Principios para garantizar la diversidad y el pluralismo en la radiodifusión y los servicios de comunicación audiovisual

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Principles for guaranteeing diversity and pluralism in broadcasting and audiovisual communication services[1]

1. Every person has the right to investigate, seek, receive and disseminate information, opinions and ideas, without prior censorship, through radio, TV and other audiovisual communications services, besides any other procedure of their choice, in the framework of respect to the rule of law and human rights. This right includes the creation of mass media services.

This principle collects the most advanced international standards regarding the subjects of freedom of expression and right to information expounded in international conventions and covenants of human rights, rulings, advisory opinions, declarations of principles and recommendations from diverse systems.

The Universal Declaration of Human Rights, adopted by the United Nations, has cemented the grounds of what for us is the right to information in its 19th article, with the following text adopted and proclaimed by the General Assembly in its 217 A (III) resolution, dating to December 10 of 1948:

> Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Two principles are clearly supported: the media, and the individuals; and a principle of generality. The first ones correspond to the media and individuals reached; the second one to the message or content of the act of expression.

[1] Audiovisual communications services: a service whose editorial responsibility belongs to a media service provider with the main goal of providing programs with the objective of informing, entertaining or educating the general public, through electronic communications networks, TV or radio broadcasting, by means of a stable and permanent supply of content, on the basis of a programming schedule..
Broadcasting: An audiovisual communication service provided by a communications service provider for simultaneous viewing or audio reception of programs based on a programming schedule. Includes radio and broadcast television, by definition of the UIT (International Telecommunication Union)

The texts exposed below are the Declarations and Treaties on Human Rights explicitly referring to freedom of expression and the right to information:

American Declaration of the Rights and Duties of Men, Approved on the Ninth International Conference of American States (Bogotá, Colombia, 1948):

> Article IV. Every person has the right to freedom of investigation, of opinion, and of the expression and dissemination of ideas, by any medium whatsoever.

American Convention on Human Rights, undersigned in San José of Costa Rica in November 22 of 1969, in the Specialized Inter-American Conference on Human Rights:

> Article 13. Freedom of Thought and Expression
>
> 1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.
>
> 2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:
>
> a. respect for the rights or reputations of others; or
>
> b. the protection of national security, public order, or public health or morals.
>
> 3. 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.
>
> 4. Notwithstanding the provisions of paragraph 2 above, public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence.
>
> 5. Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law.
>
> Article 14. Right of Reply:
>
> 1. Anyone injured by inaccurate or offensive statements or ideas disseminated to the public in general by a legally regulated medium of communication has the right to reply or to make a correction using the same communications outlet, under such conditions as the law may establish.

2. The correction or reply shall not in any case remit other legal liabilities that may have been incurred.

3. For the effective protection of honor and reputation, every publisher, and every newspaper, motion picture, radio, and television company, shall have a person responsible who is not protected by immunities or special privileges.

African Charter on Human and People's Rights, adopted in June 27th of 1981

Article 9

Every individual shall have the right to receive information.

Every individual shall have the right to express and disseminate his opinions within the law.

International Covenant on Civil and Political Rights. Adopted and open for signature, ratification and adherence by the General Assembly in its 2200 a (XXI) resolution, in December 16th of 1966:

Article 19

1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

a) For respect of the rights or reputations of others;

b) For the protection of national security or of public order (order public), or of public health or morals.

Article 20

1. Any propaganda for war shall be prohibited by law.

2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

Convention on the Rights of the Child. Adopted and open for signature and ratification by the General Assembly in its 44/25 resolution, November 20th 1989:

Article 13

1. The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice.

2. The exercise of this right may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

a) For respect of the rights or reputations of others; or

b) For the protection of national security or of public order (ordre public), or of public health or morals.

Article 17

States Parties recognize the important function performed by the mass media and shall ensure that the child has access to information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health. To this end, States Parties shall:

a) Encourage the mass media to disseminate information and material of social and cultural benefit to the child and in accordance with the spirit of article 29;

b) Encourage international co-operation in the production, exchange and dissemination of such information and material from a diversity of cultural, national and international sources;

c) Encourage the production and dissemination of children's books;

d) Encourage the mass media to have particular regard to the linguistic needs of the child who belongs to a minority group or who is indigenous;

e) Encourage the development of appropriate guidelines for the protection of the child from information and material injurious to his or her well-being, bearing in mind the provisions of articles 13 and 18.

<u>European Convention on Human Rights, adopted at Rome in 1950:</u>

Article 10. Freedom of Expression.

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or

> morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

From this enumeration it seems clear to us that an acknowledgment arises recognizing freedom of expression as a right to, not only those who control the media, but above all, to those wishing for their voices to be heard.

Only like this can this double way right may be embodied, as by the Advisory Opinion 5/85 of the Inter-American Court on Human Rights:

> (…) requires for the media to be virtually open to everyone without discrimination, or more accurately, that there are not any individuals or groups that a priori are excluded from accessing such media, however, it demands certain aspects about them, in practice, making them true vehicles of that freedom, and not vehicles to restrict it. It's the social communication media the ones that materialize the exercise or freedom of expression; as such, their operations must atone to the requirements of said freedom. For that to happen is paramount the plurality of the media, and the prohibition of a monopoly on them, in any shape it may take (....) (Whereas 34).

In the subject of content, and seeing as the American Convention on Human rights has been designed to be more generous and broader in the subject of defending the freedom of expression, the IDH Court (Inter-American Court of human Rights) also upholds in its Advisory Opinion 5/85 the following:

> (…) The two dimensions of freedom of expression become clear. This freedom requires, on one hand, that nobody is arbitrarily diminished or prevented in manifesting their own thoughts, and represents, as such, and individual right; on the other hand it implies a collective right of receiving any information, and to know the expression of thought of others. (Whereas 30).

The Whereas 31 and 32 broaden this definition:

> 31. In its legal dimension, freedom of expression doesn't end up in its theoretical recognition of the right to talk or write, it also encompasses, inextricably, the right to use any mean appropriate to spread thoughts that reach the greatest number of recipients. When the Convention proclaims that freedom of expression comprises the right to spread information and ideas "by any… procedures" is stating that the expression and circulation of thought and information are inseparable; as such, a restriction in the disclosure possibilities directly represents, and in the same measure, a limit to the right to express freely. There stems the importance of the applicable legal regime to the press, and of those professionally involved in it.
>
> 32. In its social dimension, freedom of expression is a mean for Exchange of ideas and information, and for the mass communication among individuals. As well as comprising the individual right of trying to communicate to the others their points of view, it also implies everyone's right to receive opinions and news. For the average citizen, the knowledge of others opinion or of their information holds as much importance as the right to spread their own".

In the same sense, the recommendations of the Inter-American Commission on Human Rights arising from the Declaration of Principles of Freedom of Expression dating to October of 2000, whose first and second section point out:

> Principle 1. Freedom of expression in all its forms and manifestations is a fundamental and inalienable right of all individuals. Additionally, it is an indispensable requirement for the very existence of a democratic.
>
> Principle 2. Every person has the right to seek, receive and impart information and opinions freely under terms set forth in Article 13 of the American Convention on Human Rights. All people should be afforded equal opportunities to receive, seek and impart information by any means of communication without any discrimination for reasons of race, color, sex, language, religion, political or other opinions, national or social origin, economic status, birth or any other social condition.

2. Radio broadcasting and other audiovisual communication services must be understood as a means for exercising the right to freedom of speech. This includes any information and ideas, including cultural manifestations, regardless of boundaries, expressed orally, in printed media, or in an artistic form.

Radio broadcasting was usually considered to be a pursuit of lesser recognition compared to the press at the time of assessing its institutional role, even against other ways of non media vocal expression, such as those protecting the freedom of expression of people lecturing in town squares or in the streets. More so, only with declarations close to our time frame, such as the American Convention, the Convention on the Protection and Promotion of the Diversity of Cultural Expressions by UNESCO, or the Convention on the Rights of the Child, the electronic media is starting to receive a more updated and already consolidated appreciation by the international doctrine.

As already shown, the 13.1 article of the American Convention recognizes any media chosen by the individual:

> 1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.

As for the 13.3 article, it takes broadcasting as a mean of expression comparable in its need for protection as the press, by means of obligations to the State of preventing and punishing every indirect restriction mechanism:

> 3. 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 13th Article of the Convention of the Right of the Child also contemplates beyond oral or written expression, as to effectively exercise the right to freedom of expression:

> 1. The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice.

Likewise, when defining the extent of the exercise of freedom of expression through social communication media, including radio broadcasting, the Convention of the UNESCO on the Convention on the Protection and Promotion of the Diversity of Cultural Expressions, states that "…cultural activities, goods and services have both an economic and a cultural nature, because they convey identities, values and meanings, and must therefore not be treated as solely having commercial value".[2]

[2] UNESCO, "Convention on the Protection and Promotion of the Diversity of Cultural Expressions", Paris, October 20th, 2005. available at <http://portal.unesco.org/en/ev.php-URL_ID=31038&URL_DO=DO_TOPIC&URL_SECTION=201.html>

On its part, the OAS Special Rapporteur for Freedom of Expression, stated in its 2002 reports that they “Are aware of the fact that broadcasting remains the most important source of information for most people in the world”.

Specifically, is severely limiting to hold freedom of the press as the sole paradigm to contemplate. Francisco J. Batisda prefers the freedom of the airwaves, understanding it as “before all, a freedom right, as the freedom of the press, and as well as this one, its demand should be immediate; merely demanding an attitude of no interference by the public powers”. Even though a previous objective planning is necessary before its exercise is possible “this is not because of the nature of the media itself, but because of the previous spectrum reservation made by the State (…) if this reserve directly affects an activity within the exercise of a right, the State must return the media to the individuals, organized in such a way as to be utilized as an instrument to freely inform and receive information”.[3]

[3] Bastida, Francisco, *La libertad de antenna (Freedom of the airwaves)*, Ariel (Editorial). Spain, 1990

3. Promotion of diversity and pluralism must be the main objectives when regulating radio broadcasting and other audiovisual communication services. This implies gender equality as well as equal opportunities for all members of the community to have access to, and participate in, the ownership and management of radio broadcasting and audiovisual communication services, without any restrictions being imposed, directly or indirectly, on the right to freedom of speech.

This principle can be related with several sources. From a doctrinaire standpoint, the position of the professor Owen Fiss is worthy of recognition, when stating:

> I believe, however, that this controversial view on freedom of expression –as a mere repetition of the past- is wrong.
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> I believe, however, that such a perspective on today's free speech controversies -seeing them as nothing more than a repetition of the past- is mistaken. Something much deeper and much more significant is occurring. We are being invited, indeed required, to re-examine the nature of the modern state and to see whether it has any role in preserving our most basic freedoms. The debates of the past were premised on the view that the state was the natural enemy of freedom. It was the state that was trying to silence the individual speaker, and it was the state that had to be curbed. There is much wisdom to this view, but it represents only a half truth. Surely, the state may be an oppressor, but it may also be a source of freedom.(...) This view -disquieting to some- rests on a number of premises. One is the impact that private aggregations of power have upon our freedom; sometimes he state is needed simply to counteract these forces. Even more fundamentally, this view is predicated on a theory of the First Amendment and its guarantee of free speech that emphasizes social, rather that individualistic, values. The freedom the state may be called to foster is a public freedom.(...) In some instances, instrumentalities of the state will try to stifle free and open debate, and the First Amendment is the tried-and-true mechanism that stops or prevents such abuses of state power. In other instances, however, the state may have to act to further the robustness of public debate in circumstances where powers outside the state are stifling speech.(...) It may even have to silence the voices of some in order to hear the voices of the others. Sometimes there is simply no other way.[4]

Taking into account the need to preserve plurality and diversity, the Inter-American Court has stated in its Advisory Opinion 5/85, besides the already shown, that:

> 33. The two dimensions mentioned (supra 30) of the right to freedom of expression must be guaranteed simultaneously. One cannot legitimately rely on the right of a society to be honestly informed in order to put in place a regime of prior censorship for the alleged purpose of eliminating information deemed to be untrue in the eyes of the censor. It is equally true that the right to impart information and ideas cannot be invoked to justify the establishment of private or public monopolies of the communications media designed to mold public opinion by giving expression to only one point of view. (…)

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[4] Fiss, Owen. *The irony of free speech*, Harvard University Press, 1996.

> 56. Furthermore, given the broad scope of the language of the Convention, freedom of expression can also be affected without the direct intervention of the State. This might be the case, for example, when due to the existence of monopolies or oligopolies in the ownership of communications media, there are established in practice "means tending to impede the communication and circulation of ideas and opinions."

In the same context, it may be added the recent lawsuit resolution by the IACHR of March 3rd 2009, "Ríos vs. Venezuela", from which an excerpt of its 106 paragraph is below:

> Given the importance of freedom of expression in a democratic society and the responsibility it implies for social communication media firms and for those who professionally exercise these tasks, the State must minimize the restrictions to information and balance, as much as possible, the participation of the different movements present in the public debate, promoting informative pluralism. The protection of the human rights of whoever faces the power of the media, who must exercise the social task it develops with responsibility, and the effort to ensure structural conditions that allow an equal expression of ideas can be explained in these terms.

Thus, we can be certain that the highest interpreter of the IACHR recognizes the paramount importance of pluralism and diversity.

The same position arises from the acknowledgement of the importance of pluralism and diversity by the Special Rapporteurs on Freedom of Expression, who in their 2001 Joint Declaration recommended:

> Promoting diversity should be a primary goal of broadcast regulation; diversity implies gender equity within broadcasting, as well as equal opportunity for all sections of society to access the airwaves.[5]

Going deeper into the topic, in 2007, in their Joint Declaration on Diversity in Broadcasting, named "International Mechanisms for Promoting Freedom of Expression"[6] the Rapporteurs underscored, among other things:

> (…)the fundamental importance of diversity in the media to the free flow of information and ideas in society, in terms both of giving voice to and satisfying the information needs and other interests of all, as protected by international guarantees of the right to freedom of expression;

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[5] Special Rapporteur on Freedom of Opinion and Expression (UN), OSCE Representative on Freedom of the Media (OSCE, The Organization for Security and Co-operation in Europe) and the OAS Special Rapporteur on Freedom of Expression, *International Mechanisms for Promoting Freedom of Expression – Joint Declaration Challenges to Freedom of Expression in the New Century*, November 19 and 20, 2001. Available at <http://www.cidh.org/Relatoria/showarticle.asp?artID=48&lID=1>

[6] In Amsterdam, December 7-8, 2007, a joint session with the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the ACHPR (African Commission on Human and Peoples' Rights) Special Rapporteur on Freedom of Expression and Access to Information took place, under the auspices of ARTICLE 19, Global Campaign for Free Expression, assisted by the Institute for Information Law (IViR), University of Amsterdam. The aforementioned Joint Declaration stems from the session. Available at <http://www.osce.org/documents/rfm/2007/12/28855_en.pdf>

(…)the complex nature of diversity, which includes diversity of outlet (types of media) and source (ownership of the media), as well as diversity of content (media output);

(…)the varied contributions that different types of broadcasters – commercial, public service and community – as well as broadcasters of different reach – local, national, regional and international – make to diversity;

(…)that undue concentration of media ownership, direct or indirect, as well as government control over the media, pose a threat to diversity of the media, as well as other risks, such as concentrating political power in the hands of owners or governing elites.

Regarding the specific measures intended to guarantee the diversity of media types, the Declaration of the Rapporteurs is homonymic:

Sufficient 'space' should be allocated to broadcasting uses on different communications platforms to ensure that, as a whole, the public is able to receive a range of diverse broadcasting services. In terms of terrestrial dissemination, whether analogue or digital, this implies an appropriate allocation of frequencies for broadcasting uses.

The least intrusive effective system for the administration of broadcasting to promote diversity should become used, taking into account reductions in the problem of scarcity.[7]

In the same line of thought, the African Commission on Human and People's Rights, in its Declaration of Principles on Freedom of Expression in Africa of October 2002 states:

III – Diversity

Freedom of expression imposes an obligation on the authorities to take positive measures to promote diversity, which include among other things-:

availability and promotion of a range of information and ideas to the public;

pluralistic access to the media and other means of communication, including by vulnerable or marginalized groups, such as women, children and refugees, as well as linguistic and cultural groups;

the promotion and protection of African voices, including through media in local languages; and

the promotion of the use of local languages in public affairs, including in the courts."

In the point V. 1 stating: States shall encourage a diverse, independent private broadcasting sector. A State monopoly over broadcasting is not compatible with the right to freedom of expression.

[7] Ibid.

4. Effective measures are necessary to promote the diversity of contents and points of view, access to radio broadcasting, and the recognition of several legal forms of ownership, purpose and operation, including measures to prevent concentration of media ownership.

The proposed references for this principle, once the significance of defending pluralism and diversity has been established, gather diverse measures, all suggested by international standards and the comparative law.

The need of increasing the access to the media stems from both the jurisprudence of the Inter-American Court, as well as from the IACHR Declaration of Principles on Freedom of Expression. The same is applied to the Principles promoted by Article 19 so-called "Camden Principles", as well as the Declarations and Resolutions of the Council of Europe on Diversity and Pluralism in the media, since 1992, with the Green Paper.

Just as well, the Declaration of the World Summit on the Information Society (WSIS) –Geneva, 2003- established a Plan of Action which foresees, among other things, the following:

> Chapter 8. Cultural diversity and identity, linguistic diversity and local content.
> 23. Cultural and linguistic diversity, while stimulating respect for cultural identity, traditions and religions, is essential to the development of an Information Society based on the dialogue among cultures and regional and international cooperation. It is an important factor for sustainable development.
> a) Create policies that support the respect, preservation, promotion and enhancement of cultural and linguistic diversity and cultural heritage within the Information Society, as reflected in relevant agreed United Nations documents, including UNESCO's Universal Declaration on Cultural Diversity. This includes encouraging governments to design cultural policies to promote the production of cultural, educational and scientific content and the development of local cultural industries suited to the linguistic and cultural context of the users (…)
> d) Develop and implement policies that preserve, affirm, respect and promote diversity of cultural expression and indigenous knowledge and traditions through the creation of varied information content and the use of different methods, including the digitization of the educational, scientific and cultural heritage.[8]

Also, the Special Rapporteurs, in their 2007 Joint Declaration, stated:

> Different types of broadcasters – commercial, public service and community – should be able to operate on, and have equitable access to, all available distribution platforms.[9]

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[8] World Summit on the Information Society (WSISI), Plan of Action – First Phase of the World Summit on the Information Society, Geneva December 10 through 12, 2003. Available at <www.itu.int/wsis/outcome/booklet.pdf>

[9] UN Special Rapporteur on Freedom of Opinion and Expression, OSCE Representative on Freedom of the Media, ACHPR (African Commission on Human and Peoples' Rights) Special Rapporteur on Freedom of Expression and Access to Information, and the OAS Special Rapporteur on Freedom of Expression, Joint Declaration, December of 2007, Op. cit..

Regarding the diversity of source, they added:

In recognition to the importance of media diversity for democracy, special measures, including anti-trust rules, should be put in place to prevent undue concentration of media or cross-media ownership, both horizontal and vertical. Such measures should involve stringent requirements to guarantee transparency of media ownership at all levels. They should also involve active monitoring, taking ownership concentration into account in the licensing process, where applicable, prior reporting of major proposed combinations, and powers to prevent such combinations from taking place.[10] Support should be given, based on equitable, objective criteria applied in a non-discriminatory fashion, to those wishing to establish new media outlets.

In the same way, the Declaration of Principles on Freedom of Expression adopted by the African Commission on Human and Peoples' Rights in 2002 calls for the continent States to: “there shall be equitable allocation of frequencies between private broadcasting uses, both commercial and community” and proclaims that “community broadcasting shall be promoted given its potential to broaden access by poor and rural communities to the airwaves”[11].

The proposal of this principle is also important because of the recognition of the different actors who participate in audiovisual communication activities through the electronic media. Not only regarding the quality of the commercial activity, ordinarily undertaken in the media as a predominant model, authorizing access to licenses through the appropriate channels, but also the preservation of the public media, that unlike the European or African situation, where no monopolistic development occurred, and, above all, to the possibility of civil society organizations to be beneficiaries of electronic media without impediments. It also implies the obligation by the States of not enforcing discriminatory organizational or operational mechanisms. When articles of Declarations and Conventions on Human Rights demand the right to freedom of speech and of access to information through any media, they don’t allow any conditioning in their performance capacities, or prioritize some type of organization over others when determining which can become a broadcaster. They state quite the opposite.

Endorsing the need to stop an oligopoly concentration, and especially a monopoly of the media, is gathered in the teachings of the Green Papers regarding pluralism and concentration of the media, made public by the European Commission in 1992, from which this definition is taken:

> Control of a collection of media by a single person, even if the objective is only commercial, has the potential effect of making the spreading of ideas dependent on acceptance by a single person and of restricting alternative means. Whatever the editorial content or the number of information carriers, concentration of control of media access in the hands of a few is by definition a threat to the diversity of information. Conversely, multiplying the number of alternative controllers increases the probability of diversity of information, even if this is not automatic. Economically speaking, effective competition among controllers may lead to qualitative differentiation

[10] Ibid.

[11] African Commission on Human and Peoples' Rights, “Declaration of Principles on Freedom of Expression”, 2002. Available at <www.achpr.org/english/declarations/declaration_freedom_exp_en.html>

between the products offered by each of them and, hence, favour editorial diversity.[12]

But the concentration is not only avoided in the European case (as well as in the American case, where market concentration ceilings are established by percentage of potential audience or by quantity of broadcasters in the same coverage area, or limiting the cross-ownership with press media in the same coverage area, for example) when referring to oligopolies or monopolies, but also when abuses of a dominant position takes place; all of them hypothesis that are captured in the adoption of guidelines admitting under certain conditions, or right out rejecting, applications in processes of buying or merging; in many cases, by rules of competition law, besides the ones from broadcasting.

[12] European Commission, *Green Paper:* "Pluralism and media concentration in the internal market, an assessment of the need for Community action", Brussels, December 23rd, 1992, COM (92) 480.

5. Regulatory frameworks must recognize three different sectors or types of radio broadcasting and audiovisual communication services: public, commercial, and social/non-profit, the latter of which includes community media. All these services should be able to operate in, and have fair access to, all available broadcasting platforms. Specific measures to promote diversity may include the assignment of specific frequencies to different types of media, must-carry rules (regarding the broadcasting obligation), and the requirement that both distribution and reception technologies be complementary and/or interoperable.

The formulation of this principle answers to a series of historical reasons, related to arising structural needs in the legislative shifts that occur as a consequence of the technological advancements, typical of the audiovisual communication activity, and aiming for them to be respectfully prospective of the human rights principles, from which States not only hold obligations of abstaining in order to respect them, but also obligation of lending them, as already shown.

In the previous point the considerations gathered in the 2007 Joint Declaration of the Rapporteurs were mentioned, regarding the need of an equitable administration of the radio-electric spectrum. The very same that requires the creation of high quality regulatory instruments, in order to allow "Different types of broadcasters – commercial, public service and community – should be able to operate on, and have equitable access to, all available distribution platforms. Specific measures to promote diversity may include reservation of adequate frequencies for different types of broadcasters, and must-carry rules"[13].

When an analysis of the current regulations in the different countries of the region[14] was conducted, it was detected than in most of the Latin American States the regulations regarding broadcasting established negative discrimination mechanisms against the stations owned by non-profit organizations, such as considering them low-powered, destined to utilize peripheral frequencies, to be community oriented, to be merely rural, or without right to access funding to undertake their activities, or limited in the amount they can invest. Impediments are also set preventing them from working as networks, as well as less legal protection (or none) in the case of them being interfered. The proposed principle, as such, aims to equalize the universal individuals and their right to freedom of expression, which human rights conventions guarantee, and national regulations many times deny.

Within the framework of what's being discussed, aid to community broadcasting is also sponsored and considered of great importance, and has been incorporated in the defense of human rights associated with broadcasting, by the Inter-American System as well as by the European one.

Explicit evidence comes from the "Yatama vs. Nicaragua" [15] case, ruled upon by the Inter-American Court on Human Rights. The Supreme Regional Court establishes the conditions of complying with the judgment:

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[13] UN Special Rapporteur on Freedom of Opinion and Expression, OSCE Representative on Freedom of the Media, ACHPR (African Commission on Human and Peoples' Rights) Special Rapporteur on Freedom of Expression and Access to Information, and the OAS Special Rapporteur on Freedom of Expression, Joint Declaration, December of 2007, Op. cit..

[14] See AMARC-ALC, "Mejores prácticas sobre marcos regulatorios en radiodifusión comunitaria" (Better practices of regulatory frameworks in community broadcasting), 2008; and AMARC-ALC, *The invisible gags: New and old barriers to diversity in broadcasting*, Buenos Aires, October 2009. Available at <legislaciones.amarc.org/mordazas/libro_lasmordazasinvisibles.pdf>

[15] Inter-American Court of Human Rights, Yatama vs. Nicaragua Case, Judgment of June 23, 2005 (Preliminary Objections, Merits, Reparations and Costs). Available at <http://www.corteidh.or.cr/docs/casos/articulos/seriec_127_ing.pdf>

253. The Court takes into account that “the communities use community radio as a means of information”; it therefore considers it necessary for the State to publicize, on a radio station with broad coverage on the Atlantic Coast, paragraphs 124(11), 124(20), 124(28), 124(31), 124(32), 124(39), 124(40), 124(46), 124(51), 124(62), 124(68), 124(70) and 124(71) of Chapter VII (Proven Facts); paragraphs 153, 154, 157 to 160, 162, 164, 173, 175, 176, 212, 218, 219, 221, 223, 224, 226 and 227 which correspond to Chapters IX and X on the violations declared by the Court, and the operative paragraphs of this judgment. This should be done in Spanish, Miskito, Sumo, Rama and English. The radio broadcast should be made on at least four occasions with an interval of two weeks between each broadcast. To this end, the State has one year from the notification of this judgment.

