Extract from

Challenges to Drafting Communications Regulation: Convergence, Globalisation and New Media Culture

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[1] Media content regulation

In the process of drafting communications legislation there is a need to identify the balance between censorship and regulation. Also in the implementation of the rules, such a balance has to be made constantly, but it is indeed important already in the drafting phase to be aware of the different considerations necessary in order to land on the correct side of the thin line between regulation and censorship. Although such considerations can apply to any type of communications legislation, it is in the area of media where the issues are most pronounced. There should not be any prior control of media content as that would be censorship, but also the temptation of over-regulation in a sensitive situation should be avoided. Such temptation increases in special situations like terrorism threat, war and other crises, which means that it is particularly important to consider how freedom of expression can be maintained in such situations.

The area of media is an area in which the legislator will make and impose policy choices on the population in a manner that is quite unusual in societies with freedom of expression. Media may play a negative role in the reconstruction of post-conflict societies or in democratisation processes.[1] Just as limitations to freedom of expression are serious obstacles to democracy and rule of law, this freedom itself also poses serious challenges. Media may through incitement to hatred and violence, create or prolong a conflict. This is one illustration to why media content regulation may be legitimate. However, even states with well-established freedom of expression as well as functioning market economies tend to use audiovisual media regulation for policy purposes and not just to prevent generally illegal content (in addition to incitement for example child pornography or libel). Broadcast licences are given to stations that will have news or factual programmes and not just entertainment; that provide broadcasting in minority languages or that broadcast a different kind of programming than that most widely available. Legal provisions on media ownership, preventing media concentration and/or media cross-ownership are also common. The choice of what is "good" broadcasting that should get a licence is basically made in law but more directly by regulatory decision, where the independence of the regulator from direct political control is often stated as a guarantee against politicising the choice. Lipschultz finds that for example broadcast indecency regulation is an excellent example of slow, political and incremental policy-making.[2]

Integration of minorities is a common example of a positive content obligation, ensuring that there are stations representing minorities in the country or at least broadcasting partly in minority languages. Where there are public service broadcasters, these have a special role in providing such minority programming but most countries would take minority issues into consideration also when determining what private stations to licence or what demands of programming to put on such stations. The

[1] Lynch and Crawford (2011) p.291.

[2] J. Harris Lipschultz *Broadcast and Internet Indecency. Defining Free Speech.* (Routledge, N.Y/London 2008) at p. 94. See also www.fcc.gov/eb/oip/welcome.html

recognised great impact of audiovisual media, not least of news programmes (broadcasting news is the main source of news in most countries), underlines that also minorities should be considered in this context if they are to form part of the information space of the country.[3] It may be tempting to think that the time for enforcing cultural policy through audiovisual media regulation has passed decades ago. This is not reflected in practice though, when as recently as in October 2005 a UNESCO Convention on the protection and promotion of the diversity of cultural expressions and in 2006 a Council of Europe Recommendation Rec.(2006)3 endorsing the Convention and underlining the importance of media for cultural diversity and minorities were passed. Broadcasting in minority languages is still the norm in many countries with sizeable minorities, enforced through regulatory decisions on programming content or on which stations to licence.[4]

Although there is a near global consensus on the possibility to limit some forms of expression even in a society with protection for freedom of expression, the view on the type and methodology of restrictions varies. Otherwise quite similar legal systems as those of Europe and the United States of America for example take a different view. In the United States the "marketplace of ideas" principles mean that there are very few restrictions on speech. The United States does not have bans on certain types of speech but operates on analysis in each case by the Federal Communications Commission or some other relevant body (like a court). A case often quoted in this respect is the Miller case from 1973.[5] This case stated that something could be banned as obscene based on what contemporary community standards stipulated, if the speech lacks value (scientific, artistic or political) and is depicted in a potentially offensive way, of sexual content. It is clear from the case that obscenity and indecency are different things although in practice the limits tend to blur. Obscenity can be banned whereas indecency has to be judged based on the Miller standards.[6]

