

Law and New Information Technology

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At the start of the new millennium, many believe that technology is humanity's major concern. Yet, this question is not a recent one. As far back as Ancient Greece, Anaxagoras divided the world into spirit, proper to man, and matter "so that man could dominate it". Moreover, Genesis, the Bible's first book, also presents us a vision of humanity that is entrusted by God with the task of subduing the Earth. More or less consciously, successive generations have discovered the keys to this dominion, both from the theoretical perspective of science and from the standpoint of its practical (technical) applications. Finally, the study of the latter –technology- has been placed on the most immediate foreground of actuality. For today, technology is actual in a twofold sense. Firstly, it constitutes a key constituting moment of this millenary period; secondly, it points toward the possibilities of development of the rich powers that lie latent in the world, when these are increasingly comprehended by that ensemble of reason and understanding called the human mind.

Raising again the technical plane to the level of theory, technology is becoming omnipresent in today's scientific environment. This is the case not only because we talk or hear about it, but because we conduct our lives using it daily in our private or public activities, with a higher or lower level of expertise. On top of this, technology plays a major role in facilitating the lofty endeavors of science. Indeed, we can affirm that we are living in a crucial time of history. The youngest among us will have the chance to ascertain how this statement, far from prophetic, is based on hard facts that have stopped surprising us because of their daily occurrence.

It cannot be doubted that we begin this new century amidst the splendor of a technological era. Not less true is the fact that a significant portion of this technology is dedicated to the study –*studium*, enjoyable contemplation- of the new media. Whence the legitimization of the other element that presides over these words: information. By this term, we understand the formalization of reality –both external and internal to human beings- that transforms it into a message that can be communicated through old and new media, new discoveries or by a symbiosis of those existent, that we more usually call multi-media.

The clarity with which we recognize these facts, without the need of further inquiry, could lead us to excessively optimistic views. Optimism is, in general, good. However, as human beings who are problematic by nature, we cannot but pose the question of technology as a worrisome one. Will the new technical innovations result advantageous to humankind? Will they produce progress in human life –the life of each human being as human being- or will the geometric sum total of advantages and disadvantages give us a regressive result?

Possible answers to such a grave issue are many and can be more or less satisfactory. Yet, they must be in accordance with the question that was posed, especially when it was us who formulated it in the first place. One of these answers is that technology will be progressive inasmuch as it will contribute to safeguard human rights. Of course, when talking about rights, we cannot forget about duties, for the two are related speculatively, theoretically and practically. A right, as an attribution of

power, is always awarded to a subject. This implies that at least one other subject has the duty of satisfying it.

This is not the time or place to discuss the totality of human rights. Firstly, because it is a topic that is very much alive, and little can be said or argued that hasn't been said or argued before. Secondly, because not even the widest catalogue could cover the reality of human rights comprehensively, since they arise as human life becomes more complex existentially. Oftentimes, it is the effects of technical innovations and their application that press upon us such an ever changing reality. More plausible is the existence of wide listings of human rights that appear, for instance, in some recent national Constitutions. After an enumeration, they use a style clause to establish the *numerus apertus* of rights recognized now, as well as those recognizable in the future. For we must bear in mind that so-called human rights, as innate, arise prior to positive laws; hence they are not "granted" by the latter, but only "recognized". Human rights are superior to positive legislation, and, whether they are recognized expressly or not, they cannot be hindered by it. As our Constitution affirms, legislation must respect the essential content of human rights, which implies setting them as the necessary and immediate key to the text's interpretation, over other rights that may "limit" their applicability. In this sense, informative rights are specially vulnerable, since they can be seen to interfere, at times, with public authority.

Despite being natural and innate, the relatively open-ended character of human rights' recognition is due to their lacking a comparable degree of evidence and clarity. Indeed, generations of thinkers have used the deductive method to unveil the existence of new rights necessary to humankind. This is the reason why jurists speak of those rights that are primary, and those that are derived. In strict terms, only the right to life, totally evident, is a primary right. Other rights are derived from this one, in addition to the consideration that we are dealing not with any sort of life, but with human life. These rights begin with those that affect not only the fact of human existence, but the very essence of what it means to be human: freedom, dignity, privacy and intellectual rights. Among the latter we find the right to communicate and live in a community, which the Greeks called one same thing, *koinonia*, and which Scholastic authors, from a juridical standpoint, merged into a single right: *ius societatis et communicationis*. This right, in turn, presupposes the most essentially communitarian right, namely, the right to a peaceful existence.