The Reports of the Rapporteurs on Freedom of Expression have also been characterized for acknowledging the fundamental role carried out by the community broadcasting stations, and for denouncing the effects of current discriminatory regulations in many countries of the region. Regarding this, the 2002 Report pointed out:

39. Radio stations that style themselves as community, educational, participatory, rural, insurgent, interactive, alternative, and citizen-led are, in many instances and when they act within the law, the ones that fill the gaps left by the mass media; they serve as outlets for expression that generally offer the poor better opportunities for access and participation than they would find in the traditional media. (…)
41. The Office of the Special Rapporteur understands that community radio stations, which must act within a legal framework set by an facilitated by the state, frequently respond to the needs, interests, problems, and hopes of the often, discriminated, and impoverished sectors of civil society. The growing need for expression felt by majorities and minorities that lack media access, and their claims on the right to communication, to the free expression of ideas, and to the dissemination of information makes it necessary to seek access to goods and services that will ensure basic conditions of dignity, security, subsistence, and development..
42. In many instances, acting in accordance with the law, these stations can facilitate the free flow of information, fueling freedom of expression and dialogue within communities and thus encouraging participation. “Equitable, respectful, and imaginative access to the media, as a contemporary synthesis of the public sphere, is a fundamental way of breaking down the ‘individualized’ and insular reading of poverty, provided that we supersede the view that holds that more media coverage, more news items or programs about poverty and poor, and more chronicles (from outside) truly represent the empowerment of marginalized sectors and are preferred over democratic communications"[16].[17]

[16] Reguillo Cruz, Rossana, interview with the journalist Maria Seoane, October of 2001.
[17] Office of the Special Rapporteur for Freedom of Expression, Inter–American Commission on Human Rights (CIDH), Annual report of 2002, Chapter IV, “Freedom of Expression and Poverty”. Available at <http://www.cidh.org/relatoria/showarticle.asp?artID=138&lID=1>

In the same way, the Rapporteurs have noted its importance in their already quoted Joint Declaration of 2007:

> Different types of broadcasters – commercial, public service and community – should be able to operate on, and have equitable access to, all available distribution platforms. Specific measures to promote diversity may include reservation of adequate frequencies for different types of broadcasters (...).Consideration of the impact on access to the media, and on different types of broadcasters, should be taken into account in planning for a transition from analogue to digital broadcasting (...).Community broadcasting should be explicitly recognized in law as a distinct form of broadcasting, should benefit from fair and simple licensing procedures, should not have to meet stringent technological or other license criteria, should benefit from concessionary license fees and should have access to advertising.[18]

On its part, the UNESCO proclaimed in 2008 the Maputo Declaration, created to promote freedom of expression, access to information and the empowerment of the people. It says:

> Emphasizing the particular contribution that all three tiers of broadcasters – public service, commercial and community – make to media diversity and, in particular, the role of community broadcasters in fostering underrepresented or marginalized populations' access to information, voice and participation in decision-making processes (…). Call on the Member States: To create an environment which promotes the development of all three tiers of broadcasting and, in particular, to improve conditions for the development of community media and for the participation of women within the community media framework.[19]

From a similar perspective, in September 25th 2008, the European Parliament passed judgment on a resolution on community media (sometimes also called THIRD MEDIA SECTOR) in Europe, according to the 15th point, the Commission: "Advises Member States, without causing detriment to traditional media, to give legal recognition to community media as a distinct group alongside commercial and public media where such recognition is still lacking".[20]

Lastly, in February 11th, 2009, the Committee of Ministers of the Council of Europe approved a proclamation over community media named "Declaration of the Committee of Ministers on the role of community media in promoting social cohesion and intercultural dialogue". In this document, the Council: "Recognises community media as a distinct media sector, alongside public service and private commercial media and, in this connection, highlights the necessity to examine the question of how to adapt legal frameworks which would enable the recognition and the development of community media and the proper performance of their social functions. (…) Draws attention to the desirability

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[18] UN Special Rapporteur on Freedom of Opinion and Expression, OSCE Representative on Freedom of the Media, ACHPR (African Commission on Human and Peoples' Rights) Special Rapporteur on Freedom of Expression and Access to Information, and the OAS Special Rapporteur on Freedom of Expression, Joint Declaration, December of 2007, Op. cit..

[19] UNESCO, "Maputo Declaration: Fostering Freedom of Expression, Access to Information and Empowerment of People", May 3rd, 2008. Available at <http://portal.unesco.org/ci/en/ev.php-URL_ID=26735&URL_DO=DO_TOPIC&URL_SECTION=201.html>

[20] European Parliament, resolution of 25 September 2008 (2008/2011(INI)). Available at <www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2008-0456+0+DOC+XML+V0//EN>

of allocating to community media, to the extent possible, a sufficient number of frequencies, both in analogue and digital environments, and ensuring that community broadcasting media are not disadvantaged after the transition to the digital environment"[21].

[21] Committee of Ministers of the Council of Europe, "Declaration of the Committee of Ministers on the role of community media in promoting social cohesion and intercultural dialogue", Febraury 11th 2009. Available at <http://www.cmfe.eu/docs/_Declaration_Community_media_adopted_CM-11-02-09E1.pdf>

6. Pursuant to international conventions, and in accordance with existing standards, States are empowered and obliged to establish public policies that, in an overall manner and as a condition for the granting of concessions, establish the requirement to comply with minimum quotas to ensure the distribution of locally and nationally produced sound and audiovisual broadcasts, as well as the diversity of contents and plurality among the different types of media.

The proposition of this principle lies within the framework of the public policies regarding audiovisual communication adopted by countries and regional blocs within the orbit of international treaties, regional regulation and standardized national regulations.

The first topic to highlight is supported by existent laws and instruments, such as the Convention on the Rights of the Child, which imposes on the States the obligation of encouraging the media into producing content attending to the needs of the different cultures and peoples, especially minorities and indigenous societies.

They can also be found within a Convention by UNESCO promoting Cultural Diversity, where the faculties of the States are kept when regulating the defense of their products, and educational and cultural services. In this sense, the role of the States should aim to promote a well balanced and non-discriminatory exchange of the goods related with information, communication and culture. As so, public policies in the topic of broadcasting shouldn't be guided by economic profit logic as a fundamental criterion, but as stated by the Convention, where the States are expected to take "measures aimed at enhancing diversity of the media, including through public service broadcasting". [22]

For that, respect towards cultural identity is fundamental, as well as for linguistic diversity, religions, and the traditions of the different social sectors, and in particular those of the minorities. Regarding this, the Convention states:

> Cultural diversity is made manifest not only through the varied ways in which the cultural heritage of humanity is expressed, augmented and transmitted through the variety of cultural expressions, but also through diverse modes of artistic creation, production, dissemination, distribution and enjoyment, whatever the means and technologies used.[23]

In the same train of thought, the Inter-American Court on Human Rights has acknowledged that the right to freedom of expression is a two way right, everyone should be able to express their ideas and opinions, and society as a whole should be able to receive them. This off course entails the need of enough media outlets to make it sustainable.

The 2007 Directive of the European Parliament on audiovisual communications services, in its fifth Whereas is quite explicit about it:

> In its resolution of 27 April 2006, the European Parliament supported the Unesco Convention on the Protection and Promotion of the Diversity of Cultural Expressions, which states in particular that 'cultural activities, goods and services have both an economic and a cultural nature, because they convey identities, values and meanings, and must therefore not be treated

[22] UNESCO, Convention on the Protection and Promotion of the Diversity of Cultural Expressions, Paris, October 20th, 2005. Available at <http://unesdoc.unesco.org/images/0014/001429/142919e.pdf>.
[23] Ibid.

> as solely having commercial value'. The Council Decision 2006/515/EC of 18 May 2006 on the conclusion of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions approved the Unesco Convention on behalf of the Community. The Convention entered into force on 18 March 2007. This Directive respects the principles of that Convention.[24]

For that, in its regulatory area it holds the criterion of broadcasting European content accounting to a 50%, without taking into consideration news programmes or sport events. At the same time, naming the conditions demanded to be considered as such:

> - works originating in Member States,
>
> - works originating in European third States party to the European Convention on Transfrontier Television of the Council of Europe,
>
> - works co-produced within the framework of agreements related to the audiovisual sector concluded between the Community and third countries and fulfilling the conditions defined in each of those agreements,
>
> - application of the provisions of the second and third indents shall be conditional on works originating in Member States not being the subject of discriminatory measures in the third country concerned. [25]

It is necessary to recall that all Directives of the Parliament must be correlated to national legislations.

In Canada, the Canadian Broadcasting Act establishes content stipulations. The cornerstone of the Canadian broadcasting system is the Canadian content. Considering what is established in the third section of the Broadcasting Act, broadcasting should aim at the development of public knowledge of the Canadian talent, maximizing the use of Canadian creativity, and using the capacities of the independent production sector. Meanwhile, the 10th section demanded from the Canadian Radio-television and Telecommunications Commission (CRTC) the definition of a "Canadian Programme" and the amount of time the services should devote to this programming. The CRTC utilizes a grade system for determining the nationality of the contents on TV and MW radio (including music), which accounts for the amount of Canadians involved in the production of a song, album, film, or show. Besides that, it also established a quota system to regulate the amount of national content to be broadcasted through the media, considering the American domination in the area.

On the other hand, the 7th section of the TV Broadcasting Regulations requires from public license holdesr (CBC – Quebec TV, etc.) to employ no less than 60% of the prime time schedule to the broadcasting of Canadian programmes, and no less than 50% to private license holders. Since 1998, the Commission raised the number of Canadian content in radio broadcasting (MW as well as FM) to 35%. It also defined minimum Canadian content in stations broadcasting "specialty channels".

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[24] European Parliament and Council, Directive 2007/65/EC, December 11, 2007. Available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:332:0027:0045:EN:PDF>

[25] Ibid.

Within the definitions of the Canadian policies established in the Broadcasting Act, is the creation of a broadcasting system which, through its programming and job opportunities, should reflect the circumstances and aspirations of its citizens, including the equal recognition before the law, the dual linguistic, and the multicultural and multiracial expressions of the Canadian Society. Among other things, the CRTC has established the "Ethnic Broadcasting Policy", which aims at protecting and promoting the diverse ethnical and cultural Canadian groups, as well as providing equal access to the broadcasting system by minorities.

Countries also possessing quota systems are, among others, USA, Brazil, Argentina, Chile and Colombia.

It's important to note that the positive rules of content can be of great value in educational and cultural topics, in covering institutional subjects in a plural fashion, in the provision of information for the child, in the promotion of the minorities, and in stimulating the local production, especially in local development and public welfare, with the consideration that regulations and regulating agencies should not become content editors.

Within this area it is pertinent to quote the work "Broadcasting, Voice, and Accountability", who says about it:

> Different types of broadcasters may be subject to different positive content obligations. They should be proportionate to the broadcaster's coverage, the scarcity of the transmission resources available, and their ability to meet the obligations without danger to their viability, For example, a local broadcaster could not be expected to invest in costly program production, such as drama, but might be required to carry a certain proportion of locally produced content or local news. For commercial or community broadcasters content obligations will normally be set out in the license terms and conditions.[26]

To the already exposed, a number of examples are added regarding regulations of political pluralism, especially in election times.

7. In order to guarantee the protection of the audience's rights, States are empowered and also obliged to limit the number of advertising spots in an overall manner and with no discrimination based on the media owner's legal nature.

This principle gathers the general view that regional and national regulations have over the amount of advertisement time in the contents of broadcasting media.

Regarding this, the European Parliament says in its Directive of Television Broadcasting of 2007:

> The principle of separation should be limited to television advertising and teleshopping, product placement should be allowed under certain circumstances, unless a Member State decides otherwise, and some quantitative restrictions should be abolished. However, where product

[26] Buckley, Steve; Duer, Kreszentia; Mendel, Toby and O'Siochru, Sean. *Broadcasting, Voice, and Accountability: A Public Interest Approach to Policy, Law, and Regulation*, University of Michigan Press/World Bank, USA, 2008.

> placement is surreptitious, it should be prohibited. The principle of separation should not prevent the use of new advertising techniques. (...) While this Directive should not increase the hourly amount of admissible advertising, it should give flexibility to broadcasters with regard to its insertion where this does not unduly impair the integrity of programmes. This Directive is intended to safeguard the specific character of European television, where advertising is preferably inserted between programmes, and therefore limits possible interruptions to cinematographic works and films made for television as well as interruptions to some categories of programmes that still need specific protection. (...) The limit of 20 % of television advertising spots and teleshopping spots per clock hour remains applicable. The notion of a television advertising spot should be understood as television advertising in the sense of Article 1(i) of Directive 89/552/EEC as amended by this Directive having a duration of not more than 12 minutes.[27]

Also, there are limitations in the amount of advertisements spots in the regulations of Argentina, Brazil, Chile, Colombia, Canada, among others. In none of the cases more than 25% of the programming schedule is allowed for them.

Where there is no consensus, and also where the importance of this principle lies, is regarding the discriminatory laws found in different countries, excluding or limiting without basis the access of non-profit stations to proper funding. In this subject, the OAS Special Rapporteur, alone, but also in conjunction with the OSCE Rapporteur and the African Commission have spoken on the topic, in their 2007 Joint Declaration:

> Another factor that continues to have a negative impact on the freedom of expression in several countries is the lack of appropriate legislation about community radio broadcasting, in which it is recognized as a distinct form of broadcasting. This problem arises due to the failure of the state to design public policies adapted to the special characteristics of these media, taking into account at least the following, noted in the Joint Declaration on Diversity in Broadcasting: the existence of simple procedures for obtaining licenses; no demand of severe technological requirements that would prevent them, in practice, from even being able to file a request for space with the state; and the possibility of using advertising to finance their operations.[28]

In comparative terms, there are better regulatory and political practices acknowledging the declarations of the Rapporteurs. Some are described in the following examples.

In Bolivia, on one side, the community broadcasting services can temporarily adhere to the system established in the Article 41 of the Telecommunications Act, strictly in relation to exemption of paying taxes and rights for the usage of a frequency, leaving them exempt of paying regulating fees, assignment right, and right to the use of frequencies.

Licenses holders for community broadcasting will be responsible for the economic sustainability of the services; their funding may come from self-generated resources, such

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[27] European Parliament and Council, Op. cit.

[28] UN Special Rapporteur on Freedom of Opinion and Expression, OSCE Representative on Freedom of the Media, ACHPR (African Commission on Human and Peoples' Rights) Special Rapporteur on Freedom of Expression and Access to Information, and the OAS Special Rapporteur on Freedom of Expression, Joint Declaration, December of 2007, Op. cit..

as advertisements and others, as well as donations, projects and contributions of the community, as long as the nature or source of said funding doesn't violate the community nature of the service. Honoring the non-profit nature of their activities, Community Broadcasting services must reinvest their income in the station itself, and on its social development projects.

In Canada, community stations are allowed to sell advertisement spots and to increase its funding through any way. Canada is one of the only developed nations that has not established national wide mechanism to support regional community broadcasting, which has been left aside from public funding.

Advertisement policies in radio broadcasting were defined by the 1993-38 public notice of the CRTC, by which community radio broadcasters are allowed a maximum of 504 minutes a week devoted to advertisement.

Colombian regulations allow for community radio broadcasting services to advertise, with the exemption of politics, and to acquire show sponsors, as long as they are not individuals or entities whose activities or products are prohibited by law to advertise.

Advertisements are not exceed more than 15 minutes per broadcasting hour. Stations considered as commercial broadcasters are the ones airing public interest shows combined with commercial paid advertisements.

In France, the limit imposed to "A"category radio stations (community or associations) is a quantitative limit. To remain in this category, and still perceive State aid through the Support Fund for Radio Broadcasting (FSER), the funding coming from broadcasted advertisement of a commercial or sponsoring nature is to be under 20% of its income (Article 80 of the 86 – 1067 law). Besides that, the law states that "the remuneration received by radio broadcasting services, in the diffusion of messages meant to support collective or general interest actions, is not taken into account when determining the maximum limit" (of 20%).

Only societies, foundations and non-profit organizations are eligible by the FSER to be accepted within the "A" Category.

In the Irish legislation, community radio stations are limited to obtain only up to 50% of their income through advertisement. There's also a six minute per hour limit for advertisement. Meanwhile, commercial broadcasters have an 80% limit on the amount of funding they can obtain through advertisement.

In the Netherlands, community radio stations are authorized and allowed to seek for several ways of funding. This includes advertisement, memberships, donations and sponsorships. Funding percieved through the broadcasting of advertisements is limited to a 15% of their income, and a maximum of 12 minutes per hour is allowed.

Peruvian law allows for all types of license holders to broadcast advertisement without restriction. According to their geographical location they can be recipients of tax exemptions.

In Venezuela, community radio broadcasters are allowed to advertise, though less than commercial stations, and the President is entitled to exempt all or part of the taxes established by the telecommunications act according to the area of service, as well as the nature of the station. There are some mechanisms established by the government to promote the development of the community media, among them, a monetary fund to

strengthen the training and the physical infrastructure of the community media, and a mechanism to provide telecommunication equipment to community stations through a commodatum of up to 20 years.

In Uruguay, as well as in Argentina, recently approved laws don’t establish any distinction regarding the possibility of collecting funds through advertisement.

8. Any form of pressure, preferential treatment, or punishment affecting broadcasters, companies, or institutions as a consequence of their opinions or their information or editorial profile should be prevented and punished by law, within the framework of a democratic State and respect for human rights.

This postulate gathers the principles acknowledged to freedom of expression from the article 19 of the Universal Declaration of Human Rights of 1948 and beyond, all the way to the Declaration of Principles of the Inter-American Commission on Human Rights (October, 2000), from which this proposition stems.

As well as the promotion of recommendations from the European Court, such as in the "Özgür Gündem vs. Turkey" [29]case, in which the importance of recognizing the environment in which the media (be it commercial, non-profit, or public) lies is taken into account, in principle, protecting them and journalists from all hostile environments, and from actions by the State or individuals.

This proposition implies the use of legal instruments such as legal actions, the abuse of the civil jurisdiction, direct censorship or indirect restriction, police intervention, abuse of official governmental advertisements, the manipulation of processes for the selection of applicants, imposing impossible standards for obtaining licenses or prohibitive taxes, the arbitrary administration of frequencies or of paper quotas, the establishment of discriminatory policies in the area of access to the media or of worker empowerment, as well as denying independent legal resources to address this matters.

Many declarations by the bodies of the Inter-American System have drawn attention to this situation, and have noted the need to sanction regulations meant to protect the media against possible tax punishments by State agencies because of their editorial environment. As an example, the Annual Report of the Special Rapporteur for Freedom of Expression states:

"...it is necessary for States to pass laws that prevent any of their agents from being able to make arbitrary use of oversight or regulatory control in the future to silence dissident speech."[30]

But it is also of interest for this proposal to call attention upon failures by public and private figures to the conditions of the democratic life, based on the Human Rights principles and on the State based on the rule of law, exceeding just a crisis of adverse political opinions, and fighting over the jurisdiction of the Inter-American Democratic Charter.

It is there where a harsh ethical test takes place, one devoted to establish whether the human rights system institutionally protects those who put it at risk or ignore it, affecting the rights and freedoms of others, and the right to freedom of expression as a whole, generally represented by smaller media outlets. Of course, the call to respect institutional laws, the State under the rule of law, and the Human Rights, entails explicit and implicitly to call for the protection of the right of defense and due process with all the corresponding guarantees.

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[29] European Court of Human Rights, Case Özgür Gündem vs. Turkey, application no. 23144/93 of 16 March 2000.

[30] Inter-American Commission on Human Rights (IACHR), Annual Report 2008, Volume III: Annual Report of the Office of the Special Rapporteur for Freedom of Expression. Chapter IV, "A Hemispheric Agenda For The Defense Of Freedom Of Expression". Available at <http://www.cidh.oas.org/annualrep/2008eng/Annual%20Report%202008-%20RELE%20-%20version%20final.pdf>

9. States should adopt effective policies and measures to prevent the concentration of media ownership. Ownership and control of radio broadcasting and audiovisual communication services should be subject to antitrust regulations, through the enforcement of strict transparency requirements regarding media ownership at all levels, as monopolies and oligopolies undermine democracy by restricting the plurality and diversity that guarantee every individual's right to culture and information.

This principle gathers the position adopted by the IACHR regarding the possible effects of media concentration over pluralism and diversity. Attending to this, the Principle 12 of the Declaration of October of 2000 states:

> Monopolies or oligopolies in the ownership and control of the communication media must be subject to anti-trust laws, as they conspire against democracy by limiting the plurality and diversity which ensure the full exercise of people's right to information. In no case should such laws apply exclusively to the media. The concession of radio and television broadcast frequencies should take into account democratic criteria that provide equal opportunity of access for all individuals.[31]

Applying these principles, in March of 2001, the IACHR elaborated a report on the condition of Human Rights in Paraguay[32], establishing a precedent for the entire region. In one of the three recommendations proposed to the Paraguayan government by the current Executive Secretary of the IACHR is stated:

> the need to apply democratic criteria to the distribution of licenses to radio and television stations. Those allocations should not be based solely on economic criteria, but also on democratic criteria that guarantee equal opportunity in gaining access to them.[33]

Within the same approach, the OAS Special Rapporteur on Freedom of Expression, together with its UN and OSCE counterparts, in the already quoted Joint Declaration of 2001, says:

> broadcasting remains the most important source of information for most people in the world (...)Promoting diversity should be a primary goal of broadcast regulation; diversity implies gender equity within broadcasting, as well as equal opportunity for all sections of society to access the airwaves.[34]

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[31] Inter-American Commission on Human Rights (IACHR), Declaration of Principles on Freedom of Expression, October of 2000. Available at <http://www.cidh.oas.org/Basicos/English/Basic21.Principles%20Freedom%20of%20Expression.htm>

[32] Inter-American Commission on Human Rights (IACHR), Third Report On The Situation Of Human Rights n Paraguay. Chapter VI. Available at <http://www.cidh.oas.org/countryrep/Paraguay01eng/TOC.htm>

[33] Similar recommendations were given to the Guatemalan government in April of the same year. The Report asks to: "Carry out an in-depth investigation of the possible existence of a de facto monopoly in broadcast television and implement mechanisms that will assure greater plurality in the granting of channels. (...)Review the regulations governing the granting of radio and television licenses with the purpose of incorporating democratic criteria guaranteeing equal opportunity". Inter-American Commission on Human Rights (IACHR), Fifth Report on the Situation of Human Rights in Guatemala, Chapter IX. Available at <www.cidh.org/countryrep/Guatemala01sp/cap.9.htm>

[34] UN Special Rapporteur on Freedom of Opinion and Expression, OSCE Representative on Freedom of the Media, ACHPR (African Commission on Human and Peoples' Rights) Special Rapporteur on Freedom of Expression and Access to Information, and the OAS Special Rapporteur on Freedom of Expression – Joint Declaration "Challenges to Freedom of Expression in the New Century", 19, 20 November 2001. Op. cit.

In the year 2004, the Special Rapporteur devoted a specific chapter[35] to the subject in its Annual Report, noting as one of its hypothesis:

> For several years it has been said that the concentration of media ownership is one of the greatest threats to pluralism and to the diversity of information. The freedom of expression is closely related to the problem of concentration of ownership, though this is sometimes hard to perceive because of the subtle nature of the connection, which has to do with what we know as "plurality" or "diversity" of information.

On the same idea, stating:

> Following this trend, in recent years it has been understood that one of the fundamental requirements of the freedom of expression is the need for a broad plurality of information and opinions available to the public. And this is why monopolistic or oligopolistic control of the media may have a serious detrimental impact on the requirement of plurality in information. When the sources of information are seriously reduced in number, as in the case of oligopolies, or when there is a single source, as in the case of monopolies, the possibility that the information being disseminated will have the benefits of being compared with information from other sectors is limited, imposing a de facto limitation on the right of all society to information. The existence of monopolies or oligopolies, public or private, thus constitutes a serious obstacle to the dissemination of one's own thinking, and to receiving different opinions.[36]

Jointly with the Rapporteurs on Freedom of Expression of the other systems, the Special Rapporteur has pronounced itself in various occasions regarding the need to protect pluralism, dispersal and diversity. The 2001 Joint Declaration "Challenges to Freedom of Expression in the New Century" asserts, among other things:

> Promoting diversity should be a primary goal of broadcast regulation; diversity implies gender equity within broadcasting, as well as equal opportunity for all sections of society to access the airwaves; (…) Effective measures should be adopted to prevent undue concentration of media ownership.

