

Deficient regulation of community media in Spain: the case of Cuac FM

ISABEL LEMA BLANCO

Universidade da Coruña

isabel.lesa@udc.es

ORCID: <https://orcid.org/0000-0003-2965-8052>

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Abstract

This article makes a critical analysis of the fundamental right exercise to freedom of expression and, specifically, of the deficient community non-profit audiovisual communication services regulation in the Spanish context. The case of Cuac FM (A Coruña) illustrates the limitations and difficulties faced by citizens when accessing the media. Cuac FM is a community radio station that was forced to take legal action against the regional administration and which had its broadcasting rights finally recognised by the courts of justice.

Keywords

Non-profit audiovisual services, freedom of expression, audiovisual communication regulation, right of access, community radio stations.

Resum

Aquest article realitza una anàlisi crítica de l'exercici del dret fonamental a la llibertat d'expressió i, concretament, de la deficient regulació dels serveis de comunicació audiovisual comunitaris sense ànim de lucre en el context espanyol. El cas de Cuac FM (la Corunya) ha il·lustrat les limitacions i dificultats a què s'enfronta la ciutadania a l'hora d'accedir als mitjans de comunicació. Cuac FM és una emissora de ràdio comunitària que es va veure en l'obligació de litigar contra l'administració autonòmica i que va veure finalment reconeguts els seus drets d'emissió pels tribunals de justícia.

Paraules clau

Serveis audiovisuals sense ànim de lucre, llibertat d'expressió, regulació de la comunicació audiovisual, dret d'accés, ràdios comunitàries.

1. Introduction

Social media are powerful tools of collective influence that, in democratic systems, play the role of critical observers of reality, while having the capacity to set the political agenda and favour states of public opinion, and can even produce far-reaching political changes (LEWIS 2015). The media system should constitute, as a whole, a pluralistic platform of expression for a multiplicity of groups and interests (NORRIS 2008), since access to the media is an essential condition for the full participation of citizens in the public space (MACBRIDE 1980). Different international organisations such as the UN, UNESCO, the European Parliament (2008) or the Council of Europe (2018, 2009) have highlighted the role played by the media belonging to the so-called "Third Sector of the Media" (Barranquero 2016) and have recommended the member states to protect and promote them, urging them to make available the necessary spectrum of analogical and digital radio and television frequencies, for the adequate exercise of their functions.

An example of this is Resolution dated 24 June 2008 of the European Parliament, recognising the role of the third

sector media as "effective instruments for strengthening cultural and linguistic diversity, social inclusion and local identity, contributing to intercultural dialogue". According to the European Parliament, the third sector would correct "the ideas disseminated by the mass media with regard to social groups threatened with exclusion, such as refugees, immigrants or ethnic and religious minorities". On his behalf, the Council of Europe in its Declaration of 11 February 2009 considers community media "as a distinct audiovisual sector, alongside public service and private commercial media" and urges member states to create legal infrastructures where community media can develop, establishing reserves of analogue frequencies "which may still be needed after digital switch-on" and providing funding to this sector so that "they are not at a disadvantage in a digital environment".

However, despite international recognition, if comparative law is taken into account, Community audiovisual media suffer from unequal regulation in the European context (MEDA 2015; ORTIZ SOBRINO 2014). In Europe there are countries where this sector enjoys a high degree of development and scope, even without extensive regulatory development to protect it (e.g. Holland or Austria), with other states such as France, Denmark, Norway,

Ireland or Italy whose legal system regulates the right of access to broadcast licences and provides instruments to ensure the economic sustainability of citizen-owned media (ORTIZ SOBRINO 2014; CHEVAL 2014; LEMA-BLANCO and MEDA 2016). In contrast, Spain has legislation on audiovisual communication that has yet to be developed and, as a result, the community sector is in a highly vulnerable and unequal position (GARCÍA-CASTILLEJO 2016; CHAPARRO 2014) due to a number of “barriers and administrative restrictions that contravene current legislation” (GARCÍA-CASTILLEJO 2016: 131).

This article addresses the limitations and restrictions to the exercise of freedom of expression and communication of citizens in the Spanish context and, specifically, regulation of access to the radio spectrum by non-profit audiovisual communication services. A critical analysis of the level of development and application of Spanish legislation on audiovisual communication is carried out, to then present the case of the free and community radio station Cuac FM (A Coruña, Spain) which, after 24 years of existence, has achieved the recognition of its broadcasting rights in the courts of justice, an extremely relevant fact for the third sector of the media.