Counting centuries of development, the right to communicate, or its Modern formula, the right to information, is, therefore, a derived right. If we consider human beings not just as individuals, but in their natural and vital social dimension, then this right's degree of evidence or proximity to the primary right, life, becomes high. Yet, independent of this dimension, we can say, with a declaration of what was then the European Community, in 1982, that, even if the right to information is not the most important one, it is nevertheless the most urgent. For it is the right that can do more by way of assuring the degree of applicability of other rights. In this respect, it is clear that this degree of efficiency of a right, that is, the current level of information or misinformation in a given community, is related to the existing media –which, in turn, are created by the technical innovations that the science of technology bring about. Without the slightest claim of being exhaustive, we can now round off our discussion with a few ideas on the relationship between technology and human rights, and, more specifically, between technical knowledge and the right to information.

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One can react to the advent of technical knowledge in different ways: from considering it as a heavenly gift, to something devilish, including the innumerable stances between the two extremes. Albeit, this multiplicity of responses only evidences the lack of a general understanding of what this knowledge really is, or a failure to distinguish its nature from its possible effects. Technical knowledge qua technical knowledge is nothing from a normative standpoint; hence, it deserves no moral or juridical status. It is precisely this neutral character that has made it relatively easy for both those that favor it and those against it to put forward and reason their arguments.

However, a technological valuation demands that we consider technical knowledge in terms of two parameters: order and finality. As to the former, Paul Valéry said that “mankind’s most beautiful effort is directed at transforming disorder into order and possibility into power; therein the real wonder”. About the end of technical knowledge, Plato saw that what was good “for something” was also good “in itself”. Greek *telos*, or finality, assures that the *ethos*, or value, of an action, is realized. Let us see why.

It was Kant who drew the distinction between *technica naturalis* and *technica intentionalis*. The first signifies nature itself, that offers solutions prior to any human manipulation. The second refers to the conscious obtaining of solutions that start from what nature offers. The merit of such a conception lies, rather than on the distinction itself, on having placed natural technical knowledge as the model of intentional technical knowledge, or technical knowledge, proper. For the model is, ultimately, nothing but an orderly Creation, which is harmonious in the same way as an artistic creation could be.

In this respect, it is worth recalling that, six-hundred years before our Era, the Greeks had already discovered that the Universe is something orderly and harmonious. This discovery must have effected a profound impression upon them, for they named the Universe *Cosmos*, which also means order. This finding presupposed that human understanding was able to grasp this order because there exists a convergence between order and spirit. Conversely, they saw that disorder (which they called *Caos*), was impossible to comprehend. Even if nature offers itself to human and irrational beings in a similar way, only humans discover its intrinsic order, by means of their reason and intelligence. And, should things be in an accidental state of disorder, they see the order these things should be arranged in.

In either case, human consciousness is able to profit from order, or correct disorder, because order has to do, essentially, with an arrangement of things such that their end can be obtained. This can be done by using their own inner disposition as well as by combining them towards the attainment of new ends, always in keeping with their nature. These new ends provide human beings with enough power to bring about new achievements that bring them even more power. An example this –one very close to us, that we have come to consider as elementary or normal- is the discovery of natural energetic elements called radio-electric waves, that we can order to produce a kind of energy that allows the functioning of all sorts of machines and artifacts. In turn, we find among these some that become vehicles or media for messages. Of course, the functioning modes of these products of genius, owing so much to technical knowledge, offer unimaginable future possibilities to be explored.

In the previous example, human beings render the natural order adequate to a human end that is not only good, but constructive: it contributes to the development of human personality, by adding something new to its ever unfinished perfection. Only in this light can we understand Von Mayer’s conclusion that “technical knowledge is personality”.

Although those applying such knowledge must always act within nature's framework, they nevertheless dominate it and rearrange in order to obtain the (natural) ends they set themselves. Their starting point is causal knowledge of reality that they obtain from direct observation and science. After, they proceed by using teleological orientation as their guide. And it is precisely when nature is granted an end that man, the technical expert, participates in the never ending creation of the world. For Creation came as an order that included human beings in their vocation of ordering (or re-ordering) reality.