In the same way, in 2005, the Joint Declaration made by the ACHPR Special Rapporteur for Freedom of Expression and the IACHR-OAS Special Rapporteur on Freedom of Expression stated:

> Freedom of expression requires that many different points of view can be heard. State control of media, as well as laws and practices that permit monopolies in ownership of media companies, limit plurality and prevent the public from hearing certain points of view.[37]

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[35] Office of the Special Rapporteur for Freedom of Expression, Inter-American Commission on Human Rights (IACHR), Annual Report of 2004, Chapter V, "Indirect Violations on the Freedom of Expression". Available at: <http://www.cidh.org/relatoria/showarticle.asp?artID=439&lID=1>

[36] Ibid.

[37] The UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, Joint Declaration on the Internet and on Anti-Terrorists Measures, December 21, 2005. Available at <http://www.cidh.org/relatoria/showarticle.asp?artID=394&lID=1>

The need to take anti-trust policies was manifested again in 2007, in the Declaration by the Rapporteurs on Freedom of Expression:

> Such measures should involve stringent requirements of transparency of media ownership at all levels. They should also involve active monitoring, taking ownership concentration into account in the licensing process, where applicable, prior reporting of major proposed combinations, and powers to prevent such combinations from taking place.[38]

In the same way, the Whereas 56 of the Advisory Opinion 5/85 of the Inter-American Court points out:

> Furthermore, given the broad scope of the language of the Convention, freedom of expression can also be affected without the direct intervention of the State. This might be the case, for example, when due to the existence of monopolies or oligopolies in the ownership of communications media, there are established in practice "means tending to impede the communication and circulation of ideas and opinions".[39]

To disclose a recent judgment, the IACHR shows in the Whereas 106 of the ruling in the case "Case of Ríos et al. v. Venezuela" the key role of the State in guaranteeing plurality of voice and of informative equity:

> Given the importance of freedom of expression in a democratic society and the responsibility it implies for social communication media firms and for those who professionally exercise these tasks, the State must minimize the restrictions to information and balance, as much as possible, the participation of the different movements present in the public debate, promoting informative pluralism. The protection of the human rights of whoever faces the power of the media, who must exercise the social task it develops with responsibility, and the effort to ensure structural conditions that allow an equal expression of ideas can be explained in these terms.[40]

European Parliament resolution on the risks of violation in the EU, and especially in Italy, of freedom of expression and information (Article 11(2) of the Charter of Fundamental Rights) (2003/2237(INI)) contributes with some additional definitions, among others:

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[38] The UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the ACHPR (African Commission on Human and Peoples' Rights) Special Rapporteur on Freedom of Expression and Access to Information, Jont Declaration, December 2007, Op. cit..

[39] IACHR, Advisory Opinion 5/85, "Compulsory Membership In an Association Prescribed By Law For The Practice Of Journalism (Arts. 13 and 29 American Convention On Human Rights)", November 13, 1985. Available at <http://www.corteidh.or.cr/docs/opiniones/seriea_05_ing.pdf>

[40] Inter-American Court of Human Rights, Case of Ríos et al. v. Venezuela, Judgment of January 28, 2009 (Preliminary Objections, Merits, Reparations, and Costs). Available at <http://www.corteidh.or.cr/docs/casos/articulos/seriec_194_ing.pdf>,

(…)Stresses that the concept of the media is undergoing a redefinition through convergence, interoperability, and globalisation; technological convergence and the increase in supply though internet, digital, satellite, cable and other means should not however result in 'convergence' of content; consumer choice and pluralism of content is the key issue, more so than pluralism of ownership or supply(...)Welcomes the establishment in some Member States of a media ownership authority with the duty to monitor the ownership of the media and the power to undertake own-initiative investigations; stresses that such authorities should also monitor compliance with the law, equal access to the media for the various social, cultural and political players and the objectivity and accuracy of the information supplied(...) Notes that diversity of media ownership and competition between operators is not sufficient to ensure pluralism of media content and that the increased use of press agencies results in the same headlines and content (…)[41]

From this diagnosis, the European Parliament proposes the adoption of a number of measures:

(…) Calls, therefore, on the Commission also to examine the following issues for inclusion in an action plan on measures to promote pluralism in all EU sectors of activity:

a) the revision of the television-without-frontiers directive to clarify the obligation of the Member States to promote political and cultural pluralism within or between editorial offices, taking into account the need for a consistent approach across all communications services and media forms (…)

c) the promotion of political and cultural pluralism in journalism courses so that the views held within society are adequately reflected within or between editorial offices (…)

e) for the establishment of a European 'Working Party' composed of independent national media regulators (see, for example, the Article 29 data-protection group) (…)

g) a requirement that information on media ownership collected in the national markets be sent for comparison to a European-wide body, such as the European Audiovisual Observatory,

h) an examination into whether divergent national regulatory models create obstacles in the internal market and whether there is a need for the harmonisation of the national rules restricting the horizontal, vertical and cross ownership of the media to ensure a level playing field and, in particular to ensure an adequate supervision of cross-border ownership,

[41] European Parliament resolution on the risks of violation, in the EU and especially in Italy, of freedom of expression and information (Article 11(2) of the Charter of Fundamental Rights) (2003/2237(INI)). Published in the Official Journal, April 4th, 2004. Available at : <http://eur-lex.europa.eu/en/dossier/dossier_24.htm>

i) an examination of the need to introduce in the EU Merger Regulation a 'pluralism' test and lower thresholds in relation to media mergers, or whether such provisions should be included in the national rules (…)[42]

[42] Ibid.

10. States should establish regulations to avoid the concentration of media ownership, considering both the number of audiovisual communication services that may be accumulated by direct ownership, control, or other forms of participation, as well as the level of influence on the markets that are affected or influenced.

The proposal of this principle should be articulated along the one from the 9th principle; this is why instances as the ones to be described and stemming from the comparative law are recognized.

In England there is a national and regional (16 regions) license regime. The sum of licenses can not be superior to the 15% of the audience. In the same way, papers with over 20% of the market can't be license holders, also, radio and TV national licenses can't be held together at the same time.

In France, radio broadcasting is limited to audiences covered by the same contents. More over, TV concentration allows one national service and one of a local nature (for up to 6 million inhabitants), also, the papers with over 20% of the market are also excluded.

In Italy, TV regulations allow for up to one license per coverage area, and three in total. For radios, the case is one license per coverage area, and seven in total, also, local and national licenses can not be held at the same time.

In USA, and by regulations of the Competition Law, in each area, papers and broadcasting TV can't be overlapped. Likewise, radio broadcasting licenses can't exceed 15% of the local market, potential national audience can't exceed 35% of the market, and radio and TV broadcasting licenses can not be held simultaneously.

In the year 2000, the Report of the Rapporteur, in its 25th point stated:

> "(…) the Office of the Special Rapporteur expresses its concern over the danger that the concentration of media ownership may pose to the formation of public opinion.[4344]

[44] Available at <http://www.cidh.org/relatoria/showarticle.asp?artID=439&lID=1>

[44] Available at <http://www.cidh.org/relatoria/showarticle.asp?artID=439&lID=1>

11. Radio-electric frequencies should be legally declared Common Heritage of Mankind, and the power to manage such frequencies should be considered essential amongst a State's powers and obligations.

Is especially important to highlight which is the nature of the object that broadcasting activity desires, and on the ease to access it, it should be considered as an indicator of the respect towards human rights. They are the frequencies.

International regulation on the area stems from Conferences or the International Telecommunications Union, and specifically, the Recommendation 2 of the Resolution 69 ITU (Incorporated to the Geneva Agreements of December 1992 and Kyoto in 1994) stating:

> The Plenipotentiary Conference of the International Telecommunication Union (Kyoto, 1994),in view of the Universal Declaration of Human Rights, adopted by the United Nations General Assembly on 10 December 1948; conscious of the noble principles that news should be freely transmitted and that the right to communicate is a basic human right, conscious also of the importance of the fact that these noble principles will promote the dissemination of news, thus strengthening peace, cooperation, mutual understanding between peoples and the spiritual enrichment of the human personality, as well as dissemination of culture and education among all people irrespective of their race, sex, language or religion recommends that Members of the Union facilitate the unrestricted transmission of news by telecommunication services.[45]

The article 1, Whereas 11 of the Constitution of the ITU reaffirms this idea by establishing that:

> the Union shall in particular effect allocation of bands of the radio-frequency spectrum, the allotment of radio frequencies and the registration of radio-frequency assignments and, for space services, of any associated orbital position in the geostationary-satellite orbit or of any associated characteristics of satellites in other orbits, in order to avoid harmful interference between radio stations of different countries.[46]

Regarding the role of the States, the article 44 of the same document states:

> Member States shall endeavour to limit the number of frequencies and the spectrum used to the minimum essential to provide in a satisfactory manner the necessary services. To that end, they shall endeavour to apply the latest technical advances as soon as possible. (…)
>
> In using frequency bands for radio services, Member States shall bear in mind that radio frequencies and any associated orbits, including the geostationary-satellite orbit, are limited natural resources and that they must

[45] International Telecommunication Union (ITU), Resolution 69, incorporated to the Geneva Agreements of December 1992 at Kyoto during 1994, Recommendation 2.

[46] International Telecommunication Union (ITU), Constitution approved for December 22, 1992 at Geneva. Available at <www.itu.int/net/about/basic-texts/index.aspx>

> be used rationally, efficiently and economically, in conformity with the provisions of the Radio Regulations, so that countries or groups of countries may have equitable access to those orbits and frequencies, taking into account the special needs of the developing countries and the geographical situation of particular countries.[47]

However, according to the recommendations of the ITU included in the Blue Book of Telecommunication Policies for the Americas:

> (…) When spectrum shortage is not a concern and when unlimited entry is possible and a fully competitive market is to be encouraged, individual licenses will not be required and only a simple registration or general authorization will be sufficient.[48]

To our criteria, is impossible for States to own frequencies; the administration of said frequencies is subject from a technical standpoint to the regulations of the ITU, from a legal and political standpoint to the Covenants and Declaration on Human Rights and its true interpretations by institutional bodies of the Protection Systems established. An example of this is the continental coordination for multinational frequencies. From our standpoint, the American Convention, the Declaration of Principles on Freedom of Expression of the IACHR and the rulings and advisory opinions of the Inter-American Court lend a regulatory framework endorsing this position.

From a doctrinaire standpoint we share this position:

> The debate over the legal nature of the geostationary orbit and the frequencies spectrum nears its end. It is currently properly regulated by the Outer Space Treaty and the International Telecommunications Covenant... From the long deliberations of the last years, the legal content of the article 33 of the International Telecommunications Covenant especially calls for attention, with the agreements of Nairobi is closely interpreted to the common heritage of mankind principle. This principle, progressively gaining position in the international law, was first enunciated and explained by me, as a doctrine and procedure at the Innsbruck University in 1954. In the specific, I extended it in 1976, at the Hawaii University, to the radio frequencies spectrum[49] (…) as a legal concept it is accepted in the international power law, international environmental law and international right to information. As a principle, it has been adopted in covenants related to international cultural rights and international law of the sea.[50]

Similar positions on the subject are held from deep studies by proffesors Ryzrad Struzak[51] and Cees Hamelink[52], besides the "Castellón Declaration", which incorporates in

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[47] Ibid.
[48] International Telecommunications Union (ITU), Blue Book, Telecommunications policies for the Americas, Chap. VIII. Edition of the ITU, 1996.
[49] Cocca, Aldo. *The Radio spectrum resource as a common heritage of mankind*. University of Hawaii, 1976.
[50] Cocca, Aldo. "La condición humana en las comunicaciones" (The human condition in telecommunications), In Journal "el Derecho", T. 126, page 785, Buenos Aires, Argentina, 1987.
[51] Struzak, Ryzrad, "Spectrum market or spectrum commons?", presented in the workshop "New Radiocommunication Technologies for ICT in Developing Countries (Africa Region)", Trieste, Italy May 17 through 21, 2004.
[52] Hamelink, Cees J., "The Right To Communicate In Theory And Practice: A Test For The World Summit On The Information Society", paper presented November 17th, 2003, Simon Fraser University, Harbour Centre, Vancouver, B.C., Canadá.

its whereas the quality of the radio-electric frequencies as “common heritage of the mankind”[53]. A similar position is held by Luigi Ferrajoli when referring to the spectrum as “common assets of humankind” and “common heritage of humankind”, in his paper “Democracia, Estado de derecho y crisis del Estado” (Democracy, State of law and the crisis of the State).[54]

Within this analysis framework, the operation of satellite signals of direct reception is an example of the coordination among national States to allocate frequencies to the different services and channels. The same happens with satellite signals carrying content later distributed to the users by local operators.

The same conception is found on bi or multipartite treaties of assignation of frequencies by region. If public domain reigned over the spectrum, things would be the other way around. They would have to give up something not on their territory in order to assign the frequencies to be used in the country.

Lastly the UNESCO resolutions regarding free reception of satellite signals ruled by the General Assembly in which prior authorizations policies were amended by prior notices policies, adopted by its Resolution 37/92, wouldn’t have any basis.

Besides, if treaties allocate rights of administration, allowing States to acquire something lend to them for its coordinated regional administration. Nothing states the States as having the right to administrate the frequency spectrum as if it were their property.

To this regard the Office of the Special Rapporteur of the OAS states:

> (…)there is a technological question that should not be ignored: to ensure optimal use of the radio spectrum by radio and television stations, the International Telecommunication Union (ITU) allocates countries groups of frequencies which they then administer within their territories, thereby, inter alia, preventing interference between different telecommunications services.
>
> (…)With this, the Office of the Special Rapporteur understands that states, in administering the frequencies of the radio spectrum, must assign them in accordance with democratic guidelines that guarantee equal opportunity of access to all individuals. That is precisely the thrust of Principle 12 of the Declaration of Principles on Freedom of Expression.[55]

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[53] The “Declaration on New Prospects for the Common Heritage of Mankind” as the result of the meeting organized by UNESCO y The International Bank Centre For Peace And Development, in the Spanish city of Castellón July 12th through 14th, 1999.
[54] Conference held in the Electoral Tribunal of the Federal Judiciary of the Fderation of the United States of Mexico in the conference “Estado de derecho y función judicial” (State of law and judiciary function), May 22, 2003.
[55] Office of the Special Rapporteur for Freedom of Expression (IACHR), Annual Report 2002, Chapter IV “Freedom of Expression and Poverty”. Available at <http://www.cidh.org/relatoria/showarticle.asp?artID=309&lID=1>

12. Spectrum management plans should include equitable reservations in all radio broadcasting bands as regards to other radio broadcasting sectors or modalities in order to allow the access of community media and other non-commercial media, thus guaranteeing their existence. This principle should be applied to the new spectrum allocations for digital broadcasting stations. The administration criteria – whether through the previous existence of a frequency plan or through other mechanisms for the geographic allocation of frequencies– should ensure that frequencies are allocated according to public interest and that they are equitably shared among all the different types of radio broadcast service providers (public, commercial, and community broadcasters), the two types of broadcasting (radio and television), and broadcasting stations having different geographic reach (national, regional, and local stations).

This proposal is meant to be an interpretative principle of the arising positions of the Whereas 31 and 34 of the Advisory Opinion 5/85 of the IACHR, as well as the concerns of the European Council and of the European Parliament over the need for external pluralism, and also of the recommendations of the Rapporteurs on Freedom of Expression.

A frequencies plan is a chart, or more generally a function, assigning the proper characteristics to each broadcasting station (or station groups). The name “frequency planning” is a trace of the early times of broadcasting, when only the modulation of the frequency and the geographical situation of a broadcasting station could be changed. International planning is general in nature and contains very few details. Contrarily, frequency planning for the design and exploitation include all the necessary details for the operation of a station.

In the frequency planning, beforehand, specific shortwave bands and associated service zones are reserved for particular applications long before they start operating. The distribution of the spectrum is done based on the foreseen or declared needs of the interested parties.

Is in virtue of this provisions that the technical possibility (without negative discrimination and close to mechanisms guaranteeing plural expression of the sectors of broadcasting) of developing new reserve policies of the spectrum fits perfectly. Acknowledging this, the Joint Declaration on Diversity in Broadcasting of 2007 states:

> Different types of broadcasters – commercial, public service and community – should be able to operate on, and have equitable access to, all available distribution platforms. Specific measures to promote diversity may include reservation of adequate frequencies for different types of broadcasters, must-carry rules, a requirement that both distribution and reception technologies are complementary and/or interoperable, including across national frontiers, and non-discriminatory access to support services, such as electronic programme guides. Consideration of the impact on access to the media, and on different types of broadcasters, should be taken into account in planning for a transition from analogue to digital broadcasting. This requires a clear plan for switchover that promotes, rather than limits, public interest broadcasting. Measures should be taken to ensure that digital transition costs do not limit the ability of community broadcasters to operate. Where appropriate, consideration should be given to reserving part of the spectrum for analogue radio broadcasting for the medium-term. At least part

> of the spectrum released through the 'digital dividend' should be reserved for broadcasting uses.[56]

From a similar perspective, the Annual Report of the Inter-American Commission on Human Rights, regarding the situation of the Human Rights in the Americas in 2006, by the Office of the Special Rapporteur on Freedom of Expression, recommended the OAS States to "legislate in the area of community broadcasting" and assign "part of the spectrum to community radio stations", also pointing out:

> to ensure that democratic criteria be taken into account in assigning these frequencies that guarantee equal opportunity for all individuals in accessing them, in keeping with Principle 12 of the Declaration of Principles on Freedom of Expression(…)[57]

On its part, the European Parliament, in September 2008 called for its member States to:

> make television and radio frequency spectrum available, both analogue and digital, bearing in mind that the service provided by community media is not to be assessed in terms of opportunity cost or justification of the cost of spectrum allocation but rather in the social value it represents.[58]

Specific reserves for allocation of frequencies for non-profit license holders are legally recognized in Argentina, Uruguay, Colombia (for radio broadcasting), Italy, USA (In FM for educational stations), France, Mali, and Ireland.

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[56] The UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the ACHPR (African Commission on Human and Peoples' Rights) Special Rapporteur on Freedom of Expression and Access to Information, Joint Declaration, December 2007, Op. cit..

[57] Report of the Office of the Special Rapporteur for Freedom of Expression, Inter-American Comission on Human Rights, Annual Report 2006. Available at <http://www.cidh.oas.org/annualrep/2007eng/Annual_Report_2007.VOL.II%20ENG.pdf>

[58] European Parliament resolution on Community Media in Europe, Approved for in November 25th, 2008. Available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT%20TA%20P6-TA-2008-0456%200%20DOC%20XML%20V0//EN&language=EN>

13. States should adopt measures to prevent, prohibit, and compensate for any kind of discrimination or curtailment based on a station's legal nature that affects broadcasting power or the number of available frequencies, or that imposes content limitations. This implies that there should be no arbitrary and pre-established limits regarding: geographic service areas, coverage, power, or number of stations within a particular town, region, or country, except for reasonable restrictions due to limited frequency availability or the need to prevent the concentration of media ownership.

This proposition is intended to adopt better practices and to prevent direct or indirect restriction mechanisms against non-profit entities, in the case of regulations allowing them to be license-holders. These types of restrictions violate the standards established by the article 13.3 of the American Convention, by the recommendations of the Special Rapporteur, and by the Declarations of the Rapporteurs in the years 2001 and 2007. In the same way, the principle aims at recognizing the importance that the UNESCO, the OAS, the Inter-American Court, The European Parliament and Council have given to community broadcasters.

By just glancing over the regulations present in the continent we find ourselves with direct and indirect mutilations, such as:

- Power outage limitations to almost imperceptible values
- Marginalization to the usage of just one channel in the edge of the spectrum.
- Limitation or impossibility of accessing genuine funding from advertisement or sponsorship.
- Restrictions to the quality of the contents and its themes.
- The consideration of community broadcasters as rural stations, or meant for indigenous or aboriginal communities, or for cultural and racial minorities.
- The difficulty in the creation of networks, even for the broadcasting of significant public interest events.

All this issues are part of the cases recognized by the article 13.3 of the American Convention as measures destined to hamper the free circulation of information and opinions, and it is important for States to remove them, or abstain themselves from applying them in situations not expected to use them as legal instruments or policies.

14. When administrating the radio-electric spectrum, States should maintain a register of concessions that is permanent, transparent, open and public. This register should include information clearly identifying the owner of each concession, and the members of the management bodies thereof, as well as the conditions under which the frequency was assigned.

This principle stems from the application of the Whereas and dispositions of the Audiovisual Media Services Directive and from diverse regulations in the comparative law. The first of the cases is the Whereas 43:

> Because of the specific nature of audiovisual media services, especially the impact of these services on the way people form their opinions, it is essential for users to know exactly who is responsible for the content of these services. It is therefore important for Member States to ensure that users have easy and direct access at any time to information about the media service provider. It is for each Member State to decide the practical details as to how this objective can be achieved without prejudice to any other relevant provisions of Community law.[59]

Similarly, the regulations of the Directive itself, establish:

> Provisions applicable to all audiovisual media services:
> Article 3a
> Member States shall ensure that audiovisual media service providers under their jurisdiction shall make easily, directly and permanently accessible to the recipients of a service at least the following information:
> a) the name of the media service provider;
> b) the geographical address at which the media service provider is established;
> c) the details of the media service provider, including his electronic mail address or website, which allow him to be contacted rapidly in a direct and effective manner;
> d) where applicable, the competent regulatory or supervisory bodies.[60]

The proposed provision also recognizes the relevance of similar principles in the 1996 Telecommunications Act, from USA, and is inspired by the "Public Inspection File" established by the Americans in the section 47 C.F.R. § 73.3527[61] . They must account for:

1) Authorization.
2) Applications and related materials.
3) Contour maps.
4) Ownership reports and related materials.
5) Political file. Such records as are required by § 73.1943 to be kept concerning broadcasts by candidates for public office.
6) Equal Employment Opportunity file.
7) The Public and Broadcasting. At all times, a copy of the most recent version of the manual entitled ''The Public and Broadcasting.''
8) Issues/programs lists.

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[59] Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007. Op. cit.
[60] Ibid.
[61] Code of Federal Regulations pertaining broadcasting and telecommunications.

9) Donor lists.
10) Local public notice announcements.
11) Material relating to FCC investigation or complaint.
12) Must-carry requests.

Taking again a position on the subject, the Rapporteurs on Freedom of Expression, in their 2007 Joint Declaration stated that anti-trust measures:

> should involve stringent requirements of transparency of media ownership at all levels. They should also involve active monitoring, taking ownership concentration into account in the licensing process, where applicable, prior reporting of major proposed combinations, and powers to prevent such combinations from taking place. [62]

[62] The UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the ACHPR (African Commission on Human and Peoples' Rights) Special Rapporteur on Freedom of Expression and Access to Information), Joint Declaration, December 2007, Op. cit.

15. National broadcasting legislation should recognize and acknowledge community media as a different type of media in order to guarantee the right to information, communication and freedom of speech, as well as to ensure the diversity and plurality of the media and to promote this sector. This special recognition needs to be supplemented by public procedures, conditions and policies aimed at ensuring respect for, and the protection and promotion of, community media as a way to guarantee their existence and development.

This proposal is cemented in previous points recognizing the importance of community stations and the pertinence of specific regulatory provisions, for their existence, for guaranteeing pluralism and diversity, as well as for not being discriminated against. The contribution of the "Principles for a democratic legislation on community broadcasting", elaborated by the AMARC and presented before the IACHR in October of 2008.

In this context, it's important to emphasize that the purpose of community broadcasting stations has a strict goal, given their social duty, and that is to serve as an instrument for the exercise of the rights captured in the fundamental articles of the declarations and conventions of Human Rights guaranteeing the three basic pillars: receiving, diffusing and seeking information and opinions through a particular technological tool. The European Parliament discusses, in its 2008 Resolution, certain affairs in the Whereas that appoint the pertinence of this proposal, such as:

> (…) one of the main weaknesses of community media in the European Union is their lack of legal recognition by many national legal systems, and whereas, moreover, none of the relevant Community legal acts have yet addressed the issue of community media,
> (…) the introduction of a code of practice, in addition to legal recognition, would clarify sector status, procedures and role, contributing to sector certainty while also ensuring independence and preventing misconduct.
> (…) community media are an important means of empowering citizens and encouraging them to become actively involved in civic society; whereas they enrich social debate, representing a means of internal pluralism of ideas; and whereas concentration of ownership presents a threat to in-depth media coverage of issues of local interest for all groups within the community,
> (...) that community media are an effective means of strengthening cultural and linguistic diversity, social inclusion and local identity, which explains the diversity of the sector;
> (…,) community media help to strengthen the identities of specific interest groups, while at the same time enabling members of those groups to engage with other groups in society, and therefore play an important role in fostering tolerance and pluralism in society and contribute to intercultural dialogue (…)[63]

From this diagnosis, in the judgment area, the European Parliament:

[63] European Parliament resolution of 25 September 2008 on Community Media in Europe (2008/2011(INI)). Available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT%20TA%20P6-TA-2008-0456%200%20DOC%20XML%20V0//EN&language=EN>

(…) Advises Member States, without causing detriment to traditional media, to give legal recognition to community media as a distinct group alongside commercial and public media where such recognition is still lacking;
(…)Calls on the Commission to take into account community media as an alternative, bottom-up solution for increasing media pluralism when designing indicators for media pluralism;
(…) Calls on Member States to support community media more actively in order to ensure media pluralism, provided that such support is not to the detriment of public media (…)[64]

Some countries in the region already foresee in their regulatory framework the differentiation of community broadcasting stations. In Bolivia, regulations establish simplified mechanisms for community broadcasting, while in Venezuela it isn't necessary to support the economic project over an initial capital investment, and administrative payment for the licenses isn't required[65]. In Peru, the educational and community broadcasting services, as well as those stations located near frontiers, rural areas, or of "preferred social interest"[66], and recognized as so by the Department, have a preferential treatment established in the rulings. In Colombia, the process of selection of proposals for community broadcasting stations is governed as established in the Article 20 of the Decree 1981 of 2003:

(…) the Department of Communications prompts for municipalities lacking broadcasting services, communities residing in peripheral or frontier urban and rural areas, and in general, the weakest or minority sectors of society to gain admittance to the community radio broadcasting service, with the aim of favoring its development, the expression of its culture and its integration to the national life, as established by the 6th article of the decree 1900 of 1990[67]

In Uruguay, according to its recent legislation, community broadcasting services are to be granted considering the following criteria[68]:

(a) The program of services to the community that the applicant seeks to offer, in direct relation to the principles defining the community radio broadcasting service.

