

ARTICLE 19

Ecuador: Law on Communications

June 2012

Legal analysis

Executive summary

In June 2012, ARTICLE 19 analysed the Draft Communications Law (“Ley Orgánica de Comunicación”) of Ecuador. Although it was originally proposed as far back as 2009, the Law attracted substantial controversy and its adoption became stalled. Critics feared the proposal would enable increased government control over the flow of information, while the ruling majority argued its aim was to democratise communications and break down old structures of corporate media control.

The analysis focuses on the compatibility of the current Draft Law with international standards on freedom of expression. While the Draft Law has been improved since the original draft, ARTICLE 19 believes that it still requires further revision to protect the right to freedom of expression. The analysis offers practical recommendations for Ecuador’s National Assembly to achieve this.

In the analysis, ARTICLE 19 recognises and welcomes positive provisions of the Draft Law, such as the commitment to media pluralism, and the promotion of local content and domestic productions. Similarly, we commend the provisions devoted to the rights of equal participation in and access by all parts of society to the media, such as the Indigenous, Afro-Ecuadorian and Montubio communities, and disabled persons. A particularly impressive aspect of the Draft Law is also the guarantees for the protection of sources for all groups that fall under the broad term “social communicators”. Elements of the section on public service media are also promising such as the progressive mandate proposed for public service media.

ARTICLE 19 observes that the Draft Law has been amended to prohibit prior censorship and the definition and understanding are now in line with other democracies. Yet, a more effective deterrent is required to safeguard the right such as the option to stop the prior censorship through an expedited court procedure.

Areas of particular concern were the degree of independence of regulatory bodies from political interference, and procedural inadequacies in the proposed handling of broadcasting content, licenses, and censorship. The proposed funding and appointments processes for the regulatory bodies need to be more transparent and participatory, and the accountability of these bodies should be increased through the requirement for annual reports and audited accounts to be submitted to the National Assembly.

Furthermore, amendment is also required so that the Draft Law does not bar financial companies from owning media outlets, and political parties are excluded in order to ensure political pluralism of the airwaves.

ARTICLE 19 also notes the State’s inappropriate intrusion into areas which should be self-regulated by the media, such as the content of print media and the development of ethical codes for broadcast media. Provisions for the general labour rights of social communicators are also an unnecessary consideration here and should be provided for in general labour laws.

The Draft Law allows a worrying degree of government control over content, in particular, the repetition of the President’s power to suspend media freedoms during a state of emergency, already provided for in the Constitution, and the provision for the Presidents of the Republic and National Assembly, and lower officials, to demand airtime for the broadcast of *cadena*s (announcements of “general interest”), a grotesque and unjustifiable limitation on editorial freedom, which has already been regularly abused.

ARTICLE 19 strongly recommends that vague provisions in the law be clarified or omitted, such as the prohibition on publication of information covered by a “reserve clause”, and the criterion requiring that the media be held responsible for conduct that is considered to “harm human rights or the public security of the State”. The former should be deleted, and the latter should be amended so that the media are only accountable where they have breached a specific law.

Finally, ARTICLE 19 calls on the National Assembly to recognise that the Draft Law in its current form still falls short of international standards on freedom of expression. We therefore urge that the Draft Law is only adopted after the necessary amendments have been made.

Overview of Recommendations:

- The Law on Communications should not seek to regulate the ethics of journalism. Articles 9 and 10 should be deleted.
- A provision should be added to Title II, Chapter I of the Draft Law, clarifying that the principles listed in Articles 11-15 do not create new powers, but are guidelines that public bodies must observe when exercising regulatory powers over the media.
- Instead of providing a new definition of freedom of expression in Articles 17 and 27, the Draft Law should refer to Article 13 of the American Convention on Human Rights and the relevant provisions in the Constitution of Ecuador.
- Alternatively, Articles 17 and 27 of the Draft Law should be made consistent with the American Convention, by stating expressly that freedom of expression applies regardless of frontiers and includes the right to seek and receive not only information, but also ideas of all kinds.
- Individuals and media who believe the ban on prior censorship has been violated should be able to challenge this through an expedited court procedure.
- Article 20 of the Draft Law should be amended to make it clear that media are responsible only for specific breaches of the law and not for conduct that is considered to “harm human rights or the public security of the State”.
- The rights of reply and correction should be limited to inaccurate facts and should not apply to statements clearly attributed to third parties.
- The Law on Communications should recognise a set of circumstances under which media outlets are not required to accept a reply, including when the reply is not presented within a reasonable time, exceeds what is necessary to correct the mistake, is abusive or contains unlawful content, or the individual concerned lacks a legitimate interest.
- Only persons who are entitled to the right of correction or reply should have the right to receive a free copy of the disputed media content.
- Articles 28-30 of the Draft Law, as well as other provisions of the Law intended to protect the right of privacy, should be subject to a public interest defence, which exempts a person from liability for publishing private information when doing so made a sufficiently important contribution to a debate of public interest.
- In addition, the Law on Communications should expressly recognise that public officials, especially high-ranking and elected ones, must tolerate a higher degree of scrutiny of their private lives.
- Article 28(1) of the Draft Law, prohibiting the publication of information covered by a “reserve clause”, is excessively vague and should be deleted.
- The publication of prosecutorial files should be permitted with the prosecutor’s consent. Article 28(3) of the Draft Law should be amended to this effect.
- Article 31 of the Draft Law should be amended. The Law should not bar financial institutions and bankers from owning media companies.
- Article 32 should be amended. The Law should prohibit political parties from being granted a broadcasting licence.

- The right to protection of sources, as defined in Article 38 of the Draft Law, should be extended to collaborators of the social communicator who acquire information on the source's identity during the preparation of the story.
- There should be an explicit ban on any police search and seizure operations intended to uncover the identity of a social communicator's source.
- Consideration should be given to limiting the right of social communicators to publicly speak out against their employer to cases where there has been a clear breach of a law.
- The requirement under Article 40 of the Draft Law, for certain media and communications jobs to be performed by "professionals in journalism and communication", should be dropped.
- Article 41 of the Draft Law should not seek to regulate specific labour rights of social communicators such as salaries, insurance coverage and professional development. These issues should be dealt with through general labour laws that apply to enterprises in general.
- Members of the Council for the Regulation and Development of Communication should be selected by an elected body, preferably by a qualified majority vote in the National Assembly or by a cross-party committee of its members.
- Nominations for members of the Council for the Regulation and Development of Communication should be accepted from a wider range of civil society organisations or from the public at large, and the appointments should be made in a transparent and participatory manner.
- The Law should specify that the term of members of the Council for the Regulation and Development of Communication is not renewable, or is renewable only once. Consideration should be given to staggering the terms of members, in order to ensure the continuity of the Council's work.
- The Council should be permitted to levy a fee on holders of broadcast licences to finance its operations, topped up as necessary by an allocation from the general budget, preferably in the form of a multi-year grant.
- The Council should be required to submit an annual report on its activities, including its audited accounts, to the National Assembly and to make it available to the public, for example on its website.
- The Law on Communications should not seek to directly regulate media content. Instead, it should authorise the Council for the Regulation and Development of Communication to develop a broadcasting code in collaboration with licensed broadcasters, through a process that allows for public input. This code should not apply to other types of media.
- When the Council decides to open an investigation against a broadcaster, it should provide written notification of the allegation and grant the broadcaster an opportunity to make representations.
- There should be a general obligation on the Council to ensure that any sanctions imposed are proportionate to the seriousness of the offence. All sanctions should be subject to judicial review.
- The Law on Communications should not seek to impose generalised objectives on all media. Article 74 of the Draft Law should be deleted.
- The power of public officials, including the President, to order the broadcasting of a *cadena* is an unjustifiable interference with editorial freedom. Articles 77(1) and (2) and Article 78 of the Draft Law should be deleted.
- The possibility to suspend media freedoms during a state of emergency is already sufficiently provided for in the Constitution and should not be reiterated in the Law on Communications. Article 80 of the Draft Law should be deleted.
- The mandate of the public media defined in Article 82 of the Draft Law should include a few additional functions, in particular: providing programming to minority groups and

in minority languages, covering important proceedings of the National Assembly and other representative bodies, developing content that is of interest to different regions, and providing a reasonable proportion of educational programmes and programmes oriented towards children.

