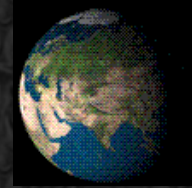


REGIONAL RESEARCH IN LATIN AMERICA

The invisible gags: New and old barriers to diversity in radio broadcasting



The Invisible Gags: New and Old Barriers to Diversity in Radio Broadcasting

Summary of the research on radio broadcasting concession regulations in Latin America

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INTRODUCTION

Abuses in the administration of radio broadcasting¹ concessions have resulted in the silencing of diverse voices, even those dissident or critical, to the detriment of the diversity and plurality of information and opinions necessary for the existence of our democracies.

“The effect of this exclusion phenomenon is similar to the effect produced by censorship: silence”, said the Office of the Special Rapporteur for Freedom of Expression of the IACHR².

Community radio stations and other stations of non-commercial nature, and even many local and regional commercial media, have been excluded from access to the frequencies due to discriminatory regulations and abusive practices that benefit only a few entrepreneurs and economic groups.

Discretionary and arbitrary practices in the allocation of the use of frequencies, the use of antidemocratic mechanisms such as auctions to the highest bidder, the lack of effective limits on media concentration and, in general, the establishment of barriers to the equitable access of indigenous communities, social organizations and other non-commercial media to radio and television, are some of the situations that are common in the American continent.

These freedom of expression and information violations occur because of the way in which States abuse their legal authority when administering the radio-electric spectrum, granting concessions, authorizations, permits or licenses³, and supervising their correct use.

¹ According to the usual definitions of the International Telecommunication Union and almost all countries in Latin America, the term broadcasting includes radio and network television.

² IACHR, Annual Report 2008, Volume III: Annual Report of the Office of the Special Rapporteur for Freedom of Expression. *Chapter V: Conclusions and Recommendations.*

³ To simplify the wording of this report, the term “concessions” will be used to refer to authorizations, licenses, permits or actual concessions, a typology that has different scopes and is applied differently in the various countries that were studied.

The State is an administrator of this limited resource and should perform this role for the general interest and without any discrimination, even more so considering that radio broadcasting is a pillar for the exercise of freedom of expression and information.

This leads us to consider that many of the questioned actions are taken pursuant to the legality adopted by a certain country, either through laws strictly speaking or through rules, government decrees and technical standards, which does not necessarily mean that they are compatible with the international treaties that our countries have signed and ratified, turning them into internal legislation, also applicable in these cases.

Thus, States can directly or indirectly abolish fundamental rights such as the freedom of expression and the right to information and communication, or restrict their exercise when accessing a frequency, even when the Constitution and general laws expressly recognize these rights.

When analyzing the compatibility between national legal frameworks and the inter-American human rights standards, our research shows that it is not enough to consider only the legal texts. Barriers and limitations are also present in the application of said legislation by the competent organizations or in the form of lower-level regulations and administrative proceedings, which condition or even contradict higher-ranking rules.

In addition, finding legislation that is not explicitly discriminatory does not transform it into a sufficient indicator of the existence of a favorable environment to guarantee the diversity of media.

For instance, with regard to the need for the legal recognition of the community media, it is essential for the State to establish active public policies, not to recognize the sector but to promote it and guarantee its existence within a framework that is unfavorable for its development because of multiple factors (general economic situation, weakness of the social groups that administer the media, context of growing concentration of media, among others.)

There are two major reasons that establish the nature and limits of the legal authority of the States in these matters. On the one hand, States are simply the administrators of the radio-electric spectrum, not its owners, as the frequencies are a natural resource, patrimony of mankind. On the other hand, radio broadcasting is a pillar for the exercise of the right of freedom of expression.

Because of these reasons, States can not administrate the use of frequencies in a discretionary or arbitrary way. Inter-American human rights standards establish that the granting of radio and television frequencies must guarantee equal opportunities to all individuals and social sectors, and that the evaluation requirements, procedures and criteria must be transparent, clear and have been previously established, promoting equitable access to this resource. These principles are valid both for the concession as well as for the renewal of the use of radio-electric frequencies.

The inter-American standards also establish that the evaluation requirements, procedures and criteria must be transparent, clear and have been previously established, promoting equitable access to this resource⁴.

⁴ IACHR, *Declaration of Principles on Freedom of Expression*, October 2000, and IACHR, *Annual Report 2008, Volume III: Annual Report of the Office of the Special Rapporteur for Freedom of Expression. Chapter V: Conclusions and Recommendations*.

The present report surveys the status of the regulations regarding concessions, highlighting the main findings of the research as a way of having appropriate material available for analyzing the degree of compliance with such standards and formulating relevant recommendations.

I. PROCEDURES FOR THE GRANTING OF CONCESSIONS

For the purpose of this work, the legislation that each country defines in order to regulate radio broadcasting establishes how the various types of services are differentiated, who is eligible to hold a concession, how long the frequencies can be used and which are the established procedures for granting the use of those limited frequencies.

These definitions are found mainly in legal norms, sometimes in specific radio broadcasting laws, others in more general telecommunications laws. Radio broadcasting is rarely expressly mentioned in constitutional norms. There are also rules and other lower-level regulations (decrees, resolutions, technical standards) that complete the applicable regulatory framework.

The procedures for the granting of concessions to use radio broadcasting frequencies have become the first and foremost access barrier to radio and television, and therefore indirect mechanisms which limit the freedom of expression. Thus, the right of the vast social majorities of our countries –frequently native or rural, but also urban– is excluded and abolished.

The comparative study shows that these situations occur as a result both of the existence of discriminatory legal frameworks as well as of arbitrary government decisions within contexts where there is a lack of clear rules.

The first case refers to legislation that expressly establishes procedures, requirements or criteria that prevent the access of certain persons or social sectors, or that do not guarantee equal opportunities.

There are also barriers that are the result of arbitrary and discriminatory administrative practices, or even practices that are against the legal and constitutional frameworks in force. This is the case of regulatory frameworks that are discretionary and lacking in transparency, that have no precise or transparent previously established rules for the granting or possible renewal of concessions.

Economic capacity as sole or determining access variable

The most emblematic situations of restrictions within the regulatory frameworks themselves are found in those countries that use auctions to the highest bidder or calls for bids, i.e. monetary offers, or other criteria where the economic capacity of the interested party is the sole or fundamental factor for granting concessions for radio and television services.

This situation violates the requirement of guaranteeing equal opportunities to all individuals in the access to frequencies, as established in numerous recommendations of the Inter-American Commission on Human Rights (IACHR) and in the Declaration of Principles on Freedom of Expression: “The concession of radio and television broadcast frequencies should take into account democratic criteria that provide equal opportunity of access for all individuals”⁵.

⁵ Extract from Principle 12, *Declaration of Principles on Freedom of Expression*, IACHR. October 2000.

The Report of the Office of the Special Rapporteur for Freedom of Expression on Guatemala (2001)⁶ informs that it “has also received information on radio broadcasting and concerns regarding the legal framework and criteria for granting radio frequencies. One basic concern is that the only criteria the Government uses to grant frequencies are economic ones that effectively deny access to minority groups such as indigenous peoples, youth and women.”

And adds: “Bidding procedures that do not go beyond economic considerations, or that do not give a fair chance to all social sectors, are incompatible with participatory democracy and the right of freedom of expression and information enshrined in the American Convention on Human Rights⁷.”

This mechanism appears in several of the national studies that were conducted as one of the recurrent and central components of the methods for granting concessions for the use of frequencies.

Economic capacity is the sole or determining access variable both in auction or call for bids mechanisms as well as when the selection criteria for a competitive procedure among several interested parties assign an important score to the monetary aspect of the offers.

A paradigmatic case of this situation is Guatemala, though auctions are also used in El Salvador and other countries of the region. The concession is granted to the bidder presenting the highest economic offer.

Guatemala’s media map reflects the disastrous results in terms of media diversity and plurality. One person⁸ is the sole owner of the four network TV channels of national reach and has become a key power, forcing all candidates to travel to Miami in order to obtain spaces for their electoral campaigns.

The majority of the population are indigenous; however, they do not have access to media, television or radio programs in their own languages. This situation has excluded not only vast social majorities but also other economic groups that would like to produce and disseminate journalistic products⁹.

Researchers point out that one of the reasons would be that Central American legislations do not consider radio stations to be instruments of freedom of expression but rather business activities, for which reason their regulation has a markedly commercial perspective. Frequencies are sold to, and bought by, the highest bidder, just as any other merchandise.

When modifications in the regulations have occurred, these have been driven by a spectrum privatizing criterion and not by the promotion of the freedom of expression as a fundamental right, and have therefore reinforced the exclusion of important social sectors from the public debate. This approach is also quite generalized in the rest of the region.

