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Toby Mendel and Eve Salomon

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FOREWORD

The freedom of expression is a pivotal component of our individual development – as human beings and as "political animals" – and to improve and radicalize democracies.

The invention of the press therefore constitutes the turning point for the debates about freedom of expression. Guaranteeing each individual's right to freely seek, receive or impart information while interacting with other individuals ceased to be enough. It was necessary to go beyond, upholding this right allied by an intermediary that radically magnified the outreach of opinions, information and ideas: the mass media.

Under this perspective, many foundational pillars of the contemporary debate on human rights (the Glorious, American and French Revolutions; the writings of John Milton, Alexis of Tocqueville and John Stuart Mill, among others) dedicated substantial attention to freedom of expression and its links to the mass media.

The idea of a free, independent, plural, and diversified media has become the ideal to be achieved in order to fully ensure the right to seek, receive and impart information. Finding the appropriate format for State participation in this equation of fostering media systems endowed with these characteristics have quickly constituted one of the most relevant pieces of the puzzle.

This challenge became particularly complex when broadcasting took over the system's leading role in the beginning of the 20th Century. The possible hypothesis that each legitimate interest from the different social groups might have been voiced in their own newspapers did not prove to be true in relation to television and radio. The electromagnetic spectrum is a finite public resource and needs to be regulated, at least as far as frequencies are concerned.

Therefore, media regulation started its development hand in hand with guaranteeing, promoting, and protecting freedom of expression. In fact, the ultimate goal for regulating media should be to protect and deepen this fundamental right.

For this reason, the most important international instruments on human rights (the United Nations Charter; the Universal Declaration of Human Rights; the International Covenant on Civil and Political Rights; the Conventions on the Rights of the Child, on the Protection and Promotion of Diversity and Cultural Expressions, on the Elimination of All Forms of Racial Discrimination, and on the Rights of Persons with Disabilities) address to the matter in different perspectives. The same holds true for regional human rights instruments and for legal instruments of the world's most consolidated and longevous democracies.

The internal "division of labor" of the United Nations System has delegated to UNESCO the responsibility of working through international cooperation to guarantee that freedom of expression is effectively ensured through a free, plural, independent and diversified media system, among others. To fulfill this mandate the Organization has availed itself of different strategies. One of the most recent and comprehensive ones is the delivery of a set of indicators to assess media development in various nations (See: *Media Development Indicators: a framework for assessing media development*).

In light of the elements proposed by the *Media Development Indicators*, UNESCO in Brazil, in partnership with Ford Foundation, decided to offer a high-level technical contribution to the discussion that Brazilian society has to a greater or lesser extent been waging over its media system, at least since its Constituent Assembly. Among the highlights over the last years' discussions are: the final format of the Social Communication Chapter in the Brazilian Constitution, regulation of the articles in the Child and Adolescent Statute on relations between children and the media, the creation of the Social Communication Council, the opening of the sector to foreign capital, the cancelling of the Press Law, the definition of digital television as well as paid audiovisual services model, and a new regulatory framework for communication.

In this sense, we offer to the key players involved in building the different aspects of a regulatory policy for the media sector a three-article-series of studies that may be useful to decision-making processes, which will need to be taking place in the coming years.

Upon request to UNESCO international consultants Toby Mendel and Eve Salomon, who have together worked on similar issues in more than 60 countries, have signed two texts of this series:

1. *The Regulatory Environment for Broadcasting: an International Best Practice Survey for Brazilian Stakeholders*. The authors discuss how media regulation is addressed in the international arena and in 10 democracies (Canada, Chile, France, Germany, Jamaica, Malaysia, South Africa, Thailand, United Kingdom and Unite States) as compared to the Brazilian status quo. To do so they build upon the following central axes: Independent Regulatory Authorities, Concessions, Content Regulation and Self-regulation, Public Broadcasters, Community Broadcasters and Ownership regulation. After each thematic session, they have discussed major recommendations for the Brazilian case.

2. *Freedom of Expression and Broadcasting Regulation* defends that regulatory policy must focus on strengthening freedom of expression. It is this article that our esteemed readers hold in hands.

