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**“State control of the media in Ecuador in accordance with the  
International Human Rights Instruments”**

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**Author: Daniela Cristina Cruz Torres**

**Professor: Dr. Sebastián López Hidalgo**

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**Dedication:**

*After all these days of effort and sleepless nights: finally I achieve my goal, so first I want to dedicate this work to my son Sebastian, who gives meaning to my life, encourages me to keep going, and motivates me to be a better person.*

*To my parents Hugo and Georgina, whose efforts help me to succeed giving me great examples of responsibility and perseverance. Thanks to you, who were always helping me continue even through the hardest moments of my career, now I can see the rewards of the effort. Your unconditional support was what makes me go all the way, I dedicate this work to you.*

*To my husband Fausto, who has fostered in me the desire to excel and the craving for success in life.*

*To all, I hope not to disappoint you and always have your valuable, sincere and unconditional support.*

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**Abstract:**

The Communication Bill was a document that has undergone a series of changes and reforms for over 4 years. Due to the lack of consensus between the opposition and ruling party, it has not been approved within the National Assembly; one of the main points of conflict is unleashed on the grounds that such document includes, items that are incompatible according to the International Human Rights Instruments signed by Ecuador, defending the freedom of expression.

This research has demonstrated how dangerous it would be if the State takes control and monopolizes the power of the media and how it would harm freedom of expression and therefore also democracy. For this purpose, legal instruments have been analyzed, both national and international, related to this right, and studies made by assemblymen and communications specialists of our country has being considered, as well as the ones published by representatives of international organizations, on the central axis of the Communication Bill.

## **Introduction:**

Freedom of expression is a right that is recognized, and it is considered vital in participatory democracies, and in recent years has become a necessity considering both at an international level and as a policy level in many countries around the world. Freedom of Expression is a fundamental Human Right and serves as a tool for governments to be efficient and transparent, as well as for a proper functioning society.

This right is essential for humans, since it does not only allow all citizens to freely express their opinions, but is essential for the proper functioning of democracy, as this enables public participation in decision-making, if citizens do not have access to information and to the different ideas held by authorities, experts and analysts, hardly are they able to exercise their right to vote effectively and responsibly, also, if they don't have access to the different kinds of media of information, then they wouldn't be able to be heard and to exercise their point of view freely either.

As explained above, freedom of expression is so important for the dignity of each individual, as well as for social and political participation, for the proper performance of the government, for accountability and democracy in general. This is why it is necessary to review the draft Communications Law in Ecuador, which contains items that can be harmful to this right. Violations of freedom of expression are linked to other violations such as the right to free association and assembly, which are so common in authoritarian governments.



## CHAPTER I

### **1. Freedom of Expression according to the instruments based on the framework of international human rights**

Freedom of expression or freedom of information has been recognized in The Swedish legal system for more than 200 years, yet it is in the last quarter century that worldwide governments, intergovernmental organizations and financial institutions have implemented this right by enacting laws and adopting different policies regarding the topic.<sup>1</sup>

Before any other instrument for human rights was approved in 1946, The United Nations Organization adopted resolution 59 (1) stating “Freedom of information is a fundamental human right and the starting point of all freedoms which is devoted to the United Nations Organization”<sup>2</sup>

Thanks to the relevance that this right has been acquiring over time, there have been developments that made it possible to ensure respect for the right to have freedom of expression. We have also made efforts to continue implementing this right through regional and international mechanisms and tools that have been discovered to make a better performance of this right such as the Internet or the worldwide satellite transmission. On the other hand, there have also been new threats, such as the media monopoly and the global pressures on independent media.<sup>3</sup>

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<sup>1</sup> MENDEL, Toby. Freedom of Information: International Protected Human Rights (on-line). (Consultation: December 28<sup>th</sup> of 2011). Available at: <<http://www.juridicas.unam.mx/publica/librev/rev/decoin/cont/1/.../cnt3.pdf>>

<sup>2</sup> HUMAN RIGHTS Education Associates. Freedom [on-line]. [consultation January 4th of 2012]. Available at: <[http://www.hrea.net/index.php?doc\\_id=851](http://www.hrea.net/index.php?doc_id=851)>

<sup>3</sup> Ibid

## **1.1. A brief history of the evolution of the Right of Freedom of Expression**

From medieval times we've had the concept of "individual", although it is not fully explored because the studies are based more in depth about the environment than the individuality itself, freedom at that time was limited to the liberties of a guild, that is to say a conglomerate, but not only of one person, furthermore this period is characterized by a total adherence to religion, faith and belief in the superiority that divinity exercises. The social organization revolved around the church hierarchy, making it impossible for the individual to exercise their rights and obligations since the unions or guilds represented the limits within which each individual could perform, which is why at this time the mainstay of the organization was to hear, believe and obey.<sup>4</sup>

Within the field of intellectuality, during this time, the thought from reason was much repressed, as religion was the basic precept under which governed human behavior, any thought that did not come from the 'divine' was definitely rejected, so there was no opportunity to create. Dogmas and religious paradigms invaded the community, it was not allowed to refute or amend the beliefs, anyone who dared to question the divine precepts using just the reason was accused of heresy<sup>5</sup> in the courts of that time, only the elected ones were allowed to interpret the sacred scriptures and to bring God's word to the rest of the community.<sup>6</sup>

"Heretics try to take these scriptures across thorough intellectual exercises, making their own judgments about the texts for dissemination to the rest of the guild, which can be interpreted as the incipient birth or claim of freedom of expression, understood as the manifestation of a human being faced with a situation that makes their evaluation, interpretation and commentary, sharing it with others, not with the intention of forcing

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<sup>4</sup> Cf., MARTÍNEZ, Andrés. Freedom of Expression in the New Society of Information. Cuenca-Ecuador: Fundación Carolina/Berufsakademie, 2009. 31p.

<sup>5</sup> Person who, based on the reasoning, intellectual and individual construct, assumes certain position, defending their ideas.

<sup>6</sup> Cf., MARTÍNEZ, Andrés. Freedom of Expression in the New Society of Information. Cuenca-Ecuador: Fundación Carolina/Berufsakademie, 2009. 31p.

others considering it to be true, but simply taken as what the individual thinks about a particular situation.”<sup>7</sup>

As time goes by, it comes to a transitional period between the Middle Ages and Modernity, where human dignity is increasingly important so they began to develop the concept of freedom beyond the limits of the guilds and started to explore the realm of individual freedom, also with the understanding of the concept of "free will" they began to give a lot of respect to the own thought and opinion of every human being. Thinkers like Thomas Moro with the introduction of the concept of "plurality" breaks the bonds of thought thus enacting tolerance and respect for different beliefs, the contribution of Erasmus of Rotterdam is materialized to launch the idea of free interpretation of sacred texts, the individual ceases to depend on a third party to understand and interpret the scriptures unleashing the use of reason. Thus, the human being, based on reason rather than religion begins to make contributions to society resulting in significant advances in science, philosophy, art and literature.<sup>8</sup>

Now, going into the modern age, in the Age of Reform, important changes occur on individual freedoms and thoughts, since at this time lies entirely on ecclesiastical hierarchy and definitely separates church-state entity which was the authority of that time because unlike the state ruling the outside world, the spiritual or world religion ruled the inner world. Also is when it gets booming Protestantism, which was a revolutionary group who first dared to interpret texts that only the ecclesiastical authorities had the right to do so, so this movement becomes a staunch and advocates tolerance and freedom of thought.<sup>9</sup>

The final step to modernity is marked by rationalism, which is based on the natural law that allows not only the recognition of the obligations of human beings but also of their rights and freedoms. Baruch Spinoza for example, in his analysis of the role of the state

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<sup>7</sup> Cf., MARTÍNEZ, Andrés. Freedom of Expression in the New Society of Information. Cuenca-Ecuador: Fundación Carolina/Berufsakademie, 2009. 31p.

<sup>8</sup> Ibid

<sup>9</sup> Ibid

referred to as the body that defends and guarantees freedom of thought and expression with statements like this: "We show that in a free state, an individual is allowed to think whatever they want and say whatever you think "believing that any interpretation based on reason in a free and individual will, be beneficial not only for the individual but for the state as a whole.<sup>10</sup>

Subsequently, the booksellers are the ones in charge of the defense of freedom of the press, in this context the figure of the English liberal, Milton, who made the first public defense of free speech to the British Parliament (Aeropagítica). Milton believes that freedom of the press must be understood not only in politics but in religion and science, and to be given the opportunity to the individual to make their own analysis and draw their own conclusions as to what is considered as the truth. Locke is another English philosopher like Milton believes in the danger of dogma and the importance of knowledge as a means to act rationally, believes in the value of reason and discernment especially for election, and sees the state as guarantor of freedoms and the ruler as a passive agent who refrains from interfering in the value of judgments that individuals generate.<sup>11</sup>

During the Age of Enlightenment, or Age of Illustration, a figure arises, Voltaire, an advocate of tolerance, freedom of thought and human rights, fought tirelessly to defeat fanaticism and dogmatism, which were ideas of the church to make way for the light of reason, in the area of free speech, it defended the concept of diversity, as developed subjectivity by stating that each individual creates his own work and develops its own criteria, and believed that these works should reach the printing company so that each person is free to choose to read and believe.<sup>12</sup>

With the figure of Immanuel Kant the progress on freedom of expression are even more notorious because virtually it starts to eliminate all intellectual barriers and develops the concept of rational criticism, believes that without this they may fall back into

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<sup>10</sup> Cf., MARTÍNEZ, Andrés. Freedom of Expression in the New Society of Information. Cuenca-Ecuador: Fundación Carolina/Berufsakademie, 2009. 38-44p.

<sup>11</sup> Ibid

<sup>12</sup> Ibid

dogmatism, for there is no absolute truth and new arguments appear continuously. Moreover, beyond the authors of the time it is about the public use of reason and also integrates a policy, which states that citizens can believe what they want by making judgments regarding the performance of the rulers, it means that they can express themselves freely even in the public sphere and also politics marking a major advance in the protection of this right.<sup>13</sup>

Continuing the story of the right to freedom of expression, there is the American model, which has great influence on the English model, due to its historical heritage, and therefore is also based on reason of the individual. The First Amendment of the U.S. Constitution is a charter of rights that defends freedom, and this includes the first ban, with the establishment of an official religion and the prohibition of any law that dictates Congress abridging the freedom of speech or of the press. Likewise, the French model has much relevance in the subject because within the National Assembly it performs the "Declaration des droits de l'homme et du citoyen" in 1789 which recognizes the freedoms for the first time in a legal text translating the assurance of the positivism of the natural rights.<sup>14</sup>

"Freedom of expression is understood as an extension of the physical liberty of the individual. Indeed, this freedom is not only manifested in the freedom of movement and circulation. The individual also has an immaterial or spiritual aspect, and personal freedom in this area will be freedom of thought or opinion. This freedom of thought is an extension of physical liberty, and freedom of expression in turn, is the one of thought"<sup>15</sup>

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<sup>13</sup> Cf., MARTÍNEZ, Andrés. Freedom of Expression in the New Society of Information. Cuenca-Ecuador: Fundación Carolina/Berufsakademie, 2009. 45-54p.

<sup>14</sup> Ibid

<sup>15</sup> VOVELLE, M, The Fall of the Monarchy, 1878-1792, loc. ANSUATEGUI ROIG. 407-408p.

## 1.2. Elements of the Right to Freedom of Expression

The elements of this law are the freedoms of:

- Thought
- Opinion
- Expression (strictly).<sup>16</sup>

As we saw earlier the way such freedoms are addressed and recognized by the consolidation of the modern age in texts such as the Declaration of 1789.

“They are called freedoms because they focus on the potential of the human being, considered in the individual sense and from a liberal view, intended to have a rather passive attitude of the states (who are the ultimate guarantors of rights) than an attitude of respect which is basically refraining from cluttering the full exercise of these freedoms”<sup>17</sup>

Below shall define each of these freedoms:

### 1.2.1. Freedom of Thought

When we say thought, we talk about the ability of each individual to reason and think, then freedom of thought refers to the ability of humans to generate ideas, product of human reasoning. This right is protected by nature, is an absolute right that cannot be subject to any limitations because it lies within the mind and has not been externalized<sup>18</sup>.

Moreover, this right of freedom of thought is the basis of all other freedoms concerning communication, this issue would become more complex and require further analysis if it is accompanied by other rights such as freedom of expression, of association, of assembly, of petition, to teach, but rather is seen as a right that crosses borders between

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<sup>16</sup> NAVAS, Marco. Freedom of Communication: Reflexion, Debate and Practice. Quito-Ecuador: Regional Assistance Foundation of Human Rights, INREDH/Foundation Point of Communication. 2005. 125p.

<sup>17</sup> Ibid

<sup>18</sup> MARTÍN C. International Dimension of Human Rights, 1999, loc. NAVAS M. Freedom of Communication: Reflexion, Debate and Practice. 127p.

different categories of human rights, that is saved with implications for civil, political, economic, social and cultural.<sup>19</sup>

After defining the concept of freedom of thought, it is important to analyze two situations: The first is that no man can be compelled to speak his mind if he willingly does not want to do it, because he only thought of his own and is entitled to maintain confidentiality of his or her opinions. And the second, it is not right to practice the imposition of ideas and thought, it is prohibited under any technique or means trying to force human beings to change or delete your thoughts, only voluntarily and at their own analyzes people are free to decide what to believe.<sup>20</sup>

"The formation of all thought, its subsequent expression in the context of a public dialogue, the formation of public opinion, the mass dissemination of ideas and the corresponding reception of more ideas for people to form new thoughts, are all a successive activities with others that are part of a sort of circle, or if you like, spiral, which allows the generation of shared social meanings ... Some communication rights guaranteed the others."<sup>21</sup>

### **1.2.2. Freedom of Opinion**

Freedom of opinion goes beyond freedom of thought, as it is still associated more with the act of expressing a judgment, externalizing it. One view is generated through the reasoning which encourages debate and criticism, allowing any human being to express their views in the public sphere. Freedom of opinion is an idea that expresses beliefs and ideologies, covered also the freedom to be externalized without being subject to prior censorship or discrimination because of opinions, but there are restrictions in the

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<sup>19</sup> ALFREDSSON G. The Universal Declaration of Human Rights. A Common standard of achievement. 1999, loc. NAVAS M. Freedom of Communication: Reflexion, Debate and Practice. 127p.

<sup>20</sup> NAVAS, Marco. Freedom of Communication: Reflexion, Debate and Practice. Quito-Ecuador: Regional Assistance Foundation of Human Rights, INREDH/Foundation Point of Communication. 2005. 128p.

<sup>21</sup> Ibid

international instruments that does not censor, but undertakes the following responsibilities generated by the opinions made.<sup>22</sup>

"Under the name of freedom of opinion, we refer primarily to ideological freedom... The freedom of opinion primarily relates both to the subject of political ideology, as with freedom of religion and belief in general of all types of freedom that can integrate human consciousness "<sup>23</sup>

### **1.2.3. Freedom of expression (strictly)**

When referring to freedom of expression "in the strict sense," it essentially refers to the means by which thoughts are made feasible, ranging from oral communication, information technology and communication, and even symbolic means such as the use of bracelets burning the flag in protest.<sup>24</sup>

Human Rights, are always seeking to protect the medium itself, to protect the right to freedom of expression through international instruments, but also each State must understand the importance of this right not only for the individual but also for the social welfare and the state as a whole, so it is also necessary to create internal laws, which according to international instruments, they both act as protectors of the fundamental freedoms of the human being, in this case protectors of the freedom of expression. It also seeks to protect the contents published in the media and as the Rapporteur for Freedom of Expression of the UN says it is "all kinds of ideas, information, opinion, news, advertising, artistic activity, critical political commentary, etc., that can be disseminated ... covers undesirable opinions ".

In this regard, worth quoting Lluís Carreras position:

"Freedom of expression is a broader right than the freedom to inform, as this relates to newsworthy facts having an appearance of truth, while the other

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<sup>22</sup> NAVAS, Marco. Freedom of Communication: Reflexion, Debate and Practice. Quito-Ecuador: Regional Assistance Foundation of Human Rights, INREDH/Foundation Point of Communication. 2005. 128p.

<sup>23</sup> Ibid

<sup>24</sup> Ibid



concerns to the expression of thoughts and ideas that may lead to judgments value or beliefs (opinions) and can manifest in speech, writing, or even through the symbolic language"<sup>25</sup>

### **1.3. Subjects of freedom of expression**

When talking about the subjects of freedom of expression it refers primarily to the parties involved in the communication system, which means, on one hand the information generating element such as a media or an individual, and the other side is the State that is responsible for ensuring that this right is respected.

Regarding the subject of a legal relationship, the doctrine of law generally recognized two categories:<sup>26</sup>

- The perpetrator: a person who has a right, who is the owner.
- The taxpayer: one relating to the active subject is obliged to recognize and respect that right, in addition to enable their exercise.

Therefore, the perpetrator of human rights, in this case of civil rights, is the person, and the taxpayer is the State. Pending for legal persons, as institutions came to develop a thought, an image or an institutional opinion. Such is the case for the media, and other institutions and businesses, nongovernmental organizations, universities, and cultural and educational institutions, in general, any legal person.<sup>27</sup>

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<sup>25</sup> CARRERAS L. Legal System of Information, citado en NAVAS, Marco. Freedom of Communication: Reflexion, Debate and Practice. 133p.

<sup>26</sup> NAVAS, Marco. Fundamental rights of communication, civic vision. Quito-Ecuador, Corporación Editora Nacional/Universidad Andina Simón Bolívar. 2002. 135p.

<sup>27</sup> Ibid

## **1.4. Rights and Restrictions on Freedom of Expression**

Freedom of speech is a very broad topic, covering specific rights that would be involved in case of violation of the rights of free speech, and are as follow:

### **1.4.1. The right to freedom of expression and opinion**

The right of freedom of expression is the right all people use to express their opinions and views. It is particularly important since it plays a decisive role on democracy and participation in political life, that's why it is a right that should be widely promoted; however, there are also forms of extreme freedom of expression that need to be controlled because it could violate other basic human rights. An example of this case is the "hate speech", which is banned in some countries, in these cases, is not only sensible but necessary to limit the right to freedom of expression.<sup>28</sup>

Hate speech refers to certain opinions that incite hatred or intolerance between groups. An example of this is the role played by the "Radio-Television free from Libre des Mille Collines" when broadcasted propaganda against Tutsis in the Rwandan genocide of 1994. Some countries have established laws to control and prohibit advocacy of such expressions, however there is a very fine balance between the limitation on freedom of expression and other human rights violation, which is why the creation of laws against these expressions is still much debated. Unfortunately controversy raised around this issue has made the success of these laws is questionable and the worst thing is that as a result has been the advocacy of underground. That's why it is necessary to ban these extreme forms of expression, and to prohibit their use by the State, it is also necessary to create media that can express contrary views.<sup>29</sup>

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<sup>28</sup> HUMAN RIGHTS Education Associates. Freedom of Expression [on line]. [consultation January 4th of 2012]. Available at: < [http://www.hrea.net/index.php?doc\\_id=851](http://www.hrea.net/index.php?doc_id=851).>

<sup>29</sup> Ibid

## **1.4.2. The right to seek, receives, and imparts information and ideas**

### **1.4.2.1. Restrictions on individual journalists**

Within the freedom to impart information we have the press, but the threat to freedom of expression occurs when pressure is exerted on journalists. These threats are mainly casual with censorship, which involves making a series of threats to individual journalists in order to punish or prevent the publication of certain information, intimidating phone calls or even physical attacks.