In the case of Brazil, the granting is made through public calls for bids. This means, in practice, that the tender is decided based mainly on the economic proposal, to the detriment of

⁶ Guatemala. Report on Freedom of Expression. Inter-American Commission on Human Rights. Guatemala 2001 – Chapter IX OAS/Ser.L/V/II.111.Doc. 21 rev. 6 April 2001.

⁷ Ibidem.

⁸ A foreigner who does not live in the country.

⁹ Such is the case of the *Prensa Libre* Group, active member of the Inter-American Press Association and one of the main denouncers of this situation.

constitutional precepts such as access to information, culture and education, according to the research.

The passing of Mexico's so-called "Televisa Law"¹⁰ in 2006 included the auction to the highest bidder as a central element for concessions in the field of commercial radio broadcasting. However, in 2007 the Supreme Court of Justice of the Nation declared the law unconstitutional, together with other provisions that had been passed.

According to the ruling, the auction mechanism is unconstitutional, as "*it violates the principles of equality and free competition because it privileges the economic aspect of the allocation and also threatens freedom of expression*"¹¹.

With regard to this, it is important to reflect whether when the need for appropriate and non-discriminatory procedures is raised it is enough to consider eliminating the discretionary nature and ensuring the publicity and transparency of the process. If needed, these characteristics are not enough to provide a positive environment that respects the principles of equal opportunity and guarantees diversity and pluralism in the media.

Auction to the highest bidder is a transparent and non-discretionary mechanism, but it is also terribly unfair. Behind a clearly regulated requirement, it was observed that this evaluation and selection mechanism for those interested in using a radio or television frequency favors media concentration and discriminates against community media and local and regional commercial media¹².

Under the pretext of being a non-discretionary mechanism, this system favors economic power and excludes the most vulnerable sectors that can not compete on an equal playing field against strong capitals, either national or foreign. The consequence is a strong presence of major radio networks which repeat the same information agenda generated from the capital city, as well as the entrance of powerful transnational capitals.

Research has also found legislation that, without being explicitly an auction, applies a determining score to the applicants' economic capacity of the.

In Peru concessions are granted by tender, but 55% of the score is obtained by the best financial offer and only 45% by other areas such as seniority of the application, location within the locality where the radio broadcasting service is put to tender, educational modality, etc.

In Bolivia auction to the highest bidder is the mechanism that governs the concession of the use of frequencies for commercial media. Bids for frequency-modulation radios in La Paz, Santa Cruz and Cochabamba range from 70 to 100 thousand US dollars, which is prohibitive for social organizations and even for commercial proposals and favors not the best radio proposal but those who have the most power¹³.

It is also possible to find legislations that demand certain unreasonable technical or administrative requirements that, indirectly, favor those with economic capacity over more

¹⁰ Art. 17 of the Decree by which various provisions of the Federal Telecommunications Law and the Federal Radio and Television Law were amended, added and repealed, *Official Gazette of the Federation*, 11 April 2006.

¹¹ www.scjn.gob.mx

¹² The same can be said for other non-discretionary mechanisms such as draw or preference (i.e. the first person appearing and fulfilling all the requirements obtains the concession).

¹³ As stated by the *Asociación Boliviana de Radiodifusoras* (ASBORA) [Bolivian Association of Radio Stations], the commercial radio stations' union.

vulnerable social groups. The same can be said about preference mechanisms which, indirectly, favor those who have more resources and are therefore able to appear first or to those who handle confidential information that can provide them with an advantage over other competitors, as has happened in Ecuador.

When eligibility criteria are vague, unclear or extremely exacting, rural organizations or indigenous communities have serious difficulties in fulfilling them or need to hire special consultants to do so. These professionals (engineers, lawyers, accountants or others) are not always available near the locality of their residence or hiring them is expensive, which transforms the economic issue into an indirect barrier even before the program and service proposals can be analyzed.

For instance, in Argentina a technical folder is required with understandable and concrete data, but it must be presented with the certified signature of an engineer registered with the COPITEC (Professional Council of Telecommunications, Electronics and Computer Engineering) of national jurisdiction. The problem is that in many cities of the provinces there are no professionals that satisfy such requirements. Organizations are forced to hire professionals from other cities, even from other provinces, with the consequent increase in costs and fees.

In Chile, similar barriers are reported. Excessive technical standards are established for presenting the specifications, which only an engineer is qualified to do, and which imply having economic resources to hire a specialist. What is more, the organization or association to which the frequency is granted must publish the decree in the official gazettes at its own cost; this represents an onerous amount that sometimes community organizations find impossible to pay.

Obviously certain minimal technical requirements must be fulfilled, but countries such as Colombia or Uruguay have simplified them notoriously in order to prevent them from becoming indirect barriers. For example, in both cases the technical folders containing equipment and antenna details are presented after the procedure for the granting of the service, and is thus not a previous requirement that excludes participation, and in both cases technicians from the regulating organizations cooperate with the authorized radio stations.

Arbitrariness and abusive administrative practices

This refers to countries where the legal texts do not establish express and direct obstacles that prevent the access of certain social sectors, groups or bodies of opinion which can be critical of the government, but where the existence of abusive practices have the same results. This is the product of a lack of clearly regulated procedures in the law that grants excessive discretionality to the State and does not ensure the due predictability and legal certainty for radio broadcasters and persons interested in obtaining a concession.

The recommendations of the Office of the Special Rapporteur for Freedom of Expression of the IACHR refer to this when stating that "it is necessary for States to adopt rules to prevent that, in the future, any of its agents can arbitrarily use supervisory or regulatory power to silence dissident expressions. Thus, (...) clear, pre-established, precise and reasonable rules are required to establish, concretely, which are the authorities' regulatory and supervisory faculties,

faculties that should pursue a lawful end and be absolutely necessary for the attainment of the pursued end”¹⁴.

In the field of administrative law, the fact that there are no strictly regulated or totally discretionary acts is unanimous doctrine; instead, those characteristics can refer to an administrative act or procedure.

The exercise of discretionary faculties does not necessarily imply the arbitrariness of state action, and arbitrariness can exist even where faculties are regulated. However, the researches that were conducted show that discretionality in the consideration of the applications for access to the use of radio-electric frequencies depends excessively on the opportunity, merit and convenience criteria considered by the State itself (generally organizations dependent on the government of the moment), resulting in arbitrariness and discrimination.

Abuses in the exercise of the discretionary legal authority of the States appear to be a constant in the concession granting procedures of several countries.

In the case of Ecuador, a number of irregularities were registered that originate directly from the excessive discretionality of the independent regulatory organization *CONARTEL* (National Council of Radio Broadcasting and Television) which grants the frequencies: granting of concessions to members of the organization, their friends and relatives; systematic violations of the legal norm and even of constitutional provisions (such as hoarding and transferring concessions), failure to control the fulfillment of requirements and previous technical reports on the part of the concessionaires, and others¹⁵.

Mexico is another case. Legislation does not explicitly exclude rural workers, natives or other sectors of civil society; however, during the 40 years in which the Federal Radio and Television Law has been in effect in Mexico, in this vast and diverse territory that comprises 114 million people and 62 ethnic indigenous groups, only one community radio station was granted authorization.

It was not until 2004-2005 that insistent popular demonstrations, national negotiations and international pressure, in which the Inter-American Commission on Human Rights and the Office of the Special Rapporteur for Freedom of Expression took part, allowed obtaining eleven new permits for community radios. Nevertheless, the law remains unmodified and the situation for social organizations who want to obtain a concession or permit remains unchanged.

This exclusion, made possible by a discretionary regulatory framework and arbitrary abuse on the part of different governments, also corresponds with one of the highest concentration levels in the continent and the existence of a duopoly in the field of network television.

Another case is Peru. In July 2004, the Radio and Television Law was passed and the existence of community radios was recognized for the first time. Nevertheless, until the finalization of the study towards the end of 2008, no concession had been granted to community radio stations in the country. Again, this is not a problem of the legal text but of abusive administrative practices, in this case for reasons of “lack of planning of the spectrum”.

¹⁴ IACHR, Annual Report 2008, *Volume III: Annual Report of the Office of the Special Rapporteur for Freedom of Expression*. Chapter VI: para. 82.

¹⁵ Even though it is not included in this project's comparative study, it can be found in the second part of this volume. Said research was carried out by *CORAPE (Coordinadora de Radios Populares y Educativas del Ecuador)* [Educational and Popular Radios Coordinator of Ecuador].