2. Conceptualisation of community media and its regulation in the Spanish system

Community media, also called associative or citizen media, are characterised by being privately owned, non-profit media whose main mission is to meet the communication needs of local communities. They are characterised by encouraging citizen participation in both the ownership of the medium and in its programming, administration, operation, financing and evaluation (AMARC 2010). Community media have been internationally recognised as a counterbalance to excessive concentration of media ownership (COUNCIL OF EUROPE 2018), as well as effective tools to strengthen the cultural and linguistic diversity of regions (LEMA-BLANCO AND MEDA 2016), improve social cohesion and promote processes of training, literacy and media empowerment (LEWIS and MITCHELL 2014; LEMA-BLANCO 2018, 2015; LEMA-BLANCO *et al.* 2016).

The existence of citizen-owned media is inferred from the 1978 Constitution, which recognises and protects the right “to freely express and disseminate thoughts, ideas and opinions by word, writing or any other means of reproduction” (Article 20.1.a), as well as “to freely communicate or receive truthful information by any means of dissemination” (Article 20.1.d), it being the responsibility of the public authorities “to remove the obstacles that prevent or hinder the participation of citizens in the political, economic, cultural and social life of the country” (Article 9.2). This right to freedom of communication has subsequently been developed by the Constitutional Court and the Supreme Court, whose case law has confirmed in a number of sentences the right of citizens, through their various forms of

collective association, to participate in radio broadcasting, with the State having to establish the channels that guarantee this exercise (SAAVEDRA 1993). Thus, as Boix points out (2007: 40), various local television and radio stations “that operated without any legal support or administrative concession, saw their rights protected in various rulings of the Constitutional Court by virtue of the exercise of their right to freedom of expression.

Nevertheless, despite the constitutional text, non-profit community audiovisual communication services have had to wait for the approval of current General Audiovisual Communication Law 7/2010 (OFFICIAL STATE BULLETIN, BOE by its initials in Spanish 2010) to be explicitly recognised in the Spanish system as citizens’ right. This recognition is the result of intense dialogue with different political actors by the free and community radio and television station sector, organised under the protection of the Community Media Network (REMC by its initials in Spanish). During the drafting of Law 7/2010, the ReMC demanded “an urgent debate on the imperative need for a democratic state to have a solid and healthy third sector of the media” (CLÚA *et al.* 2006: 2) and actively claimed the broadcasting rights of community media, presenting a good number of allegations to the draft of the rule, which were partially reflected in the final text (Meda 2013; GARCÍA 2013).

Article 32 of Law 7/2010 regulates issues related to community media as follows:

“Private entities with the legal status of non-profit entities may provide non-profit community audiovisual communication services to meet the specific social, cultural and communication needs of communities and social groups, as well as to promote citizen participation and structuring of the associative fabric” (Article 32.1).

Section 2 states that “the General State Administration must guarantee in all cases the availability of the public radio domain necessary for provision of these services” (Article 32.2), which has been considered a turning point for a sector historically forgotten by the legislator, although it does not establish the obligation to make a “reserve of radio space” as recommended by some international bodies such as the Council of Europe (MEDA 2012).

The legislator makes the rights of legal persons responsible for community radio and television stations conditional on complying with a number of requirements, such as the prior granting of a licence or the obligation to submit financial reports to the audiovisual authorities. Restrictive limitations are also placed on the economic capacity of these media, since “their contents must be broadcast free-to-air and without any form of commercial audiovisual communication” (Article 32.1), which limits the medium’s capacity for self-financing. Furthermore, as stated in the same article, “unless expressly authorised by the audiovisual authority, annual operating costs may not exceed 50,000 euros in the case of radio stations and 100,000 euros in the case of television stations” (Article 32.6). It should be noted

that these conditions are never imposed on commercial media, nor are the reasons for such a difference in treatment between commercial and non-profit media justified in the regulation. For all these reasons, some authors have been complaining that, despite the progress mentioned, citizen-owned media continue to be discriminated against and limited in comparison with the public and private commercial sector (GARCÍA-CASTILLEJO 2016; GARCÍA 2015).

Law 7/2010 established the need to develop, within a maximum period of 12 months from its approval, a specific regulation establishing the basic conditions for provision of non-profit community communication services, as well as the procedure for granting the relevant licences (Transitional Provision 14). It should be noted that this regulation has not been developed and approved yet, despite the fact that a decade has passed since adopting this regulation. This legislative failure has drawn the attention of the Council of State itself (2019), which has described this situation as “particularly anomalous and unjustified, given that it is a constant complaint from the sector”. Meanwhile, the Government has continued to carry out *de facto* distribution of the radio spectrum that discriminates against community media, without establishing any reservations for this sector (MEDA 2013; ZALLO 2010), or planning licences for community television stations. These issues are being studied by the UN Human Rights Committee, following the complaint made by the Community Media Network (REMC 2018).