That is why there are laws that protect journalists and allow them not to reveal their sources. It is important to ensure the flow of information on matters of public interest. These laws are human rights mechanisms that exist at national and international level and they establish that a journalist can never be forced to reveal their sources except in special cases such as a criminal investigation.<sup>30</sup>

Just as there are laws to protect sources, on the other hand there are laws of privacy protection which hinder the work of journalists, because they hinder investigative reporting designed to prove corrupt and illegal practices. While it is true that this type of legislation is needed to protect the private affairs of individuals, it is important to use them so they do not try to cover malpractice and other matters of public interest.<sup>31</sup>

The media are an important information tool, its research and publications can bring out both the successes and the mistakes of human beings, especially if they are public figures, that's why it is important that the media communication are free to publish the information they obtain from their investigations as to communicate conflicts and public scrutiny can help to control abuses of power and overall human rights abuses.

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<sup>30</sup>HUMAN RIGHTS Education Associates. Freedom of Expression [on line]. [consultation January 4th of 2012]. Available at: <[http://www.hrea.net/index.php?doc\\_id=851](http://www.hrea.net/index.php?doc_id=851)>

<sup>31</sup> Ibid

#### **1.4.2.2. Structural constraints on the press**

Structural constraints refer to the discussion of whether the press is free from political and governmental control. The government can often hinder media's job by pressuring them with laws, in an effort to control information for the convenience of the authorities, however, the performance of good governance can be seen clearly if we look at the role played by the media in a country.

In a society, media must be fully independent, journalists should be free to monitor, investigate and criticize the policies and actions of government. This is necessary for the consolidation of good governance, freedom for independent media are a sign that the government has nothing to hide. Also a link between independent media and regime, allow proper functioning of democracy as they allow the public to know and evaluate government actions and generate a public debate which will present the worries of citizens, unfortunately very often governments create media laws in order to hide certain practices, and provide the information only as a convenience to the media who share his view.<sup>32</sup>

In order to effectively fulfill their role, media has to be an independent and pluralistic, performing their work regardless of political and economic interests but consistent with the essence of journalism which is to provide truthful and authentic information.

To properly exercise the right to freedom of expression is essential that social media are open and available to all without discrimination, as well as the fact of not having preferences or exclusions to any social group or authority as the media should be instruments for freedom of expression and not vehicles for its restriction. Moreover, being the media vehicles for this important right, its operating conditions must be linked to the fulfillment of freedom so it is extremely important to provide all necessary

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<sup>32</sup> United Nations Educational, Scientific and Cultural Organization. Media and Good Governance. [online]. [consultation march 12th of 2012]. Disponible en: <<http://www.unesco.org/new/es/communication-and-information/flagship-project-activities/world-press-freedom-day/previous-celebrations/worldpressfreedomday200900000/theme-media-and-good-governance/#topPage>>

protection to both media and journalists have to ensure the independence and freedom of expression.<sup>33</sup>

On the other hand, it is also important that there are regulators of the media, but also they must be independent of government, and the allocation of licenses to be given to journalists must work in an open and transparent process where they will be evaluated under pre-established criteria, with the sole purpose of obtaining skilled professionals with the sole aim of fulfilling the right to keep the public informed.

Monopolies are other structural constraint because they distribute the information from one source only, so it hinder to research, this is the case of state monopolies that do not serve the public interest, if there exist monopolies there should be rules that promote the plurality of content without giving full control to the government or an opportunity for it to interfere in the media. Finally another example of "structural censorship" is the pressure exerted by a government through economic measures or preferential allocation of government advertising, as well as control over publications, distribution networks or news print, and selective use of taxes.<sup>34</sup>

#### **1.4.2.3. Access to information held by public authorities**

This issue relates to the mechanisms that protect journalists and allow them to collect information from public authorities to promote access to such information, as having nothing to hide, the fact of providing information shows the transparency of public officials and the management of its activities, which is why there are tools of regional and international human rights that governments have requested the creation of some regulation on the following topics: "... the law should be guided by the principle of maximum disclosure, public institutions should be required to publish key information, public organisms should actively promote an open government, exceptions must be established clearly and bounded and should be subject to stringent tests of 'harm' and

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<sup>33</sup> Cf., Organization of American States. Special Report of the Rapporteur on Freedom of Expression. 1998. [online]. [Accessed 14 March 2012]. Available at:<[www.cidh.oas.org/relatoria/showarticle.asp?artID=134&IID=2](http://www.cidh.oas.org/relatoria/showarticle.asp?artID=134&IID=2)>

<sup>34</sup> Ibid

'public interest', individuals should have the right to appeal a denial of disclosure by an independent administrative body, which operates in a fair way, the legislation should provide protection for 'whistleblowers' to make public any information on illegal activities "<sup>35</sup>

#### **1.4.2.4. New technologies such as the Internet, digital and satellite transmission**

These new technology tools are an important factor in the issue of freedom of expression as it has facilitated communication in a world where information is available with an Internet connection. That is why all people are able to share and learn in the most agile and quick way. Over the years, the success of globalizing communication and therefore globalizing ideas and opinions, has made that each individual is able to speak freely and share these ideas in a massive way. The problem arises when you have to limit the spread of certain content harmful to society, and here is the challenge for governments and authorities, as there is a fine line between controlling harmful content and violation of freedom of speech. Therefore it is really necessary to establish regulations and creating laws to regulate the content, however it requires a lot of skill and caution to not break the balance, since control of abuses of freedom of expression in the information age is a very debatable topic.<sup>36</sup>

#### **1.4.3. Restrictions on Freedom of Expression**

There are restrictions to public order and national security, but the instruments have ruled that such restrictions will only be imposed when: there is risk of actual harm to a legitimate interest, violence or any other act having the character of illegal or any other expression articulated with the intention of causing harm.

With that big amount of restrictions, many believe that they must be accompanied by criminal penalties, including imprisonment, however, international instruments on freedom of expression indicate a person that abuse of this right can't be punish with

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<sup>35</sup> HUMAN RIGHTS Education Associates. Freedom of Expression [on line]. [consultation January 4th of 2012]. Available at: < [http://www.hrea.net/index.php?doc\\_id=851](http://www.hrea.net/index.php?doc_id=851).>

<sup>36</sup> Ibid

imprisonment unless in extreme situations in which there is imminent and unlawful actions.<sup>37</sup>

On the other hand, in some states there are still criminal defamation laws that protect public figures of abuse. These laws limit the freedom of expression, therefore the international human rights instruments have recommended changing these laws by other criminal defamation laws, these laws can also be used to censor criticism of public matters, the international human rights bodies have determined that such legislation must comply with the following principles: "public bodies should not be able to present defamation actions, the truth should always be available as a defense, the politicians and public officials should be required to tolerate a greater degree of criticism; publications concerning matters of public interest that are reasonable in all circumstances should not be considered defamatory, the only damage award must be proportionate to the actual harm and should consider alternative remedies as apologies or corrections. "<sup>38</sup>

## **1.5. International Regulations**

In international law there is a lot of instruments that defend the right to freedom of expression, which are classified as Hard Law and Soft Law. Below is a brief definition of each concept and we will be citing several international instruments and its corresponding articles, which address the issue of freedom of expression.

### **1.5.1. Hard Law**

The hard law is mandatory and that cannot be excluded by the will of the parties obliged to comply. These standards must necessarily be observed since it protects public and general interest.

As there is no central power, are the States the ones creating norms and benefiting from them, but there are mandatory rules since in some cases states are forced to give up their sovereignty. It has not being possible to determine which norms are imperative and

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<sup>37</sup> HUMAN RIGHTS Education Associates. Freedom of Expression [on line]. [consultation January 4th of 2012]. Available at: < [http://www.hrea.net/index.php?doc\\_id=851](http://www.hrea.net/index.php?doc_id=851).>

<sup>38</sup> Ibid

which are not since there is not an organism that establishes a hierarchy of sources and norms in international law, which is a problem that must be solved in the future as they continue to develop the Public International Law.

The discussion about the existence of norms became positive with the Vienna Convention Treaties in 1969, in Article 53, it declared that "A treaty is void if, in the time of its conclusion, it conflicts with a peremptory norm of general international law ", being that character, "a norm accepted and recognized by the international community of States as a whole is a rule that no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character. "<sup>39</sup>

These rules have been created due to the prevalence of general public interest over the individual. To others, these rules guaranteeing the principle of jus cogens, which means that:

- a) They are of international public
- b) They are universal (general international law)
- c) Protect the common interest of the international community
- d) They are an imperative coercive law
- e) They sanction with nullity any derogatory rule
- f) Supreme in relation to other standards
- g) Limit the autonomy of states.

States alone cannot create mandatory rules because of "pacta sunt servanda" (agreements must be kept). These rules occupy the highest rung in the hierarchy of the sources of international law because they are non-derogable, they are formed in times of war and peace, according to the quality of the items protected.<sup>40</sup>

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<sup>39</sup> Cf., SORENSEN, Max. Manual of Public International Law, Eighth Reprint. Mexico: Economic Culture Fund, 2002.

<sup>40</sup> Ibid



The issue of the right of freedom of expression is enshrined in several international hard law, we will be referring to the 3 Conventions above:

- The American Convention on Human Rights
- The International Covenant on Civil and Political Rights
- The European Convention for the Protection of Human Rights and Fundamental Freedoms

#### **1.5.1.1. American Convention on Human Rights**

The American Convention (also called Pact of San Jose of Costa Rica or ACHR) was signed, after American Specialized Conference on Human Rights on 22 November 1969 in the city of San Jose, Costa Rica and became effective July 18, 1978.<sup>41</sup>

By this agreement the signatory States undertake to consolidate a democratic continent in which there is a system of personal liberty and social justice based on respect for the essential rights of humans. It also aims to acknowledge that these rights are not derived from one's being a national of a certain state, but are based upon attributes of a person, which justify the international protection of a covenant reinforcing or complementing the protection provided by the domestic law of American States. It also reiterated that according to the Universal Declaration of Human Rights, the ideal of free men enjoying freedom and exempt of fear can only become a reality, if conditions are created whereby everyone may enjoy his economic, social and cultural, as well as his civil and political rights.<sup>42</sup>

States Parties, to ratify this agreement, acquire duties and obligations in order to fulfill the purpose of the treaty, and these are why according to Article 1 of the Convention, States Parties are obliged to respect the rights and undertake to:

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<sup>41</sup> American Convention on Human Rights, San José de Costa Rica, 1969.

<sup>42</sup> The tax law is mandatory and that cannot be excluded by the will of the parties obliged to comply. These standards must necessarily be observed since that protects public interest or general.

"... Respect the rights and freedoms recognized in it and to ensure the free and full exercise to all persons subject to their jurisdiction, without discrimination based on race, color, sex, language, religion, political or any other opinion, national or social origin, property, birth or other status."

Also, according to Article 2, States Parties have a duty to adopt provisions of domestic law which are necessary in order to ensure the fulfillment of rights:

"If the practice of the rights and liberties referred to in Article 1 are not ensured by legislative or other provisions, the States Parties commit to assume, in accordance with their constitutional processes and the provisions of this Convention, any other measures or legislative matters that may be necessary to give effect to those rights and liberties."

With everything that has to do with the rights to express and think freely, the American Convention dedicated two chapters referring to this subject; according to Article 13 the right includes "freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, whether it be orally, in writing or in print, art, or through any other media of their choice."

Paragraph 2 states that the exercise of this right "cannot be subject to prior censorship but subsequent liability, which shall be expressly established by law and are necessary to ensure: respect for the rights or reputations of others, or the protection of national security, public order or public health or morals."

Furthermore, under Article 13, paragraph 3: "You cannot restrict the right of expression by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions."

It also notes that "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."

Finally notes that "shall be prohibited by law, all kinds of propaganda for war and advocacy of national, racial or religious hatred that constitute incitements to violence or other unlawful action against any person or group of persons on any grounds including the race, color, religion, language or national origin. "

Another chapter about freedom of expression is chapter 14 which speaks of the right to reply. Establishing that: "Any person or persons affected by inaccurate or offensive statements through news media legally regulated and targeted to the general public are entitled to be made by the same communications outlet in reply or correction conditions established by law. ""In any case the correction or reply exempt from other legal liabilities that have been incurred."

Finally it explains that "for the effective protection of honor and reputation, all media companies or publications, film, radio and television will have a person responsible who is not protected by immunities or special privileges."

It is important to note that together with the Commission and Court of Human Rights also acts another joint body, the Special Rapporteur for Freedom of Expression, which was created because of the importance of establishing a permanent office and independent acting within the legal framework of the American Court of Human Rights.

Its main functions are:

It is responsible for strategic litigation on freedom of expression within the inter-American system, in other words, does the advice and evaluation of individual cases for subsequent reporting, promotes justice and also permits you to draw attention to special cases affecting freedom of expression so you can create laws, both by the inter-American system of human rights as national authorities.<sup>43</sup>

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<sup>43</sup> Organization of American States Special Rapporteur for Freedom of Expression. [Online] [June 11, 2012]. Available at: <http://www.oas.org/es/cidh/expresion/mandato/funciones/asp.>>

This organism also works with the ACHR for the development of recommendations for the adoption of precautionary measures on issues of freedom of expression. These measures are created because of the need for mechanisms to protect the persons, subject of the jurisdiction of any State, of imminent serious harm and irreparable.<sup>44</sup>

Also, this organization participates in public hearings on freedom of expression that are lifted out in the court (ACHR), prepares relevant reports and makes appropriate interventions and monitoring. It also carries out visits to countries in the region to conduct investigations and gather research on the situation of freedom of expression in that country, promotes international standards for the exercise of this right and promotes the use of the human rights system, these visits included meetings with officials of the organizations members of the legislative and judicial systems, as well as to autonomous bodies and non-governmental organizations, journalists, academics and members of the human rights system, among others.<sup>45</sup>

Workshops and seminars are conducted with strategic partners in the region in order to promote the Special Rapporteur on the right to freedom of expression, which is why, with the cooperation of universities, governmental and non-governmental organizations these workshops includes the participation of journalists, lawyers, students, academics, public officials, among others.<sup>46</sup>

In addition, one of the main tasks of this Institution is the preparation of a report on the state of freedom of expression in the region. Each year the Special Rapporteur analyzes the situation of this law in all member countries (OAS), which highlights progress and challenges on the subject, apart from their annual reports specific reports are made when the case warrants on the situation in certain countries, and also makes thematic reports

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<sup>44</sup> Organization of American States Special Rapporteur for Freedom of Expression. [Online] [June 11, 2012]. Available at: <http://www.oas.org/es/cidh/expresion/mandato/funciones/asp.>>

<sup>45</sup> Ibid

<sup>46</sup> Ibid

generated important discussions for the implementation of legislative and administrative reforms.<sup>47</sup>

Likewise, through the daily monitoring of the state of freedom of expression in the region, the Rapporteur issues statements such as press releases, reports and opinions about specific situations that are relevant to the fulfillment of its mandate. Moreover, since its creation the Special Rapporteur has participated in the preparation of statements with other regional rapporteurs for freedom of expression. Joint declarations are usually signed by UN Rapporteur on Freedom of Opinion and Expression, Rapporteur of the Organization for Security and Cooperation in Europe for Freedom of the Media, African Rapporteur Commission on Human and Peoples' Rights and the Rapporteur of the Organization of American States for Free Expression. When it comes to regional matters, the statements are signed by the rapporteurs of the UN and OAS.<sup>48</sup>

#### **1.1.1.1. International Covenant on Civil and Political Rights.**

The International Covenant on Civil and Political Rights is a multilateral treaty that recognizes overall civil and political rights and establishes mechanisms for protection and guarantee. It was adopted by the General Assembly of the United Nations by resolution 2200A (XXI) of 16 December 1966; and entered into force on 23 March 1976.<sup>49</sup>

Hereby Covenant, States Parties undertake to ensure that rights are agreed here considering the principles of the United Nations, freedom, justice and peace in the world

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<sup>47</sup> Organization of American States Special Rapporteur for Freedom of Expression. [Online] [June 11, 2012]. Available at: <<http://www.oas.org/es/cidh/expresion/mandato/funciones/asp>>

<sup>48</sup> Ibid

<sup>49</sup> The International Covenant on Civil and Political Rights, adopted by the General Assembly of the United Nations. December 16, 1966.

that are based on the recognition of the inherent dignity of all members of the human family and their equal and inalienable rights, also recognize that these rights derive from the inherent dignity of the human person.<sup>50</sup>

Moreover, taking into account the Universal Declaration of Human Rights considered that is necessary to create conditions whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights, to also be the ideal of free human in the enjoyment of civil and political liberties. Also consider the Charter of the United Nations imposes on States the obligation to promote universal respect for and observance of human rights and freedoms of human beings. Finally, considering that each individual has responsibilities to others in the community to which he belongs and therefore they have the obligation to fight for the promotion and observance of the rights recognized in the present Convention.<sup>51</sup>

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When talking about the commitment of States, Article 2 states that "each of the States Parties to the present Covenant undertakes to respect and to ensure to all individuals within its territory the right recognized in the present Covenant, without distinction of race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".

Furthermore each State Party undertakes to take "appropriate measures to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant and that were not already guaranteed by legislative or other measures" according to their constitutional processes and the provisions of the present Covenant.

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<sup>50</sup> The International Covenant on Civil and Political Rights, adopted by the General Assembly of the United Nations. December 16, 1966.

<sup>51</sup> Ibid

The International Covenant on Civil and Political Rights lists two items within which defends the right to freedom of expression.

Article 19 states that "everyone has the right to hold opinions without interference", also warns that "everyone has the right to freedom of expression, this right includes freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, or art, or through any other media of his choice ". But he also notes that this right includes certain responsibilities, therefore is subject to certain restrictions which must be fixed by law to "ensure respect for the rights or reputations of others" and "the protection of national security, the public order or public health or morals."

Finally, Article 20 states that the propaganda war is prohibited, as well as "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence".<sup>52</sup>

#### **1.1.1.2. European Convention for the Protection of Human Rights and Fundamental Freedoms**

The European Convention of Human Rights was adopted in Rome by the Council of Europe in 1950 and entered into force in 1953. The official name of the Convention is the Convention for the Protection of Human Rights and Fundamental Freedom; is expressly based on the Universal Declaration of Human Rights proclaimed by the General Assembly of the United Nations on December 10, 1948. The Council of Europe is not the same as the Council of the European Union, which is not part of the

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<sup>52</sup> The International Covenant on Civil and Political Rights, adopted by the General Assembly of the United Nations. December 16, 1966.

Convention and has no role in the administration of the European Court of Human Rights.<sup>53</sup>

The first stated goal is to achieve the protection, through the articulation of effective legal mechanisms of civil and political rights of individuals. It is the result of the work of the Council of Europe which is what has been called an ideological community, based on parliamentary democracy, the social status of rights and respect for Human Rights.<sup>54</sup>

The control system of the European Convention on Human Rights is one of the oldest, but the most evolved and refined of the region, with the European Court of Human Rights, which is an institution of a judicial nature, and works as a real referee system.

Until the year 1998 there were two control entities, the Commission and the European Court of Human Rights but by the end of that year came into force the protocol number 11 which suppress the role of the Commission as the filter of the demands, the procedure is ruled, and since this is submitted directly to the Court.<sup>55</sup>

The mechanisms for monitoring compliance with the Convention by States are basically three:

- a) The reports that the General Secretary of the Council of Europe request, in which any Member State shall furnish giving explanations of the manner in which its internal law ensures the effective implementation of the Convention. It is a mechanism of little relevance.

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<sup>53</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms. Rome 1950.

<sup>54</sup> Ibid

<sup>55</sup> Gomez, Felipe, Dictionary of humanitarian action and development cooperation. [Online] [12 June 2012]. Available at: <<http://www.dicc.hegoa.ehu.es/listar/mostar/64>>



- b) Claims interstate, or termination of one or more Member States against another for breach of the Convention. Unlike the situation of other systems, the European Convention has been relevant in certain cases: the demand of various countries against Greece for the coup of the colonels and the resulting human rights violations, or Ireland against Britain over interrogation techniques used with IRA members, qualified by the European Court as acts of abuse.
  
