

ARTICLE 19

# Uruguay: Draft Law on Communications

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Legal analysis





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# Introduction

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In July 2013, ARTICLE 19 analysed the Draft Law on Audiovisual Communication Services (“the Draft Law”) of Uruguay which provides for comprehensive regulation of broadcasting. The Draft Law is examined under the light of international standards of freedom of expression as recognised in Article 19 of the *International Covenant on Civil and Political Rights*<sup>1</sup> and Article 13 of the *American Convention on Human Rights*.<sup>2</sup> Uruguay has ratified these international treaties and is therefore legally bound to abide by them.<sup>3</sup>

In addition to these international treaties, this analysis also relies on ARTICLE 19’s publication *Access to the Airwaves: Principles on Freedom of Expression and Broadcast Regulation*<sup>4</sup> which provides comparative principles of constitutional law. Freedom of expression guarantees should inform and animate the provisions of the Draft Law to align the Uruguayan regulation with international standards.

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<sup>1</sup> Article 19 of the International Covenant on Civil and Political Rights reads:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
  - (a) For respect of the rights or reputations of others;
  - (b) For the protection of national security or of public order (ordre public), or of public health or morals.

<sup>2</sup> Article 13 of the American Convention on Human Rights reads:

1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one’s choice.
2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:
  - a. respect for the rights or reputations of others; or
  - b. the protection of national security, public order, or public health or morals.
3. The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.
4. Notwithstanding the provisions of paragraph 2 above, public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence.
5. Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law.

<sup>3</sup> Uruguay ratified the International Covenant of Civil and Political Rights in 1970 and the American Convention on Human Rights in 1985.

<sup>4</sup> Available at: <http://www.article19.org/data/files/medialibrary/2633/11-08-08-STANDARDS-access-to-airwaves-EN.pdf>

# Analysis of the Draft Law

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The Draft Law comprises 183 Articles divided in XII titles. Title I states the object of the law which is to regulate the provision of radio, television and other audiovisual communication services. The Draft Law regulates terrestrial broadcasting as well as satellite and cable based services. Internet and telecommunications services as well as services based on networks are excluded from the scope of the Draft law (Article 1). Title II sets out the principles of regulation which include the applicability of international documents of freedom of expression (Article 4), the public purpose of broadcasting (Article 5), the right to equal use of the radio spectrum (Article 8) and diversity, non-discrimination and transparency (Article 9). Title III provides for the rights of broadcasters including freedom of expression and information, freedom from prior censorship, independence and editorial freedom (Articles 13-16). Title IV sets out the rights of people, including children and those with disabilities (Articles 34-36) and journalists (Articles 40-41). Title V focuses on the promotion of diversity and pluralism. It limits the number of broadcast licenses and the share of the satellite and cable broadcasting market a person can have (Articles 44-46). This title also provides for the promotion of national audiovisual production (Articles 51-53).

Title VI establishes the regulatory framework. Important competencies are entrusted to the president such as awarding, renovating and cancelling licenses (Article 55). The Ministry of Industry, Energy and Mining through the National Direction of Telecommunications and Audiovisual Services is mandated to advise the president on broadcasting policy and procedures (Article 56). The technical aspect of broadcasting and the use of the radio spectrum are overseen by the Regulatory Unit of Communications Services (Article 57). The main regulator of broadcasting, however, is the Audiovisual Communications Council which is a de-centralised body tasked with implementing the Draft Law, including preparing the tenders for awarding broadcasting licenses, advising the president and imposing sanctions (Articles 58-60). The Draft Law also creates the Honorary Advisory Commission of Audiovisual Communications Services which has a mandate to advise and issue non-binding recommendations in licensing processes (Article 71). The regulatory framework is completed with an Ombudsman tasked with defending the rights of persons established in the Draft Law (Articles 74-78).

Title VII regulates commercial broadcasting. It imposes duties to license-holders (Articles 79-90) and sets out the licensing process which is carried out through public tendering with different regulation for broadcasters using the radio spectrum (Articles 90-125). It also creates a register of radio and television frequencies (Articles 126-130), regulates advertising (Articles 131-132) and provides for ethical self-regulation (Articles 138-140). Title VIII regulates public service media. It creates the National System of Public Radio and Television of Uruguay and establishes its purposes and functioning (Articles 141-158). Title IX states that community broadcasting is regulated by Law 18232 of 2007. Title X establishes administrative liability and defines sanctions for those who have violated the law. Title XI establishes the cost of license fees. The final Title XII includes transitory provisions.