In addition, the UNESCO international consultant Andrew Puddephatt weaves a discussion on T*he Importance of Self Regulation of the Media in Upholding Freedom of Expression*.

Finally, we would like to highlight that a particular discussion about internet regulation was not included in these studies. This is an ongoing debate for the UN System; therefore regulatory international standards are not clearly defined. However, we believe that the general principles of freedom of expression, of a transparent and independent regulatory policy and of a fully protection of human rights should also be a central component of the debate about internet.

We hope the three above mentioned articles will provide an effective reference tool to support the ongoing debate on the matter in the Brazilian public sphere.

Enjoy your reading!

Freedom of Expression and Broadcasting Regulation

Toby Mendel e Eve Salomon

Introduction

The right to freedom of expression is a fundamental human right, important in its own right and also because of its function in underpinning the protection of all other rights. It is a complex right. First, because it is not absolute, but may be restricted to protect other overriding public and private interests, such as national security or privacy. Second, it protects both the right of the speaker and the right of the listener, in the latter case to receive a diversity of information and ideas. Sometimes these rights appear to come into conflict, and allocating priority between them can require a difficult balancing exercise.

The regulation of broadcasting necessarily engages the right to freedom of expression because by its very nature, regulation may be seen as a restriction on freedom of expression. Indeed, freedom of expression may be said to form the cornerstone of broadcasting regulation in democratic societies and the question of whether or not a given regulatory approach is legitimate will often depend on an assessment of its impact on freedom of expression.

This assessment must take into account the complex nature of the right, noted above. As elaborated in more detail below, some regulatory rules – for example prohibiting the broadcasting of discriminatory programming or imposing restrictions on the time when material addressing adult themes is broadcast – may be justified as restrictions on freedom of expression, in these cases to protect equality and children, respectively. Other regulatory rules – for example limiting concentration of media ownership or requiring broadcasters to treat issues of public concern in a balanced and impartial manner – may be justified by reference to the rights of listeners to receive a diversity of information and ideas.

International Guarantees

The right to freedom of expression is guaranteed in Article 19 of the *Universal Declaration on Human Rights* (UDHR)[1], as follows:

> Everyone has the right to freedom of opinion and expression; this right includes the right to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

The UDHR, as a UN General Assembly resolution, is not directly binding on States. However, parts of it, including Article 19, are widely regarded as having acquired legal force as customary international law since its adoption in 1948[2].

This right is also guaranteed in the *International Covenant on Civil and Political Rights* (ICCPR)[3], a

1. United Nations General Assembly Resolution 217A (III), 10 December 1948.
2. See, for example, *Barcelona Traction, Light and Power Company Limited Case (Belgium v. Spain) (Second Phase)*, ICJ Rep. 1970 3 (International Court of Justice) and *Namibia Opinion*, ICJ Rep. 1971 16, Separate Opinion, Judge Ammoun (International Court of Justice).
3. UN General Assembly Resolution 2200A(XXI), adopted 16 December 1966, in force 23 March 1976. 4 Brazil ratified the ICCPR on 24 January 1992. 5 Adopted at San José, Costa Rica, 22 November 1969, in force 18 July 1978.6 Adopted 4 November 1950, in force 3 September 1953.7 Adopted at Nairobi, Kenya, 26 June 1981, in force 21 October 1986.8 14 December 1946.

treaty ratified by over 166 States as of October 2010, including Brazil[4], also in Article 19, as follows:

> (1) Everyone shall have the right to freedom of opinion.
>
> (2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or through any other media of his choice.

Freedom of expression is also protected in all three regional human rights treaties, specifically at Article 13 of the *American Convention on Human Rights*[5], at Article 10 of the *European Convention on Human Rights* (ECHR)[6] and at Article 9 of the *African Charter on Human and Peoples' Rights* (ACHPR)[7]. Although the decisions and statements adopted under these latter two systems, as well as authoritative statements adopted by regional human rights bodies outside of the Americas, are not binding on Brazil, they do provide persuasive evidence of the scope and implications of the right to freedom of expression which is of universal application.