A similar situation went on during 12 years in Colombia¹⁶. In spite of having one of the most advanced legal frameworks of the region regarding community radio, the arbitrary application of the regulation for this sector prevented calls for community radios to be made in important cities of the country such as Bogota, thus excluding important urban social sectors which have been expressly recognized the constitutional right to establish media without restrictions.

Something similar happened in Uruguay. During the 30 years during which the Radio Broadcasting Law and its regulations were in force no concessions were granted to community radio or television stations, nor to cultural, educational or other non-commercial initiatives. Not even municipal or university public media. However, the law generically establishes that any legal entity or individual can be a concessionaire.

Since the end of 2007, however, Uruguay has become the best example in terms of the regulation of access to radio-electric frequencies. The passing of the Community Radio Broadcasting Law in December 2007 and a presidential decree of 2008, which established a deep change in the granting procedures for the use of frequencies by commercial radio stations, has positioned this country as an “example” and “role model” for the rest countries of the region to follow, according to the Office of the Special Rapporteur for Freedom of Expression and organizations in defense of the freedom of expression such as Article 19 and Reporters without Borders (*RSF*).

The new legislation recognizes the right to the equitable use of the spectrum, and expressly establishes the promotion of plurality and diversity as an object of radio broadcasting regulation, as well as the principles of non-discrimination, equal opportunity, and transparency and publicity in the procedures and conditions for granting frequency allocations.

The examination of merits is established as the mechanism for the selection of applications both for community media as well as for commercial media, giving priority to the contribution to diversity and the communicational project, and expressly ruling out economic variables as selection criteria. As a complement to this, independent organizations are created with broad and plural business, social and academic representation to mandatorily participate in the calls, and it is established that consultations and public hearings open to the population that will receive the service must be held so that they can provide their opinions on the proposals and control the actions of the state.

II. NATURE OF THE CONCESSIONS AND TERMS OF USE

A less brutal but equally effective aspect for indirectly restricting the freedom of expression occurs when access is formally authorized, but the nature and scope of the concessions impose restrictions on the exercise of freedom of expression through radio broadcasting.

Definitions such as the service’s characteristics, its purposes, the persons authorized to access them and the authorized terms of use, among others, may represent a legal but discriminatory treatment and create an indirect barrier to media access which has been detected in several countries of the region.

¹⁶ Overcome in 2008 with the opening of the call to community media in the main cities of the country.

Indirect restrictions due to discriminatory terms of use

The study revealed the existence of legislations that establish prior, arbitrary and discriminatory limitations in terms of contents, radio stations' power, territorial coverage, number of channels available, or access to financing sources, among others.

These regulations hamper the independent operation of non-lucrative media managed by social organizations of different kinds, such as rural or indigenous communities, trade union cooperatives, local or cultural, urban or rural.

The exclusion in the terms of use operates in several ways. These include recognizing access only certain bands of the radio broadcasting spectrum (thus prohibiting access to others); restricting their location or coverage to certain jurisdictions and geographic territories; or requiring technical operating characteristics such as the previous establishment of maximum broadcasting power. It is also observed in the restrictions for accessing a variety of economic sources to support their operation, such as the prohibition that commercial or public companies cannot broadcast advertising through the radio stations.

Legislations have been detected which limit access to specific media because of the type of legal organization of those who claim the right to express themselves through radio stations. The vast majority of those excluded are indigenous, rural and community organizations, and in general non-profit or non-commercial organizations.

A paradigmatic example is Brazil, where communities and social groups can not express themselves through television or AM radios but only through frequency modulation (FM) media. In Chile, social organizations are restricted to using this band only.

Meanwhile, in Peru no community radio services can be offered on AM bands. The same happens in two countries which were not included in this research: Paraguay and Colombia. In Paraguay, only social organizations, a large majority of which are rural, can access FM frequencies; while in Colombia community television is not recognized over the air but only by cable, and is limited to offering services within small areas and without exceeding a specific amount of subscribers¹⁷.

These limitations that prevent certain social sectors or non-profit groups from accessing all possible media in order to express themselves and inform their communities are a violation of the principles of universality of media and subjects, established in the Inter-American Human Rights System for the exercise of the right to free expression.

In countries such as Uruguay, Mexico, Bolivia and Venezuela there are no obstacles established in the legal texts to prevent non-profit organizations from accessing radio and television.

Some legislations also violate this principle by establishing certain geographic boundaries where the right to access radio and television concessions can be exercised and others in which that is not possible. Or by establishing, also in a previous and arbitrary way, that the transmissions of radio stations of social, rural or indigenous organizations can only have reduced power and/or marginal coverage.

¹⁷ At the time of closing the edition, the new Paraguayan government was studying a new regulation to recognize community radio and TV, and in Colombia the National Commission for Television (CNTV) has begun inquiries to pass a law that recognizes community network TV (it already recognizes, with limitations, subscriber community TV through a physical cable network).

That is the case of Peru, where only rural and native communities and exceptionally some urban social sectors, can have access to their own media. Community radio stations can be installed almost exclusively in rural areas. The same happens with Bolivia's legislation, where although access to radio and television is permitted, these can only be installed in rural localities.

Chile and Brazil again are two notorious cases of legislations which indirectly restrict freedom of expression by establishing arbitrary limitations to the technical operating characteristics. Chilean social organizations are authorized access to the so-called "sound radio broadcasting services of minimum coverage", the radio power of which must not exceed 1 watt maximum, which in practical terms limits the real possibilities of freedom of expression to a few surrounding blocks¹⁸.

In Brazil, community radios are authorized to have a maximum power of 25 watts, provided that they do not broadcast more than a kilometer away from the place of transmission. In addition, of the 50 usable frequencies in a spectrum that ranges from 88 MHz to 108 MHz of FM band¹⁹, the existence of only one frequency is admitted per locality.

Meanwhile, commercial radio stations can have transmitters with tens of thousands of watts, without previously establishing any maximum power.

The regulations that authorize access under these limiting terms of use are contrary to all international recommendations with regard to freedom of expression. Among them, the Declaration on Diversity in Radio Broadcasting: "*the different kinds of media – commercial, of public service and community – must be capable of operating in, and have equitable access to all available platforms of transmission*"²⁰.

Another important barrier that was detected in several of the countries that were studied is the prohibition for community radio stations to obtain financial resources from advertising and sponsors. Thus, the clear non-profit purpose of these media is confused with the necessary obtaining of the money needed to support its operation.

Financing of a radio station through advertising is one of the most important methods of funds collection available, and its prohibition has become a restriction to the exercise of freedom of expression. Not allowing these stations to obtain enough resources makes their survival strategy vulnerable and condemns them to financial suffocation and, consequently, to silence.

Brazil and Chile are the worst examples found in the research. Their legislations prevent access to typical sources of financing through advertising. In Brazil only cultural sponsors are allowed, while in the case of Chile the access to funds provided by the State makes them vulnerable and jeopardizes their independence²¹.

The restrictions that were found and have been mentioned are incompatible with the recommendations of the Office of the Special Rapporteur for Freedom of Expression when

¹⁸ At the time of closing this edition, the government of Chile had promoted a proposal for a law which would increase the maximum power permitted for community radios to 15 watts.

¹⁹ International technical recommendations accept that, with an optimum planning of the use of the spectrum, within the same locality radio stations can be located at a distance of 0.4 MHz in the frequency modulation dial.

²⁰ Rapporteurs for Freedom of Expression UN, OAE, OSCE and IACHR, *International Declaration on Diversity in Radio Broadcasting*, December 12, 2007.

²¹ The aforementioned project will allow mentioning companies or services within their coverage areas.

stating that “*the increasing need of expression of the majorities and minorities without access to the media and their recognition of the right to communication, free expression of ideas, and information broadcasting, make the need to find goods and services that will ensure basic conditions of dignity, security, subsistence and development imperative*”²².

Likewise, by proposing that community radio broadcasting should be legislated, the Office of the Special Rapporteur recommends assigning “*an equitable part of the spectrum and of the digital dividend to community radios and channels*” and that the allocation of frequencies should take into account “*democratic criteria that will guarantee equal opportunities for all individuals in the access and operation of this media under equitable conditions, without disproportionate or unreasonable restrictions*”²³.

Regarding non-discriminatory terms of use, the case of Uruguay also stands out, as the aforementioned Community Radio Broadcasting Law does not discriminate on the basis of technical, financial or geographical reasons in the case of community radio stations. The law expressly establishes that there will be no previous and arbitrary limitations relating to power or coverage for granting authorization because community radios are defined by their public and social purpose and not by the reach of their transmissions.

