

ARTICLE 19

Bolivia: Law on Telecommunications and Information and Communication Technologies

January 2012

Legal analysis

Executive summary

The purpose of this analysis by ARTICLE 19 is to assess the new Bolivian Law on Telecommunications and Information and Communications Technologies (“the ICT Law”) by reference to international standards on freedom of expression.

In the analysis, ARTICLE 19 welcomes several features of the new Bolivian ICT Law. In particular, the Law seeks to guarantee universal access to Information and Communications Technology (“ICT”) services, notably by exempting providers and operators of ICT services in rural areas from certain tax duties. The ICT Law also promotes media pluralism by prohibiting ICT operators and providers from engaging in anti-competitive practices, including price-fixing and concentration; and it requires the installation of the necessary infrastructure for broadcast development in the digital age, namely the installation of fibre optic cables.

However, the ICT Law falls short of international standards for the protection of freedom of expression in several key respects. *First*, the ICT Law fails to guarantee the institutional autonomy and independence of the authority regulating ICTs. *Second*, the ICT Law entirely fails to lay down rules governing the structure of the regulatory authority, including its composition, appointment of its members, tenure, and accountability. *Thirdly*, the Law fails to provide for a clear and precise licensing process. *Fourthly*, the Law provides for an unduly harsh sanction, namely confiscation, in undefined circumstances. Finally, the Law gives the authorities *carte blanche* to request the cooperation of all telecommunications service operators and providers in cases of an emergency, without providing any safeguards against disproportionate emergency measures.

ARTICLE 19’s analysis includes detailed recommendations on how the ICT Law should be amended to meet the international freedom of expression standards and calls on the government to urgently review and amend the ICT Law accordingly.

Key recommendations

1. The autonomy and independence of the Telecommunications and Transport Regulatory and Supervisory Authority should be guaranteed and protected by law, including in the following ways: (a) specifically and explicitly in the legislation which establishes the body and, if possible, also in the constitution; (b) by a clear legislative statement of overall broadcast policy, as well as of the powers and responsibilities of the regulatory body; (c) through the rules relating to membership; (d) by formal accountability to the public through a multi-party body; and (e) in funding arrangements.
2. The licensing process should be more clearly defined in the law, not regulations. This should cover clear eligibility requirements, clear licensing and licence renewal procedures, objective assessment criteria, a right to amend licensing conditions and a schedule of licence fees applicable for each type of licence.
3. Article 96 of the ICT Law, which concerns seizure, should be repealed, or in the alternative, should be amended to include a definition of the circumstances in which the regulatory authority may seize materials belonging to ICT operators and providers.
4. Emergency powers requiring ICT operators and providers to make their services, networks, and communications going through those networks, available to the authorities upon request should be repealed.

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About ARTICLE 19 Law Programme

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

On the basis of these publications and ARTICLE 19's overall legal expertise, the Law Programme publishes a number of legal analyses each year, comments on legislative proposals as well as existing laws that affect the right to freedom of expression. This analytical work, carried out since 1998 as a means of supporting positive law reform efforts worldwide, frequently leads to substantial improvements in proposed or existing domestic legislation. All of our analyses are available at <http://www.article19.org/resources.php/legal/>.

If you would like to discuss this analysis further, or if you have a matter you would like to bring to the attention of the ARTICLE 19 Law Programme, you can contact us by e-mail at legal@article19.org.

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Introduction

On 28 July 2011, the Bolivian Parliament adopted a new law on Telecommunications, Information and Communication Technologies (the “ICT Law”).¹ The ICT Law seeks to establish a comprehensive regulatory framework for the communications sector in Bolivia. In particular, the Law deals with the distribution and use of the radioelectric spectrum; universal and equal access to telecommunications and ICTs; and the development and convergence of telecommunications and information and communication technology (“ICT”) networks in Bolivia.

ARTICLE 19 welcomes the opportunity to analyse this Law from a freedom of expression perspective, part of an ongoing effort by the organisation to improve the legislative protection of media freedom in Bolivia. ARTICLE 19 has been actively involved in a number of activities to improve the protection of freedom of expression in general and media freedom in particular in Bolivia for a number of years. In 2011, we analysed the draft Law for Transparency and Access to Public Information proposed by the Bolivian Ministry of Transparency and Combating Corruption and supported local partners in the advocacy for freedom of information framework,

At the outset, ARTICLE 19 notes that the regulation of the communications sector has historically been concerned with technical matters rather than content. As such, it has seldom raised freedom of expression issues. However, this approach is now changing with convergence and the fact that increasingly content is being transported through telecommunications lines. Therefore, although Bolivia’s ICT Law is primarily concerned with the technical provision of telecommunications and ICT services, some of its provisions are relevant to broadcasting, access to the Internet and freedom of expression generally.