- c) The individual claims, which constitute the most important mechanism through which any person, NGO or group of individuals to be considered a victim of a violation of their human rights may bring an action before the European Court Human Rights.<sup>56</sup>

Regarding the issue of freedom of thought and expression, this convention includes two important articles:

Article 9, which speaks of freedom of thought, conscience and religion states that "everyone has the right to freedom of thought, conscience and religion: this right includes freedom to change his religion or belief, as well as the freedom to manifest one's religion or belief individually or collectively, in public or in private, through worship, teaching, practice and observance ", also states that " freedom to manifest one's religion or belief not subject to such limitations as are prescribed by law and are necessary in a democratic society for public safety, the protection of public order, health or morals, or the protection of rights and freedoms of others ".

Moreover this Article 10 referred only to freedom of expression, states: "Everyone has the right to freedom of expression. This right includes freedom to hold opinions and to receive and impart information and ideas without interference by public authority and

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<sup>56</sup> Gomez, Felipe, Dictionary of humanitarian action and development cooperation. [Online] [12 June 2012]. Available at: <<http://www.dicc.hegoa.ehu.es/listar/mostar/64>>

regardless of frontiers. This article shall not prevent States from requiring the broadcasters, television or cinema of a prior authorization system" also states that "the exercise of these freedoms, carries duties and responsibilities, and may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society for national security, territorial integrity or public safety, defense order and the prevention of crime, the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary. "<sup>57</sup>

### **Soft Law**

Mandatory texts (*ius dispositivum*), refers to those standards that can be revoked or amended by the sole will of the parties. They aim to meet individual and common interests of States. Self-care (the application of the rights granted the State made only directly affected) and organized protection (rights implementation within an International Organization) are the means of an enforceable standards dispositive.<sup>58</sup>

Boyle explains that the term Soft law has a number of possible meanings, but there are three relevant from the perspective of the author:

- 1) The Soft Law is not binding. The author uses the term non-binding to specify that the instruments can't be linked in what is called Soft law.
- 2) The Soft Law consists of general rules or principles, but not norms.
- 3) The Soft Law is the law which is not applicable through binding dispute resolution.

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<sup>57</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms. Rome 1950.

<sup>58</sup> Cf., Boyle. A.E. "Some Reflections on the Relationship of Treaties and Soft Law", I.C.L.Q October 1999. 901-913p

Regarding the first relevant meaning, the author believes that, when used in this sense, the Soft Law can be contrasted with the so-called hard law, which is binding. The treaties are, by definition, always the type Hard Law because they are always binding. For the second meaning, Boyle explains that soft law can be contrasted with the rules, that speak of specific obligations in this regard are Hard Law, and the rules or principles that are more open or general in content and meaning can see as softer (soft law). And from the third meaning, for Boyle is the character of dispute resolution that determines whether we are facing a Soft or Hard Law.<sup>59</sup>

The issue of the right to freedom of expression is enshrined in international instruments of Soft Law, now we will look over 3 of them being:

- The Universal Declaration of Human Rights.
- The Declaration of Principles on Freedom of Expression of the Inter-American Convention on Human Rights.
- The Joint Declaration on Freedom of Expression and the Internet.

#### **1.1.1.3. Universal Declaration of Human Rights**

The Universal Declaration of Human Rights (UDHR) is a declarative document adopted by the General Assembly of the United Nations in its resolution 217 A (III), on December 10, 1948 in Paris, which includes 30 articles in Human Rights considered basic.

The binding of this Declaration and the International Covenants on Human Rights and its Protocols understands what has been called the International Bill of Human Rights.

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<sup>59</sup> Cf., Boyle. A.E. "Some Reflections on the Relationship of Treaties and Soft Law", I.C.L.Q October 1999. 901-913p

While the Declaration is, generally, a guidance document, the Covenants are international treaties that oblige signatory states to comply.<sup>60</sup>

Member states of the United Nations have pledged to ensure "universal respect and observance of human rights and fundamental freedoms", so that the Assembly proclaims this Declaration as a "common standard of achievement for all peoples and nations to strive for, so that every individual and the society, shall attempt by teaching to promote respect for these rights and freedoms, and to ensure by progressive measures, the recognition application, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction."<sup>61</sup>

With regard to freedom of expression, this Declaration includes two articles:

Article 19 states that "everyone has the right to freedom of opinion and expression: this right includes freedom to hold their opinions, to seek, receive and impart information and ideas regardless of frontiers by any means of expression."

Article 29 speaks of restrictions stating that "in the exercise of their rights and in the enjoyment of his freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society."<sup>62</sup>

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<sup>60</sup> ORBE, International Relations, obtained from: <http://orbeinternational.jimbo.com/derechos-humanos/derechos-humanos/>

<sup>61</sup> The Universal Declaration of Human Rights, Adopted by the General Assembly of the United Nations. Paris 1948.

<sup>62</sup> Ibid

### **1.1.2.2. Declaration of Principles on Freedom of Expression (ACHR)**

In response to the mandate given to the creation of the Special Rapporteur for Freedom of Expression, in 2000 the Rapporteur worked on the preparation of a draft Declaration of Principles on Freedom of Expression. This initiative was born out of the need to provide a legal framework for the protection of the right to freedom of expression, incorporating doctrines recognized in various international instruments.

After several discussions with various civil society organizations and in support of the Special Rapporteur for Freedom of Expression, the Inter-American Commission on Human Rights adopted the Declaration of Principles on Freedom of Expression in October 2000. This statement is necessary to interpret Article 13 of the American Convention on Human Rights.<sup>63</sup>

Within this Declaration stands out the need to protect individual freedoms within the rule of law and also speaks of the importance of freedom of expression in a democracy as it is essential for the development of knowledge and understanding of the peoples. It also points out that guaranteeing the right to information and promoting the free exchange of ideas, the State ensure greater transparency of government actions.<sup>64</sup>

It is recognized that a free press is essential to the full and effective exercise of freedom of expression and crucial to the functioning of representative democracy, in which

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<sup>63</sup> Declaration of Principles on Freedom of Expression, adopted by the Special Rapporteur for Freedom of Expression, 2000.

<sup>64</sup> Ibid

citizens exercise their right to receive, impart and seek information; it also indicates that freedom of expression is not a concession by the States but a fundamental right.<sup>65</sup>

With these considerations, the following principles had been set out:

1. Freedom of expression in all its forms and manifestations is a fundamental and inalienable right of all people. It is also a prerequisite for the very existence of a democratic society.
2. Everyone has the right to seek, receive and impart information and opinions freely under terms set forth in Article 13 of the American Convention on Human Rights. All people should be afforded equal opportunities to receive, seek and impart information by any means of communication without any discrimination on any grounds, including race, color, religion, sex, language, political or other opinion, national or social origin, property, birth or other status.
3. Everyone has the right to access information about themselves or their assets expeditiously and not onerously, whether it be contained in databases, public or private records and, if necessary, update it, correct and / or amend it.
4. Access to information held by the state is a fundamental right of individuals. States are obliged to ensure the exercise of this right. This principle allows only exceptional limitations that must be previously established by law in case there is a real and imminent danger that threatens national security in democratic societies.
5. Prior censorship, interference, direct or indirect pressure exerted upon any expression, opinion or information transmitted through any means of oral,

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<sup>65</sup> Declaration of Principles on Freedom of Expression, adopted by the Special Rapporteur for Freedom of Expression, 2000.

written, artistic, visual or electronic communication must be prohibited by law. Restrictions to the free circulation of ideas and opinions, as well as the arbitrary imposition of information and the creation of barriers to the free flow of information violate the right to freedom of expression.

6. Everyone is entitled to their views by any means and form. Compulsory qualifications or requirements for the practice of journalism constitute unlawful restrictions on freedom of expression. Journalistic activities must be guided by ethical conduct, which should in no case be imposed by States.
7. A Precondition, such as truthfulness, timeliness or impartiality is incompatible with the right to freedom of expression recognized in international instruments.
8. Every social communicator has the right to keep their sources of information, notes, personal and professional files.
9. Murder, kidnapping, intimidation or threats to social communicators, as well as the material destruction of communications media violate the fundamental rights of individuals and strongly restrict freedom of expression. It is the duty of the state to prevent and investigate such occurrences, to punish their perpetrators and to ensure that victims receive due compensation.
10. Privacy laws should not inhibit or restrict investigation and dissemination of information of public interest. The protection of reputation should only be guaranteed through civil sanctions in those cases in which the person offended is a public official or public or private person who has voluntarily become involved in matters of public interest. Moreover, in these cases, it must be proven that in disseminating the news, the social communicator had the specific intent to inflict harm, was fully aware that false news was disseminated, or acted with gross negligence in efforts to determine the truth or falsity of such news.

11. Public officials are subject to greater scrutiny by society. Laws that penalize offensive expressions directed at public officials, generally known as "insult laws" restrict freedom of expression and right to information.
12. Monopolies or oligopolies in the ownership and control of the media should be subject to antitrust laws, as they conspire against democracy by limiting the plurality and diversity which ensure the full exercise of the right to information of citizens. In no case should such laws apply exclusively to the media. The concession of radio and television should consider democratic criteria that provide equal opportunity for all individuals in accessing documents.
13. The use of state power and resources of public finances, the granting of customs duty privileges, the arbitrary and discriminatory placement of official advertising and government loans, the granting of television and radio frequencies, among others, with the aim of pressing and punish or reward and provide privileges to social communicators and the media in terms of their approach to coverage, threaten freedom of expression and must be explicitly prohibited by law. The media have the right to conduct its work independently. Direct or indirect pressures to stifle the dissemination of information journalists are incompatible with freedom of expression.

### **1.1.2.3. Joint Declaration on Freedom of Expression and the Internet**

As this is a joint declaration, we will first explain the mission of the nongovernmental organization ARTICLE XIX (Global Campaign for Free Expression) which is one of the promoters of this Declaration.



"Article 19" is an NGO of Human Rights, which works around the world in order to protect and promote the right to freedom of expression. It is named after Article 19 of the Universal Declaration of Human Rights, which guarantees the right to freedom of expression. This Organization works in over 50 countries around the world and considers that this right is paramount to ensure that also other fundamental rights, and the free flow of information and ideas between citizens and authorities is essential for government transparency and democracy.<sup>66</sup>

That is why this organization struggles to combat any censorship mechanism proposed in any State; it also monitor, endorse, make campaigns, sets standards and litigates on behalf of freedom of expression wherever it's being threatened. Promote this right also in poor communities to ensure transparency and strengthen citizen participation. The organization works to ensure that all people can express themselves freely, access information and enjoy the freedom of the press.<sup>67</sup>

They understand freedom of expression as three things:

- Freedom of expression is the right to speak: express political, cultural, social and economic, or any other issue.
- Freedom of speech is freedom of press, right to a free and independent press to report without fear, interference, persecution or discrimination, the right to provide information, giving voice to the marginalized and dissenting voices.
- Freedom of expression is the right to know: accessing to all information held by the government, knowing that there are temporary exceptions, non-definitive. Is the right to know information that ensures the requirement of various human rights as the right to health, a clean environment, to feeding, to truth and to

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<sup>66</sup> NGO. Article 19, [Online] [June 13th 2012]. Available at:  
<<http://www.article19.org/resources.php?lang=es>>

<sup>67</sup> Ibid

justice, is the public demand to know information and demand accountability of government malpractice.<sup>68</sup>

Returning to the subject of the Joint Declaration on Freedom of Expression and Internet, it was created the June 1, 2011 by some international organizations including the Rapporteurs on Freedom of Expression of the UN and OAS, among others, in collaboration with article 19, Global Campaign for free Expression with the aim to propose guidelines that serve as a reference to defend the right to freedom of expression online. This emphasizes the importance of this right as fundamental both for the defense of other rights and for democracy.<sup>69</sup>

Also note that nowadays the Internet is a medium that connects thousands of people around the world and allows these to share their opinions, which promotes pluralism and disclosure, also celebrating the fact that the Internet platform is already present in all countries and regions of the world, but also note that there are still many people who do not have an Internet connection or access to lower quality.

Moreover, there is evidence that some governments have taken measures in order to restrict freedom of expression on the Internet, because although there must be a control in cases such as crime prevention, protection of fundamental rights, etc., which has not been noticed is that the Internet has very special characteristics and limitations can lead to an undue restriction of freedom of expression, violating international law.<sup>70</sup>

Within this first Declaration are included a number of general principles such as the fact that "restrictions on freedom of expression on the Internet are only acceptable when they

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<sup>68</sup> NGO. Article 19, [Online] [June 13th 2012]. Available at:  
<<http://www.article19.org/resources.php?lang=es>>

<sup>69</sup> Joint Declaration on Freedom of Expression and the Internet Adopted by Organization of American States. Article 19 and others 2012.

<sup>70</sup> Ibid

meet international standards that have, among other things, that should be provided by law and pursue a legitimate aim recognized by international law and are necessary to achieve that purpose "also points to the importance of assessing the proportionality of a restriction is" must weigh the impact that such a restriction could have on the ability of Internet to guarantee and promote freedom of expression on the benefits that accrue restriction to protect other interests "<sup>71</sup>

The rules used for telephony, radio or television could not be applied to the Internet, you need to develop specific rules taking into account their specificities. Also it should be encouraged "digital literacy", which is "to endorse education and awareness measures to promote the ability of all people to make an autonomous, independent and responsible use of the Internet" also, when it comes to illicit contents: "should be assigned greater importance to the development of alternative approaches to fit specific and unique characteristics of the Internet, and while recognizing that no special restrictions should be set to the contents of the materials disseminated through Internet" so as an alternative, self-regulation would become an effective tool to deal with injuries thus be promoted.<sup>72</sup>

Besides, when it has to do with the liability of intermediaries, the statement cites two principles: the first is that of "mere transmission", which states that "any person who offers only technical services like Internet access, searches or retention of information in the cache should be responsible for content generated by third parties that are disseminated through these services, if not specifically involved in the content or refuses to comply with a court." Second, states that "at least should not require intermediaries to monitor user-generated content and should not be subject to court rules on cancellation contents not provide sufficient protection for freedom of expression."

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<sup>71</sup> Joint Declaration on Freedom of Expression and the Internet Adopted by Organization of American States. Article 19 and others 2012.

<sup>72</sup> Ibid

As for filtering and blocking, the first number 3 indicates that blocking websites, IP addresses, ports, network protocols or social networking is an extreme measure and also "could only be justified under international standards, for example, when necessary to protect children from sexual abuse, "Also in regards to filtering the second paragraph states that" content filtering imposed by governments or commercial service providers that are not controlled by the user is a form of censorship and not a justified restriction on freedom of expression. "

The numeral 4 refers to civil and criminal liability of persons who publish certain content on the Internet and in the first paragraph states that any further liability should lie "exclusively to the States, normally because the author resides in that State, the content was published from there and / or this is specifically directed to the State concerned."

The Convention also touched the issue of net neutrality, and, in section 5 states that "the treatment of data and Internet traffic should not be subject to any discrimination based on factors such as device, content, author, source and / or destination of the material, service or application," Besides, "should require Internet intermediaries to be transparent about the practices they use to traffic management information, and any information relevant to such practices must be made available to the public in a format that is accessible to all people. "

Moreover, paragraph 6 speaks of Internet access and the role played by state. The first paragraph says that "States have the obligation to promote universal access to the Internet to ensure the effective enjoyment of the right to freedom of speech. Internet access is also needed to ensure respect for other rights such as the right to education, health care and employment, the right of assembly and association, and the right to free elections." It also indicates that "interruption of Internet access, applied to whole populations or certain segments of the public (Internet cancellation) cannot be justified under any circumstances, even for reasons of public order or national security. The same

applies to measures that reduce the speed of internet browsing or parts of this. "Within the same paragraph also states that" the denial of the right of access to the Internet, as a punishment, is an extreme measure that could only be justified where there are no other less restrictive measures and provided that it has been ordered by a court, taking into account its impact on the enjoyment of human rights. "

Finally this Convention establishes a list of obligations that States should implement to provide access to the Internet:

- "Set-regulatory mechanisms that include pricing regimes, universal service requirements and licensing agreements, to promote wider access to the Internet, even the poor and remote rural areas.
- Provide direct support to facilitate access, including the creation of community centers and information technology (ICT) and other public access points.
- Raise awareness about the proper use of the Internet and the benefits it can bring, especially among the poor, children and the elderly and isolated rural populations.
- Take special measures to ensure equitable access to the Internet for people with disabilities and the disadvantaged.
- To implement the above measures, States should adopt detailed action plans for several years to expand access to the Internet, which include clear and specific objectives and standards of transparency, public reporting and monitoring systems."<sup>73</sup>

As you can see, there are some international human rights instruments both hard law and soft law to protect and ensure the fulfillment of the right to Freedom of Expression. It is important to say that any human rights instrument of hard law will always be above any other law, international law or domestic law of each State, as in the hierarchy of those

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<sup>73</sup> Joint Declaration on Freedom of Expression and the Internet Adopted by Organization of American States. Article 19 and others 2012.

laws, they will be found on the highest step (*ius cogens*), forming a kind of umbrella that protects and guarantees other fundamental rights, which is why such rules cannot be violated in any way by any individual or of any state party.

The real dilemma is knowing, within a human rights instrument, which is right over the other and which right is more important to protect, but it will require more specific analysis according to each particular situation. To resolve these disputes it will also be necessary to resort to secondary sources of international law such as the principles and jurisprudence.

## CHAPTER 2

### 2. The State and the freedom of expression: media and the domestic legislation of Ecuador

#### 2.1. Justifications for freedom of expression

Before referring to the freedom of expression from a regulatory perspective, it is necessary to refer to it from a philosophical perspective to better understand why we defend this freedom, and what is the significance of this right. For this purpose, we first raised the following questions: what justifies that we should protect the freedom of expression?, why should a person have the right to express a point of view with which we are not agree?, what important value is protected by allowing certain subjects to defend ideas that we know are wrong or are contrary to scientific evidence?<sup>74</sup>

To answer these questions, we have three types of arguments that give sustenance to the importance that the freedom of expression has: the argument about the discovery of the truth, the argument of personal self-realization, and the argument of democratic participation.<sup>75</sup>

- **The argument about the discovery of the truth**

"The truth is a concept or an object that tends to be positively valued in contemporary societies. Some thinkers recognized the truth as an autonomous value, while others defend it from utilitarian postulates: the truth would be something valuable when it allow the progress of human society and development. Now, to discover the truth, in the

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<sup>74</sup> CARBONELL, Miguel. Freedom of expression: debates, reaches and new agenda. The foundation of the freedom of expression in the constitutional democracy. Universidad Andina Simón Bolívar. Quito, Ecuador, December 2011.

<sup>75</sup> Ibid

extent to which this is humanly possible, it is necessary to discuss all the relevant elements, leaving anyone to speak about a certain subject".<sup>76</sup>

In that sense, as the great judge of the Supreme Court of the United States, Oliver Wendell Holmes says, we must create a "marketplace of ideas", where each of them compete with others in a sort of intellectual competition which bring us closer to all the truth.<sup>77</sup>

This is the passage of Holmes that expresses the postulate of the marketplace of ideas:

"If the man is aware that time has given to the fret with many conflicting ideas, then you will find, even more than thought in the foundations of their own conduct, that the long-awaited well Supreme is better across by the free exchange of ideas; that the best proof that truth can undergo is the ability to prevail in a market in which enters into competition with contrary thoughts; and that truth is the only ground from which can satisfy their desires without risks or dangers (...) will have to be ever vigilant to curb those who seek to control the expression of ideas and opinions that hate or deem that they lead to death (...) "Only an immediate and severe emergency situation makes that we can't let that time rectify those who incite the evil".<sup>78</sup>

"The argument of the truth as a way to defend freedom of expression seems to conform clear patterns of rationality: How can I found the truth if I don't hear anything that may be relevant to form my own opinion?" How can we know if a postulate is true if we don't know all the circumstances or points of view that are relevant? This type of reasoning applies even in the judicial proceedings, in which the pursuit of legal truth is undertaken from a series of formal and substantive rules which indicates, among other issues, the

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<sup>76</sup> CARBONELL, Miguel. Freedom of expression: debates, reaches and new agenda. The foundation of the freedom of expression in the constitutional democracy. Universidad Andina Simón Bolívar. Quito, Ecuador, December 2011.

