30 or 60% in the rest of the world. Therefore, since privatization began in Chile in 1988, the region has obtained about \$40 billions of American dollars from these processes, and \$10 billions more from license granting.⁶

However, these privatization and liberalization processes have not been accompanied by strong control and supervision institutions that are reasonably independent, and whose operating capacity is adequate.

In many cases, privatization has only replaced governmental monopoly and has imposed rather unfavorable conditions to regional countries (Argentina, for example).

In other cases, market liberalization has not been consolidated because of the privileges granted to former monopolistic operators (Mexican Case).

There is no unique model for these tendencies. Each country has developed its own strategies. A few countries —like Costa Rica, Uruguay and Ecuador— have adopted slightly different modernization models from State-owned companies, which have also proved successful without resorting to the privatization of operators' ownership.

The most important achievement of these processes has been the expansion of universal access and users' connectivity through technology updating.

⁶ Data by Hilbert y Ketz, in *Building an Information Society, a Latin American and Caribbean Perspective*, Cepal, Santiago, 2003. pp. 127 and the following pages.

One main concern has been the financing of these investments, which has been possible thanks to the so-called universal funds for telecommunications development. These are composed of a certain percentage that operators must contribute from their earnings in order to finance the expansion of telecommunication services to non-profitable sectors, such as poor neighborhoods, peasant communities, deprived sectors of the population, etc.

The principle of democratization and participative access to communication, as well as the technical challenges posed by the convergence should be present in all these endeavors. These new challenges are service substitution and participation of new competitors. In other words, new demands are not only technological, as argued by the dominant discourse, but also social in terms of rights to be exercised.

Proposals for a Legislation based on the Human Rights to Communication

Regarding the convenient discourse which says that the best legislation on communication is no legislation at all, the need to have clear public policies and strong regulations for this sector is increasingly evident, especially when we are on our way to an Information Society.

Thus, the principles established in international instruments should also be applicable to Information and Communication Technologies (ICT). The issue of existing rights and their new scope should be addressed, as well as the necessity of a new instrument that fully defines the right for communication. In my opinion, and for the sake of debate, I sustain that they do not exclude each other.

In either case, when we refer to the ICT and as the PrepCom-2 pointed out (Second Preparatory for the World Summit on Information Society - WSIS), access

to communication is crucial “to guarantee the protection of the human rights to communication”⁷

But what kind of access are we talking about? We should refer to an access involving the use and appropriation of technologies, that is, an access that equals social inclusion into this new Information Society. Actually, it is a limited access since some technologies are neither freely nor equally distributed, as mentioned in this preparatory meeting to the WSIS.

Mr. Yoshio Utsumi, ITU Secretary-General, has repeatedly said that the time has come for world political leaders to commit “to design new political and legal frameworks that satisfy Cyberspace needs, and help to define a structure of new information and communication technologies that will be useful for everyone”. The premises below should be taken into account:

We can not assign to technology the “prodigious role of solving the crucial issues of society”, and believe that technology alone can alleviate or solve them⁸. Two percent of the world population have access to Internet, while around 50 - 60% are fighting against poverty. Therefore, the struggle is for Internet access, but the priority is fighting against poverty for equal development. Both goals should converge.

The recent Declaration of Bávaro (February, 2003) partially sums up this need: “Information Society should serve public interests and social welfare by eradicating poverty, creating wealth, promoting and improving social development, and

⁷ See the documents about the World Summit on the Information Society at www.itu.org.

⁸ See this theme from a critical perspective in Tomás Maldonado, *Crítica de la razón informática*, [Critique of Informational Reason] Barcelona, Paidós, 1998, pp. 27-53.

encouraging democratic participation...”. However, we have to turn to people –and look at them carefully— to balance a merely technical reading of the situation.

In this context, it is paradoxical to notice that developing countries are the best scenario for a sustainable growth of the communications business. Because they are the largest market, conditions should be created in order to provide good-quality services that foster human development in our countries.

However, there is a contradiction between the “framework discourse” that we have mentioned, and the policies promoted worldwide: the Information Society continues to grow while there is a legal vacuum and a deregulation process. Lack of legislation favors powerful media owners.

Another aspect of this global Information Society that restricts ruling capacity is the fact that decisions are made in institutions other than nations.

At the ITU and WTO, people’s rights to communication are at stake. Free trade agreements (GATS / FTAA) should foresee clear social clauses and diversity protection mechanisms. "Cultural protection" is urgent so that diverse opinions and actions are protected.

In short, one of the main WSIS commitments should be to emphasize the need for a strong legislation based on democratic principles, inspired by human rights.

Principles behind the Legislation:

1. Free and equal access to, use and appropriation of communication, that is to say, participation in the creation and use of input materials, technologies, goods and services. Fair copyright legislation for all the parties involved —and not only for knowledge pseudo-monopolistic groups— is a key issue for democratization (especially in areas such as the software industry).

2. Rediscovery of the Public Service concept and advantages in communications.
3. Solidarity should be a principle for those who profit from communication through frequency allocations. Therefore, the abovementioned Universal Funds should finance democratic access to the IS for the most vulnerable groups, through the participation and scrutiny of the communities involved in the process.
4. To establish and make viable the right to scrutiny and citizen control. The civil society, particularly users organized in different associations, should be represented. Some international agencies have admitted representatives of corporations such as the ITU and its Reform Advisory Panel. The organized civil society deserves the same treatment.
5. Social groups and individuals should demand legal mechanisms for right exigibility. Protection systems and agencies should be strengthened.

The World Summit on Information Society is expected to provide us with opportunities —such as a mandate for each country— to design national strategies within three years, and to establish a “World Digital Pact” as a new platform.

In summary and as way of conclusion, with respect to regulatory frameworks, our task is to reach a consensus among the civil society and to create control mechanisms, so that the Summit commitments are successful. We should also articulate the work done in our countries, and to adopt policies that are coherent with citizens’ rights; citizen knowledge and empowerment should be developed on the basis of human rights to communication.