The ICT Law itself contains 113 provisions and 10 transitional provisions across eight different titles, namely General Provisions (I), Authority and Powers of Government Levels (II), Telecommunications (III), Development of Information and Communication Technology (“ICT”) Contents and Applications (IV), Infringement and Penalties (V), Postal Services (VI), Participation and Social Monitoring in Telecommunications, ICTs and Postal Services (VII), and Other Provisions (VIII).

In this analysis, ARTICLE 19 assesses the ICT Law’s compatibility with international standards, as well as national best practices, for the protection of freedom of expression. In addition, this analysis draws upon ARTICLE 19’s International Standards Series, *Access to the Airwaves: Principles on Freedom of Expression and Broadcast Regulation*,² which reflects international standards, comparative constitutional law and best practices in countries around the world in the field of broadcasting regulation. Reference is also made to existing standards on the protection of access to the Internet and the digital switchover.³

¹ This analysis is based on the unofficial translation of the Law from Spanish to English in December 2011. ARTICLE 19 takes no responsibility for the accuracy of these translations or for comments based on mistaken or misleading translation. The translation is available on request from ARTICLE 19.

² *Access to the Airwaves: Principles on Freedom of Expression and Broadcast Regulation*, April 2002; available (in English) at <http://www.article19.org/pdfs/standards/accessairwaves.pdf>.

³ See, for example, the OSCE Representative on Freedom of the Media, *Guide to the Digital Switchover*, Vienna 2010; available at <http://www.osce.org/fom/73720>.

The structure of this analysis is as followings. First, it summarizes ARTICLE 19's recommendations for improving the ICT Law. This is followed by overview of relevant international standards for the protection of freedom of expression in the area of broadcast regulation. The main section highlights the positive features of the ICT Law and discusses in more detail ARTICLE 19's main concerns with a number of aspects of the ICT Law.

Summary of Recommendations

ARTICLE 19 urges the Bolivian Government to amend the ICT Law as follows:

- The autonomy and independence of the Telecommunications and Transport Regulatory and Supervisory Authority should be guaranteed and protected by law, This should be achieved in following ways: (a) specifically and explicitly in the legislation which establishes the body and, if possible, also in the constitution; (b) by a clear legislative statement of overall broadcast policy, as well as of the powers and responsibilities of the regulatory body; (c) through the rules relating to membership; (d) by formal accountability to the public through a multi-party body; and (e) in funding arrangements.
- The licensing process should be defined in the law, not regulations. This should include clear eligibility requirements, clear and transparent licensing procedures, objective assessment criteria, a right to amend licensing conditions and a schedule of licence fees applicable for each type of licence.
- The law should include a provision requiring the regulatory authority to give written reasons for refusing to grant or renew a licence or for revoking it.
- Article 62 of the ICT Law, which requires advance payment of fees for a licence not yet received, should be repealed.
- The requirement to obtain a licence to use frequencies in addition to other licences should be abandoned.
- Article 96 of the ICT Law, which deals with seizure, should be repealed, or in the alternative, amended to include a definition of the circumstances in which the regulatory authority may seize materials belonging to ICT operators and providers.
- Article 54.19 of the ICT Law should be amended to include a definition of the kinds of measures that may be sought to protect children against abuse online, the process whereby such measures may be obtained, and who should be responsible for applying them. In particular, consideration should be given to the following: (a) Internet Service Providers should be able to offer products designed to facilitate end-user filtering of “harmful” content to their customers; (b) measures such as the mandatory blocking of access to entire websites, IP addresses, ports, network protocols or types of uses should only be ordered by a court of law.
- Article 111 of the ICT Law, which entrusts the authorities with sweeping powers of interception of communications, should be repealed

International standards on Freedom of Expression and Broadcasting and ICTs

International standards and broadcasting regulation

ARTICLE 19's comments and recommendations are based on international standards for the protection of freedom of expression. These include the standards set in Article 19 of the International Covenant on Civil and Political Rights ("the ICCPR") and related jurisprudence of the Human Rights Committee; Article 13 of the American Convention on Human Rights⁴ ("ACHR") as interpreted by the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights; and the Inter-American Declaration of Principles on Freedom of Expression⁵. These standards generally require that any restriction on freedom of expression must be in accordance with law, pursue a legitimate aim and be proportionate to the aim pursued.