<sup>77</sup> The postulate of Holmes on the "marketplace of ideas" is an opinion o the Abrams vs. US case, resolved in 1919.

<sup>78</sup> Has taken the translation of transcribed passages of Beltrán de Felipe, Miguel and Julio V. Gonzales García. Basic sentences the Court Supreme of the United States of America, Madrid, 2005.



judge must hear the parties and they have right to make all elements of conviction that are appropriate to the specific case which will be aired before the judicial authority."<sup>79</sup>

"Some specialists noted that a weakness of this argument is that a free discussion not necessarily can lead us to the truth. For this purpose it would be necessary not only the freedom, but also that the participants in the debate did it voluntarily, putting aside their arguments and acting in good faith with respect to the contrary positions. This does not always is verified in practice, as any observer of contemporary politics can attest."<sup>80</sup>

Also, the vision of the "marketplace of ideas" of Holmes, is not entirely fair today, since not all people have the same ability to make their voices heard by the rest of the population. There are certain groups that have the advantage of accessing to broadcasting channels, however another segment do not have this same advantage so you have to settle for sharing their views and opinions only with the people closest to them. On the other hand, the argument of the search for truth to defend freedom of expression is positive since it allows us to defend an important idea valuable insight as it is the truth, also gives rise to legal regulations that allow and encourage informational pluralism, by which ideas come finally to certain addressees. In the same way, the value of truth determines some limits to freedom of expression; for example, the fact that in some democratic countries banning the ads or any misleading expression about certain product.<sup>81</sup>

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<sup>79</sup> CARBONELL, Miguel. Freedom of expression: debates, reaches and new agenda. The foundation of the freedom of expression in the constitutional democracy. Universidad Andina Simón Bolívar. Quito, Ecuador, December 2011.

<sup>80</sup> Ibid

<sup>81</sup> Ibid

- **The argument of self-realization**

Freedom of expression is a resource that allows us as individuals, to grow in an intellectual and moral way. Having at our disposal a diversity of ideas, thoughts, news and information, allows us to forge our own personality and delimit our ideals of life. Freedom of expression allows us to be more thoughtful people, this is good for ourselves but it also benefits the society in which we live. The freedom of expression that we exercise both as issuers and receivers can lead us towards the ideal of living a happy life. Freedom of expression, in this sense, would be an element of happiness. Therefore, we must defend freedom of expression, even preferentially against other rights.<sup>82</sup>

"Now well, as happens with the argument of the search for the truth, the argument of personal self-realization can't be used in isolation to justify any exercise of freedom of expression. With this argument we cannot justify the freedom of expression of political parties for example (which is recognized in most democratic countries in the world). Collective persons may not have moral conscience and, to that extent, can not aspire to something as well as self-realization, which is rather a privilege of individual persons.

This is no obstacle to recognize that the argument of self-realization highlights the relationship between freedom of expression and moral autonomy of persons. Freedom of expression allows us forging our own life plans, providing useful information to establish vital priorities or discard conducts that we consider wrong."<sup>83</sup>

- **The argument of democratic participation**

Nowadays, democratic countries require the democratic participation of all adult residents in that country. To make such participation really effective and full of content, it is necessary to have freedom of expression as a prerequisite for the generation of an open, plural and forceful public debate. We will now resume the concepts written in the

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<sup>82</sup> CARBONELL, Miguel. Freedom of expression: debates, reaches and new agenda. The foundation of the freedom of expression in the constitutional democracy. Universidad Andina Simón Bolívar. Quito, Ecuador, December 2011.

<sup>83</sup> Ibid

case of *New York Times vs. Sullivan* ruling by Judge William Brennan. This type of argument is supported, among others, by advocates of deliberative democracy, who understand the public debate as a very important component of the democratic system.<sup>84</sup>

"Freedom of expression helps citizens to understand the issues of political relevance and to widely participate in the construction of any democratic system (...) It also enables the development of the essential democratic principle of accountability, make visible the acts of the Government, and promotes the discuss about the best alternatives in public policy. (...) "Also allows the strengthened of political campaigns, the confrontation of ideas between candidates, endorse the good criticism against bad officials, propose more functional government models, campaigns, etc."<sup>85</sup>

As the previous arguments, the arguments of the democratic participation can't give us a strong sustentation by itself. There are certain types of expressions that have nothing to do with democracy and political participation, but that are considered worthy of legal protection. It is the case of the protection that receive the artistic discourses, novels, poetry, material with sexually explicit content or commercial advertising. All of this is protected, regardless of the relevance to the democratic participation of citizens. Likewise, democracy also protects speech advocating the abolition of the democratic regime and all its institutions. Radical and anti-democratic dissent also deserves to be protected and should have a place within the contemporary public debate.<sup>86</sup>

"Freedom of expression is what allows that political positions that are a minority at some point may become a majority. This is what led us to the terrain of the partisan, to the alternation in Government, feature that is inherent to the practice of the democratic State. The parties that nowadays are a minority can express its criticism to the Government and offer citizens alternative proposals that they consider the most

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<sup>84</sup> CARBONELL, Miguel. Freedom of expression: debates, reaches and new agenda. The foundation of the freedom of expression in the constitutional democracy. Universidad Andina Simón Bolívar. Quito, Ecuador, December 2011.

<sup>85</sup> Ibid

<sup>86</sup> Ibid

appropriate. Citizens can evaluate these proposals and support certain parties by the suffrage. Thus freedom of expression contributes significantly to the democratic development".<sup>87</sup>

Now that we delved into the reasons why freedom of expression is justified we can understand that it is one of the most important human rights, encourages discussion in the search for the truth, can lead us to the self-realization so we can express our thoughts, and finally allows and promotes the development of democracy. Ecuador is a democratic country, therefore, the State has the obligation to respect and guarantee the right to freedom of expression because in that way it is not only recognizing our right to express ourselves but respecting the ideals of a democratic State.

## **2.2. Scope of the State obligations according to freedom of expression**

"The concept of human rights places within the framework of constitutional law and international law, whose purpose is to defend, by institutionalized means, the rights of human beings against the abuses of power committed by the organs of the State and, at the same time, promote the establishment of human living conditions and the multidimensional personality of the human being development"<sup>88</sup>

According to this statement, both constitutional and international law must act together to defend human rights and to avoid that one of them counterpose with the other generating conflict when it comes to interpreting the laws. There is also a hierarchy of laws that must be respected taking into account that human rights are always in the highest rank. On the other hand there are a number of mechanisms that allow you to

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<sup>87</sup> CARBONELL, Miguel. Freedom of expression: debates, reaches and new agenda. The foundation of the freedom of expression in the constitutional democracy. Universidad Andina Simón Bolívar. Quito, Ecuador, December 2011.

<sup>88</sup> [15] VASAK, Karel "Historical foundations of human rights and subsequent developments," edit., Rowan/UNESCO, "the international dimensions of human rights VI", Barcelona, 1984.

enforce these rights, and which are product of series of obligations assumed by the State in this regard.

To introduce the subject of the enforceability it is important to take into account the reflection of Imre Szabo:

"All right recognized in the legal order of a State presupposes the support of it, so that the person, who is the subject of law, can effectively exercise it. However, if you have problems with the recognition of this right, the person may ask the State to take necessary measures and uses several mechanisms previously established for the effect."<sup>89</sup>

The enforceability of human rights means that only if they are enforceable and all the mechanisms defending these rights work, we can say that he has full rights. Thus, only if people know about your rights and know what are the mechanisms that must be followed when their rights are threatened can be said that they are able to exercise citizenship within the framework of democracy. "In this sense, it must remember that no legislation or act of public authority - including the decisions of judges or courts – can avoid the precepts set out in the international human rights law, as well as the correlative contained in our legal system, headed by the Constitution."<sup>90</sup>

That's why a real freedom of expression requires:

- A clear constitutional and legal framework, according to international standards, in other words, there shouldn't be inconsistencies that will interfere with the previously established by international instruments, thus violating human rights.
- It is also important for citizens to know their rights and they must feel free to demand the respect of them.

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<sup>89</sup> NAVAS, Marco. The communication rights: reflection, debate and practice. Quito, Ecuador: Fundación Regional de Asesoría en Derechos Humanos INREDH/Foundation communication point.

<sup>90</sup> NAVAS, Marco. The communication rights: reflection, debate and practice. Quito, Ecuador: Fundación Regional de Asesoría en Derechos Humanos INREDH/Foundation communication point.

- A State capable of ensuring freedom of expression allowing its citizens to express themselves within the limits of both internal and international legal instruments, but not setting obstacles and unnecessary laws that restrict the right to freedom of expression.

Within the basic State obligations in relation to human rights, and from a traditional position, it can be said that it is a civil right, the State's obligations are limited to respect and guarantee but not to promote, however it is also necessary to expand this sphere even reaching the field of the promotion of human rights.<sup>91</sup>

Below we will explain the implications of these obligations in relation to the right to freedom of expression.

### **2.2.1. Obligation to respect**

The main obligation of the State is to respect the exercise of the right to freedom of expression, it means that it must not only allow free expression but also avoid taking measures of censorship or other illegitimate restriction mechanisms. This means that all State officials must act within the precepts of the law and look towards the respect of these rights.<sup>92</sup>

"Enlightening is the criterion of the Inter-American Court on one of the first cases that met Velásquez-Rodríguez, who says:"

The first obligation assumed by States party in the terms of article... (referred to in 1.1 of the Convention) is the respect to the rights and freedoms recognized in the Convention. "The exercise of the civil service has limits that derive from

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<sup>91</sup> NAVAS, Marco. The communication rights: reflection, debate and practice. Quito, Ecuador: Fundación Regional de Asesoría en Derechos Humanos INREDH/Foundation communication point.

<sup>92</sup> Ibid

those human rights that are inherent to the human dignity and therefore superior to the power of the State."<sup>93</sup>

These criteria have been established precisely to avoid authoritarian and discretionary practices; it is a way of limiting public officials and authorities so that they do not commit abusive acts against the citizens and the media for giving an opinion against the current Government. The abuse of power is often transgressing the rights to freedom of expression in the name of the interest of the State.

Under article 1.1 of the Inter-American Court, is illegal all forms of exercise of public power that violates the rights recognized in the American Convention on human rights. In all circumstances in which an organ, official of the State or any public institution injures unduly one of such rights, this is a case of failure because you are neglecting this right according to this article.<sup>94</sup>

### **2.2.2. Obligation to guarantee**

In this case, the State obligation goes beyond the fact of respecting the right to freedom of expression; it also must ensure that the public officials and authorities do not act in detriment of this right. It is also a State obligation to guarantee its exercise so that no institution, group or individual particles can prevent free expression in all its dimensions.<sup>95</sup>

This second obligation as well as the previous one, is established in national and international standards, and complemented by article 2 of the American Convention on human rights, on the duty of adopting provisions of national law, which presupposes the existence of a normative order (laws, regulations and

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<sup>93</sup> NAVAS, Marco. The communication rights: reflection, debate and practice. Quito, Ecuador: Fundación Regional de Asesoría en Derechos Humanos INREDH/Foundation communication point.

<sup>94</sup> Ibid

<sup>95</sup> Ibid

administrative provisions, etc.) that will allow to prevent, investigate and punish violations of these rights.<sup>96</sup>

So that the State can fulfilled its obligation of guarantee, we should take these observations into account:

- Adoption of legislative measures:

"The existence of a normative order implies the obligation to adopt any provisions necessary to give effect to such rights; this involves legislative or other measures (regulatory, practices and administrative procedures in general, etc.), according to article 2 of the ACHR. In addition, this extends to measures of suppression of rules and practices of any kind involving violation of rights - and guarantees - provided for in the ACHR.

It is also important to mention that the tenth principle of the Declaration prescribes: "...The protection of the reputation must be guaranteed only through civil sanctions in cases in which the person offended is a public official, public or private person which have been voluntarily involved in matters of public interest. In addition, in these cases the person must prove that the Communicator had intended to inflict damage or had full knowledge that it was spreading false news led with manifest negligence in search of the truth or falsity of these (...)".<sup>97</sup>

In our country, while it is in discussion a Communication Bill it is necessary to review the sanctions in regards to freedom of expression, it is inconceivable that there are still criminal penalties, while many other countries have been removed because this type of sanctions compliance with what has been agreed in international treaties.

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<sup>96</sup> NAVAS, Marco. The communication rights: reflection, debate and practice. Quito, Ecuador: Fundación Regional de Asesoría en Derechos Humanos INREDH/Foundation communication point.

<sup>97</sup> Ibid



- Existence of mechanisms for enforceability

This also implies that the State should help people to use mechanisms and legal resources, so that they can enforce their rights to free expression if these are affected, to be restored or properly repaired.<sup>98</sup>

- Organized governmental structures

The State must organize all their appliance and governmental structures, so that they can effectively exercise those mechanisms and complied with those provisions. In addition, the Government must ensure the application of the above. For example, to ensure compliance with the sanctions, not allowing the evasion of justice by violators of rights, and not being negligent with the implementation of administrative measures, etc.<sup>99</sup>

### **2.2.3. Promotion**

We have seen the two obligations of the State with respect to freedom of expression; however it is necessary not only to respect and guarantee but also the task of the State should be more active and participate in the promotion of this right. Creating a favorable environment for the exercise of this freedom by allowing each citizen to express themselves and thus reflecting a genuine democracy and the rule of law.

In a climate of true democracy, it is important to establish clear policies of State communication. This, by the way, has to do with setting minimum criteria for civil employees and State officials that will ensure the free expression of all persons and social groups. It is not ok to regulate the smallest detail of how the communicators proceed. This last distorted idea of what a communication policy

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<sup>98</sup> NAVAS, Marco. The communication rights: reflection, debate and practice. Quito, Ecuador: Fundación Regional de Asesoría en Derechos Humanos INREDH/Foundation communication point.

<sup>99</sup> Ibid

seems to be, unfortunately, is what is handled in the circles of power, so they create this "gag law" to obligate the Media to publish favorable government propaganda.<sup>100</sup>

When it comes to promoting the expression of individuals and social groups could be also considered, as in other countries, the allocation of free spaces in media and other promotion measures in favor of social groups that require a positive action. For example, movements of women, groups that defend sexual diversity, boys, girls and young people, indigenous peoples and Afro-Ecuadorians. In this task, the media involvement is required as part of the obligations of social responsibility."<sup>101</sup>

### **2.3. Situation of the media and its conjuncture with the Government**

To understand the current situation of the media, we will take as a point of departure an unfortunate event that is part of our history, the financial crisis of 1999. Despite the passing of the years, the recession of 99 left an indelible mark in Ecuador, as freezing of bank deposits hit a large part of the population, and the State recently by the year 2008 was scheduled to finish paying the money to all affected customers, which means 10 years later. Besides, with the dollarization, the money of the affected people ended up diluted.<sup>102</sup>

After the overthrow of the President Jamil Mahuad, the crisis was not only financial but also political, so it generated an atmosphere of insecurity and confusion; at the same time it causes an irreparable loss of confidence in all the democratic institutions in public and private fields, which includes the media. This happened since bankers were

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<sup>100</sup> NAVAS, Marco. The communication rights: reflection, debate and practice. Quito, Ecuador: Fundación Regional de Asesoría en Derechos Humanos INREDH/Foundation communication point.

<sup>101</sup> Ibid

<sup>102</sup> Cf. Jordan, Tobar Rodrigo. Media in Ecuador, published on May 24, 2010. [Online]. [see 22 August 2012]. Available in: < [rodrigojordan.files.wordpress.com/2010/05/los-mcs-en-ecuador.pdf](http://rodrigojordan.files.wordpress.com/2010/05/los-mcs-en-ecuador.pdf) >

also owners of the most important television channels, newspapers and radio stations in the country, which were always transmitting news that claimed that these financial institutions enjoyed of a good economic situation. The media in our country before the 99 occupied a privileged position in the ranking of the institutions with credibility. They occupied the first 3 places, however after the crisis; they fell to the seventh and eighth places. No doubt the bank strike had left a constant social concern and especially generates tension every time you hear rumors about the poor economic situation of any financial institution.<sup>103</sup>

Since 1792 with the appearance of the first means of communication the newspaper "Primicias del Ecuador", our country has not had excelled within the field of communication, because Ecuador is one of the few countries in Latin America without a long tradition of press radio and public television, by the end of the 1990s the State was owner of just three radio stations in AM; Radio National del Ecuador, Radio de la casa de la Cultura and Radio Vigía. The private company has always been the one that has excelled in the media field.<sup>104</sup>

With the Rafael Correa's government, it began a series of changes that would turn the tables, and now the State is the protagonist of the communication arena. He used two key strategies:

The first was an investment of \$ 10 million in the creation of new institutions and the strengthening of the existing State media; so, was the reactivation of the Diario El Telégrafo, the strengthening of Radio Nacional del Ecuador today Radio Pública del Ecuador, the expansion in the coverage of the Radio Casa de la Cultura and finally the creation of Ecuador TV, the first channel of public television.<sup>105</sup>

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<sup>103</sup> Cf. Jordan, Tobar Rodrigo. Media in Ecuador, published on May 24, 2010. [Online]. [see 22 August 2012]. Available in: < rodrigojordan.files.wordpress.com/2010/05/los-mcs-en-ecuador.pdf >

<sup>104</sup> Ibid

<sup>105</sup> Ibid

The second strategy was the seizure of 12 media linked to the Isaias group, former owner of Filanbaco through coercive action endorsed in the law of the Agencia de Garantía de Depósitos which is responsible for the return of money to those affected by the banking strike. The confiscated entities include Gama TV and TC Television which had 38.5% of national audience in broadcast news for 2008. On the other hand it became also part of the State Grupo TV Cable being the largest operator of paid TV in the country with 90% of market share. It also seized Suartel and Satnet which is one of the 4 most important providers of data transmission and Internet, they seize also is Setel a fixed telephony company as well as several radio and editorials.<sup>106</sup>

The main objective of the government According to Rafael Correa was to seize the media and other 195 companies from the Isaias Group to sell them as soon as possible and thus repay deposits to customers affected by the crisis of the 99. The seizure was carried out in July 2008 and until now the sale has not been accomplished. In January 2012 the sale of 22% of the shares of Gama TV in favor of its workers was a reality, however there have been legal obstacles and the government had set unrealistic prices for sale of both Gama TV and TC television so the sale of the companies has not become visible. His presidential term ends in 2013; 4 years have passed since the seizure and the sale has not been materialized.<sup>107</sup>

When the seizure occurred, there were missing two months for the referendum in the draft of the new Constitution, many analysts called the fact as part of a strategy to promote a positive vote, besides that it was questionable that the Government is in charge of the media during the period of campaign.

So the State in one period of less than two years has already changed the history of the State media, because it handles much of the media group. President Correa repeatedly pointed out that the Government will not be in charge of that companies in the long

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<sup>106</sup> Cf. Jordan, Tobar Rodrigo. Media in Ecuador, published on May 24, 2010. [Online]. [see 22 August 2012]. Available in: < rodrigojordan.files.wordpress.com/2010/05/los-mcs-en-ecuador.pdf >

<sup>107</sup> "El Comercio", legal barriers and policies hinder the sale of GamaTV and TC, published May 1, 2012. [Online]. Available in: < www.elcomercio.com >

term, however, Ricardo Patiño has always defended the right of the Government to buy and manage those resources.