In any case, this "paradise" vision of technical knowledge and its application can be easily shattered, as in fact happens more or less frequently. For, by virtue of their free will, humans can ignore their call to order, engaging in disorder. Disorder is a disposal of things without relation to their end, or one that forgets or manipulates it. Such kind of embezzlement, in contrast to the congruence of the natural order of things, is what allows a valuation of technical knowledge measured not from its own standpoint, but from that of its contribution to humankind's authentic being.

If technical knowledge proper is an ordering factor of the world, much the same can be said about law, and, in consequence, ethics. For either objective (not merely positive) law rises to generate such order, or it does not deserve its name. After all, order is not about fusing different elements within a legalist framework. Such fusion – *con-fusion*– would produce one of the species of chaos. For unity, rather than a synonym for uniformity, presupposes and favors diversity. On a social plane, this unity arises as the principle of democracy.

Technical knowledge does not fulfill its function if it remains a mere means lost in the stormy sea of history; rather, its development must respond to an attraction toward an end. We cannot believe that a power that is transforming the world be a blind one, lacking any visible destiny. If technical knowledge orders nature, it must do so *with some end*, just as law when it attempts to order the social all in which this knowledge is included. In this way, both technical knowledge and law agree in their teleological destiny. Moreover, just as objective law is just insofar as it achieves subjective rights (among which the right to information), technical knowledge will fulfill its goal only by facilitating man's efforts at such endeavors as research and spreading and receiving information –in other words, realizing each and every one of its informative faculties.

Approaching the subject in this way, it should become clear that law cannot be an obstacle for the on-going development of technical knowledge. For, rather than containing its growth, it channels it. And any channel, by its very nature, performs a three-fold function: it directs a flow towards its outlet, it avoids any overflow (a form of disorder), and, most significantly, it accelerates the current, thus eventually augmenting its capacity.

This is the triple role law must play when regulating technical knowledge and its application. It does not oppose it, for, in so doing, it would oppose a very plausible end. Containing the technical reality, it would be law no more, but corruption thereof. On the contrary, its ordering prevents the consequences of a bad use of this knowledge. Law directs true technical knowledge –aware of its function- toward its natural end. Finally, it assures the achievement of this end with the least possible effort, just like waters flowing down the steepest slope. Harmony and order are further confirmed when law regulates technical knowledge, which in turn enhances the degree of application of human rights.

Hence, we can affirm that law requires technical knowledge and its application in order to fulfill its goals and assure the application of subjective rights, especially human rights, which are fundamental or natural. In a reciprocal fashion, technology

necessitates of law in order to assure the legality and legitimacy of technical operations, directing them toward their true end. In this respect, law helps to correct forms of disorder such as plagiarism or unfair competition. It can also serve to turn technology into an adequate means for the perfection of humankind, understood as much more than simple material well-being.

Just as any deficiency in technical knowledge may harm the rule of law, irregularities in positive law may preclude human beings from profiting from this knowledge. Law and technical knowledge, together, constitute the reproduced, restored or enlarged image of the universe's harmony –of *cosmos* versus *caos*.

The appearance of technically supported media has subsumed the world of information technology in a critical time –understanding *crisis* not as catastrophe, but in its semantic sense of historical inflexion. Such a crisis, of on-going effects, is not leaving the realm of human or fundamental rights (among them the right to information) unchanged. Some, from a doctrinal point of view, have warned us of what are quasi-apocalyptic dangers. Others have decided to engage, in a more serene way, in the study of the effects of such a moment, both what is possible and what is desirable. They do not neglect the teachings of history, that show us human beings linked to other human beings through some form of communication, multiplying the array of technical means available and, ultimately, able to profit from them as well as solving their potential hazards. The prestigious student of technology Leo Esaki has affirmed, to this respect, that “in general terms, everything depends on the degree of intelligence with which humans profit from machines, use them adequately and avoid being enslaved by their own discoveries. This is something that does not depend on the instruments themselves but, rather, on those who use them.” The latter are, of course, experts of the reality that has been labeled cyberspace, or “a digital microcosm lacking borders, distance or central authority”, as Pérez-Luño understands it. Yet, they are also the totality of human beings potentially subject to information processes, that is, humanity as a whole.

Let us clarify this point by means of an example. Placing ourselves in the time and social context of the invention of printing, in 1450, we realize that it triggered a controversy at least as momentous as the one provoked by the new media. Personally, I am of the opinion that it was superior. Many things sank, normative judgements were not always correct, the institution of censorship was consolidated, and it had serious effects, both material and spiritual. Solving these problems was neither easy nor done rapidly. However, the stray succession of events that followed Gutemberg's invention was tamed only by the sober realism with which they were examined, and that allowed us to formulate solutions for the problems they posed.

