# BROADCASTING POLICY AND PRACTICE IN AFRICA

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GLOBAL CAMPAIGN FOR FREE EXPRESSION

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# INTRODUCTION

## Background and Context

Broadcasting is very important in Africa because a majority of Africans get their information, education and entertainment from primarily radio and then television. The press tends to have an urban bias and is dependent on literacy. Radio uses more African languages than television and is therefore more accessible. However, the influence and role of television has grown among urban dwellers in Africa. Television has low penetration because of the high costs of sets, lack of electricity and weak coverage.

In the overwhelming majority of African countries, broadcasting has been the most controlled medium for both technical and political reasons. The technological limits to the frequency spectrum and its allocation at both the international and national level have meant that unlike the press, not just anyone can broadcast. Broadcasting's ability to reach the majority of citizens in a country has obvious political implications. Colonial administrations, which introduced broadcasting to Africa, controlled it and used it for largely political propaganda purposes. Post colonial African governments also followed a policy of control of broadcasting mainly for political reasons. Between 1960s and 1980s when coups were West and Central Africa's most favoured mode of change of government, broadcasting stations were often the first institutions to be taken over by coup plotters.

In the recent democratization processes of the 1990s privately owned FM radio stations, where they have been allowed, have been cited as an important factor in giving the opposition a platform during elections and in ensuring that elections are conducted freely and fairly. In Uganda, Mali and Ghana talk shows and discussions have been influential in providing a forum for robust political debates. Equally control of broadcasting has been cited as an impediment to democratization or pluralist politics. It has also been noted that FM radio stations have tended to be dominated by popular western music rather than local music or programmes in local languages.

In most if not all countries in Africa broadcasting has since independence been a monopoly of the state justified on the grounds that it

was a public service critical to development, the fostering of unity and the promotion of national culture and identity. To achieve these policy goals, broadcasting was often located in Ministries of Information or Broadcasting and the state broadcaster was answerable and accountable to the Minister and the State President. This arrangement allowed the Minister and State President a direct say in appointments to boards, management issues and programming content in the 'national interest'. The national interest was often defined as or meant the political and policy choices of the ruling party. Rarely was there a reference to the 'public interest' which was more pluralist and inclusive. More often than not, these institutional arrangements violated the editorial and programming independence of the public broadcasters and turned them into state broadcasters.

It could said then that broadcasting policy and regulation used to be 'simple'. Simple in the sense that it seemed self evident that like other public services, broadcasting should be run by the state. In the immediate post independence period, it seemed also that the tasks of nation building and development were clear priorities and governments which had lead the independence struggle the undisputed leaders. Simple also in the sense that in many countries, private broadcasting was not permitted and the only broadcasting entity to regulate was the 'public' broadcaster operating under the ambit of the government.

## Liberalization of the Airwaves

The 1990s witnessed the beginnings of changes in broadcasting in Africa that have been described as 'liberalization of the airwaves'. Liberalization of the airwaves is a reference to a process that has led to the emergence of private broadcasters and to a much lesser extent and in a very few countries, 'community' broadcasters. It has also included the emergence and growth of satellite and subscription or pay services. By 2002, direct to home satellite TV had reached 41 countries in Africa.

The liberalization of broadcasting, is happening in a context of political change from military and one party state governments of the period after independence to multi party governments. These political changes have been called democratization and are a result of broader political changes at the international level in which the former socialist and communist governments in East and Central Europe and the former

# Introduction

Soviet Union collapsed and western liberal democracy gained ascendance. The relevance of these changes to broadcasting is that pluralist politics is now linked to the existence of pluralist and diverse media systems as opposed to government and state monopolies. Freedoms of expression and the media especially with regards to editorial and programming independence have become central issues linked to the provision of alternative sources of information. New buzzwords of deregulation, commercialization and privatization of broadcasting and telecommunications became popular and in some people's minds immediate policy choices that would create a new broadcasting landscape.

Demands for democratic reforms include demands that state broadcasters be transformed into public service broadcasters that enjoy editorial and programming independence, as well as the licensing of private broadcasters to exist in their own right and as alternatives and competitors to the public broadcasters.

Technologically, the 1990s also witnessed the rapid development of satellite broadcasting and the convergence between broadcasting and telecommunications, which meant the presence in national broadcasting systems of foreign broadcasters not necessarily subject to local regulation. The rapid development of digital technologies also meant the promise of more channel availability, which could in technical terms mean an end to the problem of limited spectrum availability.

It is important to note that the advocates of liberalization of the airwaves have not often thought through the full implications of liberalizing the airwaves. Many if not most thought that the entry of private broadcasters was sufficient and would result in competition, editorial and programming independence and choices for audiences. In short, private ownership is equated to editorial and programming independence. Pluralism of stations equated to diversity of programme choices for audiences. While these equations are understandable in the light of a history of monopoly of state-controlled broadcasting being contrary to editorial and programming independence and to choice for audiences, it is a simplification that is not borne out by the practice. They did not realize that the existence of many broadcasters does not necessarily mean more choices in programmes for audiences. Private ownership does not exclude editorial controls for political and commercial reasons. They also did not realize that private broadcasters also entered the broadcasting arena as legitimate commercial activity and would operate them according to how they could make money even if it meant just

playing popular music or showing popular television programmes imported from abroad with very little news or locally made programmes, if any.

They also did not realize that without transparent regulatory mechanisms licenses could and would be easily awarded to either the rich and powerful, or to those linked to powerful politicians or even to politicians who doubled up as private businesspeople. Finally, they did not realize that building democratic societies characterized by pluralist politics and respect for human rights including freedom of expression, required not only a pluralistic media system, but media diversity as well. Achieving both media *pluralism* (many media owners and operators including genuine public service media) and *diversity* (different media owners and operators offering the widest possible range of content relevant to needs and wants of audiences as citizens in a democratic dispensation) required deliberate policy development.

Broadcasting policy and regulation is no longer going to be 'simple'. What is actually needed is a different policy regime from that which existed in the immediate post independence period in the 1960s and up to late 1980s. Liberalization requires broadcasting policies which favour diversity and pluralism. Government can no longer define the role of broadcasting as just nation building and development. In line with political changes, broadcasting has to play democratic roles as well. Democratic roles come with the imperatives of respecting and upholding freedom of expression and a free flow of information and ideas. State control and regulation has to give way to independent regulation. Independent regulation requires new institutional arrangements, which are inclusive and transparent.

It is important also to point out that the economics of broadcasting is much at the fore than in earlier decades. Broadcasting institutions are no longer just political and cultural institutions but also economic institutions. In this respect, the challenge of policy and regulation is to ensure that they do not become purely economic institutions to the neglect of their democratic and cultural roles.

Therefore, policy and regulatory frameworks have to cover a whole host of issues.

# New Directions in Policy and Regulation Frameworks

First, the question of how to create a pluralistic and diverse broadcasting landscape characterized by different (but complementary) forms of broadcasting i.e. public, commercial/private and community. This includes, determining the number of players in the sector as a whole and in each tier given that frequency spectrum is not infinite, but due to recent technological developments especially digitalization, channel availability has expanded tremendously. In this regard, technological developments should be harnessed in a proactive fashion to not only increase the number of players and but also to promote diversity of ownership and content. Second, devising funding mechanisms for the entire system and in particular public service broadcasting, as funding is critical to survival and to what kind of programming is offered to audiences. Third, creating independent, credible, adequately funded and viable regulators, which ensures the achievement of the policy goals and the viability of broadcasting. The independent regulators would perform the duties of allocation of frequency spectrum and licensing and the monitoring of broadcasters' compliance with license conditions, including content issues and competition, as well as protecting and upholding the editorial and programming independence of all broadcasters.

Developing new policies and regulatory frameworks necessitates a different kind of politics from that of the pre 1990 period and a qualitatively different kind of politics of the post 1990 period, which tend to be characterized by rhetorical affirmations of democratization and democracy. Democratization or democracy is often taken to be the exercise of some degrees of political pluralism often in conditions where competition for political power was unfair as institutions had not been sufficiently reformed to play independent roles. The media including the state broadcaster and the new private broadcaster, often did not necessarily play impartial roles during elections and in their general coverage of currents affairs. The new politics that is required would open the policy process to all stakeholders and to entrench the notion of independent, transparent and credible regulation. To a large extent, this is an essential element of a democratic dispensation.

A first step is the institutional separation of policy making and regulation. Such separation means that government and their designated

ministers cannot as the ultimate policy makers double up as regulators just as regulators are not policy makers. Separation does not mean there are no principled and defined links. Regulators exist by virtue of policy, implement policy and operate in a policy environment defined by governments. Because of the institutional knowledge they gather in the regulatory process, regulators should be able to feed into policy processes, including policy reviews.

A second step linked to effecting the separation between policy making and regulation is creating all the institutional arrangements, which are necessary for regulators to be independent. These arrangements include locating the regulators outside the government ministries, giving them constitutional guarantees of independence, devising appointment systems to governance and management structures that are transparent and exclude representation of political and economic interests and the allocation of adequate financial and human resources to enable credible, effective, efficient regulation. Institutional arrangements should also include transparent lines of accountability, which do not undermine independence. There are different ways of achieving such arrangements and the contributions in this volume refer to some. The South African example is often quoted in Southern Africa as a model well worth emulating.

It is important to point out that the intention of this volume is not to prescribe a particular model rather to suggest different models. Ultimately is important is not a particular model but whether the objectives of a pluralistic and diverse broadcasting system that is accessible, well funded, well managed, viable and responsive to the needs and wants of *all* the citizens are achieved.

# Chapter 1

# EQUITABLE FREQUENCY ALLOCATION

*Dr. Katrin Nyman-Metcalf*

## Abstract

As a global resource, frequency allocation is made at two levels, internationally and nationally. At the international level, which is the first step, the International Telecommunications Union (ITU) is in charge of frequency allocations to three defined regions.

It is the responsibility of each nation to do frequency planning at a national level. In the frequency allocation process, African countries should take into account:

- the importance of a transparent, open and a participatory approach to the decision making process;

- the application of the principle of fair and equitable use;

- the existence of independent regulators, operating in a clear policy context, to manage frequency allocation;

- the equitable sharing of frequencies among the three tiers of broadcasting, whilst public service broadcasting should be allocated the most effective frequencies to ensure national coverage;

- the existence of clear, open and transparent frequency licensing criteria consistent with promoting the goals of pluralism and diversity of ownership and content;

- the granting of frequencies for a reasonable length of time to allow users to develop their operations;

- the active monitoring of frequency use by regulators to ensure actual usage adheres to license conditions. the pricing of frequency spectrum, which differs from country to country, as this has implications for equitable allocation at the national level;

- the use of new technologies to increase channel availability where frequency spectrum is limited.

# Introduction

When gazing up at the starry sky on a dark night, space may appear endless, but the radio frequency spectrum, which is found up there, is a limited natural resource. It is a resource that belongs to all of humankind in common and should be used for its benefit in an equitable manner. These fine words not only reflect a beautiful principle but are also the guideline for a very practical and concrete activity: the allocation of frequencies for different uses in all countries on Earth. With modern technology there are more ways of using frequencies and of getting more information on to the limited frequencies available, but even so the spectrum is not limitless. Convergence of technologies may mean more efficient use of the frequency spectrum but also more users needing space in the spectrum. Consequently, there must be a way to distribute frequencies in a fair and equitable manner so that everybody can enjoy this important resource. This is crucial for broadcasting but also for the development of other modern means of communication such as mobile telephony and Internet.

As it is a global resource that does not recognise national boundaries, frequencies have to be distributed on a global level, with an equitable allocation between states. In order for the aim of achieving an equitable use of the frequency spectrum for all humankind to have any real value, the allocation must also be equitable on the national level – within the states. The international system and its obligations must be transferred down to the national level and put into practice in a manner that allows the fair and equitable use to permeate to the end users of frequencies.

The availability of different forms of broadcasting and telecommunication has changed the world and brought people closer together in a way other forms of communication cannot. The use of the frequency spectrum is the technical basis for modern communications; the importance of a fair and efficient use of frequencies thus becomes apparent. The increase in communications is beneficial for humankind in many ways, but puts increased stress on the use of the underlying resource – the frequency spectrum. Although the use may be more efficient today with new technologies, thus increasing the capacity, the need for the resource is also growing.

Broadcasting is an important tool as well as consequence of freedom of expression. The importance of broadcasting for development, for

education and culture, for the security of states and for a variety of reasons and purposes, cannot be stressed enough. The use of the frequency spectrum is in turn a necessary tool for broadcasting. This way, the rather technical issue of spectrum management moves from being a practical-technical matter for specialists to being a matter of great importance for anyone involved in broadcasting or any other forms of communication.

This paper describes the system of frequency allocation at the international level, especially as concerns broadcasting frequencies, as well as the principles for national spectrum management seen especially from the African situation. It provides some ideas and makes some recommendations on how to try to ensure that the frequency spectrum is used in the most equitable manner.

# Radio Frequency Spectrum for Broadcasting

The radio frequency spectrum as well as orbital positions for satellites are not finite natural resources in the sense that they could be "taken" to be completely used up for all future – they have no physical mass and if a certain use of them ends they are there to be used again. But the resource is limited in the sense that only so many users can enjoy it at any given time. This is not so much determined by the physical size of the resource as by the characteristics of it like its sensibility to interference. For the purpose of frequency allocation, the frequency spectrum is divided into sections called bands. The different bands have different characteristics that make them useful and adaptable to specific uses, like AM and FM radio, UHF and VHF television, meteorology, air and marine navigation, electronic mail, telephone, etc.[i] Different users and uses have to co-exist in certain bands. To be able to transmit information the user must have exclusive access to a frequency over a geographical area, which is the size of the signal travelling from its source to the designated receivers. If there is no such exclusive use, the signal may encounter interference and the message will not be properly transmitted. This is why the number of users that can be simultaneously accommodated is limited and the number and location of users that can co-exist depends on the characteristics of the band. The range of frequencies allocated by the body in charge, the International Telecommunications Union (ITU) has grown since it first started such work early in the 20th century as technological developments

makes more and different access possible.[ii] ITU does not allocate frequencies directly to states or specific users, but administers a system of registrations. It is up to states to notify ITU if a specific frequency use may cause interference internationally or otherwise have an effect across the state border. Given the nature of the radio frequency spectrum, it is obvious that cross-border issues will often occur – the spectrum cannot be divided along national borders, but follows its own rules. If the relevant organ in ITU finds that the frequency is used in accordance with ITU plans, the frequency is deemed to be protected and other spectrum users should prevent interference to it.[iii]

The basic law for frequency use with the detail of how the international spectrum management is handled is set out in the Radio Regulations, which is a large mass of rules and regulations for spectrum use, which is binding on member states of the ITU. The Radio Regulations are very detailed and thus voluminous and they are updated regularly. It is a huge mass of rules that the national regulators need to keep available and make sure is updated with the latest amendments. As this is the basis on which frequency assignment is made also nationally, the Radio Regulations should be available to be read by those interested. Given the volume and the technical nature, in many countries the texts will be kept physically available at the regulator's premises rather than being published in official gazettes or the like. In any case, the rules must be available in some form as they form part of also national law, being an international agreement binding for the state. For each band of the spectrum, plans are made at regular intervals for different geographical regions. There may be modifications of the plans and additions to them in the interval between plans. As this interval would normally be 20 or 30 years with rapid technological development there is a danger of plans lagging behind development and it is in practice quite common with additions. Conditions for use of the bands are set out in regional agreements in connection with the plans that further specify requirements for and characteristics of spectrum use in the different bands. There may also be elements in the Radio Regulations as such that determine criteria that are more detailed.

The overall usable radio frequency spectrum extends from very low frequencies of a few Kilohertz (about 3kHz) to extremely high ones of some hundred Gigahertz (300,000,000 kHz). Radio communications depend on a combination of properties of nature, on the earth and the atmosphere. The value of frequencies is different and their usefulness

varies depending on the purpose of the use. The bands between 3 and 30 MHz are where conventional radio systems operate and with this they have a potential of covering the entire world, as the radio waves in these frequencies are reflected by the ionosphere and the earth and can travel around the globe. In the higher frequency bands, radio wave propagation follows line of sight principles and are affected by rain, material obstacles and generally follows optical laws. Very low frequencies can only be used by outside aerial systems covering a limited area. Various systems of transmission like microwave repeaters are used to ensure long distance transmission on land. Satellites operate on the line of sight principle, taking into account that from certain positions like in the geo-stationary orbit a satellite can cover a vast area of the globe – provided it is not interfered with by another satellite. The number of satellites that can be launched to certain orbits is thus more limited than the available space itself may indicate.[iv]

In all bands it is important to establish criteria on technical parameters like on channel separation (bandwidth, spacing, etc) to ensure interference-free broadcasting. Antenna heights and transmitter outputs are important factors. This is why ongoing monitoring by the regulator is important – if a broadcaster or other spectrum user changes the parameters, the situation in the spectrum also changes and interference may result. Faulty and outdated equipment may lead to this, as might lack of proper technical knowledge among those responsible for the transmissions.

Apart from the issue of spectrum use as such, with the liberalisation of broadcasting and other communications services, transmission systems and infrastructure can also be looked at as a means of ensuring that broadcasting reaches more people. The public communications infrastructure often possesses transmission facilities (transmitters, masts and other equipment) which could also be used by other users. As there is a close connection between the use of transmission facilities and spectrum use, facilitating a more effective use of transmission equipment is likely to lead to efficient spectrum use. It is also a benefit not just to the broadcasters (cheaper than building your own facilities) but also to society as a whole, to make more use of existing facilities rather than to build more of them. One method used in many Central and East European countries is the creation of separate companies (privatised or still with state ownership) that are independent from broadcasters or telecommunication systems and that lease out the facilities on commercial terms.

Given the special role of public broadcasting, it is normal to treat the public broadcasting service (PBS) differently from other broadcasters in connection with spectrum allocation as well as other matters. Sometimes certain bands may be reserved for PBS to make sure that PBS gets the range it needs. Otherwise, there may just be a priority for PBS to be ensured the spectrum it needs in any band to reach all parts of the country and population. Other spectrum users will be assigned spectrum after it is determined what PBS needs. In this context, it is important that PBS does not (especially if it used to be the only permitted broadcaster) occupy frequencies it does not need or use. It may be the case that PBS reserved spectrum just in case it would need it, as the demands on them to show the actual need and use would often be different and less strict than for other broadcasters (if there were any such demands at all) or it may be that the use has changed. In order to accommodate more users, alternatives to traditional aerial broadcasting such as satellite and cable may at times increase the range and accessibility without increasing the need for spectrum. PBS as the normally dominant broadcaster in a country should make sure to look at such possibilities. It is also important to look at reaching population rather than just reaching geographical areas.

There are many important developments going on in the broadcasting sphere at the moment. Satellite use is no longer very new, but keeps evolving and presenting new opportunities for broadcasting. The digitalisation of broadcasting can mean a very important technical change and breakthrough, allowing more choice for viewers, more efficient use of spectrum, etc. In line with ITU rules, states are obliged to make the most efficient use of spectrum by using modern technologies. This is not always easy though, as it may be costly for governments and users, and thus may be beyond reach for some countries and for groups of people in countries.

