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## Bimonthly Newsletter

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### Venezuelan Insight

#### COMMUNICATION RIGHT UNDER THE LENSE

According to Article 13 of the American Convention on Human Rights, freedom of thought and expression "includes freedom to seek, receive, and impart information and ideas of all kinds", through any mediums, and shall not be subject to prior censorship but shall be subject to subsequent imposition of liability. This right may not be restricted by any means tending "to impede the communication and circulation of ideas and opinions". In the same line of thought, but in a very specific way, article 1 of the Organic Telecommunications Act (OTA) "guarantees the human right of all persons to communication" when such right is being exercised through any telecommunications medium regulated by the OTA. In other words: It is with the goal to guarantee the human right to communication that the OTA allows private parties to carry out telecommunication activities.

Protecting human communications means defending the very essence of mankind, that same essence that enables people to transmit knowledge, acquire information, grow and establish civilization. In case doubt stands as to the convenience of allowing the diffusion of a specific message, it shall always be preferable to assure the realization of the rights to communication and information rather than restrict them, understanding that such diffusion generates liabilities for those making it possible as well as for those controlling it. In the light of the recent events occurred in Venezuela between April 11 and 14, which gave rise to a profuse debate surrounding freedom of expression, as experts in telecommunications law, we feel obliged to express some legal criterion regarding the scope of such an important right.

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#### TELECOMMUNICATION SECTOR

##### • *Human right to communication vs. imposed broadcasting of shackled governmental messages through radio and television*

During the week of the political events of April 11, 2002, it was evidenced in Venezuela how all Venezuelan radio and TV stations were forced to suspend their regular broadcasting and simulcast messages from the Government. A press report says that between April 8 and 14, 38 imposed official messages were simulcasted nationwide, with a total duration of 11 ½ hours (see report of Carlos Subero in the newspaper *El Universal*, April 12, 2002). Another press report (Irma Álvarez in the newspaper *El Universal*, April 10, 2002) informed that the Office of the Special Rapporteur for Freedom of Expression of the Inter-American Commission of Human Rights (IACHR), expressed its preoccupation reiterating what had already been warned by Mr. Santiago Cantón, Executive Secretary of such Commission: that the abusive use of imposed official messages violates article 13 of the American Convention on Human Rights and contravenes the Declaration of Principles on Freedom of Expression by the IACHR. It happens that the events occurred between April 8 and 14 were an exacerbation of a practice that the current Administration had made usual. Given this conduct by the Executive Branch, deemed by many people as contrary to freedom of expression, on April 10 and 11, some private TV stations opted for dividing the screen (4 times) and simultaneously broadcast the image of imposed official messages together with the image of their regular programming (the sound of the official messages was broadcasted also). Therefore, through a divided screen, TV viewers were given the chance to see what was happening on the streets on those days simultaneously with the content of imposed official messages. These facts bring up two legal issues: whether Venezuelan law authorizes the State to impose official messages by nationwide simulcasting with the frequency and content observed between April 8 and 14; and whether private TV stations may legally disobey an order to simulcast nationwide imposed

official messages when they deem such order as an illegal one. To answer these questions, legal provisions on freedom of expression need to be examined.

From an international law point of view, article 13 of the American Convention on Human Rights provides that the right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions. The scope of this provision is developed by the Declaration of Principles on Freedom of Expression by the IACHR: Restrictions to the free circulation of ideas and opinions, as well as the arbitrary imposition of information and the imposition of obstacles to the free flow of information violate the right to freedom of expression.

On the other hand, regarding Venezuelan law, article 192 of the OTA regulates mandatory official messages as follows: "the President of the Republic may, directly or through the National Telecommunications Commission, order the operators rendering services of pay television, through the channel of information to their customers, and the companies of sound broadcasting and open television system, the free transmission of official messages or allocutions of the Presidency or Vice-presidency of the Republic, or of the Secretaries of Department. Through regulations, the forms, limitations and other characteristics of such emissions and transmissions shall be established. Advertising of public entities shall not be part of the obligation prescribed in this article". Additionally, article 69 of the Radio Communications Regulations (temporarily in effect as provided by article 208 (1) of the OTA) provides for the forms, limitations and other characteristics of such official mandatory transmissions: "radio broadcasting stations are obliged to gratuitously transmit, when the Government deems it convenient, official messages not exceeding 1,200 words within 24 hours, and to make their microphones available, also without cost, to the Government when the President of the Republic or the Secretaries of Department address the Nation in matters of public interest".