## Positive aspects

The Draft Law contains many features that are positive from the point of view of freedom of expression:

- Expressly recognising the rights to freedom of expression and information, prohibition of censorship, independence of media and editorial freedom (Articles 4 and 14-16);
- Guaranteeing fundamental rights to people including freedom of expression, right to information, transparency, cultural rights, consumer's rights, participation and non-discrimination (Articles 21-27);
- Incorporating robust provisions promoting pluralism and restricting monopolies (Articles 42-50);
- Supporting national production by establishing minimum national content quotas in radio and television and by promoting the development of the sector (Articles 51-54);
- Establishing extensive provisions aimed at protecting children from harmful content, preserving their privacy and promoting their participation (Articles 28-33);
- Ensuring access for people with disabilities by guaranteeing expressly their right to enjoy freedom of expression and information on an equal basis and by promoting accessibility policies (Articles 34-36);
- Establishing self-regulation of broadcasters and allowing them to adopt their editorial code freely (Articles 138-140);
- Adopting a comprehensive mandate of public service media, including promoting education, democracy, peace, diversity and human rights (Article 142).

### **Problematic features**

Despite its substantial positive features, the Draft Law also has several areas that need improvement to comply with Uruguay's international freedom of expression obligations, namely that:

#### **The regulation of broadcasting licensing is directly vested on the government**

ARTICLE 19 is concerned by the power wielded by the government in the licensing process.

The Draft Law states that the government is directly mandated, *inter alia*, to award, renovate and cancel licenses; to set the license fees and to approve the terms of the public tender for licenses (Article 55).

The existence of a wide range of broadcast media secures the right of individuals to receive information. To ensure that the authorities do not censor information or affect its flow, it is important to safeguard broadcasters' effective independence with regard to programming, and ensure the regulatory authorities themselves be protected from all forms of political and economic interference.

Granting licensing powers to an independent body is one of the safeguards against political influence in the broadcasting sector.<sup>5</sup>

### **Recommendations:**

- All licensing faculties entrusted to the government should be vested on an independent regulator (Article 55).

### **Lack of independence of the Audiovisual Communications Council**

ARTICLE 19 finds it problematic that the main regulatory body, the Audiovisual Communications Council (“the Council”), is not independent from the government.

As stated above, broadcasting regulation should be tasked to an independent body. The law should clearly establish that regulatory bodies are independent for political and economic interests. The independence of the regulator should also be ensured through the rules relating to membership, in funding arrangements, rules of incompatibility, payment of members and termination of office.

Some of these areas are covered by the Draft Law.<sup>6</sup> However, the appointment procedure for the members of the Council is highly problematic; of the five members of the Council, three are nominated and appointed by the President with the consent of 2/3 of the Senate. The remaining two members are directly appointed by the government through the Ministries of Industry, Energy and Mining and Education and Culture.

We are concerned that the appointment process does not secure the independence of the Council from political bodies. The independence will be best guaranteed if the nominations are made by professional organisations. The best candidates should be appointed by the General Assembly. The appointment system for the National Institution of Human Rights would be a useful template.<sup>7</sup>

Next, although the Draft Law has incompatibility rules, government officials can be nominated and appointed as commissioners. This will affect the independence of the Audiovisual Council from the government.

The dismissal procedure of commissioners is also flawed. Article 67 provides that the President shall be able to dismiss them in case of “ineptitude, omission or crime in the exercise of their office or the commission of acts affecting their good name or the prestige of the body”. Commissioners should only be able to be dismissed by the body that appointed

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<sup>5</sup> See 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.

<sup>6</sup> For example, it provides for the funding arrangement of the Council (Article 62), states a term of office for Commissioners of 6 years, renewable once (Article 66), determines clearly their salary (Article 68) and establishes incompatibility rules (Article 64).

<sup>7</sup> Institución Nacional de Derechos Humanos, Ley 18446, available at: <http://www.parlamento.gub.uy/leyes/ AccesoTextoLey.asp?Ley=18446&Anchor=>

them for not meeting the rules of incompatibility, committing a serious violation of their responsibilities or being unable to perform their duties effectively.<sup>8</sup>

Finally the Draft Law also lacks an explicit statement on the independence of the Council. Given that in Latin America broadcasting regulators have tended to be controlled by the government, securing the independence of the Council would be a significant step for Uruguay.