Broadly speaking, the present issue can be approached from two perspectives. The first one has it that it is out of reach to direct the effects of the new media to humanity's good and the efficient application of human rights. On the other hand, one can also conceive the potential difficulties that the new media entail as a further incentive to engage not only in the defensive task of protecting the rights, but on the constructive one of augmenting their efficiency. This is because new technology is susceptible of being used in a selfish way –to assure, say, financial or market profit–thereby rendering to one's own benefit what should profit the common good and hence hindering the activity of other subjects of the rights.

In this sense, the Extraordinary European Council that took place in Lisbon a few months ago underlined the fact that, in the U.S., communication is the principal factor in the reduction of unemployment. This is not new: Americans have been saying it for the last fifteen years. In contrast to the reality of the primary and secondary sectors of economic activity, employment prospects in the tertiary sector have been growing

steadily. In this respect, it is noteworthy that the communication sector has enjoyed a specially impressive growth, showing that it is indeed possible to orient technical knowledge and law towards their convergence.

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The problem we encounter is one of choosing the timing and procedure that will guarantee a successful juridical regulation of the phenomena we have been discussing. Of course, we must favor, if *iuris tantum*, the assumption that there exists an individual ethical sense that, when generalized, becomes the *ethos* that values and characterizes a community. We can summarize the responses given to this problem into three main approaches. The first one seeks to foresee phenomena and their consequences, and establish regulative norms prior to their apparition. The second will rather wait for phenomena, and, after they have been studied and understood, define the norms that can render them more favorable to the community. The third approach is based upon an understanding of the juridical ordering that goes beyond the dictates of the positive law, to include every juridical source deemed to be such. These include conventional sources, at the national or supra-national level; sources of authority, of jurisprudence or authorial; repetitive sources, such as customary ones; and, mainly, the general principles of law and justice. All these sources can provide us with enough normative material to solve legal vacuums until they disappear. They can also serve as leaven that will make just positive norms.

A fourth approach would result from the syncretistic application of the former three procedures, according to the political prudence of those ruling each community. For we cannot forget that a political form of craftiness, as a habit much akin to the virtue of prudence, allows us to solve the most unexpected problems that may arise in private as well as public life.

Up until this moment, we have employed a realist perspective to analyze the different elements that come into play in the scenario set by the new media. These elements are not different to the ones involved in the classical media that are edited, aired or screened. What does change is the subjective and objective ways in which they are manifested within information processes.

The increasing universality granted to the subject of the right to information offers no doubts as to the right's permanence and prevalence. More so, doubts that theorists held regarding the practical efficiency of the three faculties that make up the right to information have been dispersed. New ways have been opened related to research and dissemination of information, with no hindrance to the development of the faculties of reception. While the importance of the faculty of information dissemination is so evident that it requires no further commentary, it is worthwhile to note the appearance of rights associated to it, such as the right of *habeas data*, that can be found in some constitutions in either nominative or implicit form.

The principle of media universality is able to cover new media as well as those working on multi-media frames. National and supranational norms are generic enough to comprehend "all media". From this expression, it is possible to understand those past, present, predicted and future, notwithstanding media that consist in a modulation of the former. And it is precisely on the media themselves that we must concentrate our normative attention –in their structure, their ownership, their ordering, their functioning, their relations and the effects they produce. For these are the only elements of the informative process that modify juridical situations and relations, both for good and for ill; hence, it is in this realm that norms must strive to promote the good and

avoid negative consequences. Unlike the universality that can be predicated of the subject, the media's is not only quantitative but qualitative. This laws must seek to regulate the media in such a way that the new relations and effects that are produced show the potential quality in them.

In order to find a reference point from which to orient these subjective elements, we must consider the reality of messages as the other objective element. Messages are not ruled by the principle of universality, but by the principle of generality: not everything that can be communicated *de facto* should be communicated *de iure*. Hence, for this element, juridical (not just legal) norms do not change following the subject's universality and media mobility. A message remains a message regardless of its frame and the way this frame is produced and disseminated. In comparison with other elements integrating the information process, messages have been neglected by positive law; on the other hand, their principles have lent themselves to a doctrinal elaboration. This has had much to do with the fact that we cannot predicate of them the principle of universality, but only that of generality, to which we now turn our attention.