It is difficult to overestimate the importance of freedom of expression. Where information and ideas are not permitted to flow freely, other human rights, as well as democracy itself, are under threat. Participatory mechanisms depend on the free flow of information and ideas, since citizen engagement can only be effective if people are informed and have the means to express themselves. Other social values – including good governance, public accountability, individual fulfilment and combating corruption – also depend on respect for freedom of expression.

International bodies and courts have made it very clear that the right to freedom of expression is a fundamental human right. At its very first session, in 1946, the United Nations General Assembly adopted Resolution 59 (I)[8], which refers to freedom of information in its widest sense and states:

> Freedom of information is a fundamental human right and ... the touchstone of all the freedoms to which the United Nations is consecrated.

As this resolution notes, freedom of expression is fundamentally important both as an individual right and as indispensable to the exercise of all other rights. This view has been upheld by international human rights bodies. For example, the UN Human Rights Committee, the body established to monitor implementation of the ICCPR, has held:

> The right to freedom of expression is of paramount importance in any democratic society.[9]

Statements of this nature abound in the case law of human rights courts and tribunals around the world. The Inter-American Court of Human Rights has stated: "Freedom of expression is a cornerstone upon which the very existence of a democratic society rests."[10] And the European Court of Human Rights has noted: "Freedom of expression constitutes one of the essential foundations of a [democratic] society, one of the basic conditions for its progress and for the development of every man."[11]

The scope of protection of international guarantees of freedom of expression is wide, covering not only speech that may be deemed to be in the public interest, but also speech that is considered by many, or even most, people as offensive or unpalatable. Indeed, this notion somehow lies at the very heart of the importance of freedom of expression. As the European Court has made clear:

> [F]reedom of expression … is applicable not only to "information" or "ideas" that are favourably received … but also to those which offend, shock or disturb the State or any other sector of the population. Such are the demands of pluralism, tolerance and broadmindedness without which there is no "democratic society."[12]

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4. Brazil ratified the ICCPR on 24 January 1992.
5. Adopted at San José, Costa Rica, 22 November 1969, in force 18 July 1978.
6. Adopted 4 November 1950, in force 3 September 1953.
7. Adopted at Nairobi, Kenya, 26 June 1981, in force 21 October 1986.
8. 14 December 1946.
9. T*ae-Hoon Park v. Republic of Korea*, 20 October 1998, Communication No. 628/1995, para. 10.3.
10. *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85 of 13 November 1985, Series A, No. 5, para. 70.11 Handyside v. the United Kingdom, 7 December 1976, Application No. 5493/72, para. 49. 12 Handyside v. United Kingdom, 7 December 1976, Application No. 5493/72, para. 49.
11. *Handyside v. the United Kingdom*, 7 December 1976, Application Nº. 5493/72, para. 49.
12. *Handyside v. United Kingdom*, 7 December 1976, Application Nº. 5493/72, para. 49.

It is well established under international human rights law that commercial speech, and in particular advertising, is also protected by the right to freedom of expression. For example, a case from Canada before the UN Human Rights Committee challenged a ban on advertising in English in the province of Quebec, which had been justified on the basis that such a ban was needed to protect the French language speakers of that province.[13] The Human Rights Committee held that the advertisements in question were protected speech. At the same time, commercial speech warrants less protection than, for example, speech on matters of public interest. In a number of cases before the European Court of Human Rights, the principle that States have wider latitude in applying restrictions to commercial speech has been established.[14]

Freedom of expression has a dual nature, inasmuch as it protects not only the right to impart information and ideas (the rights of the speaker) but also the rights to seek and receive information and ideas (the rights of the listener). This duality of the right to freedom of expression has been elaborated upon clearly and forcefully by the Inter-American Court of Human Rights:

> [W]hen an individual's freedom of expression is unlawfully restricted, it is not only the right of that individual that is being violated, but also the right of all others to "receive" information and ideas. The right protected by Article 13 consequently has a special scope and character, which are evidenced by the dual aspect of freedom of expression. It requires, on the one hand, that no one be arbitrarily limited or impeded in expressing his own thoughts. In that sense, it is a right that belongs to each individual. Its second aspect, on the other hand, implies a collective right to receive any information whatsoever and to have access to the thoughts expressed by others…. In its social dimension, freedom of expression is a means for the interchange of ideas and information among human beings and for mass communication.[15]

Important components of the rights of the listener are to have access to a plurality of sources of information and ideas, and diversity of content, which are elaborated upon in more detail below.

