

# **The Right to Communicate in Brazil: Historical Development and Current Challenges**

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## **Abstract**

This paper aims to provide a comprehensive overview of the challenges faced in Brazil for the development and consolidation of the right to communicate. For this purpose, it critically examines the existing legal and constitutional framework and brings concrete issues into the debate, by analyzing the historical aspects of media development in Brazil and exploring the way political practices have shaped the right to communicate in this country. The paper focuses on one of the main aspects of the right to communicate, namely civil society access to traditional mass media in Brazil.

**Keywords:** Brazil; Brazilian Federal Constitution; Civil Society; Mass Media; Right to Communicate.

## **Introduction**

Brazil is one of South America's most influential countries and one of the world's largest democracies. It is also South America's largest media market, with thousands of commercial radio and TV broadcasting channels and a strong press. However, with a recent history of dictatorship and a relatively short democratic experience, Brazil is still struggling with various issues related to the right to communication, such as high media concentration, a small number of sources controlling the flow of information, an important digital divide, and basic difficulties in making mass media vehicles function as effective channels through which citizens can seek, receive and impart information and ideas.

This paper aims to provide a comprehensive overview of the challenges faced in Brazil for the development and consolidation of the right to communicate. For this purpose, it critically examines the existing legal and constitutional framework and brings concrete issues into the debate, by analyzing the historical aspects of media development in Brazil and exploring the way political practices have shaped the right to communicate in this country.

Although the right to communicate is an extremely broad concept involving issues as diverse as copyright, cultural rights, telecommunications and Internet policy, this paper

will focus on one of the main aspects of the right to communicate, namely civil society access to traditional mass media in Brazil.

This methodological choice is justified by the important relations between mass media and democracy. In fact, the role of media is not (or should not be) limited to providing entertainment. Conventional theories about media place emphasis on the capacity of media institutions to “play a role in the democratization of societies, in creating a public sphere through which people could be empowered to take part in civic affairs, in enhancing national and cultural identity, in promoting creative expression and dialogue” (Raboy, 2003). Thus, traditionally it is argued that media is important in order to (i) provide a forum for discussion of conflicting ideas; (ii) provide citizens with information they need to perform the duties of citizenship adequately; (iii) give voice to public opinion; (iv) allow public expression of minority views; and (v) act as a watchdog of the government (Graber, 1986).

It is questionable, however, whether media organizations, as private enterprises in a capitalist society, actually perform the functions assigned to them by democratic theory. Despite the fact that human rights regarding communication, such as access to information, access to communication media and pluralistic representation of diverse points of view, are considered prior conditions for a full exercise of citizenship (Golding & Murdock, 1989), issues such as increasing media concentration, its excessively commercial nature and absence of civil society participation negatively impact the conformation of mass media as pluralistic and democratic spaces of free communication and information.

Considering that the right to communicate presupposes not only an individual freedom of expression but also a collective right that includes the right to send, receive, and impart any kind of information, ideas, and thoughts *using any type of media without any barriers* (Dakroury, 2005), this article examines to what extent this right is encompassed by Brazilian legislation – as far as both individual human rights and mass media regulations are concerned – and how historical, political, social and economic factors have molded public policy interventions with respect to media in this country.

### **The Right to Communicate and the Brazilian Federal Constitution of 1988**

The right to communicate is not formally recognized by Brazilian legislation, although several associated rights – such as freedom of speech, the right to receive information and the right to media pluralism – are provided for in the current legal framework. After a long period of military dictatorship, Brazil has only recently undergone a democratization process, marked by the enactment of a new Federal Constitution in 1988. In opposition to the previous period, stigmatized by severe restrictions to freedom of press and freedom of speech, the new Constitution, although not explicitly embracing the right to communicate, established numerous individual and social rights connected to individual communication, as well as several rules and principles concerning mass communication.

Although the 1988 Constitution did not treat communication rights in a systematic

manner, it is possible to identify two distinct dimensions of the right to communicate: (i) on one hand, there are several provisions concerning *individual rights* (classified as fundamental rights), such as privacy, information rights and freedom of speech; (ii) on the other hand, the Constitution establishes several rules concerning the *social aspects* of communication rights, related to issues such as mass media, pluralism, diversity, childhood protection and participation rights. In the following pages, communication rights in Brazilian legislation are examined under these two perspectives: the first section deals with the “individual” dimension of communication rights in Brazil, examining the constitutional provisions concerning “fundamental” rights and access to information; the second section concerns the debate related to the social dimension of communication rights and the expectation of “pluralism” in mass media.