This irruption of the State in media has brought as a consequence a greater confrontation between the Government and private media companies, since the President in always questioning the credibility of the independent press.<sup>108</sup>

## **2.4. Current legal framework**

### **2.4.1. Politic Constitution of Ecuador 2008**

In the Constitution of Ecuador in 1998 the issue of communication and freedom of expression and opinion was established within article 23 in paragraphs 9, 10 and 11; while an entire section to the issue of information and communication has been established in the current Constitution, which is in the second chapter, within the "rights of the good life".

Article 16 of the third section states that: "all persons, individually or collectively, have the right to a free, cross-cultural, inclusive, diverse and participatory communication, in all areas of social interaction, by any means and form, in their own language and their own symbols.", also adds that they have "universal access to information and communication technologies".

This article also establishes that all citizens are entitled to "the creation of social media," and access in equal conditions to the use of the frequencies of the radio spectrum for the management of public, private and community radio and television stations, and free bands for the exploitation of wireless networks. It also points out that all people have "access to and use of all forms of communication visual, auditory, sensory and others allowing the inclusion of people with disabilities", and finally indicated that they also

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<sup>108</sup> Cf. Jordan, Tobar Rodrigo. Media in Ecuador, published on May 24, 2010. [Online]. [see 22 August 2012]. Available in: < [rodrigojordan.files.wordpress.com/2010/05/los-mcs-en-ecuador.pdf](http://rodrigojordan.files.wordpress.com/2010/05/los-mcs-en-ecuador.pdf) >

have right to "integrate the spaces of participation provided for in the Constitution in the field of communication."

Also article 17, which refers to the plurality and diversity of communication, establishes that the State "will... guarantee the allocation, through transparent methods and on equal terms, of the frequencies of the radio spectrum, for the management of public, private and community radio and television stations, as well as access to free bands for the exploitation of wireless networks", and will ensure that the collective interest will prevail in their use" similarly notes that "facilitate the creation and strengthening of public, private, and community media, as well as universal access to information and communication technologies in particular to persons and communities that lack such access or have limited" and finally expresses "not allowing the oligopoly or monopoly direct or indirect, of the ownership of the means of communication and the use of frequencies."

Also, article 18 of the Constitution stipulates that "all persons, individually or collectively, have the right to seek, receive, exchange, produce and disseminate truthful, verified, timely, information contextualized, plural, without prior censorship, about facts, events and processes of general interest, and with further responsibility. It also indicates there will be "freely available information generated in public entities, or private ones that manage state funds or perform public functions. There is no reservation of information except in the cases expressly established by law. In the event of violation of human rights, any public entity can denied the information."

Article 19 refers to a law that will regulate the media content by setting "the law shall regulate the prevalence of cultural, educational, and informational purposes contents in the programming of the media, and will promote the creation of spaces for the dissemination of independent national production. Prohibits the broadcast of advertising that leads to violence, discrimination, racism, drug abuse, sexism, religious or political intolerance, and all that which violates the rights."

Finally, article 20 is the final article in this section and notes that "the State shall guarantee the conscience clause, professional secrecy and the reserve of the source to

those who report the news, issued their opinions through the media or other forms of communication, or work in any communication activity."

In the sixth chapter of the Constitution, which refers to the "freedom rights" the theme of freedom of expression is taken again in the article 66 in the following paragraphs:

Paragraph 6 States that the State recognizes and guarantees the "right to speak and express their thoughts freely and in all its forms and manifestations."

Also paragraph 7 recognizes and guarantees "the right of a person aggrieved by information without evidence or inaccurate, issued by means of social communication, the corrected, replica or response, immediate, compulsory and free of charge, in the same space or schedule."

Within paragraph 11 establishes "the right to keep the convictions. No one may be compelled to talk about their own convictions. In any case you can demand or use without authorization by the holder or their legitimate representatives, personal or third-party information about their religious beliefs, affiliation or political thought; "or on data concerning health and sex life, except for health care needs."

Another important paragraph is 18 which indicates that it recognizes and guarantees "the right to honour and a good name. The law protects the image and the voice of the person."

An article that should be noted is section 313 as it has to do with the rights of the State and strategic sectors, is located within the fifth chapter and expresses the following: "the State reserves the right to manage, regulate, control and manage the strategic sectors, in accordance with the principles of environmental sustainability, precaution, prevention and efficiency. Strategic sectors, of decision and exclusive control of the State, are those by its transcendence and magnitude have decisive influence economic, social, political or environmental, which should guide the development of rights and social interest. Are considered strategic sectors energy in all its forms, telecommunications, non-renewable natural resources, transport and refining of hydrocarbons, biodiversity and genetic heritage, radio spectrum, the water, and others determined by the law."

Finally in the seventh section that talks about social communication it refers to a system of social communication which "will ensure the exercise of the rights of freedom of expression, communication and information, and strengthen citizen participation. The system will settle by institutions and public character actors, policies and regulations; and private stakeholders, citizens and community to integrate voluntarily to it. The State will formulate the public communications policy, with unrestricted respect for freedom of expression and of communication rights enshrined in the Constitution and the international human rights instruments. The law defines his organization, operation and forms of citizen participation."

#### **2.4.2. Regulations for the journalist**

In our country have a law and a code that are intended to regulate the work of journalists in the Ecuador:

##### **2.4.2.1. The law of professional journalist practice**

This law was created on September 18, 1975, which stated in its article 35 that "professional journalists who commit crimes contrary to the security of the State, in the exercise of their profession will be bankrupt in the provisions of the law of national security, of the Penal Code and other laws of the Republic and will be prosecuted by the competent authorities." Article 39 also states that "professional journalists have free access to authorized sources of information, to which all agencies of the State, private purpose social or public entities and private individuals, will give them the necessary legal assistance"



#### **2.4.2.2. The professional code of ethics of the National Federation of journalists of Ecuador.**

This code was created on January 25, 1980, it also includes a series of articles relating to freedom of expression, so for example article 7 notes that "the journalist are obliged to defend the law and the exercise of the freedom of expression of all sectors of the community, especially the marginalized of social communication." Similarly, article 14 provides that "the journalist must ensure the full effectiveness of freedom of expression and free access to sources of information and the right of the people to an objective, truthful and timely information". Article 18 States that "the journalist will fight for the full enjoyment of human rights and will manifest itself contrary to fascist regimes or the ones that do not respect human dignity." On the other hand, article 12 indicates that "the journalist must ask the state for a national communication policy that prevents the monopoly on information." And finally the article 30 expresses that "journalist are prohibited to communicate information that threaten the dignity, honor or reputation of persons, institutions and groupings of bad faith."

#### **2.4.3. Penal Code**

It is necessary to examine certain articles of the penal code since there are still criminal actions such as sanctions to slander in our country and this may involve an unfair punishment to freedom of expression, especially when the expressions or opinions are given about any authority or public figure. First we will describe the meaning of invective.

According to article 489 of the penal code the invective is "calumnious, when it consists in the false accusation of a crime; and not calumnious when it consists in any other expression issued to discredit, dishonor, or contempt of another person, or in any action performed with the same object."

Chapter 491 refers to the penalty of those who have incurred in libel and establishes that "... shall be punished with imprisonment from six months to two years and a fine of six to twenty-five dollars of the United States of America, when allegations have been made in meetings or public places;" in the presence of ten or more individuals; by means of written, printed or not, images or emblems, set, distributed or sold, put on sale, or exposed to the eyes of the public; or through writings not published, but designated to others, counting among these letters."

By contrast if you insult and the imputation was made privately or in attendance of less than ten people, according to article 492 "will be punished with one to six months of imprisonment and a fine of six to twelve dollars from the United States of America"

Finally the article 493 is about libel or accusations that have been made to the authority. Thus establishes that "shall be punished with one to three years of imprisonment and a fine of six to twenty-five dollars of the United States of America, which have led to the authority accusations constituting defamation." If the allegations made to the authority were not slanderous, but serious injuries, penalties are imprisonment from six months to two years and a fine of six to nineteen dollars of the United States of America."

## **2.5. Communication Bill**

The idea of a communication law, was already born in 2008 with the establishment of the Constitution of Montecristi, which within the first transitional provision establishes that the legislative body within a maximum of 360 days must approve the "Communication Bill" among other laws.

For its effect on September 3, 2009, Assemblyman Cesar Montufar presented the first proposal for communication Bill, followed by two more proposals presented the 15th of the same month by the Assembly members Lourdes Tibán and Rolando Panchana.

From the official delivery of 3 proposals, the Occasional Specialized Commission of Communication began discussion of the 3 projects, considering also the contributions of

citizenship, and finally by 21 November 2009 the Commission finished the report for the first debate of the "Communication Bill".

Once the positions and comments of the Assembly members were heard the occasional communication Commission continued working to take the most relevant points of the submitted proposals and integrate them into a single text which was finally introduced on July 1 2010 for the second debate.

It is important to point out that this Bill caused much controversy and a great impact at a national level, particularly among journalists and students who criticized the creation of a communication law that restricts freedom of expression, and above all granting excessive control of the communication to the State affecting democracy and the rule of law. Nationwide marches and protests took place against which they called the "gag law".

The most powerful critics was about this Bill lack of precision in the definition of terms that were very open and could lead to different interpretations, citizenship also discussed the further responsibility with not only civil but also penitentiary sanctions, and they suggest to store the project as it is going against the international instruments of human rights, and likewise another controversial point was the creation of a Council regulation with a majority of State representatives which generates excessive control and prevents from having the independence required by a regulatory body. These and many other subjects are being criticized about the Bill but we will analyze them with more details in Chapter 3.

Then, President Rafael Correa presented a consultative text to the Constitutional Court for a Constitutional Referendum and Popular consultation to be held on May 7, 2011. Within this text included two questions a referendum and one for consultation, concerning the subject of the communication:

• Referendum: Question 3

Are you agree with banning the private financial system institutions as well as private domestic communication companies, its directors and major shareholders, be owners or have shareholding outside financial or communication, respectively, amending the Constitution, as established by Annex 3?<sup>109</sup>

According to the National Electoral Council, after the counting of votes, the results were as follows:

<b>OPTION</b>	<b>%</b>	<b>TOTAL</b>
<b>YES</b>	47,187	4.074.307
<b>NOT</b>	41,886	3.616.589
<b>WHITE</b>	5,226	451.226
<b>NULL</b>	5,701	492.254

\* National Electoral Council, referendum, may 7, 2011

So we can see, that citizenship in this issue was somewhat divided, but nevertheless won Yes, so the Government achieved its objective by approving amendment as it is shown in annex 3:

The first subparagraph of article 312 of the Constitution says:

"The private banking institutions, as well as the private communication of national character, its directors and major shareholders; companies may not be holders, directly or indirectly, of shares or participations in companies outside financial or communication, activity as appropriate. The respective control bodies will be

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<sup>109</sup>El Universo, questions of the consultation and Referendum with its annexes. Published on February 16, 2011. [Online]. [see November 14, 2012]. Available at: <http://www.eluniverso.com/2011/02/16/1/1355/preguntas-consulta-referendum-sus-anexos.html>

responsible for regulating this provision in accordance with the existing constitutional and regulatory framework".<sup>110</sup>

• Referendum: Question 8

Are you agree that the National Assembly, without delay within the period specified in the organic law of the legislative branch, issued a communication law and create a Council regulation governing the dissemination of content for television, radio and print media publications that contain messages of violence, explicitly sexual or discriminatory; and to establish criteria of liability of journalists or media issuers?<sup>111</sup>

In this case, question 8 was voted by cantons for which take 3 cantons as a example, as it reflect the trend and results.

According to the National Electoral Council, after the counting of votes, the results were as follows:

QUITO

<b>OPTION</b>	<b>%</b>	<b>TOTAL</b>
<b>YES</b>	50,856	674.093
<b>NOT</b>	42,573	564.302
<b>WHITE</b>	2,304	30.535
<b>NULL</b>	4,267	56.557

\* National Electoral Council, referendum, may 7, 2011

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<sup>110</sup> El Universo, questions of the consultation and Referendum with its annexes. Published on February 16, 2011. [Online]. [see November 14, 2012]. Available at: <http://www.eluniverso.com/2011/02/16/1/1355/preguntas-consulta-referendum-sus-anexos.html>

<sup>111</sup> Ibid

## GUAYAQUIL

<b>OPTION</b>	<b>%</b>	<b>TOTAL</b>
<b>YES</b>	51,208	679.930
<b>NOT</b>	38,923	516.811
<b>WHITE</b>	4,168	55.348
<b>NULL</b>	5,701	75.702

*\* National Electoral Council, referendum, may 7, 2011*

## CUENCA

<b>OPTION</b>	<b>%</b>	<b>TOTAL</b>
<b>YES</b>	56,605	165.351
<b>NOT</b>	34,698	101.358
<b>WHITE</b>	4,212	12.304
<b>NULL</b>	4,484	13.099

*\* National Electoral Council, referendum, may 7, 2011*

This result demonstrates that, in the 3 main cities of the country it obtained more than 50% of positive votes. In this question also won the Yes, corroborating what as said the Constitution about the creation of a communication law, with the difference that in this question is also establishing the creation of a Council regulation which will be discussed in Chapter 3.

With these results, and even without having approved the law of communication the Government had more arguments to demand the legislature body to take into discussion the draft law one more time and to start the voting so that it can be approved, as he argued that it is already "a debt that the Government has with the people".

The President of the Assembly Fernando Cordero ordered the debate for the approval of the Communication Bill one more time without favorable results as the Assembly failed to reach any agreement, and would not get enough votes to approve the law. In this circumstance the Assemblyman Mauro Andino, President of the Communications

Commission announced that it would submit a supplementary report, which was presented on July 27, 2011 and its 21 articles were approved.

Far from enhance the situation that has being already suspended for two years, the supplementary report worse things because caused even more rejection since the text proposed by the ruling party determines the regulation of violent content, explicitly sexual and discriminatory messages based on criteria extremely open and even introducing prior censorship, and also raises the creation of a Council of regulation with strong Government presence to classify and define further responsibility criteria, it means that the report ratified and even worsens the points already criticized vary in the Assembly.

After discussing the points of conflict without getting results, the President of the Assembly chose to leave in the background the project, despite the pressures of the Executive who says that the adoption of the law is imperative; however after several months they take into discussion the project in more time.

In March 2012 at the request of the President of the Assembly began a series of forums to socialize the contents of the Bill. Andino collected observations to improve the legal project, then, on 4 April 2012, before the voting, Andino, in his capacity as Rapporteur of the law, made further adjustments to the articles. Creating a new document with which Cordero decided to initiate a final vote. On 11 April 2012 unable to meet the 63 votes, Andino made adjustments to the final report of the communication law. The possibility of voting article by article was discussed.<sup>112</sup>

18 July 2012 the Commission of communication officially presented a final text of the Communication Bill, some norms were repeal because it is argued that they are already regulated in the law of Radio broadcasting and Television which, at some point, could even replace the entirety text of the Communications Bill.

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<sup>112</sup> Trade. Communication law had 11 versions. Published on April 14, 2012. Consulted 17 December 2012. Available at: [http://www.elcomercio.com/politica/Ley-Comunicacion-versiones\\_0\\_681532035.html](http://www.elcomercio.com/politica/Ley-Comunicacion-versiones_0_681532035.html)

By now, it was not being taken to discussion again the Communication Bill on the Assembly, the latest proposal was to vote article by article, because of the conflict between opposition and ruling party in the controversial topics such as censorship council regulation, among others, because it violate the international instruments on human rights signed by the Ecuador. According to the opposition, if it comes to debate and approve the law, even if only one article is approved, this legal document will come to the hands of the Executive who will be able not only to veto but also to manipulate all the text. In the next chapter there will be a detailed analysis of the controversial items and will be likewise reviewed the pros and cons of the much-debated law of communication.



## CHAPTER III

### 3. Media and its relationship to democracy: Communication Bill in Ecuador

#### 3.1 Media and democracy

Democracy is an organizational form of social power that, with variations, is widespread around the world. In Latin America, with all its difficulties, democracy has been also build in recent decades. At the same time, it also warns an intense dispute about the guidance and forms that a democracy can take. Such dispute has to do with two dimensions of democracy. On the one hand, with the existing dynamics between the institutional system which is implemented democracy and the implementation of it; and on the other hand, with the duties, "material and symbolic benefits" that is expected to lead to democracy. As it is an essentially normative approach, the analysis that we will do, will have a greater emphasis on aspects of design and implementation that bring the different perspectives.<sup>113</sup>

##### 3.1.1. Perspectives of democracy

###### - Minimal perspectives of democracy

"A first perspective, that for many years dominated the public discourse and Latin American political life, is a democracy that is basically a system of delegation of powers, governed by a set of procedures that allow competition between different political forces and coming to articulate a system of representation through the voters. A first conservative version, called democratic elitism, which reduced the forms of participation only to vote, has also analyzed more open forms but always focused on

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<sup>113</sup> NAVAS, Marco. Communication rights and democracy theories. The foundation of the freedom of expression in the constitutional democracy. Universidad Andina Simón Bolívar. Quito, Ecuador, December 2011.

representation as axis of the model. This has been the answer to the problems evidenced by model exclusively representative basically in two aspects. On the one hand, the participation, which was practically represented; "and representation that began to suffer cracks related to the loss of legitimacy of the political management, lack of accountability, and on the other hand the presence (or persistence) of authoritarian and corrupt practices etc."<sup>114</sup>

"In Ecuador, this relative change can be seen in the comparison between the more static representative model established by the Constitution of 1978 and the participatory innovations of the Constitution of 1998." While the article 1 of the Constitution of 1978 stated clearly that: "the Ecuador is a sovereign State (...) Its Government is Republican, presidential, elective, representative, responsible, and alternative"; the Constitution of 1998 inserted into the representative skeleton some new political institutions, such as the revocation of the mandate (Arts. 109-113), or the referendum (Arts. 103.106). Unfortunately, such innovations are subject to a number of limiting factors (in the form of requirements) which made them impractical. Ultimately, these practices can be grouped into what has been called a liberal model of democracy that incorporates certain additional procedures that make pluralistic the system. At the same time, the liberal emphasis established, a system of counterweights, as well as a catalogue of rights (with emphasis on freedoms aimed primarily at preserving the autonomy of the individual wills, while limiting to the minimum the intervention of the State in different social fields (in the economy, for example))."<sup>115</sup>

"To deepen these perspectives we will take into consideration some Guillermo O'Donnell ideas, who deeply analyses the processes of implementation of democracy and its problems (with special attention to Latin America). One of the literary work of

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<sup>114</sup> NAVAS, Marco. Communication rights and democracy theories. The foundation of the freedom of expression in the constitutional democracy. Universidad Andina Simón Bolívar. Quito, Ecuador, December 2011.

