

A BRIEF CRITICISM OF THE NEW MEXICAN TELECOMMUNICATION LAW THROUGH THE EYES OF HUMAN RIGHTS AND DEMOCRACY

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*Para María Teresa, María del Pilar
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*Freedoms are not only the primary
ends of development, they are also
among its principal means.*

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SUMMARY: I. *Introduction.* II. *The relation of the principle of personal autonomy and self-government with the telecommunication law.* III. *How to put into effect a telecommunication law through the development of the principle of personal autonomy and self-government.* IV. *Why is the New Mexican Communications Law a threat for the development of principle of personal autonomy and self-government?* V. *Conclusion.*

I. INTRODUCTION

Social communication is a serious issue in a Democratic Constitutional State, since it helps strengthen democracy and human rights. Hence, a tele-

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¹ *Development as Freedom*, Nueva York, Anchor Book, 1999, p. 10.

communication law is one of the most important laws for it allows the development of the principle of personal autonomy of each person and of self-government. Furthermore, the law has to create a good environment for communication in order to take human rights seriously and distribute the power of information so that a Democratic Constitutional State can be achieved. This law must protect communication as a public property, which everybody should enjoy without any discrimination.²

II. THE RELATION OF THE PRINCIPLE OF PERSONAL AUTONOMY AND SELF-GOVERNMENT WITH THE TELECOMMUNICATION LAW

First of all, we have to be familiarized with the principle of personal autonomy and of self-government in order to understand why the telecommunication law is important for the development of both concepts. Based on Carlo Santiago Nino's ideas, we claim that the principle of personal autonomy is a constructivist meta-ethical conception related to the essence of a social liberal society that denies holism, perfectionism, and normative determination.³ The principle of personal autonomy consists in the idea that everyone is free to adopt the best idea of what "good" means and the design of the best plan of life based on their wishes. In a similar way, the State or private agents should not interfere with people's decisions and the realization of their life plan. Nevertheless, the only limit of the principle of personal autonomy is when starts to hamper the autonomy of another individual.⁴ In like manner, we should understand self-government based on Adam Przeworski's notion of this concept:

A system of collective decision that best reflects individual preference and makes as many of us as free as possible must satisfy four conditions: every participant must have equal influence over collective decisions (equality); every participant must have some effective influence over collective decisions (participation); collective decisions must be implemented by those selected

² Nino, Carlos Santiago, "La filosofía de una ley de radiodifusión", *Revista Argentina de teoría jurídica*, Buenos Aires, Universidad Torcuato Di Tella, vol. 14, julio de 2013.

³ Nino, Carlos Santiago, *The Ethics of Human Rights*, Nueva York, Oxford University Press, 1991, p. 129.

⁴ *Ibidem*, p. 135.

to implement them (representation); and the legal order must enable secure cooperation without undue interference (liberty).⁵

In order to reflect personal decisions into collective decisions, four axioms should be satisfied: equality-anonymity (everybody should have the same impact in decision making), neutrality (no individual decision should prevail over the decision made by the majority), decisiveness (the decisions are valid if everyone knows about the election), and responsiveness (if the people consider that an individual preference were modified, they should either maintain the same collective preference or they should break the bond in the direction preferred by voters).⁶

The principle of personal autonomy might be attained only if the State encourages the diversity of voices and keeps its neutrality regarding people's morality and their life plans, as long as these do not affect the dignity or the autonomy of another person.⁷ Most of the knowledge that people require in order to develop the principle of personal autonomy and a plan of life is acquired through the information that is received from another member of society. Therefore, a wide variety of information is required to choose a way of living which people consider more convenient so that they can develop themselves and invest their time in whatever they want.

Currently, people spend much of their time communicating either recreationally or productively (e.g. internet, telephone, TV, movies). Thence, a telecommunication law should be neutral so that no one can impose a way of life or compel anyone to spend his\her time in a particular way.

At the same time, the law should promote that a certain amount of free time should be dedicated to cultivate arts and culture, thus increasing the quality of democracy and encouraging the respect among all members of society. This is important because the teaching of arts and culture make people more sensitive, in this way people can learn to put themselves in someone else's circumstance.⁸ The law should also guarantee the access of disadvantaged groups to these benefits. The law should also guarantee the access of disadvantaged groups to information in order to secure their

⁵ Przeworski, Adam, *Democracy and the Limits of Self-Government*, Nueva York, Cambridge University Press, 2010, p. 32.