### **Recommendations:**

- The Draft Law should explicitly provide that the Audiovisual Communications Council is independent of the government and business interests. It shall not be subjected to hierarchy and shall have an autonomous functioning not receiving instructions or orders of any authority.
- The nominations for members of the Council should be made by the public.
- All members of the Council should be appointed by majority of the General Assembly after public interviews.
- The members of Council should be dismissed by the body that appointed them in case of incompatibility, committing a serious violation of their responsibilities or being unable to perform their duties effectively.
- The members of the Council should be able to appeal their dismissal to court.

### **Official messages and political advertising**

The Draft Law obliges broadcasters to simultaneously broadcast messages by the government without any restriction (cadenas - Article 86) and to give up to 15 minutes a day for government and NGOs campaigns on health, human rights and education (Article 87).

ARTICLE 19 considers that Article 86 permits the authorities to unnecessarily and disproportionately interfere with program content in violation of the principle of editorial independence. The Draft Law should set a limit on the time and specify the nature of these mandatory broadcasters. The government should not have unlimited discretion as to the time and type of messages. Moreover from a comparative law viewpoint, the obligation to broadcast public announcements and messages free of charge normally applies to public broadcasters only. Any use of commercial broadcasters' time for public purposes should be paid otherwise the authorities violate the broadcasters' right to property.

For the same reason, ARTICLE 19 considers that the obligation to broadcast public campaigns under Article 87 should apply to public broadcasters only.

### **Recommendations:**

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<sup>8</sup> ARTICLE 19, Access to the Airwaves: Principles on Freedom of Expression and Broadcast Regulation, principles 11, 13.3 and 13.4. See also, Council of Europe, Committee of Ministers, *Appendix to Recommendation Rec(2000)23 of the Committee of Ministers to member states*, paras. 4-6, 20 December 2000, available at: [https://wcd.coe.int/ViewDoc.jsp?Ref=Rec\(2000\)23&Language=lanEnglish&Ver=original&Site=CM&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75](https://wcd.coe.int/ViewDoc.jsp?Ref=Rec(2000)23&Language=lanEnglish&Ver=original&Site=CM&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75).



- The obligations to air official messages (cadenas) and public campaigns should be limited to public broadcasters

### **Lack of independence of the public service media**

ARTICLE 19 is worried by the lack of independence from the government of public service media.

Properly governed public media can make an important contribution to media pluralism. It 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.<sup>9</sup>

Although Article 142 of the draft law provides for a comprehensive mandate of public service media, the independence of the governing bodies of the public media is not secured because the members of the Directive Council the National System of Public Radio and Television of Uruguay (“NSPRT”) are appointment by the President. Furthermore, the Draft Law does not specify who appoint the National Directors of the public media.

The governing body of public media should be as independent as the broadcasting regulator. Therefore, the same recommendations on incompatibilities, appointment and dismissal of the Commissioners apply.

### **Recommendations:**

- The governance of public service media should be independent from the government.
- The members of the Directive Council of the NSPRT should be nominated by the public and appointed by the General Assembly. They should only be dismissed by the body who appointed them for serious violations to their duties.
- The National Directors of the NSPRT should be appointed by the Directive Council.

### **Protection of Children**

ARTICLE 19 considers that the rules on the protection of minors and adolescents are a positive aspect of the Draft Law. In particular we commend the watershed rule and system of the signals identifying programs which are unsuitable for children. However some rules aiming at the protection of non-adults are disproportionate and unnecessary.

*Rules for protection of the right to privacy*

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<sup>9</sup> Office of the Special Rapporteur for Freedom of Expression, Organization of American States, *Freedom of Expression Standards for Free and Inclusive Broadcasting*, 30 December 2009, OEA.Ser. L/V/II, CIDH/RELE/INF 3/09, para 83.

Article 30 of the Draft Law protects the right of privacy of children and adolescents by stating that this right should be respected under any circumstances. The law explicitly obliges broadcasters from abstaining from dissemination of the name or pseudonym, image, address, identity of the parents or the school which he or she attends or other information which could lead to his/her identification. This restriction is problematic from the point of view of freedom of expression because it is overbroad. It makes it impossible or very difficult to report on any child-related issue or recognise the contribution of children to any programs by disclosing the name of children actors or program participants.

