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The Audiovisual Law of Argentina and the Changing Media Landscape

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In Argentina, as broadcasting services consolidated in the twentieth century, the private sector gained an increasingly leading role, and the media generally adopted a commercial, competitive model, relying for economic support on the proceeds from advertising. Both radio and television media outlets tended to centralize the production of their content in Buenos Aires City. For years, open television demonstrated a strong dependence on US content. However, since the 1990s, an increased capacity to create national content has been evident, building on the precedents of the late 1960s. Even the area of prime time fiction on open television is now packed with national productions. Foreign content continues to be strong in cable television, with many channels featuring US movies and series.

Since the return to the constitutional system in December 1983 following the collapse of the dictatorship (1976–1983), the media system has undergone four different processes: first, eradication of direct censorship; second, concentration of media company ownership in a few large groups; third, technological convergence (audiovisual, information and telecommunications), and fourth, geographic centralization of content production (Becerra, 2010).

These processes have combined to transform the media system, imprinting a single-minded adherence to profitability as the basis for programming and short-term success. The legal framework for this transformation was a broadcasting decree-law (No. 22,285) passed in 1980 during the dictatorship. The regulation underwent subsequent amendments under most of the constitutional administrations that followed and this contributed to its progressive deterioration.

In the 1990s, with the promotion of neoliberal policies under Carlos Menem's two-term administration (1989–1995 and 1995–1999), the legal framework was revised to enable the establishment of multimedia groups. Since then, the concentration of media ownership has been an incessant process. Grupo Clarín is the most prominent communication group in the country, a one-stop shop gathering the number-one nationwide newspaper (also a partner of several regional newspapers in the provinces), one of the main television channels in Buenos Aires and several channels in the interior, a radio station network, the leading cable television distribution system, and several cable television signals. The Group is also engaged in other areas linked with the cultural industries, including a newspaper paper mill (in which it is a partner of the State), movie production companies, news agencies, and an Internet service provider. The biggest challenge to the dominant position of Grupo Clarín is posed by the telephone companies (particularly, Telefónica de España) which dominate, in the form of a duopoly, the fixed telephony market of Argentina. They are also the main mobile telephony operators and broadband Internet providers. Though not compatible with

the legal framework, Telefónica controls, through its subsidiaries, eight television channels and radio stations. In addition to Telefónica and Telecom (the other fixed telephony company), an increasingly prominent role is being played by Mexican company Telmex in mobile telephony. Both Telefónica and Telmex have shown interest in entering the cable television business, though the current regulatory framework now prevents them from doing so. The annual profits of these companies greatly exceeds that of Grupo Clarín.

During the Néstor Kircher administration (2003–2007), communication policies seemed to follow their historical pathways and the interests of business groups remained untouched, however, a significant shift occurred when Néstor Kircher was succeeded by his wife, Cristina Fernández de Kirchner (from 2007 to 2011). She was re-elected in 2011 with a four-year term until 2015. Almost immediately, an open confrontation was unleashed between her administration and Grupo Clarín, the main multimedia group in the country (Kirchner's predecessor had kept them on good terms due to their mutual interests). In the midst of this conflict, a new bill to regulate the audiovisual sector came before the National Congress.

In October 2009, the Congress passed the Audiovisual Communication Services Law (*Ley de Servicios de Comunicación Audiovisual,* LSCA) No. 26,522/09, superseding decree-law[1] No. 22,285 from 1980. The law represents a bold step forward, as it connects the freedom of expression concept with that of human rights. It is respectful of the freedom of speech of all issuers, and in this it stands apart from other controversial chapters in Latin America, including legislation recently adopted by Venezuela and Ecuador.

The Argentine law promotes federalism, in both content production and decision-making. It sets limits on concentration and market domination. And, for the first time in Argentina, both the regulatory authority and state-run media will not be fully controlled by the administration in power. This is a sign of positive checks-and-balances, and advocacy for political minorities, which is in keeping with a progressive regulatory tradition.