- The Law on Communications should clarify how members of the governing Councils of public media are appointed. The appointments process should be overseen directly or indirectly by an elected representative body such as the National Assembly, and should be open and participatory.
- Public media should be required to prepare and publish an annual report on their activities, including audited accounts, and submit it to the National Assembly.
- National public media should not be restricted to accepting advertising from the public sector. Consideration should be given to setting an appropriate cap on the share of public media outlets' revenues that may be generated from advertising.
- Article 110 of the Law should expressly prohibit the arbitrary and discriminatory placement of public sector advertising as a means to punish or reward media for their opinions.
- Broadcasters should not be confined to works of 'accredited' producers for the satisfaction of their obligation to purchase independent national productions. The last paragraph of Article 102 of the Draft Law should be deleted.
- There should be no absolute ban on the broadcasting or printing of foreign-produced advertising. Article 103 of the Draft Law should be amended or deleted.
- The possibility should be explored of allowing licences that were granted illegally to run until the end of their term, in cases where the licence was not granted as a result of unlawful conduct on the part of the holder.
- Before taking an important decision affecting the rights of a licence holder or applicant, the Council should in all cases grant the party in question a right to make representations. Decisions should be made in writing, stating the reasons, and should be subject to judicial review. The same requirement should apply to decisions to withdraw licences taken by the Telecommunications Authority.
- Persons who have a familial or business tie to a member of the Council should not be barred from taking part in licence competitions. Rather, the Council member in question should be barred from taking part in the decision. Article 119 should be amended to this effect.
- The duration of a licence should depend on the nature of the service and the level of investment required. Article 124 should be amended to introduce different categories of duration.
- Insofar as the Council is granted the power to levy fees on licence holders, these should be proportionate and non-discriminatory, and established through a schedule published in advance. Community broadcasters should be exempt from this fee.



Table of contents

- About the Article 19 Law Programme 7**
- Introduction 8**
 - Summary of Recommendations 2
- Analysis of the Law on Communications 9**
 - Ethical norms 9
 - General principles of regulation 10
 - Freedom of expression in general 11
 - Prior censorship and subsequent responsibility 12
 - The rights of correction and reply..... 12
 - Protection of private and confidential information 14
 - Rights of equal participation and access..... 15
 - Protection of sources and other rights of social communicators..... 16
 - The Council for the Regulation and Development of Communication 18
 - Regulation of content 20
 - Regulation of media outlets in general 21
 - Public media 22
 - Local content requirements 25
 - Licensing of broadcasters..... 26

About the Article 19 Law Programme

The ARTICLE 19 Law Programme advocates for the development of progressive standards on freedom of expression and access to information at the international level, and their implementation in domestic legal systems. The Law Programme has produced a number of standard-setting publications which outline international and comparative law and best practice in areas such as defamation law, access to information and broadcast regulation.

On the basis of these publications and ARTICLE 19's overall legal expertise, the Law Programme publishes a number of legal analyses each year, comments on legislative proposals as well as existing laws that affect the right to freedom of expression. This analytical work, carried out since 1998 as a means of supporting positive law reform efforts worldwide, frequently leads to substantial improvements in proposed or existing domestic legislation. All of our analyses are available online at

<http://www.article19.org/resources.php/legal/>.

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Introduction

In April of 2012, the Ecuadorian National Assembly commenced voting on a new Law on Communications (“*Ley Orgánica de Comunicación*”).¹ Although it was originally proposed as far back as 2009, the Law attracted substantial controversy and its adoption became stalled. Critics feared the proposal would enable increased government control over the flow of information, while the ruling majority argued its aim was to democratise communications and break down old structures of corporate media control.

One thing both critics and advocates can agree on is that the Law’s scope is very ambitious: its 127 articles run the gamut from media ethics and regulation of broadcasting to advertising and the right of reply. It is an attempt to regulate the framework for freedom of expression in a comprehensive manner, introducing widespread changes compared to existing legislation.

With this analysis, ARTICLE 19 seeks to contribute to an informed debate about the draft of the Law on Communications (“the Draft Law”), by providing a comparison of its main provisions against international law and standards in the area of freedom of expression, as reflected amongst others in Article 13 of the *American Convention on Human Rights*² and Article 19 of the *International Covenant on Civil and Political Rights*. Our conclusions lend some support to both sides of the debate; while the Law is very progressive in important areas, such as promoting equal access to and participation in the media for all groups in society, it also institutes an oppressive, multi-layered system of content control, overseen by a regulator whose independence is not convincingly assured. This analysis also expands on the concerns of ARTICLE 19 about the restrictions to freedom of expression raised in a press release when the original draft of the law was proposed in 2009.³

At the end of each section, we have included practical recommendations on how to bring the Law more fully into line with international best practice. We urge the National Assembly to consider these recommendations when finalising the Draft Law.

¹ The analysis is based on the final draft of the Law on Communications from 4 April 2012. A copy of the Draft (in Spanish) is available upon request from ARTICLE 19.

² American Convention on Human Rights, also known as the Pact of San José, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, *entered into force* July 18, 1978.

³ ARTICLE 19’S Press Release ‘Ecuador: Draft Communication Law Needs Improvement, 19 March 2009.

Analysis of the Law on Communications

The Draft Law on Communications is divided into six separate Titles, which in turn are divided into Chapters.

- Title I defines a number of important terms used in the Law.
- Title II serves two purposes; its first chapter describes the principles on which the Law is based, while the remaining chapters establish a series of rights, organised into four categories (rights of freedom, rights of equality and interculturality, rights of participation and rights of communicators).
- Title III deals with the establishment of a media regulatory body, the Council for the Regulation and Development of Communication.
- Title IV sets out certain rules on media content, while Title V deals with the media themselves, distinguishing between public, private and community outlets.
- Finally, Title VI governs the allocation and use of broadcasting frequencies.

This analysis follows the same order as the Draft Law.

Ethical norms

The first substantive subject dealt with in the Draft Law is the ethical framework governing communications. Article 10 provides a number of minimum ethical standards which all “participants in the communicative process” must take into account. All in all, 29 different obligations are listed ranging from the general, such as respecting privacy and avoiding discrimination, to the specific, such as a requirement to refrain from ridiculing persons with a handicap or presenting the process of aging in a negative light. Article 9 adds that private, public and community media are required to adopt their own codes of ethics that reflect these norms. Along with the editorial policy, these codes must be published online or in another generally available form (Article 16).

The practical consequences of a failure to respect an ethical norm are limited; citizens may lodge a complaint with the Council for the Regulation and Development of Communication (“the Council”), but the only sanction it may impose is a written reprimand, unless the conduct complained of also breaches a specific legal requirement.

Nevertheless, ARTICLE 19 considers these provisions inappropriate. It is beyond dispute that media should use their freedom in a responsible manner, and the norms set out in Article 10 are, for the most part, comparable to what is found in codes of ethics developed by journalists themselves around the world. A clear distinction should, however, be made between the responsibilities of the authorities and those of the media. The role of the State is to draw lines between what is legal and what is illegal, not to decide which legal behaviour is ethical. Freedom of the media implies that journalists are allowed to make their own judgments about which subjects to address and how to approach them. Almost inevitably, some will abuse this freedom; but attempts to eliminate “unethical conduct” merely exchange one problem for another far more dangerous one, namely excessive government control over the media. It is for

these reasons that Principle 6 of the *Inter-American Declaration of Principles on Freedom of Expression*⁴ states:

Journalistic activities must be guided by ethical conduct, which should in no case be imposed by the State.