In the Uruguayan case, at least one third of the radio-electric spectrum in each band (AM, FM radio and TV) and in every locality of the country is assigned to the establishment of community radio stations; in addition, access to diverse financing sources is allowed, including advertising, with the sole condition that all revenue is reinvested in the radio station so that it will not become a for-profit organization.

Colombia is also a model of good practices in the regulation of concessions of use in the specific case of sound radio broadcasting (not so in the case of community television) regarding economic support, as commercial advertising is allowed in the understanding that only profitable social companies can achieve the objectives set out by these radio stations.

A series of presidential decrees adopted in Colombia since 1995 with the aim of regulating and promoting community radios show a constant evolution and development in this country, including the development of a broader conception of Public Policy on information and communication governed by the principles of participation, inclusion and public interest. In the beginning, community radios were limited to operating in rural environments, but since 2008 they have been incorporated into cities and regional capitals.

III. RENEWAL AND REVOCATION OF CONCESSIONS

The regulation of concession renewals and revocations has now been an issue on the public agenda²⁴ for a few years. Organizations representing and defending community radios have been denouncing this situations for years, but for many people and institutions the relationship between state regulation of the concessions and freedom of expression only began to be considered beginning with the Venezuelan case.

²² IACHR, Annual Report 2002, Volume III: Annual Report of the Office of the Special Rapporteur for Freedom of Expression. *Chapter E: Exercise of freedom of expression through community media*, para. 41.

²³ IACHR, Annual Report 2008, Volume III: Annual Report of the Office of the Special Rapporteur for Freedom of Expression. *Chapter V: Conclusions and recommendation*, para. 10 (n).

²⁴ Particularly after the national and international debate on RCTV of Venezuela and the decision of the government not to renew the concession once the legally established period of validity had finished.

When there are no clear rules about the mechanisms for concession renewal and revocation, inappropriate rules are presented that favor administrative arbitrariness. At the same time, this can be used to silence dissident voices that disagree with the current government or, on the contrary, to perpetuate friends of the government or de facto powers in the use of frequencies, thus consolidating the irregular distribution of the spectrum and the oligopolistic or monopolistic concentration of media.

This is why discrimination in the concession renewal or non-renewal procedures, as well as those for their automatic renewal, affect the conditions for the full exercise of freedom of expression and the right to information.

Faced with the RCTV case, the generalized reaction of radio broadcasting entrepreneurs was to rapidly demand that all frequencies be renewed automatically. If that were the case, then, what would be the reason for establishing periods in the concessions for the use of frequencies?

The main reason is that concessions, licenses or permits, whatever their denomination, are authorizations to use the radio-electric spectrum and not a surrender of the property of a good that is considered to be patrimony of mankind and under state administration.

The Inter-American Commission recognizes the State's prerogative to administrate the radio-electric spectrum and to *"previously establish the duration of concessions and decide on their renewal at the end of those periods"*.

A comparative reading of the Americas shows that, with some exceptions²⁵, the legislations of every country establish periods ranging from 5 or 7 years to 20 or 25 years for concessions or permits. In many countries, however, the abovementioned discrimination also appears in other aspects: community radios are authorized for shorter periods of time than commercial radios, as in the case of Chile where authorizations are for 3 and 25 year periods respectively²⁶.

Lack of clearly regulated procedures

The lack of non-discriminative and clearly planned guidelines within the legislation allows the abusive use of the renewal mechanism, which can be used to reward or punish radio broadcasters, both community or commercial, depending on their editorial line or attitude towards the government, who is in charge of making a decision in this respect.

Governments can then use it to privilege radio stations favorable to them (or at least not actively contrary) by extending their concessions, and reject those who they find inconvenient or critical. The margin of discretionality that a government may have in the procedures for the extension or termination of licenses at the time of their legal maturity is a key aspect that needs to be studied in order to formulate recommendations for overcoming this issue.

The Inter-American Commission has been expressing its opinion on this matter, stating that this legitimate legal authority *"must be exercised taking into account the State's international obligations, which include guaranteeing the right to express ideas and thoughts of any nature*

²⁵ In Uruguay a provision of the law passed during the de facto government has been maintained, which does not previously establish periods but instead grants permits that can be revoked at any time; in Chile there are some television concessions that have been granted for an "indefinite" period, while others are granted for 25 years.

²⁶ Under revision at the time of closing this edition.

through diverse media without imposing direct or indirect restrictions on the right of freedom of expression²⁷.

For this reason, the IACHR considers that “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”²⁸.

A regulatory void in terms of the procedures for renewing or no longer renewing radio broadcasting licenses, or in terms of the definition of the periods of extension, leaves the door open to excessive discretionality on the part of the controlling organizations and the occurrence of situations that are legally unclear, conflictive or even threaten freedom of expression.

AMARC-ALC has already publicly expressed a position in this respect, stating that States have the prerogative of granting radio-electric frequencies for the use of radio and television, determining a period for their use, and evaluating the possible renewal of the licenses or revoking them if applicable.

However, it has also stated that “it is not acceptable to grant, cancel, renew or not renew the use of radio and television frequencies based on convenience or politic affinity with the government of the moment, especially when frequently it is the government itself who has this role, not an independent state organization”²⁹.

Radio broadcasters are granted the use of a natural resource which is patrimony of mankind for a certain period of time and under particular terms of use to which they have agreed and that must be periodically assessed by competent authorities.

The existence of previous and clearly regulated causes and mechanisms in the national legislation is a necessary condition prior to any revocation, renewal or non-renewal procedure. Preferably, these procedures should be carried out by an independent state organization in which there is active citizen participation, due process must be guaranteed, and appropriate mechanisms for eventually challenging their decisions must be anticipated.

In the case of the evaluation of an application for renewal, it is not enough for the radio station to render account of having complied with administrative, economic and technical aspects: it must also render account of having effectively fulfilled its professional duties regarding freedom of expression and information and the commitment to programming and social responsibility assumed when obtaining the use of the frequency.

Radio and television broadcasters offer services to citizens, therefore the citizens’ opinion should be heard and taken into account when deciding whether or not to renew the use of a frequency. Open public hearings must be held as a complementary element for the evaluation. Countries such as Uruguay and Canada apply this mechanism as a way of demanding public commitments on the part of radio broadcasters at the time when they apply for obtaining a frequency or for an extension of the period of use, and of giving the community the opportunity to exercise their rights before the media.

²⁷ IACHR, Press Release N°29/07 IACHR Concerned about Freedom of Expression in Venezuela. May 25, 2007.

²⁸ Ibidem.

²⁹ Open letter from AMARC on the RCTV case in Venezuela. April 13, 2007.

A case that was analyzed in the research is the non-renewal of the *Radio Caracas Televisión (RCTV)* concession in Venezuela, as well as the renewal of other television broadcaster concessions which were in the same situation and were due on the same date.

Beyond the *lato sensu* reference to compliance with the law and the commitments arising from the assignment of licenses, Venezuelan legislation does not list any specific causes to justify the non-renewal of commercial, public or community radio and television deeds. There are no previously regulated mechanisms or defined and transparent criteria to grant legal predictability and certainty to concessionaires or clear and precise guidance to the authorities who must consider the renewal requests.

The same lack of clear rules can be seen in several other countries, but the Uruguayan legislation stands out because it does not establish a duration for commercial broadcaster authorizations³⁰ and the government reserves the right to revoke concessions at any time because they are, by definition, precarious and revocable³¹. This situation generates a lack of legal certainty which, if used abusively, could affect fundamental rights.

Automatic renewal and concentration

The automatic renewal or ratification of concessions transgresses freedom of expression in so far as it can become a barrier to diversity and plurality in radio broadcasting.

In unfair media systems such as the ones that exist in Latin America, the renewal of concessions without evaluating their due compliance with the commitments assumed by the radiobroadcasters leads to situations of undue concentration or unequal distribution of the spectrum – which is, by its own definition, a limited resource –, and thus represents a barrier to the entrance of new users.

Automatic renewals or, as mentioned before, concessions without a specified duration render any attempt to guarantee media diversity and pluralism unsuccessful, as they prevent the entrance of new competition and a greater diversity of operators to the system, protecting those who are already there simply because they arrived earlier.

If the fact that an important number of broadcasters have benefited thanks to abusive governments or anti-democratic mechanisms such as auctions to the highest bidder is included, a vicious circle that consolidates unfairness and inequity in the access to radio and television frequencies is closed.

A solution such as this to potential abuses in the renewal of concessions can be even worse than the illness which it attempts to attack. Attention must be focused on previously establishing –by law– public, non-discriminatory, clear and reasonable mechanisms for evaluating and deciding the renewal or non-renewal of concessions, with citizen participation and controls, and on creating or strengthening independent organizations that will ensure non-discriminatory and fair treatment, guaranteeing due process.