⁶ *Ibidem*, pp. 32 y 33.

⁷ Nino, Carlos Santiago, "La filosofía de una ley...", *cit.*

⁸ Nussbaum, Martha C., *Sin fin de lucro: por qué la democracia necesita de las humanidades*, trad. de María Victoria Rodil, Buenos Aires, Katz, 2010.

capability of both receiving and transmitting information. This will help integrate those sectors into society in more equal circumstances.

The Communication Law has to strengthen self-government throughout the promotion of collective discussions among all groups within society. Thereby, the discussion should be broad and inclusive enough so that the public deliberation can be brought about through the creation of public forums such as talk shows, social networks or street protests on topics of interest that are crucial for the development of society. Furthermore, the Communication Law has to ensure that those affected by public decisions are heard above all others. Only then would public decisions be more legitimate and the law would in this way be able to generate more equal opportunities.⁹

In the context of a Democratic Constitutional State, a communication law has to encourage vertical and horizontal communication.¹⁰ The vertical communication is encouraged by giving permits to private, collective, and state groups to disseminate information. In such a way, the law should also prevent the existence of monopolies or oligopolies in order to increase plurality and diversity of voices by preventing information to be distributed in a few hands. On the other hand, horizontal communication is encouraged by the diversity of social networks. It also fosters the possibility of doing social protest, since it expands access to information technologies and protects personal data. The inclusion of the people into society must be a key role for a telecommunication law, owing to the fact that this kind of law has a commitment to create social activities so that people can be aware and interested on issues that affect the community and do the best to fix the problems of society.¹¹

The law also has to limit self-government when it tries to undermine human rights and break down democracy's values. Additionally, the law has to provide equal access to the media for every political party and for every independent candidate so that the political power can be distributed equitably. With this, it would be possible to enhance equality to have a fairer election. Prior censorship should not be present in a communication law. Otherwise, if there is censorship in any way, democracy and human rights

⁹ Gargarella, Roberto, "La concepción constitucional de la libertad de expresión", *Revista Argentina de teoría jurídica*, Buenos Aires, Universidad Torcuato Di Tella, vol. 14, julio de 2013.

¹⁰ Nino, Carlos Santiago, "La filosofía de una ley...", *cit.*

¹¹ *Idem.*

are immediately undermined. The government turns into an authoritarian or totalitarian regime.¹²

Nonetheless, the telecommunication law of a Democratic Constitutional State can only encourage the principle of personal autonomy and collective self-government if it is based on liberal principles such as impartiality and pluralism:

- The principle of impartiality decrees that State institutions should maintain a balanced view in order maintains the diversity of society. It obligates the State to respect the decisions made by people in regard to their conception of good and evil, this is, their decisions and life plans. The State must act without preference or prejudice in its actions, the evaluation of the action must be guided by principles of fairness.¹³ In some ways, impartiality is important due to the fact that it promotes the State's neutrality in any government branch, this is, in autonomous-constitutional, legislative, judicial, and administrative bodies.¹⁴ In the case of a communication law, due to the importance it has for the development of personal autonomy and collective self-government, it ought to be the most impartial and neutral law inside a Democratic Constitutional State. This fact is vital for the existence of democracy and human rights (e.g. freedom of expression, freedom of association, freedom of assembly, the right to protest and so on).¹⁵ A law of such import has to ensure the inclusion of the most vulnerable and disadvantaged groups in society.
- The principle of pluralism recognizes the existence of different forms of life associated to different groups in each society, which include tastes, ethnic traits and ideologies. Each one requires protection so that harmony is possible between the different social groups, which also require protection of the dignity of each

¹² Dworkin, Ronald, "The right to ridicule", *The New York Review of Books*, Nueva York, 2006.

¹³ Rawls, John, *Liberalismo político*, trad. de Sergio René Madero Báez, México, Fondo de Cultura Económica, 1995, pp.336-338.