While Article 10 does not create any meaningful powers for the authorities to crack down on unethical conduct, it sends the wrong message. Questions of ethics should be left to the media to address through self-regulation.

Recommendations:

- The Law on Communications should not seek to regulate the ethics of journalism. Articles 9 and 10 should be deleted.

General principles of regulation

Along with the requirement to observe ethical norms, Chapter I of Title II of the Draft Law sets out a number of general principles that the State must observe in the regulation of communications. All of these are related, in some way, to the promotion of diversity. They include a duty for the authorities to encourage access to the media for disadvantaged groups (Article 11), to work progressively towards the democratisation of access to and ownership of the means of communication, including broadcast frequencies (Article 12), to encourage citizen participation in the media (Article 13), to promote intercultural communication between the various cultural, ethnic and linguistic groups in Ecuador (Article 14), and to promote the free expression of children and youths and protect their development (Article 15).

ARTICLE 19 welcomes the emphasis placed on pluralism. Ensuring that all groups and viewpoints present in society have equitable access to the media is a key goal of media regulation, as emphasised by the Inter-American Court of Human Rights in a recent ruling:

[T]he State must minimize the restrictions to information and balance, as much as possible, the participation of the different movements present in the public debate, promoting informative pluralism.⁵

At the same time, while the principles expressed in these articles are positive, their exact legal effect is not clear. They may simply have been included as guidelines that the authorities must observe in the exercise of their specific powers granted elsewhere in the Law. However, given the very general and broad wording used in these provisions, it is important that they are not interpreted as creating an independent basis for regulation. Goals such as “deepening the democratisation of ownership of and access to the media” are laudable, but also vague, and therefore potentially subject to abuse if they are taken to justify specific measures such as expropriation of media outlets for the purpose of ‘democratisation’.

⁴ Approved by the Inter-American Commission on Human Rights during its 108th regular session, 19 October 2000.

⁵ Case of *Ríos et al. v. Venezuela*, Judgment of 28 January 2009, §106.

One solution would be to insert a new provision into Chapter I of the Draft Law, stating that public bodies with powers to regulate the media shall take into account the principles listed in Articles 11-15 in the exercise of those powers. This would make it clear these articles are intended only as guidelines.

Recommendations:

- A provision should be added to Title II, Chapter I of the Draft Law clarifying that the principles listed in Articles 11-15 do not create new powers, but are guidelines that public bodies must observe when exercising regulatory powers over the media.

Freedom of expression in general

Article 17 of the Draft Law defines freedom of expression in general terms, stating that every person has the right “to express himself and opine freely in any form and through any medium, and will be responsible for his expressions in accordance with the law”. Article 27 elaborates that each person also has the right to search and receive information through any medium or channel, and to freely choose how to obtain information; this right can only be limited in cases “contemplated by the law, the Constitution or an international human rights instrument”.

This definition is a significant improvement over previous drafts of the Law that limited freedom of expression to information which is “accurate, verified, timely, contextualised and plural”. The present wording is more consistent with how the right is defined in Article 13 of the *American Convention on Human Rights*.

At the same time, the objective of including these provisions in the law is unclear. ARTICLE 19 notes that both the *American Convention* and the Ecuadorian Constitution already guarantee freedom of expression in general terms, leaving the details, such as which restrictions apply, to be elaborated in detailed lower legislation. While there is no harm in principle in restating international or constitutional guarantees in lower legislation, it becomes problematic when the right recognised in the lower legislation is more limited. In this respect, there are still two small – but important – differences between the Law on Communications and the *American Convention*: the Convention guarantees freedom of expression “regardless of frontiers”, an element missing from the Law; and under the Convention, the right to “seek” and “receive” includes not just information, but also “ideas of all kinds”. Moreover, the statement that restrictions may be made in the cases contemplated by international human rights instruments is a bit circular; these international instruments themselves state that restrictions may only be made in national laws.

Recommendations:

- Instead of providing a new definition of freedom of expression in Articles 17 and 27, the Law should refer to Article 13 of the *American Convention on Human Rights* and the relevant provisions in the Constitution of Ecuador.
- Alternatively, Articles 17 and 27 of the Draft Law should be made consistent with the Convention, by stating expressly that freedom of expression applies regardless of frontiers and includes the right to seek and receive not only information, but also ideas of all kinds.

Prior censorship and subsequent responsibility

Both Article 13(2) of the *American Convention* and Article 18(1) of the Constitution of Ecuador prohibit prior censorship. The Draft Law implements this prohibition in Articles 18-21, which also give effect to the principle of responsibility after the fact.

Article 18 of the Draft Law defines prior censorship as the editing, approval or disapproval of content by an official or authority prior to dissemination through the media. Article 19 of the Draft Law adds that the suspension of the publication of an article or the cancellation of a scheduled broadcast are considered prior censorship. This accords well with how prior censorship is understood in other democracies.

Less convincing is the mechanism for preventing prior censorship. Article 18 of the Draft Law states that officials who commit prior censorship or take indirect steps with the same aim, may be given a fine worth two to six months of their salary. But the body that decides on such fines is the Council for the Regulation and Development of Communication which, as will be seen below, is not sufficiently independent from the government. Perhaps a more useful safeguard for the media would be the right to go to court and put an end to the prior censorship through an expedited procedure.

Article 20 of the Draft Law underlines that, the ban on prior censorship notwithstanding, the media may be held responsible after the fact for what they publish or broadcast. Although it is logical that media are held to account, ARTICLE 19 believes that the standard should be whether a law was broken, not whether the content in question “harms human rights or the public security of the State”, which is the vague criterion found in Article 20.

Article 21 of the Draft Law establishes an important safeguard: the media are responsible for their own words, but not for statements which are clearly attributed to others. In many cases, the fact that a statement is made (such as an allegation of corruption against a person) is a newsworthy fact in itself, and the media should be able to report on such statements in a neutral way, without fear of being held liable for their content. Article 21 helps ensure this. It also clarifies the question to what extent a website owner is responsible for comments left by visitors. Liability can be avoided by informing users that they are personally responsible, by collecting data enabling the author of the comment to be identified, or by screening contributions and providing an opportunity to report abuse. This rule strikes a fair balance between the responsibility of the website publisher and that of the user.

Recommendations:

- Individuals and media who believe the ban on prior censorship has been violated should be able to challenge this through an expedited court procedure.
- Article 20 of the Draft Law should be amended to make it clear that media are responsible only for specific breaches of the law, not for conduct that is considered to “harm human rights or the public security of the State”.

The rights of correction and reply

The right of reply is a contentious area of media law. In some democracies, it is viewed as a quick, low-cost and effective alternative to lawsuits against media outlets, as well as a means to ensure that the public hears both sides of contentious stories. In others, it is viewed as a serious limitation on editorial freedom, which interferes with a media outlet’s right to decide on its own content within the limits of the law.

As a party to the *American Convention*, Ecuador does not need to decide on which side of the debate it stands, as Article 14(1) requires States Parties to guarantee the right of reply:

Anyone injured by inaccurate or offensive statements or ideas disseminated to the public in general by a legally regulated medium of communication has the right to reply or to make a correction using the same communications outlet, under such conditions as the law may establish.