### ***Individual Dimensions of the Right to Communicate in Brazil***

Individual communication rights are protected, in Brazil, by a series of specific legal mechanisms designed to ensure that there are no constraints over free creation, expression and diffusion of thought and information. It is worth noting that most individual rights associated to communication have the structure of traditional defensive rights against interference from the State, which leads some authors to classify them as “liberty rights” (i.e. the right to resist the oppression of power) and to name them, collectively, “freedom of communication” (Silva, 2001).

The freedom of expressing thought and the freedom of expression of intellectual, artistic and scientific activities and of communications, established in the Brazilian Constitution (1988), are, in fact, typical negative rights, that bring upon the State the obligation of refraining from any actions that may jeopardize them. Observance of such rights is guaranteed through the prohibition of any kind of censorship and by the right to expression without any prior governmental license. On the other hand, they are counterbalanced by the prohibition of anonymity and by the right to claim indemnity for material or moral damages. The Constitution also ensures the right to intimacy, to privacy, to honor and to one’s image. These rights, although directed mainly against the State, may also be claimed against private individuals or enterprises that may obstruct freedom of thought and expression.

The 1988 Federal Constitution additionally provides for several rights concerning access to information of personal, collective or general interest held by public organizations, a measure directly associated to the attempts to eliminate the “secrecy culture” that for many years was prevalent throughout the public sector. Such rights reflect the general principles of transparency and publicity formally adopted after democratization, and imply that the State must not only abstain from withholding information, but must also take measures to make such information available to public scrutiny. There are specific legal measures that may be taken by any individual who wishes to obtain access to personal information contained in public or governmental data bases.

### ***Social Dimensions of the Right to Communicate in Brazil***

Although the individual rights connected to communication are of crucial importance for the exercise of citizenship, the main challenges concerning the right to communicate lie with mass media organizations, in view of their close relation with the political system and of the role they play concerning pluralism and democracy itself.

The 1988 Federal Constitution reserved an entire chapter for so-called “Social Communication”, although it did not define precisely which activities it includes. Article 220 of the Constitution establishes the general principle of “freedom of social communication”, forbidding any restriction to free expression of thoughts, information or creations, through any form, process or vehicle. The freedom of expression defined in this constitutional chapter differs from the individual rights regarding communication described previously, since it is expressly characterized by the *medium* through which the communicative content is transmitted and specifically directed towards mass media (Ferreira, 1999).

Similarly to what occurs with the rules concerning individual freedom of expression, the so-called freedom of social communication is also a negative right, that is, a right *not* to be subjected to abuse or coercion by the State or by individuals. For this reason, the 1988 Constitution establishes additional safeguards, forbidding the law to contain any provision which may hinder full freedom of press in any medium of social communication; forbidding any and all censorship of a political, ideological and artistic nature; and determining that the publication of a printed social communication medium shall not depend on a license from authorities. These articles are complemented by the prohibition of levying taxes on books, newspapers, magazines and the paper used for their printing.

In addition to these negative rights, the 1988 Constitution also created positive rights, imposing on the Legislative Branch the obligation of regulating public entertainment with the aim of protecting childhood and youth, as well as establishing legal measures that allow persons and families the possibility of defending themselves against radio and television programs that violate ethical and social values and against publicity of products, practices and services which may be harmful to health or to the environment. These provisions establish a legislative obligation concerning the protection of childhood, of individuals and of families against inappropriate or harmful content transmitted through mass media, creating a corresponding right to information on behalf of society.

One of the most important aspects of Brazilian constitutional provisions concerning mass media is the right to *pluralism of sources and pluralism of information*. These rights unfold into several elements, such as the right to access communication media and the right to obtain diversified information, which, in their turn, translate into legislation and public policy obligations for the State.

It is impossible to overestimate the importance of pluralism of sources of information. A free media, reflecting a wide diversity of opinions is, in fact, a condition for democracy, as it increases the number of participants in democratic debate, allows for representation of minority viewpoints and gives access to diversified information, thus ensuring political

pluralism. In a democratic system, it is necessary that all political parties and trends of thought be known by society, in order to enable citizens to make their political choices and to cooperate in decision making processes. These are reasons why it is necessary to legally ensure that all segments of society have access to communication media, thus guaranteeing effective knowledge of existing debates and proposals and equality in face of communication opportunities (Lopes, 1997). In the field of political science, several authors, such as Dahl (2001), have defended media pluralism as one of the cornerstones of democracy.