<sup>115</sup> Ibid

this author, which talks about the subject that concerns us, is the essay "democratic theory and comparative politics" which recently has been published. In this text O'Donnell precisely deals with the relation between the democracy in its pluralistic and representative version, and the communication rights, advocating a review of the theories of democracy, not only from an analytical point of view representative, but also from a legal and historical approach. He based his analysis in a concept of political democracy which he calls realistic. This concept is interesting, because is really simple and functional and it focuses on the essential elements (minimum) for the existence of a democracy. These elements are two: clean elections and political freedoms, framed both within the existence of a regime. Political freedoms freedom of information encompasses not only freedom of expression and association, but also freedom of seeking information"<sup>116</sup>

We want to highlight the denomination of the freedoms and how the author uses it. In this regard, it is important to clarify, for example, the place that these freedoms occupy within the rights of communication. Or in the case of the freedom of information, if we talk about a freedom or if it is a right to information. With regard to the essential elements already referred to, O'Donnell makes an important point in the sense, there is a causal relationship between these freedoms and choices. Freedoms are concomitant with the elections. However, contrary to electoral processes, the freedom regime should have permanent and full presence, so that they become necessary conditions required (although not sufficient by themselves) to ensure proper development of the processes. Freedom and elections should therefore be parts of a regime that allows the institutionalization of democracy in a society. In this sense, both elements are part of what the author calls a "institutionalized commitment." With these elements O'Donnell is shaping up a definition of political democracy, even though it emphasizes the two components mentioned above, holding the need that these are articulated in a regime, understood as the presence of a law or legal system developed in function of guaranteeing the observance of rights and freedoms. In addition, as already mentioned, it requires that this regime has mechanisms of counterweight that control effectively the exercise of power, so that none of the powers act as

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<sup>116</sup> NAVAS, Marco. Communication rights and democracy theories. The foundation of the freedom of expression in the constitutional democracy. Universidad Andina Simón Bolívar. Quito, Ecuador, December 2011.

"legibus solutus". This implies that none of the powers of the State (or functions for the Ecuadorian case), can declare itself above the legal system or exempt of the obligations that it establish to violate for example, the right to freedom of communication."<sup>117</sup>

**- Maximalist perspectives**

"Secondly, we have other perspectives about the democracy that we call maximalist, as they expand the spectrum of democracy, in reference to design, implementation and according to its responsibilities." "For expository purposes, we present them divided in three variations: participatory, radical and deliberative democracy."<sup>118</sup>

- **Participatory democracy**

"Inspired by the philosophical tradition of republicanism, the participatory concept of democracy emphasizes in the social basis, which means that takes as its core budget a political community who participates responsibly, and continues to be part of the decisions affecting it. This conception in its contemporary versions stems from the profound critique of instrumental reductionism of the representative approaches, postulating the need to rescue the substance of the democratic process and associating it therefore with the purposes of democracy. In Western countries there is a widespread disaffection with the representative democracy that, among others, takes the form of what is called as *Demokratiemudigkeit* (fatigue, tiredness and listlessness with democracy). In Latin America and particularly in the case of Ecuador, as Barrera states, "there is no evidence that this criticism or disaffection is a process that goes beyond the poor economic performance of some Governments". What is questioned is the

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<sup>117</sup> NAVAS, Marco. Communication rights and democracy theories. The foundation of the freedom of expression in the constitutional democracy. Universidad Andina Simón Bolívar. Quito, Ecuador, December 2011.

<sup>118</sup> Ibid

representative system or, as the author says, the "systems of parties and legislative bodies."<sup>119</sup>

"In any case, with the multiple visions that democracy may have, it is a prerequisite the political participation of the citizens. Understand this, not only by means of the vote but also other more direct forms of power-sharing. These forms at the same time, are not seen as mere additions to the representative model, but as fundamental elements of the democratic design. The weakness of the participatory concepts has settled in the creation of sustainable, viable and institutionalized forms of participation. Despite this, is in the social practice where innovative participatory "traditions" have been developed. These forms of democracy have been covering not only the dimensions of the consultation and debate on various public issues, but also the accountability. Moreover, these practices are looking toward the decision making. These experiences have been reproduced in various fields, particularly in local areas. In this regard, the role played by various expressions of civil society, such as social movements, occasionally to the public formulation of demands for recognition and redistribution in different social assets, has been very relevant to resize the implementation of democracy, particularly in highly unequal societies."<sup>120</sup>

"It is clear that a conception of participatory democracy is linked with communication." This is not only about guarantying electoral processes, but strengthening all participation forms described above and that take shape thanks to various forms of communication. A participatory view requires a strong formulation of the rights to communication that are needed to promote the participation. But at the same time, it is necessary to exten the participation in the dimension of communication. This second aspect is associated in

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<sup>119</sup> NAVAS, Marco. Communication rights and democracy theories. The foundation of the freedom of expression in the constitutional democracy. Universidad Andina Simón Bolívar. Quito, Ecuador, December 2011.

<sup>120</sup> NAVAS, Marco. Communication rights and democracy theories. The foundation of the freedom of expression in the constitutional democracy. Universidad Andina Simón Bolívar. Quito, Ecuador, December 2011.

particular with the protection of the institutionalized space where currently circulates the communication. We refer specifically to the field of mass media and information production processes and therefore to the importance of the right to information which sometimes is merely seen as an individual freedom, but it is also a social right. "According to this, it also raises the need for new specific communication rights, such as access to the media, to technology, to forms of debate about the differences, etc."<sup>121</sup>

- **Radical democracy**

"A second maximalist variant is which we call as radical democracy. The term "radical" is derived from the Latin word *radix*, which means root. As a result, talking about radical democracy assumes a search from the root of democracy. This could be understood with two different meanings. On one hand, it can be associated with direct forms of democracy and, on the other, with deeper forms of changes (Revolutionary). However, currently, the radical democracy refers mainly to a paradigm of construction, covering several positions about democracy in highly complex societies. In this sense, this definition is far from the meaning that for example Marx uses to define the term "radical" to describe the forms of direct democracy emerging in the Paris Commune, although, it also recovered several emancipatory elements of the Marxist approach. As well as the case of the experiences of participation, the paradigm of radical democracy-building creates a debate in which various thoughts, practices and experiences derived from the social mobilization are articulated. Therefore the debate becomes complex and diverse. "For this reason, and for the purposes, we propose to establish roughly what we consider the main (and common) contents of the debate around this paradigm."<sup>122</sup>

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<sup>121</sup> NAVAS, Marco. Communication rights and democracy theories. The foundation of the freedom of expression in the constitutional democracy. Universidad Andina Simón Bolívar. Quito, Ecuador, December 2011.

<sup>122</sup> Ibid

Firstly, we make emphasis on the in-depth action based on the exercise of continuous criticism. So, what is proposed is to "democratize democracy" through a systematic questioning of how it is developing. Second, the scope of democracy should be extended in different social spheres which often overlap, from the global to the local and from the local to the everyday life. Thirdly, radical democracy is based on the experience of the depth diversity. So it promotes the incorporation of this in its latest dimensions, cultural diversity, biodiversity, demodiversity (i.e., several forms of understanding democracy), among others. Fourth, use a constructivist approach and an experimental method, whereas, in the absence of a role model form of democracy (a recipe to be applied), the challenge lies precisely in assembling a model that is appropriate to each historical reality. However, such construction process must take into account the plurality and complexity of each society. For example, one of those values is the dignity that is positioned as a center of this democratic process. Democracy in its radical variant demands a body of communication rights that, through different variants, acts protecting the complex and radical citizenship."<sup>123</sup>

- **Deliberative democracy**

"The third maximalist variant that we present is the so called deliberative democracy." One of the main exponents of this perspective is Jürgen Habermas. The model of democracy that Habermas proposes, is based on processes of communication and more specifically deliberations, in other words, the public use of reason with the purpose of generating (plot exchanges) discussions about public issues. As part of the scheme, the author refers to the "rights of participation and communication". As he presents them, these rights become not only necessary conditions for elections, but also for the

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<sup>123</sup> NAVAS, Marco. Communication rights and democracy theories. The foundation of the freedom of expression in the constitutional democracy. Universidad Andina Simón Bolívar. Quito, Ecuador, December 2011.

institutionalization of mechanisms of participation. These rights protect the very existence of the democratic model."<sup>124</sup>

"The innovation introduced by Habermas, located democracy on a communicative processes, rather than in the representation mechanisms, procedures of the political system, or popular sovereignty held by the society. State and society are two components of this deliberative political model (*deliberative Politik*), which is located in an intermediate dimension, the so called *politische Öffentlichkeit*, which has been translated as public sphere (or simply as the dimension of the public). Within this public dimension is located the permanent communication (communicative power) that gives democratic legitimacy to the State, which safeguard "an inclusive process of the formation of the common will". Habermas in this sense, as O'Donnell, refers to the need for an institutional design (or regime) that ensures the democracy. This design divides it into three dimensions: first, the private citizen autonomy; second, the democratic citizenship, which means the inclusion of free and equal citizens in the political community; and, third, the independent public sphere, which operates as already noted, as a system of mediation between the State and society. In the second and third dimensions the communication rights reach central and specific role to protect the generation of this communicative power, through guarantying the different and mutually linked processes, for example, the processes of consultation or accountability."<sup>125</sup>

"In that sense, it is also crucial to protect the autonomy of the public sphere, which is the environment where the communicative power lies and which legitimates the political system. The structure of the economic and political power of the public sphere, has insisted Habermas, "can distort the dynamics of mass communication and interfere with the normative budget of that relevant issues, the information necessary and appropriate

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<sup>124</sup> NAVAS, Marco. Communication rights and democracy theories. The foundation of the freedom of expression in the constitutional democracy. Universidad Andina Simón Bolívar. Quito, Ecuador, December 2011.

<sup>125</sup> Ibid



contributions are mobilized". The approach of deliberative democracy in the version made by Habermas (deliberative Politik), in accordance with the above, is considered the most complete postulate. "Particularly because these formulation emphasizes somehow the three dimensions of the regime, to the core elements of the variants radical and participatory (and even accommodating the basic of representative democracy)."<sup>126</sup>

### **The implications of the democratic appraisals in rights to communicate**

"The assumptions of the different models of democracy and especially the role that the communication rights would play in each of them, has been reviewed broadly and in a very synthetic way. Both the maximalist and minimalist positions recognized the important role of these rights, however, there is not only a quantitative difference (more or less rights) but also a qualitative difference in the form in which each posture includes and especially valued these rights. In the case of the representative model it refers to two freedoms, the freedom of expression and information, as large central concepts. In the case of the maximalist visions (and let's take the version that has our criterion is the most developed theoretically: the deliberative) refers to the rights of communication and participation, as interdependent sets covering various specific rights. In relation to how to incorporate the rights from both great prospects is marked a qualitative difference. While minimalism is associated with procedures argumentative-interpretative, in order to adapt the law to social changes, the maximalist postures incorporate other wider forms of argumentation and deliberation on the scope of these rights. But above all, inscribed within the framework of what Barrera has define as "a strong trend of institutional innovation in the perspective of retrieve attributes of social cohesion,

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<sup>126</sup> NAVAS, Marco. Communication rights and democracy theories. The foundation of the freedom of expression in the constitutional democracy. Universidad Andina Simón Bolívar. Quito, Ecuador, December 2011.

inclusion and senses of belonging to society"; These postures promote more radical regulatory change processes to produce a new body of rights".<sup>127</sup>

Media<sup>128</sup> play a very important role in contemporary societies, they are the platform on which opinions are exchanged, information is transmitted, they rise the public debate, and they are generally the stage on which all social interactions occur. They offer a guarantee for democracy, because only through the pluralism and the exchange of ideas is guaranteed a free and democratic State. "It's the only possible forum in modern democracies; the agora of our times. A reality which, for better or worse, is our main daily reference."<sup>129</sup>

"This is the reason for the liberal constant concern of the media." From the foundations of this political thought, the press has been understood as the essential ingredient to shape other freedoms, such as the freedom of thought and expression, in this regard, it is the ideal instrument to achieve the informational pluralism, citizen participation in the public sphere as well as the transparency of the public authorities. Benjamín Constant believed that the most important social freedom was the freedom of the press. Only through the media you can spread various opinions and, through their confrontation, you can approach to the truth. "It is the only means of advertising and, therefore, the last

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<sup>127</sup> NAVAS, Marco. Communication rights and democracy theories. The foundation of the freedom of expression in the constitutional democracy. Universidad Andina Simón Bolívar. Quito, Ecuador, December 2011.

<sup>128</sup> Media are the instruments through which informs and communicates on a massive scale; the way they are as people, members of a society or a community learn what happens to her around to economic, political, social, etc. The media are the physical representation of the communication in our world; i.e., they are the channel through which information is obtained, is processed and, finally, expresses, communicates. Retrieved from home page online:  
<http://mediosdecomunicacion.yourbubbles.com/definicion.htm>

<sup>129</sup> LOPEZ, Noriega Saul, democracy and media, December 1, 2006. Accessed 14 December 2012. Available at: [http://www.cervantesvirtual.com/buscador/?f\[cg\]=1 & q = democracy + and + media + of + communication](http://www.cervantesvirtual.com/buscador/?f[cg]=1 & q = democracy + and + media + of + communication)

citizen warranty: all limitations to power become a chimera without the light of the media."<sup>130</sup>

The press is a key element in society, because it is the channel in which the information is obtained, processed and expressed; but if there no limits and regulations it can also become a political instrument. Media pluralism is a very important feature to ensure democracy. On one hand we have to state that if you intervene with great force in control of the media, it would restrict the freedom of expression, and on the other hand, if private media monopolize the power of communication, they would be favoring certain groups of interest, thus restricting the plurality which is a key element for the balance of power. In Ecuador, the proposal of creating a communication law was widely accepted by the population, but what is the purpose of this law? What issues need to be regulated? It is a fair law? It is oriented to favor one or another side of the scale?

The President of Uruguay, José Mujica said: "the best press law is the one that doesn't exist"<sup>131</sup>, that's why it is important that leaders know how to tolerate criticism of the press, "if they react lose twice because they will be attacked again". Mujica believes that if the authorities are tolerant of the press and the diversity of ideas they would be contributing to shaping a more respectful press.

The President of Argentina Cristina Fernández de Kirchner, on the other hand believes that a law of communication is the only way to democratize and diversify the media. "Freedom of expression cannot become freedom of extortion because that right to information means to inform without concealment of some part of the information,

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<sup>130</sup> LOPEZ, Noriega Saul, democracy and media, December 1, 2006. Accessed 14 December 2012. Available at: [http://www.cervantesvirtual.com/buscador/?f\[cg\]=1 & q = democracy + and + media + of + communication](http://www.cervantesvirtual.com/buscador/?f[cg]=1 & q = democracy + and + media + of + communication)

<sup>131</sup> El Clarín. Mujica: "the best press law is that there is no"; September 27, 2010 from: home page online: [http://www.clarin.com/mundo/Mujica-mejor-ley-prensa-existe\\_0\\_343165898.html](http://www.clarin.com/mundo/Mujica-mejor-ley-prensa-existe_0_343165898.html)

without distortion or manipulation", said the President referring to the need to regulate the participation of the media in that country.<sup>132</sup>

In our country, the Government feels more akin with the ideas of Kirchner, but the Communication had sought to be approved for several years without definitive results. The majority of Assembly members do not seem to be completely convinced about this Bill, that's why it has not being possible to get the necessary votes to approve this law. In addition the social pressure against a law of communication has had much importance at national and international level.

Albert Camus said: "the press is free when does not depend neither on the power of the Government nor the power of the money"<sup>133</sup>. How complicated is to draw up a law with such precision, allowing for a balance of power between the State and private property. Our country's Bill gives too much power to the State for example with the creation of a Council regulation with a clear ruling majority and with both administrative and punitive powers, it also goes against the international instruments of human rights because it restricts the right to freedom of expression in some of the proposed articles which are going to be analyze later.

### **3.1.1 Risk of the predominance of private companies in the control of the media**

When we talk about media, the ideal thing should be that they act as simple instruments which objectively report about the social realities of a country; however this is not more than a fantasy. The reality is that the private media companies have lucrative goals and therefore they tend to favor certain groups according to their interests, thereby limiting

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<sup>132</sup> Página 12, This law put to test Argentina democracy, 27 August 2009. Retrieved from home page online: <http://www.pagina12.com.ar/diario/ultimas/20-130696-2009-08-27.html>

<sup>133</sup> CAMUS, Albert, morals and politics. 1944 Retrieved from home page online: [www.kclibertaria.comyr.com/lpdf/l234.pdf](http://www.kclibertaria.comyr.com/lpdf/l234.pdf)

the freedom of expression and giving the word to those groups they represent that most of the time are the ones with the economic power and therefore they monopolize the communication.

According to Saúl López Noriega, "in a society no one must own of the truth", he believes in the importance of having as many voices as possible, they not necessarily have to contribute with the smartest ideas. The variety of voices not necessarily helps to get to the truth but it surely helps to avoid the merger between truth and power. The multiplicity of voices allows the people to know every possible opinion, this plurality prevents a single voice to be heard above the rest, and this is democracy, a diversity of ideas, interests and visions of the world.<sup>134</sup>

"Shrill and nasal voices will undoubtedly be nasty and others irritate by the gibberish they say. For mental health, it would be better to allow that only intelligent, and melodious voices to be listen, but democracy is not the way to cure or perfection. The picture of a Symphony directed by a conductor that eliminates the chaos and imposing order and harmony in the voices, it is completely undemocratic. In a free society no one must have absolute power over the life and death of the voices. Decide which voice is heard and which has to be muted."<sup>135</sup>

Alexis Tocqueville said: "the only way to neutralize the effects of newspapers is to multiply their number". This is why diversity is so important in the media field, you can't have an orchestra conductor, that cannot be called democracy. No one can

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<sup>134</sup> LOPEZ, Noriega Saul, democracy and media, December 1, 2006. Accessed 14 December 2012.

Available at: [http://www.cervantesvirtual.com/buscador/?f\[cg\]=1 & q = democracy + and + media + of + communication](http://www.cervantesvirtual.com/buscador/?f[cg]=1 & q = democracy + and + media + of + communication)

<sup>135</sup> Cfr. Canetti, Elias, mass and power, trad. Horst Vogel, Alliance-Muchnik, Barcelona, 1977, First Edition in German 1960, pp. 465-7

appropriate voice and truth, the diversity of voices is the way to achieve a true balance in the distribution of power in the media scene.<sup>136</sup>

The idea of pluralism without regulation is not the solution, to make this effective, it requires a legal structure, and is the State responsible for providing the necessary regulations, as a unrestricted freedom of the media is nothing more than a power without control, the power of a minority who acts on behalf of the interests of certain groups without any regulation. The media, to be a company that fulfills a public function should be limited. The key is that the State does not confuse with any freedom that will regulate and limit. Freedom of expression is an essential condition for the development of regulations, and the intention of the State to control this sector is a clear indicator of concern about the accumulation of power in the private media. The task is not easy, requires great precision to design legal structures that control the media pluralism without affecting freedom of expression, and therefore the balance between control and autonomy within democratic limits.<sup>137</sup>

In the Ecuadorian case, the history of the media was marked by an imbalance in favor of the private media, because over the years the private company has been controlled communication. The participation of the State in this field has been almost null, so with the advent of the current Government, the Executive considered it necessary to make a change on the media stage. The media enterprises of former bankers were seized, the views contrary to the Government was censored, inhibited certain journalists to continue practicing journalism, and moreover is in discussion a Communication Bill that seeks to control and regulate communication. Although the creation of this new law consists in the Constitution, the project which intends to approve collects mainly the proposal of the ruling party assemblymen. This is the current landscape of Ecuador, a country where the

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<sup>136</sup> LOPEZ, Noriega Saul, democracy and media, December 1, 2006. Accessed 14 December 2012. Available at: [http://www.cervantesvirtual.com/buscador/?f\[cg\]=1 & q = democracy + and + media + of + communication](http://www.cervantesvirtual.com/buscador/?f[cg]=1 & q = democracy + and + media + of + communication)

<sup>137</sup> Ibid

media and Government are waging a constant war for power. The media have historically been the owners of the communication, now the balance seems to be leaning toward the side, causing reactions, confrontations and even damage to the freedom of expression, generating fear and intimidating the press that dares to publish ideas contrary to the Government, going completely against the ideals of a democratic country.

### **3.1.2. Risks of the predominance of the State in the control of the media**

"The authoritarian spirit is not dead. Persists in many parts of the world, even if it is often masked by the democratic verbosity of leaders who frequently proclaim the freedom of the press "is a phrase from William L. Rivers and Wilbur Schramm which rightly defines what is currently happening in our country, an authoritarian disguised as a democracy that threatens freedoms including the freedom of expression.