These standards also recognise that different types of media require different regulatory approaches because of their different natures. In this regard, international law standards have traditionally allowed a more intrusive form of regulation of broadcasting media than would be considered legitimate for the print media for two main reasons. First, a wholly unregulated broadcast sector would be detrimental to free expression, since the electromagnetic spectrum used for broadcasting is a limited resource and the available bands must be distributed in a rational and fair manner to avoid interference and ensure equitable access⁶. Secondly, the regulation of broadcast media is needed to ensure plurality and diversity.⁷

At the same time, international standards for the protection of freedom of expression require the adoption of broadcasting laws and policies which guarantee editorial independence; universal and affordable access to the means of communication and reception of broadcasting services; and transparent and fair licensing processes overseen by an independent regulatory body.

Independence of the regulatory body

The need for protection of regulatory bodies against political or commercial interference was specifically stressed in the 2003 Joint Declaration of the UN Special Rapporteur on Freedom of Expression, the OAS Special Rapporteur on Freedom of Expression and the OSCE Special Representative on Freedom of the Media, who considered:

All public authorities which exercise formal regulatory powers over the media should be protected against interference, particularly of a political or economic nature, including by an appointments process for members which is transparent, allows for public input and is not controlled by any particular political party.⁸

⁴ Adopted at San José, Costa Rica, 22 November 1969, in force 18 July 1978.

⁵ Approved by the Inter-American Commission on Human Rights at its 108th regular session.

⁶ UNESCO, *Freedom of Expression and Broadcasting Regulation* by Toby Mendel and Eve Salomon, CI Debates Series, No. 8 February 2011, available at: <http://unesdoc.unesco.org/images/0019/001916/191623e.pdf>

⁷ *Ibid.*

⁸ Adopted 18 December 2003; available at: <http://www.article19.org/pdfs/igo-documents/three-mandates-dec-2003.pdf>.

ARTICLE 19 has also recommended a number of ways in which the institutional autonomy and independence of broadcast and/or telecommunications regulatory bodies may be guaranteed, including⁹:

- specifically and explicitly in the legislation which establishes the body and, if possible, also in the constitution;
- by a clear legislative statement of overall broadcast policy, as well as of the powers and responsibilities of the regulatory body;
- through the rules relating to membership;
- by formal accountability to the public through a multi-party body; and
- in funding arrangements.”

Promotion of pluralism

Under international law, States are required to promote media pluralism. In this connection, the establishment of an independent regulator is key to ensuring plurality and diversity. This was confirmed in the Joint Declaration on Promoting Diversity in the Broadcast Media adopted in 2007 by the special mandates for the protection of freedom of expression of the UN, OSCE, OAS and African Commission, which stated:

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

Other aspects of the promotion of pluralism include equitable access to the airwaves; fair and transparent licensing processes; and the prevention of undue media ownership concentration. For example, for comparative perspective, we note that the *African Charter on Broadcasting (2001)* provides:

1. The legal framework for broadcasting should include a clear statement of the principles underpinning broadcast regulation, including promoting respect for freedom of expression, diversity, and the free flow of information and ideas, as well as a three-tier system for broadcasting: public service, commercial and community....
5. Licensing processes for the allocation of specific frequencies to individual broadcasters should be fair and transparent, and based on clear criteria which include promoting media diversity in ownership and content....
7. States should promote an economic environment that facilitates the development of independent production and diversity in broadcasting.¹⁰

The principle of equitable access to the airwaves has been further elaborated by the UN and regional Special Rapporteurs for Freedom of Expression. In particular, they recommend that enough space should be assigned for the transmission of different communication platforms in order to ensure that the public, as a whole, can receive a diverse spectrum of mass media services. Similarly, the Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights has stated that part of the spectrum should be reserved for the existence of community and other non-profit media, recommending “to legislate in the area of

⁹ See *Access to the Airwaves Principles, Supra note 2*.

¹⁰ The African Charter on Broadcasting 2001, adopted at a UNESCO Conference held on 3-5 May 2001 in Windhoek, Namibia, Part I; available at http://portal.unesco.org/en/ev.php-URL_ID=47094&URL_DO=DO_TOPIC&URL_SECTION=201.html.

community media so that part of the spectrum is reserved for community radio” (2007 Report)¹¹ and “to legislate in the area of community radio so that an equitable part of the digital spectrum is reserved for community media” (2008 Report).¹²

The threats posed by media concentration have also been highlighted by the UN, OSCE and OAS Special Rapporteurs on several occasions. For example, they note in the 2007 Joint Declaration on Diversity that “*undue concentration of media ownership, direct or indirect, as well as government over the media, pose a threat to the diversity of the media, as well as other risks, such as concentrating political power in the hands of owners or governing elites*”. The Declaration goes on to state in relation to diversity of sources that:

In recognition of the particular importance of media diversity to democracy, special measures, including anti-monopoly rules, should be put in place to prevent undue concentration of media or cross-media ownership, both horizontal and vertical. Such measures should involve stringent requirements of transparency of media ownership at all levels. They should also involve active monitoring, taking ownership concentration into account in the licensing process, where applicable, prior reporting of major combinations, and powers to prevent such combinations from taking place.