In recent years there has been little legislative activity to address this anomaly. In 2017, the Congress of Deputies approved a non-legislative proposal in the Committee on Energy, Tourism and the Digital Agenda, which urged the central government to “regulate the granting of temporary authorisations to community radio and television communication services that were in operation prior to 1 January 2009” (OFFICIAL JOURNAL OF THE CONGRESS OF DEPUTIES, BOCG by its initials in Spanish 2017). However, this non-legislative proposal, backed by the majority of the political groups, did not result in any progress on the part of the executive.

At the regional level, a small number of autonomous communities have begun to develop specific regulations for the granting of licences for community media, as has been the case of the Government of Catalonia and the Andalusian Parliament. The Catalan Government has drawn up a draft decree on non-profit audiovisual communication services, which establishes that when the central government plans new frequencies, a tender will be launched to select frequencies from among the Community broadcasters in operation (Government of Catalonia 2018a). This draft, pending approval, also includes measures to promote community media and is accompanied by a regulatory impact assessment report, aimed at regulating community media as an effective mechanism to reduce radio piracy (GOVERNMENT OF CATALONIA 2018b).

In October 2018, the Andalusian Parliament approved the

Andalusian Audiovisual Law 10/2018, which establishes measures aimed at digital literacy (OFFICIAL BULLETIN OF ANDALUSIA 2018, BOJA by its initials in Spanish). This was the result of an intense debate which around forty sector-specific and educational organisations took part in, constituting the “Andalusian Forum for Education, Communication and Citizenship”. The contributions of the aforementioned forum have been essential for this law to regulate citizens’ right of access to public media, promotion and recognition of community media, promotion of media literacy and promotion of citizen participation in the Audiovisual Council of Andalusia, constituting the most advanced legislative development for the audiovisual sector in the Spanish context.

The Andalusian Communications Law provides for the need to achieve “as far as possible (...) a balance between public sector providers, non-profit community media and private commercial media” (Article 2). It also establishes different technological and economic conditions for private commercial media and community media when accessing new broadcasting licences. The law includes a specific process for awarding licences for non-profit communication services and allows these media to have access to public funding sources to carry out their activities (Article 56). Economic and technological viability will be determined in accordance with the characteristics of the sector and by virtue of the capacity of the medium “to contribute to the structuring of the associative network of the service provision area, the number of hours of programming carried out by persons, social groups and social entities in the service provision area or the existence of mechanisms to form part of the project, participate in decision-making and in the governing bodies” (Additional Provision 2). These conditions established by the legislator are intended to ensure that licences are granted to non-profit-making entities which, among other requirements, are governed by criteria of free access, democratic functioning and service to their community of reference, as demanded by Andalusian community radio stations.

However, the Andalusian Government recently approved the Decree-Law 2/2020 (BOJA 2020) which amends, among others, the Andalusian Audiovisual 10/2018 extremely regressively as far as local radio and television stations are concerned. This situation has been denounced by organisations such as EMA-RTV or the Platform for the Defence of Communication and Journalism of Andalusia, who consider that the decree, appealed to the Constitutional Court, violates the state’s competence over telecommunications and social communication media, by enabling radio broadcasts in chain. The decree therefore eliminates the obligation to have a broadcasting studio in the coverage area, while at the same time abolishes the prohibition on the inclusion or broadcasting of any type of audiovisual commercial communication on unlicensed stations (the so-called “pirate stations”) and also opens the way to the privatisation of municipal stations (Article 28.8).

3. Litigation of broadcasting rights: the CUAC FM case

Cuac FM is the community radio station of A Coruña. Founded in 1996, Cuac FM is owned by the Colectivo de Universitarios Activos (CUAC), a non-profit cultural association made up of a hundred members, which besides the informative activity of a local media, it also promotes various media training projects. Throughout its 24 years of history, Cuac FM has requested on several occasions to the Government of Galicia a licence to broadcast as a non-profit radio station, always obtaining a negative response and being placed in future planning or regulatory developments at the state level. After the approval of Law 7/2010, the regional government called a public tender for commercial broadcasting licences in 2012, which was appealed in court by the Community Media Network. This entity argued that the Galician administration was depleting all the concessions that could be granted under the existing radio spectrum planning, without attending to the needs of the existing community media or establishing a reserve in the radio space for future awards to this sector.