The law admits three types of audiovisual communication service providers: state-run, private for profit, and private not-for-profit. Within the state sector, the law recognizes the importance of university broadcasting. There is a special safeguard to grant licenses to indigenous communities. One of the most innovative aspects of the law is that it reserves 33 percent of the telecommunications spectrum for the non-commercial private sector.

As regards institutional design, the law introduced the Federal Audiovisual Communication Services Authority (*Autoridad Federal de Servicios de Comunicación Audiovisual*, AFSCA), made up of seven members: two of whom are appointed by the National Executive Power, three by the National Congress (the law requires that two of these three members be appointed by parliamentary minorities), and three by the Federal Council on Audiovisual Communication (*Consejo Federal de Comunicación Audiovisual*, CFC). The law also introduced the Audience Ombudsman and an Audiovisual and Childhood Advisory Council.

Another noteworthy chapter is that the legal restriction on excessive media concentration. In this regard, the number of licenses that a single company or person may hold is restricted to 10 (in the past, up to 24 were allowed). The potential market share for each owner should not exceed 35 percent. Restrictions are also applied to cross-ownership of electronic media in the same coverage area, although print and electronic crossovers are not included. In fact, a major controversy triggered by the law was the prohibition on one person or company owning both cable and open TV distributors in the same region. At the same time, cable distributors may only own one signal.

Finally, in terms of content, quotas are established for national production (60 percent), own production (30 percent), and independent production (10 percent). Additionally, the broadcasting system has been linked with other cultural industries, in that part of the taxes that broadcasters pay for the use of the spectrum is transferred by the Federal Authority to the film and music enterprises.

After enactment of the law, the government became lukewarm regarding its enforcement. Furthermore, political groups opposing the government and media companies filed legal complaints questioning the constitutionality of the law on the grounds that it impaired freedom of expression. During 2010, the Supreme Court of Justice proclaimed the constitutionality of the Audiovisual Communication Services Law in its general aspects. However, the complaint regarding four articles directly associated with restrictions on media ownership concentration remained in court.

In the meantime, the government inexplicably delayed the application of the law. It aimed the policies of the audiovisual sector against Grupo Clarín, instead of promoting the new solutions enabled by the new legislation. On the one hand, the institutional regulatory structure of the law was not fully implemented, as the members selected by parliamentary minorities were only appointed in 2012. On the other, no new bids were organized for the granting of licenses to the nonprofit commercial sector, and licenses were awarded only provisionally or through processes that had started before the law existed. Another obstacle is encountered in the operation of state-owned media, whose news and editorial line continues to be linked to government interests. Additionally, the government encouraged, through a significant mass of official advertising, the emergence of private media groups aligned with the official information agenda.

Another problematic policy issue is the implementation process for Terrestrial Digital Television. The process was the responsibility of the Ministry for Federal Planning, Public Investment and Services, with hardly any involvement from the regulatory authority (AFSCA). The digital television deployment process had certain positive aspects including the handing out of set-top boxes to underprivileged sectors, a strong investment in infrastructure and a wide national coverage. However, it should also be noted that in the process licenses were hastily granted on an experimental basis to private groups aligned with the government. This was done to comply with the regulatory framework established by the Audiovisual Communication Services Law (the introduction of bidding processes).

In October 2013, the Supreme Court of Justice issued an opinion declaring the constitutionality and full enforceability of the Audiovisual Communication Services Law. The appeal had been filed by Grupo Clarín, on the grounds that Law No. 26,522/09 imperiled vested property rights and threatened freedom of expression.

Six of the seven members of the Supreme Court established that the law did not affect freedom of expression, and a tighter majority of four members declared that the impairment of economic rights was not unconstitutional in this case.