The Draft Law distinguishes between a right of correction (Article 24) and a full right of reply (Article 25). The former requires a media outlet that has disseminated “unproven, false or inexact information” regarding a person to publish or broadcast a prompt and free rectification in a similar format, and at a similar time or in a similar place. The latter entitles a person whose “honour, dignity or reputation” has been affected by a direct mention to publish or broadcast a reply in the same space, page and section, or on the same programme. To facilitate these rights, Article 26 requires media outlets to promptly respond to a request for a copy of an article or broadcast presented by a person “who feels affected by media information”, failing which they risk a fine imposed by the Council. The Council also has the right to impose sanctions in response to a refusal to provide the right of correction or reply; these include an order to apologise on the media outlet’s website or on air, or in the case of multiple transgressions in one year, progressively stiffer fines. These sanctions do not prevent the aggrieved person from taking additional steps through the courts.

Striking the balance between editorial freedom and protection of individuals is not easy, but these provisions go somewhat further than is justified. First, ARTICLE 19 believes the rights of reply and correction should be limited to inaccurate facts. Opinions, even harsh ones, are by definition not ‘true’ or ‘false’, so there should be no need to correct them. Second, there are certain circumstances under which a media outlet should be permitted to refuse a reply. The Council of Europe – an international organisation which sets continent-wide standards in the area of human rights and democratic development – has recommended the following exceptions:⁶

- i. if the request for the publication of the reply is not addressed to the medium within a reasonably short time;
- ii. if the length of the reply exceeds what is necessary to correct the information containing the facts claimed to be inaccurate;
- iii. if the reply is not limited to a correction of the facts challenged;
- iv. if it constitutes a punishable offence;
- v. if it is considered contrary to the legally protected interests of a third party;
- vi. if the individual concerned cannot show the existence of a legitimate interest.

Third, in addition to these exceptions, we would recommend allowing a media outlet to refuse a correction or reply if the statement in question was a quote or otherwise attributed to a third party and not endorsed as true, and if the proposed reply is abusive, for example, because it contains swear words or clearly falls below the standards that may be expected of media content. The right to demand a copy of media content should also be limited to those persons who enjoy a right of reply or correction under the Law; otherwise, media outlets may be

⁶ Resolution (74) 26 on the right of reply – position of the individual in relation to the press, adopted by the Committee of Ministers on 2 July 1974 at the 233rd meeting of the Ministers' Deputies, Appendix, Article 3.

flooded by requests from persons who claim to be “affected” by a broadcast or article but simply want a free copy.

Finally, ARTICLE 19 believes the best way to promote the right of correction and reply is not to enforce it through forced apologies and fines, but to give media outlets an incentive by guaranteeing that their compliance will count in their favour in any subsequent legal proceedings.

Recommendations:

- The rights of reply and correction should be limited to inaccurate facts and should not apply to statements clearly attributed to third parties.
- The Law on Communications should recognise a set of circumstances under which media outlets are not required to accept a reply, including when the reply is not presented within a reasonable time, exceeds what is necessary to correct the mistake, is abusive or contains unlawful content, or the individual concerned lacks a legitimate interest.
- Only persons who are entitled to the right of correction or reply should have the right to receive a free copy of the disputed media content.

Protection of private and confidential information

Articles 28-30 of the Draft Law restrict the publication of certain types of information in order to protect the right to privacy and the development of minors. Article 28 gives the Council the power to fine anyone who, among other things, publishes personal data or communications without permission or publishes from a prosecutor’s file. Article 29 prohibits the recording of the personal communications of a third person without his or her permission. Finally, Article 30 prohibits the “victimisation as well as the dissemination of content that violates the rights of children and adolescents”.

Like freedom of expression, privacy is a human right protected by international law, as reflected in Article 11 of the *American Convention*. The question how these two rights should be balanced is not a straightforward one.

In a recent decision, *Fontevicchia y D’Amico v. Argentina*,⁷ the Inter-American Court of Human Rights provided some guidance. The case arose from the conviction of two journalists for the disclosure of information about an illegitimate child fathered by Carlos Menem, the then President of Argentina. The Court found that:

[T]wo important standards for the dissemination of information about potential private life issues relate to: a) the different threshold of protection for public officials, especially those who are popularly elected, for public figures and individuals, and b) the public interest in the actions taken.⁸

⁷ Case No 12.524, Judgment of 29 November 2011.

⁸ §59.

The Inter-American Court went on to find that the existence of the illegitimate child and the reportedly large sums of money and other forms of support given to him and his mother by the President reflected on his integrity and were matters of public interest. Moreover, stories about the possible paternity of the child had been widely disseminated in the media at least 2 years before the publication complained of, and Mr Menem had not taken measures to safeguard his privacy during that time. As a result, the penalty imposed on the petitioners had not been necessary and violated their right to freedom of thought and expression.

Viewed in light of this ruling, Articles 28-30 of the Draft Law go too far in granting automatic priority to privacy over freedom of expression. First, these provisions should be subject to a “public interest defence”: where the publication of private information makes a sufficiently important contribution to a debate of public interest, it should be permitted. And second, the Law should recognise that while public officials are entitled to a private life, the more senior they are, the more they should accept scrutiny of aspects of their private life that reveals matters of public interest.

Even with these additions, some of the provisions in question remain overbroad. Article 28(1), which states that information which is “expressly protected by a reserve clause previously established by law” is extremely vague and should be deleted. The unqualified prohibition on publishing from prosecutorial files in paragraph 3 of the same article also goes too far; this should certainly be permitted with the permission of the prosecutor’s office.

Recommendations:

- Articles 28-30, as well as other provisions of the Law intended to protect the right of privacy, should be subject to a public interest defence, which exempts a person from liability when the private information published made a sufficiently important contribution to a debate of public interest.
- In addition, the Law should expressly recognise that public officials, especially high-ranking and elected ones, must tolerate a higher degree of scrutiny of their private lives.
- Article 28(1), prohibiting the publication of information covered by a “reserve clause”, is excessively vague and should be deleted.
- The publication of prosecutorial files should be permitted with the prosecutor’s consent. Article 28(3) should be amended to this effect.

Rights of equal participation and access

A particularly positive side of the Draft Law is the attention devoted to equal access for all parts of society to the media. Some of the key provisions on this subject are found in Articles 31-35.

Article 34 of the Draft Law guarantees the Indigenous, Afro-Ecuadorian and Montubio communities the right to produce and disseminate content that reflects their cultures and languages. To give effect to this right, private, public and community media are obliged to devote at least 5% of their programming to this content, either by producing it themselves, rebroadcasting it or making airtime available to these communities. Failure to do so may result in a fine. Article 35 requires media operators and public authorities to promote access of disabled persons to the media, through sign language, subtitling and braille, although no specific numeric target or enforcement mechanism is provided.

Articles 31-33 of the Draft Law deal with the establishment of media, access to frequencies, and ICT. All persons are guaranteed the right to found a media outlet. This positive principle is tarnished by an exception for financial institutions, a restriction flowing from Article 312 of the Constitution, which stipulates that

[F]inancial entities or groups, along with their legal representatives, board members and shareholders ... [from having] any share in controlling the capital, investment or assets of the media.

While recognising the importance of diversity of media ownership, ARTICLE 19 considers a blanket ban on financial institutions investing in the media excessive and, insofar as it has been used to weaken critical media outlets, very troubling. The only blanket ban that should be considered is a prohibition on political parties owning broadcasting stations, to ensure sufficient political pluralism in the airwaves. This would require an amendment to Article 32, which states that any natural or legal person has a right to access a broadcasting frequency under equal conditions.

Recommendations:

- Article 31 of the Draft Law should not bar financial institutions and bankers from owning media companies.
- Article 32 should prohibit political parties from being granted a broadcasting licence.

Protection of sources and other rights of social communicators

The final category of rights protected by the Draft Law is the “rights of communicators”. These include a number of rights that have traditionally been granted to journalists only, but are increasingly viewed internationally as belonging to a broader range of actors who fulfil a comparable role in society, such as campaigners or bloggers. The Draft Law follows this positive trend by using the wider term “social communicators”.

