



Ecuador: Pending Bills on Communications and Territorial Organization

June 2010

LL File No. 2010-004324
LRA-D-PUB-000559

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ECUADOR

PENDING BILLS ON COMMUNICATIONS AND TERRITORIAL ORGANIZATION

Executive Summary

Bills currently pending in Ecuador's Congress seek to implement new mandates reflected in the 2008 Constitution concerning: (1) communication, freedom of expression, and access to public information; and (2) territorial organization, autonomy, and decentralization. The pending bills are being debated on various grounds as negotiations between the government and the opposition continue.

I. Introduction

On October 20, 2008, Ecuador adopted a new Constitution (CRE) upon the initiative of President Correa.¹ The new text was passed by a Constitutional Assembly, has 444 articles and was approved in a Referendum on September 28, 2008. The new charter strengthens the powers of the president, specially in economic matters. Under the new text it is the Executive power that is in charge of formulating economic, financial and monetary policy, which under the old Constitution was within the Central Bank's authority. It also allows the reelection of the president for two consecutive terms of four years and allows him to dissolve the parliament if it hinders the execution of the National Development Plan. In addition, the new Constitution gives the government more control of strategic sectors, such as energy, mining, telecommunications, and water.

The Ecuadorian government and opposition parties are currently working on a compromise to reconcile various versions of two bills pending in Ecuador's Congress that would implement new mandates in the new Constitution—the Bill on the Organic Law on Communications, Freedom of Expression, and Access to Public Information and the Bill on the Organic Code on Territorial Organization, Autonomy, and Decentralization (COOTAD). Because these bills are currently under debate in Congress and are very recent, there are no sources available at the Library of Congress to make an assessment of the constitutionality of their provisions. However, some news articles have been located that make reference to the discussions currently underway and point out the critical issues and positions with regard to these legislative debates, as discussed below.

¹ CONSTITUCIÓN DE LA REPÚBLICA DEL ECUADOR [CRE], Registro Oficial [R.O.], Oct. 20, 2008, available at <http://www.eluniverso.com/2008/07/24/1212/1217/E8C064BD52EF420CAECDB65555BF60C.html>.

A. Bill on the Organic Law on Communications, Freedom of Expression and Access to Public Information

The CRE guarantees the right to free access to information and communication that is intercultural and diverse.² The State is required, under the CRE, to guarantee the enjoyment of such rights without any discrimination.³ The CRE also forbids the direct or indirect oligopoly or monopoly of the ownership of media outlets and the use of frequencies.⁴ In addition, it delegates to implementing legislation the regulation of the contents of programming and advertising.⁵

However, implementing legislation may not in any way hinder or restrict the content of a constitutional right, even if it is due to the imprecision or vagueness of its language.⁶ Therefore, in order to be approved, any bill that is adopted will have to pass this test of constitutionality, with provisions that respect the essential content of the right to communication and information as constitutionally protected.⁷

There are three versions of the Bill on the Organic Law on Communications, Freedom of Expression and Access to Public Information⁸ currently being debated in Congress.⁹ According to Cesar Montúfar, a Congressman from the opposition party and author of one of the three bills, the debate should be aimed at comparing the three proposals to determine the points of agreement among the three, and then determining which points need reconciliation.¹⁰

Mr. Montúfar believes that one of the main issues to be determined from the outset is the definition of “regulation,” that is, who is going to regulate the right of communication. This is one of the main points of disagreement between the government and the opposition. Mr.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ J. Zavala Egas, *Comentarios al Proyecto de Ley Orgánica de Comunicación* (June 4, 2010), available at the Derecho Ecuador [Ecuador Judicial] website, http://www.derechoecuador.com/index.php?option=com_content&task=view&id=5158&Itemid=134.

⁷ *Id.*

⁸ Proyecto de Ley Orgánica de Comunicación, Libertad de Expresión y Acceso a la Información Pública, submitted by Congressman Cesar Montúfar, available at http://www.lahora.com.ec/frontEnd/images/objetos/ley+comuni+montufar_1.pdf (last visited June 1, 2010); by Congresswoman Lourdes Tibán Guala, available at http://www.lahora.com.ec/frontEnd/images/objetos/ley+comunica+tiban_1.pdf (last visited June 1, 2010); and by Congressman Rolando Panchana Farra, available at http://www.lahora.com.ec/frontEnd/images/objetos/ley+comuni+panchana_1.pdf (last visited June 1, 2010).

⁹ *Dos Informes de la Ley de Medios se Preparan*, *Diario El Comercio*, EL COMERCIO.COM, May 28, 2010, <http://www.elcomercio.com/Generales/Solo-Texto.aspx?gn3articleID=244923>.