The High Court of Justice of Galicia (TSXG by its initials in Galician) admitted the appeal, but ruled in favour of the administration, interpreting that this procedure did not infringe the right to have a licence in the future for this community broadcaster, since “there is the possibility of opting for commercial licences” (TSXG Sentence No. 620/2016). However, the court did not assess the inequality of conditions that exist between media companies and non-profit entities when it comes to meeting the technical and economic requirements necessary to be able to participate in a competition for commercial licences (for example, the provision of a deposit) and which represent an entry barrier for entities that do not carry out an economic activity.

In spite of the non-awarding of licences for community broadcasters, the Galician institutions had been maintaining a policy of non-persecution and respect for the *status quo*, which allowed for the activity of community media, given the evident anomaly in the media system. However, this situation was altered in September 2017, with the opening of a sanctioning procedure against Cuac FM by the Galician Government, at the request of the Ministry of Industry, for broadcasting without the corresponding licence, subjecting this station to an administrative sanction of between €100,001 and €200,000, which led to the temporary cessation of its broadcasts on the FM frequency, although maintaining its activity on the Internet.

The group submitted a pleading to this sanctioning file which was mainly based on three arguments: (1) the recognised public service provided by the community radio station Cuac FM, of whose existence the regional administration had been aware since before the start of its activity, without that radio broadcast affecting the rights of other media in the area or representing any damage; (2) the non-existence of the infringement due to the recognition of the right of access to non-profit radio communication services which is deduced from transitional

provision 14 of Law 7/2010; and (3) the action in good faith by the defendant in the exercise of a fundamental right. An example of this was that, upon the opening of the sanctioning file, the defendant group immediately ceased its FM broadcasts.

The allegations presented were partially accepted by the Galician administration, which resolved absolving Cuac FM from the foreseen economic sanction, but establishing the prohibition to broadcast through the modulated frequency (CUAC 2018). Disagreeing with this administrative resolution, the association decided to file a contentious-administrative appeal against the Galician Government before the High Court of Justice of Galicia (TSXG) through the special channel for the protection of fundamental rights. CUAC requested the annulment of the ban on broadcasting on the FM frequency, arguing that the ban violated its fundamental right to freedom of expression.

The TSXG issued a Sentence that upheld the claims of the community broadcaster (Sentence 00507/2018), declaring that the General Secretariat of the Media of the Government of Galicia violated with its resolution “the fundamental rights of CUAC” by not making effective Article 20 of the Spanish Constitution, which recognises “the right to create and use media, in this case community audiovisual communication services through which to disseminate ideas, opinions and information”. The TSXG gives Cuac FM a temporary guarantee for broadcasting and bases this ruling on the fact that audiovisual legislation provides for a period in which operators can continue to broadcast until it is regulated by the state, “providing for the granting of the appropriate licences, without any regulation having taken place in Galicia”.

The TSXG’s sentence is also consistent with the doctrine of the Constitutional Court (Sentence of the Constitutional Court 31/1994 of 31 January), which ruled that the exercise of a fundamental right such as those recognised in Article 20.1 (a) and (c) of the Spanish Constitution cannot be deferred *sine die* by the legislator, since the absence of legal regulation would lead, *de facto*, to the outright prohibition of the exercise of freedom of communication. After the sentence of the TSXG, Cuac FM decided to resume broadcasting on FM on 1 November 2018 after thirteen months of silence on the airwaves. This sentence by the TSXG was subsequently appealed against by the Galician administration in cassation before the Supreme Court, which rejected the appeal and ordered the Galician Government to pay the costs of the proceedings.

4. Conclusions and proposals

This article presents an analysis of community media’s legal situation in the Spanish context from which it is concluded, firstly, that the exercise of media communication by citizens is not carried out in adequate conditions of equal access to the radio spectrum. This sector is discriminated against by the administration, as various authors and experts have denounced (GARCÍA-CASTILLEJO 2016; MEDA 2015). The Administration has

prioritised public and private commercial media in granting broadcasting rights (CHAPARRO-ESCUADERO 2014; ZALLO 2010), while it has kept community television and radio stations in a situation of legal uncertainty, penalising the communication activity that is carried out without any burden and with a social purpose, relegating it to a situation of marginality (MEDA 2013; GARCÍA 2015).