¹⁴ Vázquez, Rodolfo, *Entre la libertad y la igualdad: introducción a la filosofía del derecho*, Madrid, Trotta, 2006, p. 176.

¹⁵ Nino, Carlos Santiago, "La filosofía de una ley...", cit.

of their members.¹⁶ Thus, the diversity of our contemporary societies and the mutual respect between each group is safeguarded. If we defend plurality we are defending the development of personal autonomy, because in this way we enrich the growth and the configuration of human identity. Humans are separate individuals, but when they want to be together, they must assimilate the diversity of different purposes and lifestyles. Afterward, they must learn how to cooperate with each other so they can assimilate the differences between them and live in a fairer society.¹⁷ Therefore, a communications law should promote and take care of diversity, owing to the fact that we live in multicultural societies, a condition inherent to the 21st century. From this, it follows that cultural and media pluralism should be the objective aim in any communications law pertaining to a Democratic Constitutional State. As Carlos Santiago Nino states: “The State should guarantee pluralism, granting individuals access to lives which display different combinations of virtues”.¹⁸

III. HOW TO PUT INTO EFFECT A TELECOMMUNICATION LAW THROUGH THE DEVELOPMENT OF THE PRINCIPLE OF PERSONAL AUTONOMY AND SELF-GOVERNMENT

In order to materialize the principles of impartiality, plurality, and to develop the principle of autonomy and self-government, I consider that a communications law should contain at least 20 points out of the 21 points proposed by academics and activists in Argentina when the new communication law was discussed in this country. When the law was being discussed, the activists and academics made 21 proposals which were ignored by Argentina’s Legislative branch, which was dominated by a Peronist majority. These proposals could provide an important guide for the crea-

¹⁶ Vázquez, Rodolfo, *Entre la libertad...*, cit., p. 173.

¹⁷ Sandel, Michael, *El liberalismo y los límites de la justicia*, María Luz Melon, Madrid, Gedisa, 2000, pp. 73 y 74.

¹⁸ Nino, Carlos Santiago, “*The Ethics of Human...*”, p. 134.

tion of any other telecommunication law, anywhere in the world where human rights and democracy are taken seriously.¹⁹

1. A communications law should promote the reception, dissemination and search for information, opinions and ideas, which should be uncensored by the state or the different powers.
2. Communication has to be seen as a human right and not as a private business enterprise or State monopoly, granted that communication promotes the social integration of individuals into the community and helps develop education and culture.
3. The independence of media is essential. The law has to make sure that the State and de facto powers don't exert pressure or punish journalists for the information they disclose.
4. The law must protect radio spectrum since it is a public good relevant for human development and should not be used as a good liable for business. On contrary, since the State manages the radio spectrum, it should be in charge of assigning it to private groups so as to promote plurality of voices and ensure the quality of democracy.
5. The diversity and plurality of voices must be the main goal of this law. The State should encourage the inclusion of disadvantaged groups through the equal distribution of their information.
6. The state should ensure that disadvantaged groups have the same access to media and the distribution of their information as any other member of the population.
7. The law should not allow telecommunication to be concentrated in the hands of monopolies or oligopolies, in order to develop the principle of autonomy and of self-government.
8. The law must guarantee the right of access to plural information and acknowledge cultural diversity. Therefore the law must guarantee the intellectual and ethical information of those who are involved in the production of cultural goods.
9. The State should restrict the number of concessions in regard to the exploitation of the radio spectrum. The private sector should deduct

¹⁹ “21 puntos básicos por el derecho a la comunicación”, disponible en: https://es.wikisource.org/wiki/21_puntos_b%C3%Asicos_por_el_derecho_a_la_comunicaci%C3%B3n (consultada el 22 de septiembre-2014).

taxes by transmitting cultural, artistic, or social interest programs in peak time.