The most famous right of journalists is the protection of sources, a topic covered by Article 38 of the Draft Law. According to this provision, no person who disseminates information of general interest may be compelled to reveal his or her source, and any information about the source obtained illegally or forcibly is inadmissible as evidence in court. The person responsible for the wrongful disclosure is liable towards the source for the consequences. Article 39 contains a similar safeguard against forced disclosure of facts shared with a social communicator in the course of his or her professional activities.

These are impressively strong guarantees. In most jurisdictions, the protection of sources is not unlimited; in particular, it is quite well recognised that a court may legitimately order disclosure of the source’s identity if it is necessary for the prevention, investigation or prosecution of a serious crime, or to guarantee a person accused of such a crime a fair trial. This is subject to the requirements that the necessary information cannot be obtained through other means and that the public interest in disclosure clearly outweighs the harm to freedom of expression.

Although ARTICLE 19 welcomes the commitment to a very strong protection of sources, consideration could be given to building in a very limited exception along the lines described

above. This would reduce the risk of courts finding it necessary to create new exceptions outside of the law. On the other hand, the protection of sources could be further bolstered in two ways. First, the right should apply not only to the social communicator, but also to other persons who collaborated in the preparation of the story and acquired information on the source's identity during that process. Second, there should be an explicit ban on any police search and seizure operations intended to uncover the identity of the source.⁹

While the protection of sources is quite universally recognised, the right guaranteed in Article 37 – the ‘conscience clause’ – is more controversial. As defined here, the clause protects a social communicator against professional sanctions or dismissal if he or she refuses to carry out instructions that violate the code of ethics of the media outlet or the ethical norms laid down in the Law.

Some believe that disagreements of this nature should be handled as any other labour dispute, and that a conscience clause risks justifying routine and excessive interference by employees in the editorial board's decisions. Its advocates view the conscience clause as an important tool to ensure that journalists and other communicators can demand ethical conduct from managers who may be willing to cut corners to make a profit in a competitive market. ARTICLE 19 considers the conscience clause, as defined in Article 37, to be appropriate, subject to our view that codes of ethics should be freely developed by the media themselves rather than imposed by law. The right of employees to publicly speak out against their employer through another medium should arguably be limited to extreme cases, such as a clear violation of the law.

A provision which is clearly not appropriate is Article 40, which requires journalistic activities and “social communication of a permanent character” to be performed by “professionals in journalism or communications”, with certain limited exceptions. The Inter-American Court of Human Rights, in one of its most famous rulings,¹⁰ clearly held that limiting the practice of journalism to persons who possess certain professional qualifications is not permissible. The Court considered that “journalism is the primary and principal manifestation of freedom of expression of thought”.¹¹ In this sense, journalism is fundamentally different from other professional activities such as the practice of law or medicine, which are not intertwined with the exercise of a human right and may therefore be restricted to persons who meet relevant educational requirements. By contrast, freedom of expression, including the practise of journalism, is a right that every person should enjoy.

Finally, Article 41 of the Draft Law guarantees a number of labour rights for communications workers. We welcome the fact that these include protection from the public authorities in the case of work-related threats; international law requires that States make a positive effort to protect the safety of media workers, a requirement which regrettably is ignored in many countries.

⁹ The European Court of Human Rights has on a number of occasions condemned police search and seizure operations conducted with a view to uncover a journalist's source as an even more drastic measure than an order to divulge the source's identity. See, for example, *Roemen and Schmit v. Luxembourg*, Application No. 51772/99, Judgment of 25 February 2003, para. 57.

¹⁰ Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 of the American Convention on Human Rights), Advisory Opinion OC-5/85, November 13, 1985, Inter-Am. Ct. H.R. (Ser. A) No. 5 (1985).

¹¹ *Id.*, §71.

On the other hand, we question whether certain other guarantees provided in this article, such as a salary “fixed by the competent authority”, insurance coverage and professional development are appropriate subjects for a law on communications, rather than a more general law on labour rights. The danger is that these provisions could be enforced selectively to put financial pressure on critical media outlets.

Recommendations:

- The right to protection of sources, as defined in Article 38, should be extended to collaborators of the social communicator who acquired information on the source’s identity during the preparation of the story.
- There should be an explicit ban on any police search and seizure operations intended to uncover the identity of a social communicator’s source.
- Consideration should be given to limiting the right of social communicators to publicly speak out against their employer to cases of a clear breach of a law.
- The requirement, under Article 40, for certain media and communications jobs to be performed by “professionals in journalism and communication” should be dropped.
- Article 41 should not seek to regulate specific labour rights of social communicators such as salaries, insurance coverage and professional development. These issues should be dealt with through general labour laws, applicable to enterprises in general.

The Council for the Regulation and Development of Communication

A central feature of the Draft Law is the establishment of the Council for the Regulation and Development of Communication, a public body with regulatory powers over various forms of communication. The mandate of the Council is defined in Article 46, which includes no fewer than 17 headings. Many of these are general, such as “promoting the incorporation of the values and practices of intercultural coexistence in the programming of the media”. Among the Council’s more specific powers are the administration of licences for broadcasting, monitoring and enforcing compliance by radio, television and print media outlets with the Law, and processing complaints from citizens.

ARTICLE 19 is concerned about the breadth of the Council’s mandate. The need for a public body with powers to manage the scarce frequencies for broadcasting in the public interest is clear. But the case for similar regulation of the press is much weaker; in many democracies, the print media are successfully self-regulated. Moreover, many of the Council’s powers are framed in vague terms, leaving it much room to interpret its own mandate.

An important requirement under international standards is that all public bodies with powers to regulate the media should be independent, as underlined in a Joint Declaration adopted by the OAS Special Rapporteur on Freedom of Expression together with his counterparts at the UN and OSCE in 2003:

All public authorities which exercise formal regulatory powers over the media should be protected against interference, particularly of a political or economic nature, including by

an appointments process for members which is transparent, allows for public input and is not controlled by any particular political party.¹²

Given the Council's extensive powers, the question of its independence takes on added importance. Article 44 states that the Council possesses "functional, administrative and financial autonomy", and Article 50 states that its members must act with independence, but the appointments process and the funding arrangements fail to provide a sufficient guarantee that this autonomy will be realised in practice.

The Council will consist of five regular and five alternate members, with one of each put forward by five nominating entities: the President, the Associations and Consortia of Autonomous Governments, the National Equality Council, the communications faculties of public universities, and human rights and media organisations (Article 47). This means that four-fifths of the Council's members will be supplied by public authorities, and the remaining one-fifth by a sector which includes a large number of publicly owned media. This setup seems designed to ensure a measure of government control over the Council, rather than to prevent it. A better arrangement would be to entrust the appointments to the National Assembly, through a process that ensures cross-party support. For example, the Law could require a two-thirds majority for the approval of the Council's members, or place the responsibility to select them on a cross-party parliamentary committee.

In contrast to the flawed selection process, Article 48 of the Draft Law provides a strong safeguard against the appointment of anyone whose personal situation might compromise his or her independence. Close relatives of senior government officials and investors or managers in the media are ineligible to serve on the Council, and its members may not hold any other job, except as an academic. Their term of service is four years (Article 50); whether this is renewable is not clear. A non-renewable term is preferable from the point of view of independence, since Council members will not have to worry about whether their decisions affect their chances of reappointment. To prevent the loss of continuity that would occur if all members were replaced at the same time, their terms could be staggered.

Council members may vote to dismiss one of their colleagues based on a limited number of grounds mentioned in Article 53, such as acceptance of bribes, unjustified absence from three consecutive meetings, or involvement in political activities. A decision of this kind requires a concurring vote of three-fifths, and the expelled member may appeal to a court (Article 52). This procedure provides a reasonable safeguard against politically motivated dismissals.