(b) The mechanisms provided to secure the civic participation in the management and programming of the station.

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[64] Ibid.
[65] Regulation of Public Service non-profit community TV and Radio Broadcasting stations. Decree N° 1.521, 03/11/2001. Published in the Official Gazette N° 37.359 January 8th, 2002. the Art. 5.4 of said ruling, does demand among the requisites for applying to obtain the license of accreditation the "Economic viability and sustainability of the project".
[66] La Ley de Radio y Televisión de Perú (Radio and TV Act of Peru), Law 28.278, July 15th, 2004, establishes in the article 10 what they have called a preferential Regime, implying that "educational and community broadcasting services, as well as those stations located near frontiers, rural areas, or of "preferred social interest", and recognized as so by the Department, have a preferential treatment established in the rulings"". Likewise, the Art. 65 of said law states that community and educational media are exempt of paying royalties for the usage of the radio-electric spectrum.
[67] Official Diary 45.252 July 18th, 2003. Decree 1981 of 2003 by which the Servicio Comunitario de Radiodifusión Sonora (Community Radio Broadcasting Services) is ruled as well as other regulations are drawn.
[68] Servicio de Radiodifusión Comunitaria (Community Radio Broadcasting Services), Law 18.232, published in the Official Diary in January 9th, 2008.

(c) The social and community work background of the covering area requested.

(d) References by individuals, organizations or social institutions representative to the program of services to the community and of the communication proposal sought to deliver.

In *Broadcasting, Voice, and Accountability*, Steve Buckley, Kreszentia Duer, Toby Mendel and Sean O'Siochru state, as part of better policies in regulating community broadcasting, the following points:

> Licensing processes for community broadcasting should be fair, open, transparent, and set out in law and should be under the responsibility of an independent licensing body. Criteria for application and selection should be established openly and in consultation with civil society.
> License terms and conditions for community broadcasting should be consistent with the objectives of broadcast regulation and be designed to ensure that the community broadcasting service characteristics are protected and maintained for the duration of the license period.[69]

Lastly, is valid to reiterate the position of the Amsterdam Declaration, by the Rapporteurs, in 2007, according to which:

> Community broadcasting should be explicitly recognized in law as a distinct form of broadcasting, should benefit from fair and simple licensing procedures, should not have to meet stringent technological or other license criteria, should benefit from concessionary license fees and should have access to advertising.[70]

[69] Buckley, Steve; Duer, Kreszentia; Mendel, Toby and O'Siochru, Sean, *Broadcasting, Voice, and Accountability: A Public Interest Approach to Policy, Law, and Regulation*, University of Michigan Press/World Bank, USA, 2008.
[70] The UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the ACHPR (African Commission on Human and Peoples' Rights) Special Rapporteur on Freedom of Expression and Access to Information, Joint declaration, December 2007, Op. cit.

16. Community radio and television stations are private-sector players with a social purpose, usually managed by different types of non-profit social organizations. Their main characteristic is that they are community-owned, and the community is also involved in aspects such as programming, management, operation, financing, and evaluation. These are independent, non- government media that do not undertake religious proselytism and are not owned by, under the control of, or related to, any political party or commercial venture.

17. The purpose of community media is to meet the communication needs and to enable the exercise of the right to information and freedom of speech of the members of the community in which they operate, be they territorial or ethnolinguistic communities or communities based on common interests. The objectives of community media are closely related to the objectives of the community they serve and represent. Among others, these include the promotion of social development, human rights, linguistic and cultural diversity, plurality of information and opinions, democratic values, satisfaction of social communication needs, peaceful coexistence, and strengthening of cultural and social identities. These are pluralistic media and should therefore enable and promote access, dialogue, and participation of a diversity of social movements, races, ethnic groups, and people of any gender, sexual or religious preference, age, or any other status in their stations.

This point is related to the last one, and is recognized by the Principles for a democratic legislation on community broadcasting presented by AMARC before the IACHR, and in the declarations of organizations supported and recognized by UNESCO.

But they are likewise anchored in doctrine considerations, as proposed by the *Broadcasting, Voice, and Accountability* authors:

> Community broadcasting refers to broadcast media that are independent and civil-society–based and that operate for social objectives rather than for private financial profit. They are run by community based organizations, local nongovernmental organizations, workers organizations, educational institutions, religious or cultural organizations, or associations comprised of one or more of these forms of civil society organization.[71]

Principles of this nature were acknowledged by the Argentinean and Uruguayan legislations. They are also referenced in the French broadcasting associations regarding the technical/legal description of their exercise and in Irish regulations featuring different ways of managing and obtaining licenses in regards to requirements.

On its part, Canadian CRTC adopts the definition of community radio as those owned and controlled by a non-profit organization, the structure of which provides for membership, management, operation and programming primarily by members of the community at large. Also, programming should reflect the diversity of the market that the station is licensed to serve[72]

An additional example within the same line is the African Charter on Broadcasting, adopted in 2002 by personalities of the media, journalists, and attorneys with expertise in

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[71] Buckley, Steve; Duer, Kreszentia; Mendel, Toby and O'Siochru, Sean, *Broadcasting, Voice, and Accountability: A Public Interest Approach to Policy, Law, and Regulation*, University of Michigan Press/World Bank, USA, 2008.
[72] CRTC, Public Notice 2000-13.

the field of Freedom of Expression from all of Africa. About community broadcasting, the Charter adopted the following definition:

> Community broadcasting is broadcasting which is for, by and about the community, whose ownership and management is representative of the community, which pursues a social development agenda, and which is non-profit.[73]

[73] African Charter on Broadcasting, adopted at the UNESCO Conference held at Windhoek, Namibia, May 3 through 5, 2001.

18. Every organized community and non-profit entity has the right to set up radio and TV stations, as well as to use any radio broadcasting technology available, including cable and other physical links, satellite signals, or signals transmitted by any radio or TV bands, and other systems using the radio-electric spectrum, whether analog or digital.

19. Within the framework of spectrum availability and management plans, a community station's technical features depend solely on the needs of the community that it serves and on the station's communication proposal. Under no circumstances shall it be understood that a community radio or TV station necessarily implies a service with a geographically restricted coverage.

The principles reviewed are the best standards proposed in the Report made by the Rapporteurs on Freedom of Expression, in order to avoid discrimination to this media just by the owners they have, and remembering the premises of universality of the individual and of the media, without arbitrary exclusions. The emphasis is placed in the existence of regulations that, as already expressed, have limitations as to allow non-profit entities equality before the law, as well as bestowing them with equal opportunities in providing audiovisual communications services.

The Report of the Rapporteurs gathers the concerns on the subject, especially the Amsterdam Declaration of 2007, stating:

> Different types of broadcasters – commercial, public service and community – should be able to operate on, and have equitable access to, all available distribution platforms. Specific measures to promote diversity may include reservation of adequate frequencies for different types of broadcasters, must-carry rules, a requirement that both distribution and reception technologies are complementary and/or interoperable, including across national frontiers, and non-discriminatory access to support services, such as electronic programme guides.[74]

This Declaration doesn't recognize any impossibility in the alternatives to the different sectors involved in broadcasting. The selected criteria also encourages for community broadcasters to be considered different from rural broadcasters, or from those only covering peripheral areas. There are many examples pointing out this risk, as well as many examples of proper regulatory practices encouraging this spirit.

In Argentina such limitations are not present, neither in Uruguay, after the amendments of 2009 and 2007 respectively, and both enjoy a right to spectrum reservation[75]. The same happens in Australia, whose legislation recognizes community media anywhere in the country, being them metropolitan areas, sub-metropolitan, or "regional" (about 60% of the total), and also of community media representative to the interests of a community.

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[74] The UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the ACHPR (African Commission on Human and Peoples' Rights) Special Rapporteur on Freedom of Expression and Access to Information, Joint Declaration, December 2007, Op. cit.
[75] Laws 25622, y 18832, respectively

In Ireland, holders of community stations can be limited liability entities[76] as well as cooperatives, but both must manage their services without profit, and they are able to operate in both rural and urban areas.

South Africa follows this criterion, by allowing licensees of community stations to be geographically located, as well as any group or area of the public with an "ascertainable common interest" [77]. In this country its Electronic Communications Act defines community radio broadcasting under the following terms:

> ''community broadcasting service'' means a broadcasting service which—(a) is fully controlled by a non-profit entity and carried on for non-profit purposes;(b) serves a particular community;(c) encourages members of the community served by it or persons associated with or promoting the interests of such community, to participate in the selection and provision of programmes to be broadcast in the course of such broadcasting service; and (d) may be funded by donations, grants, sponsorships or advertising or membership fees, or by any combination of the aforementioned.[78]

Good policies on the matter are present in South American countries such as Ecuador, whose legislation doesn't allow for any kind of exclusion, establishing that community stations can stem from indigenous, afro-ecuatorian, or rural communities or organizations, or from any social organization[79].

In Canada, all non-profit organizations are allowed to access frequencies for community stations, and there are a number of specific rules for campus or student stations, as well as for those of an ethnical origin[80]. Licenses are granted anywhere in the country.

[76] Broadcasting Act, 2001, Art. 5.
[77] Broadcasting Act # 4, 1999. In its Article 1 community is defined under the following terms: "Community": "includes a geographically founded community or any groups of persons or sector of the public having a specific ascertainable common interest".
[78] Electronic Communications Act (ECA Act), Act Number 36, 2005.
[79] Art. 8º of the Ley de Radiodifusión y Televisión (TV and Radio Broadcasting Regulation). Supreme Decree Number 256-A. Art. 1 of the Law 89-2002, R.O. 699, 7-XI-2002.
[80] That can also be of a commercial nature.

20. Community media have the right to ensure their financial sustainability, independence, and development, using resources obtained through donations, sponsoring, support, commercial and official advertising, and other legitimate means. All these resources must be fully reinvested in the station, thus ensuring the fulfillment of its purposes and objectives. Any limit established in terms of advertising time or number of advertisements should be reasonable and non-discriminatory. Community radio and TV stations should manage their resources in an open and transparent manner, periodically rendering accounts to the community they serve.

This principle aims at highlighting the importance of preventing discriminations endangering the durability of projects carried out by community broadcasters. One of the most notorious exclusions is the one stemming from the lack of real resources and funding resulting from the broadcasting activity itself.

Regarding the need of creating regulations meant to protect community media because of their duty, considerations by the Rapporteurs on Freedom of Expression have been taken, as well as from UNESCO, the Inter-American Court on Human Rights, and the European Parliament.

Firstly, the stance of the OAS Special Rapporteur for Freedom of Expression, stating in its 2002 Report:

> The growing need for expression felt by majorities and minorities that lack media access, and their claims on the right to communication, to the free expression of ideas, and to the dissemination of information makes it necessary to seek access to goods and services that will ensure basic conditions of dignity, security, subsistence, and development.[81]

Among these conditions is the possibility of perceiving funding from a variety of genuine sources, among them advertisement, a vital resource for keeping broadcasting stations independent from political parties, commercial firms and governments.

Regulations should recognize the rights of non-profit entities providing community broadcasting services to ensure their economic sustainability, independence and development, with the intention of obtaining resources, among other sources, from donations, contributions, sponsorships, auspices, and private and official advertisements, from which they shall not receive discrimination.

There is a great confusion as to the meaning of “non-profit”, sometimes associated to the absence of commercial or economic activities for their sustainability. Contrarily, they are activities not pursuing amassing profit for its distribution or inversion in objectives different that the community broadcasting service. The only condition enforceable to the community media operators is the compromise of using all profit in investments guaranteeing the continuity of the station and the development of the objectives of the community broadcasting services. Control mechanisms may be established for complying with this condition, that may even foresee sanctions such as the loss of the right to use a frequency in the case of detecting an abuse.

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[81] Annual Report of the Special Rapporteur for Freedom of Expression 2002, Inter-American Commission on Human Rights. Available at <http://www.cidh.org/relatoria/showarticle.asp?artID=309&lID=1>

Likewise, in most of the countries object of this study, the broadcasting of advertisements is allowed under the condition that is destined, as well as all other resources, to the station operation. The exceptions are Chile, who forbids its usage, and Brazil, who only authorizes auspices and sponsorships.

In this sense, the definition adopted by the Department of Communications of Colombia is exemplary, who has set as its objective:

> Aim its task to the accomplishment of a vision of community stations operating in all Colombian municipalities, with strong social organizations in charge, with absolute community service devotion, with a non-profit nature, but solid from a financial standpoint, and operating according to the technologies expected from the telecommunications sector.[82]

In Western Europe several countries allow advertisement in community media, with certain restrictions in relation to the amount of expected income. With the goal of guaranteeing several sources of funding for the stations, in the United Kingdom, and Ireland this can't account for more than 50% of their budgets. Some countries forbid advertisements, as is the case with Switzerland and Germany, in turn financially supporting them.

Australia allows for five minutes per hour for advertisements, but has a governmental funding to partially sustain their operation. Community radio stations have the right to operate under many funding sources: governmental, sponsorships, fund collecting, membership, etc.

In the UK regulations uphold every way of generating income allowed by law, with the exception of certain limits applicable to advertisement and sponsorships sources. In this away, there are codes on publicity and sponsorship applicable to commercial broadcasters as well as to community ones, jointly regulated by the OFCOM and the Advertising Standards Authority. These codes include, among other things, the prohibition to advertise alcohol, tobacco, pornography, religious and political campaigns, restrictions in the advertisements of gambling, financial services, and health care products, as well as rules to prevent misleading publicity, harmful, or offensive. Different codes are applied to TV and radio broadcasting. A requisite for protecting the independence of community stations is not allowing one financial source to exceed 50% of the income of the fiscal year. Sources of funding include public and private funding, service contracts, advertisement, show or station sponsorship, subscriptions and memberships, donations, funds raised at events, etc.

A financial system mostly or wholly dependent on the money of the State would be impracticable in most in the world, especially in southern countries where resources are growing scarce, and where States have lost the "weight" developed Nations still possess. Besides, the risk of losing independence from governments is huge, and could turn in an indirect censorship mechanism with which to punish those criticizing, and benefit those manageable or allied with it.

France allows the use of advertisements as well as other resources, without limitations, but in the case of one community station wishing to be recipient of the Radio

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[82] Manual de administración para emisoras comunitarias (Administrative guide for community radio broadcasting stations), Social Communications Directive, Department of Communications, Colombia, November 2000

Expression Support Fund (FSER) as a complementary income, advertisement and sponsorship income must be less than 20% of its absolute gross budget.

In Canada stations are authorized to sell advertisement spots, and to increase their income through any means, but are limited to four minutes of advertisements an hour, and 504 minutes a week.

South African regulations allows for community broadcasting services to be funded by donations, awards and recognitions, sponsors or advertisements, memberships, or any combination of them all. All income derived from the operation of a community broadcasting station should be devoted to the benefit of the community, and that will be certified by the proper authorities.

Similarly, Ecuadorian regulations recognize the right of community stations to "conduct self-management for the improvement, maintenance and operation of their facilities, equipments and staff wages through donations, advertisements spots and publicity of commercial products". All income received "should be reinvested in enhancing the services, systems or equipments of the station, or in activities of the communication they represent".

O the other hand, facing the risk of some stations losing or distorting the goals and objectives of the community service, these matters turn into requisites and also conditions for the use of a frequency, and periodic evaluations or controls (for the presentation of complaints or reports) should take place. For this situation to take place, mechanisms ought to be established for community members to report complaints over breaches of the legal commitments of the station/s. The non-fulfillment of these conditions may lead to the loss of the authorization to broadcast, to be executed after a due process.

In South Africa the compromise that "programming provided by a community broadcasting service must reflect the needs of the people"[83] must be recognized, promoting the participation in the selection and supply of programmes. Irish regulations states that when applying, the participants must commit to promote and "sustain" the active participation of the community at all levels of operation.[84]

Within the conditions to the use of a frequency, one of the channels to assure the community nature of the emissions during the term of the concession is based on upholding the requirements especially considered at the time of its allocation. One of them is the content of the emissions and its programming schedule. In this sense, among other cases, Colombian regulations in its Decree 1981 of 2003, establishes in the Chapter III the creation of "Programming Meetings".

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[83] The Article 32 inc. 4) of the Broadcasting Act, 1999 of South Africa: Community broadcasting services.--(1) Despite the provisions of this Act or any other law, a community broadcasting service licence may be granted by the Authority in the following categories: (a) Free-to-air radio broadcasting service; (b) free-to-air television service. (2) The licence of a community broadcasting service must be held by a licensee. (3) The licensee referred to in subsection (2) must be managed and controlled by a board which must be democratically elected, from members of the community in the licensed geographic area. (4) The programming provided by a community broadcasting service must reflect the needs of the people in the community which must include amongst others cultural, religious, language and demographic needs and must-- (a) provide a distinct broadcasting service dealing specifically with community issues which are not normally dealt with by the broadcasting service covering the same area; (b) be informational, educational and entertaining; (c) focus on the provision of programmes that highlight grassroots community issues, including, but not limited to, developmental issues, health care, basic information and general education, environmental affairs, local and international, and the reflection of local culture; and (d) promote the development of a sense of common purpose with democracy and improve quality of life.

[84] Art. 39. Section 6. a) Broadcasting Act, 2001.

Another example to consider is found in the “law to guarantee freedom of expression in community broadcasting media” recently approved in Uruguay, in the article 14, under Civic Participation is established that:

> The Executive Power should establish mechanism guaranteeing the civic participation in applying the rules on community broadcasting and in the elaboration, decision implementation and follow-ups of the policies for the sector.

It also contemplated the creation of the “Consejo Asesor Honorario de Radiodifusión Comunitaria” (Advisory Honorary Council in Community Broadcasting) “that will perform independently and in the orbit of the Unidad Reguladora de Servicios de Comunicaciones (URSEC, Communication Services Regulating Unit) which will be obligatorily consulted for the elaboration of the regulations to this law, documents and mechanism for the allocation of frequencies and consideration of the applications submitted, among others”

21. State media should be public and non-governmental, for which different social sectors should participate in their management and their authorities should be appointed by parliamentary majority. Innovative mechanisms for financing public media should be studied to allow them to fulfill their public service mandate, guaranteeing, in advance, funding for periods of several years and their adjustment according to inflation.

Public broadcasting media are a fundamental component of the audiovisual scene in all of the countries, and nothing points out to this being different in the near future, however, in certain places of South America there are still state/governmental media to be turned into public media. In this context, and for the stated reason, interest is growing from the governments and civic societies in discussing the subject.

Historically, it was notorious in the European continent the predominance -sometimes even monopoly- of the public or state system. Explaining its role in the public needs, its activity was kept in order to secure quality programming in almost every general interest topic and accounting for all the needs of the society

The use of the public media must therefore be used within the framework of pluralism, access and participation, or otherwise they would never be true sources of high quality information, and from diverse sources, ideologies and interests. When plurality is lacking, the popular sectors are the ones being left aside.

As a result, the commitment to the public media and its operation is present more solidly in countries where the respect towards civic societies is more explicit, where the governments have a more transparent management and a democratic designation of the public employees entrusted with technical subject and the leading of the regulating authorities.

The principles proposed are created to correct a situation as the one exposed in a recent paper by Rosario de Mateo and Laura Bergés Saura:

> The results of increasing the possibilities of audiovisual broadcasting are bound to the access to technology by the different social groups, among which an important technological gap, as well as economic and educational differences. This justifies a general interest not covered by the market, as the speech and positions of politicians and of media companies promising more diversity of content for all of the public hasn't come to fruition yet.[85]

Without prejudice to it, for approximately 10 years a process of reflection and discussion of the role of the public media, their structure, operation and funding is in place. Proofs of this are the regulations of the *Canadian Broadcasting Corporation*, of the *British Broadcasting Corporation* for an even more deep process that the raising standard journalistic of the Hutton report and the one initiated in Spain for RTVE after José Luis Rodríguez Zapatero was elected president, after it was urged upon by denounces of its deficit and the conditions of competition within the European Union.

[85] By Mateo Pérez, Rosario and Bergés Saura, Lausa, "Los retos de las televisiones públicas: financiación, servicio público y libre mercado" (The challenges of public TV: funding, public service and free market). Comunicación Social Editions and Publications; Seville 2009.

Valerio Fuenzalida in a presentation to the UNESCO[86] forum in August 2004, pointed out the various obstacles in relation to the amendment of the public TV:

> a first obstacle is of a political nature as the more traditional politicians are not inclined into amending the governmental TV and dream of it as a potential tool of (supposedly) propagandistic power when elected, and as a bounty to some of their electors. A second obstacle is the difficulty of the political-academic in determining a mission of a Latin-American nature to an amended TV.

Regarding the roles of this TV, the same author states a diversity of approaches from which to view them:

> a) some (the minority of them) continue placing upon Public TV a mission of expanding the bourgeois High Culture of European origin (Theater, Literature, Art, Cinema, etc.); so, with this mission for Public TV the metaphor is Theater & Museum of the High Culture;
>
> b) a variant emphasizes the presence of cultural experimentation by universities and the innovating elite, the metaphor is the Avant-garde Exposition gallery;
>
> c) other conceptions highlight a separated mission for the children, under the metaphor of TV as kindergarten or school;
>
> d) another enlightenment conception takes Public TV under the metaphor of the New Parliament of the conceptual political-academic debate, a debate usually found in the conceptual analysis of institutions such as the University;
>
> e) another underscores the financial nature of the industry and take the metaphor of Public TV as a Purchasing Power to describe it, asked to acquire certain contents with scarce participation in the commercial broadcasting TV, as cinema and documentaries, with the objective of developing private audiovisual companies;
>
> f) another is based on the characterization of the audiovisual language as recreational-affective as takes the metaphor of taking Public TV as a virtual Square, diverse and contradictory, more closely related to the carnival like medieval squares, where popular and refined sectors of society mingle, politicians with buffoons, information with charlatanry, the religious liturgy with the erotic sensuality, discussion with gossip, the publicity shouts of the market with the festive show thick or irreverence and frivolity, musicians and jugglers, fiction with disguises and masks, jokes and excesses.

This diagnosis is also able to cover radio broadcasting, though with particularities of its own language.

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[86] Fuenzalida, Valerio, "La TV pública de América Latina" (Latin America Public TV), document presented at the Reunión Técnica (Technical Meeting) of UNESCO held at Santo Domingo, Dominican Republic August 13th and 14th, 2004. Available at http://200.2.115.237/spip.php?article247

The African Commission has expressed itself in its 2002 Declaration on Principles on Freedom of Expression: "State and government controlled broadcasters should be transformed into public service broadcasters, accountable to the public through the legislature rather than the government"

Also setting the following principles: public broadcasters should be governed by a board which is protected against interference; particularly of a political or economic nature; the editorial independence of public service broadcasters should be guaranteed; public broadcasters should be adequately funded in a manner that protects them from arbitrary interference with their budgets; public broadcasters should strive to ensure that their transmission system covers the whole territory of the country; and the public service ambit of public broadcasters should be clearly defined and include an obligation to ensure that the public receive adequate, politically balanced information, particularly during election periods.[87]

[87] African Commission on Human and Peoples' Rights, "Declaration of Principles on Freedom of Expression in Africa", 2002. Available at <www.achpr.org/english/declarations/declaration_freedom_exp_en.html>

22. The mandate of the public media should be clearly defined by law, and should include, among other aspects, the obligation to contribute to diversity by providing a wide range of informational, educational, cultural, fiction, and entertainment contents, as well as to ensure that all community sectors can be heard and that their information needs and interests are satisfied, guaranteeing citizen participation.

As already exposed, in the last years a process or re-discussion and controversies has taken place around the importance and function of the public media.

In this context, the Committee of Ministers of the European Union had approved on November 22nd 1994 the Recommendation No. R (94) 13 On Measures to Promote Media Transparency. It states that regulation regarding media concentration presupposes that the competent services or the hearings have access to information allowing them to know the situation of said media, and summing up, identifying the social actors that may exert influence on their independence. It also emphasizes how media transparency is necessary to allow citizens to form an opinion over the value given to information, ideas and opinions broadcasted by this media. These are, evidently, some hypothesis of a regulatory nature, shared by us, and that we will promote.