The Brazilian 1988 Constitution created several mechanisms with the aim of ensuring *pluralism of sources* of information, such as the prohibition of monopoly or oligopoly in social communication media and the principle of complementarity between the private, the public and the State broadcasting systems. These provisions, coupled with the infraconstitutional norms concerning community broadcasting should, in theory, allow for the transmission of information originated from diverse sources. The Constitution also establishes several principles of production and programming that radio and television broadcasters and all other “electronic social communications media” must comply with: (i) preference to educational, artistic, cultural and informative purposes; (ii) promotion of national and regional culture and fostering of independent productions aimed at their diffusion; (iii) regional differentiation of cultural, artistic and press production, according to percentages established by the law; and (iv) respect for the ethical and social values of the person and the family.

In parallel, with the purpose of ensuring protection of the national culture and identity, newspapers and broadcasting companies are subject to severe restrictions as to foreign capital participation, limited to 30% of all investments, and only native Brazilians or those naturalized for more than ten years may hold editorial responsibility or be responsible for their management. The constitutional norms concerning protection of certain contents are complemented by specific legal rules relative to the channels that must necessarily be carried by cable TV and by digital TV.

Transmission of diversified opinions, especially on the political level, is also promoted by the so-called “antenna right”, namely the right to free-of-charge access to radio and television. This right is currently limited to political parties. The Constitution, furthermore, created a Social Communication Council (*Conselho de Comunicação Social*), that, in theory, should function as a democratic instrument through which civil society could influence the National Congress on topics related to mass media (Pieranti, 2007).

Finally, the special relevance of rights associated to social communication is reinforced by the fact that the Constitution determines that broadcasting and telecommunications services may be rendered directly by the State or by concessionaires or authorized companies, which should, in theory, imply a certain level of public control. In the case of broadcasting, the 1988 Constitution itself established specific rules for granting and renewal of licenses, involving the necessary approval of the National Congress. According to such rules, the non-renewal of a broadcasting license depends on approval

by at least two-fifths of the National Congress, and cancellation of a concession or permission prior to its expiring date depends on a court decision.

The extensive array of rights, guarantees and duties established by the 1988 Constitution regarding social communication reveals its strategic nature for the consolidation of democracy and for the social, economic and political development of the country. For this reason, regulation of mass media is justified not only in connection with its ownership, management and control, but also in regards to the *content* that is transmitted, concerning, for example, protection of children, editorial responsibility and pluralism of sources of information.

The numerous constitutional guarantees described above seem to indicate that Brazil is relatively well positioned in the protection and promotion of the right to communicate. Although this may be true from a formal and legal standpoint, it is important to note that these guarantees were introduced fairly recently – most of them only in 1988 – and that many of them still face serious challenges for implementation. The following sections provide a historical narrative of Brazilian broadcasting policy and examine how specific aspects of media development in Brazil and political practices have limited civil society access to mass media and shaped the development of Brazilian policy concerning the right to communicate.

### **Media ownership in Brazil: Evolution and Current Structure**

The evolution of media ownership in Brazil is marked by the fact that the most important mass media organizations in Brazil have traditionally been owned by private enterprises. As far as broadcasting is concerned, service provision is conditional on a license (a concession, permission or authorization) issued by the federal government, as mentioned above, and although there are some legal precedents concerning exploitation directly by the State, governmental investment is unusual. Furthermore, as demonstrated over the following pages, guarantees concerning civil society access and participation in mass media are scarce. This section addresses the development and current structure of broadcasting and telecommunication markets in this country, providing a review of the historical context of the right to communicate in Brazil and covering topics such as radio and community radio, commercial or state owned TV, community cable TV channels and public broadcasting.

### **Historical Development**

Radio was introduced in Brazil in the 1920's, but only began to be regulated in 1931, during President Getúlio Vargas's authoritarian regime. Although the first presidential decrees on the subject – decrees number 20.047 (1931) and 21.111 (1932) – characterized radio as a service of national interest and ensured that State-rendering would be a priority, conditions were created for its development also under private initiative: permission was given for advertising, according to specific criteria, and licenses were granted to private individuals. This attempt to enable the rendering of the service by private enterprises, in spite of explicit declarations of State prevalence, was to become one of the main characteristics of radio regulation in the country (Jambeiro et al., 2004).