In a press-government confrontation, the Government takes the lead, but beyond the struggle for the power, it is necessary to expose the conflict points that allow revealing which are these disagreements that can harm the informational freedom. When a governor proceeds in an authoritarian way, he will always find a way to control communication.<sup>138</sup>

The media are instruments of self-defense of the civil society, and when the powers of the State avoid or evade the press, the capacity of the civil action is subtracted. In dictatorships for example it is difficult to decouple the State of the media, their bond is based on the State ownership of the media or in a legal observance to which they are subject.<sup>139</sup>

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<sup>138</sup> SINOVA, Justino . Public and media power: symptoms of the authoritarian temptation, 1945 retrieved on December 10, 2012. Available at: [www.cuentayazon.org/revista/pdf/031/Num031\\_007.pdf](http://www.cuentayazon.org/revista/pdf/031/Num031_007.pdf)

<sup>139</sup> Ibid

On the other hand, when the institutions of the State remain unprotected workers, they weaken the exercise of his profession and in the case of the journalists, the worst thing is the confrontation with the judiciary power. A legislation that contains open, imprecise and incomplete concepts may end up being an instrument to carry journalists frequently to the courts; fixing penalties and compensation that intimidate the press and threaten freedom of expression. When journalists are not well protected, the Government has more power to disarm the press that present emancipatory information.<sup>140</sup>

In the Ecuadorian case, it is not just the surveillance on them, the Government also owns seized media, there are journalists and media that has imposed harsh sentences for having expressed their opinions as for example the case of Emilio Palacio<sup>141</sup>. There are also citizens who have been penalized for making comments on social networks. This mechanism of self-defense and free expression is increasingly being controlled by the power of the Government.

Another vulnerability that affects the media is what happens when the Government limits the creation of media companies, when it prevents the sale of journalistic products with contents that don't support the ruling party ideals, and a Government with these characteristics that is not protecting the free competition in the media and also maintains a constant mistrust between reporters is a threat of ruthless effects.<sup>142</sup>

Another way of violating freedom of the press is when a Government public authorities decide to ignore the media, press aims to create a space to show people the reality of the country, the Government's action, but when they ignore the press, the public

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<sup>140</sup> SINOVA, Justino . Public and media power: symptoms of the authoritarian temptation, 1945 retrieved on December 10, 2012. Available at: [www.cuentayazon.org/revista/pdf/031/Num031\\_007.pdf](http://www.cuentayazon.org/revista/pdf/031/Num031_007.pdf)

<sup>141</sup> See, chronology of the case: Emilio Palacio, El Universo. Retrieved from: <http://www.eluniverso.com/2010/03/30/1/1355/cronologia-caso-juicio-emilio-palacio.html?p=1354 & m = 1775>

<sup>142</sup> SINOVA, Justino . Public and media power: symptoms of the authoritarian temptation, 1945 retrieved on December 10, 2012. Available at: [www.cuentayazon.org/revista/pdf/031/Num031\\_007.pdf](http://www.cuentayazon.org/revista/pdf/031/Num031_007.pdf)



administration becomes impenetrable. Leaders have an obligation to work with transparency, offering explanations to the media and keeping open sources of information. "Blinding the sources or the distribution of news from the power of the state, offers a large capacity of power to the Government; but in detriment of the freedom"<sup>143</sup>

The draft telecommunications law was presented in our country, this text aims to distribute equitably the radio spectrum, it also prohibited people who are linked to the financial sector to be owners of communication enterprises, thus preventing the creation of new spaces. However, the President qualified a newspaper as "corrupt media" and urged the population not to buy that newspaper. Besides, the Executive gave an order that forbid Ministers to give interviews in private media, thus destroying the power of the news, ignoring the media and therefore the citizens.

These symptoms are indicators of authoritarianism and attacks on freedom of information. "The media should be understood as vehicles for social control of the action of the Government and, in general, of all the powers" making public the Government's actions, its more difficult to have cases of corruption and is easier to get to the truth. Therefore, that freedom of expression is the main ingredient of democracy.<sup>144</sup>

### **3.2 Control of the media by using the Communication Bill**

The Communication Bill has had 11 versions of which, as matter of relevance are scanned only by the most controversial articles of the last Bill, hereinafter (CB), presented by the Occasional Commission of Communication for second debate of June 1<sup>st</sup>, 2010, the supplementary report (SR) submitted on August 2<sup>nd</sup> of 2011 after the

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<sup>143</sup> SINOVA, Justino . Public and media power: symptoms of the authoritarian temptation, 1945 retrieved on December 10, 2012. Available at: [www.cuentayazon.org/revista/pdf/031/Num031\\_007.pdf](http://www.cuentayazon.org/revista/pdf/031/Num031_007.pdf)

<sup>144</sup> Ibid

popular consultation, and finally the final text of July 18<sup>th</sup> of 2012, which to date has not been discussed.

Within the framework of international law, this law has been the subject of criticisms and observations, the most important wakeup call was on August 11<sup>th</sup> of 2010, when the President of the Assembly, Fernando Cordero received a letter from the Special Rapporteur for Freedom of Expression, signed by your rapporteur Catalina Botero, who questioned some items of the CB and recommended its review and possible correction of articles that go against the Inter-American Convention of Human rights. These were some of the comments:

In article 8 of the CB which refers to ethics, good practices and transparency establishes that "the media of social communication public and private entities must observe good practice and ethical principles in the production and dissemination of its contents", also points out that "they must have a code of ethics that induce good practices and behaviors". According to the rapporteur, "ethical principles may not be imposed by the State, but it must be a product of the self-regulation of media and journalists."<sup>145</sup> In addition concepts such as 'good practices' are vague standards or "indeterminate legal concepts" whose extent and general application can bring problems.

Within article 9 of the CB in where it refers to the definition of the right of freedom of thought and expression, it "recognizes and guarantees the right of freedom of thought and expression. This right comprises the search, reception, exchange, production and broadcasting truthful, verified, timely, contextualized, plural, in any form, signs and signals"; in this case Botero indicates that:"these includes additional requirements to those required by article 13 of the American Human Rights Convention. The Declaration of principles on freedom of expression adopted by the IACHR notes that previous constraints, such as truthfulness, opportunity and fairness, intended to be imposed on the

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<sup>145</sup> BOTERO, Catalina . Comments to the draft of law of communication. Media law contradicts the Convention of DD.HH. El Universo, Monday, June 20, 2011, consulted on December 17<sup>th</sup> of 2012. Available at: <http://www.eluniverso.com/2011/06/20/1/1355/ley-medios-contradice-convencion-ddhh.html>

project is incompatible with the right of freedom of expression recognized in international instruments."<sup>146</sup>

In the terms of article 13 of the CB which talks about the clause of conscience, says that this "is a right for social communicators that aims to ensure independence in the performance of their duties (can object to make a contrary to ethical principles of order of work)." But in the final paragraph States that "in cases of substantial change of information referral or ideological line in the means of social communication and social communicators may end this legal relationship with the same effect referred to in the previous paragraph" which indicates that "the violation of the above provisions shall be deemed untimely dismiss and entitle to greater compensation provided for or in the law so that it can be contractually agreed. Likewise, for Botero, this "imposes a real penalty to the media by simply changing its editorial line, to which makes part of the legitimate and natural exercise in a plural and democratic society".<sup>147</sup>

Article 16 of the CB which talks about the right to reserve source and professional secrecy, and points out that "social communication and social communicators have the right to keep store or reserve their sources and the professional secrecy of notes, files, personal accounts and recordings, as well as everything that directly or indirectly leads to the identification of their sources (apart from the exceptions derived from the Constitution and International Instruments, however within the article 102, literally I) the same law establishes that it may impose the penalty of admonition written against the media which "omits the origin of the news or comment" the rapporteur indicates that "this could be interpreted as the news based on confidential sources that have no value and are therefore susceptible to sanction. This law aims to protect not only reporters, but

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<sup>146</sup> BOTERO, Catalina . Comments to the draft of law of communication. Media law contradicts the Convention of DD.HH. El Universo, Monday, June 20, 2011, consulted 17 December 2012. Available at: <http://www.eluniverso.com/2011/06/20/1/1355/ley-medios-contradice-convencion-ddhh.html>

<sup>147</sup> Ibid

also the sources, for the fear of reprisals, individuals that are seen in the need to communicate with the press under the condition to maintain in reserve their identity”<sup>148</sup>

In terms of article 18 of the CB which refers to the practice of communication and journalism, is set to “(Professional Communicators and journalists are the ones exclusively in charge of redeeming the next: a) in print media: General Editor in Chief or head of information, Chief or head of writing, editor or reporter, editor or Correspondent Editor”, or those performing equivalent functions. (b) in audiovisual media: Director and Deputy Director or Assistant Director of news, producer or producer of news, writers, or editors, or those performing equivalent functions. “(c) In radio: Director of news and editors, or those performing equivalent functions.” The rapporteur points out that “this provision is contrary to the case law of the Inter-American Court of human rights which says that the imposition of special requirements to practice journalism, such as compulsory membership, is an illegitimate restriction on freedom of expression, and is inconsistent with article 13 of the ACHR. The establishment of requirements to exercise greater importance and responsibility in the media, charges restrict unduly the right of all people with freedom of expression limiting the areas of exercising this right to a specific group of citizens.”<sup>149</sup>

In article 20 of the CB which talks about the right to rectification, is nominated that “every person, collective, commune, community, people or nationality, injured by reports without evidence or inaccurate, are entitled to such information shall be issued immediately, free of charge, with the same characteristics and the same space or form of schedule is rectified” in this respect Botero explains that “the right to rectification or reply, as it is regulated in the Bill exceeds the regulation of the same right provided in article 14 of the ACHR. “Freedom of expression protects not only the right of media to

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<sup>148</sup> BOTERO, Catalina . Comments to the draft of law of communication. Media law contradicts the Convention of DD.HH. El Universo, Monday, June 20, 2011, consulted 17 December 2012. Available at: <http://www.eluniverso.com/2011/06/20/1/1355/ley-medios-contradice-convencion-ddhh.html>

<sup>149</sup> Ibid

disseminate information and opinions, but the right to make them non-contained censure released.”<sup>150</sup>

Article 21 which speaks of retort or reply, states that “any person who has been directly referred to by tergiversate or inaccurate information that affects their dignity, honor or reputation are entitled to spread their free and immediate reply or response of it. When a media based on research work spreads information that may affect the reputation and integrity of a person or group shall be obliged to notify it and offer the opportunity to respond by him or her through his or hers legal representative.” To which the rapporteur considers that “if it were possible to respond to all the opinions or criticism, beyond the false or offensive information, the opened columnists are weaken, because the media would be forced to grant all requests for response or reply that could receive on the basis of the views and criticisms that these channels make. The obligation to notify an affected person going on by an investigation, involves the imposition of a requirement incompatible with article 13.2 of the Convention “which poses that” he or she cannot be subject to prior censorship but to further responsibilities, which must be expressly fixed by law and its necessary to ensure: respect the rights or reputations of others, or the protection of national security, public order or public health or morals.”<sup>151</sup>

In terms of article 29 of the CB which speaks about the liability that we have states that “the exercise of the rights of communication will not be subject to prior censorship, except for cases set forth in the Constitution of the Republic, international treaties enforced by the law, as well as the liability for the violation of these rights.” In this case, Botero says that this article presents difficulties, since “it foresees the possibility of that

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<sup>150</sup> BOTERO, Catalina . Comments to the draft of law of communication. Media law contradicts the Convention of DD.HH. El Universo, Monday, June 20, 2011, consulted 17 December 2012. Available at: <http://www.eluniverso.com/2011/06/20/1/1355/ley-medios-contradice-convencion-ddhh.html>

<sup>151</sup> Ibid

established grounds for prior censorship” this is by law which is different to those provided for in article 13.4 of the ACHR<sup>152</sup>

The observations then presented on articles 34, 35 and 36 of the CB which talks about the communication Council, its powers and conformation, which states that the powers of the Council would be to “protect and promote the effective observance of the rights to communication, to know and solve administrative headquarters, if violations to the rights of communication were made. Technical programming monitoring of radio and television has to be made in order to determine compliance with the classification of content and time slots. It is important to designate territorial delegates from the Council of communication and information, and determine their functions and powers according to law. Take and update of the registry of social media. Encourage and promote the creation and strengthening of public, private, and community media.” Regarding conformation, it is necessary to note that that the Council will be integrated by: "two members nominated by the President of the Republic. A member nominated by the Council for Equality. A member nominated by the faculties or schools of social communication of public and private institutions of higher education. And three representatives of the citizenship “before this Botero says that” in 2001, the rapporteurs for the freedom of expression of the UN, OAS and OSCE, stressed that institutions and governmental bodies that regulate broadcasting should be protected against political and commercial interference. You must ensure that the organ is plural, independent and autonomous. The problematic is the establishment of a sanctioning system encompassing all media, without any relevant differentiations (between radio, television newspapers and Internet for example). As the project is, communications would have to withstand impact on their right of freedom of expression imposed by administrative authorities during all the time that lasts ordinary invalidity proceedings, which are reduced in a disproportionate judicial manner that guarantees that all people have the

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<sup>152</sup> BOTERO, Catalina . Comments to the draft of law of communication. Media law contradicts the Convention of DD.HH. El Universo, Monday, June 20, 2011, consulted 17 December 2012. Available at: <http://www.eluniverso.com/2011/06/20/1/1355/ley-medios-contradice-convencion-ddhh.html>

right before supporting a substantive restriction of their fundamental rights. It is essential that the Agency should be independent, autonomous and ensures the process."<sup>153</sup>

Article 51 of the CB which refers to the powers of the Office of the Ombudsman, provides that the Ombudsman may “arbitrate the necessary measures to protect the rights to communicate the people, communities, nationalities and groups, in particular of the priority groups, including the suspension of advertising”, advertising or programs containing pornography, religious or political intolerance, incitement to violence, propaganda about war and advocacy of hatred, genocide, ethnocide, or advertising cigarettes, alcohol and narcotic substances”, also can “receive, send and go through a process with competent authorities, allegations that reveal affectations to the full exercise of the rights of communication for people and communities”, people, nationalities and groups by the media and other public and private institutions. In addition, they can “assess the disseminated contents by means of information and communication and public entities, including advertising and propaganda affecting fundamental rights.” What the Rapporteur notes that, “the vagueness with which these powers are granted by the Bill to prevent from knowing the extent of them, if they are a due process to the ACHR. It could fall in prior censorship”<sup>154</sup>

Chapter 65 of the CB, which refers to the public registry, it says that “the public registry is a measure to make and allow transparent access to the information in the media and it must contain general, political, editorial and informational, organizational data, it should have structure, composition of share capital or property and code of ethics. This registration does not constitute an authorization for the operation of the media.” The rapporteur considers that “force to register to all media, regardless of its format, scope or size, under penalty of being further responsible, is an excessive requirement which could have effects out of proportion on certain media and inhibitory on certain speeches.”

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<sup>153</sup> BOTERO, Catalina . Comments to the draft of law of communication. Media law contradicts the Convention of DD.HH. El Universo, Monday, June 20, 2011, consulted 17 December 2012. Available at: <http://www.eluniverso.com/2011/06/20/1/1355/ley-medios-contradice-convencion-ddhh.html>

<sup>154</sup> Ibid

There appears to be an enough reason to make and they must register with the state its editorial line. “Minority Groups or collective political positions of diverse sexual, religious, racial or cultural identities might feel inhibited by the obligation to register its existence and manifest when registering its editorial line”<sup>155</sup>

In the terms of article 72, which refers to the general interest, is set to transmit national or local chain “(audiovisual media will be required to provide the following free social information services: a) messages with the President of the Republic, the President of the National Assembly, President of the National Electoral Council “President of the Supreme Electoral Court, President of the Judicial Court, the President of the function of transparency and Social Control, the President or Chairperson of the Council of citizen participation and Social Control, the President or Chairperson of the Constitutional Court, the Ministers of State and other servers and servants of the Executive function that have the rank of Minister. These spaces will be used solely for reporting matters of its competence when it is necessary for the public interest. Public servants referred to in the preceding paragraph shall be liable for the misuse of this power. (b) Transmit national or local “chain or news”, in cases of the State there is an exception provided by the Constitution of the Republic of Ecuador, the messages the President has about the Republic or the authorities designated for such purpose. (c) allocate up to one hour daily, not cumulative, from Monday to Saturday, for free official programs with educational relevance for citizenship, to strengthen democratic values and the promotion of human rights; It will contribute to the prevention of consumption of narcotic and psychotropic substances, of alcohol, tobacco and other health matters; that favor plurinationality, interculturality and gender equity; and to promote the rights of groups of priority attention.” In this article the rapporteur points out that “circumstances that are not defined precisely justify the use of strings to convey certain messages. This will allow the abuse of official channels. So that freedom of expression is not affected, it is necessary that those assumptions are clearly established by law, tend to meet an

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<sup>155</sup> BOTERO, Catalina . Comments to the draft of law of communication. Media law contradicts the Convention of DD.HH. El Universo, Monday, June 20, 2011, consulted 17 December 2012. Available at: <http://www.eluniverso.com/2011/06/20/1/1355/ley-medios-contradice-convencion-ddhh.html>



imperative to end under the ACHR, and such transmission is strictly necessary in a democratic society. In this regard, the precise regulations of these powers are essential, because otherwise they might provide in the future abuses which denatured the limited and urgent subject that justifies them. According to international standards, it is not any information that legitimizes the interruption of the regular programming, but that can have reversed interest of the collectivity in the knowledge of facts that can lock up public significance and which are really necessary for the real participation of the citizens in the collective life. "An intervention, whether it is from President of the Republic without any kind of limit, restrict the right of citizens to learn about other issues that interest them."<sup>156</sup>

Finally we have the articles 102 and 103 of the CB talking about the written reprimand and fines, where it is designated "(the written reprimand will proceed in the following cases: a) spread by any form or means of communication cards that are not properly supported with a signature, identification or pseudonym of the perpetrators." (b) Comply with the obligation to transmit messages of State institutions that are of national interest such as health, education, risk prevention, national defense or others, in accordance with the provisions of this law. (c) It should not include the dissemination of national music stations broadcasting in all their schedules, spaces and conditions, according to the provisions of this law. (d) Failure to comply with the codes of ethics. (e) Breach of the obligation to include the percentage of national production in its programming, in accordance with this law. (f) Breach by any means of communication from the obligation to publish their instruments of self-regulation. (g) The issue of advertising something that leads to violence, discrimination, racism, drug abuse, sexism, religious or political intolerance and all that which violates human rights. (h) Non-compliance with labor rights for the workers providing the services in the media. (i) Omit the source of news or comment, when it is not of direct responsibility for the station, or the mention of the fictional or fantastic nature of the acts or programs that this characteristic has. j)

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<sup>156</sup> BOTERO, Catalina . Comments to the draft of law of communication. Media law contradicts the Convention of DD.HH. El Universo, Monday, June 20, 2011, consulted 17 December 2012. Available at: <http://www.eluniverso.com/2011/06/20/1/1355/ley-medios-contradice-convencion-ddhh.html>

Breach of the obligation to maintain a file of media in accordance with this law. (k) Disseminate the propaganda or advertisements that encourage the use of cigarettes, alcohol and narcotic substances.” In the case that has to do with the fines, it said that “(the sanction of a fine in the following cases: a) specific recidivism of an offence punished with a warning written in the past two years.” (b) Transmission of programming or realization and promotion of public entertainment which violate the dignity, reputation, honor and image of girls, boys and adolescents or which may cause damage or alteration in normal development, by natural or legal people. (c) Failure to comply with the right to retort or rectification. (d) Violation of the right to conscience clause. (e) Failure to comply with the classification of contents and its appropriate dissemination within the relevant slots. f) The Breach of the obligation that the media has which is to register at the Council of Communication and Information.” To which Botero indicates that “this article is problematic from the point of view that lies within the protection of the reservation of the source, as well as the protection of the use of new technologies such as the Internet in which the speech is anonymous, not only is widely used but clearly protected. Project assigns to the Council and its territorial delegates the power to monitor the ethical conduct of journalists and media. Implementation of ethical standards and control over their fulfillment cannot be in the hands of State bodies, as established by the Declaration of principles on freedom of expression. States cannot assume the role of guardians of journalistic ethics. Each of the limits imposed on the media that are part of a punitive regime must meet the requirements of article 13.2 of the ACHR, i.e. they must have a clear and precise way through a law in formal and material sense. Any regime of obligations which may affect freedom of expression must describe clearly and accurately both obligations whose breach could lead to the imposition of a sanction as prohibited conduct. The Special Rapporteur considers that some of the obligations are drafted with ambiguous terms or refer to behaviors whose adequacy is particularly difficult, given to the Agency in charge of applying them an excessive discretion that could be incompatible with the ACHR. The project seems to impose a lot of obligations to all media, without distinguishing between large, small, alternative, College, media means that the use radio spectrum, those who serve as television by

subscription, General Media, or writings of specialized information and even in the Internet, furthermore any regulation must attend carefully to the nature of each media for not incurring unnecessary or disproportionate restrictions on the right of freedom of expression. The Special Rapporteur noted with concern that many of the aforementioned media establishes obligations that are not in material conditions comply with them and would be forced to close or could simply never exist.”<sup>157</sup>

Botero has been pretty clear with the observations made to the project, and the contradictory stance of the same with respect to the ACHR is really alarming. However both the President of the Assembly, Fernando Cordero, and the occasional President of Communication Commission Mauro Andino ignored the letter. Ecuador being a subscriber state of the OAS when it does not accept the recommendations made in the present document is giving back to a binding for the Convention in Ecuador such as the American Convention on human rights.