The Committee also emphasizes the need for Member States to consider including regulations in their national legislations, with the purpose of guaranteeing or promoting media transparency. To accomplish this, they propose, among other things, that the following principles be included:

> Members of the public should have the possibility of having access on an equitable and impartial basis to certain basic data on the media. Bearing in mind that the aim of transparency is, as far as the public is concerned, to know who are the owners of the media so as to be able to form an opinion as to the value of the information disseminated.
> The communication of information to the public should be carried out with respect for the rights and legitimate interests of the persons or bodies required to disclose the information. In particular, communication should be carried out in a way which takes due account of freedom of trade and industry as well as of the requirements of commercial secrecy.[88]

In 1996, the Resolution 10 of the Committee of Ministers to Member States of the European Union established a series of principles on the guarantee of independence of the public broadcasting services. The Committee understands pluralism and diversity of the media as essential for the proper operation of the democratic society, and that its independence should be respected, especially by governments.

Among the fundamental considerations in the resolution is the "(…) vital role of public service broadcasting as an essential factor of pluralistic communication which is accessible to everyone at both national and regional levels, through the provision of a

[88] Committee of Ministers to Member States of the European Union, Recommendation N R (94) 13, signed upon November 22, 1994. Available at <http://www.coe.int/t/dghl/standardsetting/media/Doc/CM/Rec(1994)013&ExpMem_en.asp#TopOfPage>

basic comprehensive programme service comprising information, education, culture and entertainment".[89]

In the same line of thought, the Committee of Ministers of the European Union adopts the Resolution 30/01 1999/C related to Public Broadcasting Services, in which they ratified its vital relevance for guaranteeing democracy and protecting diversity, and warning that the growing diversity of programmes through new media conduits comprises more missions for the public media, and recalls that the Amsterdam Protocol of the Union reassured the relevance of the public media and public funding.

Years later the Parliamentary Assembly of the Council of Europe, on January 27 of 2004 the Recommendation 1641 (2004), relating to Public Service Broadcasting. The preliminary considerations state:

> "Public service broadcasting, a vital element of democracy in Europe, is under threat. It is challenged by political and economic interests, by increasing competition from commercial media, by media concentrations and by financial difficulties. It is also faced with the challenge of adapting to globalisation and the new technologies".[90]

Also stating "Public service broadcasting, whether run by public organisations or privately-owned companies, differs from broadcasting for purely commercial or political reasons because of its specific remit, which is essentially to operate independently of those holding economic and political power" their mission is based on providing:

> "(…) information, culture, education and entertainment; it enhances social, political and cultural citizenship and promotes social cohesion. To that end, it is typically universal in terms of content and access; it guarantees editorial independence and impartiality; it provides a benchmark of quality; it offers a variety of programmes and services catering for the needs of all groups in society (…)".[91]

Comparing the situation of the public broadcasting media in different countries contributes some interesting elements that can elucidate on the goal of these principles.

Australia has two public networks: Australian Broadcasting Corporation (ABC) and the Special Broadcasting Corporation (SBS). The first one provides general services and entertainment of general interest, while the latter provides contents focused on the interests of Australian communities. Both services operate independently from the government and are regulated by "Acts" approved as laws before the National Parliament. The ABC provides national coverage by way of the operation of production and retransmitting centers on various cities.

In the subject of radio stations, the State operates six different networks alongside repetition stations and affiliated stations. Each of the networks attends for different interests, be them musical styles (classical, popular, etc.), information, audiences

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[89] Committee of Ministers to member States on the guarantee of the independence of public service broadcasting, Resolution 10, adopted September 11, 1996, <http://www.coe.int/t/dghl/standardsetting/media/Doc/CM/Rec(1996)010&ExpMem_en.asp#TopOfPage>.
[90] Parliamentary Assembly of the European Council, Recommendation 1641 (2004), January 27 2004. Available at <http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta04/erec1641.htm>
[91] Ibid..

(childhood, youth, etc.), or by the broadcasting of official matters, as in the case of one of them that broadcasts parliamentary sessions.

The role of the public service is established in regulations, demanding from ABC nationwide coverage, innovative and comprehensive services on radio and TV, and high standards within a system made up of a public sector and a private sector of broadcasting.

The regulations also asks from the public system to provide for educational services, programmes with artistic content by Australian “performers” reflecting the cultural diversity, as well as journalistic and opinion information showing the Australian view over the international political situation.

The legislation regulating the Australian Broadcasting Corporation is the Australian Broadcasting Corporation Act (1983), last amended the 29/03/2000. The ABC Act, section 6, states the functions of the corporation as being:

> (a) to provide within Australia innovative and comprehensive broadcasting services of a high standard as part of the Australian broadcasting system consisting of national, commercial and community sectors and, without limiting the generality of the foregoing, to provide:
>
> (i) broadcasting programs that contribute to a sense of national identity and inform and entertain, and reflect the cultural diversity of, the Australian community; and
>
> (ii) broadcasting programs of an educational nature;

(b) to transmit to countries outside Australia broadcasting programs of news, current affairs, entertainment and cultural enrichment that will:

(i) encourage awareness of Australia and an international understanding of Australian attitudes on world affairs; and

(ii) enable Australian citizens living or travelling outside Australia to obtain information about Australian affairs and Australian attitudes on world affairs; and

(c) to encourage and promote the musical, dramatic and other performing arts in Australia.

In Canada public media services on a federal level is based on the Canadian Broadcasting Corporation (CBC), which has many networks in different media and languages. On a provincial level one of the most important is Radio Quebec, dependent from the State of the same name.

For the CBC , as well for all other TV and radio stations the enforceable regulation is the Canadian Radio-television and Telecommunications Commission (CRTC), and the enforceable law is the Broadcasting Act of 1991 and its ulterior amendments. It also periodically reports before the Minister of Canadian Heritage, and its intermediary to the parliament.

According to this law, the CBC has to fulfill certain imperatives, given its nature as a “National public broadcaster”, among them, providing radio and TV services incorporating a wide programming, one that informs, entertains, and that works towards the general betterment of its audience. To accomplish this, the programming must, among others things, be mainly Canadian, reflect Canada and its regions to the national and regional

audiences, providing services that attend to the special needs of its regions, as well as the respect towards linguistic diversity.

The CBC has MW and FM radio stations, of free-to-air TV, cable TV channels, short wave international stations. In TV it possesses two networks, one in English, and one in French, besides especial services for cable TV. On radio it broadcasts both in English and French (two networks each), besides local services on FM, some of them in languages of the “First Nations”.

In France public broadcasting is in the hands of several state-owned companies. The specific law for the assignation of this division of duties is the law of 1986 (since amended in 1989 and 1994), that establishes as the regulating authority the “Conseil supérieur de l'audiovisuel” (Audiovisual superior council) (CSA).

Companies undertaking the broadcasting activity of the State are six: three of them concentrate on TV, and another three to radio broadcasting, all their activities being developed according to the definitions of the article 44 of the law 2000-719 and its amendment 2000-1207.

In regard to the specific requirements, the law establishes for the CSA the obligation to guarantee the independence and impartiality of the state media, as well as assure that the totality of the stations promote quality and diversity of the programming, national audiovisual production, and the culture and language of France.

As in most Western Europe public media, the French based on an mix regime of public funding and commercial advertisement, even though annually, the Council of State establishes limits to publicity investment that each media can receive.

In the subject of programming, the French public media must offer pluralism, diffusion of election information, promote orchestras, choirs and French authors, as well as other of an educational, social and cultural nature, likewise, it must facilitate through the proper means the access of the deaf and of people with cognitive impairments to the broadcasting programmes.

In the UK, the British Broadcasting Corporation (BBC), founded in 1926 and regulated in its activity and composition by a Royal Charter, held a monopoly on the activity tipical of the European broadcasting services until 1973.

In 1996 the activities of the BBC started being regulated by a License Agreement amended in the closing days of 2003, as the result of the discussion of the role of the BBC in the Gilligan Affaire and the Hutton Report. This license agreement was performed between the Secretary of State and the BBC Board of Governors in 1996, and between the Secretary of State for Culture, Olympics, Media and Sport and the Board in 2003.

Its independence is explicit as established both in the Royal Charter as in the License Agreements, the BBC is independent in all matters related with the content of its programmes, the time of their emission, and the administration of all concerning matters.

To date, the BBC has four national radio signals, two of national TV, and several regional ones, besides the BBC World Services in several languages (the latter being dependant on the funding provided by the Cabinet of the United Kingdom).

According to its regulations, the most relevant objectives of the BBC aim at providing radio and TV broadcasting services, as well as news, entertainment and educational programmes for the general reception within the United Kingdom. It can also broadcast services paid by advertisement, publicity, sponsorship, pay per view systems or a number of others.

Moreover, the License Agreement forces the BBC to issue reports and annual projects in regards to the programming schedule, detailing the goals set for the station, and the ways in which to accomplish them.

Another obligation to comply with is securing programming schedule quotas for original and regional productions, especially favoring these expressions with financing aids or facilitating the access to said funding. To these the need established by the License Agreements for a relevant percentage of independent production is added.

23. Independent State bodies in exercise of their functions should be in charge of granting concessions and assigning the use of frequencies, when applicable, for radio broadcasting and audiovisual communication services. Independent State bodies in exercise of their functions should also be in charge of enforcement, regulation, and supervision tasks. Such State bodies should be protected from any pressure exercised by economic or corporate groups. Civil Society's effective participation in this process should be guaranteed.

This proposal is based on recommendations of the Rapporteurs on Freedom of Expression, and in the conclusions of comparative studies underscoring the high degree of permeability of the regulating organs in regard to the political and economical powers.

The 2007 declaration of the Rapporteurs states:

> Regulation of the media to promote diversity, including governance of public media, is legitimate only if it is undertaken by a body which is protected against political and other forms of unwarranted interference, in accordance with international human rights standards.[92]

Previously, in 2001, the Rapporteurs had established that:

> Broadcast regulators and governing bodies should be so constituted as to protect them against political and commercial interference.[93]

Moreover, The Office of the Special Rapporteur on Freedom of Expression of the Inter-American Commission on Human Rights states:

> (…)it is necessary for States to pass laws that prevent any of their agents from being able to make arbitrary use of oversight or regulatory control in the future to silence dissident speech. As in the previous case, clear, pre-established, precise and reasonable laws are required. They must establish specifically the authorities' powers of oversight and regulation, which must pursue a legitimate aim and be strictly necessary for the accomplishment of the aim pursued. In particular, it is fundamental that the bodies with oversight or regulatory authority over the communications media be independent of the executive branch, be fully subject to due process and have strict judicial oversight.[94]

Agreeing with these postulates AMARC-ALC and other organizations have noted in the Principles on Democratic Regulation of Community Broadcasting that:

> Allocation of broadcasting licenses, assignment of frequencies and other aspects of the operation of community broadcasters should be regulated by state agencies that are independent of the government or private economic groups. The State must guarantee the effective participation of the civil

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[92] The UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the ACHPR (African Commission on Human and Peoples' Rights) Special Rapporteur on Freedom of Expression and Access to Information, Joint Declaration, December 2007, Op. cit.

[93] The UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression - *International Mechanisms for Promoting Freedom of Expression, Joint Declaration*, November 19th and 20th, 2001. Op. cit.

[94] Annual Report of the Office of the Special Rapporteur for Freedom of Expression, Inter-American Commission on Human Rights, 2008. Available at <www.cidh.org/relatoria/showarticle.asp?artID=742&lID=1>

society in these decision-making processes. Due process and the right to appeal licensing decisions are essential to guarantee the rule of law in this area.[95]

It's important to mention, as a reference, that in most systems authorities in the subject don't encounter instances of independence or of parliamentary control in the election of its members. There are some exceptions that do recognize selection processes with parliamentary agreements, such as in Chile or USA (National Television Council and FCC respectively), or other cases in which the Parliament has the capacity to appoint for itself some members, as in the Conseil supérieur de l'audiovisuel of France (six of the nine), Argentina (three of the seven), the Canadian CRTC, the National Television Council of Colombia, or the South African ICASA.

Working with autonomy from the government can be found in the FF (though with parliamentary control over some of its general decisions), the British OFCOM (that as well as the CRTC issues periodical reports to the Parliament), or the French CSA.

[95] AMARC-ALC, "Principles on Democratic Regulation of Community Broadcasting", 2008.Op. cit.

24. States should enact regulations concerning the abilities and qualifications of members of the regulation and enforcement authority, as well as their independence from the regulated sectors both within a certain period of time before their office begins as well as after it ceases.

In consonance with the supported arguments of the previous principle, it is considered important that the regulations in the subject of media services go through a process of public consideration, prior to the designation and operation of the positions created to verify the background information of the competence for the task. In the same way, it is important to recognize as valuable harsh scrutiny rules of the performance in order to guarantee the independence from regulators in the exercise of their position.

This criteria is advisable to any civil service employee, so the principle would be covered if the if the generic regulations over the exercise of a public position were in effect. When that's not the case, the incompatibility of the position with the private activity, as well as the inability of accessing a position without a previous period of not communicating with the regulated parties, or the impossibility of accessing a paid position in the private media after leaving the regulatory position, are the strengths of the regulatory body. Such is the case, for example, of the authorities of the FCC in USA in regard to the reinsertion of the regulator in the regulated industry.

Regarding the characteristics of the authorities, the Declaration of Principles on Freedom of Expression in Africa, 2002, states:

> VII - Regulatory Bodies for Broadcast and Telecommunications
>
> Any public authority that exercises powers in the areas of broadcast or telecommunications regulation should be independent and adequately protected against interference, particularly of a political or economic nature.
>
> The appointments process for members of a regulatory body should be open and transparent, involve the participation of civil society, and shall not be controlled by any particular political party.
>
> Any public authority that exercises powers in the areas of broadcast or telecommunications should be formally accountable to the public through a multi-party body.[96]

[96] The African Commission on Human and Peoples' Rights, "Declaration of Principles on Freedom of Expression in Africa", 2002. Available at <www.achpr.org/english/declarations/declaration_freedom_exp_en.html>

25. Any resolution or measure adopted, or any penalty applied, by the regulation and enforcement authority should be based on the law and meet all publicity and justice requirements commensurate with due process, have a legitimate purpose, and be strictly proportional to the seriousness of the offence committed and to the involved party's record.

This principle appears as a consequence of the analysis of the chapters referring to violations and penalties in most of the regulations over audiovisual communication services. In many cases, legal matters are relegated to application or regulatory authorities, which determine hypothesis on blank rules that are completed by extra parliamentary bodies, that wouldn't the legal principles of authentic interpretations, such as the article 13.2 and 10.2 of the Inter-American Convention of the European Charter on Human Rights.

According to the constitutional mechanisms present in a state of law such principles require the prior intervention of the Parliament; this is particularly relevant seeing as we are referring to sanctioning rules imposing ulterior responsibilities. Such is the position of the Inter-American Court expressed in their Advisory Opinion 6/86.

As so, rules stemming from the executive power or of an administrative nature recognizing new infractions not established by Covenants, Assemblies or Parliaments wouldn't be living up to these requirements.

Another observed issue is the vagueness in the definition of the behaviors to penalize, even when they are drawn up in a respectful manner from the parliamentary proceedings set by constitutions, which is also in violation of the principle of legality, according to the requirements deemed as demandable by the Inter-American Court. This posture is represented, in among other cases, in the ruling of the Inter-American Court on Human Rights on the case "Kimel vs. Argentina"[97].

As vaguely defined behaviors examples:

In Canada, the Broadcasting Act establishes (section 31) that, as a regulating authority, its decisions are final and conclusive. The appeals are directed to the jurisdiction of the federal courts. The law foresees sanctions to any person operating a broadcasting station without a license as an enforceable offense, in the case of individuals, of up to 20.000 Canadian Dollars, and of up to 200.000 in the case of corporations.

Also procuring that every individual violating or breaching regulations or orders related to broadcasting services operation is susceptible of penalties of up to 25.000 Canadian Dollars in the case of a first offense by an individual, and of up to 50.000 for each ulterior one. These values elevate to 250.000 in the first and 500.000 in all subsequent offenses in the case of corporations. According to section 33, contravening or breaching the conditions of licenses is penalized with imprisonment.

In Chile the law 18.838, regulating TV, specifies the penalties in its article 33:

> The infractions against rules of the hereby law and of all those drafted by the Council in the use of its faculties, will be sanctioned, according to the gravity of the offense, with:

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[97] Inter-American Court on Human Rights, Case Kimel vs. Argentina, judgment of May 2nd, 2008. Available at <www.corteidh.or.cr/docs/casos/articulos/seriec_177_ing.doc>

1. Reprimand.
2. Fine no inferior that 20 and no superior than 200 monthly tax units. In the case of relapse on an offense, the fine might be doubled.
3. Suspension of broadcasts, for a period of up to seven days, in the case of grave and relapsing offense.
4. Termination of the concession (…) 2) breaching of the technical rules dictated by the concession; and 3) infringement of what is established in the final section of the article 1 of this law. Limited TV services concessionaires can only be sanctioned in virtue of the offenses established in the final section of the article 1 of this law.

At the same time, the article 1 of the Chilean law in its final section defines:

It will be understood as proper functioning of these services the permanent respect, through its programming, to the moral and cultural values of the Nation, to the dignity of the people, the protection of the family, the pluralism, democracy, peace, the protection of the environment, to the spiritual education of the childhood and the youth within said values.

In USA, the regulations of the FCC ban the broadcasting of certain counterfactual news[98]. This article prohibits diffusing false information relating to a crime or catastrophes in the cases in which: the channel or station knew that the information was false; it was foreseeable that the broadcasting would lead to a substantial public harm, and, in fact, broadcasting it cause it. To the means of this rule, the public harm must take place immediately and manifest upon the property, the health, or the public safety, or in a breaching of the law or its functions by part of the public powers and authorities. It has the ability to impose pecuaniry penalties, revoke licenses or deny renewal applications. It can also issue warnings, and in occasions, if having a specific legal base, issue sentences for damages and losses[99]. According to the section 309 of the Communications Act, the FCC can revoke or deny a renewal if a channel or station don't satisfy "the public interest, benefit or necessity"

It is also important to set the criteria by which sanctions tend to the protection of legitimate means recognized by the human right conventions and according to their standards. The listings of said legal assets protected by legislations in the subject of audiovisual communications that are grounds of justification of the enforced sanctions largely exceed the appropriate number to consider.

The presence in legislations on audiovisual communication of terms such as "moral values", "national culture", "identity", "national values", "Christian morality", "informational veracity" –especially in the countries of the region who had suffered authoritarian regimes-, are not mere exceptions, and justify, in many cases, the application of sanctions, fines, expiration of licenses and concessions.

In the same train of thought, it is important that sanctions to be applied recognize the need for the principle in a State of law which is demanded by conventions and standards established by the international tribunals of human rights.

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[98] 47 C.F.R. § 73.1217.
[99] 47 C.F.R. §§ 0.111(17).

26. States should only include in their regulatory frameworks ulterior responsibilities relating to the exercise of audiovisual communication activities that are in accordance with the requirements and doctrines of internationally recognized human rights. Civil and criminal responsibilities should be contemplated in general legislation, and the respective provisions cannot merely concern audiovisual communication. Unauthorized installation of broadcasting stations should not be penalized by imprisonment.

This postulate encourages the determination of a legislative criteria that regulates based on international standards the relevance on each legislation, in order to avoid the double or triple legal prosecution of infringements, promoting situations of deep legal insecurities to operators, acting parties and participants.

According to the general principles and rules of implementation of sanctions set by law, in many situations provisions are found to exceed the capacities of the regulations in regard to the media, establishing regulations common to the civil law or to the criminal law, referring to issues that should be prosecuted outside the competence or the regulating bodies, and only with the ruling of a legal body implying risking the loss of ability as operator or participant in the media.

One of the circumstances studied by this proposal is the guarantee to the right to due process. Litigating in independent stands for the eventual commission of behaviors that are not specific to the broadcasting activity complies with the requirements to the right to due process and justice. Another is the specificity required from the Judiciary Branch of understanding in its rules, and not present in the regulatory bodies of broadcasting, that in the best of cases is to be integrated by individuals with expertise in the matter, and not in criminal or civil law. The ability of applying penalties for damages and losses of the FCC, or of terminating licenses because of non-complying with obligations of protection to the dignity of the individuals by the National Council of Television in Chile give merit to the adoption of this principle.

An additional topic to add up in a universal principle is that sanctions depriving freedom for the installation of unauthorized stations should not be admissible. The use of the radio-electric spectrum in most of the countries doesn’t comply with the standards set by the principles 12 and 13 of the Declaration of Principles of the IACHR of October 2000 for the breaching administration of the article 13.3 of the Inter-American Commission on Human Rights by establishing themselves within an ambiguity indirectly restricting the freedom of expression. This can easily be verified, as most of the countries accounting for this provision don’t comply with the minimum requirements of a law type in the matter.

In any case, if the existence of such an important social need was to be admitted as a legitimate end in preserving the radio-electric spectrum from all broadcasts emitting from unauthorized stations or equipments, almost all stations in the continent are under scrutiny to verify their equipment, location, power outage, screening and sweeping of the stations complies with the totality of the technical standards requested.

If this scrutiny was executed in a neutral fashion (understanding as neutral the independent technical scrutiny of the legal nature and conditions under which the equipments operate) the dispute of the legal standardizations wouldn’t just go through the authorization to broadcast, but also in the protection of the indemnity of the radio-electric

spectrum by keeping away all those broadcastings outside the rules, regulations, concessions or licenses.

In this sense, attention should be paid to the fact that authorization is lacking in both those who hasn't obtained it, but also in those exploiting an station in condition different to those foreseen in its allocation for its concession, license or usufruct (depending on the regime we are speaking about). But nobody asks for criminal prosecution of those denaturing the legal contract by doing something different that the authorized by the State.

It is necessary to distinguish the interference of the electronic media from the inalienable nature of the telecommunications. The proposed distinction isn't idle, every time services are not only differentiated by the definitions of the International Telecommunications Union, but also –besides and fundamentally- those foreseen as support to the exercise of freedom of expression for being directed to the general public, and others are provided to be services subject to the liberation of markets by the agreements of the OMC and are links establishing communications point by point, sheltered by the secrecy of telecommunications. A secrecy based on circumstances of confidentiality, of a perspective of invulnerability and bilateralism of the link, all conditions broadcasting lacks and much less offered with the presence of a pressing social need.

In regards to the protection of the public order and its relation to air navigation, no categorization of the crime is needed. That legal asset tends –and almost by definition- to be only included within the criminal law and anyone affecting it, independently of the type of emission used, can count with concrete provisions.

However, if what is sought with criminal penalties is to distinguish unauthorized broadcasting as an obstruction to the right of ownership over the radio-electric spectrum, and besides the already exposed positions over the nature of the frequencies, the following can be mentioned:

a) Radio-electric emissions are not subject to the right of ownership. Considering their nature as radio-electric impulses and that nobody hoards or acquire them in a physical way, the definition of the offense "energy theft" is not appropriate for their reception. Independently from the impossibility of applying analogical principles for the interpretation of the criminal laws, there's no possible benefit (for self benefit or for the benefit of third parties) from appropriating said intelligible emissions. The sole definition of "emissions" proposed by the ITU makes this legal possibility unfeasible.

A look at the ITU glossary:

> Term: radiated emission. Definition: The phenomenon by which energy in the form of electromagnetic waves emanates from a source into space (energy transferred through space in the form of electromagnetic waves).

Being its nature an emanation of energy into space, it should be considered a commodity susceptible to appropriation. The case of an eventual unauthorized retransmission by third parties is different, as it would violate principles of intellectual ownership for unauthorized repetition of contents. It is an absolutely different possibility, and would be within the provisions of the Roma Treaties regarding the protection of the contents of the broadcasting bodies based on principles of intellectual ownership and right of exhibition or broadcasting to the public.

b) The ITU Constitution states in its 44th article, regarding the usage of the radio-electric frequencies spectrum and the orbit of geo-stationary (and others) satellites, that:

> Member States shall endeavour to limit the number of frequencies and the spectrum used to the minimum essential to provide in a satisfactory manner the necessary services. To that end, they shall endeavour to apply the latest technical advances as soon as possible. In using frequency bands for radio services, Member States shall bear in mind that radio frequencies and any associated orbits, including the geostationary-satellite orbit, are limited natural resources and that they must be used rationally, efficiently and economically, in conformity with the provisions of the Radio Regulations, so that countries or groups of countries may have equitable access to those orbits and frequencies, taking into account the special needs of the developing countries and the geographical situation of particular countries..[100]

Therefore, we see that in no section is are emissions or frequencies foreseen as subject of ownership by particular, and not even by the State, as an asset, an indispensible hypothesis for the existence of the offense of theft.

In the same line, an allocated frequency (bandwidth) is also unable of being defined as an asset, or to be recognized in ownership. The ITU states:

> assigned frequency band: ITU-R Rec. V.573 - The frequency band within which the emission of a station is authorized; the width of the band equals the necessary bandwidth plus twice the absolute value of the frequency tolerance. Where space stations are concerned, the assigned frequency band includes twice the maximum Doppler shift that may occur in relation to any point of the Earth's surface.
> Note 1 – For certain services, the term "Assigned channel" is equivalent.
> Note 2 – For the definition of "Frequency tolerance" see § D (Term D02).
> (Source : RR 1.147).

Then, it is an immaterial asset allowing the transit of emissions. It can't be subject to ownership not even when the emissions are being emitted.