# International Frequency Allocation

A resource that is limited and that needs to be shared between users needs regulation. Even in this era of deregulation and liberalisation in many fields, the basic fact that we are dealing with something of which there is not an unlimited amount shows that there must be a form of regulation, unless we want to accept that the strongest gets all. The global nature of the resource also shows us that the regulation and system for it must be developed and implemented on a global level. This brings us into the

sphere of public international law. Public international law – the law between states – differs from national law in that there is no global legislator or any implementers at the global level. Even with a multitude of international organisations, some with far-reaching powers, there is still at least in theory a possibility for states to decide if and how they will be part of the international legal system, in a way in which subjects of national law cannot decide whether or not they will follow the law. The effect and impact of international law thus fundamentally depends on the will of states to follow the rules. Frequency allocation and the system set up for it through the ITU are often quoted as a success story of international law. The rules and decisions of the ITU are more often than not followed by the member states, even if ITU like all international organisations lacks any special force to implement its decisions.[v]

The ITU is the world's largest existing international organisation (with 189 member states in 2002) and the oldest still operating one. It was set up in 1865 as the International Telegraphic Union and merged in 1932 with the International Radiotelegraphic Union (formed 1906), when it changed its name to the International Telecommunications Union. Although the organisation is still a state organisation (and since 1947 a UN specialised organisation) in more recent years, apart from member states there are also sector members, different bodies active in the communications field. This is a reflection of the increased private involvement in the communications sector. The size and age of the ITU and the fact that it has a well-established system for dealing with issues within its remit provide some explanation to why the spectrum management and other elements of international telecommunications law is successful in the sense of ITU gaining wide recognition for its decisions. The interdependence of states when it comes to organising functioning communications is another part of the explanation. When states have a practical and direct interest in working together internationally, this co-operation is likely to be desired by all. It is when the joint interest is more abstract and ideological that certain states tend to prefer not to bind themselves to any international co-operation. In communication, from the very first radio broadcasts and telegraphic messages it was clear that there were a lot to be gained from working with other countries.

Frequency allocation means that the ITU determines the spectrum bands to be used for a special service (like for space to Earth or Earth to space for satellite communications, different types of radio, etc). An

allotment plan is made and state administrations must adopt characteristics in accordance with the plan when they assign the frequencies to end users. The allotment is thus when a state is given a share of the frequency spectrum. The state gives the right to use that for various purposes through assignments. The assignment is made by the national administration, notified to the ITU and if it is in accordance with the plan and there are no objections, it is registered and thus obtains a certain protection.[vi] Through procedures of notification and registration, harmful interference is avoided. The idea behind the system with plans made at regular intervals is that no permanent priority is given to countries or to users of a certain share of the spectrum, but only a right to use it for a specified period of time. The Earth has been divided by the ITU into three regions for the purpose of spectrum management. The regions are determined by the nature and characteristics of the spectrum, which has lead to Europe and Africa becoming region one.

ITU was reformed to an important extent in 1992 (entered into force in 1994) with new structures created to meet new demands put on the organisation with changing communications. The new structure consists of a Telecommunications Development Sector, a Telecommunications Standardisation Sector and a Radio communications Sector. The Radio communications Sector (ITU-R) deals with frequency allocation mainly through its Radio Regulations Board. Previously the same activities were carried out by the International Frequency Registration Board. The work of the ITU as a whole and in the Sectors is carried out through conferences at different levels, uniting countries all over the world or regionally. ITU-R will to an important extent deal with the routine but important matters of frequency allocation, registration of frequencies and orbital positions, checking compatibility of assignments and systems of member states with ITU rules and verifying the proper co-ordination.[vii]

ITU-R is responsible for the allocation of bands of the radio frequency spectrum to different uses, the allotment of frequencies and the registration of radio frequency assignments and associated orbital positions, in order to avoid harmful interference. ITU-R shall also co-ordinate efforts to eliminate harmful interference and improve the use made of radio frequencies. Specifics of the task of ITU-R are set out in a strategic plan in Resolution 71 of the 1998 ITU Plenipotentiary Conference. Rational, equitable, efficient, and economical use of the spectrum by all radio communication services is set out as the mission. The Resolution describes the environment in which these principles

should be ensured, including e.g. growing recognition of the economic value of the spectrum; market-driven and user-oriented rapid development and ever increasing demand for spectrum; growing role of regional organisations and private-sector activities; convergence of technologies, digital techniques and increased interest of the developing countries.[viii]

The Radio Regulations Board is an important part of ITU-R. The members of the Radio Regulations Board shall according to the ITU Constitution not represent any country or region but shall serve as "custodians of an international public trust" (ITU Constitution, Article 14.3.1). The same words were used regarding members of the predecessor organ and the idea behind it was to make it possible to elect members based on their competence alone. However, as often happens in the UN system as well as in other international co-operation other considerations also play a part. Different regions feel they should be represented, issues that do not necessarily have to do with the actual matter at hand (political relations between states) influence what support different candidates get, etc. Even if the Radio Regulations Board would appear well placed to be elected only on technical merit, this is not the case in practice but considerations of geographical distribution do play a part. This is also reflected in the Constitution and it means that there must be a combination of knowledge in the field with geographical distribution. The importance of qualification in the field of radio communication is stressed also in Article 14.1 of the Constitution. It is underlined furthermore that members of the Board cannot take instructions from anyone.[ix]

The Radio Regulations Board meets several times a year and can convene without meeting by using modern technologies. Unanimity is sought but it is possible to take decisions by voting. As there is an existing system with procedures for frequency allocation with a Master International Frequency Register it has at different times been suggested that it is sufficient if only staff of the ITU deal with frequency allocation rather than an international board. However, the board has been maintained as it gives more emphasis and perhaps inspires greater trust in the work. The Board also has a role in helping to solve disputes, in proposing areas for action and in otherwise promoting the issues.[x]

Among specific matters for ITU-R apart from the traditional work with the spectrum and implementation of the Radio Regulations, are also the development of criteria for frequency sharing and co-ordination of new and existing systems in space and terrestrial environments to increase efficiency as well as improving flexible working methods for ITU-R.

ITU-R should also in co-operation with those sections of ITU directly responsible for development assist developing countries in spectrum management. Not just least developed states, but all member states should be assisted with guidance on economical and timely implementation of radio communication systems.

The World Radio Communication Conference (WRC) of the ITU is the key decision-maker in the frequency management field. It is the organ that revises the Radio Regulations, instructs the Radio Regulations Board and deals with other issues of a global nature. The WRC is normally held every two years. At the WRC the future frequency allocation is normally discussed and how this affects the potential of future telecommunication. Any new uses or applications must be accommodated, so there is a need for constant review. Study groups as well as Radio communication Assemblies help prepare issues relating to new technologies and anything else that should be considered by the WRC. The Plenipotentiary Conference held every four years is the top decision-making body of the ITU. Such a conference is held in October 2002 in Marrakech, Morocco. ITU has a secretariat based in Geneva as a permanent executive organ and some field offices with different tasks.

ITU has developed and is still refining different processes to take into account the risk of saturation and to try to ensure as much as possible that only real and relevant use is made of the spectrum. This is especially important for satellite positions and also in other space-related contexts. What is called the administrative due diligence system is one such element – making sure that care is taken to get information from potential user, to be able to determine that the intended use is real and feasible and to ascertain the seriousness as well as usefulness of the applicant. Systems introduced in recent years are subject to evaluation to determine the most feasible way forward.

ITU assumes new issues as they arise to try to achieve a better and more equitable communications area. The issues dealt with can vary. One topical matter at the moment (second half of 2002) is the pricing for spectrum. There are great differences between countries on how spectrum is priced. This question is within the competence of states themselves, but ITU is discussing it and issuing questionnaires to states in order to come up with a recommendation on how to harmonise pricing systems. Even if the ITU cannot impose rules on this, it can have an important role in harmonising.

# ITU and Equitable Frequency Allocation

Article 44 of the Constitution of the ITU (now from 1992, in force 1994) says:

> Use of the Radio-Frequency Spectrum and of the Geo-stationary-Satellite Orbit.
>
> Members shall endeavour to limit the number of frequencies and the spectrum used to the minimum essential to provide in a satisfactory manner the necessary services. To that end, they shall endeavour to apply the latest technical advances as soon as possible.
>
> In using frequency bands for radio services, Members shall bear in mind that radio frequencies and the geo-stationary satellite orbit are limited natural resources and that they must be used rationally, efficiently and economically, in conformity with the provisions of the Radio Regulations, so that countries or groups of countries may have equitable access to both, taking into account the special needs of the developing countries and the geographical situation of particular countries.

Frequency allocation must permit equitable access. By using the word "equitable," it is shown that different aspects must be taken into account so that the end result is the most appropriate from the viewpoint of as many different interests as possible. There is no definition in ITU legal texts for the word "equitable." In the well-known Black's Law Dictionary, equitable is explained as just, fair and right in consideration of the facts and circumstances of the individual case. So it is clear that the content must be looked at in each individual case. In the context of frequency allocation and allocation of orbital positions, there has been a discussion since at least the 1970's on how the needs of developing states must be seen vis-à-vis needs of developed states. The latter require more frequencies at the present time but thus they may potentially hinder frequency use of developing states once these have the technical and economic conditions for needing frequencies. It has been discussed if it

would be more equitable to reserve parts of the spectrum and orbit or if it is indeed better to allow those who need it now to have the right to use it. The ITU system attempts a balance between interests, which is seen by the fact that the word equitable is used rather than "equal." The legal texts furthermore talk about efficient use and in other ways indicates that there is no question of just equal distribution, but that the use of the spectrum is what is the key. This said, the gaps between different countries should be taken into account to give some content to the equitableness. If it is ignored that not only current needs but also possibilities to make the most efficient use vary between states, then the distribution would in no way be globally equitable but just confirm the advantage of certain states.[xi]

Although the ITU system for frequency allocation as well as that for allocating orbital positions for satellites is construed around the equitable distribution and concern for many different things, it can still not provide any guarantee that more developed states do not come to dominate globally over those that have less technical resources. This can concern frequency use but is perhaps even more likely to be of concern for orbital positions, where the connection with certain territory on Earth is less direct. These concerns lay behind different initiatives of developing states to ensure a guarantee of future allocations – something not well received by developed states and other market actors, who point to the need of efficient spectrum and orbit use. This conflict of interest is likely to remain, although technology develops so fast that some issues take care of themselves in one way or another.[xii] The fact that ITU by and large functions well and is respected, in itself provides some guarantee that the issues are dealt with in a proper forum and not just used to make relationships between states complicated.

Even if one can debate how well it succeeds, the international ITU system does attempt to ensure equitability on the international level. It also presupposes that the member states ensure the continuation of equitability to the national level. The ITU system is a state-based system, which means that even if the actors in the communications field – those actually using the frequency or orbital position – are increasingly private subjects, the state they are based in must be responsible for their actions in the international context. To ensure that a state knows what goes on in its territory, it has a system of licensing and national regulation – here the principle of equitable allocation must be included.

# National Frequency Allocation

International law is the system of law between states. In order for it to be effective, the states must make sure that the rules they agree to at the international, inter-state level, are also implemented and enforced within each state. The state and its organs are responsible for its citizens and subjects and must make sure they follow international law. The state is independent in its decisions about what the system for implementing international law should look like and what the details of it are to be, but it must be efficient and effective. If the international system is ignored at the national level it may break down totally or at least become ineffective in that whatever is agreed internationally never has any effect when it comes down to the level of individual subjects of law. For frequencies, the system must e.g. be capable of dealing with interference between countries. The frequency allocation system and the responsible bodies must be clearly designated, known to those concerned and the process must be known and accessible. Article 44 of the ITU Constitution also puts the demand of use of the latest technologies in order for the use of the spectrum to be as efficient as possible. Regulators are the tools for implementing international rules in national law and making sure the desired results of the international system are properly implemented on the national level. If there were no system for implementing rules at the level of individual broadcasters and other users of the spectrum, there would be chaos. Broadcasters may cause interference, they may find that their frequency gets taken over, they cannot plan and the audience and/or customers would not have any security.

It is in accordance with ITU instruments a sovereign responsibility for states to regulate the frequency spectrum. It means that it is a right for states to do it, but also a responsibility. Member states of the ITU must determine the minimum amount of spectrum and orbital positions they require, they must licence the specific frequencies and orbital positions, they must apply procedures for international co-ordination and take responsibility for what is licensed.[xiii] As shown, ITU allocates frequency bands for certain usage but it is for the member states to determine how the frequencies in these bands are specifically used. The state assigns specific frequencies to specific users and this means that the state has a possibility to influence which users get access within the scope of use determined by the ITU. The ITU or any other international body cannot

determine the exact make-up of frequency users, even if it is indeed ITU that determines the make-up of frequency use.[xiv]

As the radio frequency spectrum is a limited resource – limited through the use made of it at any given time – it must be allocated to a user based on the need this user has for a specific frequency at a specific location and time period. The regulators must be able to determine as clearly as possible that need and use. Regulators should have plans for frequency allocation that not only ensure that the use is in accordance with ITU rules and the use designated by the ITU for a specific band, but also ensure the most efficient use for the country. As use of the spectrum is a matter under development, not only present uses but also potential uses, new technologies and other developments must be taken into account in order for these to be accommodated as well as can be. This means a need for flexibility, but at the same time there must be some stability so that both broadcasters and the audience know where in the spectrum to find what and can plan accordingly. Licences should not be given for very short periods of time but at the same time, regulators should have some possibility of amending licences – in accordance with set procedures so as not to compromise legal certainty.

It is important that the issuing of frequencies is followed-up by inspection of spectrum users to verify that licence parameters are complied with, that the frequency assigned is really used and for the purpose for which it was given. This task must be carried out by the regulators, data of it must be gathered and at times supplied to the ITU. When creating a licensing system, this important element must not be forgotten, as an important building block in the security and stability of the system.

With all of these important tasks of the regulator, it is crucial that there is confidence in the regulator from those affected by its decisions. Transparency as well as a firm legal basis for the work of the regulator are important elements promoting such confidence. If it is seen that the regulator takes into account only objective facts, clear performance criteria and bases its decisions on what is best for the entire country, the decisions will be accepted and it is more likely that also those who get a negative decision will accept it. As it is impossible to have a fool-proof guarantee against unlawful uses of the spectrum, it is important to have an environment in which most users follow the rules, so that policing of unlawful uses does not become such a huge task that there are no resources for normal regulatory work.

# Equitable Frequency Allocation

One new element to think about in the frequency allocation sphere is the need to harmonise regulation of telecommunications and broadcasting. There is more and more convergence between these two sectors and more and more of frequency use has impact on use for other services, coherence and co-ordination are growing in importance. Convergence in the sense of the same legal basis for regulation, joint regulators or established systems for joint regulation has recently started and has not been completed or got very far anywhere in the world. In Europe, more and more attention is given to this and there are some joint regulators or established structures for joint regulation. This is also the case in North America. In most of the rest of the world, Africa included, the harmonisation has not got very far. It is desirable and important that this proceeds. The convergence may mean that new possibilities open up for a more efficient use of the spectrum as well as of infrastructure related to spectrum use. A simple example is that the same mast may be used for broadcasting and mobile telephony. As regulators should make demands when it comes to technical facilities used, the regulators can influence such a positive development of frequency and infrastructure use. The fact that systems are now being built up in e.g. Africa, gives a possibility to take such steps that may even be greater and more efficient than in countries with an older and more established infrastructure.

Whatever system is used for the licensing process, before granting a licence to any potential broadcaster, the regulatory authority will and should ask for certain information and will pose certain questions. Procedural rules for the licensing processes vary from country to country, even if they are all designed for the same purpose and in the same international framework. Certain basic questions and demands tend to be similar however. The entity applying for licence must be set up in a proper manner and have a certain stability, technical requirements must be met and generally it must be proven that the entity applying will be capable of meeting demands put on it. It is more and more common that not everyone applying for a licence can get one, because of scarcity of spectrum. Some applicants will be disqualified for not meeting the demands, but increasingly it may be the case that there are just more applicants than what the available spectrum can accommodate, even if the regulators do what they can to suggest shared frequencies, smaller coverage areas than what applicants ask for, etc. When designing the rules for selecting between candidates that all meet the basic requirements ITU rules do not offer much guidance, but states have to determine the system from their own criteria and needs.

Frequency allocation is furthermore not the only element of international law that broadcasting bodies have to deal with. Apart from this technical issue, matters of freedom of expression come into the picture. Diversity and plurality of broadcasts should be ensured, while respect for other laws and rules – like protection of privacy and against incitement to violence – must not be forgotten. In some countries, the same body will deal with the various aspects of broadcast licensing and monitoring, elsewhere there will be different bodies that must work together. A broadcaster that incites ethnic violence should be deprived of its frequency or should never get one in the first place if this intent can be seen, so even if content and technical parameters are quite different topics, they must be treated in close connection with one-another. The great impact broadcasting media has underlines the importance of some regulation. For media as a whole, as far as content regulation is concerned the need for regulation depends on the amount and effectiveness of self-regulation. If there is a functioning system of self-regulation, the need for official regulation is less. The need for co-ordination with the frequency regulation however remains.

Away from technical issues, economic reforms and liberalisation also influence the licensing process. To begin with, if private broadcasters are only just beginning to be permitted the whole procedure as such is new. But also in countries that have had some private broadcasters and communications operators for some time, the share of these as compared to the state sector is generally increasing. The importance of private telecommunications operators has an influence for the whole spectrum management field. Reforms of regulatory systems may aim at giving the market forces more say in the determination of how spectrum is used. One element of this is that it is quite common that frequencies may be auctioned off at certain given times among those who meet certain basic requirements. Many broadcasting laws prescribe that the consequence of the auction shall be that the broadcaster that provides the most needed content will win the auction, provided other criteria are met. The most needed content may be something that does not already exist or simply that is oriented towards a wider public demand. There are however also systems (as used in some form in e.g. the United Kingdom and Australia) under which those who pay the most get the spectrum. The philosophy behind this total market approach is that the most efficient use will be made as those who pay the most must be presumed to have a great interest in the spectrum and furthermore state organs should not interfere with the

content. As this approach is coupled with the existence of public broadcasting systems, it still gives a possibility for cultural and educational broadcasting policy. Even so, by choosing this approach the regulators give up a large part of the possibility of directing what spectrum should be used for. Ensuring diversity in also private broadcasting is hard with this type of licensing process. It is also possible to go further in giving up regulatory influence over the use of spectrum by issuing spectrum licences without proscribing what service the spectrum is to be used for (whether broadcasting, telecommunications or other use). Convergence of technologies makes this a practical possibility but whether the ideas behind allocation for different purposes must be dismissed just because technology allows this to be so is another issue. What is probably inevitable is that ITU must make sure that its rules do not prohibit the free use of technologies, as the technological development is so rapid that the ITU system otherwise would risk becoming obsolete. In international law, in a more direct manner than in national law, rules that are seen by the users as obsolete and not in tune with reality will be disregarded.