There are also other agencies which have expressed concern about the danger that is freedom of expression in our country, with a draft law with characteristics of restrictive as it is the Communications Bill.

The special rapporteur of the Organization of the United Nations (UN) for freedom of Opinion and expression, Frank La Rue, also sent a letter to President Correa where expresses its concern at the failure to comply with international standards. Le Rue thus referred to the professionalization of journalists that it “should be a personal choice of those who work in communication, while the role of the State should be limited to promoting and facilitating alternatives to achieve this goal”. However, he noted that “this professionalization should not be conditioned only to a degree.” On the objectivity and accuracy of the information, the UN Rapporteur considered that “this qualification is granted to public opinion than any State attempts to validate the veracity, as previous or subsequent to their issuance, will become a mechanism of censorship.” Finally La Rue

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<sup>157</sup> BOTERO, Catalina . Comments to the draft of law of communication. Media law contradicts the Convention of DD.HH. El Universo, Monday, June 20, 2011, consulted 17 December 2012. Available at: <http://www.eluniverso.com/2011/06/20/1/1355/ley-medios-contradice-convencion-ddhh.html>

was opposed to the idea that the State could interfere with the content of the information issued by the media, which now rises with the Council's regulation.<sup>158</sup>

On the other hand, Reporters without borders also have become present with his remarks. Benoit Hervieu, representative of the International America's Reporters Organization without borders (RSF), said that there is fear because in the project of the law of communication, confuses the regulation of the media, in charge of a communication Council, with the aim of improving information. "No law can be an absolute definition of what is a good journalist who does his job well. That's impossible." In addition, he has asked to include the decriminalization of offences that the press reveals, RSF argues that the application of penalties such as imprisonment against journalists because of what they think or report, "contravenes the Inter-American jurisprudence that Ecuador must respect as a Member State of the OAS" and is also "a way of pressure and intimidation".<sup>159</sup>

Finally, Human Rights Watch, a private organization for defense of human rights, which has also made public its concern by several provisions that could lead to prior censorship, undue interference from the Government or unlawful restriction of the freedom of expression. Thus the director of this agency, José Miguel Vivanco, has also sent a letter to Fernando Cordero, where he warns that the discussion text is ambiguous, especially in what refers to the qualifying information, as that it must be "truthful", because it could lead to censorship. In addition, it is considered that certain texts of the regulations entitle an undue Government interference, "for example, by allowing that sanctions be applied to media who breach their codes of ethics".<sup>160</sup>

On the other hand, it will mention some articles that even though they have not been mentioned by international bodies have caused great controversy nationwide by its

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<sup>158</sup> Media law contradicts the Convention of DD.HH. El Universo, Monday, June 20, 2011, consulted 17 December 2012. Available at: <http://www.eluniverso.com/2011/06/20/1/1355/ley-medios-contradice-convencion-ddhh.html>

<sup>159</sup> Ibid

<sup>160</sup> Ibid

restrictive to freedom of expression. I will then present the opinion of former Assemblyman Cesar Montufar on certain articles of the CB and the SR.

Article 28 CB which refers to news and views states that "Social Media, should be clearly distinguished, avoiding any confusion between news and views. The news is based on information on facts and data; and opinions, express thoughts, ideas, beliefs or value judgments, media communication, publishers, editors, journalists, presenters or speakers, the facts, circumstances and consequences. Montúfar explains that "it is not possible for communication, the use of language, or the narration and description of facts, without intention, without load's value by who built the news or titled it; by who chooses one as relevant subject rather than another. This requirement should be part of the self-regulation of the media and, in no way, be included in the scope of the regulation of this law. To put it as an obligation of the media this would strengthen a power which is very broad and ambiguous regulatory in favor of the Council's regulation."<sup>161</sup>

In article 5 of SR which talks about the discriminatory content. Here it establishes that "for the purposes of this Act which means discriminatory content all message that are spread by any means, format or technology platform it denotes distinction, exclusion or restriction based on grounds of ethnic group, place of birth, age, sex, gender identity, cultural identity, marital status, language, religion, ideology, political affiliation, judicial history, socio-economic status, immigration status", sexual orientation, State of health, carrying AIDS, disability or physical difference and others that has the object or result impairing or nullifying the recognition, enjoyment or exercise of the rights recognized in the Constitution, it incites the Commission of discriminatory acts or make apology for such discrimination". What Montufar added to include the word "message" "can refer to

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<sup>161</sup> MONTÚFAR, César. 41 arguments for the file of the communication law and restart the process from passage of a new law project. Trade, November 7, 2011. Accessed 8 November 2011. Available at: [www.elcomercio.com/.../argumentos-archivar-proyecto-Ley-Comunicacion](http://www.elcomercio.com/.../argumentos-archivar-proyecto-Ley-Comunicacion)

posts by text, Twitter, Facebook, email; comments or messages written in a portal or web page".<sup>162</sup>

In articles 7 and 8 of the SR is speaking about the qualification criteria for content and administrative measures establishing that "for the purposes of this Act, a content is described as discriminatory and it is necessary that the Regulation Council and development of communication establish, by a reasoned decision, the concurrence of the following items: 1. The diffused contents denotes some particular kind of distinction, exclusion or restriction. 2. That such distinction, exclusion or restriction is based on one or more of the reasons set out in article 5 of this law; 3. Que such a distinction, exclusion or restriction has the object or result of impairing or nullifying the recognition or enjoyment of the human rights guaranteed in the Constitution and in international instruments; or that the diffused contents constitute advocacy of discrimination or incite the implementation of practices or some kind of discrimination-based violence. And in what refers to administrative measures establishes that "the dissemination of discriminatory contents will need the following administrative measures: 1. public apology the Director or the director of the media presented in writing to the affected direct with a copy to the Council for the regulation and development of the communication, which will be published on its website and in the first interface of the website of the media for one period of not less than seven" consecutive days. 2. Reading or transcription of the public apology in the same space and media that spread the discriminatory content. "3. Case of recidivism will be imposed a fine equivalent of the 1% to 10% averaged over the last three months billing presented in their statements to the internal revenue service, considering the gravity of the infringement and the coverage of the environment, without prejudice to comply with the provisions of paragraphs 1 and 2 of this article". To which Montufar has indicated that "article 7 IC, gives to the Council regulation the authority to qualify the discriminatory contents and article 812 IC the sanction to the media by disseminating them." "This Council, in

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<sup>162</sup> MONTÚFAR, César. 41 arguments for the file of the communication law and restart the process from passage of a new law project. Trade, November 7, 2011. Accessed 8 November 2011. Available at: [www.elcomercio.com/.../argumentos-archivar-proyecto-Ley-Comunicacion](http://www.elcomercio.com/.../argumentos-archivar-proyecto-Ley-Comunicacion)

practice would have wide discretion to interpret and sanction with respect to what you consider or not" discriminatory content, thus creating a legal, administrative and political uncertainty that affect freedom of expression."<sup>163</sup>

On the other hand, article 14 SR which refers to the liability of the media, establishes that "there will be room for liability of the media, in the civil and administrative fields, when widespread public relevance information are expressly assumed by the environment or are not assigned explicitly to another person. Comments at the foot of the electronic publications on the web pages of the formally constituted media will be responsibility of the media if not verify the identity of persons who submit such comments. So Montúfar points out that "the so-called liability of the media, for content that appear in them and are not attributed to another person paves the way to affect the reservation of the sources and, thus, to hinder the work of journalists and communicators. Similarly, the responsibility to the environment by the comments of people in its electronic portals if mechanisms are not established to identify the identity of those who comment on them inhibit the development of virtual spaces characterized by interactivity, anonymity and freedom."<sup>164</sup>

In the terms of article 36 of the CB already previously noted by the rapporteur for freedom of expression, Catalina Botero, and it refers to the formation of the Council regulation, Montufar added that "this project proposes three delegates from the Executive to the Council, as the tips of equality are part of this role of the State. If in addition to this, delegates citizens appointed by the Council of citizen participation and

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<sup>163</sup> MONTÚFAR, César. 41 arguments for the file of the communication law and restart the process from passage of a new law project. Trade, November 7, 2011. Accessed 8 November 2011. Available at: [www.elcomercio.com/.../argumentos-archivar-proyecto-Ley-Comunicacion](http://www.elcomercio.com/.../argumentos-archivar-proyecto-Ley-Comunicacion)

<sup>164</sup> MONTÚFAR, César. 41 arguments for the file of the communication law and restart the process from passage of a new law project. Trade, November 7, 2011. Accessed 8 November 2011. Available at: [www.elcomercio.com/.../argumentos-archivar-proyecto-Ley-Comunicacion](http://www.elcomercio.com/.../argumentos-archivar-proyecto-Ley-Comunicacion)

Social Control, CPCCS, of dubious independence from the Executive, is clear that the intention is to control board controlled by the Presidency."<sup>165</sup>

We also return to article 72 of the CB already mentioned by Botero and talking about the general interest, that Montúfar Additionally argues that in this article "not set any control, limit or control propaganda, advertising and chains of public institutions. In the discussion for the adoption of the SR is deflected any consideration of the topic. If to this we add that "omitted" resolve in the temporary sale of the seized media, is clear the claim that the CB legalized monopoly media that the Government is seeking."<sup>166</sup>

Finally, article 20 of the SR which talks about the independence between the financial system and the media States that "they may not be owners, directly or indirectly, of shares of enterprises, companies or non-communication activity corporations, shareholders of a private company of communication of national character, which have 6% or more of the shares, or those shareholders to maintain a dominant position in the institution or that form a unit of economic interest. Nor may be it main and alternate members of the directories or its administrators. Means that they are indirect holders, shareholders of a private communication company that are at the same time owners, through trusts, certificates representing the subscribed capital of enterprises, companies, or corporations outside the communications activity; or, via this same mechanism through their spouses or cohabiting in a common-law union". Montúfar explains that this article provides that "to be considered a principal shareholder it will be sufficient to have 10 percent of the shares of a company's communication of national character, percentage too low and adopted in an arbitrary manner. International standards to combat monopolies of certain media companies point out that anti-trust measures to be taken must be common to all sectors of the economy and not specific or discriminatory for the communication sector. In this case we have precisely an antitrust measure only valid for

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<sup>165</sup> MONTÚFAR, César. 41 arguments for the file of the communication law and restart the process from passage of a new law project. Trade, November 7, 2011. Accessed 8 November 2011. Available at: [www.elcomercio.com/.../argumentos-archivar-proyecto-Ley-Comunicacion](http://www.elcomercio.com/.../argumentos-archivar-proyecto-Ley-Comunicacion)

<sup>166</sup> Ibid



the financial sector and private communication companies. Subsequently approved law of Control and regulation of the market has further the situation, establishing that percentage at six percent."<sup>167</sup>

Thus, we can see that the arguments exist and are reasonable for the purpose of proceeding with the preparation of a new document that respects international standards, which does not give so much power to the Government and that also complies with the objective of regulating communication without affecting freedom of expression.

Then, there was the proposal of voting article-by-article, and there were modifications in the project several times in order to obtain this approval. Thus the final text of the draft was submitted on 18 July 2012, in which there are already some changes with respect to the document of the second debate however, have fallen still some articles which are the subject of observations and which require changes, and others that it is necessary that they be definitely removed.

The Ecuadorian Association of newspaper editors has presented an analysis of the document which highlights the problems in article 20 for example, that talks about the liability and establishes that "for purposes of this law, further responsibility is the obligation that has every person to assume administrative consequences subsequent to disseminate content that injured human rights and public security of the State", through the media" However, this article, "should include a rule that establishes that public servants who feel affected by the contents disseminated by the media of social communication must prove that the publication was made with actual malice, that is, with knowledge that it was disseminated was false or "with reckless disregard of its author to find out if the information was false or not."<sup>168</sup>

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<sup>167</sup> MONTÚFAR, César. 41 arguments for the file of the communication law and restart the process from passage of a new law project. Trade, November 7, 2011. Accessed 8 November 2011. Available at: [www.elcomercio.com/.../argumentos-archivar-proyecto-Ley-Comunicacion](http://www.elcomercio.com/.../argumentos-archivar-proyecto-Ley-Comunicacion)

<sup>168</sup> Ecuadorian Association of editors of newspapers, different looks to the organic Bill of communication, Wednesday, April 25 from 2012. Consulted on 22 August 2012. Available at: [www.aedep.org.ec/docs/SUPLEMENTOMAYO2012.pdf](http://www.aedep.org.ec/docs/SUPLEMENTOMAYO2012.pdf)

Another article that still presents differences is article 81 which refers to public media which is designated "the public media of social communication are legal persons of public law. They are created through Decree, Ordinance or resolution as appropriate to the nature of the public entity which creates it. You will guarantee their editorial autonomy and independence from political power. The structure of the national public media shall be subject to the provisions of this law; and the structure, composition and powers of the management of other public bodies be established in the same legal instrument of his creation. You can also create public media under the figure of public companies, in this case its structure and operation are subject to the provisions of the organic law of public companies." To which the AEDEP added that "it must explain public media shall have editorial autonomy and independence from political power and the national Government so it will not be administered by authorities of free appointment of executive function. In addition the provision of services must be done with social responsibility as is required in private."<sup>169</sup>

The biggest problem of the project the creation of the Council regulation which according to Montúfar, would be a punitive body, a "media commissariat" conceived as a heavy bureaucratic machinery in throughout the country and provided with a broad discretion to initiate administrative actions against actors of the communication... giving them discretionary powers to prosecute and punish the media making it an hybrid between Commissioner and Ministry."<sup>170</sup>

However, there are some articles which should be maintained, as for example the 107 that promotes domestic production and domestic independent production, 15 and 30 who promote the exercise of the right to communication for children and adolescents and which also protects them from the violent content. There is also article 14 favouring

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<sup>169</sup> Ecuadorian Association of editors of newspapers, different looks to the organic Bill of communication, Wednesday, April 25 from 2012. Consulted on 22 August 2012. Available at: [www.aedep.org.ec/docs/SUPLEMENTOMAYO2012.pdf](http://www.aedep.org.ec/docs/SUPLEMENTOMAYO2012.pdf)

<sup>170</sup> MONTÚFAR, César. 41 arguments for the file of the communication law and restart the process from passage of a new law project. Trade, November 7, 2011. Accessed 8 November 2011. Available at: [www.elcomercio.com/.../argumentos-archivar-proyecto-Ley-Comunicacion](http://www.elcomercio.com/.../argumentos-archivar-proyecto-Ley-Comunicacion)

intercultural and plurinationality contents that reflect their worldview, culture and traditions are disseminated and thus respect the diversity that characterizes the Ecuadorian State.

The current Government of the revolution has always been characterized by the words of Machiavelli "the end justifies the means"<sup>171</sup>, because despite the arguments of the opposition has always managed to carry out the projects proposed, although I had to change laws, change the Constitution, intimidating the media, or abuse of pro-Government propaganda. But in the case of the communication Act, this is the Achilles heel of the Government, despite efforts to achieve approval, the National Assembly did not get enough votes so this law finally to crystallize.

This is mainly due to the social pressure exercised on the subject both at national and international level, I think that the Assembly members are aware that in approving this document they would be hopelessly going against international standards. However, the scenario has changed in the current context. After the elections of February 17, 2013, the ruling party has managed to get most of seats in the Assembly so probably, in this new period if he is able to approve the controversial law of communication.

Despite this, the Ecuadorians must always defend the fundamental right to freedom of expression, because without this we would be unable to enforce other human rights. We are a democracy where each one of us as citizens are on duty to demand justice, independence of powers, more freedoms and above all respect for freedom of expression.

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<sup>171</sup> MACHIAVELLI, the Prince. Retrieved from: home page online:  
<http://www.philosophia.cl/biblioteca/Maquiavelo/EI%20pr%EDncipe.pdf>

## **Conclusions:**

The first signs of freedom of expression appeared already in the medieval period, where religion was the only true belief and valid thought, those who dared to think different, were called heretics.

With Protestantism and the separation of the Church from the State arises for the first time, the freedom for the interpretation of the texts when only the Church has the power to do it.

The right to freedom of expression is particularly important since it plays a decisive role in democracy and in the participation of political issues.

Extreme forms of freedom of expression (advocacy of hatred) need to be regulated since they might violate other fundamental human rights.

It is important to regulate the media with a communication law, but not with the current project, because it restricts freedom of expression.

The media has to be independent and pluralistic in order to accomplish its role, they must work for the society without taking into account political and economic interests.

Journalists should be free to supervise, investigate and criticize the policies and actions of the public administration.

Everyone has the right to freedom of opinion and expression; these rights include researching and receiving information and opinions, regardless of frontiers, by any means of expression.

Any Instrument of Human Rights, will be above any other law according to the principle of preferential rights enforcement, besides, as they are in the category of “ius cogens”, and are hierarchically located in the upper echelon of international laws.

Ecuador is indebted to respect the international human rights treaties to which they are subscribed.

The current Communication Bill violates the international instruments of human rights because it restricts freedom of expression.

The main obligation of the State is to respect the exercise of the right of freedom of expression, this means to allow free expression, and to avoid censorship or other restriction mechanisms.

Since 2007, the Government has tried to change the stage of media by strengthening the public press and discrediting the independent press.

Media pluralism is a very important feature to ensure democracy.

In Ecuador, the government exerts excessive control over the media.

The media perform a public function, so it has to be regulated. The key is to make a law that favors neither the Government nor private enterprise.

Democracy doesn't mean only popular elections, participatory democracy requires free debates that generate public opinion and especially it is necessary to have independence of powers.

The current Communication Bill includes the creation of a Council regulation with the pro-government majority.

This Bill includes items that although they don't indicate prior censorship explicitly, this can be done in practice.

The lack of consensus in the National Assembly is due to the absence of ability when the Commission designs the project; it has several articles that can easily be misinterpreted.

With the results of the past elections, with a government majority in the National Assembly, it is likely that in the next period the Communication Bill will be approved.

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## News

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