The Importance of the Media

In most countries, the mass media is the main conduit for public discussion on any and all matters and, as a result, the right to freedom of expression is of particular importance to the media. The Inter American Court of Human Rights has stated: "It is the mass media that make the exercise of freedom of expression a reality."[16] In a Declaration adopted in 2003, the African Commission similarly stressed "the key role of the media and other means of communication in ensuring full respect for freedom of expression, in promoting the free flow of information and ideas, in assisting people to make informed decisions and in facilitating and strengthening democracy."[17]

The media play a very important role in underpinning democracy, including during elections. The UN Human Rights Committee has stressed the importance of free media to the political process:

> [T]he free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion.[18]

In a similar vein, the European Court has emphasised:

> Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of their political leaders. In particular, it gives politicians the opportunity to reflect and comment on the preoccupations of

13. *Ballantyne and Others v. Canada*, 31 March 1993, Communication Nos. 359/1989 & 385/1989.
14. See, for example, *Hertel v. Switzerland*, 25 August 1998, Application No. 25181/94. See also Irwin Toy Ltd. v. Quebec (Attorney General), [1989] 1 SCR 927 (Supreme Court of Canada).
15. *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, note 10, paras. 30-2.
16. *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, note 10, para. 34.
17. *Declaration of Principles on Freedom of Expression in Africa*, adopted by the African Commission on Human and People's Rights at its 32nd Session, 17-23 October 2002.
18. UN Human Rights Committee General Comment 25, issued 12 July 1996.

> public opinion; it thus enables everyone to participate in the free political debate which is at the very core of the concept of a democratic society.[19]

At the same time, international law does not provide special protection for press or media freedom. Rather, the media enjoy the same protection under the right to freedom of expression as everyone else. However, because of their key role in disseminating information and ideas – the media are the primary means by which most citizens are informed about developments in their own societies and internationally – international law recognises certain special privileges for the media, along with others who disseminate information of public importance.

Thus, it is widely recognised that whereas ordinary citizens must testify openly before courts, the media may refuse to provide testimony which identifies sources who have provided them with information on a confidential basis. However, as noted, this protection should be afforded to anyone engaged in the regular dissemination of information to the public. Thus, the Council of Europe Recommendation on The Right of Journalists Not to Disclose Their Sources Of Information defines those who benefit from the protection as "any natural or legal person who is regularly or professionally engaged in the collection and dissemination of information to the public via any means of mass communication". This would presumably include not only new media – such as bloggers – but also NGOs and probably also academics.[20]

The reason for this lies in the underlying rationale for the protection, which is not the special status of the media, as such, but the role of the media in informing the public. Thus, if the media and other social players cannot protect the identity of their confidential sources, those sources will not come forward in the first place, and the public will be denied access to the information they have disclosed. As the European Court of Human Rights has stated:

> Without such protection [for sources], sources may be deterred from assisting the press in informing the public on matters of public interest.[21]

International law also recognises the very different nature of different types of media dictates that different regulatory approaches for these different media are required. Because of the fact that broadcasters rely on a limited public resource – the airwaves – as well as the fact that broadcasting, particularly television, is a very powerful medium that is provided directly into our living rooms, international law allows more intrusive regulation of broadcasting than would be considered legitimate for the print media.

Restrictions

Every system of international and domestic rights recognises that freedom of expression is not absolute. Some carefully drawn and limited restrictions on freedom of expression may be necessary to take into account the values of individual dignity and democracy. However, under international human rights law, national laws that restrict freedom of expression must comply with the provisions of Article 19 (3) of the ICCPR, which states:

> The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
>
> (a) For respect of the rights and reputations of others;
>
> (b) For the protection of national security or of public order (ordre public), or of public health or morals.