Since the 1930's, however, State action in the sector has been limited, despite an overwhelming initial success. In 1940, as a result of State-incorporation of one of its shareholders, the National Radio (*Rádio Nacional*) began to be State-operated. Gradually this broadcasting company became one of the most important in Brazil, partly due to investments in the transmission of medium and short waves, which allowed a more extensive propagation, reaching not only the national territory, but also other countries. In the 1970's, following the course of other smaller radio broadcasting stations, the company was incorporated by recently created *Radiobrás*, a public company designed to operate the Federal government's broadcasting stations. At that time, the government was carrying out an "interiorization" policy that aimed to carry State-held radio companies' signals to communities traditionally deprived of information and access to public services. Nevertheless, the lack of investments and political problems – especially the dismissal of employees contrary to the military regime, installed in the country in 1964 – relegated State broadcasting to a secondary role (Saroldi & Moreira, 2005).

No more significant was State participation in commercial television. Since 1950, when *TV Tupi*, the first Brazilian broadcasting station, was launched, television developed mainly as a result of private investments. Until the 1970's, the country passed through a "transition phase" (Bolaño, 2004), during which several broadcasting companies began functioning in major capitals, although not yet in the form of national networks. This was the case, for example, of *TV Tupi*, *TV Excelsior* and *TV Rio*.

The Brazilian State did, however, play a crucial role in the development of telecommunications infrastructure, which ended up benefiting the broadcasting market. During the military regime, from 1964 to 1985, a modern microwave network was set up and satellite transmissions were initiated, both of which were considered essential measures for the formation of broadcasting networks (Bolaño, 2004; Pieranti, 2007). The military regime also undertook the nationalization of the telecommunications system, creating a company named *Embratel* in charge of national and international long distance calls, regional companies and a holding company named *Telebrás*. This complex telecommunications system was entirely privatized in 1998.

While Brazilian television gradually became more professional, small broadcasting companies entered an economic crisis. Partly due to political issues and partly due to the amateurish manner in which they were managed, broadcasting stations, such as *TV Excelsior*, *TV Continental* and *TV Rio*, had to close down. The most critical moment was the end of *Rede Tupi* (TV Tupi and part of its network), in the 1980's. Despite being the second largest broadcasting network in the country, *Rede Tupi* had a significant part of its program grid occupied by religious sects and television sales programs. As a result, the Federal government determined the closure of the company, in view of the severe financial losses the company was experiencing; it is worth noting that the President of the Republic, until the proclamation of the Federal Constitution of 1988, had powers both to grant and to withdraw broadcasting concessions.

A new scenario for broadcasting began to emerge in the 1960's, with the creation of *TV Globo*, today the largest and most powerful TV network in Brazil. Shortly after the beginning of operations, the company was accused of illegally receiving foreign financial aid, which led to an investigation by the National Congress (Herz, 1988). The cancellation of the contract between *TV Globo* and the Time-Life group after the end of the investigations did not, however, prevent the company from growing. By the 1970's, *Rede Globo* had become the largest network in the country. The former *TV Tupi* broadcasting concessions were, in their turn, divided between two new entrepreneurs, who would later create the broadcasting networks *Rede Manchete* and *Sistema Brasileiro de Televisão*.

State participation in TV was quite limited, and occurred mainly through the creation of educational broadcasting companies. According to Decree-law 236 (1967), published during the military regime, these companies were envisioned as the embryo of a national distance education program. In practice, however, educational broadcasting companies – some controlled by the Federal government, some by state governments – began transmitting programs that were not strictly educative, and the imagined network was not formed (Fradkin, 2004). In parallel, with the creation of *Radiobrás*, the Federal government began relying on small broadcasting stations that were in charge of transmitting official news.

Neither private nor public broadcasting companies had institutionalized mechanisms of participation or formal accountability processes, although, in time, some State-held broadcasting companies began introducing mechanisms for investigating and addressing complaints, such as the appointment of *ombudsmen*. Apart from isolated initiatives, institutional forms of ensuring society had access to media were implemented only in the 1990's, through two main mechanisms: (i) community radio broadcasting and (ii) participation in community and university cable TV channels.

*Community radio broadcasting* was legally regulated in 1998, defining community radios as low power and limited reach broadcasting stations directed by foundations and by non-profit community associations. Community broadcasting is without question an important way of empowering citizens, fomenting media pluralism and enabling people in distant, rural or underprivileged areas to share information that is relevant to them. Nevertheless, in Brazil, the extensive bureaucratic procedures required for the installation of community radio stations is one of the main obstacles for the rendering of the service and one of the most important criticisms directed towards the existing legislation (Leal, 2007).