³⁰ Community radio and TV station authorizations have a one-year duration and there are regulated procedures for evaluating the possible renewal of these authorizations, including public hearings.

³¹ Chile is another country in which there are certain network TV concessions that have been granted for an “indefinite” period.

Two of the studied cases are particularly graphic in describing how this mechanism works, its defects, and how the State is losing its capacity for democratic regulation in defense of the general interest.

In Chile concessions are up for renewal 25 years after being issued, and with preferential right is granted to their respective holders³². In practice, this preferential right has become practically an automatic renewal, initially through a law voted twice for such purposes. In 1994 the duration of sound radio broadcasting concessions was extended to a period of 10 years, while in 2000 a new law was passed according to which sound radio broadcasting concessions ending in January 2004 would be automatically renewed until January 20, 2010; likewise, concessions ending after January 2004 and before January 2010 would be automatically renewed until January 2010.

With the objective of “simplifying” the renewal mechanism, in September 2008 the law popularly known as the “Express Law” was passed, expanding this preferential right to make renewals almost automatic. The Law establishes preferential rights for concessions that apply for renewal, stating that repeating the same service area in the renewal competition is enough to be awarded the preferential right and the only grounds for losing the concession is the commission of an administrative mistake in the presentation of documents or not presenting them within the legal period that has been established.

The true capacity of the State to regulate when facing such powerful interests was denounced at the time, not only because this Law was passed extremely quickly, but also because it was passed just a few months before the city mayors and councilors election and just one day before the call for bids to renew concessions ending in January 2010.

In Mexico, concessions are granted for periods of up to 20 years but, because renewal requirements have been minimal, they have been exploited by the same people generation after generation.

In fact, the term used to refer to this mechanism is “*refrendo*” (ratification) which means to repeat or restore. Applied to the concessions issue, “it must be understood as a repetition in the granting of the same concession, i.e. it does not refer to granting and authorizing a new concession, but repeating the authorization or permit to continue to use, take advantage of, and exploit the frequency band assigned for the radio and television concession that was previously granted”³³.

This situation is even more serious when only two economic groups dominate 99% of the country’s network television audience³⁴. According to the Secretary of Communications and Transportation, in Mexico there are 457 concessions have been granted for network television services. *Grupo Televisa* has 243 stations for broadcasting four channels of national or regional coverage, while *Televisión Azteca* has 179 stations for broadcasting two channels of national coverage. These two groups represent more than the 92% of stations.

If it is not possible to revise these concessions, a situation considered by the IACHR to be antidemocratic and restrictive of the freedom of expression will never be modified.

³² Except for nine channels whose concessions were granted for an indefinite period of time.

³³ Ruling of the unconstitutionality action 26/2006, *Official Gazette of the Federation*, August 20, 2007.

³⁴ *Grupo Televisa* concentrates 71.3% of the audience and 69% of the income of the network TV market in Mexico, *Televisión Azteca* 28% of the audience and 31.4% of the income. Source: Becerra, M., Mastrini, G. (2009) “Los dueños de la palabra. Acceso, estructura y concentración de los medios en América Latina en el siglo XXI” [Owners of the Word. Access, structure and concentration of the media in Latin America in the XXI Century]. Prometeo, Buenos Aires. pp. 135.

The power of these concentrated groups –favored by this legislation– also affects administrative decisions of the State which have served to consolidate their power even more. When faced with the adoption of the digital terrestrial television standard, the government of Vicente Fox extended the concession period until 2021, although this period can be extended for an even greater number of years until the market is fully developed. In addition, the government of Felipe Calderón ratified 131 radio concessions (11% of the total commercial radio of the country), against the criteria established by the Supreme Court of Justice regarding automatic renewals.

The situation is similar in other countries. In Brazil, concessions can be renewed for equal and successive periods on the condition that their holders have complied with all legal and contractual undertakings and continue to maintain their profile in terms of technical, financial and moral suitability and to serve the public interest. In this case, the lack of supervision and procedures for controlling concessions while they are in force is highlighted. As for concession renewals, these occur without other interested parties being able to express their interest and therefore the prevailing status quo is maintained.

In the case of Argentina, the lack of regulated renewal mechanisms has recently favored two of the major groups involved: *Telefónica de España* (Spanish) and *Grupo Clarín* (Argentinean). The benefit was materialized in the automatic 10-year extension of the licenses for television channels 11 and 13, one from each group, respectively, that was decided in December 2004 because they were not in financial trouble and did not exhibit law-violating behavior before the COMFER (Federal Radio Broadcasting Committee), the regulatory organization. A few months later, a decree establishing practically perpetual licensing conditions was passed, as the period for counting the number of years of the licenses was suspended for 10 more years. The latter must be considered together with the fact that all licenses granted in 1982 were renewed, without exception, throughout the different governments from 1996 on.

Due to its relevance, we have gathered some quotations from the study regarding this issue in Mexico, which will be dealt with in depth in the corresponding national chapter. In the ruling of unconstitutionality against the “Televisa Law” and particularly against the provisions authorizing automatic renewals, one of the judges considered that the lack of ratification requirements and the possibility of applying for renewal an unlimited number of times, “*simply means that current concessionaires or the winning bidders of future tenders will acquire the perennial right to operate radio broadcasting stations for as long as they do not relinquish it*”³⁵.

Because it refers to media that require the use of a restricted public good –the radio-electric spectrum–, “*the legislator is forced to regulate it in a manner such that guarantees equal access opportunity and favors a pluralism that will ensure society the permanent openness of a communication process that vivifies democracy and culture. Under this perspective, how can equal opportunity in the access to the use of the spectrum be conciliated with automatic and unlimited ratification? How can pluralism be achieved in the information media when perpetual ratification prevents new voices from being incorporated into the polyphony of freedom? How can we talk about competition between perpetual concessionaires of radio and television spaces, and all other persons?*”³⁶

³⁵ “Votes formulated by Justice Genaro David Góngora Pimentel regarding the ruling of unconstitutionality by the full Court dated June 7, 2007, which resolved unconstitutionality action 26/2006, promoted by senators members of the fifty-ninth Legislature of the Congress of the Union”, p.36.

³⁶ *Ibidem*, pp 37-38.

In the opinion of the Justice, *“this is not about wiping any radio broadcasting sectors off the map, as that would mean going from one extreme to the other. A framework that allows rationalizing and making the administration of the spectrum more equitable must be established, so that more of the voices that shape our multicultural nation can be heard and that, through them, the largest number of social needs can be satisfied in the best possible way”*³⁷.

IV. INSTITUTIONAL DESIGN

In Latin America, radio and television concessions are mostly regulated by governments through their respective Ministries or organizations, not by independent regulatory organizations. Where they exist, the Executive Power reserves key powers to itself, such as granting or revoking concessions, authorizations, licenses or permits.

There are organizations that specifically regulate radio broadcasting, but there are also others that have general competence over communications, with radio broadcasting being but one of their concerns.

As mentioned earlier, either because of their characteristics or because of their origin, the majority are marked by a technical, industrial or market approach, which represents a difficulty for appropriately regulating a sector of cultural industries such as radio and television which cannot be treated as the mere trading of merchandise.

A regulatory entity of this kind is always involved with other powers of the State, with the media themselves (be they public, commercial or non-profit in nature) and, in the best-case scenario, with organized user communities. This means that, by definition, the system in which a regulatory entity works will be affected by the logic and interests of all those stakeholders.

The action or inaction of the organization responsible for regulating radio broadcasting concessions is even more important when referring to issues that affect or facilitate the exercise of freedom of expression. That is why it is important to prevent these organizations and their employees from acting in arbitrary or discriminatory ways, even though it may be within the law, as these actions can become direct or indirect censorship.

The Latin American cases that were analyzed in terms of their institutional designs for regulating radio broadcasting concessions share certain features:

- a) lack of true autonomy and consequently an institutional and/or de facto dependence on the Executive Power, with some exceptions;
- b) permeability to the influence of pressure groups resulting in regulatory capture, sometimes due to complicity and others to an integration or faculties that make them vulnerable;
- c) lack or weakness of active controls of the due use of the spectrum;

³⁷ Ibidem, p. 38.

- d) an institutional position and a technical-professional education of the employees which hampers the comprehension of social, cultural and human rights-related phenomena that also include radio broadcasting media;
- e) regulations that enable highly-discretionary actions that, as mentioned earlier, frequently lead to the abuse of power;
- f) lack of transparency and account rendering mechanisms, for example lack of transparency or hiding of information regarding the various regulatory procedures, or blocking access to information with regard to media owners;
- g) lack of mechanisms and institutional instances of citizen participation and social supervision and control.