Going digital

While the digitalisation of the broadcast media and the convergence of broadcasting¹³ may have rendered the traditional justifications for broadcast media regulation obsolete – digitalisation and convergence have vastly expanded the range of frequencies available – regulation is still necessary for a number of reasons. In particular, regulation is needed to promote local content in the face of the inevitable competition from foreign programming which digital broadcasting creates. It is also necessary, amongst other things, to prevent media concentration and ensure equitable access to the infrastructure for digital broadcasting. The principles mentioned above therefore remain equally applicable in a digital broadcast environment.

In addition, a number of more specific international standards have been established to deal with the new digital environment, taking into account freedom of expression standards. These include the obligations of the State to regulate the digital switchover; to initiate and stimulate public participation in radio spectrum management; to ensure that it is based on objective, transparent, non-discriminatory and proportionate criteria; to ensure universal access to public service media; to manage the digital dividend in the public interest; to guarantee the interoperability of conditional access systems; and to preserve the social remit of public service media. These standards have been comprehensively set out in our submissions on the Digital Switchover in Romania. We therefore invite our readers to refer to those submissions for further detail¹⁴.

¹¹ Annual Report of the Office of the Special Rapporteur for Freedom of Expression. (2007). Inter-American Commission on Human Rights, Volume III, Chapter III, Paragraph 6.

¹² Annual Report of the Office of the Special Rapporteur for Freedom of Expression. (2008). Inter-American Commission on Human Rights. Volume III, Chapter V, Paragraph 10 (n).

¹³ Convergence refers to the way in which digital items can be communicated by any one of a variety of means. See ARTICLE 19, *Broadcasting Pluralism and Diversity – Training Manual for African Regulators*, June 2006, p.21; available at <http://www.article19.org/data/files/pdfs/publications/africa-broadcasting-policy.pdf>.

¹⁴ ARTICLE 19’s submissions on the Digital Switchover in Romania; available at <http://www.article19.org/data/files/pdfs/analysis/romania-the-digital-switchover.pdf>

Freedom of expression and the Internet

While Internet Governance is not the subject of international treaty regulation, the four special rapporteurs on freedom of expression have issued a Joint Declaration on freedom of expression and the Internet in 2011.¹⁵ In particular, they highlight that:

[r]estrictions on freedom of expression on the Internet are only acceptable if they comply with established international standards, including that they are provided by law, and that they are necessary to protect an interest, which is recognised under international law.

The special mandates warn that the use of software aimed at filtering or blocking content on the Internet, which is imposed by government or a commercial service provider and which is not end-user controlled amounts to prior censorship. They further recommend that the mandatory blocking of a website should always be ordered by a court.

Moreover, the UN Special Rapporteur on Freedom of Expression, Frank La Rue, made similar recommendations on Internet freedom in his report in May 2011.¹⁶ He also pointed to the dangers of unchecked Internet surveillance for the free flow of information online. In particular, he stressed that States are required to adopt effective privacy and data protection laws in accordance with Article 17 of the ICCPR.

¹⁵ The 2011 Joint Declaration of special mandates; available at <http://www.article19.org/data/files/pdfs/press/international-mechanisms-for-promoting-freedom-of-expression.pdf>

¹⁶ See UN Special Rapporteur on Freedom of Expression, A HRC/12/27, 16 May 2011, available at http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf

Analysis of the ICT Law

1. Positive aspects of the ICT Law

ARTICLE 19 generally welcomes the new Bolivian ICT Law as paving the way to digital TV and radio broadcasting and hence, the greater free flow of information and ideas in Bolivia. In particular, we commend the following aspects of the Law.