Restrictions must meet a strict three-part test.[22] First, the restriction must be provided by law. This implies not only that the restriction is based on a legal provision, but also that the law meets certain standards of clarity and accessibility, sometimes referred to as the "void for vagueness" doctrine. The

19. *Castells v. Spain*, 24 April 1992, Application No. 11798/85, para. 43.
20. Recommendation No. R(2000)7, adopted on 8 March 2000.
21. *Goodwin v. United Kingdom*, 1 March 1994, Application No. 17488/91, para. 39.
22. This test has been affirmed by the UN Human Rights Committee. See *Mukong v. Cameroon*, 21 July 1994, Communication No.458/1991, para.9.7. The same test is applied by the European Court of Human Rights. See *The Sunday Times v. United Kingdom*, 26 April 1979, Application No. 6538/74, para. 45.

European Court of Human Rights has elaborated on the requirement of "prescribed by law" under the ECHR:

> [A] norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. [23]

Vague provisions are susceptible to wide interpretation, by both authorities and those subject to the law. As a result, they are an invitation to abuse and authorities may seek to apply them in situations which bear no relation to the original purpose of the law or to the legitimate aim sought to be protected. Vague provisions also fail to provide sufficient notice of exactly what conduct is prohibited. As a result, they exert an unacceptable chilling effect on freedom of expression as broadcasters and publishers steer well clear of the potential zone of application to avoid censure.

Second, the restriction must pursue one of the legitimate aims listed in Article 19 (3). It is quite clear from both the wording of Article 19 of the ICCPR and the views of the UN Human Rights Committee that this list is exclusive and that restrictions which do not serve one of the legitimate aims listed in paragraph 19 (3) are not valid.[24] It is not sufficient, to satisfy this part of the test, for restrictions on freedom of expression to have a merely incidental effect on one of the legitimate aims listed. The measure in question must be primarily directed at that aim.[25]

In assessing whether a restriction on freedom of expression addresses a legitimate aim, regard must be had to both the purpose and the effect of the restriction. Where the original purpose was to achieve an aim other than one of those listed in the ICCPR, the restriction cannot be upheld.[26]

Third, the restriction must be necessary to secure the aim. The necessity element of the test presents a high standard to be overcome by the State seeking to justify the interference, apparent from the following quotation, cited repeatedly by the European Court:

> Freedom of expression, as enshrined in Article 10, is subject to a number of exceptions which, however, must be narrowly interpreted and the necessity for any restrictions must be convincingly established.[27]

Courts have identified three aspects of this part of the test. First, restrictions must be rationally connected to the objective they seek to promote, in the sense that they are carefully designed to achieve that objective and that they are not arbitrary or unfair. Second, the restriction must impair the right as little as possible (breach of this condition is sometimes referred to as 'overbreadth'). Third, the restriction must be proportionate to the legitimate aim. The proportionality part of the test involves comparing two considerations, namely the likely effect of the restriction on freedom of expression and its impact on the legitimate aim which is sought to be protected.

Under international law, different kinds of restrictions on content may be imposed. First, for more seriously harmful material – such as incitement to crime, undermining national security and promulgating hate speech – criminal restrictions may be legitimate. Second, for more personal forms of harm – such as invasions of privacy or unwarranted attacks on reputation – international law allows certain civil law rules providing for redress, such as a right of reply or damages.

Because of the potential power of the media to cause harm, many countries put in place special regimes allowing for individual complaints to be made about unprofessional media behaviour, including unacceptable content, along with some system of redress. In many democracies, the print media is fully self-regulating, meaning that this media sector provides its own system for handling complaints, usually with the remedy being to publish

23. *The Sunday Times*, note 15, para. 49.
24. See *Mukong*, note 15, para. 9.7.
25. As the Indian Supreme Court has noted: "So long as the possibility [of a restriction] being applied for purposes not sanctioned by the Constitution cannot be ruled out, it must be held to be wholly unconstitutional and void." *Thappar v. State of Madras*, [1950] SCR 594, p. 603.
26. The Canadian Supreme Court has noted: "[B]oth purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation." R. v. Big M Drug Mart Ltd, [1985] 1 SCR 295, p. 331.
27. See, for example, *Thorgeirson v. Iceland*, 25 June 1992, Application No. 13778/88, para. 63.

a statement recognising the wrong that has been committed.