10. Public officials of any state power cannot be holders or members of the board of a private corporate media.
11. Broadcasting and telecommunications must be public, commercial and communitarian. The competitors in these areas must be under equal conditions and should suffer no discrimination.
12. State media have to be public and not exclusive to the actual government. Much of its programming should have the aim to promote social integration, arts, culture and education, in addition to developing individual creativity. Additionally, state media, inasmuch as it is public, has to encourage people to participate in its programs and should be held responsible for the needs of the population. Moreover, public and private universities may have radio frequencies for the transmission and dissemination of culture and entertainment so as to promote the solidarity among university communities. Furthermore, the university and community radios should not pay taxes.
13. Private sectors must have a frequency reservation greater than 25% for the diffusion of nonprofit programs in order to transmit necessary information for the community.
14. Auteur cinema from Mexico and Latin-America should be promoted by TV channels at least four times weekly for the purpose of encouraging the union among young talents and Latin-American nations.
15. Only those who have a license can operate the service of their airwaves, therefore they should not transfer the concession granted by the State to a third party.
16. The law has to stress that the relation of a communicator should be with his/her audience and not with the company. Therefore, if a company unjustly censures a communicator, the law should penalize the company and protect the right of the communicator and his/her audience. Nevertheless, the only way in which a company can justly censor a communicator is when the communicator has affected the rights of others or violated the ethics code of a company.

17. The law and the Constitution must create an ombudsperson with the duty to defend the respect for democracy in the media and human rights.
18. Since communication plays an important role in the development of self-government and in the development of the principle of personal autonomy, the law must promote the dialogue between the branch of the government and the people.
19. The law should seek the decriminalization of crimes such as libel and slander so that communicators and journalists are able to enjoy freedom of speech.
20. The law should encourage the production of TV programs from several nations rather than from only one country, in order to integrate Mexicans into cultural globalization and to learn from other cultures, completing their multicultural mosaic by such means. This suggests that the law has to put a limit for many TV products imported by another country.
21. If the Constitution does not recognize the human right of access to the internet, the law should.

IV. WHY IS THE NEW MEXICAN COMMUNICATIONS LAW A THREAT FOR THE DEVELOPMENT OF PRINCIPLE OF PERSONAL AUTONOMY AND SELF-GOVERNMENT?

Now let's see why the new Mexican Communications Law is not in accordance with a Democratic Constitutional State and is incompatible with democratic and human rights.

Chapter VI Article 145 of The Telecommunications and Broadcasting law establishes the network neutrality through general guidelines that the internet must have: Free choice, Non-discrimination, Privacy, Transparency and information, traffic management, Quality, and Sustained infrastructure development. This chapter forgets to protect pluralism and diversity in the network, which are essential conditions for a democracy. When the State does not strengthen plurality in any communication, society cannot develop either a collective self-government or the people's autonomy principle. The Internet has to be plural, otherwise the collective deliberation and public

debate would be limited. Consequently, the generation of consensus and diversity of voices would be nothing but a dream of democracy.²⁰

Article 190 Section I in the Act mentions the following:

Telecommunication concessionaires and, if necessary, only those authorized should:

I. Collaborate with the security agencies, law enforcement and administration of justice in the geographical location, real time and mobile communication equipment in the terms established by law. Any omission or disregard of these provisions will be sanctioned by the authority, pursuant to the provisions of the applicable criminal law.

II. Keep a register and control communications that are made from any type of line to use a unique numbering or leased in any form to accurately identify the following data:

a) Name, corporate name and address of the subscriber;
b) Type of communication (voice, voice mail, conferencing, data), supplementary services (including call forwarding, transferring) or multimedia messaging services or employees (including short message services, multimedia and advanced services).²¹

This article allows the authority to locate any person in real time through GPS cellphone without warrant. This violates the constitutional principles of due process and separation of powers.²² Definitely, this is serious because of the fact that human rights are subjected to a single branch of government (the executive power), which it has been featured in contemporary history, for many violations against human rights. This article strengthens the criminalization of the social protest and the opponents through violation of rights such as the right to privacy, the freedom of assembly, the right to protest, the freedom of association, and freedom of transit; and it allows the government to have access to information such as contacts, emails, messages and so on.

Whereas the persecution of political opponents, journalists and activists is very common in Mexico by the government of many states (e. g.

²⁰ Steiner, Jurg, *The Foundations of Deliberative Democracy: Empirical Research and Normative Implications*, Cambridge, Cambridge University Press, 2012, pp.167-182.