From the above quoted provisions, the following legal principles may be inferred: (i) interruptions of radio and open TV stations regular programming, ordered by the Executive Branch, for the transmission of official messages, may be deemed as an indirect method to restrict the right of expression, since such interruptions constitute an obstacle to the free flow of information; (ii) for imposed simulcasted messages to be legitimate, extenuating circumstances must exist in order to extraordinarily justify them; (iii) Venezuelan internal provisions authorizing the use of simulcasted official

messages must be restrictively interpreted regarding the intervention power of the State, always favoring freedom of expression; (iv) in the light of the OTA and its Regulations, it shall be understood that simulcasted official messages may be exceptionally ordered by the State only when they are given by the President of the Republic, the Vice-president or the Secretaries of Department, and only when it is justified by reasons of extenuating public interest and the message does not exceed 1,200 words within 24 hours; (v) regarding the content of simulcasted official messages, the OTA expressly excludes "advertising of public entities", such phrase encompassing all kind of political proselytism or propaganda in favor of the Government or its works.

Pursuant to such legal *status-quo*, the private TV stations measure to countervail the abuse by the State in its use of simulcasted official transmissions, was not only legal, but also moderate, since in our opinion such governmental conduct could have been legally questioned. We certainly do not intend to act as judges or original interpreters of the law; TV stations may not intend to do so either. We express our opinion without prejudice to a better one at law, and the conduct of TV stations may imply liabilities should it be so declared by a court with competent jurisdiction over the matter. Accordingly, it will be necessary to wait for the outcome of any administrative or judicial proceedings, or a decision by the Supreme Tribunal of Justice triggered by a constitutional injunction action, or an action for interpretation of the law as provided by article 206 of the OTA which an interested party decides to file.

• ***Does Venezuelan law authorize the State to force interruption of private TV stations transmissions?***

On April 11, 2002, around 4:35 pm, while the President addressed the Nation in a shackled message, and some private TV stations broadcasted the official message together with images showing the violent events occurring on the streets, the signal of such TV stations suddenly disappeared from the air. As informed by TV stations themselves right before their transmissions were interrupted, by means of a written message slipped along the bottom of the screens, and as announced by the President during its allocution (see reports by the newspaper El Universal on April 12 and 13, 2002), the interruption was due to an official order. Does Venezuelan law authorize the adoption of such a measure by the State, in the way that it was ordered and executed? In our opinion, it does not, because of the following reasons. First of all, it must be highlighted that the purpose and primary intent of telecommunications law is to guarantee the human right to communication (article 1 OTA). This means that telecommunication regulations must be interpreted in the light of the supremacy of such human right,

including the usage and exploitation regime of the radio electric spectrum. Additionally, the legality principle is of the utmost importance, which rules all actions by the Government (article 141 of the Constitution). From this point of view, the provisions of the OTA gain meaning and coherence in a way that differs from the interpretation that some governments officials have expressed. Regarding the radio electric spectrum, and despite it is a resource of public domain (article 7 OTA), neither the administrative agency in charge of its management, regulation, organization and control (CONATEL) nor any other State authority, may discretionarily dispose of it. A legal regime in full force and effect limits and conditions the exercise of governmental authority in the light of the human right to communication.

The radio electric spectrum is a resource belonging to the public domain of the Republic, and its use by private parties is legally possible through a license granted under a specific legal regime. This is a regime that confers rights to and imposes obligations on the licensee, so should the licensee breach such set of rules, liabilities legally established may be applicable to it. In this respect, the Constitution establishes important guarantees and rights: nobody shall be penalized due to acts or omissions not being previously and legally typified as crimes, faults or infractions; and every person has a right to due process in all administrative proceeding conducted against it (article 49 of the Constitution). In this line of thought, in accordance with article 159 of the OTA, the sanctions which may be imposed due to infractions and crimes established by such Act, must be those also legally provided (public admonition, penalty, revocation of the license, cessation of clandestine activities and prison). In exercising its punishing powers, the Administration must follow the special administrative procedure provided by article 176 and subsequent articles of the OTA, unless a criminal punishment is at bar.

Regarding all these legal provisions, a strong interpretative effort is not needed to conclude that the Government performance on April 11 - when interrupting the transmissions of private TV stations in the way it was done - violated the Constitution and the law. Without considering whether such TV stations committed or not an infraction against the radio electric public domain regime, it is obvious that the Government imposed and executed a penalty not corresponding to any of the ones expressly typified by the OTA, and also with total absence of due process. The Government executed an act of force without support of a decision, such a conduct being known in law as an arbitrary act, "*vía de hecho*" (article 78 of the Administrative Procedure Organic Act). Even if it is argued that the State conduct pertained to the application of one of the precautionary and temporary

measures provided by article 183 of the OTA, it would have to be counter argued that the interruption of a TV signal does not correspond to any of the strictly and expressly established measures authorized by such provision; and that, in any case, the imposition of a precautionary measure must be preceded by a legal decision opening a sanctioning procedure. Article 209 of the OTA may not serve as the ground for the governmental conduct, since such article does not exempt the government from following the constitutionally established due process. Not even under circumstances of state of exception (if such a state had been declared), the State could proceed as it did, given that neither the right to due process nor the right to information may be subject to restriction or suspension (article 337 of the Constitution and article 7 of the State of Exception Organic Act). Ultimately, it is pertinent to observe that, having proceeded in such a violating and contrary way to the Constitution and the law, not only the State may have compromised its liability for the damages that it may have caused (article 139 of the Constitution), but also government officials may have compromised their civil, administrative and criminal liability (article 140 of the Constitution).