The absence of an appropriate regulatory framework, as well as an adequate funding model for community media, has been detrimental to the sector's economic and social sustainability, leaving them in an extraordinarily weak position compared to their European counterparts. Thus, while in countries such as Ireland, France, Austria or Germany, associative radio and television stations are legally protected and financially supported by the Administration, allowing them to employ a good number of journalists, social communicators and cultural promoters (CHEVAL 2014), in Spain these media seem to be condemned to perpetual amateurism (MEDA 2015). This situation also undermines citizens' right to be informed through different sources, especially in the audiovisual field, where television and radio continue to be the media most used by citizens (EUROBAROMETER 2017) as well as the ones they trust the most (EUROBAROMETER 2018). The weakness of the third sector of the media, in particular community media, puts audiovisual pluralism at risk, as recognised by the recent *EU Media Pluralism Monitor* report (MASIP *et al.* 2017). Receiving plural information is a right of the citizenry and is based on the legal obligation that alternative sources of information are protected by law and that, in addition, such sources of information exist (DAHL 1989 in KLIMKIEWICZ 2019: 3).

In Spain, the exercise of the right to communication is not fully guaranteed under the terms established by the constitution. An example of this is the case of the Community radio station Cuac FM, which was the subject of a sanctioning procedure that led to the cessation of its broadcasts on the FM frequency for 13 months, without the damage caused to the group having been repaired. There is therefore a situation of abandonment arising from the ineffectiveness of a State, which has decided to refrain from complying with a law passed ten years ago, and from the ineffectiveness of an autonomous community which has not known how to, or has not wanted to, regulate or protect community radio broadcasting services in its territory, having the tools to do so.

Seeking protection of their rights of expression and communication in the courts of law is not a trivial issue for community media. This implies having the capacity and skills to design a legal strategy, when many of them do not have adequate economic and human resources, especially if the lawsuits to be initiated entail the risk of paying legal costs that these non-profit media cannot assume, as they have denounced before the UN Human Rights Committee (CDR 2018). This is why the recognition of Cuac FM's broadcasting rights in the courts of law and, specifically, of the temporary broadcasting guarantee included in the 2008 law, is a particularly important

milestone for the sector. This is the first time that a court decision has recognised that the ineffectiveness of the administration is a violation of a community radio station's constitutional rights.

The Court interpreted that the transitional regime of the General Audiovisual Communication Law, which regulates those community communication services that precede the law, grants them legal protection until the sector is adequately regulated. Thus, recognition of the guarantee of temporary broadcasting would legally support the activity of a hundred or so community broadcasters who have no licence. It is to be expected that the Cuac FM case will also serve as a legal precedent for the regional and state administrations to consider their claims to persecute and close down community radio and television stations on the grounds that they do not have a licence. This sentence highlights the repeated failure of the competent public administrations to comply with their legal obligations by maintaining the General Audiovisual Communication Law inapplicable today, ten years after its entry into force.

Community radio and television stations contribute to democratise the current media system, insofar as they guarantee citizens to participate directly in media ownership and act as a counterbalance to the phenomenon of media concentration, reflecting political pluralism and diversity of opinion, as stated in the Council of Europe's recommendation of 2018. That latter reminds member states that community media "are particularly suitable for addressing the information needs and interests of all sectors of society, by providing different social groups, including cultural, linguistic, ethnic, sexual minorities, etc., the opportunity to receive and disseminate information, to express themselves and to exchange ideas".

Community media contribute to the media literacy of citizens through their direct participation in creation and dissemination of content. Their existence allows social groups and individuals who are not usually reflected in the mass media to become active participants in society by engaging in debates relevant to them, building their own story and transmitting it through their own medium. In order to carry out this mission, it is necessary to delve into the legal and effective recognition of this sector, establishing for them a sufficient reserve of the spectrum both in FM and in digital terrestrial television, developing a non-discriminatory regulation for granting broadcasting rights adapted to the sector's characteristics.

It is also necessary to eliminate the arbitrary restrictions contained in the current law that affect carrying out non-profit audiovisual communication services, in terms of budget and scope of activity limitations and which have been imposed exclusively for community services. Little progress has been made at the regulatory level in the European Union as a whole on the objective of balancing distribution of broadcasting rights among the three communication sectors, public, private commercial and community, following the own recommendations of the European Parliament and the Council of Europe. There is an urgent need to promote, at European level, a common framework protecting right of access to audiovisual media

under equal conditions, as well as specific funding measures guaranteeing the development, growth and sustainability of community, associative and citizen-owned media.

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