²¹ Artículo 190, Ley de Telecomunicaciones y Radiodifusión. (Own translation)

²² Salazar Ugarte, Pedro, *La democracia constitucional: una radiografía teórica*, México, Fondo de Cultura Económica, 2006.

Veracruz),²³ organized crime has infiltrated most municipal governments.²⁴ Hence, the only way I would support the geolocation would be when people have already complained with the Public Ministry crimes as drug trafficking, extortion and kidnapping.

Article 67, section IV is very important because it allows the existence of community broadcasting, which strengthens the social fabric and the collective public debate on issues that affect the community, especially in Mexico where as much as 7 out of 10 Mexicans do not have access to internet.²⁵ Hence, community broadcasting is the most direct way of forming part of a community's problems. Nonetheless, Article 89 removes the economic autonomy of community broadcasting because of the fact that they can only be received from public entities and not for the sale of advertising. This is serious because it creates economic dependence on the government's resource, which limits the free press, the accountability, and reporting on corruption. By taking away the economic autonomy out of community broadcasting, the law goes against the Article 2, Part B Section IV of the Mexican Constitution:

Extending the communications network allows the integration of communities through the construction and expansion of roads and telecommunications. Establishing conditions for indigenous peoples and communities may acquire, operate and manage media, in the terms that the laws on the matter determine.²⁶

Without economic autonomy for the community broadcasting, the law does not allow the developing of collective self-government of communities, neither the principle of autonomy nor life plan of individuals. In Mexico, most of indigenous communities do not have Internet access from

²³ Vivanco, José Miguel, "A Wake-Up Call for Mexico", Human Rights Watch, 12 de octubre de 2015, disponible en: <https://www.hrw.org/news/2015/05/04/wake-call-mexico> (consultada el 22 de septiembre de 2014).

²⁴ Buscaglia, Edgardo, *Vacios de poder en México: cómo combatir la delincuencia organizada*, México, Debate, 2013.

²⁵ "Sólo 3 de cada 10 hogares con acceso a Internet: INEGI", *El Universal*, México, 15 de mayo de 2014, disponible en: <http://www.eluniversal.com.mx/computacion-tecnologia/2014/acceso-internet-mexico-88620.html> (consultada el 22 de septiembre de 2014).

²⁶ Artículo 2o., Constitución Política de los Estados Unidos Mexicanos (own translation).

their home. Therefore, the developing of the community broadcasting is necessary so that the deliberation of public interest issues can include the whole community. The public decisions would have greater legitimacy if all members of the community were included through the deliberation, due to the fact that when a public issue is debated horizontally, the quality of democracy increases.²⁷

In modern days there are no radio stations that transmit 100% of the broadcast in indigenous languages, hence the marginalizing of the community in broadcasting is just like discriminating indigenous people for the only fact of being different. I think they do not have to seek a mediator for the use of radio spectrum, it should be a simple procedure instead, added to the fact that the broadcasting of communities strengthens the right to information of individuals and their integration into the community.²⁸ Furthermore, the 2010 report “Freedom of Expression Standards for Free and Inclusive Broadcasting” from The Organization of American States, mentions that community broadcasting stations have the right to economic autonomy: “the possibility of using advertising to finance their operations”.²⁹ This issue was also emphasized in the Annual Report of the Office of the Special Rapporteur for Freedom of Expression in 2007 by the Inter-American Commission on Human Rights.³⁰ Thereby, when law cuts economic autonomy, it goes against the Inter-American human rights system. This means that Article 1 of the Mexican Constitution is disregarded by the Telecommunication Law. The State must guarantee a space of the radio spectrum for the broadcasting of communities in order to strengthen the social fabric through affirmative action.

Article 86 in this law establishes the requirements for an individual to obtain the concession of some space in the radio spectrum. Among the

²⁷ Gargarella, Roberto, *Nos los representantes. Crítica a los fundamentos del sistema representativo*, 2a. ed., Buenos Aires, Miño y Dávila, 2010, p. 136.

²⁸ IACHR, *Freedom of Expression Standards for Free and Inclusive Broadcasting: Special Rapporteur for Freedom of Expression Inter-American Commission on Human Rights*, OEA, 2010, pp. 26. At, disponible en: <http://www.oas.org/en/iachr/expression/docs/publications/Broadcasting%20and%20freedom%20of%20expresion%20FINAL%20PORTADA.pdf> (consultada el 22 de septiembre de 2014).