These situations are far away from creating an environment which allows the application of the recommendations of international organizations on defense and promotion of freedom of expression.

In fact, the Office of the Special Rapporteur for Freedom of Expression of the IACHR states that *“it is necessary for States to adopt rules to prevent that, in the future, any of its agents can arbitrarily use the supervisory or regulatory power to silence dissident expressions. Thus, as in the previous case, clear, pre-established, precise and reasonable rules are required to establish, concretely, which are the authorities’ regulatory and supervisory faculties, faculties that should pursue a lawful end and be absolutely necessary for the attainment of the pursued end. In particular, it is essential for media regulatory or supervisory organizations to be independent of the executive power, completely abiding by due process and under strict judicial control”*³⁸.

In the Principles for a Democratic Regulatory Framework for Community Radio and Television, AMARC-ALC and other organizations hold 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 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”*³⁹.

Meanwhile, Rapporteurs for Freedom of Expression have stated that *“regulating media with the purpose of promoting diversity, including public media viability, is only legitimate if it is implemented by an organ that is protected against undue political or other types of influences, in accordance with the international human rights standards”*⁴⁰.

Several countries in Latin America have specialized organizations which regulate radio broadcasting, but governments maintain key competences such as granting, revoking and renewing concessions.

³⁸ IACHR, Annual Report 2008, *Volume III: Annual Report of the Office of the Special Rapporteur for Freedom of Expression*. Chapter VI: para. 82.

³⁹ Principles for a Democratic Regulatory Framework for Community Radio and TV, Principle Nº 8. Competent authorities. AMARC-ALC, 2008.

⁴⁰ International Mechanisms for Promoting Freedom of Expression - Joint Declaration on Diversity in Broadcasting. UN Special Rapporteur on Freedom of Opinion and Expression, OSCE Representative for Freedom of the Media, OAS Special Rapporteur for Freedom of Expression and the African Commission on Human and Peoples’ Rights and Access to Information, 12 Dec. 2007.

These entities can regulate and control their operation and compliance with the terms of use and technical standards, but at the time of making major decisions they are merely advisors.

In Mexico, concessions and permits are granted by the federal government through the Communications and Transportation Secretary (*SCT*), with the prior favorable opinion of another government office, the Secretary of Government (*SEGOB*).

The amendment of radio and television laws in 2008 transferred the attributions relating to radio broadcasting “exclusively” to a decentralized organ of the *SCT*, the Federal Telecommunications Commission (*COFETEL*). The objective was to achieve greater transparency in frequency allocation procedures; however, the final granting of concessions and permits still are a faculty of the government.

From a strictly legal point of view, as *COFETEL* is a decentralized organ of the *SCT*, in practice it cannot keep the central sector from intervening in the transcendental decisions of the concessionary process. In addition, it cannot operate with enough autonomy to face political pressures in decision-making, either from the Executive Power directly or indirectly or through the *SCT*, or from major media companies, particularly where these are capable of influencing parliamentary bodies⁴¹.

Neither *COFETEL* nor *SCT* have advisory or consultancy bodies with direct or indirect participation of the society. The decree that created *COFETEL* anticipates the creation of an Advisory Council in which representatives of academic institutions, business associations and experts can participate, but not representatives of civil society. This Council is not currently operating.

In Brazil, there is an autonomous organization responsible for the administration of the radio-electric spectrum called the National Telecommunications Agency (*ANATEL*). Nevertheless, the Ministry of Communications and the National Congress play a central role in the granting of radio and television permits and authorizations.

Low-power AM and FM radio permits and AM concessions of regional or national reach, as well as TV channel concessions, are issued by the Ministry of Communications, go through the Presidency and must be ratified by both chambers of the National Congress. The advisory bodies and a legislative Commission analyze permits and concessions. Authorizations for television repeaters and retransmitters are granted by the Ministry of Communications, as well as community radios, but they must later be ratified by the National Congress.

The business sector participates very actively in the regulatory practices, lobbying at all levels and even directly occupying positions in the parliamentary commissions in charge of these matters, as many legislators are also media owners. These practices strongly affect the defense of their interests during the stages of the process which must be analyzed at a legislative level.

In Bolivia, the task of regulating the use of the electromagnetic spectrum and the administration of the radio broadcasting services depends on the Executive Power and is executed by the Ministry of Public Works, Services and Housing through the Vice-Ministry of

⁴¹“The regulators have been captured by the regulatees” and “They do not always respond to the public interest. I’m facing a huge problem”, said the president of *SCT*, Luis Téllez, to the Financial Times. *El Universal*, 4 April, 2007.

Telecommunications. The task of applying the law that regulates the sector is in the hands of an independent regulatory organization –the Telecommunications Superintendence (*SITTEL*).

This organization grants commercial media concessions through public tenders, while concessions for socio-cultural service broadcasters are granted by the Executive Power by direct allocation, after previously receiving the technical opinion of *SITTEL*.

In Argentina, the Federal Radio Broadcasting Committee (COMFER) is responsible for regulating, controlling and supervising the operation of radio and television broadcasters within the country. This organization coexists with the National Telecommunications Commission (CNC), which is responsible for supervising telecommunications, the use of the radio-electric spectrum, and postal services.

Besides having different institutional missions, these organizations also have different origins, experiences, and organizational cultures. COMFER has a tradition in contents supervision and control, a fact that is reflected in their staff of professionals and employees, which differs from the technical profile of CNC, where engineering visions predominate.

COMFER is defined by law as an autarchic organization. However, together with the CNC, they report directly to the Executive Power (COMFER is within the orbit of the Secretary of Media) and the Executive Power reserves the right to grant sound radio broadcasting and television licenses. COMFER can grant frequency modulation radio and cable TV licenses.

Venezuela is another case where government power affects the decisions of the National Telecommunications Commission (CONATEL), the organization responsible for regulating telecommunications and radio broadcasting and that, as set forth in the Organic Telecommunications Law, has operational and administrative autonomy beyond the ascription to a Ministry.

During the past ten years, the central government has appointed CONATEL general directors who have also performed other key functions within the Executive power. For instance, on several occasions the same person was appointed to simultaneously occupy the positions of general director of CONATEL and head of the Ministry of Infrastructure, or of the Ministry Telecommunications and Information Technology, thus compromising the organization's autonomy.

The research reveals that some countries share some of the aspects that have been described above, which can be considered good practices.

Chile is one of these cases. In this country, the Ministry of Transportation and Telecommunications, through the Subsecretary of Telecommunications (SUBTEL), has the faculty to administrate and control the radio-electric spectrum, as well as to dictate the technical telecommunications standards and control their compliance.

It is the government, through this Ministry, who grants concessions for sound radio broadcasting services. Nevertheless, the Chilean model (just like the Colombian and Paraguayan models) differs from the predominant model in Latin America in that it grants the faculty of awarding, renewing and modifying concessions and declaring their culmination to an autonomous organization. SUBTEL acts as a technical organization, an advisor to the Council.

The regulation of television contents is subject to special regulations and a special regulatory body, the National Television Council (CNTV), which also has the faculty of granting concessions for free-reception television services, with the peculiarity that its creation has constitutional rank.

Another case is Uruguay. General competence in the administration of the spectrum corresponds to the Executive Power (Ministry of Industry, Energy and Mining), and this is where the granting of authorizations for the use of frequencies or radio and network TV are decided.

URSEC (the Communications Services Regulatory Unit), the competent organization for the regulation and control of telecommunications-related activities including broadcasting, operates as a decentralized agency within the orbit of the Executive Power. This state entity is in charge of granting licenses to subscriber TV and telecommunications services.

URSEC has technical autonomy but maintains legal dependency on the Executive Power, for which reason it is subject to hierarchy. For example, the law expressly establishes the right of evocation, which means that the higher-ranking organ (the Executive Power, through the Ministry of Industry, Energy and Mining) can assume the exercise of competences that are typical of a hierarchically inferior organ (URSEC), evoking the right to hear and decide on any concrete action.

The interesting thing about the Uruguayan institutional design is the inclusion of permanent citizen participation mechanisms and instances in the concession granting process. Recently, two regulations incorporated the requirement to hold public hearings both for granting as well as for renewing concessions, and created the Honorary Advisory Council for Community Radio Broadcasting (CHARC) and the Independent Honorary Advisory Commission (CHAI), which acts in commercial radio and television station procedures.

Media business associations, trade unions, universities and civil society organizations participate in the CHAI. The CHARC has a similar composition, but in this council the media are represented by community radio coordinators.