¹⁰ *Proyecto de Ley de Comunicación del Gobierno pone en riesgo libertad de expresión, según César Montúfar*, ECUADORINMEDIATO.COM, Sept. 29, 2009, http://www.ecuadorinmediato.com/Noticias/news_user/view/proyecto_de_ley_de_comunicacion_del_gobierno_pone_en_riesgo_libertad_de_expression_segun_cesar_montufar_audio--113862.

Montúfar's bill proposes a regulatory system based on the participation of three parties and three regulatory roles:

- (1) The self-regulation of the media through internal mechanisms, codes of conduct, and good practices, which should be open and public;
- (2) Because these self-regulatory systems have proved not to be effective enough, there should be a second supplementary component, through social regulation, by listener and viewer organizations and readers, who may create a council for the protection of the rights of communication. This council should constitute a forum for discussion and investigation with no authority to impose sanctions; and
- (3) The courts should be the only authority of this tripartite regulatory regime with the power to impose sanctions in the case of violation of rights.¹¹

Under this version of the bill there is no government representative, in order to avoid interfering with and putting political pressure on the communications and media companies.¹²

The government's bill authored by Congressman Rolando Panchana proposes instead the participation of two members appointed by the government in the Council of Communications.¹³ The government's appointees could not have any political affiliation or be relatives of any government official.¹⁴ This proposal does not convince the opposition lawmakers, who have already announced that they will submit a minority report that includes their objections.¹⁵

Other disputed issues in the bill are as follows:

Public Media: Public media would be allowed to receive advertising from private companies in addition to public funding, marketing of their own products, donations and sponsors, commercial advertising, and advertising from public companies. The Ecuadorian Association of Television Channels (*La Asociación Ecuatoriana de Canales de Televisión*) noted that these provisions would create unfair competition between public and private media. The public media instead stated that even with private funding they would still be independent.¹⁶

Journalism Diploma: Persons would be required to have a journalism degree to exercise the journalism profession. This requirement would undermine freedom of expression, according

¹¹ *Id.*

¹² *Id.*

¹³ Proyecto de Ley Orgánica de Comunicación: Exposición de Motivos, <http://www.eluniverso.com/data/recursos/documentos/leycomunicacionpanchana.pdf> (last visited June 1, 2010).

¹⁴ *Los puntos Polémicos de la Ley de Medios*, EL COMERCIO.COM, May 31, 2010, <http://www.elcomercio.com/Generales/Solo-Texto.aspx?gn3articleID=245329>.

¹⁵ *Id.*

¹⁶ *Id.*

to the Inter-American Commission on Human Rights, because everyone should be entitled to perform information-related work even without a formal diploma.¹⁷

Advertising: The duration of advertisements would be limited to fourteen minutes on the radio and twelve minutes on television. The Association of Television Channels opposes this restriction on private advertising. Public advertising has no restrictions.¹⁸

Closure of Media: Even though there was an agreement among congressional leaders to not include the closure of media companies by the government as a sanction for those that intend to threaten the democratic system of government, a transitory provision has been proposed that would amend the Criminal Code and allow a court to order the closure of a media company in such circumstances.¹⁹

Sanctions: One of the most critical points of discrepancy with regard to various versions of the bill is a proposal that would authorize the Commission on Communications to impose a fine on a media company of up to 20% of the company's income for the last three months.²⁰ Some experts believe that this amount may be too high and should be revised. The grounds for imposing this fine would be: repetition of an infraction previously sanctioned with a written warning; direct inducement to physical or psychological violence; sex commerce; child pornography; promotion of cigarettes or illegal drug consumption; and religious or political intolerance, among others.²¹

The Council of Communication: The presence of government appointees in the Council of Communication remains the most important topic of disagreement. It has not been yet determined what powers it is going to have to implement public policies on communications, including the authority to impose sanctions on media companies. This is the main reason for the opposition's demand that the Council be organized as an independent body, free of political pressures.²²

B. Bill on the *Código Orgánico de Organización Territorial, Autonomía y Descentralización* (COOTAD)

The 2008 Constitution adopted important changes in the political-territorial organization of the country as well as the distribution of competences among the different levels of government.²³ The territory is divided into regions, provinces, cantons, and parishes, which may

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ D. PEREZ ORDONEZ, LA CONSTITUCIÓN CIUDADANA 87 (Taurus Pensamiento, Quito, 2009).

interact and join to improve the management and administration of their natural and economic resources.²⁴

The new Constitution not only strengthened the central government but also strengthened local, municipal and regional governments.²⁵ The central government adds to its already exclusive powers on defense, security, and international and economic relations, powers such as national planning, immigration, and the management of state-owned companies.²⁶ Under the 2008 Constitution, the exclusive powers of the central government do not exclude its concurrent exercise with other levels of the government with regard to the management of public services.²⁷ Some critics have expressed concern about the duplication or overlapping of powers between the central government and the other regional governments, which may create confusion.²⁸