Article 55 of the Draft Law foresees only one source of income for the Council, namely an allocation from the general State budget. This runs contrary to the practice in most democracies, where the broadcast regulator is funded as far as possible by fees levied on holders of broadcast licences. A further way to strengthen the Council's independence would be to stipulate that grants from the general State budget are made for a multi-year period, rather than annually.

¹² Joint Declaration of the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, adopted 18 December 2003.

The need for the Council to operate independently does not mean it should not be accountable to the public. We recommend requiring the preparation of an annual report on the Council's activities, including a statement of its audited accounts. This report could be submitted to the National Assembly and published, for example, on the Council's website.

Recommendations:

- Members of the Council for the Regulation and Development of Communication should be selected by an elected body, preferably by a qualified majority vote in the National Assembly or by a cross-party committee of its members.
- Nominations for Council membership should be accepted from a wider range of civil society organisations or from the public at large, and the appointments should be made in a transparent and participatory manner.
- The Law should specify that the term of Council members is not renewable, or is renewable only once. Consideration should be given to staggering the terms of members, to ensure the continuity of the Council's work.
- The Council should be permitted to levy a fee on holders of broadcast licences to finance its operations, topped up as necessary by an allocation from the general budget, preferably in the form of a multi-year grant.
- The Council should be required to submit an annual report on its activities, including its audited accounts, to the National Assembly and to make it available to the public, for example, on its website.

Regulation of content

Title IV of the Draft Law sets out a number of binding rules on content. Some of these apply only to broadcast media, such as a ban on sexually explicit or violent content broadcast during restricted hours (see Articles 69 and 71; Article 68 defines a two-tiered watershed). Others apply to all types of media. This includes the prohibition of the dissemination of discriminatory material (Articles 64-67). A breach of the content rules can result in the imposition of a fine by the Council, and also, in the case of discriminatory content, an order to make an apology.

The effect of this and other laws is to subject media to a complex, multi-layered system of content regulation. All media must in the first place respect general laws such as the criminal and civil code. Then there are the codes of ethics they must adopt pursuant to Article 9 of the Law on Communications, supplemented by the general ethical norms imposed on them by Article 10. On top of that come the content rules of Title IV.

ARTICLE 19 submits that it is inevitable that so much regulation will have an undue chilling effect on the media. There is no need or justification for the print media to be subject to content rules over and above those provided for in laws of general application, which either prohibit hate speech and incitement to violence already, or ought to be updated themselves.

In the case of broadcast media, additional regulation of content can be justified on the grounds that TV and radio are beamed straight into families' living rooms, and that broadcasting frequencies are a public resource whose use should benefit the public as a whole. Moreover, the subjects identified in Title IV, such as sexual, discriminatory and violent content, are certainly legitimate areas in which to set standards for broadcasters. But some of these provisions are very problematic, for example, the definition of what constitutes

prohibited discriminatory speech is so complex that it is challenging for a lawyer to understand, let alone a journalist or ordinary citizen. One may also ask whether there is any point in requiring broadcasters to adopt a code of ethics dealing with these issues if they are at the same time subject to a set of detailed and binding rules.

In short, while there is a need for broadcasting standards in the areas identified in Article 10 and Title IV of the Draft Law, the manner in which they are imposed and the way they are defined requires an extensive rethink. In many countries, standards are set in a broadcasting code drawn up by the regulatory body in close cooperation with the broadcasters themselves, and in consultation with the general public. Not only does this secure buy-in from the sector and its audience, it also allows standards to be described in much more detail than is possible in a law. For example, the most recent UK broadcasting code¹³ runs to 134 pages. It contains numerous explanatory boxes where the meaning of various terms is illuminated in a way that is understandable to members of the public.

A positive aspect of Title IV of the Draft Law is the moderate maximum fines broadcasters face in the case of non-compliance. But there is no guarantee of a proper legal process leading up to the imposition of a fine. At a minimum, broadcasters should be informed in writing of complaints against them and be given the right to make representations before the Council reaches its decision. Broadcasters should also be able to challenge a sanction imposed on them in court; this indeed appears to be provided for under Article 61.

Recommendations:

- The Law on Communications should not seek to directly regulate media content. Instead, it should authorise the Council to develop a broadcasting code in collaboration with licensed broadcasters, in a process that allows for public input. This code should not apply to other types of media.
- When the Council decides to open an investigation against a broadcaster, it should provide written notification of the allegation and grant the broadcaster an opportunity to make representations.
- There should be a general obligation on the Council to ensure that any sanctions imposed are proportionate to the seriousness of the offence. All sanctions should be subject to judicial review.

Regulation of media outlets in general

Title V of the Draft Law deals with regulation of media outlets, with separate sections devoted to public, private and community media. These are preceded by an introductory part which applies to all three categories – and which, unfortunately, contains provisions that are grossly out of step with international standards.

As if the extensive system of content regulation described in the previous sections weren't sufficient, Article 74 of the Draft Law states that all media must operate with "responsibility and quality, respecting the Constitution and international instruments, and contributing to the

¹³ See <http://stakeholders.ofcom.org.uk/binaries/broadcast/831190/broadcastingcode2011.pdf>.

good life of persons”. They must also promote seven broad goals, ranging from the development of a critical mind in citizens to the maintenance of peace and security. Although no penalty is prescribed for failing to meet these goals, it is inappropriate for the state to dictate, in a generalised manner, what the objectives of the media should be. A differentiated approach is needed. Public media should naturally have a public service mandate, but as will be seen, this is already provided for in Article 82. Certain content obligations may also be placed on commercial and community broadcasters as part of their licence terms, but there is no justification for applying a requirement of this kind to the privately owned print media.

Article 77(1) allows the President of the Republic and the President of the National Assembly to order terrestrial broadcasters to transmit a message of “general interest ... when they consider it necessary”. Lower officials may also demand airtime for such announcements, known as *cadenas*, but they are limited to an allowance of five minutes per week. Apart from being a grotesque limitation on editorial freedom, this power – which is already provided for in existing legislation – has reportedly been abused on a remarkable scale, with hundreds of *cadenas* broadcast over the last few years, in some cases interrupting a scheduled programme to attack its producers or other government critics.

Another worrying provision is Article 80 of the Draft Law, which allows the President to suspend the right to information and impose prior censorship during a state of emergency. The exercise of this power is subject to a number of conditions, which admittedly correspond quite well to what is required under Article 27 of the *American Convention* and Article 4 of the *ICCPR* to justify a suspension of freedom of expression. But the amount of attention devoted to this subject in the Law – Articles 77(2) and 78 establish even broader powers to order *cadenas* during a state of emergency – combined with the fact that declaring and indefinitely renewing a state of emergency is a common strategy of authoritarian regimes around the world to muzzle the media – is cause for significant concern. The Constitution already provides for the possibility to suspend freedom of information during a state of emergency and we see no need to reiterate that in the Law on Communications.

Recommendations:

- The Law on Communications should not seek to impose generalised objectives on all media. Article 74 should be deleted.
- The power of public officials, including the President, to order the broadcasting of a *cadena* is an unjustifiable interference with editorial freedom. Articles 77(1) and (2) and Article 78 should be deleted.
- The possibility to suspend media freedoms during a state of emergency is already sufficiently provided for in the Constitution and should not be reiterated in the Law on Communications. Article 80 should be deleted.

Public media

In recent years, the Ecuadorian Government has gone from controlling only one radio station to running a large network of media, including five television stations and several widely-read newspapers, giving it a market share that many regard as excessive. The Government has also been accused of taking advantage of this new media apparatus to discredit political opponents and critical journalists.