- The ICT Law clearly states that the regulation of the communications sector is established with a view to guaranteeing the individual and collective human right to communication of the Bolivian peoples (Article 1);
- The ICT Law aims to guarantee the equitable distribution and efficient use of the radio-electric spectrum; ensure the exercise of the right of universal and equal access to ICT services; and promote the use of ICTs to improve the living conditions of Bolivian men and women (Article 2);
- The ICT Law seeks to promote universal and affordable access to the means of telecommunications and reception of ICT services by: (i) creating a national programme to enable universal access to telecommunications in rural areas, especially to the most vulnerable sections of the community (Article 65); (ii) funding such programme through various taxes levied on ICT operators and providers (Article 66); and (iii) requiring public telecommunications networks to be accessible and inter-connected, and notably capable of inter-operability (Article 45);
- The ICT Law requires the installation of the necessary infrastructure for broadcast development, in particular the installation of fibre optic cables (Article 24);
- The ICT Law strives to create an economic environment in which community broadcasting can prosper in the following ways: (i) natural or legal persons providing ICT services in rural areas are exempt from frequency allocation and use fees, and from contributing to the funding of telecommunications projects intended to ensure universal access to ICTs (Article 36); (ii) such persons can apply for a licence using a simplified, direct, procedure, i.e. they are not required to take part in public contests of community projects (Article 36); and (iii) radio broadcasting services provided by indigenous communities living in rural areas are exempt from paying rates and frequency use fees (Article 64);
- The ICT Law supports media pluralism by generally promoting fair competition between ICT operators and providers, in particular: (i) ICT operators and providers are prohibited from engaging in anti-competitive practices, including price-fixing and concentration (Article 61); and (ii) network operators are required to give access to and share the use of infrastructures with other operators subject to reasonable conditions (Article 21.I and II);
- Civil society is invited to participate in the design of ICT policies through the creation of special public spaces and public hearings (Article 110).

2. Problematic aspects of the ICT Law

In this section, ARTICLE 19 discusses in detail the key concerns with the ICT Law.

As a preliminary remark, we would note that the ICT Law is generally very loosely drafted and fails to address important issues, such as the structure of the regulatory authority or media ownership and control rules. It also frequently leaves considerable scope for further regulation by the Bolivian authorities and the regulatory authority, e.g. the regulation of the licensing process or the circumstances in which sanctions may be imposed. ARTICLE 19 recognises that it is to a degree inevitable that general regulation of a field as complex as broadcasting and telecommunications will involve a significant amount of secondary legislation. However, we believe that it is generally undesirable to leave important points of principle, such as the determination of the rules governing the licensing process, to be determined in this way. We recommend that future legislation in this area address these issues with greater specificity. We make more specific recommendations in relation to the areas which are of greatest concern to us further below.

ARTICLE 19 finds the following aspects of the ICT Law to be highly problematic and in violation of the international freedom of expression guarantees:

a) Lack of independence of the regulatory authority

ARTICLE 19 is seriously concerned that the authority entrusted with the regulation of the communications sector lacks the required independence and autonomy required under international law. The Bolivian ICT Law entrusts the Telecommunications and Transport Regulatory and Supervisory Authority (*Autoridad de Regulacion y Fiscalizacion de Telecomunicaciones y Transportes*, “the regulatory authority”) with regulatory powers in the field of telecommunications and ICTs generally.

Under Article 14 of the ICT Law, the regulatory authority is tasked, amongst other things, with ensuring the correct application of the ICT Law and subsequent regulations; allocating radio frequencies in accordance with the Frequency Plan; supervising the licensing process and acting as a first instance appeals body against decisions to revoke a licence and administering sanctions for breaches of the ICT law. Article 14 further provides that the regulatory authority must report on its activities to the competent ministry for the telecommunications sector, which also acts as an appeals body against the decisions of the authority.

It is unclear to us whether the ICT Law establishes the regulatory authority as a new institution under the ICT Law or if it merely expands the remit of its regulatory powers established elsewhere. At any rate, we note that the ICT Law entirely fails to provide for the structure of the regulatory authority, including matters such as its composition; appointment of its members and funding arrangements.

This may partly be explained by the fact that the regulatory authority entirely lacks the independence and autonomy required under international law. Indeed, it is apparent from the regulatory authority’s reporting obligations under Article 14 that the authority forms part of the executive. The lack of independence of the regulatory authority is a major concern. As noted above, it is well-established under international law that bodies which exercise regulatory powers over the media and the communications sector in general should be independent of government. Accordingly, we recommend that the law should be amended to guarantee the independence and autonomy of the regulatory authority in line with international standards for the protection of freedom of expression (see key recommendations below).

Lastly, we note that the regulatory authority’s description appears to include transportation within its remit, suggesting that it may have additional responsibilities under other legislation to regulate the transport sector. We think it is plainly undesirable for the same body to be responsible for two

different sectors and recommend instead that the regulatory authority's remit be confined to communications only.