# The African Situation

The frequency assignments plans for Africa at the present time include:

- Medium Wave Sound Broadcasting: Geneva Plan of 1975 for Africa, Europe and Asia between 535,5 kHz and 1606,5 kHz
- VHF FM Sound Broadcasting. Geneva Plan of 1984 for Africa and Europe between 87,5 MHz and 108 MHz
- VHF and UHF television: Geneva Plan of 1989 for Africa and neighbouring countries between 174 MHz to 254 MHz and 470 MHz to 854 MHz.

There is also a broadcasting satellite service plan from 1997 with later updates (originally made in 1977).[xv]

Many least developed countries of the world are situated in Africa and there is a need here for building up capacity in the form of infrastructure as well as human resources in the various fields related to spectrum use. The ITU development work supports this, e.g. through field

offices in different African states and regional activities aimed at reducing dependence on foreign especially non-African undertakings for different communications facilities. A summit of African regulators and development of regional action plans have also been supported by ITU recently. The convergence of technologies and the increasing importance of various forms of telecommunications precipitate the need for strengthening structures in relation to spectrum use.[xvi]

Although the basic issues of frequency allocation are the same for all countries, there are important practical differences depending on the differences in development between different countries and regions. The ITU system with its reference to equitable allocation is supposed to take into account interests of all countries and to make sure its rules to some extent compensate for differences that would otherwise mean that some countries are disadvantaged because they are developing at a slower pace than others. At the same time, ITU rules recognise that frequency use must be efficient seen in a global perspective, so systems of giving equally regardless of need would not be more suitable than systems just looking at current need. One or the other system would mean that frequencies are not used in the best possible manner seen from the viewpoint of all people having the use of a scarce resource. The balancing between satisfying current needs, which are more dominant among more developed states using modern technologies in an intensive manner and the respect for current and potential future needs of states at a slower pace of development, is a dilemma for ITU. The organisation has been criticised not least by African states for not taking into account the needs of less developed states sufficiently. But ITU has also been criticised for excessive regard to less developed countries and their future needs and thus for an in-effective management of the frequency spectrum. On balance, the system does have respect from different sides, which shows that the balancing is not totally ineffective.

One aspect not to be overlooked is that with rapid development of technology in the communications field, countries who reach a higher stage of development later do not have to go through the same stages as those who got there before, but can leap-frog several steps and go directly onto new technology. Using mobile phones rather than fixed lines in areas that previously had no phone systems is one example, using satellite transmission rather than terrestrial and digital rather than analogue are other examples. Many parts of Africa provide possibilities for these kinds of rapid developments. African regulators are well placed to explore such possibilities, as they have fewer vested interests to deal with.

On the legal and regulatory side, it is notable that many African countries have new broadcasting and telecommunications laws adopted in recent years. This is not specific only for Africa – indeed globally, this is an area in which there is a lot of legislative activity going on. New regulatory bodies are established or existing ones reformed. One reason that this happens not least in Africa, is that there has been across the continent a liberalisation of broadcasting as well as of other communications in recent years. There is thus at the moment a good possibility to influence the design of frequency allocation systems. But with a lot of reform going on and with perhaps certain gaps in legislation, the situation may also be uncertain to the detriment of spectrum users. Even when new rules and systems are adopted, they may in many cases not be fully implemented. In many countries in Africa legislation followed development. Media – including broadcast media – became more pluralistic even before the laws actually allowed for it and forced more freedom on the sector. There are of course still many examples of countries in Africa as well as on other continents where media is still not totally free (or free at all) but more freedom is to some extent forced by technical developments as well as the general world liberalisation. There is no contradiction in welcoming this liberalisation and in advocating for regulation – frequency regulation is needed to avoid the chaos that otherwise may ensue. In many African countries, there is a lack of transparency of the regulators, which makes it very difficult to understand on what basis or why decisions are taken. Increasing transparency and accessibility of the activities of regulatory bodies should be priorities in new regulation or the implementation of it. The new laws may include some such guarantees, but getting it to have full impact on implementation is still difficult.[xvii]

One complaint in many African countries is that the licensing system entails that the licensee must obtain different licences from different places, paying for each one of them. This is cumbersome and may discourage broadcasters and other users. There is much that speaks in favour of a system with one body authorised to deal with the licence application. This can and should be the case even if more than one body must be involved in the decision-making (most notably different instances for determining issues related to content and those related to frequency allocation). The person applying for a licence should not have to go to more than one place. This also ensures that the organs involved must have a system of co-ordination, which in any case is necessary for efficient spectrum management.

Another issues that occurs in some countries in Africa (and elsewhere) is that frequencies assigned to a user are offered for sale by this user. Laws on frequency allocation should – and normally do – prohibit this, as there are special procedures for transferring a frequency to another user, normally only after approval of the regulator. But such rules can be circumvented if there is not a sufficient control. Obviously, with this practice the aims of frequency regulation are lost, as is the control that the regulator can have on proper technical means and equipment being used. Another negative effect is that the person who has initially been granted the frequency, if he or she only wanted it to be able to earn money by selling it, it is likely that the frequency may remain unused for some length of time. The control that assigned frequencies are really used must also be in place. The stockpiling of frequencies and keeping them for potential future use but keeping them away from any use at the present is a problem in African states, where the control may not be so developed. One deterrent against trade in frequencies is to demand thorough documentation to ensure as far as possible that the applicant indeed will use the spectrum assigned to him or her, coupled also with a fee. At the same time, such demands should not be too far-reaching, as they will then also deter serious applicants.[xviii]

In this time of rapid and often profound change, many NGOs and other organisations are active in Africa in promoting media freedom. This work includes developing and implementing principles on broadcasting freedom as well as general principles on media freedom. Apart from stressing the importance of freedom of expression and other issues that are of interest for different types of media, special issues of concern for broadcasting are highlighted in various documents. The importance of no prior control of material is at least as important for broadcasting as for other media. Such principles are not the topic for this chapter, but frequencies are also often mentioned in different principles, as it is impossible to imagine broadcasting freedom without appropriate rules in this area. The open and participatory nature of decision-making is promoted, the need for plans to ensure the optimal use of frequencies and the independence of the body in charge and the need to ensure frequencies to different types of broadcasts. This is reflected among other instruments in the African Charter on Broadcasting from 2001, adopted in the Windhoek +10 process, ten years after the Windhoek Declaration on Promoting an Independent and Pluralistic African Press was adopted under the auspices of UNESCO.[xix]

# How to Achieve a Really Equitable Frequency Allocation: Ideas for Improvement

Finally, as concluding remarks and to sum up the matters discussed, some issues will be highlighted as needing attention by those who are working for an equitable broadcasting situation in Africa. A key element in any improvement of the frequency allocation situation in order to allow the spectrum to be used equitably for the benefit of all is to strengthen the regulators. This does not mean to make more rules and regulations for broadcasters or to create bodies with dictatorial powers, which would definitely not be in the interest of a pluralistic and accessible broadcasting market. It does mean to ensure that the body in charge of spectrum management is capable of carrying out its task in the best possible manner and that its work will be respected. The regulators must be independent, transparent and operate on an objective and non-discriminatory basis. Broadcasters, other spectrum users as well as the public must be able to trust the regulators. They will not do this if the regulator is not professional and competent as well as open about its work. The regulator is in charge of implementing the international rules. These are complex, technical and change often and are thus not easy for non-experts to follow and understand. Spectrum users should be able to rely on the professionalism and expertise of the regulator in applying the rules. If a frequency is assigned to a user, that user is entitled to expect that it will not encounter interference or indeed cause interference to any other recognised user and that it can continue using the frequency for some length of time.

For anyone to be able to take the decision of investing in broadcasting and the equipment necessary, the staff, etc, or to at least make plans for this, it must be known what the chances are of getting a frequency and what the criteria are. Again, transparency and clear rules are important. Not just for lawyers but also for anyone who wants to find out what applies in a certain field, if there are clear rules it is possible to look at these, to get a picture of how and on what ground a decision is taken. If there are allegations of wrongdoing, of discrimination or of invitations to bribe and otherwise influence wrongly, the possibility for anyone concerned to see the decisions and the basis on which such decisions should be taken makes corruption much more difficult and thus less likely. Broadcasting laws or laws on frequency management (that

may be in the same or separate laws) should list criteria as well as set out the competence of the regulator. Often it is better that detailed conditions for licences are set out in regulations by the regulator rather than in the law (to allow for more flexibility), but also in this case the body of rules must be easily accessible.

In frequency regulation, one of the key issues is evidently who qualifies for frequencies and how to determine this. The legislation and process showing this must be de-mystified and clear. The public concerned must understand why someone gets a frequency and others denied, what the process is and the criteria. The decisions should be explained and in case of rejections, there must be an independent appeal. In order to influence the plurality of the broadcasting field, only auctioning off frequencies to the highest bidders is not a good idea, but some form of "beauty contest" among applicants that meet certain basic criteria gives more of a possibility to affect the content of broadcasting. Such rules and criteria must be clear and understandable, based on accepted ideas and set out in some form that ensures some stability. It should not be so that the government in office at any given time decides to give frequencies only to its supporters. The independence and professional background of the regulator should give a certain guarantee. Furthermore, although it is acceptable that the regulator charges a fee for its administrative work and as an application fee for spectrum applications may be a useful tool to deter non-serious applicants, fees should not be so high that they deter applicants. There may be special rates or exemptions for e.g. community broadcasters, public broadcasters also apart from the countrywide PBS services and maybe other types of desirable and not necessarily commercially viable broadcasters. The possibility of making ad hoc exemptions from licence fees or setting different rates on a case-by-case basis should however be avoided.

Regulators should be independent. Not only should they be independent from the operators (broadcasters and telecommunications operators) but they should also enjoy an independent status in the state structures. Even if it will be the government that in the end is responsible for policy issues and for spectrum in the relation with ITU, the day-to-day running of the regulator should not be influenced by the government or other political bodies. This can be ensured by making sure that the working methods permit independent decision-making, that members of the governing organs are chosen based on merit and in a manner to ensure a plurality of interests. Civil society organisations should be able to

nominate members to the governing bodies of regulators and/or there should be frameworks for the close co-operation between the regulator and such bodies.

ITU has among its aims and strategies to assist less developed countries with spectrum matters and related issues. It also stresses the need to promote broader participation by member states including developing countries in its activities, including on frequency matters. The opportunity to influence ITU is there and should be used. Also, there may be assistance available to set up the best possible system for registering frequencies and implementing the Radio Regulations. Such assistance could prove very useful for states in the process of building up systems of frequency management. However, as always with international aid it is important to ensure that it is relevant and useful, targeted at the right issues and recipients. Again, transparency helps monitor that the international assistance available is indeed used for the benefit of the sector.

Broadcasters and others active in the field in Africa, where regulators are undergoing changes following the liberalisation of the communications field should campaign for and in other ways try to ensure the maximum independence, objectivity and transparency possible of the regulators and for a possibility to participate in the work of the regulators. There is no need for secrecy concerning principles for frequency assignment. Some of the information broadcasters have to submit, like financial information, may be sensitive and should not be publicly available, but on the whole, the regulators should allow access to most information they hold and in any case, decisions must be public. Regulators have an important role not just for creating order in the broadcasting field by protecting frequencies and ensuring that broadcasters have the access they need, but also in shaping the broadcasting scene. A liberalised broadcasting market means that there should not be a strict regulation, but that there should be freedom to broadcast. Even so, regulators can have a positive impact on liberalisation by ensuring that different interests are represented. It is not incompatible with a liberalised market to have rules ensuring that there is programming suitable for different groups and that money is not only what determines what will be broadcast. Public service and community broadcasts are very important not least in rural areas of Africa and regulators must make sure such broadcasts get licences and the frequencies they need. If the international system for frequency allocation wants to ensure equitable

access for humankind as a whole to a resource, which is the common heritage of humankind, the idea must be that humankind as a whole enjoys the resource.

The broadcasting systems in most of the world were until recently dominated by state broadcasters. The liberalisation of the sector has occurred with different speed in different parts of the world. In most of Africa it is relatively recent but now going ahead in many countries at considerable speed. Frequency allocation is a key to a successful liberalisation as obviously broadcasters cannot operate without frequencies and the better the allocation and the more protected the spectrum use, the better the chances for good and high-quality broadcasting. Regulators must be prepared to work for this allocation to private broadcasters, community broadcasters and whatever the actors that provide a pluralistic media scene. PBS has a special position and need, as it has a special responsibility to the public. For it to merit the special rules on spectrum access it must fulfil the special duties, like providing a wider range and higher quality of programming also for narrower interests than what the private broadcasters tend to do. The regulator must have a possibility to determine if PBS fulfils its special duty – whether this is done by the same regulator as for other broadcasters or by a special body (both methods exists in different countries). The preferential treatment should not be more far-reaching than necessary. Private as well as community broadcasters must have a realistic possibility to get the spectrum they need, which in most cases with an effective assignment should be possible. It is important that PBS are not allowed to occupy too much of the frequency spectrum. At the same time of course, given the importance of PBS, it must have a proper allocation of the most useful frequencies to be ensured good coverage of the country. PBS should however not be allowed to occupy frequencies maybe just out of old habit, if they do not need them. Alternatives to traditional aerial broadcasting such as satellite and cable may at times increase the range and accessibility without increasing the need for spectrum. Technical issues such as what technology to use to reach the most people take on much more than a technical importance in this context.

There are many ways of promoting a pluralistic media market without introducing too heavy-handed and interfering regulation. Regulators and broadcasters should be working together to ensure a fair and equitable broadcasting field. The regulator should not hinder broadcasters and the broadcasters should not see the regulator as an obstacle but as a facilitator.

**End Notes**

[i] The radio spectrum or the range of Hertzian rays ranges from 3 kHz to 3,000,000 MHz (3000 GHZ) and is divided into nine bands officially numbered band 4 to 12, of which 4 to 11 are broadcasting bands with band 12 being studied for possible use.

[ii] Already in 1903, a radio conference discussed interference, even if that was not really a problem then. ITU has issued frequency bands since 1927. See Lyall *Law and Space Telecommunications* (Dartmouth 1989) and Nyman-Metcalf *Activities in Space – Appropriation or Use?* (Iustus 1999).

[iii] See for a discussion on this (mainly on space communications) Soroos "Global Commons, Telecommunications and International Space Policy", Chapter 8 in Papp & MacIntyre (eds.) *International Space Policy* (Quorum Books, 1987).

[iv] "Managing the Scarce Radio Frequency Spectrum and Orbital Positions", pp 344-355 in *World Communications*, Le Monde Economique International Publications (with ITU), 1995.

[v] Authors discussing the force of international law and the way telecommunications and other "practical" issues are areas in which international law works well, include the classic Brierly *The Law of Nations* (Clarendon Press 1963), also Harris *Cases and Materials on International Law* (Sweet & Maxwell, many editions) and sources quoted there, Zacher "Multilateral Organizations and the Institution of Multilateralism" in Ruggie (ed) *Multilateralism Matters* (Columbia University Press 1993).

[vi] Note the ITU terminology: Allocation – Allotment – Assignment. These are the different steps from the most global and encompassing to the final act giving spectrum to the user.

[vii] On the ITU, see e.g Lyall, op. cit. n 2. Later changes are treated by the same author e.g. in the European Centre for Space Law Summer Course on Space Law and Policy, 1993 Basic Materials in "The International Telecommunications Union Reconstructed" and in "The Role of the International Telecommunications Union" in Lafferranderie/Crowther (eds) *Outlook on Space Law over the Next 30 years* (Kluwer 1997). See also Noll "The Space Law related role, activities and contributions of the ITU in the last decade of the 20th Century" in *International Organisations*

*and Space Law, Proceedings of the Third ECSL Colloquium* (ESA, 1999) and by the same author "The International Telecommunications Union" in *Multimedia und Recht,* (8/1999 M¸nchen).

viii The information comes from the ITU web-site, , visited in September 2002.

ix That geographical and other non-technical criteria is more and more of a determinant for membership of different bodies in UN organs or other international organisations is discussed by many authors of international law. Whether seen as negative or not, it is in any case an illustration to how the actual practical issues at hand in today's international context cannot be the predominant determining factors in creating international systems: national borders and national decision-making is still too strong for that. Even in the EU, the world's most far-reaching international co-operation it has not been possible to totally do away with nationality criteria. For the telecommunications sector and ITU, this phenomena is discussed by Lyall, *op.cit.* n. 2 and 7, and Smith *International Regulation of Satellite Communication*, especially Chapter 5.(Martinus Nijhoff 1990).

x Lyall and Noll discuss the need for the Board and its predecessor, see n 7.

xi See e.g. Smith *op.cit.* n. 9.

xii New use of different satellite orbits is an example.

xiii World Communications, *op. cit.* n 4, especially at page 350.

xiv In the sphere of telecommunication rather than broadcasting, this has lead to occasional fears that states will favour domestic operators and hinder expansion of international enterprises by treating the latter unfavourably at the frequency assignment. US global mobile satellite systems expressed such fears in context with WTO telecommunications negotiations. In the end, due to the less favourable development if such systems, the issue has not yet had any major practical consequences. See e.g. Lessard "International Trade in Telecommunications Services" in *Annals of Air and Space Law* Vol. XXII-I 1997 pp 403-411 at p 408.

xv Detailed information about the plans is found in ITU documents, most however not electronically freely available. The African plans are also described on the web-site of the South African regulator.

xvi The ITU web-page gives further information on the development activities.

[xvii] These issues where discussed by experts from many different countries at a broadcasting policy and legislation conference held in Nairobi in October 2001, organised by Article 19 and the Kenya Community Media Network (KCOMNET).

[xviii] Examples of this were given during the conference in Nairobi (see fn. 17) regarding e.g. Kenya but also other countries. The Ghanaian experience was presented at the Forum on Telecommunications Regulation in Africa and in the Arab States in September 2001 in a paper by Kanor "Frequency Management – Ghana's Experience", available on Internet at the ITU web-page under the heading of the above mentioned Forum.

[xix] Southern African Media Law Briefing, Vol. 6, No. 2, August 2001.

# Chapter 2

# REGULATORY MODELS FOR BROADCASTING IN AFRICA
*Jill Hills*

## Abstract

It is necessary to regulate broadcasting and that regulation must exist within a policy context that has defined goals about the structure of the broadcasting system. In the current context, both at a global level and in Africa, broadcasting policy debates revolves around creating pluralism and diversity of ownership and content.

The principles that underpin differing models of regulation are the importance of editorial and programming independence and a pluralistic and diverse broadcasting system differentiated into three tiers public, commercial and community.

The regulatory framework must address both structural and behavioural aspects. Structural regulation refers to the broadcasting system and institutional arrangements; while behavioural regulation refers to programming and content issues.

Government policy in relation to broadcasting is critical to the shape and size of the system and must address issues of ownership and funding for the entire system. Regulating competition between the players is also part of structural regulation.

Local content regulation is important, as are regulations about specific programming or what are called 'must carry rules' as a way of promoting pluralism and diversity in content.