Once again, because of its particular power, international law permits more intrusive content rules to be imposed on the broadcast media. While in some countries this sector is also fully self-regulating, in other countries co-regulatory systems are in place pursuant to which the sector regulates itself, but within some sort of legislative regime. This may require the sector to self regulate, set basic minimum standards for such regulation and/or allow the statutory oversight body to impose standards if the self-regulatory system is failing to meet basic community standards.

However, it remains the case that in the majority of countries, broadcasters are subject to direct content regulation by a statutory regulator, and, as long as certain minimum conditions are met – including that the regulator is independent of government – international law permits this. In most cases, the regulator is tasked with developing a detailed code of conduct for broadcasters, which is then applied both through a complaints system and directly through monitoring by the regulator.

Independence of Regulatory Bodies

Respecting freedom of broadcasting, although a key aspect of the guarantee of freedom of expression, does not imply that the broadcast media should be left unregulated. A wholly unregulated broadcast sector would be detrimental to free expression, since the audiovisual 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 access. The problem was summarised by the United States Supreme Court in the following terms:

> If 100 persons want broadcast licenses but there are only 10 frequencies to allocate, all of them may have the same "right" to a license; but if there is to be any effective communication by radio, only a few can be licensed and the rest must be barred from the airwaves. It would be strange if the [guarantee of freedom of expression], aimed at protecting and furthering communications, prevented the Government from making radio communication possible by requiring licenses to broadcast and by limiting the number of licenses so as not to overcrowd the spectrum. [28]

Furthermore, regulation is needed to ensure plurality and diversity (see below). However, due to the universally observed tendency of governments and businesses to want to minimise access of their critics and competitors to the broadcast media, it is vital that all bodies with regulatory powers in this area are protected, legally and practically, against political, commercial and other forms of interference.

This principle finds strong support in international decisions and statements. The African Declaration states very clearly, at Principle VII (1):

> Any public authority that exercises powers in the areas of broadcast or telecommunications regulation should be independent and adequately protected against interference, particularly of a political or economic nature.

The need for protection against political or commercial interference was also stressed in the 2003 Joint Declaration by the (then) three specialised mandates for the protection of freedom of expression – the United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media and the Organization of American States (OAS) Special Rapporteur on Freedom of Expression – which stated:

> 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. [29]

Within Europe, an entire recommendation of the Council of Europe is devoted to this matter, namely Recommendation (2000,23 on the independence and functions of regulatory authorities for the broadcasting sector. The very first substantive clause of this Recommendation states:

> Member States should ensure the establishment and unimpeded functioning of regulatory authorities for the broadcasting sector by devising

28. *Red Lion Broadcasting Co*., Inc., et al. v. Federal Communications Commission, et al. No. 2, 395 U.S. 367, 389 (1969).
29. Adopted 18 December 2003.

> an appropriate legislative framework for this purpose. The rules and procedures governing or affecting the functioning of regulatory authorities should clearly affirm and protect their independence.

In 2008, UNESCO's Intergovernmental Council of the International Programme for the Development of Communication adopted the *Media development indicators: a framework for assessing media development*. These set out in some detail the issues that should be considered when assessing the framework for media development. Indicator 1.6 focuses on the independence of the regulatory system for broadcasting, setting out a number of considerations by which to assess the extent to which that independence is guaranteed.