Recommendations:

- The regulatory authority's autonomy and independence should be guaranteed and protected by law, including in the following ways:
 - specifically and explicitly in the legislation which establishes the body and, if possible, also in the constitution;
 - by a clear legislative statement of overall broadcast policy, as well as of the powers and responsibilities of the regulatory body;
 - through the rules relating to membership;
 - by formal accountability to the public through a multi-party body; and
 - in funding arrangements.
- The remit of the regulatory authority should be streamlined, and any non-communications responsibilities (e.g. transport) should be the subject of a separate regulatory body

b) Lack of clarity of the licensing process

ARTICLE 19 takes the view that the licensing process laid down in the ICT Law lacks the clarity and transparency required under international law. Article 10.I of the ICT Law provides that the frequencies allocated to the State will be designated by the executive at central level; the frequencies intended for the commercial sector are to be allocated through a tendering process whilst the frequencies intended for the social community sector are to be allocated following a public contest of projects using objective criteria. Article 10.II goes on to state that the technical and regulatory details, such as the Public Tender and the public contest of projects, will be defined in the relevant regulations.

In our view, it is clearly undesirable that important points of principle such as the licensing process be left to further regulations. The decision whether or not to grant a licence has a clear impact on freedom of expression. Indeed, this decision effectively determines which voice the public will be able to hear for the years to come. For this reason, the licensing process must be strictly regulated by law, be transparent and guided by clear, objective, public and democratic standards¹⁷. The Bolivian ICT Law clearly fails to meet those standards by leaving the details of that process to be defined in regulations.

This is not remedied in the more specific provisions dealing with the various types of licences which may be obtained in order to operate an ICT service, including: single licences; radio broadcasting licences; special licences; licences to use frequencies; licences for private networks; licences to provide value added services; licences to provide satellite-based services; licences granted for rural areas; and authorisations for strategic public enterprises (Articles 28 to 37). Indeed, these provisions mainly deal with the duration of the different types of licences, any additional licences that must be obtained in order to obtain another licence, or exemption from certain licence fees, rather than the licensing procedure.

Likewise, the ICT Law fails to provide for clear and objective selection criteria, leaving those matters to be further defined in the regulations. For example, Article 29 provides that a single

¹⁷ See Special Rapporteur on Freedom of Expression, Inter-American Commission on Human Rights, *Freedom of Expression Standards for Free and Inclusive Broadcasting*, 2010.

licence will be granted subject to legal, economic and technical requirements to be established in the regulations. However, a requirement that applicants must have a particular form, such as incorporation, or in the case of private companies, that they hold a certain capital, could potentially limit their ability to get a licence, and hence constitute an illegitimate interference with freedom of expression. Similarly, stringent technical requirements would impede the ability of providers of community ICT services to obtain a licence.

ARTICLE 19 therefore recommends that the law, rather than regulations, should provide for a clear procedure and clear and objective assessment criteria. In particular, such criteria should include the promotion of diversity in order for users of ICT services to get access to the widest possible range of programmes.

Other major flaws of the licensing process include: (i) the absence of a requirement on the part of the regulatory authority to give written reasons for refusing to issue a licence; (ii) the absence of a clear appeals or review process by a judicial authority if the regulatory authority refuses to issue or revokes a licence; (iii) the requirement under Article 62 of the law to pay frequency allocation fees in advance for a licence which has not been yet received; and (iv) the requirement under Article 32 of the law to obtain specific licences for the use of frequencies in addition to other licences, for example radio licences (Article 30). This means that applicants must go through separate decision-making processes, and pay for multiple licences, without any certainty that the licence will be granted in the absence of objective criteria. In our view, these provisions are problematic as they ultimately unduly impede access to the means of communication. As such, they are very likely to fall foul of international standards for the protection of freedom of expression and should be repealed.

Finally, we note that the ICT Law fails to provide for clear licence conditions, a right to amend licensing conditions, and a schedule of licence fees for each type of licence. Similarly, no provision is made for a clear procedure for the renewal of licences.

Recommendations:

- The licensing process should be defined in the law, not regulations. This should cover a clear licensing and renewal of licence application procedure, objective assessment criteria, a right to amend licensing conditions and a schedule of licence fees applicable for each type of licence.
- The regulatory authority should be required to give written reasons for refusing to grant or renew a licence.
- Article 62 providing for the requirement to pay in advance for a licence should be repealed. The requirement to obtain a licence to use frequencies in addition to other licences should be abandoned

c) Sanctions

ARTICLE 19 is concerned that the unduly harsh sanction of seizure of equipment, components, parts and material may be imposed either as a precautionary measure or as a penalty in undefined circumstances.