The models suggested emphasize independent regulation and regulatory agencies whose independence is secured through open and transparent appointments processes, which are participatory and not hostage to any political and economic interests.

A critical issue is the viability and affordability of regulatory agencies in the African context, where financial and human resources are a constraint. Ineffective regulation stifles the growth of the broadcasting sector and trumps policy goals.

# Introduction: Changing International Environment

Traditionally, broadcasting has been a national market, often with a state-owned national broadcaster. As a result, in 1985 there were only ten commercial broadcasters in Africa. And, in general, over the past fifty years, in countries gaining independence from colonial powers, governments of liberation have been unwilling to give up their control of the content of national broadcasting. To a large extent state broadcasters have been the propaganda tools of government. In Africa, the output of these national broadcasters has been supplemented by broadcasts from overseas. Industrialised states— and some non-industrialised— have maintained overseas broadcasters such as BBC World Service and Deutsche Welle, as an adjunct to their foreign policy objectives. In a recent example, the visit of President Clinton in 1998 to six African countries was the occasion for his promise that the US external broadcaster, Voice of America, would come to Africa.

However, these traditional domestic markets with limited foreign penetration have changed since the 1990s. The liberalisation of telecommunications in the industrialised West in the 1980s and its export to the developing world through the World Trade Organisation agreement of 1997 has brought the opening of telecommunications to private companies in many African countries. In turn, that market opening has overlapped into the broadcasting sector. In parallel, the decline in aid and the emphasis on 'governance' by Western governmental aid donors has pushed the 'free flow of information' up the agenda with Western private companies and domestic lobby groups looking to exploit new markets.

Today satellite broadcasting reaches not only into Europe from the USA, but from the USA, Europe and South Africa into the rest of Africa. PanAmSat's launch of a satellite in 1995 allowed satellite distributed pay TV. By 2002 direct-to- home satellite TV had reached 41 countries in Africa. New companies have arisen to take advantage of such new technologies as satellite and microwave distribution.

Faced with harsh economic circumstances, existing broadcasters are also pooling resources and entering into new commercial arrangements. For instance, the African Broadcast Network was set up in 2001 to link public broadcasting companies in Ghana, Nigeria, Kenya, Zambia and Zimbabwe with a British broadcaster so as to cut costs by the delivery of

identical daily programming. And, from 2002, the commercial arm of the South African Broadcasting Corporation, the South African public service broadcaster, has been competing with the likes of CNN and BBC World to deliver TV news to Africa via satellite. African countries are moving towards the liberalisation of the broadcasting sector, and to the private provision of both TV and radio.

In general, in Africa, it is satellite broadcasting that is opening up domestic TV markets. Using digital technology, such broadcasters can compact large numbers of TV channels into a small spectrum bandwidth. Whereas TV markets are still largely confined to the urban elites, it is radio that is more universal. Previously the state broadcaster had a monopoly of radio broadcasts but today there are commercial stations in many African countries. To some extent the opening up of the airwaves is seen as an indicator of and adjunct to democracy. For instance, in Uganda where commercial radio began in 1994, by the year 2000 there were between fifteen and twenty FM stations. In South Africa in 2002, there were 180 FM and AM radio stations. Yet, as Mandla Langa, the Chair of the Independent Communications Authority of South Africa (ICASA), has pointed out, whereas an absence of democracy 'features a corresponding lack of media diversity,' a plurality of media does not necessarily make a democracy. Numbers of broadcasters who transmit the same diet of programming without regard for diversity or local people's concerns, or who transmit no news or informative programmes, do not create broadcast diversity. In turn, 'diversity means codifying the subterranean implications of language, to shape it in a manner that empowers rather than bewilders. It is to understand that the public will be the first to hear the eloquence of silences from the broadcasters, where the public strives to hear what is not broadcast, and to what extent what broadcasters say has (or does not have) any relevance to their lives.'[i] In this situation of changes to national broadcasting markets and increased commercialisation and competition, there is an urgent need for regulation by national governments.

There are those who argue that the broadcasting market is no different from other markets and that competition within the market can take care of consumer needs. In the 1980s, the Chairman of the US Federal Communications Commission, Mark Fowler, argued that: 'The public interest...defines the public interest,' and attempted to reduce the role of government regulation in the sector.[ii] His view was that there was no overriding national interest that demands regulation of broadcasting.

Deregulation of broadcasting, particularly in terms of concentration, is once more gaining currency under the Bush-appointed Chairman of the FCC, Michael Powell, and is likely to penetrate developing countries in parallel with USAID.[iii]

But the economics of information are different from the economics of other markets. The major costs come in the creation of information. Its reproduction and distribution is much less costly. Hence, rather than create programmes, the economic incentives are to buy in programmes that others have created and to spread the costs of creation by distributing the information in as many formats as possible. There is therefore an economic incentive to control both content and delivery systems, an incentive which has led to concentration of media and transmission companies at international level, for instance between AOL and Time Warner.

In addition, there is an economic incentive to broadcast to as many receivers as possible. Those broadcasters with a large home market are therefore at an advantage in that they can cover their costs of creation in their home market and export programmes at a low price. It is for this reason that US programmes are cheap. In addition, the incentive to cover as large a market as possible leads to concentration. Without regulation, the market would be dominated by one commercial company repeating programmes and buying in programmes at as low a cost as possible.

A broadcasting market without regulation would favour the industrialised country exporter of programmes and those in majority languages – English, French, German and Spanish. Programming in minority languages that cannot be exported or re-used elsewhere is expensive. In fact, it was not that long ago in 1998, that the European Commission proposed that minority language broadcasts in Europe should cease because only those broadcasting in the major languages had economically viable markets (Hills, 1998). However, in Europe because broadcasting is a cultural matter as well as one of economics, this proposal failed.

Nevertheless, there is an economic incentive for any commercial broadcaster to use only the majority language of the country in which it transmits. When those using minority languages are poor, the demands of advertisers increase that commercial incentive. For instance, Mandla Langa has asked why private radio stations in South Africa broadcast predominantly in English (with a smattering of Afrikaans).[iv] Without local programmes in local languages, broadcasting fails to reflect the

communities and cultural identities of the population. Only with regulation can local languages survive. Without regulation in Africa, there would be no local programming industry and no local music industry, only Western imports.

There are other reasons for governments to regulate. Broadcasting can have adverse external effects. It can fan hostile attitudes and violence. So, for instance in Rwanda, it is widely argued that radio broadcasting played a part in the genocide of 1994. Although in the USA the press is covered by the First Amendment which guarantees freedom of speech, while US broadcasters now argue that regulation infringes their freedom of speech, most countries control what may be broadcast. Regulation can prevent the broadcast of provocative or insulting material.[v]

Left to themselves, broadcasting markets suffer 'market failure' linked to 'externalities'. This economic term 'externalities' means that one person's decision to purchase affects another person's although the market alone cannot take account of this link between individual decisions (Graham and Davies,1997:17). And it is because of these externalities that without regulation, the broadcasting market will end up providing less choice for consumers than if it were regulated. The problem is that the consumers of broadcasts do not know what they are consuming until they have consumed it. Left to themselves they will not try new things. 'This is not because consumers are stupid, but because it is only in retrospect that the benefits of such investment become apparent (Graham & Davies, 1997:20). If no one will try anything new, the end result of all those individual decisions is that the market coalesces on a narrow set of topics or formats, thereby reducing choice for everyone. Such an outcome is termed 'market failure' by the economists, and is the economic reason behind regulation of content.

Commercialisation exacerbates the trend towards uniformity because advertisers want larger audiences, and commercial broadcasters look to their audience share in order to sell advertising. The economic incentive is to look to the tried and tested and to the lowest common denominator. For instance, the US broadcasting market, which is perhaps the nearest of the industrialised countries to a free market in broadcasting, has a high proportion of game shows and low cost entertainment formats and a low proportion of news, current affairs, drama, educational or more challenging programmes. To quote Mandla Langa again: 'Have broadcasters played their role in transforming South Africa or have they taken the safer route of using formats and processes tried and tested under

the apartheid regime, while offering facile arguments that any experimentation might affect their bottom line?"[vi] If broadcasting is to do more than pump out low cost and lowest common denominator programmes, it requires regulation of content.

Regulation imposes rules to stand in for the market. It consists of mechanisms to put into effect government policy. It is part of the domestic political process of each country. It defines the 'public interest' balancing the interests of commercial lobbies and citizens, it can keep markets separate (for instance telecommunications from broadcasting), thereby preventing concentration of the ownership of information and creates both winners and losers according to its overall goals. It can advantage citizens/consumers or advertisers/large corporations or politicians/elites or local owners/ foreign investment or local content/foreign imports or programmers/ operators, or majority language/local languages within the broadcasting sector. How then should the broadcasting sector be regulated?

# Broadcasting Policy

It is the government's role to determine overall broadcasting policy and the structure of the domestic market. The government has to decide how many players there will be in which technologies, and where they should be located. That policy is then given effect through legislation. It is within this framework setting out the goals of policy and the structure of the broadcasting market that the regulator will work. Without legislation the regulator, be it a Minister or appointed agent, works without structure, targets and accountability. Hence it is important that the legislation sets out not only the form of regulatory agency, how it will be appointed, its powers and to whom it is accountable, but also the goals of that policy. To produce competition and increase the numbers of broadcasters is not a goal in itself. A democracy requires something more. The aim must be that each citizen, however poor, should have access to broadcast information from which he or she can make choices. In turn, that goal holds implications for market structure and for content. However, communications is about much more than economics. In the words of a British minister opening Parliamentary debate on the Communications Bill of 2002:

The Bill deals with the means by which our society speaks to itself and, as it were, hears the echo. It is the means by which we talk to the world. It is a shaper of our culture, our identity and our values. For the Government, therefore, the Bill is not simply a device to regulate or deregulate an industry; it plays a vital role in every one of our wider aspirations for Britain. It will give consumers choice-the variety that they demand and deserve-and will give citizens the information that they need. It will free the industry of unnecessary interference, give it freedom to grow and diversify, allow it an opportunity to change as the world of communications changes, and to gain access to new sources of investment, as well as new ideas and challenges. It prepares us for a digital era. [vii]

The words may be British, but the goals are universal. What is needed is one or more African ways of implementing them.

# Market Structure

The outline broadcasting market structure contained in legislation usually refers to the licences that will allow holders to transmit in certain bands of radio spectrum. The legislation should state how many licences will be issued covering what geographical areas and how broadcasters will be financed. It should also state which agency is responsible for the award of licences. But, as John Barker has argued, many governments in Africa have not passed such legislation.[viii] Rather, where new private entrants have been allowed, the broadcasting market has been left to develop according to commercial priorities, while the government has retained control of the state broadcaster. This pattern produces the worst of both worlds – commercial organisations dependent on advertisers expanding into the most lucrative areas, and state broadcasters dependent on government with little editorial independence. The policy legislation needs to bring all types of broadcasters under a transparent regulatory framework setting out their place in the market and what is expected of them in return for their licences. That regulatory framework needs to specify how the broadcasters will be financed.

The regulatory framework itself needs division into two aspects, which include structural regulation as well as behavioural regulation. Structural regulation determines who may broadcast, how many broadcasters, where they broadcast and at what power, with what technology and in which portion of the spectrum, together with their financing. Behavioural regulation sets out the main principles by which they are expected to work. We consider the financial aspects of structural regulation first.

# Structural Regulation: Financing

Methods of financing have important consequences for programming. Whereas the stability of licence fee income or subsidy allowed the state-owned broadcaster in Europe to develop programmes for the public without concern that some attracted only minority audiences, the American commercial system demanded that broadcasters deliver audiences to advertisers. Programmes were part of an integrated process that attracted audiences to advertisers who then sold consumer goods. Commercial radio was a means of developing a mass market for expanding industrial production. Then, because radio companies looked for low costs in a competitive market, radio became linked to the burgeoning recorded music industry. To fill in the gaps between advertisements, recorded music, phone-ins and headline news have become US commercial radio's staple programming diet.

An ideal market would contain radio and TV outlets supported by different forms of financing. But in the fledgling poor markets of Africa, this ideal situation is unlikely to exist. Instead, with a deteriorating economic situation, state subsidies to broadcasters have been cut back leaving the state broadcaster to rely increasingly on advertising. In turn, where satellite TV broadcasting is coming in from outside the country, major international advertisers such as car firms are likely to concentrate on the elite markets of satellite subscribers. State broadcasters dependent on other advertising are then likely to crowd out commercial broadcasters, particularly where per capita income is low and the advertising market is small.

In the African context, where licence fees from would-be broadcasters produce much-needed income, there may be a tendency for government to allow into the market large numbers of commercial

broadcasters. But, if there is no advertising market to support them, then the economics of information would suggest that these outlets will use stratagems to cut costs and gain cheap programmes. They may opt for 'free' programmes, perhaps donated by overseas broadcasters, play repeats ad infinitum, or evade royalties on the music they play. They will also become concentrated. Hence, by not taking a view on how many broadcasters the advertising market can support, governments can impede the development of commercial radio as well as prevent the development of local programming and local music.

The fact that a broadcaster is financed by advertising and aims to be profitable does not mean it should not be regulated. For instance, in Britain there has been a 'duopoly' system of state and commercial broadcasting. All off-air broadcasters, including the BBC owned by the state and the commercial broadcasters financed by advertising, have been regulated according to the same broad criteria with some differences in the amount of advertising and imports they may carry. In other words, the form of financing does not necessarily determine the regulation of the broadcasters.

The financing of radio and TV by advertisers can take a number of forms. It can include not only direct advertising but sponsorship of individual programmes and product placement within TV programmes. But advertising has to be controlled; otherwise there would be only advertising and no programmes. From the customer's point of view, in order to assess the information given, there must be a distinction between advertising and programmes. Broadcasters must make it plain to the audience that they are watching an advertisement. Hence legislation needs to contain a definition of what is an 'advertisement.'

The economics of information and incentives to concentration in both commercially funded and state broadcasters have favoured vertical integration. In a vertically integrated system, broadcasters create the programmes, package them into channels and then transmit them. Such a system leaves little room for local programming. In the USA, the Federal Communications Commission has controlled this vertical integration by insisting that 30 minutes of the four-hour prime time slot should be devoted to local or other than network programming. In Britain in the 1980s, to end such vertical integration and reduce its power over the market, the state-owned broadcaster, the BBC, was forced to sell off its transmission network and to take 25% of its programmes from independent producers. In a small market, it may not be economically

viable to allow other than vertical integration, but such integration means there is an even greater need for regulation of the content broadcast.

It is possible then for the broadcasting market structure to include broadcasters and programme makers financed from a number of sources:

- Pay TV: payments made for individual sports events or films.
- Satellite TV and digital radio, cable TV or that distributed by microwave systems financed by subscription and/or advertisement
- Commercial off-air broadcasters financed by advertising
- State owned broadcasting financed by subsidy, licence fee and/or advertising.
- Local/community radio financed by charitable donations/ subsidy or advertising.
- Independent production companies creating local content

Yet it is not the method of financing that determines the extent of broadcasting regulation anymore than it is the technology that is used. Simply because digital broadcasting is coming to Africa does not mean that its use should be regulated differently from the old technologies. Technologies may change but the goals of broadcasting policy remain the same.

# Structural Regulation: Radio Spectrum and the Public Broadcaster

The national regulation of the radio spectrum is the only element of broadcasting that is subject to international rules to prevent interference. The International Telecommunication Union, based in Geneva, decides on allocation tables for the use of the radio spectrum. To do so, the ITU divides the globe into three regional areas: the Americas; Europe (including the old Soviet Union) together with Africa; and Asia. Within each region, at World Administrative Radio Conferences, the members of the ITU agree on which services shall use which portion of the spectrum. A specific service is allocated a specific waveband or has to share it with

other services. In order to avoid interference between services, national governments must make allocations within those internationally specified bands.

Regulation of broadcasting originally came out of the scarcity of spectrum frequency and the practical necessity of preventing interference between stations. Out of this initial spectrum licensing, even in the commercially driven system of the USA, came a very detailed system of regulation. The transmission licence was the primary instrument of regulation. It specified the area in which a station might operate, the technology it could use and the area in which it might broadcast its signal. In contrast, in Europe governments solved the problem of radio interference by only licensing one operator – the state controlled broadcaster – and financing that operator through state subsidy or licence fees paid by the consumer.

These monopoly state broadcasters then outlasted the original reason for their establishment. Many of these state broadcasters subsequently served the political interests of the European government in power. For instance, in France the state broadcaster, directly controlled by government appointees, has been expected to be the 'Voice of France.' Because of fear of the power of broadcasters, liberalisation of the broadcasting market did not begin until the 1950s in Britain and the 1980s on the European continent.

Just as in Africa today, in the industrialised West private commercial broadcasts presented a light relief from the stultifying monopoly of the state-owned broadcaster. But another broadcasting model, positioned between commercial broadcasting on the one hand and state broadcasting on the other developed in Britain. As a result of the personality of John Reith, the first Director of the British Broadcasting Corporation – his strong sense of mission and his desire for independence from government – state broadcasting in Britain became 'public service broadcasting'.

The BBC became the primary model of a broadcaster at arms length from government with the public service goals being to 'inform, educate and entertain.' In response to the Nazi misuse of the state broadcaster, this public service model also became strong in Germany after the Second World War.

An ideal model of public service broadcasting has emerged. Garnham defines it to be:

> a means of providing all citizens, whatever their wealth or geographical location, equal access to a wide range of high quality entertainment, information and education, and as a means of ensuring that the aim of the programme producer is the satisfaction of a range of audience tastes rather than only those tastes that show the largest profit (Garnham 1983 13-14).

The most important features of this form of state-owned broadcasting are then:

- Universal access
- Promotion of national cultural identity
- Editorial independence
- Impartiality
- Programme diversity
- Accountability

Subsequently, these principles have undergone some modification. It is now generally appreciated that there is not one national cultural identity but a number of regional or local cultural identities subsumed into the national concept of identity; that there should be content that represents ethnic and regional diversity. In both Britain and Germany, these principles are upheld by a governing board, which regulates the broadcaster. In Germany, legislation lays down the representation of particular groups in society – such as labour unions -on these Boards, whereas in Britain, despite attempts by the Blair government to open up the process, nomination to the Board is still non-transparent. The governing board also has the role of acting as a buffer between the politicians and the broadcasters, preventing political interference in editorial decisions. To all intents and purposes, the Governors of the BBC have been its regulators. Nevertheless, in Britain, the Minister does have the overriding power of intervention in the 'national interest' and although this power is rarely used, on various occasions governments have

intervened in programme content. In addition, the very fact that the BBC's board is made up of government appointees leads to questions concerning its impartiality.