ARTICLE 19 recalls that under international law any restriction on freedom of expression should be necessary for the protection of a legitimate interest. In contrast to international law, the Draft Law does not require that the limitations aiming at the protection of the right to privacy be necessary. When interpreting the compliance with the requirement of necessity international courts consider if there has been a pressing social need for interference with the right to freedom of expression and if the measures of the authorities have been proportionate. ARTICLE 19 considers that prohibition for identification of children is disproportionate and unnecessary. The prohibition should be apply to offenses involving under-eighteens only. In any other cases the right of privacy of children is the same as of adults. We point out that such an approach is the regulatory practice across the world (see for example the UK Ofcom Broadcasting Code).

#### *Rules restricting content*

The draft Law also protects children by prohibiting certain content during the watershed. This prohibition includes excessive violence, cruelty, pornography, showing people addicted to drugs, and content that exalts promotes or incites to discrimination.

As noted previously, the restrictions on freedom of expression, including those that are content-related, are permissible under international law only if they are necessary. The draft law does not contain such requirement. Instead it sets out blank prohibitions. While a blank prohibition of pornography can be regarded as necessary, the Draft Law should set out that any content restriction is permissible only if they are necessary and proportionate in view of the context of the expression and the program's purpose.

#### **Recommendations:**

- The ban on revealing the identify of children and adolescents should be limited to coverage of offences involving children
- The law should provide that all content restrictions aiming at the protection of children must be necessary and proportionate in view of the content's context and purpose of the program.

#### **Public participation and public accountability**

Public participation is a fundamental element for democracy. It ensures an inclusive, diverse and democratic broadcasting environment. Moreover, broadcasting regulators should be accountable to the public.

The Draft Law provides that transparency and publicity of licensing procedures is one of the principles of broadcasting regulation (Article 9). Everyone is granted a right to request information on licensing process (Article 23). The Draft Law also imposes a duty on the

government to implement mechanisms of public participation in designing broadcasting policy (Article 26).

Regarding complaints, the Ombudsman is mandated to defend the rights of the public, including holding public hearings on any relevant issue, trying to solve any conflict and filing legal and administrative complaints on behalf of the public (Article 76). Moreover, the Draft Law establishes self-regulation for broadcasters which should address complaints from the public (Article 140).

In terms of the accountability of the regulator, the Council is mandated with convening public hearings. It has to submit an annual report to the Honorary Advisory Commission of Audiovisual Communications Services and its decisions are subjected to judicial review (Articles 61(g), 61(s) and 62).

### **Recommendations:**

- The Ombudsman should be obliged to include information in his/her annual reports about the activities concerning complaints against broadcast media.
- In order to make regulatory bodies accountable for their activities, while also protecting their independence, it is necessary that they are supervised only in respect of the lawfulness of their activities and the propriety and transparency of their financial activities.
- All decisions taken and regulations adopted by the regulatory bodies should be duly reasoned, made available to the public and open to review by the competent courts.

### **Enforcement mechanism**

ARTICLE 19 considers that the Draft Law sets out an effective enforcement mechanism. It gives powers to the government, the National Direction of Telecommunications and Audiovisual Services and the Council with applying sanctions. The sanctions range from a reprimand to the cancellation of the license. It is positive that the Draft Law clearly states the criteria for graduating fines and the offenses which can carry the cancellation of a license. Article 169 provides that sanctioning decisions will be published. Article 170 provides that sanctions will be applied ensuring due process and the proportionality of the sanction to the offense.

When considered specifically in regard to freedom of expression the problem with the enforcement mechanism set out by the Draft Law concerns the powers given to the government to cancel licenses (Article 55(f)). ARTICLE 19 maintains that only the independent regulator should be able to impose sanctions to broadcasters.<sup>10</sup> Moreover, the license-holder should be allowed to make representations before a decision is made and any sanction should be subjected to judicial review.<sup>11</sup>

### **Recommendations:**

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<sup>10</sup> ARTICLE 19, *Access to the Airwaves: Principles on Freedom of Expression and Broadcast Regulation*, principle 26.

<sup>11</sup> Office of the Special Rapporteur for Freedom of Expression, Organization of American States, *Freedom of Expression Standards for Free and Inclusive Broadcasting*, 30 December 2009, OEA.Ser. L/V/II, CIDH/RELE/INF 3/09, para 147.

- Only independent regulators should be able to impose sanctions which should be subjected to judicial review.
- The decisions on cancelling licenses should be made following a public hearing, and be subjected to a judicial review.