The right to information has a stabilizing function within the juridical system regarding information. This function is foremost actualized through the reality of the message. In a strict juridical sense, only that which is disseminating and capable of being disseminated deserves the name, message. Outside of that we encounter messages and counter-messages that misinform rather than inform. Thus understood, a stabilizing element, far from blocking or slowing down the flux of messages themselves, is responsible for maintaining their regulation regardless of the medium through which they are conveyed or changes affecting it (for example, the use of electronic or cybernetic elements to enhance information dissemination). Of course, new information resources and increasing speed of access to information are factors that strengthen the right to information, as well as the dangers of its violation. As in so many cases, it is the corruption of the best that produces the worst. And this undesirable outcome results from two sources: stripping messages of their essential constitutive, which is the truth; and ignoring that the right to information is actualized at the same pace as the other human rights, and in concordance with them.

The principle of generality, that, as we have seen, informs any legal consideration regarding messages, implies personality. A message's personality is not that of its manifold receiver, nor of a sender that is, at least, binary: it is that of its author. A right of authorship, as a species of the right to information, is nothing but the right to spread the message that corresponds to its creator. And it extends to the moral foundations of the right to information by allowing authors to preclude the dissemination of their own messages on ethical or scientific accounts.

Generality also implies specialty. When we rightly say that the truth is the essential constituent of any message, we are still in want of matching the species of message we encounter with the modality of truth that best expresses them. Basing ourselves on the ontological truth –things are what they are- we can affirm that there are different classes of truth that apply to the exterior world (where communication results in news) and the interior world. Truth regarding the exterior world, that is directed toward knowledge, is the truth of logic or the correspondence of reality with what is being communicated. On the other hand, the truth that affects communication in the interior world and that must be directed toward the will through the understanding, is the operative truth that we call the Good. News and communication of ideas constitute simple messages that informers are in the obligation of representing correctly. In the case of news, this means being objective; as to ideological communication, however, this duty only demands sincerity.

The combination of simple messages results in complex messages, some of which are typified by the law. The most important one is the message of judgment or opinion. Not only it is the most common one, but, appealing to the faculty of reason, it is the most natural to humankind. Its characteristic mode of truth is criteria-oriented, evaluating the congruence between the fact that is subsumed, the idea that values it and the conclusion that is obtained from this valuation. News cannot be arbitrary, for it is tied to an exterior reality. Ideas are free because it is conceivable to hold different views on what is good, that is, always excluding the bad. Yet, where freedom is broadened the most is in opinions: even allowing for the necessary congruence, we can derive different conclusions from a single given fact and valuing idea. In this compelling justification of the human right to participation lies another key to the importance of democracy.

It should also be clear that the principle of generality also implies the principle of exception. There can be no opposition between human rights, for this would condemn humankind to a state of perpetual inner contradiction. On the contrary, every human right can be fulfilled at the same time. Of course, subjective rights are flexible enough that they may contract before other subjective rights under specific circumstances, to regain their proper dimension as soon as these circumstances cease to exist. Every human right, as well as their sum, works toward the fulfillment of human beings. In saying that the right to information works in this direction, we are implying the same about other rights. Occasionally, it may seem that information is being limited by life, freedom, dignity, privacy, peace and so on. However, such cases only help to guarantee the existence of the same information in its fullest sense. In other words, they help to assure the right to information.

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In conclusion, we can affirm that the fears that arise before the new technological media often result from a superficial consideration of the phenomena that so suddenly appear in the information world. In contrast, we can obtain a better picture of what is happening through an in-depth study of these issues –one that raises them to a theoretical, even speculative, plane. In Konrad Weich’s words, “praxis is only fruitful inasmuch as it yields to theory.” And, from a theoretical plane, the praxis of an ever-changing technical skill can only appear as progress for humankind. In both science and its technical application, one must have an innovative spirit. This is the case of the classics –those who have and maintain class. Only in this spirit should we face the problematic of the advent of new media, now and in the future.

Applying these considerations to the meaning of this article’s title leads us to a last statement. Information technology, if and when correctly utilized, favors human rights, including the right to information. This implies, as a complementary evidence, that legislation can only show interest toward the development of new information technology; it must foster technical innovation in the media, as well as their creation and perfecting. For all these reasons, let us welcome the technology of the new millennium that will allow us to widen the scope of human rights, serving the fulfillment of human beings and the pacification of the universal community.