This model of public broadcasting where there is some space between the broadcaster and the government has recently been adopted in some Southern African states, such as South Africa, Malawi, Namibia and Botswana. Lobbying by civil society organisations such as the Media Institute of Southern Africa and Article 19 has brought it into discussion elsewhere.[ix] However, in Northern Africa, its adoption has a long way to go.[x] Nevertheless, the model that is emerging in Southern Africa is of an 'African way' which tends to feature a transparent system of appointment to the public broadcaster's board, with open nomination from a range of professions, or appointment by an independent quasi-judicial body as in Botswana. Such transparency creates additional space between government and broadcaster. Yet, in the African context, such a board alone is not sufficient to prevent the intervention of politicians in editorial decisions. In fact, if the board contains political appointees, it can become the mechanism for that intervention. So, for instance the President of Namibia has been able to intervene in the content decisions of the Namibian Broadcasting Corporation in 2002 leading to accusations that the 'public service' broadcaster has become a state broadcaster.[xi]

While governments hold financial controls over the public broadcaster, it is difficult for the broadcaster not to self-censor, so that news items which are likely to offend certain quarters are not broadcast. The tension between editorial independence and government desire to spin events in its own favour is one that is ongoing. Even in Britain in 2002, reports of political manipulation of editorial appointments to BBC news programmes illustrate the day-to-day difficulties of retaining editorial independence (Wells 2002). In effect, while a Governing Board helps to bring about some distance between government and broadcaster, editorial independence – that is the concept that programming decisions are taken by broadcasters on the basis of professional criteria and the public's right to know – requires a commitment from the government and enshrinement in legislation. The British model of a 'Charter' (a kind of agreement between broadcaster and government) to separate the broadcaster and the government may work within a mature political system which relies on unwritten rules, but is hardly any barrier to intervention in a more volatile political environment. In the African context, legislation which, as in the South African case, guarantees

'freedom of expression and journalistic, creative and programming independence,' to the public broadcaster, is essential. xii Also in the African context, legislation that forbids political appointees to the broadcaster or political intervention within appointments or political intervention in editorial decisions would allow appeals to the judiciary.

The principle of 'impartiality' is important in that it ensures that the broadcaster does not represent only one set of interests. In Germany, the public broadcaster must pursue internally pluralistic programming, which is defined in legislation. It 'must present all social interests in a balanced fashion' and, in particular its programs are 'forbidden from pursuing any one-sided interest or viewpoint' (Hoffman-Reim, 1996,117). To strengthen the public broadcaster's ability to balance conflicting views, it may seem advantageous to legislate for such 'impartiality.' But it is possible for governments to legislate in such a way that the edicts of 'accuracy and impartiality' come to mean that no opposition or criticism of government can be aired. In six Southern African Development Community (SADC) countries, there are surviving colonial laws preventing criticism of the state and governments under pressure may seek to target the broadcaster or journalists for airing criticism however balanced that criticism may be. Again, it is commitment from government to openness and debate that is necessary.

Other aspects of the public service broadcasting model that are useful in the African context are those of programme diversity and accountability. The goal of programme diversity implies that the broadcaster will not only attempt to represent the community to which it broadcasts, but that it will seek to cover a diversity of voices and news, not simply government and boardroom spin. In the ideal model, the public broadcaster represents within programmes the cultural, religious and language diversities of the community. In reality, there is a tendency for public broadcasters serving a national audience, to concentrate on the capital city and its environs. The model in which the broadcaster produces a diversity of programmes also implies some form of decentralisation. In South Africa, the SABC has been criticised for the fact that 70% of its broadcasts have been in English and that it has not provided programming for the poor and disadvantaged.

The notion of accountability, not just to the formal institutions of Parliament, but to the civic society helps to reinforce diversity of programming. For instance, in Britain, the BBC must not only publish an Annual Report to Parliament but has advisory committees of consumers

in different regions and hosts road shows around the country at which citizens can make their views known. Although this may be an imperfect method of democracy, these events do allow demands for specific programming content to be made by members of the public. In the Broadcasting Amendment Act of 2002, the SABC will be similarly required to find the means for the input of public opinion before creating programming policies. Competition may also focus more attention on audiences and may increase accountability, but it can also lead to uniformity of product as the broadcaster fears the impact that minority broadcasting will have on advertising income or subsidy.

In general, Africa can learn from the European public broadcasting model, in terms of its goals. But the ideal of editorial independence that the model holds out can easily be subverted. Silences can creep in through self-censorship. And when economic circumstances deteriorate, unless there is a legislative defence, state control can reassert itself, either by the targeting of individual journalists as in Zimbabwe or, as appeared to be happening in South Africa in 2002, where the government sought to legislate to empower the Minister over the broadcaster.

An additional drawback of the traditional European public service model for African countries is that to have a Governing Board for the state broadcaster and a regulatory agency for commercial broadcasters is likely to be too expensive in both money and personnel resources. In addition, there is the problem that financial stringency forces public broadcasters into commercial activities. Because they may be supported by licence fee or subsidy, these commercial activities may become anti-competitive and need to be regulated. In South Africa, this problem led to the splitting of the regulation of SABC with its commercial activities regulated by ICASA, the telecommunications and broadcasting regulator. In Britain, commercial aspects of the BBC's activities will in future come under the new regulator of telecommunications and commercial broadcasting, Ofcom. In both countries, programming will be subject to review by the independent regulator. SABC will have its programming policies reviewed and the BBC will be subject to fines if it fails on programme quality.xiii In other words, a Governing Board for the public broadcaster is a necessary, but not sufficient regulatory safeguard to ensure it meets the goals set for it by legislation.

To some extent, change is likely to force itself on the African state broadcasters. Where it is possible for people to access foreign broadcasts via satellite or radio, then, unless the government is to become so

authoritarian that it forbids such access, state-controlled broadcasting which censors news tends to undermine public confidence in itself. If people do not believe what they hear they will look to alternatives – a reason why external foreign broadcasters are still important within Africa.[xiv] But the major advantage the state broadcasters have is their ability to broadcast in the local language. The lessons from countries as diverse as India, China and Korea is that state broadcasting has to look to its programming to survive, particularly if it is forced to rely more heavily on advertising. In Russia and China, as in some African countries, the state broadcasters have had to cope with the withdrawal of state subsidy. In the UK in the 1990s, the BBC was also told to cut costs and raise more money through commercial activity. It now sells its own programmes in magazine format, on video, reuses them on the internet, and exports both programmes and formats. In similar circumstances, the South African Broadcasting Corporation has begun to create an export market for its programmes through satellite broadcasting, leading to the risk that it could dominate the regional market. Hence a regional strategy from other smaller African broadcasters joining together to create regional content could form a counterbalance.

Public service broadcasters have also taken other actions to raise money. The hiring out of programme making facilities has taken place in both the UK and Russia as it is now taking place in Africa. John Barker has pointed out that in Malawi and Zambia, it has been possible for private entities to buy prime-time slots to stage private productions, and in some cases to sell their own advertising and keep the income.[xv] This practice of 'barter' of airtime for programmes has a long history among African broadcasters with little money and there is an international company that specialises in this practice. But the danger is that the broadcaster allows the use of the airwaves at too little cost to the private company, that it does not pursue the expansion of its own advertising finance, and that non-accountable private interests come to hold control over the public broadcaster. Taken to its logical conclusion, the practice equates to the unofficial privatisation of the public broadcaster. Even where there is a Board of Governors, they can be uncritical of content in the face of financial stringency. The practice reinforces the need for state broadcasters to be subject to independent regulation, which ensures they meet the programming goals set out in legislation.

It is possible then to have a model of regulation, which separates out the state broadcaster from government by the means of self- regulation

through a Board of Governors and then regulates private commercial broadcasters through another regulatory agency. In such a system, a regulatory agency responsible for telecommunications would also have to regulate broadcasters use of the radio spectrum. But, although a Board of Governors acting solely as the regulator of the public broadcaster is useful in acting as a buffer to political interference, it is not sufficient to ensure that programme quality and diversity is maintained, or that the broadcaster does not act in an inappropriate or an anti-competitive manner. For broader regulation, an alternative model of an external regulator for the whole sector including the state broadcaster may be less expensive and more effective.

Where should that external regulation be located?

# The Regulator

What agency should regulate broadcasting? Currently, in Africa the tendency is for the Ministry of Information to regard control of the broadcaster as its domain. While having the regulator inside the Ministry is the cheapest solution, it is also that which is likely to lead to political interference in day-to-day editorial decisions. In Britain, when commercial broadcasting was introduced, the commercial broadcasters also became subject to the goals set for public service broadcasters, but a separate agency regulated them.[xvi] Commercial radio was regulated by a third agency, broadcasting standards by a fourth, the regulatory spectrum by a fifth and telecommunications by a sixth. This British model, with fragmented, technologically specific regulators is not a suitable model for Africa. There needs to be one regulator for the whole sector.[xvii] In Britain, this regulator will now be Ofcom, to be set up in 2002 under new legislation bringing telecommunications and broadcasting under one agency. This agency model will go outside the British tradition of one Director, appointed by the Prime Minister and supported by a primarily civil service staff. Instead, it is headed by a Board of part-time appointees with a Chair, under which will be an Executive Director. The new model is more akin to that adopted in African countries such as Botswana. The new agency will be accountable to Parliament but financed by a proportion of the licence fees it collects from telecommunications operators, from broadcasters and for use of the radio spectrum.

## *Regulatory Models for Broadcasting in Africa*

An alternative regulatory agency model from the industrialised countries is that of the Federal Communications Commission (FCC). In that model, the regulator is subject to the legislature. Congress has traditionally voted the FCC's finance but this revenue is now supplemented by licence fees. The Commission consists of five persons (no more than three from one political party) nominated by the President and confirmed in their appointment by Congress. The problem with this model, as described by a previous Chairman, Reed Hundt (2000), is that each of the commissioners tends to become the spokesperson for a particular lobby and decisions become trade-offs with no regulatory logic. In this system the FCC gives notice that it intends to issue a rulemaking. Those lobbies with an interest in the rulemaking then make representations and Congressmen pressure the Commissioners into favouring their causes under threat of the withdrawal of finance. The Commission then issues the rulemaking notice, which is subsequently challenged in the courts by those affected. The whole process is very expensive and favours those companies who can pay for lobbyists to challenge regulation within Congress, within the Commission and in the Courts. Because of its expense, the model is not suitable for Africa.

In general, multi-member Commissions take up scarce personnel resources, and open up too many informal channels for lobbyists, whilst single person directors accountable only to Parliament accrue considerable personal power. Although the majority of African countries that have set up regulatory agencies have opted for Commissions, the Botswana alternative represents a potential middle way between the US and traditional British systems. Here the Executive Director works to a part-time, or unpaid Board selected for its representation of citizen interests. Such a system allows the Director to be linked into the political system. The split of responsibilities tends to mirror those in public companies between Managing Director, Board and Chairman. But it is important that Ministers are not Chairs of the Board (as in Ghana) and that those with financial interests in the sector (whether their own or their family's) are not members of the Board.

How then could broadcasting regulation 'fit' within such a regulatory agency? If the agency is financed from licence fees and is originally set up for broadcasting, then it is likely to be poor. It will be much richer if it is also a telecommunications regulator. But the problem is that broadcasting content regulation is quite different from telecommunications regulation. How then could the two be combined?

# Broadcasting and Telecommunications Regulation

Throughout the past ten years in Europe, there has been discussion on how broadcasting and telecommunications regulation could be brought together under one regulatory framework. Although both developed out of the same technology – the telephone – regulation of the two sectors has diverged. Whereas, following liberalisation of the sector, regulation of telecommunications has been economic in character, concerned at anti-competitive behaviour on the part of the previous state-owned national operator, concerned with access to networks and bottlenecks, regulation of broadcasting has traditionally been concerned with content. However, with the liberalisation of the broadcasting sector and new modes of delivery of content, such as satellite broadcasting and cable or MMDS, a similar concern with economics has arisen. For instance, if there is only one satellite broadcaster there are questions about whether it should be subject to a 'must carry' rule regarding the programming of public service broadcasters and what access charges to its network are reasonable.

The debate in Europe has centred on how to construct technologically neutral regulation to replace the previous regulatory rules, which tended to regulate each telecommunications and broadcasting technology differently. The issue has become more urgent as digitalisation of broadcasting and penetration of the internet has seemingly brought about technological convergence between telecommunications and broadcasting. For a time, it seemed that telecommunications interests which favoured the treatment of broadcasting as a value added service subject to no regulation would win the European debate and succeed in creating a regulatory regime where there was no regulation of content at all. But, if there were no content regulation there could be no public service broadcasting and scenting danger to their existence the broadcasters fought back.

Finally, an agreement was reached that content regulation would vary, not according to technology but according to the choice exercised by those in receipt of the broadcast. Regulation of content is therefore differentiated between public service broadcasters and those supported by subscription. The argument in favour of this differentiation in regulation is that whereas everyone receives public service broadcasting, only those who choose to do so receive subscription television. Because of this

element of choice satellite broadcasting will be regulated less heavily than commercial off-air public service broadcasting and the internet will be regulated less than satellite broadcasting. The more the element of individual choice,the less the regulation of content. Hence in the British 2002 Communications Bill, regulation will be tiered according to that element of choice, with general principles concerning the protection of minors and standards of taste and decency applicable to all.

# An African Model for a Telecommunications and Broadcasting Regulatory Agency

Working within this model of combining telecommunications and broadcasting into one agency, there is a model for telecommunications regulation already available in Africa, which could be adapted to cover broadcasting. Those African countries, which signed up to the World Trade Organisation agreement of 1997 on Basic Telecommunications Services also signed up to what was called a Reference Paper. This paper set out basic principles of regulation, such as transparency, which were designed to protect companies undertaking inward investment. Those WTO member states which signed the Reference Paper, also undertook to set up a regulator 'independent' of the telecommunications network operator. The original intention was to ensure that the national operator could not skew the terms of regulation for its competitors, but subsequently international bodies, such as the World Bank, have interpreted the terms of the Reference Paper to mean 'independent' of the Ministry. In this scenario, governments must set up semi-autonomous regulatory agencies for the telecommunications sector.

In fact one year before the WTO agreement on basic telecommunications was signed the member countries of the Southern Africa Development Community had agreed something similar to the Reference Paper. In 1996, helped by the United States Agency for International Development, the regional body for Southern Africa agreed a Protocol on Transport, Communications and Meteorology under which member countries would harmonise telecommunications policy on a regional basis. Under the Protocol, members agreed to 'develop supportive regulatory and investor-friendly legislation.' not just over the telecommunications sector but also covering the provision of broadcasting

and information technology infrastructure. They agreed that member states should 'strengthen the co-operation and coordination between the broadcasting and telecommunications sectors whilst retaining the structural separation between the operating organisations.' Member states would establish 'appropriate institutional mechanisms for co-operation and coordination between appropriate sector coordinators.' In other words, they would proceed to bring together the regulation of broadcasting, telecommunications and information technology.

The Protocol did not deal with content regulation. It recognised 'the need for the content or substance of that which is transmitted to be dealt with in another appropriate Protocol.'[xviii] The Second Protocol on Culture Information and Sport of 2001 did not address broadcasting specifically and has been criticised for its provisions on the licensing of journalists. However, the Protocol included a commitment to the right of access to information and participation in cultural and sporting activities by all citizens.'[xix] The Protocol did not spell out how this right of access was to be achieved in terms of regulation either at the national or regional level nor did it link up with the existing strategy on telecommunications. However, a model had already been established by SADC, which could be used for this purpose.

In 1998, the SADC Ministers agreed a Model Telecommunication Bill, which would establish a regulatory authority in each member state. This Model Authority would have between three and five members 'appointed by the appointing authority through a competitive and transparent selection procedure.' for terms of five years.[xx] The 'appointing authority' is defined as the Head of State, the Minister, or other person or body vested with the power to appoint. The exact procedure is not specified and therefore could vary from appointment by a Minister subject to legislative oversight to a public nomination and consultation process as adopted in South Africa. However, the Model Bill states that the appointing authority in appointing members to the Board must 'have regard to a broad representation of the whole population' and 'appoint persons who collectively have knowledge or qualifications or experience in the fields of economics, accountancy, telecommunication technology, engineering, public policy, business practice, finance or law or any other relevant experience.' Hence the emphasis on appointments to the Board of the Regulatory Agency is on citizen representation.[xxi]

Since 1998, despite the Model Bill allocating the regulation of broadcasting to the Model Authority, this aspect seems to have been

forgotten. By 1999 eight of the fourteen members of SADC had created independent telecommunications regulators, with the majority consisting of regulatory commissions of several members. These and others where the regulator remained in the Ministry had signed up to membership of the Telecommunications Regulator's Association of Southern Africa (TRASA) designed to facilitate best practice harmonization throughout the region. But, in general, broadcasting regulation had got lost in concern for the richer telecommunications sector.

The main exception was South Africa, where a broadcasting regulatory agency, the Independent Broadcasting Authority, was established subject to accountability to the legislature but without links of accountability to the Ministry. Because of mistakes in its original structure, the regulatory agency subsumed the policy making of government. It became the de facto policy maker, rather than the regulatory agency working within policy goals set by the government. As a result, using the technological convergence of broadcasting and telecommunications to give its proposals legitimacy, the Ministry set out to bring the regulation of broadcasting together with the regulation of telecommunications under one agency, ICASA.[xxii] However, the changes proposed provoked anxiety that the Ministry's intention was to increase state control of broadcasting by making the South African Broadcasting Corporation report on its programming policies to the Minister. That reporting will now be to ICASA retains the public broadcaster's autonomy from direct political control.

However, there are other African models available. In Botswana, in 1998, a Broadcasting Act brought into being the National Broadcasting Board to issue licences and regulate the sector. The telecommunications regulator provides the secretariat for the Broadcasting Board. In turn this Board could provide a model for other countries in the region. It consists of eleven members with five year terms of office, seven of them appointed by the Minister from ten people whose nominations had been approved by a Nominating Committee comprising a member nominated by the Council of the Law Society of Botswana, the Vice-Chancellor of the University of Botswana and a representative of the Office of the President. The legislation demands 'transparency and openness' in the nomination process. Members and their spouses are disqualified from holding an interest in a licence. In some respects the legislation follows British practice in that codes of practice to be issued by the regulator will contain detailed guidelines on content regulation.[xxiii]

Hence there is a regulatory model which is already accepted within Southern Africa containing a regulatory agency created for telecommunications, independent of the telecommunications operator and semi-autonomous but linked into the Ministry, with a separately elected or nominated board for broadcast content regulation serviced by personnel within the telecommunications agency. It is possible therefore, where resources are limited, instead of separate regulatory agencies for telecommunications and broadcasting, that one agency to regulate the two sectors can be combined. Although headed by one Director, it is possible that internal differentiation and responsibility to two different boards may prevent broadcasting regulation losing out to the telecommunications responsibilities of the regulator.

The advantage to this model is that even in the poorer African economies, the telecommunications sector tends to be larger and richer than the broadcasting sector and the amount that licence fees can produce to support the independent regulator will be more substantial. The dangers are that, as in the South African example of 2002, bringing broadcasting regulation under the telecommunications regulator can lead to the potential for increased political control of broadcasting. It is therefore important, as in the Botswana example, to have a separate Board for Broadcasting Regulation.