Despite their advisory nature, legislation establishes that the State must mandatorily obtain their opinion and has the obligation of providing them with all the information related to authorization procedures. In both cases, they have the power to evaluate and select which of the parties interested in obtaining a frequency are in the best conditions to receive authorization. In practice, URSEC has taken part in technical matters, and, although they are not binding, the Executive Power has accepted CHARC and CHAI's opinions in all cases analyzed to this date.

Brazilian legislation also includes forms of citizen participation, as the legislation establishes that civil society has the capacity of participating in the monitoring of the regulators' activities through the Social Communication Council, an advisory organ of the national Senate. Unfortunately, in practice, this council meets only sporadically and the spaces reserved for civil society representatives are usually taken by entrepreneurs of the sector.

The Peruvian case presents an example of good practice with the creation of CONCORTV (Radio and Television Advisory Council), an advisory body made up of representatives of

commercial and educational media, universities, journalists and consumer associations, among others.

Although CONCERTV's opinions are not binding, it improves the transparency levels of the process because it has oversight functions over the public tenders used for granting concessions and can present comments and proposals relating to different radio broadcasting issues such as, for example, prior to the determination of sanctions by the Ministry of Transport and Communications (MTC).

In any case, the government of Peru maintains the exclusive right to grant, renew or revoke radio and television concessions. The MTC, through the Vice-Ministry of Communications and its General Telecommunications Authorizations Authority, is specifically charged with these duties.

Some of the deficiencies noted by the researchers in relation to the performance of these Peruvian radio broadcasting regulatory organizations summarize many of the weaknesses and obstacles to the proper exercise of these organizations' functions: the technocratic profile of their employees, to the detriment of care and respect for the law in areas such as the promotion of educational radio broadcasting; the lack of incentives to take people of low income into consideration when requesting or processing information; the lack of presence outside Lima, and scant outreach to exercise controls or comply with the requests for license renewals in a proper and timely manner.

The report on Central American regulatory frameworks included in this document shows aspects that are common with the countries that were studied in this project. In this region, the administration of the radio-electric spectrum is in the hands of public entities reporting to the executive power, with scant independence, no citizen participation, and considerable discretionality in their actions.

Transparency issues were also observed as, in order to carry out the research, huge difficulties had to be surmounted for obtaining information from the regulatory entities regarding the status of the radio-electric spectrum's utilization, details of granted concessions, and data relating to legal entities or individuals in possession of such concessions.

The results of the study, as well as our knowledge of the other countries of the region, reveal that, with some exceptions, governments maintain an absolute quota of power as regards the regulation of concessions for the use of radio and television frequencies.

Meanwhile, as mentioned before, the autonomy and independence of the organizations in charge of regulation and implementation are fundamental values to which several organizations for the defense of freedom of expression and international organizations⁴² adhere.

In any case, the notion of complete independence of a regulatory organization is an ideal which is difficult to materialize in the daily lives of institutions and individuals. Some of the difficulties are the result of the regulations on which they are supported, while others are the consequence of the administrative and cultural practices themselves – as these are based on fragile legal frameworks with no follow-up of their implementation and compliance, local idiosyncrasies and the civic culture in general.

⁴² In some contexts the terms "autarchy" or "autonomy" (either technical, operational, financial) are used, sometimes complementing and others as an alternative to the concept of "independence".

The creation of an independent organization should not imply the complete separation of national public policies on communication, development and social inclusion, but rather adequate technical autonomy and protection that allows it to act fairly when facing the unavoidable interests at stake in these issues, be they governmental, political, and above all pertaining to private groups of power.

Some findings caught our attention. It is possible to find cases of ministerial organizations that are clearly dependent on the government but that have acted using reasonable and non-discriminatory criteria. The case of Uruguay in the latter years, as well as the case of Colombia with regard to sound radio broadcasting, are clear examples of this.

As will be seen when reading the cases that were the object of an in-depth study and could be confirmed in the region in other examples such as Ecuador, there are organizations which are formally presented as independent of the government, or as having an autarchic nature, but whose practices are strongly discriminatory.

Despite their formal “independence” or “autonomy”, they have not guaranteed equal opportunity in the access to frequencies, either because they act in complicity with groups or individuals with corporate or political interests, or because they are vulnerable to the influence of those interests to the detriment of the general interest.

The Ecuadorian case is paradigmatic in this sense. The regulatory organ is the National Radio and Television Council (CONARTEL), which is formed by representatives of commercial radio and television business associations, among others. Serious studies carried out by social organizations, the General Comptroller’s Office of the Nation, and the Auditing Commission for Radio and Television Frequency Concessions, an independent organization created pursuant to the provisions of the new Constitution, have denounced systematic abuses of power, including lack of controls and self-allocation of concessions, among other illegalities and unconstitutionality⁴³ incurred by CONARTEL.

The existence of an organization that is not hierarchically dependent on the government and has technical autonomy seems to be, according to the research, a desirable and necessary indicator, but not enough to avoid discriminatory practices that restrict the freedom of expression.

V. CONCENTRATION

Latin America is one of the continents with the highest rates of media concentration. This fact reaffirms the validity of the warnings and statements of various international and human rights agencies regarding its negative effect on pluralism and diversity and how it becomes a determining restriction to freedom of expression and the right to information.

The Declaration of Principles on Freedom of Expression of the OAS states that “monopolies or oligopolies in the ownership and control of the communication media must be subject to anti-

⁴³ In August 2008, the government of Ecuador created a Ministry of Telecommunications and the Information Society and dissolved CONARTEL, merging it into another already existing organization, the National Telecommunications Council (CONATEL).

trust laws, as they conspire against democracy by limiting the plurality and diversity which ensure the full exercise of people's right to information (...)"⁴⁴

The Declaration *Challenges to Freedom of Expression in the New Century* issued by the UN Special Rapporteur on Freedom of Opinion and Expression, OSCE Representative on Freedom of the Media, and OAS Special Rapporteur on Freedom of Expression establishes, among other, issues that: *"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 radio broadcasting airwaves"*⁴⁵.

In the same sense, and highlighting the recognition of community radio broadcasting, the *Joint Declaration on Diversity in Broadcasting* signed by the four special rapporteurs on freedom of expression, broadens and strengthens the above, as this document recognizes *"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"*⁴⁶.

In October 2005, the *Convention on the Protection and Promotion of the Diversity of Cultural Expressions* was approved at the UNESCO in Paris, a convention that came into effect in March 2007. Among the measures for promoting the diversity of cultural expressions, it provides for the implementation of *"measures aimed at enhancing diversity of the media, including through public service broadcasting"*⁴⁷.

Our research focused on the study of the existence and scope of national legislations for preventing or limiting media concentration. As a summary, it can be said that legal frameworks show major weaknesses in terms of the prevention of these situations, either because regulations are completely absent or because they are scarce and insufficient.

In Mexico, the Federal Radio and Television Law does not address the issue of concentration. Radio broadcasting limits were only included as of the Federal Law of Economic Competence and the creation of the Federal Commission of Competence (COFECO).

In this way, this organization can prevent the merger of two broadcasters when it considers that monopolistic practices may exist. The COFECO is also authorized to prohibit concession transfer operations. In the field of broadcasting, the organization has not conducted specific investigations on the issue of the concentration of radio broadcasting frequencies, but on the matter of contents, particularly those of commercial television.

The most striking case of media concentration in this country is the aforementioned "Televisa Law", an initiative which amended several articles of the Federal Radio and Television Law and the Federal Telecommunications Law. The government and the majority of Congress endorsed and promoted a legal reform that strengthened television entrepreneur privileges, the

⁴⁴ Principle 12, *Declaration of Principles on Freedom of Expression*, Office of the Special Rapporteur for Freedom of Expression, IACHR.

⁴⁵ International Mechanisms for Promoting Freedom of Expression. Joint Declaration. Challenges to Freedom of Expression in the New Century (2001).

⁴⁶ The Joint Declaration on Diversity in Radio Broadcasting, December 2007, was signed by four special rapporteurs on freedom of expression: Ambeyi Ligabo, UN Special Rapporteur on Freedom of Opinion and Expression; Miklos Haraszti, OSCE Representative on Freedom of the Media; Ignacio Alvarez, OAS Special Rapporteur on Freedom of Expression; Faith Pansy Tlakula, ACHPR Special Rapporteur on Freedom of Expression. Said annual meeting of the special rapporteurs on freedom of expression with NGOs, academicians and experts took place in Amsterdam, on December 7 and 8, 2007, sponsored by ARTICLE 19, Global Campaign for Free Expression, with the help of the Institute for Information Law, University of Amsterdam. The complete text of the declaration is available at <http://www.article19.org/pdfs/publications/mandates-broadcasting.pdf>

⁴⁷ Article 6 of the Convention.

concentration of frequencies in just a few hands, and retrained the possibilities for the growth of public service media.