²⁹ *Ibidem*, p. 27.

³⁰ IACHR, Annual Report of the Office of the Special Rapporteur for Freedom of Expression 2007, OEA/Ser.L/V/II.131, Doc. 34 rev. 1. 8, March 2008, chapter III, para. 6. Available at, disponible en: http://www.cidh.oas.org/annualrep/2007eng/Annual_Report_2007.VOL.II%20ENG.pdf (consultada el 22 de septiembre de 2014).

requirements is that the particular defends the content that is going to be transmitted. Nevertheless, the law does not say which will be the parameters that the Federal Telecommunications Institute (IFT) uses to decide on the programming. This article forgets to enrich diversity and plurality. Why do we need many channels if all of them transmit the same material and information? On contrary, the State should foment diversity and plurality in programs in order to give more ways for live plans.

The Article 256 states that the information must be for “reserving plurality and truthfulness”. When the article mentions truthfulness, the law limits rights and democracy, because it enables the government to censor any information that is uncomfortable, due to the fact that this word is ambiguous and vague, therefore a stronger political and social interpretation is necessary to benefit human rights when we find such words.³¹ It is preferable to have a lot of false or unconfirmed information, than to have any voices silenced. It is always going to be very difficult to know what “the truth” is, especially in Mexico where the governments have been characterized by censoring voices that they find uncomfortable. Nonetheless, public servants, inasmuch as they are living out of public funds, must be subject to criticism and suggestions. This evidently cannot be done if we limit the information. Hence, when the law uses words such as truthfulness in order to regulate an issue so important for democracy as information, it gives politicians the opportunity to transform the democratic government into an authoritarian or totalitarian regime, owing to the fact that accountability can be protected through diversity of voices.

The Article 197 referred to above, mentioned the duty of the concessionaires and the authorities to block any web content without an explanation. I grant that the article should specify that the block can only happen when someone’s rights are breached. In the form that the article is written, it gives the State and private enterprises the mechanisms to exert censorship without valid reasons. In a Democratic Constitutional State the freedom of speech is an absolute right due to the importance it has to exercise other human rights and democracy, thus its limitations must be very specific and should be used in extreme causes only.³²

³¹ I thank Dr. Imer B. Flores for the discussion of this topic.

³² Holmes, Stephen y Sunstein, Cass R., *El costo de los derechos: por qué la libertad depende de los impuestos*, trad. de Stella Mastrangelo, Buenos Aires, Siglo XXI, 2011, pp. 129-133.

The Constitution and the Telecommunications Law should explicitly protect the right to the internet as a human right. In the recent history we have seen that one of the best forms to fight the concentration of information it is through the internet and social networks. The distribution of media power through the Internet promotes quality of information and democracy, and maximizes the principles of autonomy and dignity as well. That is why the United Nations General Assembly elevated Internet access as a positivized human right.³³ If Mexico wants to be a Democratic Constitutional State where human rights and democracy are taken seriously, it is necessary that the Constitution and the Telecommunications Law guarantee a minimum bandwidth for each citizen, in order to guarantee the access to the Internet; especially in a country with such a deep social inequality, where most of the people build their reality according to the television.

V. CONCLUSION

The new Telecommunications Law does not strengthen the accountability and the criticism that most people exert upon to their government. In a Democratic Constitutional State, laws have to be a mechanism that fortifies democracy and human rights through the strengthening of social liberal values such as tolerance, responsibility and solidarity. Furthermore, we must remember the principle of interdependence of rights, a principle which states that when a right is violated, other rights are violated too. This is added to the effect that all rights are linked. For instance, when a group of activists sought to generate conscience through Mexican television regarding the risk of obesity that is a consequence of consuming soda drinks; the activists received a negative answer from the Mexican television duopoly, due to the fact that most TV shows are sponsored by soft drink companies. Consequently, the right to health is undermined by the Mexican television duopoly by obstructing the right to information.



³³ La Rue, Frank, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, General Assembly, United Nations, April 2013. At, disponible en: http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.40_EN.pdf (consultada el 22 de septiembre de 2014).