For drafters of legislation, a problem in the media content context is that establishing what is indecent or what can be incitement must be determined in each individual case, as views on indecency are very different even within a state and something that is inciting in certain circumstance may not be so in more stable times. If the situation is very tense, especially if there is sectarian violence (like Afghanistan or Somalia for example) even just factually reporting something may have an inciting effect. However, if something is newsworthy it should be reported even if this may have some potential negative consequences. The determination should be one of proportionality. Media playing an instrumental role in incitement to violence provides an illustration to the need for regulation, even if regulation may have the down-side of providing a temptation to take it too far. Leaving media in a post-conflict society in the hands of those that started a war is dangerous, as many real examples show.[7] Media can also start the conflict in the first place. The famous case of Radio-TV libre des milles collines in Rwanda provides a frightening illustration to how media can have a very real inciting effect.[8] In the wars in former Yugoslavia media is also recognised to have played an important role in inciting violence as well as maintaining the level of tension between ethnic groups after the conflict. The Kosovo public service broadcaster provided almost a textbook example of incitement in

[3] Nyman-Metcalf (2008) p. 209.
[4] *Ibid.*
[5] Lipschultz (2008) pp. 6-7
[6] Lipschultz (2008) p. 11
[7] K. Kurspatric in *Prime Time Crime – Balkan Media in War and Peace* (United States Institute of War and Peace, Washington D.C. 2003) stresses the importance of looking at media in an internationally lead rebuilding process after a war, not leaving the media in the hands of those responsible for the war, p. 210.
[8] Broadcasts on this broadcaster as well as Radio Rwanda and the journal Kangura are regarded as having been instrumental in inciting the campaign of violence in Rwanda. See e.g. International Federation of Journalists, www.ifj.org.

its treatment of an event in 2004 of some Kosovo Albanian children drowning in unclear circumstances. The incident was blamed on Serbs, even if the purported evidence was scattered and contradictory, and furthermore the incident was used as an excuse to broadcast very nationalistic Albanian concerts and similar instead of regular broadcasting content, thus possibly contributing to setting off the riots that erupted in March 2004 and lead to several deaths.[9]

Rules on incitement to hatred and violence take into account statements as well as their intended and/or likely effect. This further illustrates that it is not possible to prescribe exactly what statements should be banned - such prescriptions would pass the threshold of censorship. Explicit bans on certain types of content in a society with a free media present an anomaly and should be imposed only when such content is in all situations so harmful that this aspect takes precedence over freedom of expression (child pornography as an example). The Holocaust denial laws that exist in several countries are an anomaly in this context. They provide an example of a detailed legislated limitation to freedom of expression, where it is not just expression in a certain setting or of a certain kind but the content of the information that is prohibited.[10] The Austrian Holocaust denial law was used as recently as 2005 against the British historian David Irving (subsequently successful in his appeal).[11] This led to a debate on whether such a law and imprisonment under it could really be justified in a situation where the statements of David Irving were unlikely to have any real effect on Austrian society. In 2006 the French National Assembly responded to another strong lobby by voting for a law making denial of the Turkish massacre of Armenians equally prohibited (which however did not reach the stage of a law).[12] In recent controversies over media content that is offensive to Muslims, some commentators have brought up the existence of Holocaust denial laws as an analogy claiming that if laws exist to ban certain statements against Jews, statements offending Muslims should also be prevented in law. Regardless of whether such an analogy can be made or not, the existence of laws preventing a specific content of media (or other expressions) does make it harder to argue against the kind of limitations that groups seeking media restrictions claim.

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[9] See the Kosovo broadcast regulator www.imc-ko.org. The author worked as legal advisor to this regulator between 2003 and 2006 and was member of its Council 2006-2007. See also OSCE Representative on Freedom of the Media "The role of the media in the March 2004 Events in Kosovo", www.osce.org/documents/rfm

[10] In the book by I. Hare and J. Weinstein *Extreme Speech and Democracy* (Oxford University Press, Oxford 2009) an entire section is devoted to the Holocaust denial laws, unfortunately without any real critical discussion but more just to justify these laws, not so much from a freedom of expression viewpoint as rather from the viewpoint of the uniqueness of the Holocaust as a historical phenomenon. See pp. 511-579, contributions by D. Fraser "On the Internet Nobody Knows You´re a Nazi: Some Comparative Legal Aspects of Holocaust Denial on the www " pp. 511-537; M. Whine "Expanding Holocaust Denial and Legislation against it" pp. 538-556; D. Grimm "The Holocaust Denial Decision of the Federal Constitutional Court" pp. 557-561; and P. Weil "The Politics of Memory: Bans and Commemoration" pp. 562-579.

[11] Fraser (2009) p. 517; Whine (2009) pp. 552-553. Whine also discusses other convictions, pp. 548-550.

[12] Fraser (2009) pp. 513-515 and Weil (2009). Weil brings up the issue of slavery in the context of special "denial" laws, pp. 575-579.