*Community and university television channels* are, as a result of the Cable TV Law (1995), obligatorily transmitted by Cable TV providers. This law – a remarkable exception amongst Brazilian legislation – was enacted as a result of a rich interaction between organized civil society groups, market and governmental representatives. The outcome was an innovative law that created must-carry regulations, including new “public” channels (such as university and community channels), that should be carried on cable service provider's systems<sup>1</sup>. Even so, the low penetration of the service and



problems associated to the shared use of these channels still represent obstacles to the right to communicate.

A third form of access to mass media was conceived in March 2008, with the creation of a *public broadcasting system*. The impact of this measure is still hard to evaluate. Although the Federal Constitution of 1988 declares that there are three television systems in Brazil – State-owned, private and public –, Brazil has never had a strong tradition of public radio and television services such as those existing in many European countries. Only in 2007, through an Interim Measure (*Medida Provisória*)<sup>2</sup>, did the Federal government create public television, through the fusion of *Radiobrás* and the educational broadcasting companies connected to the Federal government, also allowing regional educational broadcasting companies to voluntarily join so as to create a network. The British and the Japanese models of public television, centered on BBC and NHK, respectively, were debated throughout this process, and served as references at some moments, especially concerning the topics related to accountability, administration and content. This Measure, following the Brazilian legislative process, was examined and approved by the National Congress in the beginning of 2008. The Interim Measure provided for some important steps towards democratization of the right to communicate, such as the participation of civil society in the Trustee Council of the public TV and the mandatory transmission of independent production programs. There are some concerns as to the degree of control and interference from the Executive Branch, which may weaken the public broadcaster's independence and impartiality, but it is still too early to assess the result of this experience.

### ***Structure of Broadcasting and Telecommunications Markets***

Until the enactment of the Federal Constitution of 1988, the President of the Republic was the sole person responsible for granting broadcasting licenses. Not surprisingly, this process was traditionally marked by privileges for fellow politicians and for government supporters.

According to Motter (1994), for example, the Federal government, between 1985 and 1988, when the current Federal Constitution was published, granted one thousand and twenty eight broadcasting concessions, which equals 30.9% of the total granted in the entire Brazilian history until that moment. Ninety-one members of the National Constitutional Assembly were granted one or more concessions, which equals 16.3% of the total number of five hundred and fifty nine constituents. The distribution of concessions became more intense as the moment approached for voting important issues. Among the members of the Constitutional Assembly that were granted broadcasting concessions, according to Motter, eighty-four (92.3%) voted in favor of the presidential regime and eighty-two (90.1%) in favor of a five-year term for the president at that time in office, decisions that clearly favored the Executive Branch. There are other similar examples in the country's history.

The proximity between politicians and the State as far as access to mass media is concerned, and the resulting use of broadcasting licenses as a medium of exchange in

political bargaining, is described as “electronic colonelism” (*coronelismo eletrônico*) by authors such as Santos and Capparelli (2005), Santos (2008) and Bayma (2008). This expression derives from another well-known concept in political science debates in the country – “colonelism”, a term that was popularized in 1948 by Victor Nunes Leal to refer to “a compromise, an exchange of advantages between the public power, progressively strengthened, and the decadent social influence of local leaders, notably landowners” (Leal, 1997: 40). The local leaders were known as “colonels” and counted on the goodwill of the State thanks to their domination of local people: in elections that were usually fraudulent, the “colonels” controlled the votes of the members of the communities they protected. Although the concept of “electronic colonelism” can and should be submitted to further critical examination, it is worth mentioning that this expression currently is used to refer to the use of mass media by politicians as a way of influencing the population and limiting the actions of their adversaries.

This kind of action is not considered illegal, although it could be described as a fraud to the “spirit” of the legislation in force. Both the Federal Constitution of 1988 and the Brazilian Telecommunications Code forbid elected officials to hold directive functions in broadcasting companies, and the 1988 Constitution prohibits them from maintaining formal relations with companies that hold public service concessions. Nevertheless, senators and deputies argue that they may hold shares of broadcasting companies as long as they do not manage these companies directly.