The decision of the Court is very significant in that it constitutes jurisprudence at the highest level concerning freedom of speech. The majority decision considers that there are two dimensions to freedom of expression: an individual one, based on the personal right to make ideas public, from which property rights derive; and a social or collective dimension, which should guarantee to the entire population the right to exercise its freedom of expression. In a time when communication media are central, the Supreme Court of Justice has stated that freedom of expression is inseparable from the potential for disseminating ideas. From that premise, the legal system applicable to communication media is expected to safeguard both principles.

The Supreme Court of Justice did not actually evaluate the quality of the Argentine Audiovisual Communication Services Law because it indicated that it was the business of legislators to do so, and said that Law No. 26,522 "is aimed at favoring competitive and antitrust policies to preserve a fundamental right for life in democracy that is freedom of expression and information". In other words, the Supreme Court analyzes whether the law is balanced and reasonable based on the legislative will, emphasizing respect for the segregation of powers.

The decision is based on the need to promote and guarantee the robustness of public debate, as has been argued by North American constitutionalist Owen Fiss. For that reason, the Supreme Court has said that the principle proposed by the Audiovisual Communication Services Law is the plurality of voices. The State thus has the right to set the limits to the concentration of media as it deems necessary (as long as this does not affect the existence of companies in the sector). One of the key issues in the decision is the distinction made by the Supreme Court between profitability and sustainability. The Court has stated that, although the law can impact upon the profitability of companies (it acknowledges their right to make an economic claim for any losses), there is no proof that after the process of de-concentration the continuity of companies will be jeopardized, and therefore their freedom of expression is not compromised.

In this manner, the decision recognizes the specificity of the communication sector, whose diversity must be especially protected, as it is the cornerstone of democratic society: "unlike other markets, in communication concentration has social consequences that become evident over the right to information, an essential asset for individual freedoms", and adds: "Restrictions of a strictly economic order are not out of proportion faced with the institutional weight that the objectives of the law have".

After the Supreme Court of Justice validated the constitutionality of the audiovisual law, the regulatory authority was entitled to carry out reorganization of over 20 media groups that had exceeded the quantity of permitted licenses. These groups, including Grupo Clarín, submitted plans that in most cases entailed the distribution of shares among their majority shareholders. Between December 2013 and March 2014, the regulatory authority accepted the plans and authorized the inception of reorganization processes for almost all groups. This time frame will be extended in 2014 as long as no controversies arise among the State and private groups in the form of new lawsuits. This could occur if any of the groups undergoing reorganization regards the state authority as acting outside the law or arbitrarily exercising its power. In this regard, there are concerns regarding the capacity of the State to de-aggregate companies in the manner outlined by the business reorganization plans.

The only group on whose situation AFSCA has not yet given an opinion is Telefónica. This is the largest conglomerate in an open television market which, under the audiovisual law, cannot operate licenses as it is a holding company for the licensees of fixed telephony services. As regards the pending reorganization of this group, oppositional political forces have stated that the Argentine government acts asymmetrically, dispensing preferential treatment to Telefónica compared to the rest of the conglomerates with concentrated ownership.

These reorganization processes mean that for the first time ever in Argentina, concentrated media groups are forced by law to give up licenses and to divide, formally, into economic units, in order to diminish their presence in the audiovisual sector. However, the temperament of the government, the regulatory capacity of the Argentine State, and the power of media groups have combined such that, in many cases, the reorganization consists of a reengineering that assigns future companies to existing shareholders. This is especially evident in the interior regions. The situation

has been criticized by civil society players who had entertained a hope that de-concentration of the media market would open up opportunities for greater participation and license access for nonprofit organizations. In the application of the audiovisual law, these organizations have so far been relegated, even though the law establishes that 33 percent of frequencies should be reserved for the third sector.