The same happens were we to legally try to protect a channel:

> Term: (frequency) channel. Definition: Rec. ITU-R V.662-3 - Part of the frequency spectrum intended to be used for the transmission of signals and which may be defined by two specified limits, or by its centre frequency and the associated bandwidth, or by any equivalent indication. Note 1 - A frequency channel may be time-shared in order to allow communication in both directions by simplex operation. Note 2 - The use of the term "channel" to mean "telecommunication circuit" is deprecated. Note 3 - The term "radio-frequency channel" used in radiocommunication is defined in Recommendation ITU-R V.573.

It is necessary to point out, that in order for something to be under the right of ownership; this very something must be able to be owned. Also, this something must be in the market.

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[100] International Telecommunications Union (ITU), Constitution approved for on December 22, 1992, at Geneva. (196 PP-98). Op. cit.

But frequencies or radio-electric emissions of broadcasting are not in the market, and the States don't lend frequencies to the right of ownership. So its condition as a legal asset protected from recognizing it as theft or aggravated theft.

c) This can be corroborated with the many obligations imposed on States to facilitate the extensive use with social and satisfactory goals of the services, as stated in the recommendation 2 of the Plenipotentiary Conference of Kyoto (1994):

> (…) conscious of
>
> the noble principles that news should be freely transmitted and that the right to communicate is a basic human right,
>
> conscious also of
>
> the importance of the fact that these noble principles will promote the dissemination of news, thus strengthening peace, cooperation, mutual understanding between peoples and the spiritual enrichment of the human personality, as well as dissemination of culture and education among all people irrespective of their race, sex, language or religion,
>
> recommends
>
> that Members of the Union facilitate the unrestricted transmission of news by telecommunication services."

Therefore, within this system of interpretation of international regulations that States must protect, seems contradictory that national regulations may tolerate the right of ownership as protected legal asset allowing for the application of ulterior responsibilities in the matter.

In such a way, a legal action should never take place against the exercise of a right that the very Inter-American System recognizes as left aside.

In this sense, although with explicit reference to the use of the public space for the exercise of freedom of expression and the protest, the renowned Argentinean lawmaker Roberto Gargarella states:

> (…) the judge can close its eyes to the context organizing the public expression of the society. In countries like Argentina, said context is troublesome because of the correlation between expression and money, and for the extraordinarily uneven way in which money is distributed (…) the access to the media depends upon what one is willing to do to access them, or of the capacities that one has to seduce those who can pay, within a framework in which not many can pay such price… one has to be alert as to avoid a fairly common confusion, that is to think that one is upholding freedom of expression by respecting an status quo where some voices are systematically silenced while others are over represented within the political sphere. Respecting freedom of expression demands public actions destined to make different voice be heard, of actions facilitating the access to the public scene of opposing points of view, of actions breaking the habit of punishing in worst situations for reasons beyond their responsibilities.

According to the interpretations over the principle of need and the fundaments of the criminal law, there are alternative measures, less restrictive to freedom of expression than the legal classification and provision of emissions without authorization that ought to be considered by the national legal systems. This is particularly relevant in a continent accounting for grave vices when administrating the radio-electric spectrum and the access to licenses, that not only answer to the Principles on Freedom of Expression of the IACHR from October 2000, but that have also being questioned in more than one opportunity in the Annual Reports and Special Reports (for a number of countries) by the same organism.

The various amounts of existing criteria in the comparative law doesn't allow to elucidate legal solutions to be added, while also keeping consistency with the previously acknowledged principles. Some examples are discussed in the following pages.

In Australia, the article 134 of the Australian Broadcasting Act states that "individuals should not provide community TV services with the use of frequency bands of broadcasting radio, unless having a license for providing said service". The penalty is a fine of 50.000 Australian Dollars.

The section 135 of the same law issues a penalty of five-thousand Australian Dollars when a radio broadcasting service is operated without authorization.

In Brazil, according to the 9472 law, it is labeled as theft public domain property.

There are also provisions in the case of affecting the air traffic that, as already said, qualifies as a different legal asset, independently from the media and its usage.

The article 183 of the Chapter 2 of the 9472 law foresees that clandestine telecommunications activities to have a penalty of two to four years of imprisonment, aggravated in the case of damages to third parties, plus a fine of 10.000 R$. The article 184 of the same rule considers clandestine an activity undertaken without concession, permit or competent authorization for the usage of radio-frequencies.

In the case of Bolivia, there is an undetermined reference to the Criminal Code in the telecommunications law 1632, stating in its 26 article:

> Without prejudice to the sanctions determined in the Penal Code, the Telecommunications Superintendent will also apply sanctions on the offenders, namely warnings and sequestration or seizure of equipment and material, fines and temporary interdiction to undertake business activities for a maximum period of one year. Sanctions will be graded in the regulations and their amounts and terms and conditions of payment will be determined in the corresponding concession contracts. The amounts paid as fines will be deposited in an account belonging to the National and Regional Development Fund, for the purposes set forth in Article 28 herein..

In the Criminal Code there are not specific rules but those protecting from damages and interruptions to the communication or radio broadcasting services, or to protect their channels. It is important to note that the legal asset protected is not meant to discourage the exercise of broadcasting, but is applied nonetheless.

In the Colombia Regulations, a similar provision is found. The article 10 of the law 72 of 1989 states:

> Any telecommunications service operating without previous authorization by the Government is considered to be clandestine and the Department of Communications and military and police authorities will proceed to suspend it and to confiscate its equipments, without prejudice to the application of sanctions of an administrative or legal order enforceable according to current legal rules and regulations.

What is particular of the case is that communications are only protected as a legal asset in offenses of fraud by way of seizure through clandestine mechanisms or through the distortion of control systems.

The article 256 of the Colombian Criminal Code establishes:

> Fluid/power Fraud. An individual that through any clandestine mechanism, or by altering control systems, appropriates electric current, water, natural gas, or telecommunications channels, in the detriment of others, is to be imprisoned from one (1) to four (4) years and to be fined with one (1) to a hundred (100) current legal minimum wages.

It neither represents codification in regard to unauthorized broadcastings, understanding it as means to exercise of freedom of speech, the article 257 of the same legal body:

> The access or use of the mobile phone communication service or any other communication service, by means of the copy or reproduction, non-authorized by the competent authority, of the identification marks of terminal equipment of these services, junctions, or the use of non-authorized public service telephone network, local extended or long distance, as well as the provision of services for profit and non-authorized telecommunication activities, will result in imprisonment for a period of two (2) to eight (8) years and a fine of five hundred (500) up to a thousand (1000) Legal Current Monthly Minimum Wages. The previous penalty will be increased from a third part to half of the wages for those who had exploited the access, use or provision of non-authorized telecommunication services for commercial purposes, either by themselves or by means of an intermediary. Those who facilitate the access to third parties, illegitimate use or non-authorized provision of the service in question will be issued the same increase in the penalty.

But the case is that emissions are not fluids. And we say that a broadcasting station doesn’t fit in any of the seen criteria.

More closely related to the subject at hand is the case of the Broadcasting Act of Chile. Its article 36B establishes:

> Participates in crime qualifying to public indictment:
>
> a) The one operating or exploiting services or installations of telecommunications of free reception or broadcasting without authorization from the proper authority, and the one allowing his/her domicile, residence, home or transportation mean to the operation of said services. The penalty shall be short-term imprisonment from minimum to medium degree, a fine of

five to three-hundred monthly tax units (MTU), and the seizure of the equipments and installations,

b) The one maliciously interfering, intercepting or interrupting a telecommunications service shall suffer short-term imprisonment in any of its degrees and the seizure of the equipments and installations.

c) The one intercepting or receiving maliciously or records without proper authorization any type of signal emitted through a public telecommunication service will be sanctioned with short term imprisonment in its medium degree and a fine of 50 to 500 MTU.

d) The public or private broadcasting of any communication obtained in violation to the previous statements shall be sanctioned with short term imprisonment in its maximum degree and a fine for 100 to 5.000 MTU.

The subsection a) goes directly to the point. The non-authorized operation of broadcasting stations is punishable with imprisonment, fine and seizure. Now: according to this document, which is the legal asset being protected? Apparently, the authority of the administration in seeing the heading of the article 36:

On infringements and sanctions

Article 36.- the infringements to the rules of the hereby law, to its regulations, fundamental technical plans and technical rules shall be sanctioned by the Minister in conformity to the dispositions of this law. Sanctions are only to materialize once executed the resolution imposing them. In the lack of a proper sanction, and according to the seriousness of the infringement one of the following sanctions shall be issued.

On a regular basis, the provision of the legally-protected right is stated within the meaning of the article, chapter or section of the law. Here we only find “customs infringements and penalties”. The only reference to this has already been quoted.

When contrasting this provision with the requirements of the article 13, sub section 2 of the American Convention, it becomes clear that the penalty will hardly be proportional to the necessities of the State of law, for the inhibiting capacity of the article protects no more than the formal observance for the need of a permission. As long as comparative law offers solutions way more flexible and respectful of the freedom of expression in regards with such circumstances, our hypothesis will be verified again.

In Ecuador an unnumbered article governs, within the chapter “General Dispositions of the Radio and TV Broadcasting Law” amended by the Supreme Decree No. 256-A Official registry No. 785 of April 18th of 1975, ref. L s/n. Official Registry No. 691 /May 9 1995, according to which:

(...) The radio and TV broadcasting stations operating covertly, meaning, without authorization granted by conformity with this hereby law, shall be foreclosed and its equipments seized, immediately, by the Telecommunications Supervisor; who will also denounce the action before one of the judges in the criminal law of the proper jurisdiction. Once the infringement is confirmed the responsible shall be sanctioned with imprisonment of two to four years, while agreeing with the dispositions of the Criminal Code and the Criminal Proceeding.

Then, the closest references that we can find in the Criminal Code consider the means of transport and communication as a legally-protected right through the article 422, pointing out that:

> Shall be convicted with imprisonment from six months to two years the one interrupting communication, be it postal, telegraphic, telephonic, broadcasting or of any other system, o violently resisting the re-establishment of the interrupted communication. If the deeds were done in cohort or gang, or the interruption occurred through violent means, factual of threats, the penalty shall be imprisonment from three to five years.
>
> Those offering, providing or profiting from telecommunication services without being legally entitled to do so, be it through concession, authorization, license, permission, covenants or any other way of administrative contract, with the exemption of the usage of Internet services, shall be imprisoned from two to five years.
>
> Those included in this disposition shall be, those covertly possessing installations that, because of its configuration and other technical data, lead to the presumption that they are being used to offer the services described in the previous subsection, even when not being utilized. The penalties described in this article shall be issued without prejudice of the administrative and civilian responsibilities foreseen in the Ley Especial de Telecomunicaciones y sus Reglamentos (Special Law of Telecommunications and its Regulations).

Short from analyzing the soundness of the provisions, we find that there is no legally-protected right within the telecommunications law and that, when being derived to the penal provision of the Substantive Code, the penalties – which by the way are minor – apply to those who affect or interfere (instance which is different from the operation per se, as already mentioned). In regards to the non-authorized operation, it only refers to telecommunications point by point, since otherwise the exclusion from the Internet would not make any sense.

In this case we would have serious doubts in asserting that it complies with the requisite of legality and does surely not the one of a need for a democratic society either. Neither will we know the legitimate mean authorizing it in relation to broadcasting stations. More so, in the considerations of the National Congress to arrive at the current draft of the article 422 we can find:

> (…) in the market have appeared companies that, deviating from the current legal system and from the legal rules enforceable, offer publicly and provide illicit international calls services, in direct infringement the principles of the Special law on Telecommunications; That this illicit practice harms in a considerable way, both the legal constituted operators, as well as the treasury, from the tax evasion that these operations generate, profiting the natural or legal persons acting outside the law; That, without prejudice to the existing rules in the Criminal Code, and the Especial Law on telecommunications, it is necessary to incorporate new types that convict illicit telecommunications and the mere possession of equipment destined to commit these illicit infringements.

Therefore, no mention authorizes to subject the stations to the criminal code in the conditions the telecommunications law illegitimately does, which – also – is prior to this amendment of the article 422.

In France, even when the article 10 of the European Convention on Human Rights is certainly narrower in its definition than the article 13 of the American Convention, the article 78 of the law 1986 on radio broadcasting establishes that:

> A punishment shall be delivered, with a fine of 75.000 Euros to the manager by right or fact of an audiovisual communication service emitted or to be emitted. 1 - without authorization from the Higher Audiovisual Council or in violation of a decision of foreclosure, or of retreat, pronounced, or over a frequency different from the one allocated; 2 - in violation of the dispositions related to power outage of geographical location of the station; 3 – without having completed with the Higher Audiovisual Council a covenant.
>
> The same rule adds that:
>
> In repetition or when the regular emissions have interfered the emissions or hertzian waves of a public service, of a national programming society or of an authorized service, the author of the infringement may be punished with a fine of 150.000 Euros, and an imprisonment period of up to six months.

Then, we find that although the legislation does not apply corporal punishment to those who violate the administrative dispositions, it does apply this kind of punishment to those who inflict damage to third parties. The lecture of these dispositions shows that penal repression is not necessary, unless their ideology is destined to guarantee the maintenance and enhancement of the processes of concentration regarding radio electric means of communication.

A noteworthy case is Peru, whose Criminal Code has had a recent amendment, supposedly oriented at the battle of unauthorized broadcasting. For this, it incorporates a provision within the aggravated theft category. By only adding a subsection to the article 186 of the Criminal Code provisions are made to sanction the transmission of illegal telecommunications signals. The definitive version of the article with the new subsection 6 is as follows:

> Article 186.- The agent shall be convicted with imprisonment for no less than three and no longer than six years if the crime is committed:
>
> 1 In the Residence.
>
> 2 At night.
>
> 3 Though dexterity, scaling, destruction or breakage of obstacles.
>
> 4 With the occasion of fire, flood, shipwreck, public calamity or particular disgrace to the aggravated party.
>
> 5 Over the assets constituted from the luggage of the traveler.
>
> 6 By participation of two or more.
>
> The penalty shall be not inferior to four, nor greater than eight years of imprisonment if crime is committed:

1 By an agent acting in quality and as a member of an organization created to commit these crimes.

2 Over assets of a scientific value or belonging to the cultural heritage of the nation.

3 Through the usage of electronic funds transference systems, of the telematic in general, or the violation of using secret codes.

4 Placing the victim or his/her family in a dire economic situation.

5 With the usage of explosive materials or artifacts for the breakage of obstacles.

6 Using the radio-electric spectrum for the transmission of illegal telecommunications signals.

The penalty shall be no less than eight and no greater than fifteen years when the agent acts in quality of leader, ringleader or boss of an organization directed at committing these crimes.

The complex side of the situation, made up of the lack of prior and precise provisions of the law that suppressed the usage of this mean of the exercise of freedom of expression, is that its writing indicates that the legal asset protected is the property, but not the frequency, but of another object, which is affected by the radio-electric spectrum. For two reasons: first, almost all of the article and every one of its subsections make reference to circumstances of commission that aggravate the theft. Second, when aggravated theft is established by the quality of the legal asset to protect, pointed out by the article (and the Code), the object of the crime is said rest “over” it. In this case, the subsection 5 of the first part, and the subsection 2 of the second one. Therefore, the questionable (for the already exposed reasons) theft of a frequency is not subject to codification in the Peruvian Code.

In the case of the Mexican legislation, the federal law of radio and TV establishes a chapter of infringements that defines the situations in a specific way. But a law of national assets incorporates in its article 150 the frequency spectrum as a current asset of the public domain of the States, and as such, susceptible of theft.

A recent criminal ruling in the province of Chubut, in Argentina states:

We can admit that the energy is a thing from a physical standpoint; taking into consideration how modern physics understands it as measured and even weighted. But the issue is to be settled not in the field of physics, but from the legal field, and such a character is not present there. What is really bizarre from every standpoint is considering that TV broadcasting airwaves are energy. They are not so from a physical, as neither from a semantic one. According to the Pocket Illustrated Dictionary of the Spanish Language, Espasa Calpe S.A., 3rd edition, Madrid, 1983, energy is all cause capable of transforming itself to mechanical work, be it electric, wind power, solar, atomic, ionization, radiating or kinetic. One ponders which kind of mechanical work can be caused by TV signal. Electricity powers home appliances, gasoline powers cars. By other means, for being energy and producing work, in the field of physics they are measurable, as is done with consumption, being the measure the different units of Kw o Kg in the case of electricity and gasoline respectively. However the signal, not being energy,

doesn't have a measure unit, and so the same taxes are to be paid by someone who has three TV operating the whole day and one who only turns it on a night to watch the news[101].

[101]Penal Chamber Nº 1 – Trelew; Magistrates: Roberto Portela - Juan Di Nardo - Daniel Rebagliati Russell, ruling in the case 000A 000004, February 26th, 1998.

27. States have the obligation to adopt −pursuant to a law formally passed by Parliament− rules that determine in a previous, clear, and precise way the evaluation and selection procedures and criteria that will be necessary to obtain a concession or to become an audiovisual communications service provider. Concessions for the use of radio-electric frequencies should be assigned for a predetermined period of time to those who offer to provide the best communication service.

This principle lies on the need to establish an international standard on accessibility to the possession of licenses or concessions meant to observe and contemplate mechanisms that are compatible with the recommendations from the Declarations of the Rappourteurs for Freedom of Expression, as well as from the premises from the Declaration of Principles of the CIDH October 2000, and respectful of the principles that derive from the criteria of universality of subjects and media, fixed by the clauses 1 and 3, article 13 of the American Convention.

While Principle 12 of the Declaration of the CIDH points out that 'radio and television assignments must consider democratic criteria that guarantees an equality of opportunities in the access for every individual', mechanisms should be cautious as to prevent this right, postulated in the article 13 from being merely declarative.

Thus, the 2001 Report understood that draw assignment mechanisms where not compatible with the standards required by the Inter-American Human Rights System.

Moreover, it is a must to understand that the conditions under which these assignment processes start and become public, require an equality of previous conditions as to avoid any possibility of manipulation.

As an example to this, it is necessary that, in the case of existing score tables or any other criteria, these are previously shown, as well as a list of the members of the panel of judges in conditions to participate in the resolution of biddings.

In terms of comparative examples, there can be verified among the following examples:

In Canada, CRTC can not assign, revoke or suspend licenses or establish the fulfillment of its own objectives without a public audience (article 18 Broadcasting Act). The only exception to this is when it is not required for reasons of public interest, in which case the situation must be properly justified.

Audiences take place in the location indicated by the president of the CRTC, and it is necessary to record and report of what happened and had been decided. Public notice regarding the realization of these audiences should be provided either for extension, renewal or modification of the licenses, except for the ones given to temporary networks. The notification must be published in the Canada Gazzette (Official Journal) and in one or more general circulation newspapers in the area in question (Article 19 Broadcasting Act).

According to the article 20 of the Broadcasting Act, the CRTC can establish rules regarding the procedure for the request, amendment or renewal of licenses, as well as to get the audience procedure to be respected, as well as their relation with business of the sector and their behavior.

It is pointed out in the article 22, that it is indispensable to count with equipment that is certified and authorized by the authorities in the conditions foreseen by the laws of radio communications, in order to obtain renewals, amendments or licenses.

The article 24 establishes that no licenses can be suspended or revoked without the consent of its holder or, in case of appeals to the measure, without the realization of a public audience in which it becomes demonstrated that the holder of the license has infringed or violated the conditions or the substantive orders, or the regulations dictated in conformity with the law. This can also occur when, in two years previous to the publication of the realization of the public audience, the license has been in power or subjected to the direction of a holder not designated as owner of the license by the authority

> In Spain this regulation is foreseen by minor legal regulations such as the Agreement of Secretaries of July 29th[102]. Among the criteria to take into account when assigning the licenses, the Agreement establishes:
>
> (…) the submitted proposals and their suitability to satisfy the criteria established in the section 1 of the article 9 of the Law 10/1988, 3rd of May, on Private Television, will be contemplated as a whole, being the most valued the ones which prove to best meet the public interest, prioritizing guarantees offered by the applicants regarding the safeguard of plurality of ideas and opinions, as well as the necessity of diversification of the informative agents and the objective of avoiding abuse from dominant positions as well as restrictive practices of free competition.

It is also necessary to set a standard indicating that the terms of assignment and renewal of the licenses are not undetermined, but that they are subjected to specific deadlines and that its allocation and renewal must be subject to public scrutiny, specially on the basis of aspects regarding the need for pluralism, opportunity in the migration to digital and recognizing the condition of radio-electric frequencies as being finite goods of world heritage not appropriable by particulars,. Following, some compared examples to this:

In Spain the law 10/1988 modified by the law 10/2005 establishes the grant for ten years renewable without contest, for equal periods, attending to criteria such as guarantees of free and pluralist expression as well as to technical and economic viability.

In the United States, in agreement with CFR 73 section 1020, the initial concessions of the licenses should be delivered on a regular basis until a specific day, depending on the state or territory in which the station is located. Were it to be delivered after that date, it should be pushed until the next deadline foreseen in the section. Both types of licenses, radio and TV, should on a regular basis be renewed for eight years. However, if the FCC understands that for the sake of the public interest, its convenience and needs should be served, it can deliver both, a license or a renovation for a shorter period of time, and the subsequent for a period of time of eight years.

Therefore, licenses are granted for eight years, being eligible to be renewed more than once for equal periods of time on the basis that the regulatory body can modify the deadlines of licenses and permissions were it to consider that they meet the public interest, convenience or needs, or if this fulfills in a more appropriate way both, the law and agreements.

In Canada, licenses are granted for at least seven years if they are considered appropriate for radio broadcasting policies foreseen in the law, being renewable for periods

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[102] Published in the Official Bulletin, July 30, 2005.

of seven years. The regulatory body can modify the conditions upon request of the parties, or by the court's initiative as long as five years had passed since its assignation or renewal.

In Japan, concessions are granted for 5 years being eligible for renewal for an equal period of time; in Colombia for ten years; In France, ten years extendable up to two times.

In Argentina, according to the law 22.285, before its amendment, licenses were granted for a period of 15 years from the initiation of regular broadcasts. In the case of radio stations located in frontier or promoted areas, the Executive National Power was able to assign the licenses for a period of 20 years. After the expiration date they could be prorogated for another 10 years only once and at the request of the holders. This term is set at 10 years in the new law and is eligible for extension for another 10 years by the law 26522.

In the case of Brazil, it is established in the Constitution that “the terms of concessions or permissions will be granted for 10 years for radio and 15 for television stations”. In this same way, the law 41117, article 33 explains that these can be renewed for consecutive and equal terms if the concessionaires have not only complied with legal and contractual obligations, maintained the same technical, financial and moral suitability and attended the public interest, but also with educational, cultural and moral purposes (article 67).

In the law 18.168 of the Chilean legislation, the terms of concessions for radio broadcasting last 25 years from the day in which the respective supreme decree gets published in the Official Journal, for radio broadcasting concessions, in regards to which the concessionaire will have priority for its renewal. As for free reception TV broadcasting concessions (law 18.838), these will only be allocated to legal entities with validity no shorter than the concession term. Concessions will last for 25 years (article 15)

In Paraguay, concessions, licenses and authorizations will have a maximum term of 10 years for broadcasting services and are eligible to be renewed only once and for an equal period of time in accordance to the terms established in the license, remaining exempted those licenses which count more than ten years from its assignation, which can be renewed more than once, only if they adequate to the National Attribution Plan of Frequencies as well as to the other CONATEL current regulations, for a term no longer than a year.

In Uruguay, the regulation does not establish terms for licenses of radio broadcasting.

28. The general procedure for granting concessions to the community and commercial sectors should be a transparent, open public call for tender, and should include non-binding participation mechanisms such as public hearings. States may establish registration requirements for the provision of audiovisual services that do not use limited resources such as radio-electric frequencies, or that do not reach the audience directly.

As mentioned before, the Principle 12 of the Declaration of Principles on Freedom of Expression of the OAS provides that "The concession of radio and television broadcast frequencies should take into account democratic criteria that provide equal opportunity of access for all individuals."[103]. In order to ensure the fulfillment of this guarantee, it must be adopted as a general procedure the mechanism of an open, public and transparent bidding process, differentiating, community broadcasters from commercial ones, as a way to contemplate the differences between these two radio broadcasting models.

This is also expressed in Principle 13 of the Declaration of the IACHR, October 2000:

> The exercise of power and the use of public funds by the state, the granting of customs duty privileges, the arbitrary and discriminatory placement of official advertising and government loans, the concession of radio and television broadcast frequencies, among others, with the intent to put pressure on and punish or reward and provide privileges to social communicators and communications media because of the opinions they express threaten freedom of expression, and must be explicitly prohibited by law. The means of communication have the right to carry out their role in an independent manner. Direct or indirect pressures exerted upon journalists or other social communicators to stifle the dissemination of information are incompatible with freedom of expression.

It is therefore necessary to count with regulating authorities that guarantee in a sufficient way the development of the directives at a national level.

Even though economic aspects, such as the sustainability of the radio station with an economic financial plan may be included among the established minimum requirements, these should not be unreasonable or excessive and they should never be the only or main selection criteria.

Despite eliminating State discretion, the economic bid for the access of frequencies is an unfair and antidemocratic procedure. In Peru, that amount represents the 40% of the score in the allocation of frequencies, in the case of biddings. In both cases the encouraged ones are the wealthiest or the ones that are closest to powerful groups that support them economically.