The same rationale applies to public broadcasters, the independence of which should also be protected. The African Declaration calls for comprehensive protection for the independence of public service broadcasters, stating:

> • public broadcasters should be governed by a board which is protected against interference, particularly of a political or economic nature;
> • the editorial independence of public service broadcasters should be guaranteed;
> • public broadcasters should be adequately funded in a manner that protects them from arbitrary interference with their budgets;; [...]30

Once again, the Council of Europe devotes a whole document to this issue, its 2006 Declaration of the Committee of Ministers on the guarantee of the independence of public service broadcasting.[31] The Declaration goes into the issue in great detail, in different sections focusing on such issues as the legal framework, public service remit, editorial independence, funding and openness.[32]

Plurality and Diversity

As noted above, plurality and diversity in the media are fundamental principles of international law. The airwaves are a public resource and they must be used for the benefit of the whole public, including people with minority views or interests. Furthermore, it is through the availability of a range of viewpoints that individuals can exercise full citizenship, choosing between competing perspectives as they engage in public decision-making. The need for plurality also flows from the right to seek and receive information and ideas. Central to this aspect of the right is the idea that citizens should have access to a wide range of different perspectives and analyses through the media, in other words, access to a diverse media.

Plurality and diversity, as principles which support freedom of expression, finds strong support in the case law of international human rights courts. The Inter-American Court has held that freedom of expression requires that "the communication media are potentially open to all without discrimination or, more precisely, that there be no individuals or groups that are excluded from access to such media."[33] The European Court of Human Rights stated: "[Imparting] information and ideas of general interest … cannot be successfully accomplished unless it is grounded in the principle of pluralism."[34]

Article 2 of the ICCPR places an obligation on States to "adopt such legislative or other measures as may be necessary to give effect to the rights recognised by the Covenant." This means that States are required not only to refrain from interfering with rights but also to take positive steps to ensure that rights, including freedom of expression, are respected. An important aspect of this is that States are under a positive obligation to create an environment in which a diverse, independent media can flourish. The need for positive measures to promote pluralism has been noted specifically by international authorities. The African Declaration, for example, states:

> Freedom of expression imposes an obligation on the authorities to take positive measures to promote diversity.[35]

Within Europe, Council of Europe Recommendation 2007(2) on Media Pluralism and Diversity of

30. Principle VI.
31. Adopted 27 September 2006.
32. See also MDI Key Indicator 3.5.
33. *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, note 10, para. 34.
34. *Informationsverein Lentia and Others v. Austria*, 24 November 1993, Application Nos. 13914/88 and 15041/89, para. 38.
35. Principle III.

Media Content is devoted to the question of the importance of pluralism in the media and measures to promote it. It states:

> Member states should encourage the development of other media capable of making a contribution to pluralism and diversity and providing a space for dialogue. These media could, for example, take the form of community, local, minority or social media. [36]

The special mandates for the protection of freedom of expression of the UN, OSCE, OAS and African Commission adopted a Joint Declaration in 2007 on Diversity in Broadcasting.[37] It refers to three key attributes of diversity, namely diversity of outlet, diversity of source and diversity of content.

The first type of diversity refers to the need to ensure that the State promotes the existence of all three types of broadcasters, public, commercial and community. All three types should benefit from "equitable access to, all available distribution platforms". This might, among other things, require the "reservation of adequate frequencies" for public and community broadcasters. The African Declaration also calls for an equitable allocation of frequencies between different types of broadcasters, and the particular promotion of community broadcasting "given its potential to broaden access by poor and rural communities to the airwaves."[38] UNESCO's Media Development Indicators also stress the need for a three-tier system of broadcasting.[39]

The second type of diversity is plurality, which requires that positive measures be put in place to prevent monopolisation of the airwaves. As the 2007 Joint Declaration notes: "[S]pecial measures, including anti-monopoly rules, should be put in place to prevent undue concentration of media or cross-media ownership, both horizontal and vertical." The Inter-American Court has also stressed the need for such measures:

> [T]he conditions of [the media's] use must conform to the requirements of this freedom, with the result that there must be, inter alia, a plurality of means of communication, the barring of all monopolies thereof, in whatever form, and guarantees for the protection of the freedom and independence of journalists. [40]

Finally, various measures may be put in place to promote diversity of content, including support "for the production of content which makes an important contribution to diversity" and "measures to promote independent content producers".[41] The precise measures may vary depending on the context. The African Declaration, for example, stresses the need for the promotion of the use of local languages.[42]

Taken together, the wider notion of diversity thus underpins a number of features of modern, democratic broadcasting systems. These include support for strong public service and community broadcasting sectors, positive content obligations, including in the areas of local/regional content and independent producers, and restrictions on concentration of media ownership.