Another distinguishing mark of the Brazilian broadcasting model is the high concentration of media ownership. Researches carried out by the *Instituto de Estudos e Pesquisas em Comunicação – EPCOM (2002)* indicate that the six main private television networks embodied 140 affiliated groups, which, in their turn, held 309 television stations, 308 radio stations and 50 newspapers and magazines. A partial update of this research in 2005 by the National Forum for Democratization of Communications (*Fórum Nacional pela Democratização das Comunicações – FNDC*) revealed that the six main commercial television networks had 263 affiliated broadcasting companies, out of a total of 332 existing in the country<sup>3</sup>. Since the main networks usually produce a large part of their programs, the media space for distribution of regionally and independently produced programs is greatly diminished.

Media concentration in Brazil is not yet marked by the presence of global economical groups. Nevertheless, although the participation of groups like Time Warner, Viacom and News Corp is lower than in the United States, for example, the Brazilian communications market is mainly occupied by national groups that adopt “expansion patterns” similar to those of international groups.

*Organizações Globo*, whose structure is compared by some authors to that of Mexican Televisa (Fox & Waisbord, 2002), controls free to air television channels, radio stations, pay TV channels (such as *Globo News* and *Sportv*, which often owns exclusive rights over the Brazilian Soccer Championship transmission in pay-TV), the biggest cable provider in the country (*NET*, in a partnership with minority shareholder *Embratel*, controlled by *Telmex*), several newspapers (including *O Globo*, one of the largest in the

country), a weekly magazine (*Época*), and other mass media organizations. Other groups, like *Record* and *Bandeirantes*, also control, simultaneously, free to air television channels, radio stations and pay-TV channels.

Since television networks in Brazil are not subjected to limits related to potential audience or to the number of stations that retransmit the same programs, the free to air channels mentioned here often command huge networks: according to the research carried out by EPCOM (2002), *Globo's* network reunited, in 2002, 89 VHF television channels; *Record*, 45; *SBT*, another large group, 93; and *Bandeirantes*, 43. At that time, *Globo's* network was responsible for 54% of the television audience in Brazil, and the six main private networks were responsible for 92% percent of the audience (the situation has changed slightly since the recent growth of *Record*). There are some cases of “double affiliation”, i.e., one channel partially retransmits the programs of two or more networks. In the case of radio, the networks are smaller and often are related, when they exist, to regional groups.

The importance of free to air channels can be clearly understood when they are compared to the results of other mass media: pay TV, for example, has a penetration of only 10% (around 5.3 million subscribers), and only seven million newspapers were sold per day in 2002 – in a country with more than 180 million inhabitants (Agência Nacional de Telecomunicações [Anatel], 2007; Pieranti, 2007). It is important to mention that the Brazilian legislation establishes no media cross-ownership limits; the only limits, established by Decree-law n. 236 (1967), refer to a maximum of ten free to air television channels (five VHF), ten local radios, six regional radios and two national radios per economic group. Since there are no limits to the network's expansion, these legal restraints represent no real obstacle to media concentration.

Media consolidation and the intense participation of elected officials in broadcasting companies are mainly due to two historical factors: the preponderance of private initiative and commercial broadcasting, as previously described, and nationalism. Since the passing of the first legal norms concerning communication, in the 1930's, it was decided that only native or naturalized Brazilians could own radio and TV broadcasting companies, a limitation that finds strong support in the National Security Doctrine and its variants, the main marks of the national authoritarian regimes (Pieranti, 2007). Restrictions to foreign capital, motivated by concerns as to the preservation of national identity and political and economic sovereignty, coupled with the limited number of economic groups in Brazil capable of deploying and maintaining a broadcasting network, are some of the factors capable of explaining the extremely high levels of media concentration experienced in Brazil.

Foreign capital restrictions were mitigated in 2002, with the approval of a constitutional amendment that allowed newspaper and broadcasting companies to have up to 30% of foreign capital. The constitutional revision was the result of an agreement between broadcasters and congressmen of all political trends and can be explained as a reflection of the progressive opening of previously protected economic sectors to foreign

investments, in the aftermath of multilateral agreements, of international pressure (Lima, 2001; Bolaño, 2007) and of State deficiency in the direct rendering of services.

The same reasoning was applied to telecommunications services, traditionally rendered directly by the State. In 1995, a constitutional amendment was passed that determined the creation of a national regulatory authority and allowed telecommunications services to be rendered by private companies, conditional on obtaining a license. The National Telecommunications Agency – Anatel was created in 1997, by the General Telecommunications Law, and privatization of the State-held telecommunications companies took place in 1998, justified, among other arguments, by the government's lack of financial resources to promote expansion of telephone networks.