In a report about the situation of freedom of expression in Guatemala, the former Rapporteur for Freedom of Expression of the IACHR, Dr. Santiago Cantón, mentioned as one of the main concerns that the government "keeps on granting concessions basing merely on economic criteria that result in denial of access to minor sectors of the Guatemalan society such as natives, youth and women. In this way, the granting or renewal of licenses should be subjected to a clear, fair and objective procedure taking into

[103] Inter-American Commission on Human Rights, Declaration of Principles on Freedom of Expression, October 2000.

account the importance that communication media has for citizens to participate in an instructed fashion in the democratic process". The same was applied for the Paraguay Report in 2001.

Conditions, requirements and criteria taken into account for the evaluation and selection of the proposals must be established in a clear and transparent way before the selection procedure. Both, administrative and economic requirements, as well as technical characteristics demanded to these broadcasting stations will be those strictly necessary, as to guarantee their proper operation and the appropriate exercise of their rights.

In regards to participation and the needed transparency, the procedure of public hearings for the renewal of licenses has been adopted by Canada, where the CRTC cannot issue, revoke or suspend them or establish the fulfillment of its objectives without a public hearing (art. 18 Broadcasting Act, 1991). The only exception to this is when it is not required for reasons of public interest, in which case the situation must be properly justified.

In Uruguay, the Communications Regulatory Authority (URSEC), created under the Organic Law, foresees in its 86th article section v) "to call for public hearing when considered necessary, with prior notice to all interested parties, in the cases of ex officio initiation procedures or at the request of a party, related with the non-fulfillment of the respective regulatory framework." This also occurs with the Community Radio Broadcasting Act approved in November 2007.

This regime is also maintained by the FCC in the United States. This organism establishes the mechanisms and the reasonableness of protecting information at the request of the parties, balancing public and private interest – as established in GC Docket Nº 96-55 FC, Section II.B.21, y FCC Rules, Section 457 – when carrying out the hearings. It is stated in the North American regime that the LFT (agency of the FCC in charge of these procedures) will carry out hearings in six cities from all around the country.

The purpose of these hearings is to get acquainted with the opinions of the citizens, the civic organizations and the industry of radio and television broadcasting, as well as localism. In spite of the fact that its format may change from one hearing to the next, the LFT trusts that every hearing gives the citizens the opportunity to participate in an open microphone session. The state agency announces the details regarding every hearing and publishes this information on its web site before its fixed date, both to get the public interested in it to participate, as well as to invite the local service´s radio and television audience to express their points of view.

In Argentina, regular hearings have been incorporated, by a recent regulation, with the law 25622.

29. States may establish reasonable economic requirements to ensure the broadcasting station's sustainability using legal funds. These conditions may only be applied in a reasonable and non-discriminatory manner in the form of conditions for establishing the admissibility of proposals; they may not influence the evaluation of a proposal for the purpose of granting a concession. The administrative, economic, and technical requirements to be met by organized communities and non-profit entities interested in establishing community media should only be those strictly necessary to guarantee their proper operation and the appropriate exercise of their rights.

Moreover and deriving from the premises, is considered necessary the establishment of a regulatory standard that contemplates that the economic requirements to participate in a bid or in any other transparent mechanism for the granting of licenses or concessions can not exceed the conditions of admissibility and legal sustainability of the activity to be fulfilled.

The information exposed in relation to the existence of mechanisms that mean an indirect way of restriction to the access of frequencies, may be present in the form of : impositions, either by legal or administrative practices of minimum resources, inaccessible for non-profit entities or minor enterprises, bidding mechanisms for obtaining licenses, unreasonable technical standards, economic or personal warranties not replaceable by others of a different nature, inappropriate formal requirements or the demand to count with the participation of professional staff in equality of conditions than in bigger urban centers, not taking into account the rise in the costs of the procedures, and in many cases ending up turning into prohibitive situations.

In has also been verified to this respect the evaluation of documents and forms without taking into account economic or formal circumstances of the eventual license holders or concessionaires.

As already mentioned, in the 2007Joint Declaration, the Rapporteurs understood that:

> Community broadcasting should be explicitly recognized in law as a distinct form of broadcasting, should benefit from fair and simple licensing procedures, should not have to meet stringent technological or other license criteria, should benefit from concessionary license fees and should have access to advertising.

30. The law should establish what conditions are incompatible with, and disqualify from, becoming the owner of audiovisual communication services, including holding an elected position at national, provincial, or municipal government level, or being a public officer employed in the executive, legislative, or judicial branch, or a member of the Armed and Security Forces, or having actively participated in acts involving human rights violations.

This principle lies on the need to create spaces for the media as to guarantee their independence and freedom from interference, as well as to prevent the state spaces from being used in benefit of audiovisual communication owners closely related to public officers.

Taking into account the importance of the broadcasting media on fulfilling the exercise of freedom of expression in democratic states, and as an essential part of a mandate meant to enforce the right to information for all citizens, it is necessary that the legislation guarantees basic rules to keep those who participate in the public debate, such as public officers employed in the different branches of the State, apart from those in charge of investigating and communicating news, opinions and cultural manifestations.

This duty, which specifically belongs to the media, includes monitoring the different state agencies and their employees as a way to promote well-informed societies and the promotion of public debate. Media depending in either a direct or indirect way on members from the government could hardly fulfill this role.

This point can be related to the opinions of the IACHR regarding the conditions of ineligibility for presidents of the democratic States, as established in Comparative Law. This rule excludes members of religious orders, branches or services of the State, members of the Armed and Security Forces and contractors to the State.[104]

While States set conditions on the access to elective posts, specially for the exercise of the Nation's Presidency, the characterization of the media as actors who are independent from all branches of the State, with a decisive role on both, monitoring these branches and strengthening the democratic system, applying these restrictions in the same way but in opposite directions. Otherwise, there would be a conflict of interests that would weaken not only institutionalism but also the exercise of freedom of expression.

The Parliament of the EU has also expressed its concern in regards to the control of the media by government members or other political figures:

> (…)Considers that pluralism in the EU is threatened by the control of the media by political bodies or persons and by certain commercial organisations, such as advertising agencies
>
> (…)the national, regional or local government should not abuse its position by influencing the media and that, furthermore, even stricter safeguards should be provided for where a member of the government has specific interests in the media.[105]

[104] Inter-American Commission on Human Rights, Report 30/93 – Case 10.804, October 12, 1993.
[105] European Parliament resolution on the risks of violation, in the EU and especially in Italy, of freedom of expression and information (Article 11(2) of the Charter of Fundamental Rights) (2003/2237(INI)). Op. cit.

On a similar basis it can also be justified the exclusion of those who had been involved in the infringement of human rights, as owners of audiovisual communication services. This response falls within the States obligations of repair and non repetition in order to prevent the victim's and their family's dignity from being injured again.

Juan Méndez, former President of the Inter-American Commission on Human Rights, established that the purge of those related to events from the past is an autonomous obligation which belongs to the State. According to Méndez, "the obligation to remove" these people from the State institutions "is a basic requirement for the validity and respect of human rights in the post-transition regime, is the right of the society to count with institutions which are, not only democratic but also free of human rights infringers".[106]

The regulation of audiovisual communication services must contemplate this kind of exclusions, especially in countries where human rights were seriously infringed in the past.

[106] Méndez, Juan, "Derecho a la Verdad frente a las graves violaciones a los derechos humanos" (The right for truth facing the grave violations to the human rights), in "La aplicaciones de los tratados internacionales sobre derechos humanos ante los tribunales locales" (The application of the international treaties on human rights before the local courts), Abregú, M. y Courtis, C., Del Puerto Editorial, Buenos Aires, 1997.

31. In view of the mechanisms used for distributing frequencies to different countries and the importance of these services for a nation's identity and sovereignty, States should enact regulations that give preference to their citizens as regards the provision of audiovisual services that require finite or exhaustible resources.

While public services keep losing ground gradually despite offering resistance, the evolution of private television maintains a continuous expansion characterized by internationalization and entrepreneur concentration. In Europe, the opening of the exploitation to the private sector initiated or strengthened a new space for entrepreneur diversification strategies and a reinforcement of the search for international markets. Also, these initiatives counted with strong diplomatic and financial support in many countries around the world.[107]

This has determined that in many countries the control regarding nationality of investments in radio broadcasting has not only meant the control of the participants in the activity during selection process and eventual transferences of share packages, but also in the reinforcement of the concept of competition.

But these rules concerning foreign property were not always understood as a reason to restrict services, but also a way to prevent certain foreign contributions from hampering the activity of independent media, as a result of the disproportion that would result within the market with their activity.

Moreover, when this economic disproportion is verified, it goes in line with a notorious asymmetry regarding professional experience and the quality of programs, and the right to broadcast particularly interesting events for their ratings and their influence capability in the advertising market.

According to the Regulatory Guidelines II[108] of UNESCO "Several countries prohibit foreign ownership, but permit a degree of foreign investment". Following, some comparative examples:

The United States are considered to be among the most restrictive countries concerning foreign ownership. According to their regulation, licenses or transferences are denied to those from foreign States, to citizens or firms registered in foreign countries, companies whose corporate will has more than 20% of foreign vote capability or social capital with a foreign ownership of over 25%.

Australia currently allows international media companies to own only up to 15% of a television network. Following a Cabinet decision in 1955, foreign ownership of Indian media is not permitted.

In Canada, according to the CRTC Directive on the Ineligibility of Non-Canadians: "no broadcasting licence may be issued, and no amendments or renewals thereof may be granted, to an applicant that is a non-Canadian." A "non-Canadian" is defined as any broadcaster whose foreign ownership exceeds 33.3 per cent of voting shares at the

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[107] Mateo Pérez, Rosario and Bergés Saura, Lausa, "Los retos de las televisiones públicas: financiación, servicio público y libre mercado" (The challenges of public TV: funding, public service and free market). Comunicación Social Ediciones y Publicaciones (Social Communication Editions and Publications); Seville 2009.

[108] Salomon, Eve, *Guidelines for Broadcasting Regulation*, Second edition published by Commonwealth Broadcasting Association, 2008. Available at <http://portal.unesco.org/ci/en/ev.php-URL_ID=29290&URL_DO=DO_TOPIC&URL_SECTION=201.html>

holding-company level. Foreign ownership of the company responsible for programming (the broadcast license holder) is restricted to 20 per cent.[109]

In Colombia, foreign investments are limited to 40% with reciprocity requirements.

[109] Summary of the Canadian Broadcasting Act: Media Ownership Provisions. Available at <http://www.media-awareness.ca/english/resources/legislation/canadian_law/federal/broadcasting_act/broad_act_owner.cfm>

32. Different calls for tender may be used for different radio broadcasting sectors. These may establish specific procedures and criteria and must take into consideration the nature and peculiarities of community media and other non-profit media in order to ensure an effective and non-discriminatory participation of this sector. The law should clearly and previously establish the criteria for evaluating and selecting candidates in order to ensure equal opportunities, diversity, and pluralism in terms of access to media, taking into consideration the fact that States should promote the responsible exercise of the media's social function through transparent and non-discriminatory rules.

This principle is based on the need to ensure the full recognition of the right to provide radio broadcasting services to the various groups and social actors, especially to community and non-profit media, whose peculiarities regarding the way they operate and their resources should be taken into account by the legislations, in order to guarantee equal opportunities in accessing licenses.

The lack of consideration for the sector requirements, as well as the absence of precise evaluations concerning the social role these broadcasters play, results in the limitation of community broadcasters activities in many countries of the region and, as a consequence, it reflects in non-transparent practices and bureaucratic barriers when granting the permissions for non commercial use of the spectrum. This kind of obstacles work as a means of exclusion, hampering the development of a media system which is coherent with the need of information, education and culture circulation as well as community entertainment.

In order to provide equal opportunities in the access to communication media, the rules of the game established by the States should be clear as to guarantee an equal access to the licenses for all three radios broadcasting sectors. In this regard, it is important to guarantee that the procedures for the granting of licenses are transparent and based on democratic criteria, and that conditions of use of the licenses are reasonable, that is to say non-discriminatory and in coherence with the needs of each provider.

The distinction between the bidding and the procedures derived from specific criteria from each radio broadcasting sector has been pointed out not only as a priority to guarantee an equal access to the media, but also as an essential condition to ensure the plurality of voices. The Declaration of Principles on Freedom of Expression of the IACHR (2000) offers an approach to this respect:

> (…)The concession of radio and television broadcast frequencies should take into account democratic criteria that provide equal opportunity of access for all individuals.

The importance to this respect was also stressed in the 2007 Joint Declaration:

> Different types of broadcasters – commercial, public service and community – should be able to operate on, and have equitable access to, all available distribution platforms (...) Community broadcasting should be explicitly recognized in law as a distinct form of broadcasting, should benefit from fair and simple licensing procedures, should not have to meet stringent technological or other license criteria, should benefit from concessionary license fees and should have access to advertising.

In turn, the OAS Special Rapporteur for Freedom of Expression has drawn attention in several occasions to the need of establishing democratic criteria to guarantee the full incorporation of all radio broadcasting sectors, as indicated in its 2002 Annual Report, where it states:

> 43. Given the potential importance of these community channels for freedom of expression, the establishment of discriminatory legal frameworks that hinder the allocation of frequencies to community radio stations is unacceptable.

This concern on the development of mechanisms in order to provide equal opportunity in accessing licenses for all sectors in radio broadcasting was recapitulated in the 2008 Annual Report:

> (…) It is necessary, among other things, for the States to recognize and facilitate Access under equal conditions, for the commercial, social and public uses of radio or television, not only the electromagnetic spectrum, but also the new digital dividend. It is indispensable to remove all disproportionate or discriminatory restrictions that prevent radio and television operators of all kinds to fully accomplish the commercial, social or public mission they undertake. It is fundamental that the allocation of frequencies processes be open, public and transparent, and that they be submitted to clear, pre-established rules and requirements that are strictly necessary, fair and equitable. It is necessary for this process to guarantee that disproportionate or unequal barriers to access to the media are not imposed, and that the arbitrary or discriminatory allocation, withdrawal, or non-renewal of frequencies or licenses is prevented.

In this same way, the already mentioned *"*Declaration of the Committee of Ministers on the role of community media in promoting social cohesion and intercultural dialogue", adopted by the Committee of Ministers on 11 February 2009, points out:

> (…) the necessity to examine the question of how to adapt legal frameworks which would enable the recognition and the development of community media and the proper performance of their social duties.

It is relevant to introduce the African Commission criteria for its 2002 Declaration stating: V - Private radio broadcasting

The broadcast regulatory system shall encourage private and community broadcasting in accordance with the following principles:

· there shall be equitable allocation of frequencies between private broadcasting uses, both commercial and community;

· an independent regulatory body shall be responsible for issuing broadcasting licenses and for ensuring observance of license conditions;

· licensing processes shall be fair and transparent, and shall seek to promote diversity in broadcasting; and

· community broadcasting shall be promoted given its potential to broaden access by poor and rural communities to the airwaves.

Spectrum reservation and the design and implementation of appropriate procedures to guarantee fair access to the spectrum by all radio broadcasting sectors represent essential tools to fulfill the postulates of this principle. It is a must, in the case of community media, that the requirements necessary to postulate and be selected as providers, to be developed through public consultation procedures in order to get the civil society involved in the elaboration of clear and transparent regulations that take into account the characteristics of these radio broadcasters.

Besides being based on reasonable requirements, clearly specified in regulations before the notification for the reception of proposals, the granting of licenses for non-profit media should be carried out in a limited period of time determined by the same regulation, in order to avoid unjustified delays which may result in a discriminatory treatment.

In this regard, the Rapporteur for Freedom of Expression of the OAS, in its 2008 Annual Report has stated that:

> (…) given the important role these community channels can play in the exercise of freedom of expression, it is necessary to ensure the establishment of non-discriminatory legal frameworks free of delays that might hinder the allocation of frequencies for broadcasters.

It would be desirable for the evaluation process to foresee participation mechanisms as a way of getting other civic actors to input their opinions, support or contests towards the proposals. The decision taken by the authority in charge of granting the license must be justified and accounted for, both the evaluation of the proposals but also the reasons for incorporating or rejecting the contributions made by other actors along this process. These procedures are in line with statements by the IACHR regarding transparency and equality of opportunities in accessing to licenses:

> In the bidding for licenses to operate on the radio electric spectrum, the principle of equality of opportunity dictates that States must strive to use open and transparent procedures, with clear, objective and reasonable criteria to avoid any influence dictated by discriminatory political considerations related to the media outlet's editorial line.[110]

[110] Annual Report of the Inter-American Commission on Human Rights, 2007, Chapter IV, Venezuela.

33. Applications submitted by community or non-profit media should be evaluated considering the following criteria: the relevance of the proposal from a communicational, social, and cultural point of view; the community's participation in the project; previous community work carried out by the interested organization; and the broadcasting station's contribution to diversity within the area of coverage.

Defense of pluralism and diversity of voices, as shown in previous principles, also constitutes the basis of this proposition. The allocation of public, open and transparent bidding for the granting of frequencies should incorporate the evaluation of non-commercial media proposals. In order to consider this kind of initiatives, it is important to take into account some aspects such as their relation with the community in which the broadcasting activity will take place, as well as the ability to give voice to ignored sectors of society, for whose expressions, broadcasted through public or commercial media, seems insufficient.

While community media is meant to expand the possibilities of expression, especially for ignored sectors of society, contributions as to reach that goal should be guiding criteria for the assessment of proposals and the granting of licenses.

In this regard, it would be suitable to stress the diagnosis expressed by the IACHR Rapporteur for the Freedom of Expression, chapter IV of the 2002 Annual Report on "Freedom of Expression and Poverty":

> The freedom of individuals to debate openly and criticize policies and institutions guards against abuses of human rights. Openness of the media not only advances civil and political liberties–it often contributes to economic, social, and cultural rights. In some instances, the use of the mass media has helped drive public awareness and bring pressure to bear for the adoption of measures for improving the quality of life of the population's most vulnerable or marginalized sectors. (…) However, the traditional mass media are not always accessible for disseminating the needs and claims of society's most impoverished or vulnerable sectors. Thus, community media outlets have for some time been insisting that strategies and programs that address their needs be included on national agendas.[111]

From a similar perspective, the resolution on community media ruled upon by the European Parliament on September 25th, 2008, asked the States Members:

> (…) to make television and radio frequency spectrum available, both analogue and digital, bearing in mind that the service provided by community media is not to be assessed in terms of opportunity cost or justification of the cost of spectrum allocation but rather in the social value it represents.

The possible contributions, derived from the submitted proposals by non-profit radio broadcasters in terms of pluralism and diversity of voices within the station coverage area, can be analyzed from specific goals:

- facilitate the expression of groups traditionally excluded from the media

[111] Inter-American Commission on Human Rights, Annual Report, 2007, Chapter IV, Venezuela.

- strengthening the civic participation in the democratic debate

- accessing new sources of information and knowledge

- including the handicapped

- promotion of cultural and linguistic diversity

- promotion of gender equality and of the children and youth rights

- promotion of regional economies and sustainable development

- creation of new job sources and training

Bids and granting license procedures should not take into account the investments done for the presentation of the projects. The technical or administrative requirements should be reasonable and adequate in their evaluation, and must be created as in order to prevent community broadcasters from having to contract specialists, as this could result in economic barriers to the access of the frequencies.

Moreover, the evaluation of the proposals should also take into account technical and financial viability as well as transparency concerning the origin of said resources.

34. Applications submitted by commercial media should be evaluated considering the following criteria: applications submitted by individuals or legal entities that do not currently own other radio broadcasting or audiovisual communication services; applications that offer programs or services not being provided by other media; proposals that seek to strengthen local cultural production by promoting and broadcasting independent local and national productions; applications that consider providing free slots to social organizations; proposals that will provide the largest number of direct and dignified employment opportunities.

This principle aims at strengthening the criteria used in regard to the evaluation of proposals, in order to reach an agreement between the goals of commercial radio broadcasters and the general interest of the communities in which they operate. In order to do this, it is necessary to consider that the granting of licenses for the use of the spectrum for profit should be oriented to enhance freedom of competition, and to avoid concentration and abuse by dominant positions within the media market, as mentioned in previous principles.

Procedure regulations concerning the granting of licenses should conceive the media system as a whole, bearing in mind the possibility of complementarities between non-commercial radio broadcasters, those related to the public service and for profit oriented ones. These last can be obliged to pay compensation for the use of a scarce public good as the radio-electric spectrum. Despite this, neither the commercial objective, nor the obtainment of reasonable profits should be unviable, in coherence with the business model proposed.

In the first place, the evaluation of commercial media projects should contemplate the offering of contents that enhance diversity and prevent the overlapping of speeches and aesthetics with relation to providers already operating in the same coverage area. Another aspect to bear in mind is the adaptation of the proposals to the community interests, uses and needs. Ground percentages as well as national and local production quotas, either owned or independent, are fundamental ways to accomplish this objective, besides guaranteeing the creation of job positions and the training of human resources within the coverage area.

In the same way as with non-profit media, the process for the granting of licenses should be based on clean and transparent regulations meant to contemplate mechanisms of participation for the civil society as well as to establish reasonable and limited deadlines for the bidding allocation. The State will be able to set taxes not only on the presentation of the projects but also on the concession of use of the spectrum, after the allocation of frequencies, after the frequencies were allocated, bearing in mind that these should neither act as an obstacle to the technologic development nor to the fulfillment of commercial objectives, and that they will be enforceable under a legal regime in order to prevent discriminatory treatment.

In this same way, it seems necessary to highlight that economic criteria can not be, by its own definition, an excluding variable for the granting of licenses for the use of the spectrum, not only because it leaves aside a fundamental part of the evaluation based on the contributions to diversity and pluralism, but also because it means a violation to the right of freedom of expression, which demands guarantees of equal opportunities in the access to the frequencies. Despite the fact that some legislations may consider the economic criteria to be an objective aspect that puts a limit to the State discretion, the selection processes based in this factor may result in the exclusion of vast sectors of society and in discrimination

regarding their access to the media. The IACHR, in their 2003 Report on the situation of human rights in Guatemala, stated:

> biddings that would only contemplate economic criteria or assign concessions without giving equal opportunities for all sectors, are not compatible with democracy and the right to the freedom of expressions and information guaranteed in the American Convention on Human Rights and the Declaration of Principles on Freedom of Expression.[112]

Another procedure contemplated by some legislations, and that is incompatible with human rights international instruments are the mechanisms based on draws or on priority orders, that as well as with the economic criteria, release the State from its duty as the guarantor of all the citizens freedom of expression, and from the obligation to consider the social contribution of the proposals for the use of the spectrum.

Regulation of the bidding process will bring about additional criteria such as the importance of counting with national providers, the restriction of access to those working in any of the three branches of the government, the Armed or Security Forces as well as to those directly involved in violations to the human rights. The same procedure is to be applied to rules meant to prevent concentration of radio broadcasting media property and graphic media cross-ownership.

[112] IACHR, *Justicia e inclusión social: los desafíos de la democracia en Guatemala (Justice and social inclusion, the challenges to democracy in Guatemala)*, Chapter VII: "La situación de la libertad de expresión en Guatemala" (The situation of Freedom of Expression in Guatemala), December 29th ,2003, paragraph 414.

35. The terms of the concessions for operating frequencies or other finite or exhaustible resources must be clearly defined by law and subject to reasonable conditions that will allow developing the projects undertaken, recovering the investments in reasonable proportion to the activities that are carried out, and achieving technological growth. When determining the terms of a concession, it is inadmissible to discriminate based on the legal status of non-government service providers.

By virtue of its role administrating the radio electric spectrum, the State should have among its powers the establishment of a duration term for the concessions. Moreover, the expiry of licenses in a limited period of time which is determined by the legislation is a way to ensure the exercise of freedom of expression, as it guarantees the renewal of the stations, in particular those located in areas where the spectrum space is over-crowded.

However, both commercial and non-commercial radio broadcasters require certainty and predictability as for the duration and conditions in the usage of permissions. In this respect, the democratization of the access to the spectrum is a necessary but insufficient condition to ensure the full exercise of freedom of expression with support from the audiovisual media, as stated in previous principles. Therefore, it becomes necessary to incorporate a ruling framework that prevents arbitrary limitations to the activity of radio broadcasters and that enables the fulfillment of the objectives fixed for each project when allocating an authorization.

Establishing excessively short terms for the use of the licenses are among the main limitations that the States should avoid, either within the legislation, or through restrictive administrative practices, as it would prevent the proposals from being correctly carried out. The terms of duration of the licenses should be reasonable and set by law, before the permission is granted, and should avoid any kind of discrimination based on the provider legal nature.

In the case of non-profit radio broadcasters, arbitrary restrictions on the terms of use of the spectrum may prevent them from fulfilling communicational goals, such as giving voice to those community sectors which are excluded from traditional media as well as consolidating their presence in the public debate. As for commercial radio broadcasters, it is necessary that the established durations enable an appropriate return of investment at reasonable fees.

Restrictions on the way in which the licenses are used are also considered to be discriminatory, especially when it comes to restrictions regarding content, power, territorial coverage or access to financial sources to certain radio broadcasters.

Therefore, regulations must limit themselves to the establishment of the terms and conditions of use of the licenses that guarantee the operation of each one of the services and media, according to their own goals, as well as the fulfillment of the projects submitted for the allocation of a license.