This initiative was limited by the Judicial Power, in response to an unconstitutionality action filed by senators of various parties. The ruling declared some of the articles⁴⁸ unconstitutional on the grounds that they were contrary to the principles of equality, the State as rector of the national economy, and the social use of public domain goods, while at the same time they favored concentration phenomena that were contrary to the public interest and free competition.

In Brazil, the Constitution as well as the Brazilian Telecommunications Code and other regulations prohibit concentration. The same person cannot participate in the management of more than one radio broadcasting concession within the same location; the same applies to associations or groups of individuals. Restrictions also apply to the number of frequencies that can be held per State and at national level. In the case of television, each entity can only hold ten concessions within the national territory, with a maximum of five VHF frequencies and two for each State. The legislation does not establish limits on the cross-ownership of media.

However, numerous independent studies, including ours, reveal that important concentration phenomena occur in this country. This situation is not due to the absence of rules, but to the lack of mechanisms for implementing the law and monitoring the competent organizations. In other words, laws and the Constitution are not obeyed.

Researchers highlighted five private networks that control (through more than 100 affiliated groups) 559 radio and television stations throughout the territory, in addition to newspapers, magazines and Internet access providers. The paradigmatic example of undue concentration corresponds to television, where *Grupo Globo* concentrates nearly 50% of the Brazilian television audience and 75% of its advertising revenue.

In Argentina the study found that the mechanisms for regulating access to concessions generate conditions that encourage the concentration of ownership, the majority of which is in the hands of *Grupo Clarín* and *Telefónica*, but other groups such as PRISA and some national entrepreneurs also operate.

In addition to a concentration process encouraged by the amendments made to the existing radio broadcasting law currently in force –passed during a dictatorship–, the weakness of the radio broadcasting regulatory organization against the external pressures to consolidate the concentration, among others, was also noted.

The research reveals that the strong influence of the de facto powers during successive governments, the legal inconsistencies in the application of the regulations to solve the issue of the fair distribution of the scarce spectrum spaces available, and a permissive legal framework that allows concentration, combined with the lack of effective controls for monitoring licensees' compliance with the regulations, create a negative scenario⁴⁹.

In Peru concentration is regulated by the Radio and Television Law, although its margins are very wide. Hoarding, for example, is considered to exist when a legal entity or individual holds more than 30 percent (30%) of the frequencies technically available, whether allocated or not,

⁴⁸ In this case, Article 28.

⁴⁹ At the time of closing the edition, the Argentine government had introduced a bill that establishes innovative, diverse and strong antitrust measures in the field of radio broadcasting and other audiovisual communication services.

in the same frequency band within the same location in the case of the television broadcasting, and 20 percent (20%) in the case of sound radio broadcasting.

In addition, the law imposes no restrictions on cross-ownership. This allows the emergence of large media groups that tend to become exacerbated with technological convergence, as is the case of *Telefónica* and the group that owns the *El Comercio* newspaper.

Researchers once again state the need to analyze not only the legal texts in this country but also their correct application, which is generally affected by a broad discretionality, an administration characterized by low transparency due to the lack of information, and a lack of transparency in the license renewal processes, which show evidence of corruption, discrimination and arbitrariness on the part of certain public officials responsible for that task.

The Peruvian radio broadcasting sector suffers severe pressures from the de facto powers, particularly from those that are the most concentrated. The importance of money is clearly noted, as it acquires decisive importance in the public tenders in pursuit of the few available licenses. To conclude, the centralism observed in the public administration of radio broadcasting authorizations completes the scenario described above and facilitates its establishment.

In Chile the problem of the economic concentration of the media and its impact on the exercise of the rights of freedom of expression and information is being debated with increasing insistence. The study observes that within the Chilean media market there are a number of elements that limit pluralism and seriously threaten the freedom of expression, negatively affecting the quality of politics by creating obstacles that hinder the manifestation of a diversity of perspectives regarding the themes of national interest and how they should be treated, thus impoverishing the debate as well as the public space.

A duopoly in the written press has become a consolidated trend, strengthened by State advertising investments. Television exhibits serious deterioration in terms of regional stations, and both the programming contents of regional channels as well as their concession system are beginning to timidly to be discussed within the framework of the changes imposed by digital television. Sound radio broadcasting shows a profile increasingly concentrated on its property and with a clear trend towards vertical integration, especially with financial sectors, a phenomenon that makes it more susceptible to a greater content uniformity.

The Court for the Defense of Free Competition (TDLC) has jurisdiction on concentration issues, but a purely economic approach does not appear to be sufficient when broadcasting, diversity and pluralism are involved. In this regard, the study mentions the merger of the Spanish Grupo Prisa with Ibero-American Radio Chile SA in 2007.

Despite all the advances that were surveyed in the case of Uruguay, the television sector of this country continues to be highly concentrated. Moreover, the legislation establishes accurate limitations in terms of the number of concessions that the same person or company may have, but the reality is very different and these provisions are exceeded. This is because, on the one hand, concentration phenomena are not limited to the ownership of media and, on the other, deceptive business practices such the use of "figureheads" –also common in other countries– are employed to overcome those barriers.

Historically, the predominant allocation mode was determined by the allocation of frequencies according to political affinity. Since the restoration of democracy in 1985, successive governments and even the military dictatorship have used their discretionary faculties to strengthen media concentration in the hands of the companies possessing network TV channels and radio stations of greater penetration.

The most notorious case of this discretionality that favors concentration processes is cable television. During the government of Luis Alberto Lacalle (1990-1995) the concession to operate cable television in the capital city was awarded to the three network television companies, thus reinforcing cross-ownership of an oligopolistic nature.

The study repeats earlier concepts when it notes that the regulatory and controlling capacity of the State throughout the 20th century has been virtually non-existent, allowing all kinds of abuse in the use of the spectrum, acting without transparency or competitive processes. In Central America there is a marked tendency towards the concentration of frequencies in just a few hands, based mainly on the fact that access to the use of frequencies is decided through the mechanism of auction to the highest bidder. Only a few individuals or companies have acquired frequencies and formed major radio chains, with presence at national level.

Guatemala is the paradigmatic case in this American sub-region. A single entrepreneur holds the concessions for the four open TV channels of the country, but there are also strong radio and television oligopolies with great economic and political power who are interested in preventing newcomers from accessing the radio-electric spectrum and who consider community radio to be a threat to their privileged status. These groups have enough power to dictate the agenda of the public institutions.

There is a kind of “eternalization” of concessions due to prolonged periods of concession and automatic extensions that make it very difficult, if not impossible, for new individuals, organizations or companies to access a frequency that has already been granted.

Researchers also stress that, although the legislation is not the most appropriate, the biggest problem lies in the lack of controls and proper implementation of the regulations on the part of the State.

To summarize, from the analysis of the group of national chapters corresponding to our research and other chapters that we have incorporated as contributions to this book, some important conclusions can be reached:

- a) The concentration phenomenon is widespread in the region and constitutes one of the greatest restrictions to freedom of expression, as it drastically limits the diversity and pluralism of the opinions and information that reach the population;
- b) a major origin of the concentration situation is the type of procedures laid down in each country's legislation and the way they are applied. The most notorious example is the auction to the highest bidder;
- c) legal frameworks to prevent or avoid concentration, where they exist, are scarce, inadequate and frequently exceeded in reality by business practices such as the use of figureheads;

- d) regulations regarding concentration are limited to determining a maximum number of licenses that a single person or company may hold, when they should include other measures such as limiting cross-ownership and the potential audience that an audiovisual communication service can reach within the same coverage area. The concentration of media "ownership" is only one of the processes that are generating concern, but the centralization and homogenization of content by one or several dominant economic groups through different chains and repeaters, even if they are under the name of different holders, generates just as much, if not more, concern;
- e) in some cases, the regulation of concentration processes has been transferred to organizations devoted to defending competition. Some examples that were surveyed show the limitations of an economist analysis of radio broadcasting concentration;
- f) the deficiencies, vulnerability or complicity of regulatory and implementation organizations largely explain the lack of effective controls of the compliance with antitrust legislation;
- g) under the pretext of simplifying procedures or preventing potential government discretionality, automatic concession renewal after their term has expired or the establishment of preferential rights hides the privilege awarded to certain corporate interests so that they may consolidate their oligopolistic or monopolistic situation, making any objective to promote and ensure the diversity and pluralism in radio and television a Utopian pursuit.