Although the original idea was to reform both broadcasting and telecommunications legislation, powerful lobbies and the direct interest many congressmen had in broadcasting companies (Ramos, 1997) led to the result that only telecommunications services regulations were reviewed and came under the jurisdiction of the new law and of the new regulatory agency. Broadcasting services remained under the supervision of the Ministry of Communications and under the rule of the Brazilian Telecommunications Code of 1962, a law characterized by strong centralization of powers in the Executive Branch (Lopes, 1997). Thus, under the current legal framework, licensing and regulation of broadcasting services is excluded from Anatel's jurisdiction, although, paradoxically, cable television and all other pay TV services remain under its responsibility.

As a result of the privatization of State-held telephone companies, the country was divided into three Regions, each one to be commercially exploited by a concessionaire, with universal service obligations. Besides these three regions, a fourth region was created, covering the entire national territory, to be exploited by another concessionaire responsible for national and international long distance calls. After a period of duopoly in each region between the concessionaire and a "mirror-company", the market was fully liberalized. Other companies were allowed to enter the market without universal service obligations, but had to build their own networks, while the concessionaires inherited the pre-existing infrastructure. The mobile telephony market was also liberalized, and experienced large success. The previously State-held telephone companies were sold for a little more than R\$ 22 billion (around US\$11 billion today), an amount that was strongly contested at the time.

There were no limitations to foreign investments during privatization, which allowed a significant influx of financial resources from Europe and from North America. Currently, fixed telephone service providers aim to offer cable TV, which is, at the moment, not legally permitted. There are ongoing debates in the National Congress about changing the legislation in force.

### **The Right to Communicate in Brazil: Challenges and Emerging Issues**

Media concentration creates an obvious obstacle to real pluralism, a key-concept for the right to communicate. This problem could be greatly diminished if there were effective

and institutionalized participation mechanisms that allowed civil society access to media and accountability before the competent regulatory authorities. It is, however, important to remember that the growth of social movements in this field is slow and began only in the mid-1980's, during the political democratization process, which, in its turn, was not accompanied by significant transformations in media structure (i.e., there was no review of existing concessions or revision of the main rules of the sector). The limits of democratization and the maintenance of a *status quo* may explain, at least in part, the limited capacity of social movements in exercising pressure and promoting changes in the field of mass communication. This section offers a critical examination of existing participation mechanisms – such as the Social Communication Council, the public consultations carried out by Anatel, cable television and community broadcasting – , and of the challenges that must still be faced.

One of the most important instances of civil society participation in mass media should, in theory, be the Social Communication Council (*Conselho de Comunicação Social*), created by the 1988 Federal Constitution. When the Council was initially envisaged by progressive congressmen and by civil society groups, during the National Constitutional Assembly, it had several diversified functions: it should be responsible for drawing up policies and controlling broadcasting grants, and should be composed by members of civil society, of the market and of Executive and Legislative Branches. The project was harshly criticized and, in the end, the Council's role was reduced to that of an auxiliary organ of the National Congress.

Despite the constitutional provision, the Council was only legally regulated in 1991 and installed in 2002. It was composed, as provided by law, of three representatives of broadcasting companies and press associations, one engineer with knowledge in social communication, four representatives of class entities and five civil society representatives, all connected to journalism and broadcasting. Until 2006, the Council functioned normally, but once the second two-year term of office was concluded, no new members were appointed. This situation persists up to the present moment (July, 2008). Between 2002 and 2006, on more than one occasion the Social Communication Council was recognized by its own members as an organ with limited power and influence (Congresso Nacional, 2004).

As far as civil society participation in policy-making is concerned, it is important to mention that the formulation and implementation of public policies is the responsibility of the Executive Branch. In the case of telecommunications, the first stage is in charge of the Ministry of Communications, and the second, excluding broadcasting, as mentioned previously, is in charge of Anatel, the national telecommunications Agency. While broadcasting policy-making, according to Ramos (1997), is still largely influenced by lobbying and powerful interest groups, usually connected to congressmen, telecommunications regulation offers a relatively larger degree of participation and transparency. The Agency is legally obliged to hold public consultations, open to all interested parties, before editing any new regulation, although there are no guarantees that the opinions expressed will influence the decision-making process. Civil society also has representatives in Anatel's Consultive Council, whose new members were chosen

and appointed in March 2008 after one year of inactivity. Among the Council's attributions are expressing opinions on the General Licensing Plan and on the General Plan for Universal Service Goals.