In the case of Grupo Clarín, its proposal is to de-aggregate into six specialized business units. Thus, one of the main media groups in Latin America, known for its expansive and conglomerate style, will tend toward specialization in the midst of technological convergence. In addition to the units included in the plan, Grupo Clarín has other media outlets that are not regulated by the audiovisual law, including newspapers (*Clarín, Olé, Muy*), magazines, a news agency, Internet portals and production companies. Rearrangement in specialized units will be consistent with the strategy designed in the reorganization plan. This has already started in print media. Additionally, Grupo Clarīn's holdings beyond the audiovisual sector would have a defensive value when faced with potential regulatory changes that might question the concentration of print and audiovisual media in a single company.

If the division into six units is implemented, Grupo Clarín will lose profitability, but it may gain the flexibility to advance the convergence and digitization of the media ecosystem, providing its journalistic production with more independence, and relief. It would be the exact opposite of what the Group argued at the hearing with the Supreme Court of Justice in August 2013, when it linked profitability to information vitality, on the grounds that news companies needed a high degree of concentration to handle the operating and innovation costs required by cultural markets.

The process of reorganization should be controlled by the Government which, according to the law, has to ensure that there are no corporate relationships or anti-competitive links among the future companies within designated groups. If the reorganization process is completed in compliance with the law, the audiovisual media system of Argentina will have a larger number of licensees, but they will continue to be big businesses, though not conglomerate groups of the size that we see today in Clarín or Telefónica.

Media concentration, jointly with the centralization of capital and a partial transfer of property to foreign hands, remain as central features of the Argentine media structure more than four years after the audiovisual law was enacted. These features, also typical of other countries in the region, are enhanced through the discretionary use of public resources by the government in a process designed to reward submissiveness and punish criticism. These resources are fundamentally distributed by way of official advertising; though one must also consider tax exemptions and debt waivers, the extension in the terms of license operations, and permissiveness towards systems of precarious labor in news companies.

One should not dissociate the concentration of the audiovisual market, cited in the objectives of the law as one of the priority reforms to be made, from the economic functioning of a system whose viability requires regular funding with public resources. These resources are far from being managed within the fair rules of the game.

Furthermore, the problems in the application of the Audiovisual Communication Services Law are not limited to the reorganization of concentrated groups. Media policies which have largely been subordinated to the political dispute between the government and Grupo Clarín, neglect key priorities outlined in major underpinnings of the law. Among other aspects, it is worth highlighting that no significant progress has been made in the allocation of frequencies to nonprofit

organizations. The mandate of political pluralism ascribed to public media by the law has not been fulfilled. Public media continue to have a markedly governmental editorial line.

Additionally, more than four years after the passing of the audiovisual law, there is no clear knowledge of how many licenses are available, or which of them are taken by licensees in each region of Argentine territory. Without a technical plan to survey that elementary information, no bids can be launched to grant new licenses and therefore reserve 33 percent of the spectrum for nonprofit organizations. The lack of a technical plan not only weakens transparency and the management of audiovisual licenses, it also impairs the allotment of the spectrum for telecommunications. This sector is insistently pushing for space because of the shortage of frequencies available for expanding mobile networks (it is argued that the poor service provided by operators cannot improve unless new frequencies are granted).

In this state of affairs, reorganization processes reveal innovation, but exemplify the limitations of the law and of state capacity (through the Executive, Legislative, and Judicial branches) to reduce the concentrated property of the media system. The processes of adaptation concerning Argentine audiovisual law are relevant to the entire Latin American region, where, through various strategies, attempts have been made to modify a historically consolidated structure comprised of a few major groups. The Argentine case so far demonstrates that, in addition to the importance of laws and regulations, the economic and social configurations that structure media systems should be recognized.

Consequently, what is at stake is whether legal regulations and political commitment are sufficient to allow the influx of new economic and social players into the media communication domain.

Endnote

[1] There is jurisprudence in Argentina indicating that the decrees passed during military administrations are enforceable as legislation since the return to democracy. This argument was upheld by the Supreme Court of Justice many years ago in the interest of judicial continuity. For that reason, to supersede the decree-law enacted by the military, a congressional law was required; a presidential decree was not enough.

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