Public media should not eclipse the private sector, but if properly governed, they can make an important contribution to media pluralism. Public media can cater to audiences that are underserved by commercial media, promote public interest objectives such as a well-informed and critical citizenry, and serve as a trusted source of balanced information. To achieve these objectives, two things are essential: a clearly defined public service mandate, and strong guarantees of independence from the government.

The mandate of Ecuador's public media can be found in Article 82, a welcome provision which sets progressive objectives such as providing independent, reliable and pluralistic information, promoting tolerance and respect for human rights, and entertaining viewers. Additional objectives that ARTICLE 19 believes should be considered are:

- providing programming to minority groups and in minority languages;
- covering important proceedings of the National Assembly and other representative bodies;
- including programmes that are of interest to different regions;
- providing a reasonable proportion of educational programmes and programmes oriented towards children.

By contrast, guarantees of independence are largely absent. According to Articles 85 – 88 of the Draft Law, the management of public media consists of an Executive Council in charge of charting the general line, an Editorial Board in charge of specific quality control over content, and a Citizens' Council which sees to the implementation of the norms of the Law on Participation and Social Control. While Article 81 states in general that public media should be independent, the Law is silent on the all-important question of who appoints the members of these three management bodies. The same considerations apply here as with the Council for the Regulation and Development of Communication. Public media should be accountable to a directly elected representative body, such as the National Assembly, rather than to the government. This does not mean that each member of the Councils which make up the management of public media should be directly chosen by the Assembly – that would entail an excessive burden – but an intermediate solution could be found, whereby the National Assembly has indirect control over appointments.

ARTICLE 19 is not certain what the role of the Citizens' Council will entail or what rights and duties flow from the Law on Participation and Social Control. Nevertheless, it is important that public media are accountable to the public as a whole, rather than a small selection of citizens. In this regard, we welcome the requirement under Article 76 to appoint a “defender of the public”, an ombudsman who can receive complaints. Consideration should also be given to requiring public media to report on their activities and expenditures, for example, by submitting an annual report, including audited accounts, to the National Assembly.

Article 83 foresees four sources of funding for public media with a national reach: an allocation from the general budget, income from public sector advertising, revenues from sales of productions, and donations and sponsorships. Non-national public media are permitted in addition to receive funding from the public body that created them, and may carry advertising from the private sector.

Whether public media should be funded through advertising is a hotly debated topic in many countries, and it seems Ecuador is no exception. The most obvious advantage of permitting advertising is that it gives public media a source of income of their own, reducing their

dependence on the general budget and thus both reinforcing their independence and saving taxpayers' money. Obvious disadvantages include the fact that accepting advertising puts public media in competition with commercial and community media, who will be left with less money to produce quality content. There is also a risk that public media will allow their content to be influenced by commercial logic, at which point they begin to duplicate rather than complement the private sector.

It strikes us as a strange choice to restrict national public media to advertising from the public sector. This defeats the purpose of giving these media a source of income that is completely independent from the government. Perhaps a better rule would be to permit private sector advertising, but restrict it to a defined maximum share of the media outlet's income, for example 25%.

Meanwhile, it is also important to prevent public sector advertising contracts from being used as a means to reward or punish media outlets – whether public or private – for their positions. This is a requirement under the *Inter-American Declaration of Principles on Freedom of Expression*.¹⁴

[T]he arbitrary and discriminatory placement of official advertising and government loans ... with the intent to put pressure on and punish or reward and provide privileges to social communicators and communications media because of the opinions they express threaten freedom of expression, and must be explicitly prohibited by law.¹⁵

Article 101 of the Draft Law goes some way to offering such a safeguard, by providing that public sector entities should strive for “equality of opportunity” when procuring advertising. This is a good rule, but discrimination for political reasons should be more expressly prohibited. It will be easy to monitor compliance with this requirement thanks to the excellent rule, also under Article 101, that public bodies must publish an annual overview of their expenditures on advertising on their website.

Recommendations:

- The mandate of the public media defined in Article 82 should include a few additional functions, in particular: providing programming to minority groups and in minority languages, covering important proceedings of the National Assembly and other representative bodies, developing content that is of interest to different regions, and providing a reasonable proportion of educational programmes and programmes oriented towards children.
- The Law should clarify how members of the governing Councils of public media are appointed. The appointments process should be overseen directly or indirectly by an elected representative body such as the National Assembly, and should be open and participatory.
- Public media should be required to prepare and publish an annual report on their activities, including audited accounts, and submit it to the National Assembly.

¹⁴ *Inter-American Declaration of Principles on Freedom of Expression*, approved by the Inter-American Commission on Human Rights during its 108 regular session; available at <http://www.iachr.org/declaration.htm>.

¹⁵ *Supra* note 4, §13.

- National public media should not be restricted to accepting advertising from the public sector. Consideration should be given to setting an appropriate cap on the share of public media outlets' revenues that may be generated from advertising.
- Article 110 should expressly prohibit the arbitrary and discriminatory placement of public sector advertising as a means to punish or reward media for their opinions.

Local content requirements

Many countries have local content rules in the broadcasting sector to protect and promote local programming. The economics of international markets hugely favour production companies in large and developed countries. These companies can produce high budget programmes for domestic audiences of tens of millions, recoup their investment in the national market, and then sell their programmes internationally at reduced prices with which production companies in smaller markets cannot compete. Without local content rules, small countries such as Ecuador thus risk ending up without a viable domestic production sector, and with radio and TV channels that provide mostly recycled foreign programmes and little content of local relevance.

Presumably for similar reasons, the Draft Law provides a system of local content rules for Ecuadorian broadcasters. According to Article 102, at least 40% of daily programming broadcast during the hours suitable for all ages must consist of “national production”. In turn, one quarter of this programming must be produced independently. A programme is considered national production if at least 80% of the persons contributing to its creation are Ecuadorian nationals or legal residents (Article 105). Furthermore, a production is considered independent if the company and its owners are not tied through ownership, investment, employment or family ties, to the broadcaster (Article 106). Television stations will have to do business with at least four production companies, as they are not permitted to acquire more than 25% of their national content from any single company (Article 104).

ARTICLE 19 welcomes these provisions and the commitment they demonstrate to supporting domestic production. The requirement to purchase from multiple and independent companies can make a positive contribution to pluralism, ensuring that no producer acquires an overly dominant market position. Nevertheless, we are very concerned by the statement in the last paragraph of Article 102, that the quota for independent national productions must be satisfied with “works of producers accredited by the authority charged with the promotion of national film and audio-visual production”. We have no information on what the conditions for accreditation are, but this appears to be an arbitrary requirement that could be abused to put critical production companies out of business.

We also question the justification for Article 103 of the Draft Law, which bans foreign-produced advertising from all media. There is no obvious need for advertising to be of local relevance, particularly if the product that it promotes is an international one. This requirement will force companies who wish to buy advertising to spend a greater share of their budget on production rather than airtime or newspaper space, potentially reducing the income the media derive from this source.

Recommendations:

- Broadcasters should not be confined to works of ‘accredited’ producers for the satisfaction of their obligation to purchase independent national productions. The last paragraph of Article 102 should be deleted.
- There should be no absolute ban on the broadcasting or printing of foreign-produced advertising. Article 103 should be amended or deleted.

Licensing of broadcasters

The Draft Law reserves one of its most important subjects, the licensing of broadcasters, to its final part. As discussed above, the responsibility to manage broadcasting frequencies lies with the Council for the Regulation and Development of Communication. Title VI provides it with guidelines for the fulfilment of that responsibility.

ARTICLE 19 points out that international standards call for an equitable distribution of frequencies between different types of broadcasters. Article 112 of the Draft Law states that one-third of the frequencies available for broadcasting shall be reserved for each of the three tiers of broadcasters – public, commercial and community.