# Structural Regulation for Access Diversity, Plurality and Quality

We have argued above that diversity of programming will not happen without regulation. Today it is accepted that in liberal representative democracies, it is necessary for the human rights of freedom of speech and freedom of information to be respected and that the broadcast media have a major part to play in the access of citizens to democratic processes and institutions. The traditional aim of European regulation has been to create **diversity, plurality and quality** in the choice available to the consumer/citizen and to guarantee access to that citizen. These goals are worth transferring to the African environment.

Only if a citizen can access several sources of information can he/she make up their own minds on an issue. Creating that pluralistic structure ideally means several layers of broadcasting, from national to regional to

community. In turn, the differentiating factor is likely to be the geographical area that stations serve, the technology and radio spectrum they use, who may own what, the extent of foreign ownership and the method of financing. For community broadcasting some form of specification of community ownership may also be required.

Since the economics of information favour concentration and monopoly, structural regulation in favour of diversity usually refers to those aspects of legislation, which keep media outlets from owning each other. It is possible to regulate for specific geographical areas or for the country as a whole. It is possible to regulate against the concentrated ownership of one transmission medium or against the ownership of one medium by dominant owners of another. The intention is always to retain a number of sources of information for the local populace. For instance, in the USA in the 1990s, companies were limited to owning 3AM and 3FM stations and TV coverage of not more than 25% of TV homes in a given market and not more than 20AM and 20FM radio stations nationally. But those restrictions have gradually been liberalised to allow ownership of 3 radio stations (either FM or AM) in a given market where there are less than 15 radio stations. Today demand from the US Courts that the FCC produce a rationale for its policy on media ownership is likely to lead to further relaxation of the rules.

However, in the case of African regulation, it seems reasonable that when private commercial stations are first allowed, the number that any one company may own should be strictly limited. That number may then be gradually increased depending on how many licences have been issued. As in the USA, regulations concerning ownership may address both the national market and the local market, preventing concentration in both. If the primary goal of policy is to ensure diversity of sources of information then the concentration for which the economics of information provides the incentive is contrary to that policy. In some countries, such as South Africa, it is the regulatory agency that will take the decision on how much concentration should be allowed, in others it will be the government.

In addition, in the USA, there are rules that prevent cross-media ownership, particularly between the press and broadcasting. These too have been loosened over the past ten years. In the UK, since the 1990s the cross-ownership rules have prevented newspapers with 25% of the national market from owning a television station. In addition, rules have prevented the commercial TV stations from consolidation into one operator. But these rules are also coming under pressure. The difficulty is

that they run against the economic incentive and corporate desire for concentration, particularly in a poor overall economic situation and a downturn in advertising income. Such rules are likely to be difficult to get legislated in the poor economic situation of many African countries, but, in general, where the regulatory agencies are likely to be weak, structural regulation is easier to enforce than behavioural regulation. So it is easier to enforce separation of ownership than it is to ensure that a consolidated entity fulfils its programming obligations.

In developing countries, the economics of information also run up against the desire to keep ownership local or subject to specific ethnic requirements. In South Africa recently the regulatory authority, ICASA, ruled against the consolidation of New Africa Investments Limited (Nail) with Kagiso Media for such reasons. In African countries, where local capital is scarce, without regulation there would be no local ownership. Particularly in a time of expansion of both satellite and foreign broadcasters, foreign investment rules are necessary. Even the industrialised countries have such rules. For instance, in the USA, a non-US citizen may not own more than 20% of a company using the radio spectrum. Local ownership rules as practiced in South Africa to ensure black empowerment are therefore not unusual and are essential to achieve the goal of diversity. Similar rules in other African countries may protect against the takeover of local media by South African capital.

In the global economic downturn of the early years of the twenty first century, the trend in both the USA and the European Union is for foreign ownership and media concentration requirements to be relaxed. In the industrialised West, the grounds for relaxation are that cable and satellite TV coupled with the ongoing digitalisation which allows the carriage of an increased number of TV and radio channels are creating a plurality of outlets. But in the African context such arguments that media plurality exists cannot be valid. However, the situation in Africa is complicated by the fact that it is often newspapers and media groups that are the 'first movers' and set up new radio stations in the most promising urban areas. These media interests together with those of privatised telecommunications operators may be the only indigenous source of capital. However, once they hold control of all media outlets in a geographical area they can push up advertising rates to the detriment of other businesses. Although it is possible to borrow mechanisms from telecommunications regulation and demand accounting separation and separate reporting between different businesses within the same media

group, such mechanisms cannot control the impact of concentration of media on the economy in general. Hence for African governments regulation of cross-media ownership is more important than for industrialised governments.

In similar fashion, community radio has been shown to be an important adjunct to economic development. Community based media can become a means of community participation, not only in the media, but also in the decision-making process of development. But, in similar fashion to commercial radio stations, community media need to be licensed, to have their means of financing established in that license and to be regulated within that license in terms of language, advertising, programming and local content. There is a danger that once the financial support of donor agencies or government subsidies runs out, if there has been no consistent application of regulatory structural principles, then commercial incentives may produce a similar effect on community radio as on any other commercial radio. It may become a vehicle for Western music and advertising, indistinguishable from commercial radio.

African governments therefore need to think ahead. The structural regulation of the market contained in the enabling legislation needs to set out the licensing pattern for the whole country, including only that number of commercial radio and TV stations that the advertising market can support. It needs to set out which markets are considered separate. For instance, should telecommunications operators or newspaper owners be allowed to own broadcasting licences? The enabling legislation needs to ensure that the regulatory authority issues the licences without which no service can be provided and that changes in licences have to be approved. Too many stations in a small advertising market, or a market dominated by the advertising needs of the state broadcaster will lead to consolidation. And that consolidation will favour those companies with deep pockets and the best licences in the major cities. Similarly, without a defined licensing regime, companies in urban areas can expand transmission power thereby covering a wider area. They can then squeeze out smaller competitors and set up national networks by stealth (as happened in the USA where the regulator has had numerous problems in regulating the major broadcast networks).

To sum up, the initial structure of the market envisaged in government policy is very important in African countries. Too many operators in a small advertising market and the market will fail. If the structure is not stated and transparent, and enforced through licences, then

companies will push to provide service to the largest number at the least cost, and any regulator will be under immense pressure. The aim of the market structure is to retain a plurality of media outlets that a citizen can access to gain information. No one source, private or public, should dominate. Cross-ownership restrictions should apply to telecommunications operators, newspapers, radio and TV stations and rules on concentration should be aimed at preventing any one company achieving a position where it holds the bottlenecks which prevent others entering the market. Local ownership rules can help bolster local entrepreneurs or disadvantaged groups. Diversity of ownership leading to diversity of content and opinion is the goal.

# Behavioural Regulation

The primary mechanism of control for the regulator is the licence. It contains the conditions and obligations under which the licensee must operate. Licences can be awarded by auction to the highest bidder or by a 'beauty contest.' A beauty contest is the term used to describe the process where operators enter bids for licences and the regulator either chooses or advises the Minister between them. It is also possible to have a mixed system in which an auction has certain criteria attached. These criteria can, for instance, demand that those bidding are capitalised to a certain extent and are financially sound, or have local ownership, or demonstrate local support. Although the 'beauty contest' has been the traditional method of awarding licences in the industrialised countries and ensures that the government retains control, the lack of transparency in the process lends itself to challenges in the courts by the losing bidder and is being replaced by auctions. In Canada and South Africa, public hearings are held to determine the suitability of applicants, but this is an expensive process for creating transparency.

The advantages of an auction are that the available spectrum is licensed to the highest bidder and the mechanism of allocation is transparent to the applicants. But before bidding starts the regulatory framework in which the auction takes place has to be publicly available. The bidders have to know what the structure of the market will be in which they will be operating.

Where a regulatory agency is inexperienced an auction is less demanding on resources and less liable to legal challenge. In Europe, there

is discussion on whether companies winning auctioned licences should in the future be able to trade them in a secondary market A secondary market allows the licence to be sold on if the first applicant is unsuccessful. It reduces the risk to the bidder. But the disadvantages are that an applicant may bid for a licence with the specific intention of selling it on at a profit and taking the windfall gains. Therefore, there needs to be restriction within the legislation as to how many licences one company may hold.

How long should a licence run for? And should it be renewable? The longer the licence runs the more valuable it becomes as a property to the licensee. The licensee will also require time to make a return on its investment. In the industrialised countries, in order to reduce the risk to the licensee, the licence period seems to have been extended from the traditional five-year period and automatic relicensing has become more common. In general, regulators seem to favour the view that to change licensees may involve upsetting viewers or listeners, but this conservatism then creates a barrier to market entry for potential competitors. Such practises also act as a barrier to the effective regulation of programme quality and diversity.

# What's in the Licence?

Normally the government will want to specify the type of financing allowed within the licences it issues:

- Subsidy/licence fee
- Advertising/sponsorship
- Subscription
- Pay per view

Traditionally, licencing has been limited to broadcasters transmitting from within the country concerned. But in Europe there has been discussion (in 2002) about the licensing of satellite broadcasters which are transmitting into a country. These broadcasters would be forced to gain a licence to use the spectrum in the country into which they broadcast. A similar provision could be adopted in Africa to raise money from the licence fees of broadcasters who otherwise contribute little financially, to the economies

of the countries into which they broadcast. Ideally such action would be best taken on a regional level.

# Codes of Practice and Guidance

## Advertising

Advertising may be controlled by the regulatory agency through codes of practice or guidelines. Rules may vary from those applicable to all; to those applicable only to the commercial public service broadcasters to those applicable to other channels, such as cable and satellite TV. Particularly, in Europe there is a ban on programmes carrying 'subliminal' advertising; that is advertising which the viewer knows nothing about. In Britain, companies are prevented from introducing lotteries and bingo games, while mail order and home shopping are strictly controlled. Advertisers are prevented from using the term 'free', on the grounds that it is rarely true. They are also controlled in their use of animals or appealing to fear to sell products. The intention is to protect the consumer from unscrupulous advertisers.

These guidelines also state how many minutes of advertising may be shown in total per hour, how often advertising breaks may come and how many minutes advertisements may last. In Europe the average is 7 minutes per hour with 9 minutes per hour for cable and satellite plus a further 3 minutes for teleshopping. In addition no advertising breaks are allowed in certain programmes – for instance religious services. Again the intention is to protect the consumer. Codes of practice may also delineate the role of sponsorship in actual programmes – for instance, whether the sponsor's name may be shown within the programmes as well as at the beginning and end.

In some countries, legislation controls advertising. It may be government policy to limit or ban the advertising of certain products, such as tobacco or alcohol. In addition, separate legislation and regulation of advertisers across the media is likely to be necessary to ensure a standard or code of conduct in advertisements – that they are true, do not promote violence, crime or racism.

There are certain controls on advertising where practice between the USA and Europe differs. In European countries regulators ensure that

minors are protected by bans on advertising certain products within children's programmes. And whereas in the USA political advertising during elections is used without restraint, it is also the norm in Europe to regulate political advertising during elections.

## Content Regulation

Content regulation can be covered within the licencing process either by the issue of regulations or guidelines or by demanding a business plan from companies taking part in a 'beauty contest.' So, for instance, the enabling legislation for the Botswana Broadcasting Board allows it to demand such other information as it sees fit when it takes a decision on a licence. The Board can therefore demand a business plan from the licensee, which covers what programming mix the broadcaster undertakes to provide. In particular, a broadcaster can be obliged in its licence to provide such programmes as national, regional and local news, current affairs, minority language broadcasts and religious broadcasts or to provide universal coverage.

Either the legislation itself or the regulator can also specify the quotas of imported material the broadcaster is allowed to use. In specifying the quota as a proportion of broadcasting hours, attention has to be paid to detail, such as whether the total hours cover advertising, at what time may the imported material be played (for instance how much of prime time should be taken up with imports), is the quota based on regional production or does it refer to non-domestic programmes. However, the difficulty in placing limits on imports is that it creates political problems with industrialised donor countries. Also, unless and until sufficient local production is possible, a quota on imports might lead to unfilled airtime.

Alternatively, and less contentiously, quotas can refer not to imports but to locally produced programmes or to independently produced programmes. So, for instance, in order to support the domestic programme making industry in South Africa, a quota of 20% for local programming and music was intended to help support local creative industries. Since 'local' content may be interpreted by broadcasters to mean no more than news or sport, again the legislation needs to be detailed in its definitions of what is 'local' content. Does 'local' refer to the origin of those who create, or the finance used or the place where the creation took place?

Does it include co-productions or material from the region. Is the quota proportion that of all programming or programming in peak times or programming without news. Because local content is expensive, broadcasters are likely to obey the letter of the law, so it is important to specify exactly what is required. In the context of ongoing GATTS negotiations under the World Trade Organisation local content rules may be threatened, so that it is important for African governments to have them in place before they come under pressure from the industrialised West.[xxiv]

Moreover, unless there are people available with the requisite skills and finance, such quotas alone may not be enough to ensure that a local content creation industry survives. Broadcasters may argue that local content is of too poor quality to broadcast. In South Africa, such quotas have been followed by the setting up of the Media Diversity and Development Agency, to "increase access to the media for all citizens", develop community radio stations and newsletters, and ensure a racial balance in newsrooms. a government entity to support local content creation.[xxv]

Even without specific regulation favouring local content, regulation, which enforces broadcasting in minority languages, may have a similar effect. In order to protect minorities, the licence may contain provisions on the language or languages to be used. The regulation may specify the numbers of hours, time of day and specific content required. So, for instance in Wales, the transmission of Welsh language programmes has led to a local independent production industry. In all cases, as the potential for local supply of content improves so the quota can be increased.

The enabling legislation of the Botswana Broadcasting Board also has a clause preventing the broadcast or rebroadcast of non-copyright material. This provision is designed to ensure compliance with the World Trade Organisation's rules on copyright protection. The intention is to prevent broadcasting stations pirating material from elsewhere, or playing music without paying royalties.

## Taste and Decency

In general, most industrialised countries have some provision to prevent the broadcasting of sexual and violent material that offends the mores of the society in which it is broadcast. The difficulty for the regulator in

enforcing the duty of 'taste and decency' on the broadcaster is that what is acceptable for the majority in any particular society changes over time and that an element of discretionary taste is inevitable within such decisions. In a society with many minority groups, the regulator may be pressured from all sides. Nevertheless, there is general consensus that children should be prevented from watching such material, and the protection of minors through the application of a 'watershed' time, before which sexual and violent material may not be broadcast is one way of children. The legislation may give the regulator the power of levying fines if broadcasters breach 'taste and decency' undertakings.

The regulator is responsible for monitoring the programme mix promised by licensees and enforcing their compliance. Those licensees may include all commercial broadcasters and community broadcasters together with or without the public broadcaster. In Britain, the commercial broadcasters had at first to submit programming for agreement with the regulator, but such prior assent creates a huge regulatory burden. Instead, it is more practicable for the broadcaster to make undertakings on programming standards, on how much news, sport, local content, current affairs, drama and in what languages it will broadcast and for the regulator to proceed on the basis of the monitoring of those commitments. If the legislation empowers the regulator to accept complaints on programming from the general public, the expense of content regulation can be reduced. Openness to consumer complaints is an alternative source of information to the regulator on how effective in satisfying the needs of the community is the current regulatory regime. For the public broadcaster, such accountability to the public can also be written into the legislation. Hence the Broadcasting Amendment Bill of 2002 in South Africa has ensured that the programming policies of the South African Broadcasting Corporation are first brought to the public before being subject to the regulation of ICASA.

One of the problems with detailed programme promises is that the operator may need to adjust programming in order to become more competitive. It is therefore necessary for the regulator to have the power to be able to vary programme promises at a later date. However, in small advertising markets, where competition is unlikely to develop quickly, the regulator needs to be vigilant in ensuring diversity of content within a broadcaster's output, rather than diversity across stations.

# Conclusions

This chapter has discussed a number of models for the regulation of the broadcast media. It rejects the argument that diversity flourishes without regulation. Instead it argues that the aim of independent regulation of broadcast media is to protect **plurality, diversity, quality** and **access** by a combination of structural and behavioural regulatory mechanisms. In a democratic society, the aim of the regulator is to strengthen that democracy by giving even the poorest individual within the poorest minority the potential to access information from which he or she can make choices. Neither to privatise a state broadcaster nor to introduce commercial broadcasters into a market will gain these goals by themselves. An independent regulator can help to retain editorial impartiality and independence by standing and mediating between government and broadcaster.

There are a number of different institutional models for that independent regulation. It is possible to take the previous South African model, to have a Board of Governors that acts as the regulator of the public broadcaster together with separate regulatory agencies for commercial broadcasting and for telecommunications. But such a solution is based on British tradition, is expensive and has weaknesses.

In the case of the public broadcaster, this model relies on the Board of Governors not becoming too closely identified with the broadcaster's interests. It relies on the self-regulation of a public broadcaster that will be under pressure to follow the tenets of commercialisation in the African economic situation. Other than the possibility that the Governors have been drawn from a wide representative section of society, it provides no means for the government to ensure that the public broadcaster meets the needs of the population it serves. Nor does it prevent interference in editorial decisions by the government. Although the Governors may stand between the government and the broadcaster, unless editorial independence is guaranteed in legislation, the Governors may not be strong enough to withstand pressure from those who appointed them.

In the case of commercial broadcasters, by divorcing the regulation of these from the regulation of the public broadcaster, the model makes it more difficult to impose similar obligations in terms of programme mix and local content. It appears to prioritise commercial interests over those of the receiving public and to give commercial broadcasters a status different from the public service broadcaster. And if the regulator is

dependent on licence fees from the sector, it also fails to give the broadcast regulator an assured source of income.

A second institutional model is to bring telecommunications and broadcasting under the same regulatory agency. While this solution may be less expensive and is likely to produce the income from licences that can support the regulatory agency, it risks demoting the poorer broadcasting sector below the interests of the richer telecommunications sector. In the USA, that demotion of broadcast interests has tended to occur in the Federal Communications Commission where there is one media division of the organisation. The British are attempting to solve the problem by creating a Content Board to be subject to the overall new Ofcom Board.

However, there is an African answer. The agency can be forced to give attention to broadcasting matters by being held accountable to two Boards – one for telecommunications and one for broadcasting, both drawn from the community. In Botswana the telecommunications regulator is also responsible to and services the Broadcasting Board. Again this model can include regulation of satellite broadcasters, of commercial TV and commercial radio and community radio together with that of the public broadcaster. Or it may exclude the public broadcaster.

The advantage of this Botswana model is that it comes out of Africa, it can be subsumed under the model telecommunications bill of the SADC region and makes use of the existing independent telecommunications agencies that are under establishment in many African countries to meet WTO obligations. It represents an answer to some of the problems that have been evident in Western regulatory agencies. It does not adopt the FCC model of a commission at the head of the agency, which can lead to bargaining between commissioners and uses scarce personnel. Nor does it place regulatory power in the hands of a Director accountable mainly to the media, as in the British Oftel and Independent Television Commission cases. Instead, it emphasises the role of transparency in appointments and brings in part-time members of Boards from a wide variety of occupations. To these, a full-time Executive Director is responsible, and the agency itself can be further accountable to Parliament and Minister.