Licensing

Having independent regulatory bodies is important, but it is not enough to ensure freedom of expression in the broadcast sector. It is also essential that the licensing process be fair and democratic. As the special mandates for freedom of expression stated in their 2003 Joint Declaration:

> The allocation of broadcast frequencies should be based on democratic criteria and should ensure equitable opportunity of access.[43]

Similarly, the African Declaration calls for the licensing process to be "fair and transparent".[44]

Recommendation (2000) 23 of the Council of Europe addresses in some detail the matter of the granting, by independent regulators, of broadcasting licences. It calls for the process to be "clearly defined

36. Para. 4.
37. Adopted on 12 December 2007.
38. See Principle V.
39. See Key Indicator 2.3.
40. *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, note 10, para. 34. See also Key Indicator 2.1 of UNESCO's Media Development Indicators.
41. 2008 Joint Declaration.
42. Principle III.
43. Adopted 18 December 2003.
44. Principle V.

in law" and states that it "should be clear and precise and should be applied in an open, transparent and impartial manner". Calls for tenders for broadcasting licences should be public and should "define a number of specifications, such as type of service, minimum duration of programmes, geographical coverage, type of funding, any licensing fees and, as far as necessary for those tenders, technical parameters to be met by the applicants." Finally, licensing decisions should be made public. [45]

UNESCO's Media Development Indicators similarly stress the need for licensing processes to be fair, for licence applications to be "assessed according to transparent and objective criteria set out in law" and for fees to be set in a transparent manner and to be made public in advance of licence competitions.[46]

Conclusion

The right to freedom of expression underpins all other rights, finding strong endorsement in both global and regional treaties on human rights. It is also a wide right, recognising the special importance of the media in disseminating information and ideas in society, and protecting both popular and offensive speech, as well as commercial speech. It is, however, a complex right, both because it may be subject to restriction and because it has a dual nature, protecting both the speaker and the listener. The interplay between these various aspects of the right has a number of important implications for the regulation of broadcasting in the public interest.

The protection of viewers and listeners from harm has been recognised under international law as an interest of sufficient importance to warrant imposing special content restrictions on broadcasters. In most democracies, (independent) statutory regulators are given the power to set codes of conduct for broadcasters covering a wider range of issues, including protection of children, due accuracy in news and prohibitions on discriminatory programming, and to establish complaints systems for members of the public. In some countries, however, such codes are set and applied by broadcasters themselves, either on a purely self-regulatory basis or through a system of co-regulation.

Although international law recognises the need for certain forms of regulation of broadcasting, these are only legitimate if applied by an independent regulator. Otherwise, the risk of political interference in the broadcasting sector would outweigh the benefits of such regulation. There are many different ways in practice of protecting independence, and systems for this must be developed taking into account the local context.

Protection of the freedom of expression rights of viewers and listeners is manifested importantly through protection for diversity and pluralism. This aspect of the right imposes certain positive obligations on States. These include creating an environment in which all three broadcasting sectors – public, commercial and community – may flourish and preventing undue concentration of ownership in the commercial broadcasting sector. They also include imposing positive content obligations on all broadcasters, for example in relation to national and independent productions and local content.

Finally, licensing is the key mechanism for regulating access to broadcasting. As a result, licensing processes must be fair and competitions must be judged against clear criteria set out in advance, which include promoting diversity in the airwaves.

A regulatory system for broadcasting which meets all of these conditions will not only pass muster under international law. It will also contribute to democracy, the rule of law and, indeed, national development. Putting in place such a regulatory system should, as a result, be a key objective for any democratic government.

45. See paras. 13-18.

46. See Key Indicator 2.8.

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