Article 96 of the ICT Law provides that seizure of equipment, components, parts and material may be imposed as a precautionary measure in circumstances to be defined in the regulations. It goes on to state that seizure will be applied as a penalty for any infringement of the rules laid down in the regulations and will involve the complete loss of ownership of the relevant equipment.

ARTICLE 19 is very concerned by this provision. Seizure of equipment and other materials is an extreme measure, which constitutes a serious interference with freedom of expression. Therefore, it should only be used in the context of criminal proceedings, or alternatively, for the most serious regulatory offences. In this regard, ARTICLE 19 is particularly concerned that the law does not expressly define the circumstances in which such measure may be used. It is therefore almost impossible to predict, as the law currently stands, when the sanction will be applied. This is especially worrying given that Article 96 provides that seizure may not only be used as a sanction but also as a precautionary measure. Moreover, we recall that under international law, such measures should only be ordered by an independent body following a fair and open process. In this regard, we note that Title V, which deals with sanctions generally, entirely fails to provide that sanctions may only be imposed following a fair and open process. Similarly, the law does not expressly provide for a right to apply for judicial review of the decisions of the regulatory authority. This is especially worrying given that the authority lacks the independence required of a body with such sanctioning powers.

Accordingly, we would recommend that Article 96 of the ICT Law is repealed, or in the alternative, that it is amended to include a definition of the circumstances in which the regulatory authority may seize materials belonging to ICT operators and providers. It is imperative that such circumstances are defined in the law rather than regulations in order to comply with the requirements of legal certainty under international law.

Recommendations:

- Article 96 of the ICT Law should be repealed, or in the alternative, should be amended to include a definition of the circumstances in which the regulatory authority may seize materials belonging to ICT operators and providers. It is imperative that such circumstances are defined in the law rather than regulations in order to comply with the requirements of legal certainty under international law.

d) Allocation of radio frequencies

ARTICLE 19 is concerned that the principle of equitable allocation, proposed in ARTICLE 10 of the ICT Law, may be used to unduly restrict existing media freedoms. Under Article 10, the State is allocated 33% of available radio frequencies. The same percentage is allocated to the commercial sector whilst the remaining 33% is split between the social community sector (17%) and indigenous people of rural origin (17%).

ARTICLE 19 notes that there is wide Inter-American and international consensus about the efficiency of reserving an equitable part of the broadcasting spectrum to promote community media. The reservation of the third of the spectrum for community radio stations has been also supported by the World Association of Community Radio Broadcasters (AMARC) for several years. Two countries in the region, Uruguay and Argentina, have also recently adopted legislation in this direction.¹⁸

This principle is also broadly consistent with the guidance of the UN and regional Special Rapporteurs for Freedom of Expression, in particular their recommendations that enough space should be assigned for the transmission of different communication platforms in order to ensure

¹⁸ Since 2007, Uruguay reserves at least one third of the available frequencies for community radio. Argentina reserves 33% of the spectrum for these media since 2009.

that the public, as a whole, can receive a diverse spectrum of mass media services. Similarly, the Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights has stated that part of the spectrum should be reserved for the existence of community and other non-profit media, recommending “to legislate in the area of community media so that part of the spectrum is reserved for community radio” (2007 Report)¹⁹ and “to legislate in the area of community radio so that an equitable part of the digital spectrum is reserved for community media” (2008 Report).²⁰

ARTICLE 19 notes that under Article 10 of the ICT law, the State is allocated 33% of the radio spectrum. In line with the above standards, however, ARTICLE 19’s believes that the State’s share of the radio spectrum should more specifically benefit a genuinely public service media, which are lacking at present in Bolivia. Indeed, there is a danger that the State may use its share of the radio spectrum to promote its own views rather than a variety of sources of information.

Moreover, although the proposed distribution of frequencies appears broadly equitable under the ICT law, we note that there has been widespread criticism of the proposals from existing licensees who are concerned at potential loss of their licences.²¹ In ARTICLE 19’s view, the principle of equitable allocation is an extremely important one but should not be used as a basis to unduly restrict or curtail existing media freedoms.

For this reason, ARTICLE 19 recommends that the radio spectrum should be equitably allocated between public service media, commercial media and community media.