There are some cases, as with concessions in Uruguay, where they lack predefined terms in their laws, or others of greater complexity, like in Mexico, where prior to the amendment of the Federal Law on radio and TV broadcasting a term of 20 years was in place, with right to amend by will of the concessionaire.

Regarding the article 16 of the law that rules this subject, the Supreme Court resolved that the disposition allowing the signing of concessions, except in the case of

resignation, was illegal, stating that the exclusion of this case in the allocation procedure law was unconstitutional. Because of that, as a concession nears its term, the same must be renewed through a new procedure.

In the same way, it is important that licenses terms are not set in a discriminatory fashion, allowing for better funded media to have longer terms, and community media with shorter terms, as this would create instability situations that processes or tendencies of concentration could take advantage of.

36. The terms of the concessions for operating frequencies or other finite or exhaustible resources must be clearly defined by law and subject to reasonable conditions that will allow developing the projects undertaken, recovering the investments in reasonable proportion to the activities that are carried out, and achieving technological growth. When determining the terms of a concession, it is inadmissible to discriminate based on the legal status of non-government service providers.

The Inter-American system has established precise definitions regarding this principle. Along with the already reckoned necessity to establish terms and conditions to the use of licenses, it is also necessary to establish mechanisms that prevent the automatic renewal or any other kind of mechanism oriented to perpetuate the use of a scarce good such as the spectrum, by the same actors or social groups to the detriment of other groups, either commercial or non-commercial ones.

The regulation can contemplate or not the renewal of licenses. In the latter case, the extension of the permission, whether for the same or for a different period of time, should be subject to democratic and non-discriminatory mechanisms, carried out within the framework of the corresponding procedure. These mechanisms should not only foresee the participation of the civil society in the evaluation of the radio broadcaster performance, but also take into account their opinions when approving or rejecting a renewal.

In this respect, the IACHR, in the chapter IX of its 2001 Report on the situation of human rights in Guatemala, pointed out that:

> (…)The procedures for the granting and renewal of broadcast licenses should be clear, fair and objective, and the importance of the media in fostering informed participation in democratic processes should be given due consideration

In this same way and within the framework of its 128º ordinary period of sessions celebrated between the 16th and the 27th of July, 2007, the Commissioners of the IACHR stated, when evaluating the situation of fundamental rights in Mexico:

> (…) highlighted the effect of the decision by the Supreme Court of Justice of Mexico, that declared unconstitutional the articles of the Radio and Television Act that granted concessions for 20 year periods with automatic renewal, and without prior bidding[113].

Nevertheless, the IACHR pointed out that the issues related to the editorial line of the media can't prevail within the criteria used at the time of evaluating the renewal of a license. As expressed in relation to the situation of freedom of expression in Venezuela, 25th May 2007:

> The Commission recognizes the State's prerogative to administer the wave bands, to previously establish the duration of concessions and to

[113] Inter-American Commission on Human Rights (IACHR), Press Release Nº 40/07, "IACHR CONCLUDES ITS 128th PERIOD OF SESSIONS", August 1st, 2007.

> decide on their renewal at the end of those periods. That competence, however, must be exercised taking into account the State's international obligations, which include guaranteeing the right to express ideas and thoughts of any nature through diverse media without imposing direct or indirect restrictions on right the freedom of expression as described in Article 13 of the American Convention on Human Rights. For these reasons, the IACHR believes that in competitions for or in the awarding of licenses for the use of wave bands, in accordance with the principle of equality of opportunity, states must promote open, independent and transparent procedures with clear, objective and reasonable criteria that avoid any political discrimination on the basis of the editorial line of a media outlet.

On the other hand, regulations concerning mechanisms for the renewal of licenses should establish reasonable terms as to be able to evaluate the results obtained when compared to the original project, and should consider the possibility of an term extension of the allocation, just as expressed in previous principles in regards to allocation procedures for authorization for use of the spectrum. Furthermore, both, existing license holders near to the expiration date as well as those with the intention to submit a project for the use of this space, should be able to promote the procedure of a new public bid ruled by objective criteria and with the participation of the civil society.

Public hearing mechanisms, within the reference community, are crucial instances as they contribute to the State decision making process, as it enables the registration of the feelings of the citizens towards the activity of the media in question, as well as the comprehension of the holders position in respects to its previous activity and its perspective for a possible forthcoming period. In this way, the process for the renewal of licenses should be opened at all times for the submission of documents, statements and any other material considered necessary by the media.

The States authorities should consider the contributions provided by the existing projects and the degree of accomplishment regarding the objectives presented at the time of the allocation, as well as the license holder new proposals for the period to commence in the case of a renewal. These elements should be evaluated with the goal of enhancing pluralism and diversity of voices, the main objective for the administration of the spectrum, as already mentioned. This aspect gains relevance in the coverage areas where the spectrum is over-crowded and the expiration of the license would mean the possibility for new actors to enter the media scene, in accordance to the principle of equality of opportunities regarding the access to radio broadcasting.

Similarly, diversification of ownership and the advance towards an enhancement of plurality of informational sources, opinions and artistic and cultural manifestations, should be a main aspect to be taken into account at the time defining a renewal, in media systems with high levels of concentration and license holders in possession of dominant positions in the market, as viewed in many countries of the region. In this way, it seems appropriate to repeat that the decision regarding the renewal of licenses or their granting to another media has no room for discriminatory criteria based on the legal nature of the providers.

In every case, the decision adopted by the State should be supplied in writing and should allow judicial revision in accordance to the rules of due process.

37. The provision of radio broadcasting services is non-delegable, and such services should always be provided by the owner of the concession. The regulatory framework should expressly prevent the transfer, sale, or any form of assignment of the concession, whether direct or indirect. Frequency appropriation by third parties should not be allowed; the law should establish that frequencies should be exploited exclusively by the owners of their concessions.

Denying appropriation by the third parties is directly related to the fact that holders who obtained their licenses were evaluated and acknowledged as qualified to do so by the enforcement authority by means of transparent mechanisms, and thus they should hold the effective ownership for the station exploitation. Were a third party to take over the station, authorized by indirect means, it would be a carelessness action by the allocation process and to the principles promoted by the mere adoption of transparent mechanisms.

This should complemented, as usually the case in these regulations, with a strict examination for awarding the authorization for the transference of licenses, to the extent admitted by law – being several the solutions to this respect – establishing criteria such as:

In a first scenario, the law does not allow the transference of concessions (article 12 of the law 10/88 in Spain). Colombia applies this criterion for local operators [114].

In a second scenario, the law authorizes the transference of the licenses or titles that enable the station's exploitation. In this case, the requirements demanded, besides fulfilling the ones foreseen for an initial granting stage, can also include:

a) Being transferred after the activity has commenced – with or without a minimum term-. The first case includes Brazil (five years), in the second Argentina after the 1998 reform (before, 5 years), the law in Peru (two years).

b) Admit the transfer of shares either totally or partially. In the latter case, considering that most of the corporate will should not be modified.

Another issue to resolve is if prior to the administrative authorization of transferences, antitrust laws and control areas should be intervened. We believe that not only is this advisable but also necessary in order to establish additional clauses for the action in question.

Public entities licenses or authorizations should not be transferred. Moreover, comparative law does not recognize the entitlement to transfer licenses or authorizations regarding community media.

It is also convenient to establish a regulatory scenario, complementary to transfer rules, as the ones that appear in the legal regulations of the FCC § "73.3615 Ownership reports." Radio broadcasters should complete an ownership declaration every two years and upon the opportunity to request the renewal of their licenses. There is also another rule "47 C.F.R. § 1.65." which establishes the penalties in case of distortion of information and it has also been stated as a zero tolerance regime to frauds regarding the ownership of the stations.

In any case, most regulatory systems establish that the license holder or the holder of rights or registrations should request for authorization, and the authority should have a

[114] Article 48 of the 182/95 law.

deadline to issue it (in the case of Spain, 3 months) and, if authorized, a deadline to complete the transfer.

For instance, in Brazil, either the modification of social objectives, the directive chart, corporate control, or transference of the concession, permission or authorization, depends for its validity on the previous consent of the competent body within the Executive Power. In its absence, it is not necessary. With regards to those transferences that do not modify the corporate control or the social objectives will only have to be notified. This attitude could include that authorizations only occur over a certain transferred percentage.

Likewise, it is advisable to establish that either Statutory or company holding authorities' amendments should be informed to the enforcement authority. Then, deadlines should be set. Some of them, already current: Paraguay, 30 days; Chile, 5 days; 5 days for television and 10 for radios; Brazil, 60 days.

38. States should include in their respective regulatory frameworks the non-discriminatory conditions necessary to ensure that all audiovisual communication services have equal access to economic resources for the development of their activities, notwithstanding any measures that may be adopted to guarantee diversity and pluralism under conditions of equality and transparency, as this allows ensuring editorial independence and establishing economic conditions that will recognize the economic, social, and cultural human rights of those participating in the provision of the services.

The effective exercise of the right to freedom of expression through audiovisual communication media is neither confined to the acknowledgement, on an equal basis, of the three areas of radio broadcasting in order to access the licenses, nor to the reserve for the use of the spectrum. It is also necessary to guarantee the access to proper resources through an appropriate and non-discriminatory legal framework that takes into account the particularities of each group.

The limitation of financial resources to certain media operates as a way of censorship and tends to perpetuate the economic disparity that reduces the possibility for vast sectors of society to express through audiovisual means. Prohibition for non-commercial radio broadcasters to obtain resources through advertisements (as stated in some regulations in Latin America) represents a paradigmatic example of the discriminatory effects that these kinds of measures bring about.

Economic autonomy is an essential condition as it enables the media of the three sectors to fulfill their goals and contribute with what was expected from them, for the enforcement of the democratic debate, diversity and plurality of voices. Thus, no funding resources within the legal framework should be banned, a priori, for none of them. This becomes even more important in the case of non-profit and public service media, where advertisements can interfere with the accomplishment of the mission assigned to each of them.

In regards to public media, advertising can operate as a complement to official financing, provided it does not result in the conditioning of contents. However, many countries have decided to prohibit advertising in broadcasting in both radio and television channels operated by the State. This measure prevents them from entering in contradiction with international standards, as long as they receive enough funding to ensure the fulfillment of essential goals such as free cover throughout the territory and plural participation in the production and distribution of contents that satisfy educational, informative and cultural needs of society.

In the 2007 Joint Declaration on diversity in broadcasting, the Rapporteurs recalled that:

> Special measures are needed to protect and preserve public service broadcasting in the new broadcasting environment. The mandate of public service broadcasters should be clearly set out in law and include, among other things, contributing to diversity, which should go beyond offering different types of programming and include giving voice to, and serving the information needs and interests of, all sectors of society. Innovative funding mechanisms for public service broadcasting should be explored which are sufficient to enable it to deliver its public service

mandate, which are guaranteed in advance on a multi-year basis, and which are indexed against inflation.[115]

Meanwhile, the situation for non-profit private media is quite different. Towards the full acknowledgment of their rights, the access to funding from advertisement broadcasting, in equal conditions to commercial license holders, represents the basis to prevent discrimination and the endangering of economic, social and cultural rights.

In this way, regulations should not tend to restrict advertisement broadcasting, but establish effective control mechanisms over the impact that these kind of broadcasting could have on the main features regarding the character of these media.

In the first place, it is necessary to clarify that this factor should neither undermine the accomplishment of the goals proposed by the media in question, nor distort its specific social mission. Secondly, the legislation should be directed to develop adequate monitoring tools in order to account for the fulfillment of the compromise, meant to reinvest the whole of the profits raised by these means – both, by way of advertisements as well as by any other legitimate source – in the maintenance and expansion of the services being provided.

Moreover, the establishment of public subsidies for community stations, from an objective evaluation of its contributions to plurality of voices and its social role in the community of which they are part, is also an alternative way to guarantee viable economic conditions for groups other than commercial media. These funds should be administrated by independent organisms as to prevent discriminatory allocations from the government.

Venezuela counts with an economic funding for “strengthening training as well as adapting community media physical infrastructure” within which it can be included the contribution regarding equipment in commodatum for up to 20 years. In Bolivia, a public funding has been raised from the payment of invitations to tender from telecommunication enterprises.

In the case of Australian radios, the Commonwealth government funding comes from the Department of Communications, Information Technology and the Arts, and it is distributed by the Community Broadcasting Foundation Ltd (CBF). The CBF is an independent, non-profit entity created in 1984. Its main objective is to act as a funding agent for the development of community radio broadcasting (radio and television) in Australia. It receives an annual fund from the DCITA which is distributed with the objective of enhancing development, programming and infrastructure for community radio broadcasters in general including ethnic, native and support to the handicapped ones. In 2003 this fund was U$S 3,7 millions from which 68% was destined to established expenses and the remaining 32% to promote new initiatives.

Since November 1982, it exists in France the Radio Expression Support Fund (FSER), which is destined to support the creation and existence of associative radios (not directly included in the State budget). It consists in a parafiscal charge raised from advertisements incomes from radio and television

[115] UN Special Rapporteur on Freedom of Opinion And Expression, OSCE Representative on Freedom of the Media, ACHPR Special Rapporteur on Freedom of Expression, OAS Special Rapporteur on Freedom of Expression, Joint Declaration, December, 2007, Op. cit.

enterprises. These funds are directly transferred to associative radios. The financial management of the Fund is directly related to the Ministry of Culture and Communication which, in turn, depends on the Ministry.

The main contribution is to subsidize the operation of radio stations. The allocation is carried out under objective criterion that makes procedures almost automatic if the radios fulfill their obligations. The first is to present every year a complete report containing the financial balances validated by an independent accountant. The accounting documents provided show the income raised the previous year by the radio.

The support provided by the FSER goes in line with the magnitude of the radios, their activity and their needs as well as with the effort to obtain other rents besides the FSER fund, toping, beyond which the subvention gets reduced. Those radios considered to be with enough financial resources, will not be considered to need the FSER.

Ireland also counts with funds to support community media by means of a subvention program, "Sound and Vision", to support the planning of contents. This program has been designed to support the production of new contents for both, radio and television, in different areas such as Irish culture, cultural legacy, experiences, traditions and adult's alphabetization. It is also the result of the 2003 Radio and Television Law (Broadcasting (Funding) Act, 2003 – Number 43 of 2003), and its funds are composed of 5% of the encumbrance or rights from the radio broadcasting licenses.

In addition to these basic subsidies, there are also specific assistances either for the establishment of recently authorized radios as for purchase or renewal of the stations equipment.

In the United Kingdom, the Community Radio Fund, foreseen by the legislation, is administrated by OFCOM and represents an exceptional or unique funding for community radios in order to attend to their sustainability. The decision for the granting of supports coming from this funding includes the representation of the community media sector.

In Spain, the establishment of financial lines as well as the existence of means to support the sector in question is foreseen within the framework of the Law on Measures to Promote the Information Society under the following terms:

> With the objective to promote lines of funding as well as means for supporting the development of the services regarding society of information, will be established without profitable goals as to, enhanced by citizen entities, promote democratic values and citizenry participation, attend the general interest or provide service to undermined communities and social groups, in order to promote the presence of citizenry and non-profit private entities and to guarantee pluralism, freedom of expression and citizenry participation in the society of information[116].

[116] Law on Measures to Promote the Information Society, approved by the Plenary Session of the Congress of Deputies in its session of the 20th December, 2007. Official Bulletin of the General Courts. Congress of Deputies VIII Legislature. 28/12/2007. Number 134-15. Page 269. Fifteenth Additional Provision.

39. States should ensure that the adoption of new broadcasting technologies increases pluralism and diversity, and is not a mechanism for maintaining or strengthening the concentration of audiovisual communication services.

This principle is situated in the analysis of the new possibilities that arise from the use of the digital dividend in broadcasting. Despite the auspicious forecast that the changes in technology bring about, these do not imply per se a democratization of the access to the frequencies. In order to achieve this, it is necessary for the States to work on the regulation of migration to the new technologies with two main objectives: in the first place, to ensure basic conditions for the three sectors of radio broadcasting as to enable them to advance and complete the transition in a successful way. Secondly, to develop policies to make the most of the new digital resources as to widen the diversity of voices and multiply the access to the media for society.

The European Parliament, in its Resolution of 25th of September, 2008 on concentration and pluralism of the means of communication in the European Union (2007/2253(INI)) requires the States:

> (…) Calls for a balanced approach to the allocation of the digital dividend to ensure equitable access for all players, thereby safeguarding media pluralism.

Similarly, in its resolution on the risks of violation, in the EU and especially in Italy, of freedom of expression and information (Article 11(2) of the Charter of Fundamental Rights) (2003/2237(INI)), the European Parliament:

> Notes that digital media will not automatically guarantee greater choice, because the same media companies that already dominate the national and global media markets also control the dominant content portals on the Internet, and since the promotion of digital and technical literacy are strategic issues for the development of lasting media pluralism, and expresses concern about the switching off of the analogue frequencies in some parts of the Union.

From this point of view, universal access for all citizens to the Information and Communications Technology (ICT) becomes a priority to be guaranteed. This mandate contemplates not only the obligation to make available the infrastructure needed for the use of the ICT for all sectors of society, but also to ensure that the whole of the social groups, specially the most vulnerable ones, count with the sufficient knowledge to exercise their right to information through the use of these new means.

In line with the above mentioned, the Declaration of Principles of the World Summit on the Information Society (WSIS - Geneva 2003), in its principles 5, 13 y 21 states that:

> We are also fully aware that the benefits of the information technology revolution are today unevenly distributed between the developed and developing countries and within societies. We are fully committed to turning this digital divide into a digital opportunity for all, particularly for those who risk being left behind and being further marginalized. (…)
>
> In building the Information Society, we shall pay particular attention to the special needs of marginalized and vulnerable groups of society, including

migrants, internally displaced persons and refugees, unemployed and underprivileged people, minorities and nomadic people. We shall also recognize the special needs of older persons and persons with disabilities.

Connectivity is a central enabling agent in building the Information Society. Universal, ubiquitous, equitable and affordable access to ICT infrastructure and services, constitutes one of the challenges of the Information Society and should be an objective of all stakeholders involved in building it. Connectivity also involves access to energy and postal services, which should be assured in conformity with the domestic legislation of each country.

In regards to this point, the regulation concerning means of communication, with the appropriate previsions as to guarantee the full exercise of the right to information in equality of conditions for all citizens, should be complemented with measures meant to reduce asymmetries on the ability to use these new technologies, as these asymmetries usually tend to affect the most relegated groups of society.

The Directive 65/2007 on audiovisual communication services of the European Union, adopted in December 2007 by the European Parliament, in its Whereas 37, indicates that:

`Media literacy' refers to skills, knowledge and understanding that allow consumers to use media effectively and safely. Media-literate people are able to exercise informed choices, understand the nature of content and services and take advantage of the full range of opportunities offered by new communication technologies. They are better able to protect themselves and their families from harmful of offensive material. Therefore the development of media literacy in all sections of society should be promoted and its progress followed closely.

The need to move towards a regulatory adaptation has been pointed out by the General Assembly of the OAS the 4th of June, 2009, when approving the 2440 Resolution on "Telecommunication Development in the Region to reduce the Digital Divide". This Resolution is meant to enforce the role of the Inter-American Telecommunication Commission (CITEL), and therefore decides:

4. To instruct the General Secretariat to support, through CITEL, member state efforts to:

(…)

b) Implement to the extent possible the guidelines and requirements established by CITEL on the use and sharing of the radio frequency spectrum, with the aim of achieving harmonization of spectrum use;

c) Update national policies and legislation and promote the exchange of experiences, bearing in mind that the network and service

> convergence process is creating a new landscape, for which appropriate legislative conditions must be developed. (…)[117]

Overall, the benefits derived from the transition to digital broadcasting represent a historic opportunity towards overcoming the asymmetries derived from the concentration of media ownership through an enhanced democratization process. Antitrust and competence control regulation should adequate to the technologic environment, thus the diversification regarding the ownership of means of communication will appear as one of the governing principles to take into account in the new processes concerning assignation and renewal of frequencies.

Herbert Ungerer, Head of the Division of Information, communication and multimedia, within the framework of European Commission, in his paper on "Impact of European Competition Policy on Media", points out:

> As digitisation multiplies the number of available channel capacity by a figure of 5 - 10, the main concern under a competition perspective must be to transform this new multi-channel environment into a truly larger choice for the users. This implies as the major goal of competition policy in the area the maintenance, or creation, of a level playing field during the transition. In short, digitisation must lead to more market actors and not to less. It must not lead to the traditional actors, in many instances already very powerful, to use the new channels to entrench their positions further, to the detriment of market entrants and the New Media that are developing such as the new Internet based media providers. Neither must it lead powerful actors in neighbouring market to leverage their dominant position unduly into the newly developing media markets. During the transition we must strengthen pluralism and a pro-competitive market structure.[118]

[117] OAS General Assembly, AG/RES. 2440 (XXXIX-O/09), "Telecommunication Development in the Region to Reduce the Digital Divide", approved June 4th, 2009.
[118] Ungerer, Herbert, "Impact of European Competition Policy on Media", Centre for Media Studies, Madrid, Febraury 15th, 2005.

40. When planning the transition from analog to digital radio broadcasting, the impact of this transition on media access and on the different types of media should be studied. States should adopt measures to ensure that the cost of transitioning to digital broadcasting does not limit the operating capability of public and community media. No media should be the object of discrimination, and all necessary provisions should be adopted to ensure the continuity of analog broadcasting until the transition to digital broadcasting can be completed under reasonable conditions.

Migration from analogue to digital media requires the adoption of certain measures in order to prevent its costs from being a restriction of broadcast capability to those actors who do not count with the resources to carry out this transition. It this view, the state's assistance (acquisition of digital transmitters, electric wiring or wireless technology and provision of broadband services among others) seems fundamental to finance the access to this technology for community and non-commercial, public and independent local media.

The regulation should contemplate a migration program which takes into account the needs and capabilities of the several actors involved in this process, as well as the application level of the new technologies by each one of the.

The Rappourteurs in their 2007 Joint Declaration, have expressed:

> Consideration of the impact on Access to the media, and on different types of broadcasters, should be taken into account in planning for a transition from analogue to digital broadcasting. This requires a clear plan for switchover that promotes, rather than limits, public interest broadcasting. Measures should be taken to ensure that digital transition costs do not limit the ability of community broadcasters to operate.[119]

In turn, the European Parliament in the KEA Report on "The State of Community Media in the European Union" refers to the situation of community media towards migration from analogue to digital services:

> Digital technology is an opportunity as well as a challenge for CM. Internet-based CM allows the sector to reach out to new audiences as well as to engage new participants in innovative ways. It also allows the sector to adopt new operational models as well as the ability to disseminate and Exchange content. Furthermore, the future switch-over to digital broadcasting could free radio spectrum that could potentially be utilized for new CM services. However, there is a growing concern among the sector that switch-over policies of most Member States do not take CM into account. Moreover, transition to Digital – whether to internet or digital broadcasting – involves some high initial costs that many CM organizations (as well as many other small scale media organizations) cannot afford. Finally, digital broadcasting standards often do not cater for the needs of small media organizations such as CM and may exclude the

[119] The UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Media Freedom Representative, the ACHPR Special Rapporteur on Freedom of Expression and Access to Information. and the OAS Special Rapporteur on Freedom of Expression, Joint Declaration, December 2007, Op. cit.

sector from future platforms. The study shows that only few countries include must carry rules to prevent this from happening.[120]

Within this context, it is necessary to guarantee the State's support for the community media to count with special protection measures to face migration, among them, the reduction of costs on receptors and digital decoders and the elimination or reduction in the payment of national or international royalties to technology providers.

Analogue transmissions should continue operating until migration has been completed and the stations with digital technology reach adequate standards regarding power, quality and geographic coverage. In time, it is necessary to develop mechanisms from the state meant to reduce costs and the extension in time of the trial period, during which, it will be simultaneously broadcasted in both systems.

Already in 1997 and concerning public media, the Council of Ministers of the European Union, in its Resolution 30/01 1999/C, underscored their importance in the protection of democracy and diversity and warned that, the increasing diversification of programs through new means of support result in more challenges for public media, and reminds that the Amsterdam Protocol of the Union reaffirmed the relevance of this kind of media and their public financing. It promotes:

(3) The fulfillment of public service broadcasting's mission must continue to benefit from technological progress;
(4) broad public access, without discrimination and on the basis of equal opportunities, to various channels and services is a necessary precondition for fulfilling the special obligation of public service broadcasting;
(6) the ability of public service broadcasting to offer quality programming and services to the public must be maintained and enhanced, including the development and diversification of activities in the digital age;
(7) public service broadcasting must be able to continue to provide a wide range of programming in accordance with its remit as defined by the Member States in order to address society as a whole; in this context it is legitimate for public service broadcasting to seek to reach wide audiences.

Digitalization brings about a number of challenges for public media in relation to supporting these services by means of an adequate migration policy, but also to the possibilities of expansion of the audiovisual communication public services by taking advantage of the digital dividend. Thus, the spectrum reserve is a basic condition for the public services to provide with a more diverse and vast contents supply, directed to satisfy the needs of groups which are usually excluded from radio broadcasting. Specific measures, including financial contributions for the sector have been adopted in Canada and Argentina, where the new law of audiovisual communication foresees the involvement of federal authority funds in order to subsidize the transition.

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