Among positive experiences of civil society participation in media, it is worth highlighting two important national experiences: cable television and community broadcasting, as described previously. In the first case, the current discussions concern the rules for sharing the channels to be used by civil society and the ways to expand the market, since all subscription television services jointly have only 10% penetration. A bill of law in discussion at the National Congress proposes to increase their penetration by homogenizing the rules applicable to pay TV services and allowing the provision of cable TV by telephone service providers. In the second case, the bureaucratic demands relative to the obtaining of broadcasting licenses have created difficulties for those interested in installing community radios.

As for broadcasting, one of the most recent debates on larger and more effective civil society participation occurred during the discussions on which technological standard should be adopted for digital television. In 2006, Brazil opted for the Japanese standard, and in the same presidential Decree that stated this choice, four channels were assigned for "social" purposes: to be used by the Executive Branch, for educational purposes, for cultural purposes and by citizens. There is still, however, no explanation as to how they shall be used. Another important landmark was the creation of a public broadcasting network, as mentioned above.

### **Current Challenges**

Although the right to communicate is still one of the most controversial issues today, there is a growing consensus that it is necessary to ensure the creation of democratic spaces of communication and to reaffirm rights such as freedom of expression and access to information and knowledge. Affordable access to information and communication technologies is also an important step to allowing transparent democratic debate and the dissemination of knowledge of public interest, for education, entertainment and practical uses. The right to communicate also focuses on important subjects such as the preservation of cultural and minority rights, as well as security and privacy. Perhaps the central issue is to ensure free interaction among individuals and groups by guaranteeing their access to communication media in an extremely complex and unequal society.

In this sense, the Brazilian Federal Constitution of 1988 is quite generous in providing rights and guarantees, and is certainly much more progressive than previous Constitutions drafted during dictatorial periods. Nevertheless, there are still many issues to be faced. Merely to state rights does not ensure their observance, and changes do not emanate from top-down directions. Although the Constitution is an important legally binding document, enforcement is not a simple issue.

In the Brazilian legal system, there are no ways to verify compliance with the constitutional principles of programming and production in mass media, and there are no

objective criteria to evaluate the fulfillment of the social goals that are inherent to a broadcasting concession. The requirements that (i) non-renewal of a broadcasting license shall depend on approval by at least two-fifths of the National Congress, and (ii) cancellation of a concession or permission prior to its expiring date depends on a court decision, have the effect of solidifying existing concessions. Concurrently, the Social Communication Council has never functioned effectively, and the national legislation concerning mass media is outdated and unprepared to deal with a scenario of technological convergence.

Perhaps the main difficulty in Brazil for the democratization of media and communication lies with State inertia in formulating and implementing the regulations and public policies that the 1988 Constitution demands. Although numerous rights concerning communication have been formally stated, they are often ignored or only partially implemented, according to political and economical conveniences. This disposition to remain inactive, possibly related to the close historical bonds between broadcasters and politicians in Brazil, ends up preserving the problems and difficulties faced under previous constitutional law and giving force to the defenders of savage capitalism in mass media in Brazil (Bolaño, 2003).

Over the next years, debates concerning the guarantees connected to the right to communicate will tend to continue, especially in relation to traditional mass media. The need for modernization of the legal framework in relation to the broadcasting sector (today still ruled by a law from 1962) and the appeals for reactivation of the Social Communication Council are recurrent themes. Current debates also include the bill of law for subscription television and the need for consolidation of recent conquests, such as the public broadcasting network and the “public” channels created in the digital television Decree. There is still a long way to go. However, despite the many structural difficulties that Brazil still faces, the present moment of discussion is a significant opportunity for the introduction of new prospects on communication rights in Brazilian civil society.

## Endnotes

<sup>1</sup> For an in-depth examination of the process that led to the enactment of the Cable TV Law, important references are Jambeiro (2002) and Ramos and Martins (1996). Must-carry rules are not applicable to MMDS and to DTH, other pay TV platforms, but a bill under discussion at the National Congress aims to homogenize these rules. At the time this paper was written (July 2008), the Bill of Law had not yet been approved.

<sup>2</sup> An Interim Measure (*“Medida provisória”* or *MP*) is an instrument with force of law of which the President of the Republic disposes to decide issues that are urgent and relevant for the country. The Interim Measure must be examined by the National Congress and, if approved, is converted into a law. This was the case of the Interim Measure that created Public TV.

<sup>3</sup> In July 2008, Epcom was preparing an update to this research.

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