Recommendations:

- The principle of equitable access to the airwaves should not be used to curtail existing media freedoms.
- The radio spectrum should be equitably allocated between public service media, commercial media and community media.

e) Content regulations

While content regulation does not appear to have been at the forefront of the minds of the drafters of the Bolivian ICT Law, ARTICLE 19 is concerned that Article 54.19 of the ICT Law may be used to impose undue restrictions on online content in violation of international law. Article 54.19 entitles users of ICT services to require the protection of children in the way in which services are provided. In our view, this provision is excessively vague and fails to comply with the strict legality requirement under international law. There is nothing in the law explaining in what sort of circumstances such protection may be required. Furthermore, the law fails to identify the kinds of measures that should be taken in such circumstances and who should be implementing them. Given the worldwide concerns about child abuse on the Internet, the law should, at the minimum,

¹⁹ Annual Report of the Office of the Special Rapporteur for Freedom of Expression, 2007, Inter-American Commission on Human Rights, Volume III, Chapter III, Paragraph 6.

²⁰ Annual Report of the Office of the Special Rapporteur for Freedom of Expression, 2008, Inter-American Commission on Human Rights. Volume III, Chapter V, Paragraph 10 (n).

²¹ See, for example, news media report of 11 August 2011; available at <http://knightcenter.utexas.edu/blog/journalists-balk-president-evo-morales-promotes-new-bolivian-telecommunications-law>

clearly define the kinds of measures that may be sought to protect children against such abuse, the process whereby such measures may be obtained, and who should be responsible for applying them.

We suggest that there are two ways in which the protection of children on the Internet may be addressed in line with international standards²². First, ISPs should be able to offer products designed to facilitate end-user filtering of “harmful” content to their customers. In other words, such content filtering measures would be available on a voluntary basis and end-user controlled. Secondly, measures such as the mandatory blocking of access to entire websites, IP addresses, ports, network protocols or types of uses should only be ordered by a court of law.

Recommendations:

- The law should, at the minimum, clearly define the kinds of measures that may be sought to protect children against abuse online, the process whereby such measures may be obtained, and who should be responsible for applying them.
- Internet Service Providers should be able to offer products designed to facilitate end-user filtering of “harmful” content to their customers.
- Measures such as the mandatory blocking of access to entire websites, IP addresses, ports, network protocols or types of uses should only be ordered by a court of law

f) Sweeping powers of interception in case of an emergency

ARTICLE 19 is disturbed by Article 111 of the ICT Law which gives sweeping powers of interception of communications to the authorities in case of an emergency. Article 111 provides that in cases of danger to the security of the State, external threat, domestic disturbance or disasters, ICT operators and providers must cooperate with the authorities by making available to them ICT services and networks and giving them access to all telecommunications emitted, transmitted and received, upon request.

Whilst this provision essentially raises issues of data protection, and the protection of private life more generally, it has important implications for freedom of expression. Indeed, the explosion of everyday Internet use means that the ability of individuals freely to communicate on the Internet, using emails, social media networks or other web platforms has become an essential aspect of freedom of expression. By the same token, any restriction on such freedom must meet the strict three-part test laid down under international law, i.e. it must be clearly defined by law, pursue a legitimate aim and proportionate to the aim pursued.

ARTICLE 19 recognises that in times of genuine emergency, there may be legitimate grounds for the authorities to adopt exceptional measures, e.g. requiring public broadcasters to carry emergency announcements, etc. However, there is an obvious danger that emergency measures could be disproportionate or abused. In particular, ARTICLE 19 is seriously concerned that Article 111 of the ICT Law could be used by the authorities, for example, to indiscriminately clampdown on social media and access to the Internet under false pretences of an “emergency”. In our view, this provision entirely fails to meet the strict legality test laid down in the ICCPR and the ACHR. In particular, the law does not clearly set out which kinds of measures may be requested by the authorities. Indeed, Article 111 merely refers to “making available” communication networks and services and telecommunications, without any requirement of necessity or proportionality.

²² See above the section on international standards.

Moreover, the ICT Law does not provide for any safeguards against abuse since, under Article 111, ICT services providers are required to cooperate with the authorities “upon request”, i.e. without judicial authorisation.

In our view, the legal framework for ICTs and telecommunications should not allow State authorities to assume sweeping powers over ICT operators and providers – in particular their equipment or content going through their networks – in an emergency.²³

Recommendations:

- Article 111 of the ICT Law should be repealed.

g) Miscellaneous

Given the wide ambit of the ICT Law, it is a matter of regret that the Bolivian Parliament missed an opportunity to elaborate on the digital switchover. Similarly, the ICT Law does not address the issue of online content regulation and the liability of Internet Service Providers despite their obvious relevance to the ICT and telecommunications sector. ARTICLE 19 stands ready to provide further detailed comments on any legislative proposal dealing with those issues.

²³ See Principle 4 of the Access to the Airwaves Principles.