ARTICLE 19 notes that there is wide Inter-American and international consensus about the efficiency of reserving an equitable part of the broadcasting spectrum to promote community media. The reservation of the third of the spectrum for community radio stations has also been supported by the World Association of Community Radio Broadcasters (AMARC) for several years. Several countries in the region (Bolivia, Uruguay and Argentina) have also recently adopted legislation in this direction.¹⁶

This principle is also broadly consistent with the guidance of the UN and regional Special Rapporteurs for Freedom of Expression, in particular their recommendations that enough space should be assigned for the transmission of different communication platforms in order to ensure that the public, as a whole, can receive a diverse spectrum of mass media services. Similarly, the Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights has stated that part of the spectrum should be reserved for the existence of community and other non-profit media, recommending “to legislate in the area of community media so that part of the spectrum is reserved for community radio” (2007 Report),¹⁷ and “to legislate in the area of community radio so that an equitable part of the digital spectrum is reserved for community media” (2008 Report).¹⁸

This diverges from the practice of other democracies, where it is common to entrust the broadcast regulator with the task of drawing up a frequency plan, which ensures a reasonable division of frequencies amongst different types of users.

¹⁶ Since 2007, Uruguay has reserved at least one third of the available frequencies for community radio. Argentina has reserved 33% of the spectrum for these media since 2009. Bolivia adopted the same approach in the Law on Telecommunications and Information and Communications Technologies in July 2011.

¹⁷ Annual Report of the Office of the Special Rapporteur for Freedom of Expression, 2007, Inter-American Commission on Human Rights, Volume III, Chapter III, Paragraph 6.

¹⁸ Annual Report of the Office of the Special Rapporteur for Freedom of Expression, 2008, Inter-American Commission on Human Rights. Volume III, Chapter V, Paragraph 10 (n).

The equal division prescribed by Article 112 follows these standards, however, we note that it also gives the state one third of the spectrum. In line with the above standards, ARTICLE 19 believes that the State's share of the spectrum should more specifically benefit a genuinely public service media, which Ecuador is lacking at present. Indeed, there is a danger that the State may use its share of the radio spectrum to promote its own views rather than a variety of sources of information. Hence, it would still be a good idea to require the development of a plan to deal with other questions, such as how frequencies will be shared between radio and TV, and between local, regional and national stations. One criticism of the current broadcasting landscape is that it has developed in a chaotic and unplanned way, with too little consideration for pluralism and the public interest; a frequency plan would help bring some structure to the decision-making. As far as possible, the public should be given a chance to participate in and comment on the development of the plan.

How to transition from the existing situation to the one envisaged in the Draft Law is a thorny issue. It is unavoidable that numerous frequencies will need to be withdrawn from current holders and given to new ones. Article 112 foresees five means by which the transition will be accomplished:

- the allocation of as yet unused frequencies;
- the cancellation of illegally granted licences and the reallocation of the associated frequencies;
- the cancellation of licences in cases where a frequency is not being used for its intended purpose or in accordance with the technical or legal conditions under which it was granted;
- the reversion to the State of frequencies in accordance with the law (for example, at the end of a licence term);
- the distribution of frequencies freed up as a result of a digital switchover.

Decisions to terminate illegally granted licences are to be made by the Telecommunications Authority "after conducting the necessary administrative process". A decision to terminate a licence is subject to judicial review, but if upheld, the prosecutor's office will seek to recover all the income derived from an unlawfully granted licence (Article 114). Broadcasters can prevent proceedings of this kind by voluntarily surrendering their illegally obtained licence within six months of the Law's entry into force (Article 115).

On paper this looks like a reasonably proper process. Nonetheless, given its record, there will inevitably be concerns that the Government will use the transition as a means to exert further control over the broadcasting sector, particularly if the independence of the Council and the Telecommunications Authority is not properly guaranteed. Abuse of authority can never be fully ruled out by the adoption of proper legal safeguards. We do, however, strongly recommend exploring the possibility to allow licences whose term expires in the next few years to run out 'naturally', unless there is clear evidence that the illegal granting of the licence was the result of corruption or other serious unlawful conduct on the part of the licence holder. Furthermore, withdrawal of a licence should be automatically suspended from the moment that the decision is challenged in court.

When a frequency for commercial or community broadcasting becomes available it will be put up for competition (Article 116). The competition is open to natural and legal persons of any kind, and must be conducted in a public and transparent manner. Applicants will be asked to present a proposal describing the content and technical nature of the service, a business plan

and a technical study. The Council will score each proposal and issue its decision (Article 118). In recognition of their experience, holders of an expiring licence will enjoy a 20% mark up in a competition (Article 113).

This is on the whole a very proper process. A further improvement would be to build in a phase for public comment on proposals, so that the Council can take the views of viewers and listeners into account. Furthermore, the Council should publish a written decision, stating the reasons for its choice, and aggrieved applicants should have the right to challenge the decision in court.

Article 119 of the Draft Law disqualifies certain persons and businesses from participating in competitions, for example, if they are related to or have a business link with a member of the Council. This is a strange rule as it prevents persons from applying for reasons that are not necessarily within their own control. It would be far more logical to require members of the Council to recuse themselves from decisions when they face a possible conflict of interest.

The rule according to which a person can no longer apply for a licence if s/he was ever a shareholder in a company that was stripped of its licence, also seems unduly strict. Shareholders often have very limited control over decision-making in a company. At the very least, this rule should be restricted to incidents occurring in the recent past, for example, the last five years.

Once granted, a broadcasting licence can be terminated on any of the seven grounds mentioned in Article 120. These are mostly technical in nature, such as expiry of the licence term, dissolution of the legal person that holds it, or having obtained the licence based on false information. Another ground for withdrawal is breach of the anti-concentration rule found in Article 121, according to which no person may concurrently control more than one TV station, one AM radio station and one FM radio station. While we consider these rules appropriate, a decision to withdraw a licence should never be taken before the licence holder has been given an opportunity to present a written response, and should be subject to judicial review.

Little is said in the Draft Law about which licence terms the Council may impose. Article 124 states that the licence shall be valid for fifteen years, once renewable without the need for a new competition. This may be appropriate for a national-level broadcaster, which will need time to make large investments and is entitled to a sufficient period to recoup these. But a local commercial or community broadcaster should be subject to a shorter term, perhaps with the possibility of more than one renewal without having to undergo a competition.

In the section on the Council, we proposed allowing it to levy a licence fee on broadcasters to provide it with an independent source of funding. A fee of this kind should of course be proportionate to the broadcaster's size, and should be imposed in a non-discriminatory manner. This could be accomplished by the publication of an official schedule of fees. In view of their not-for-profit status, community broadcasters should be exempt from the fee.

Recommendations:

- The Council should be tasked with the development of a frequency plan which sets out how the frequencies available for broadcasting will be shared equitably and in the public interest among radio and television, and broadcasters of different

geographic reach (national, regional and local). The plan should be developed in a transparent manner and allow for public input.

- The possibility should be explored of allowing licences that were granted illegally to run until the end of their term, in cases where the licence was not granted as a result of unlawful conduct on the part of the holder.
- Before taking an important decision affecting the rights of a licence holder or applicant, the Council should in all cases grant the party in question a right to make representations. Decisions should be made in writing, stating the reasons, and should be subject to judicial review. The same requirement should apply to decisions to withdraw licences taken by the Telecommunications Authority.
- Persons who have a familial or business tie to a member of the Council should not be barred from taking part in licence competitions. Rather, the Council member in question should be barred from taking part in the decision. Article 119 should be amended to this effect.
- The duration of a licence should depend on the nature of the service and the level of investment required. Article 124 should be amended to introduce different categories of duration.
- Insofar as the Council is granted the power to levy fees on licence holders, these should be proportionate and non-discriminatory, and established through a schedule published in advance. Community broadcasters should be exempt from this fee.