For African governments faced with a changing broadcasting environment, with pressure from commercial interests to open markets, with a declining economic situation and widespread drought and poverty, the money available from broadcast licences may be tempting in the short term. However, without regulation it is possible that foreign interests can

simply take over whole national broadcasting systems. Current GATS negotiations within the World Trade Organisation open up the possibility that developing countries may be pressured to allow liberalisation of service industries such as; broadcasting. Before liberalisation of the market, governments need to structure the sector according to what the advertising market will support. They need to put in place regulations that will retain diversity of ownership and will support a local content creation industry. They need to put in place transparent independent regulation for the broadcasting sector, as they have been obliged to do under the WTO 1997 Basic Telecommunications Agreement. And for all broadcasters, they need to legislate for independence of editorial decision and creation from political interference.

Independent regulation of the broadcast media can contribute to ongoing democratisation in both industrialised and non-industrialised societies.

### End Notes

[i] Mandla Langa (2001)'Serving a Diverse Community' The Radio Festival 2001 http://www.radioacademy.org/festival/2001/mandla_speech.html

[ii] Mark S.Fowler and Daniel L. Brenner (1982) ' A marketplace approach to broadcast regulation' Texas Law Review 207:60 quoted in Wilhemina Reuben Cooke(1986) 'Broadcast and Cable Deregulation in the United States' in CNRS La Deréglementation des telecommunications et de l'audiovisuel Paris ,CNRS Colloquium.

[iii] See Michael Powell, Chairman of FCC before the Subcommittee on Commerce, Justice, State and the Judiciary of the Committee on Appropriations, US Senate, 7 March 2002. http://www.fcc.gov

[iv] Mandla Langa (2001) 'Serving a Diverse Community' The Radio Festival 2001,http://www.radioacademy.org/festival/2001/mandla speech.html

[v] For instance in October 2002 the Malawi Communications Regulatory Authority reacted to complaints of anti-Christian remarks by Radio Islam with an investigation which could lead to a public hearing. See broadcast@misa.org.na

[vi] Mandla Langa 'Serving a Diverse Community' http://www.radioacademy. org/festival/2001/mandla_speech.html

[vii] Tessa Jowell in Hansard, House of Commons Parliamentary Debates, Vol.395, Part 13,3 Dec 2002 : Column 783.

[viii] John Barker (2001) 'Is no policy a policy goal' http:www. africafilmtv.com/pages/archive/magazines/afm27e/coverstory.htm

[ix] See for instance the report of a conference on Public Service Broadcasting in West Africa held under the auspices of ARTICLE 19 and the Media Foundation for West Africa. http://www.africafilmtv.com/pages/features/NF174recommendations.htm

[x] See Par Said Essoulami (2002) 'Les defies de la radio télévision en Afrique du Nord.' Conference organised by le Conseil Mondial de Radio télévision. Morocco 28-31 May.

[xi] 'President blasts national broadcaster on programming content' 2 October 2002 ,See broadcast@misa.org.

[xii] Broadcasting Amendment Bill, 6 (2) no. 23745 government gazette, 15 August 2002, Broadcasting Amendment Bill, 2002. http://www.pmg.org.za/bills/020815broadcasting.htm

[xiii] Claire Cozens, 'BBC daces fines over falling standards' The Guardian 29 October 2002

[xiv] See Par Said Essoulami (2002) 'Les defies de la radio télévision en Afrique du Nord.' Conference organised by le Conseil Mondial de Radio télévision. Morocco 28-31 May.

[xv] John Barker (2001)'Is no policy a policy goal' http:www.africafilmtv.m com/pages/archive/magazines/afm27e/coverstory.htm

[xvi] First the Independent Broadcasting Association (IBA) then the Independent Television Commission (ITC)

[xvii] See the Media Institute for Southern Africa: http://www.misnet.org/broadcast/vision2.html.

[xviii] SADC Protocol on Transport, Communications and Meteorology (1996) Article 10.4

[xix] SADC Protocol on Culture, Information and Sport (2001) General Principles (d)

[xx] SADC Model Telecommunication Bill (1998) Part II, 7(1)

[xxi] SADC Model Telecommunication Bill (1998) Part II, 7 (5) (a & b)

[xxii] See Mandla Langa, 'Which way to the Web?', Speech to UBS

Warburg TMT Conference 5-6 October 2000 http://iba.org.za/warburg.htm

xxiii In Britain the Independent Television Commission has regulated commercial TV and has produced guidelines on

xxiv See: World Development Movement (2002) 'Public service broadcasting measures threatened by free trade agreement': http://www.wdm.org.uk/presrel/current/ukgatscommunications.htm

xxv See CPJ homepage: http://www.cpj.org/attacks01/africa01/southafrica.htm

# Chapter 3

# AFRICAN REGULATION OF SATELLITE BROADCASTING IN THE ERA OF CONVERGENT ICTS

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## Abstract

The rapid development of new communications technologies and digitalization and the rapid growth of satellite television in an unregulated fashion in Africa, has created a number of new policy and regulatory challenges. Whilst the focus of regulation in traditional broadcasting was frequency allocation and content, in the new technological context both content and technological issues are the focus. Satellite communication cannot be easily regulated at the level of nation state because the signals or communications networks they use are not transmitted or located physically within the bounds of the nation state.

However, satellite broadcasting can and should be regulated at the point of access by audiences. It is the local providers of access to broadcast content who would be regulated. This requires modification of existing broadcasting regulation to take into account telecommunications regulation.

This regulation can be justified on several grounds:

- to promote fair and sustainable competition that will foster new and diverse forms of content, packages and delivery.

- to enhance cultural integrity which is informed by cultural diversity, since satellite broadcasters often provide popular foreign programming to public broadcasters who have low capacity to produce local content (regulation would include levies on advertising or pay television subscriptions, which could be a contribution towards financing local production);

- to introduce technical standards that ensure standardization and compatibility within system (such regulation may also improve access for audiences who might be constrained because of cost or inability to transfer from technology, which might become redundant);

- to address issues of the exclusive purchase of sporting rights by satellite and pay channels of national or popular sporting events;

- to address issues concerning advertising, especially international advertising which might conflict with regulation of advertising for terrestrial broadcasters.

Any form of regulation should remain consistent with principles of freedom of expression and the free flow of information. These principles advocate independent regulators who have the knowledge and expertise on broadcasting, telecommunications, ICTs and the economics of broadcasting.

# Introduction to African Broadcasting and ICT Policy

## The Information Age and Broadcasting Policy in Africa

Conventional terrestrial broadcasting in Africa is extensively regulated, sometimes in terms of legislation dating back to colonial times. But satellite television was not provided for in some legislation, and it is becoming an increasingly prevalent means of communication that some governments wish to regulate.

This chapter seeks to identify trends in African broadcast policy, as the technology and meaning of broadcasting it self is changing. Digital technology developed since the 1980s allows television services, and other forms of information, to be communicated using any or all of a variety of communications technologies (traditional terrestrial radio frequencies, cable and satellite). Digitisation of information means that all forms of information (video, audio and text) are converging to form a data stream, which can be handled equally by any communication technology. The user decodes this digital stream using his or her reception device, such as a PC or computerised reception device. Satellite television is not

the only alternate delivery method for television services there is also cable. Interactive services available on television now include Internet and even voice telephony. This convergence of the worlds of telecommunications and broadcasting means that regulators need to embrace new concepts and terminology. In this chapter, the reader will find terminology from two worlds: broadcasters use the words 'content' and 'transmission', while in the world of convergent ICT policy makers use the words 'information' and 'communications'. The two sets of words have similar intents, except that content does not include interactive services of data and voice information, and transmission does not include a communications return path.

International satellite signals are beyond the power of national governments to regulate, but they do not need to regulate these signals: they can be regulated at the point of access to national populations. This requires defining the information (broadcast) system of the nation. In this way existing or modified legislation and government policy as it affects information content, can regulate broadcasters and other content providers. Regulation of the broadcasting and telecommunications sectors may be further harmonised and possibly unified.

Human Rights declared in areas of freedom of speech, diversity and access to communication are reflected in national constitutions. These rights need to be implemented through legislation in telecommunications and broadcasting that reflects the convergence of these technologies.

This chapter looks at broadcasting and communications in Africa today, and the ways in which government policy and regulation is grappling with the changes in this convergent industry, in three different territories: South Africa, where the latest policy thinking is being enacted; Zimbabwe where the government is using regulatory legislation to obtain political control of broadcasting; and Kenya, where broadcasting legislation is only being updated recently since the colonial era.

## What is Broadcasting in Africa in 21st Century Africa?

For most of the latter part of the twentieth century, broadcasting referred to terrestrial broadcasts in radio frequencies. The term embraced both the content of what was being broadcast, and the means of transmission, since the broadcaster carried on both these activities. Limited frequency availability gave the necessity to regulation in order that the many services

using radio frequencies would not conflict with each other. The frequencies are regarded as a public asset and regulated at an international level by conventions of the International Telecommunications Union (ITU).

Cable TV has not become widely established in Africa, with the exception of Cameroon and the capital city of Mozambique, Maputo. Extension of cable networks to large audiences is capital intensive, but may also be limited by regulation of telephony, which places responsibility for landline infrastructure, into the hands of a state owned monopoly.

Satellites are also capital intensive, but offer a more cost effective way of reaching affluent markets throughout Africa and some are not controlled by governments. MultiChoice DStv, an African digital multichannel TV service, reaches around 700,000 subscribers in Africa through four satellites, PAS 4, PAS 7, PAS 10 and Eutelsat. DStv caters for niche markets, and may have pre-empted cable TV in some of the more affluent urban centers.

The practicalities of electronic communication, notably the user interfaces (telephone, television set, PC) and transmission formats (analogue) divided the users of these services into distinct sectors and regulatory areas. In terms of this paper, broadcasting has come to mean: radio frequency, satellite or cable TV transmission of programme content (information) to a uni-directional electronic communications system open to the public, through subscription or otherwise. The introduction of interactive television services is threatening to make the word 'uni-directional² redundant.' Telecommunications has come to mean: other kinds of electronic communication such as voice and data (telephony and internet).

Within broadcasting, communication technology formats also defined market sectors. Terrestrial, radio frequency transmission was where the first telecommunications mass audiences were. Satellite and cable were relatively small, affluent markets that were overlooked in some regulatory legislation.

## Convergence

Digital technology is causing the broadcast and telecommunications sectors to converge into one information communication technology

(ICT) market. Internet Protocol (IP) universal formats for electronic information mean that all information can be converted into a universal format and transmitted using any of the available communications technologies. Now, popular television and radio programming can be received in Africa by terrestrial broadcasts, satellite, cable, or (broad band) internet. Electronic information is converging on a single format protocol, and, in literal sense, converges on an electronic communications pipeline for transmission to users around the globe: the 'information super-highway'.

## Interactivity, Multimedia and the Digital Divide

In November 2001, the ITU Africa 2001 (Johannesburg) conference promoted the idea that establishment of effective ICTs in Africa would significantly advance development in the continent. The phrase 'bridging the digital divide' reflects the expectations of what ICTs can do. The concept is one where communications, whether by radio frequency, satellite or cable or wire, delivers interactive content to people throughout the continent. This interactivity is seen as providing fundamental solutions to development issues, whether they are agricultural education in Ethiopia, primary schooling in Gauteng, or raising international finance in Nigeria.

Interactivity means a communications system with a 'return path'. The receiver can interact with the sender. The first interactive telecommunications services were telex, telephone, and fax. The Internet used digital technology to compress communications, and made them a lot cheaper. For cable or telephone landline delivery, interactivity is simple: two way communications come down a wire, connect a keyboard and you can talk electronically two ways: order shopping, argue politics, discuss things with a tutor and arrange finance on the Johannesburg Stock Exchange.

This interactive content can be delivered by any transmission method. Cable can offer huge capacity for information transmission for correspondingly huge capital outlay, for example, the fibre optic backbone, which is planned for Africa, by South Africa's Telkom. Satellite has restrictions on return path can be overcome using other return paths. Interactivity in terrestrial broadcasting is seen as restricted by frequency availability, but the 'cellular' approach (as in mobile phones) has been

demonstrated in dense German cities as capable of providing multi-user interactivity over terrestrial frequencies.

Interactive text communications are now commonplace in the Internet, delivered over telephone lines. But video signals such as television require a lot more data carrying capacity (or band width). A new communications term, multimedia, has emerged to refer to such data heavy Internet services involving interactive text, audio and video data. The term is still subject to complete definition, with some preferring to call multimedia by the term interactive broadcasting.

Africa's first interactive television service was launched by MultiChoice in early 2002. Satellite transmission capacity is limited, and expensive. How is the return path provided? Most subscribers cannot set up their own earth links to communicate with satellites (though some corporate clients do). The solution is found through land telephone lines. MultiChoice Interactive TV (iTV) requires that the subscriber has a digital telephone link. The subscriber gets his, or her, down link from the satellite, data heavy with video images such as TV programmes. The return path is by telephone link. Phillips (Netherlands) and others are already manufacturing TV sets with modems built in, for equivalent European services such as French TAK TV. The keyboard is your remote control.

## Likelihood of Transformation of ICT Sector in Africa

Access to broadband Internet connection is the main limit to reception of interactive multimedia services. Broadband refers to a large bandwidth of data carrying capacity. The cost of infrastructure is significant. So, terrestrial broadcast is still the main mode of delivery for television, or video communications. But, new policies may oblige states to provide universal ICT access to its people, so new regulations may affect the future of broadcasters. Internet connectivity is low but growing rapidly in Africa. It is beyond the ambit of this paper to discuss the growth and potential growth of broadband ICT access in Africa, and in any event, future government and global policy toward ICT in Africa will be the determining factor. How much, and how fast, the ICT infrastructure will be extended in Africa will be greatly affected by national and global political decisions. If broadband Internet access becomes commonplace in Africa, regulators will face the problem that broadcast content will be increasingly difficult to distinguish from internet content.

# Major Players and Early Regulation in African Satellite Broadcasting

Satellite has become an important communication technology for television in Africa, compared with cable delivery. This is partly due to the fact that capital intensive cable laying operations work best in affluent urban areas, whereas satellite can reach niche markets scattered over wide areas. But it is also to do with fact that international satellite broadcasts cannot be regulated by national governments, and African governments have been slow to license independent television operators. So new television services have emerged with satellite delivery aimed at pan African audiences. These may be grouped in three main categories: pay TV television platforms, free-to-air TV networks and TV channels.

# Pay TV Television Platforms

## MultiChoice

MultiChoice DStv is the name of the first pay TV platform in sub-Saharan Africa. MultiChoice grew from M-Net, a single channel pay TV service that was set up in South Africa in 1986. When first established, M-Net used terrestrial frequencies to broadcast an encrypted signal with sports and movie programming. Subscribers bought a decoder and paid monthly subscriptions. M-Net obtained a license from the South African government for its terrestrial channel, as a pay TV service with two hours per day free-to-air broadcasting which turned out to be an important marketing tool, since non subscribers could see the exclusive programming contained in M-Net during this open time. By 1993, M-Net had leased a satellite transponder, which gave C-band (satellite transmission frequency) footprint over sub-Saharan Africa. This was leased from INTELSAT, the global communications satellite network. At that time, the world's governments, through their Posts and Telecommunications Authorities, controlled INTELSAT. M-Net set up MultiChoice to be a satellite platform for delivery of television services throughout Africa. MultiChoice soon became a part of Netherlands headquartered Nethold, with television services in Europe as well as Africa. One secret of the group's success was the viewer decoder,

developed by subsidiary IRDETO, which remains one of the worlds most advanced integrated reception devices (IRD). The other was exclusive programming, including the latest global drama and movies, as well as sports, especially rugby in South Africa.

MultiChoice signal distribution subsidiary, Orbicom, was desperate for additional transponder space to offer more channels to Africa. it also wanted to use digital technology to compress more channels into the transponder space it did have. INTELSAT set up a satellite capacity agency based in Senegal and named Rascom, to handle the demands of commercial communication operators such as TV. Rascom was effectively under the control of the African governments, who were not whole-heartedly committed to the development of independent continental television services, though they did grant an additional channel to MultiChoice at the cost of US$1m in 1994.

The arrival of the PAS-4 satellite in 1995 changed all that. PAS-4 was launched by PanAmSat, the Mexico/USA owned satellite company which had just successfully challenged the effective monopoly of INTELSAT in South America, using USA anti-trust legislation. MultiChoice launched one of the world's first digital multichannel TV services in 1995 (Arabic platform Orbit was the first by a few months). The MultiChoice DStv service included 22 channels of TV and 40 audio channels. For a monthly subscription of US$45, and was available in Ku band for the first time. Ku band needs smaller, cheaper satellite dishes than C-band for reception, so reception kit cost was reduced from US$2-7,000 to US$400. By 2002 there were over 500,000 subscribers in Sub-Saharan Africa to DStv's 55 television channels, now with interactive services including email and shopping.

During the 1990s, MultiChoice DStv was effectively unregulated in many territories where subscriptions were sold. MultiChoice agencies in some territories did set up licensed terrestrial re-broadcasters, in other territories they installed satellite dishes and managed subscriptions for Direct to home (DTH) satellite services. This is one reason that African regulators are prompted to try to define satellite broadcasting.

In 2002, MultiChoice Africa was part of the international MIH group, traded on Johannesburg New York and Amsterdam stock exchanges, with over 2.1 million subscribers in Africa, Middle East and Thailand. MIH tuned over US$644m in year ending March 31 2002. Though it recorded massive losses totalling US$442m from USA ventures into interactive television last year, these businesses (Mindport and Open

TV) were disposed of, and the Africa subscription operations remained profitable, with MultiChoice Africa contributing earnings before interest, tax and depreciation (EBITDA) of US$75 million.

MultiChoice Africa (Pty) Limited (MCA)'s aggregate subscriber base ended 2002 with 1.28 million households. The digital base for Africa grew by 140,000 subscribers to 793,000 for the year, and now accounts for 62% of the total number of subscribers, establishing a platform for the roll-out of interactive television (iTV) services which were available to most digital subscribers by July 2002.

## Le Sat

Le Sat is an initiative taken over by the government Canal France International (CFI) in June 2002, through its commercial subsidiary, Port Invest. Le Sat pay TV platform is a bouquet of pay TV channels originated in France, in French language. The service became a digital platform in September 2001. By March 2002, 12 channels were on offer with 85,000 subscribers in Africa.

The mode of delivery of Le Sat illustrates the difficulty of defining new television services. Le Sat can be received by direct to home (DTH) satellite transmission, or through local MMDS terrestrial or cable broadcasters. In future this might include broadband cable. We can see that a distinction between the delivery methods might be possible, but that the principal point of regulation is the point of connection, or access to information, to the public. This access to information is made possible through one of a variety of communications technologies.

## Vivid

VIVID is the name of a pay TV platform set up by the South African, state owned, common signal carrier, Sentech. At present VIVID carries only free-to-air South African services, but new legislation seeks to position Sentech as a supplier of public access to multimedia services. The new license for these services is the focus of much regulatory attention, and spotlights the capability of regulators to set the conditions under which commercial television services and other information access providers can operate.