- ***Draft law about Social Responsibility on the Provision of Audiovisual and Radio Broadcasting Services***

In last April, CONATEL initiated the public consultation process for the so-called "Content Law", and expects to receive observations and comments through public audiences, electronic *fora* and working groups from throughout the country. The purpose of this law shall be to regulate the content of audiovisual and radio broadcastings, thus declaring such activities of public interest. Accordingly, this law would be intended to procure respect for freedom of expression and information, without censorship. However, there are several formal and substantial considerations derived from the examination of the draft. Freedom of expression comes along with the right to communication by any media. Therefore, the goal and essence is the communication itself, not the media used. Hence, the control of audiovisual and radio broadcastings may not purport the sacrifice, not mattering how little, of such essence which is the absolute exercise of the human right to communication. However, it is important to note that the draft generously provides for "undefined legal concepts" when establishing the rights and obligations of the subjects which the law would regulate. Specifically, such normative technique is used to define prohibited conducts qualified as contraventions and triggering several sanctions. In this respect, it must be noted that such undefined legal concepts imply discretionary powers when their categorization

depends on the subjective appreciation of the administrative authority. How is it to be ascertained whether some content promotes or incites political or ideological discrimination or alteration of public order; whether some content jeopardizes national security, incites breach of the law, or hinders police or judicial action? A great danger exists in the application of this law as proposed. Even though freedom of expression may be legally limited, it must be done in a way that does not imply prior censorship and establishes obligations attached to the exercise of freedom of expression. This is very important given that international law provides that prior conditionings based on requirements of veracity, timing or impartiality, or rewards or disapprovals of certain contents of informative, political, economic or other nature, are incompatible with the right to freedom of expression. The existence of the right to communication does not exclude State regulation, but requires that such regulation does not impose prohibitions purporting prior censorship, and that such regulation be limited to establishing future liabilities assuring respect to the rights of honor and reputation of third parties, the protection of national security, public order, health and public morality. In this sense, whilst the draft addresses many laudable purposes related to the protection of children and young people, on the other hand, it also proposes the implementation of prohibitions related to content of certain nature, raising such prohibitions severe constitutional questionings. Finally, the viability of this proposed new law will depend primarily on the administrative authority in charge of its application. In this context, the mechanism of selection, designation and stability of such officials does not guarantee the suitability of those who will be called to carry out such an important duty, their impartiality being exposed to "capture" by the Government.

## **ECONOMIC NEWS**

### **• Data Bases and Low Income Tax Payers**

Given the elimination of the VAT exemption base, client data bases of public utilities providing electricity, telephone, water and gas services, appear as valuable resources for the Venezuelan Tax Administration (SENIAT) in pursuing its difficult task of reducing tax evasion and increasing tax collections. Article 12 of the bill containing a proposed reform of the currently-in-effect VAT Act, provides for the legal foundation to authorize the SENIAT to appoint public utilities as "perception agents" of the additional tax that would have to pay, generally, all subjects failing to demonstrate to such companies their official condition as payers of the VAT or of the nowadays called *Minimum Tax*. Thus, the Tax Administration would be able to activate the obligation of public utilities to collect from its non-residential clients an additional tax equal to 50% of the

usual VAT normally triggered by the provision of public services. Accordingly, in practical terms, public utilities' non-residential clients would be obligated to pay a VAT of 21.75%, that is, the usual VAT of 14.5% plus an additional rate of 7.25% (50% of the usual rate), unless they demonstrate to such companies their official condition as payers of the VAT or of the *Minimum Tax*. The draft Minimum Tax Law for Low Income Tax Payers provides for an alternative and optional tax paying regime to which all subjects generating annual gross income of 9,000 tax units (approximately US\$140,000), or less, may adhere. Low Income Tax Payers opting for the new (and not yet in effect) regime shall not be obligated to pay VAT, Income Tax and/or Corporate Assets Tax. Needless to say, those individuals or entities currently falling under the VAT exemption base to be eliminated, once the new VAT bill is passed, should consider to formalize their official VAT payer condition or their Minimum Tax paying condition. Otherwise, most probably, in the near future, their electricity, telephone, gas and water bills shall increase in 7.25%. Ultimately, once the new tax reform is approved, should public utilities be appointed by the Tax Administration as perception agents, low income tax payers shall become more visible and public utilities shall be bound by the terms of the Organic Tax Code as perception agents. Everything indicates that low income tax payers are one of the targets of the imminent tax reform, and that client data bases of public utilities constitute a key factor in the matter.