The bill on the *Código Orgánico de Organización Territorial, Autonomía y Descentralización* (COOTAD) (Organic Code on Territorial Organization, Autonomy and Decentralization) being debated in Congress is aimed at implementing the constitutional provisions on the organization of the territory and filling the gaps of the constitutional text. The COOTAD bill,²⁹ with more than 600 provisions, has been criticized for being ambiguous and for redistributing the resources derived from the hydroelectric energy in a way that would reduce the percentage currently received by the energy producing provinces.³⁰ It also derogates nineteen laws that granted economic benefits to some provinces, including a public roads development program for the province of Loja.³¹

The COOTAD creates new regions and a new distribution of resources aimed at preventing the overpopulation of some provinces.³² Its supporters, including Congressman Hernandez from the government's party, maintain that the bill intends to eliminate distortions in the distribution of resources—for example, the Bolivar province, which has the highest poverty index in the country, receives US\$156,960, while Quito receives US\$ 90 million.³³ In this regard, some legislators from the opposition have observed that the bill is “centralist” because it

²⁴ *Id.* at 88.

²⁵ CRE arts. 242, 244.

²⁶ *Id.* art. 261.

²⁷ *Id.* art. 260.

²⁸ A. Grijalba, Principales Innovaciones en la Constitución de Ecuador del 2008 (Institut de recherche et débat sur la gouvernance, Jul. 16, 2009), available at <http://www.institut-gouvernance.org/fr/analyse/fiche-analyse-454.html>.

²⁹ Bill on the Código Orgánico de Organización Territorial, Autonomía y Descentralización (COOTAD), available at <http://documentacion.asambleanacional.gov.ec/alfresco/d/d/workspace/SpacesStore/a9929599-2f55-4c43-a223-714983c7a9e9/C%C3%B3digo%20Org%C3%A1nico%20de%20organizaci%C3%B3n%20Territorial%20y%20Autonom%C3%ADa%20y%20Descentralizaci%C3%B3n> (last visited June 4, 2010).

³⁰ *El Código Territorial*, HOY.COM.EC, Mar., 11, 2010, <http://www.hoy.com.ec/wphoy-imprimir.php?id=396938>.

³¹ *Id.*

³² *Id.*

³³ *Id.*

allows the central government to dictate the policies and planning of the decentralized governments instead of reinforcing decentralization.³⁴ Currently, the congressional commission in charge of the COOTAD debate has requested the assistance of experts from National Technical Universities to determine a formula for the equitable distribution of resources among the decentralized autonomous governments.³⁵ The new formula should consider the following criteria for the assignment of resources: the size of the population; unmet basic needs of the population of each of the autonomous decentralized governments; achievements with regard to improvements in the standard of living; and the administrative and fiscal discipline to meet the standards set by the National Development Plan.³⁶

The 2008 Constitution and the COOTAD bill also provide that the autonomous decentralized governments have political autonomy,³⁷ which also includes regulatory powers within the competences assigned according to the different levels of government at the local and regional levels.³⁸

In sum, the bill on COOTAD is still a work in progress and a lot of political negotiation will be needed to reach a consensus in a matter that has remained unsolved for many decades. The 2008 constitutional provisions represent progress toward a solution in the sense that they recognize the different levels of government, but those provisions fall short of providing a clear solution to territorial organization and its inequities, leaving this task to congressional negotiations at the time of the adoption of the implementing legislation, such as the COOTAD bill.³⁹

Prepared by Graciela Rodríguez-Ferrand
Senior Foreign Law Specialist
June 2010

³⁴ *El Código Territorial Volvió a la Comisión*, EL COMERCIO.COM, Mar. 16, 2010, <http://www.elcomercio.com/Generales/Solo-Texto.aspx?gn3articleID=231057>.

³⁵ Asamblea Nacional República del Ecuador, *Comisión solicitó el apoyo de Expertos de la Politécnica Nacional y la ESPE para replantear la fórmula del COOTAD*, May 27, 2010, <http://nuevoweb.asamblea.nacional.gov.ec/201005273292/noticias/boletines/comision-solicito-el-apoyo-de-expertos-de-la-politecnica-nacional-y-la-espe-para-replantear-la-formula-del-cootad.html>.

³⁶ *Id.*

³⁷ CRE art. 238.

³⁸ *EL COOTAD*, EL COMERCIO.COM, May 19, 2010, <http://www.elcomercio.com/Generales/Solo-Texto.aspx?gn3articleID=242296>.

³⁹ S. Ortiz, *La Nueva Constitución y los Nudos Problemáticos de la Organización Territorial* (Institut de recherche et débat sur la gouvernance, Aug. 2008), <http://www.institut-gouvernance.org/fr/analyse/fiche-analyse-462.html>.