## Free-to-Air Networks

Three free-to-air African television networks are delivered by satellite to local TV stations, which then broadcast the channels in whole or in part. These networks are the French government owned CFI professional, which styles itself a programme bank, Africa Broadcast Network (ABN), which grew from programme distributor ABC, and TVAfrica, which received financial backing from the International Finance Corporation in December 2001. The latter two networks seek income from continental advertisers, while their local partners seek advertising from local clients.

## African Broadcast Network (ABN)

ABN, a content-provider, is a pan-African television network that aims to own and maximize the value delivered to prime-time television across the Continent. ABN provides free-to-air television services through its terrestrial private and public affiliates.

The commercial justification for the establishment of such a network is that many African countries cannot afford to purchase quality (read American) programmes, or to sustain any programming consistency. As a result, concludes ABN's marketing information, advertisers no longer use television as their primary means of communication in many African countries. The net effect of this is that African broadcasters are faced with the problem of financial and programming instability.

Currently ABN broadcasts one-hour pre-packaged programmes to the following countries:[i]

| COUNTRY | AFFILIATE | TIME |
|---------|-----------|------|
| Ghana | Ghana Broadcasting Corporation (GBC) | 18:00 – 18:30 22:00 – 22:30 |
| Kenya | Kenya Broadcasting Corporation (KBC) | 18:30 – 19:00 19:45 – 20:15 |
| Zambia | Zambia National Broadcasting Corporation (ZNBC) | 18:00 – 19:00 |
| Nigeria | Africa Independent Television (AIT) | 21:00 – 22:00 20:00 – 21:00 (Fri) |
| Tanzania | Independent Television Limited (ITV) | 20:30 – 21:00 22:30 – 23:00 |

ABN concluded a deal in 2002 with broadcasters in Malawi, Rwanda and Namibia.

[1] ABN content typically consists of American comedies such as "Kids say the darndest things" and "King of Queens." ABN also has plans to start broadcasting and co-funding local productions although no transmission date has been set yet.

# TV Africa

TV Africa currently provides a free-to-air satellite broadcasting service to an estimated 128 422 people living in East, West, South and French-speaking Africa. It broadcasts a full-time schedule or sports/special events schedule to those countries either through its public/private affiliates. Although carriers of foreign content into Africa distribute their material via private stations, this discussion focuses specifically on satellite broadcasters that transmit their signals using the national terrestrial broadcaster's free-to-air services.

| COUNTRY | AFFILIATE | FULL/SPORT SCHEDULE |
|---|---|---|
| **TV Africa – East** | | |
| Ethiopia | ETV2 | Full |
| | ETV | Sport |
| Eritrea | ERITV | Sport |
| Zanzibar | TVZ | Sport |
| Seychelles | SBC | Sport |
| | | |
| **TV Africa – West** | | |
| Nigeria | NTA | Sport |
| Ghana | GTV | Sport |
| Cameroon | CRTV | Sport |
| Sierra Leone | SLBS | Sport |
| Liberia | LBC | Sport |
| Gambia | GRTS | Sport |
| | | |
| **TV Africa – South** | | |
| Angola | TPA | Sport |
| Namibia | NBC | Sport |
| Botswana | BTV | Sport |
| Zimbabwe | ZBC | Sport |
| Zambia | ZNBC | Sport |
| Malawi | MBC | Full |
| Mozambique | TVM | Sport |
| Swaziland | TVS | Sport |
| Lesotho | LTV | Full |

| COUNTRY | AFFILIATE | FULL/SPORT SCHEDULE |
|---|---|---|
| **TV Africa – French** | | |
| Cote d'Ivoire | RTI1 | Full |
| | RTI2 | Sport |
| Senegal | RTS | Sport |
| Benin | ORTB | Full |
| Togo | TVT, TVG-2 | Full |
| Burkina Faso | RTB | Sport |
| Mali | ORTM | Sport |
| Central African Republic | RTCA | Sport |
| Congo | RTCA | Sport |
| Democratic Republic of the Congo | RTNC | Sport |
| Guinea | ORTG | Sport |
| Mauritius | MBC3 | Sport |

TV Africa's economic rationale is similar to that of ABN's: broadcasters in Africa lack the financial capacity to purchase programming and able, through TV Africa's pre-packaged formula, to guarantee advertisers an audience and provide programming to broadcasters.

It is of particular concern to note that TV Africa's programming line-up does not contain any local content nor does is its programming content differentiated in any of the countries that receive its signal.

## Television Channels

The above pay TV and free-to-air services might be considered information access providers regulated at the point at which they provide access to the public. But the information is provided by third parties: the television channels. Mostly these are global media operations including

the likes of CNN, BBC, Arabic and Indian services. Some originate in Africa, such as privately owned M-Net, SuperSport, KTV, Summit TV, some are intended for African audiences, such as French Canal + Horizons, and an increasing number of African national channels are obtaining distribution by satellite. Even those channels originated in Africa cannot be legislated for and regulated except in their home territory. It is the local providers of public access to information who can be regulated.

# Why regulate? Considerations of Regulators of Broadcast Information and Communication

## Channel Availability

Frequency and other channel availability is the first and undeniable reason that electronic communications need to be regulated. This includes cable and satellite networks, since space is limited and operators need to know what frequencies they can broadcast under, and what streets they can lay cable under. Positive regulation can also be used to extend access to communication technology to the public. Frequency regulation mechanisms are detailed below.

## Constitutional Rights and Media Freedom and Universal Access

The monopolistic tendencies of state and capital mean that a diverse and accessible communications media (infrastructure) needs to be legislated for. See discussion on South Africa below. The concept of universal access to communications and information has been advanced as a human right. Global and South African groups are convinced that universal access to information and communications technologies can bring social and economic change to Africa. Policy development, legislation and regulation are seen as essential to bringing about changes in the infrastructure of communications, and the production of information (content).[ii]

Legislation can provide differing emphasis to the concepts of human rights. The South Africa Broadcasting Act 1999 is full of references to

human rights: 'The South African broadcasting system... provides... for the maintenance of a South African identity, universal access, equality, unity and diversity and resolves to align the broadcasting system with the democratic values of the Constitution and to enhance and protect the fundamental rights of citizens'.[iii] By contrast, the Zimbabwe Broadcasting Services Act of 2001 makes no mention of human rights, constitutional rights or freedoms, except in that the regulator is expected to 'to ensure the role of broadcasting services and systems in developing and reflecting a sense of Zimbabwean identity, character and cultural diversity'.[iv]

## Political Independence

Ownership of communications technologies brings immense political power. The government needs to be regulated in its licensing of information and communications technologies. For this reason, the regulator and its officers need to be appointed and funded in such a way that they are free from political interference. Nominations by the public, or by civic institutions, are both ways of achieving this. Again the South African and Zimbabwean legislation provide differing examples of modern legislation, the latter designed to promote freedoms of speech and access to information, the latter seeking to impose political control on broadcasters.

## Commercial Considerations: Development of a Viable Media Industry

The development of Africa's broadcast industries cannot be performed by regulation alone. Audiences for television are needed, as are commercial revenues from these audiences. From such a commercially viable industry will flow local content and the expression of national identities, in formats acceptable to audiences. A viable commercial broadcasting sector can also be a significant employer and contributor to national wealth. For this reason, commercial broadcasting is considered a necessary part of a national broadcasting system. The job of the regulator is to create an environment in which commercial operators are encouraged, and required to contribute toward local content.

It may be best for commercial operators to make this contribution to local content in the form of a levy on revenues (advertising, pay TV subscriptions, cinema admissions), the resulting fund to be administered by an independent production financing body. An alternative is a requirement for minimum percentage of airtime

Commercial television broadcasters are only interested in commercial success. This means becoming the first choice for their audiences, in order to make a commercial success of their popularity. The regulator must try to ensure that suitable local content is available to commercial broadcasters.

The licensing of communications services is an important revenue earner for the state. European telecommunications companies such Vodaphone (UK) paid billions for rights to broadcast G3 mobile telephony. Equally, the revenues earned from such services are huge (though they have not yet materialised for Vodaphone's G3 investment). MultiChoice earned US$870m in 2001 from its DStv service. Regulations can significantly impact these commercial revenues.

## Content Regulation

New African satellite television networks are delivering popular (Hollywood) programming to national audiences through national television services, which should be public broadcasters. But the advent of satellite broadcasting is not responsible for the dilution of local identity. African television was broadcasting cheap western programming from tape, before it was available from satellite. The answer is not to ban foreign product, but to develop local content. Local content development, and the development of public broadcasters, can contribute to the national identity, while still allowing audiences freedom of choice, and respecting the universal freedom of access to information. The SABC has already proved itself competent in developing effective local programming that local audiences will choose to watch. Television programmes such as the soap Generations and others dominate the audience ratings in South Africa. Local content regulations may have helped to stimulate production of programmes like Generations, and more importantly, the training and industry background necessary for the production, but only audience choice can make a success of these programmes.

# Content Regulation: Advertising, Copyright and Other Issues Relating to Content

Other issues relating to the content of satellite delivered broadcast programming, range from whether international advertising is suitable for local markets, to issues of copyright, to issues of whether national sporting rights can be purchased exclusively for pay television. This chapter suggests that these are not special issues for regulation of satellite broadcasting. In some cases national legislation or industry regulation already deals with these matters. Confusion arises when we say that the signal comes from abroad: how can local laws be effective to control advertising, etc, that originates from abroad? This chapter proposes that the organisation which provides access to the content, to the local audience, (e.g. local pay TV sales organisation) is responsible for ensuring that the content complies with local regulations, which already exists to deal with issues such as advertising, copyright, obscenity, defamation etc.

# Technical Standards

The South African Broadcasting Act 1999 defines the broadcasting system provided by a common signal carrier as well as other commercial signal carriers, who provide transmission services for a range of content broadcasters, categorised as public, commercial and community. A newcomer to broadcasting may use the existing broadcast system to reach consumers, without the expense of setting of setting up a national network. Broadcasters must pay licence fees to utilise the system. Regulation of technical standards will ensure that parts of the broadcasting system are compatible with each other, and with future developments. Adoption of such standards may improve universal access, since it may help to streamline industrial development of the broadcasting system, and may prevent consumers from purchasing equipment, which later becomes redundant. In practice, the global industry will adopt, evolve and change broadcast technology as it sees fit.

Broadcasting standards PAL and NSTC became regional industry standards in the era of analogue television. Now, in the digital era, there are three digital standards competing for global acceptance: DVB-T (Europe), ASTC (North America), BST-OFDM (Japan). The South

African Department of Communications is examining the adoption of technical standards for the national broadcasting system through a Digital Broadcasting Advisory Board (DAB).

Consumer receiving devices are needed for public access to the communications broadcasting system. Integrated Receiver Devices (IRDs) are the decoders, which are needed to decode encrypted satellite signals, so only those viewers with paid subscriptions may view the signals. In the digital era, these will be needed for even free-to-air broadcasts and cable TV. Some of this technology is patented, restricting its adoption for national use by regulatory authorities. African subscription television group MultiChoice has advanced, patented IRDs, which help to make it difficult for competition to attack its subscriber base. But, the common carrier (in South Africa this is Sentech) may adopt its own IRD technology, along with a satellite platform, in order to provide access to South African audiences, for competing satellite and cable services. Sentech has already established such a platform in South Africa. Known as Vivid, this service has yet to carry commercial services, in part because the regulatory basis for the operation is not yet established. There is an issue of whether it is right for a state-owned organisation, with financial resources belonging to the state, to compete with a private sector, which developed digital television subscription technology and markets in Africa, and its own risk and profit. See further discussion of this issue below.

## Global Policy Regarding International Communications: Open Skies vs Prior Consent

The emergence of satellite broadcasting services means that in many cases, several territories will be included in the footprint of a satellite signal. The governments of those territories cannot control the content of those signals. Most nation-states do, however, wish to ensure that the broadcasts reaching their population conform to policy objectives such as promoting a national identity, promoting the public interest and promoting competition and stability. This is sometimes expressed as concern that foreign content is a threat to local cultures.[v] This debate is discussed by Fischer (1990) who argues that for developing nations, their prerogative is the protection of their national boundaries and sovereignty. Developed nations have rejected this argument based on the idea that any attempt to

limit the reception of satellite broadcasting services would constitute a breach of the universal principle of freedom of information. Some developing countries have requested an international legislative approach that would resolve disputes of such a nature. They have proposed a principle of prior consent whereby advance permission would have to be obtained from a receiving country in order for foreign transmissions to take place. Developed nations such as the United States (U.S.) have opposed this motion, resulting in a stalemate in United Nations (U.N.) negotiations in 1982. The resulting situation is known as 'open skies', where there is no regulation of the content of international communication signals.

The principle of prior consent is fraught with dangers. If for example, prior consent to broadcast to southern Africa were required for an international television news service, it is unlikely that such a news service could get on the air, or that it would survive for long. The government of Zimbabwe has, for example, banned CNN from re-broadcast in Zimbabwe.[vi] Yet a neighbouring country might wish to have access to CNN. It seems that the universal principle of freedom of access to information must take precedence over prior consent. In any event, most practical concerns of national governments can be met by regulating local suppliers of communications technologies and their access to citizens of that country.

# Mechanisms of Regulation

## Types of Regulation: Content and Transmission

Broadcasting legislation as it was conventionally phrased, licensed the broadcaster to both use particular frequencies for communication, and, implicitly, to supply content to the public. New South African legislation is differentiating between the provision of content to the public (through a broadcasting system), and the offering of access to communications technology to the public, by a signal carrier or telecommunications network. The various legislation acts to regulate in the two main sectors of ICT:

- Content, (information), and
- The transmission of that content (communication).

A variety of other legislation can have the effect of regulating content, or broadcast information, for example those relating to press freedom, freedom of information, obscenity, defamation, ownership of copyright or intellectual rights.

## Regulation of Content (Information)

Individual countries can regulate locally based content providers, and can also promote access to, and creation of, information. They cannot regulate foreign based content providers such as satellite television. But they can regulate those local organizations, which supply access to content as if they are the content providers. These providers of access to content include subscription television agencies, and internet service providers (ISPs).

Broadcasting has historically received the attention of regulators of content and information. But what of internet content? South African legislation[vii] defines broadcast as a unidirectional communication of information on a broadcast system. Where an individual calls for particular information, and gets a specific response, this is not broadcast, since it is not available to the public. Some argue that internet content is not broadcast, so does not need regulation under broadcast content legislation. However, internet content is effectively broadcast to a national communications system when it is connected to that system.

Public access to specific internet content can be regulated by the Internet Service Providers (ISPs). It is possible to block web addresses accessed through national ISPs, or to offer only a limited selection of web addresses. Controlling internet content in this way is difficult, in view of the vast numbers of web addresses, which are all content providers to the internet. Some groups say regulation of internet content is not necessary and an impingement on freedom. Content licences to host a web site or own a web address are not being talked about in any legislation.

Policy makers want regulation to stimulate development of local content, and to control what local audiences are watching. If broad band internet access becomes common in Africa, the convergence of television and internet will make existing regulation of broadcast content increasingly irrelevant. Regulators will have to decide whether they will try to regulate internet content. Positive regulation of internet content (local content, national identity) is easy, but restrictive regulation is

difficult, and would most likely involve huge limitations to internet accessibility. Regulators would then be in the position of having to concentrate on encouraging the development of local content, and local content channels, to compete with global content for local audiences. In this environment, content regulation will embrace both internet and broadcast information.

# Regulation of Transmission (Communications)

To get from its originator, to its recipient, content (information) requires transmission using electromagnetic frequencies or land lines, and connection (via some sort of reception device) to users or audiences. Together this process is called communication, and can be regulated at transmission and reception. Providers of communications technology (signal carrier and cable network operators), do not supply any content, or information, to the system.

Electromagnetic frequencies are regarded as a public asset and regulated at an international level by conventions of the International Telecommunications Union (ITU), and at a national level by the members of the ITU, the Posts and Telecommunications representatives of the world's governments. The International Telecommunications Union is the principal international forum within which international consensus is reached about spectrum use, and ITU Conventions have, in some countries, been given the equivalent status of international treaties. The frequencies to be used as broadcast frequencies are determined by the ITU.

Regulation of ownership of means of reception and transmission of signals is the most direct, and the traditional method of broadcast regulation. Licences are required for ownership of equipment for receiving and broadcasting radio transmissions. These are justified in terms of needing to regulate radio frequencies. But they also earn money for the state owned broadcaster through listener's licences. Regulators who wished to make the public hold licences for ownership of reception technology for multimedia services might be faced with a difficult task: could they ask for licences for those owning modems, or satellite decoders?

Global satellite TV signals are regulated by the ITU under open skies policy, and seem to be out of the reach of regulators in any individual

country, except to the extent that the ground station may be located in that country, or to the extent that that country can regulate ownership of reception devices. In Afghanistan, in recent history, ownership of satellite reception equipment was banned. In South Africa, satellite dishes and reception kits can be owned by anyone without a licence, though conventional TV sets need one.

Cable does not use radio frequencies, and falls under telecommunications legislation. Cable infrastructure can be regulated with licences to carry out the work of laying and maintaining the cable infrastructure, and charging the public for access to it.

Governments may try to make providers of access to communications responsible for content. This would be inaccurate: they should focus on the providers of access to content- pay television subscription companies, television companies and ISPs.

## Towards a Unified Regulatory Policy

In noticing the difference between: regulation of content (information); and providers of transmission (communication) technology to the public, the concept of a national information communications system suggests some redefinition of existing sectors for regulatory purposes. Public providers of access, to communications technology, and to the information available through it, are always based locally in the regulating state, and can be the effective point of ICT regulation.

The local providers of public access to information content include broadcasters (e.g. SABC), subscription TV services (e.g. MultiChoice) and ISP's, who use the communications (broadcast) system to deliver content provided by content owners. Regulation of information including promotion of national identity and public interest happens here.

Local providers of public access to (tele-) communications technology, include signal carriers and networks (e.g. Sentech, Orbicom, Telkom) that provide the public with access to the communications backbone maintained by carriers of carriers (global and local). Regulation of communications including frequency management and universal access happens here.

At present, special regulation of electronic information extends to 'broadcast content', but not to internet information, except in as much as other statutes dealing with information affect internet content. Freedom of

speech considerations, and the 'non broadcast' status of internet, indicate that internet need not be further regulated, but this countered by the idea that internet content needs some regulation to promote its development.

## Can National Governments Regulate Convergent Communications?

Broadcast regulation used to be limited for practical purposes by the range of terrestrial television stations. Satellite transmission footprints include more than one territory, and can be made from remote geographic locations. Convergence of telephony, internet and broadcasting has blurred the boundaries of what constitutes any of these sectors. Internet can carry telephony and broadcast content. So not only are governments trying to grapple with legislative ways of defining and controlling these activities, but also, those in telephony, satellite, internet and broadcasting have financial interests at stake in the outcome of such legislation.

   Some say that government has no business in trying to regulate the content of the new communications technologies. But regulation is a two edged sword, it can both inhibit and promote the subject of regulation, and much content regulation in the new legislation is designed to provide to positive developments in the content of the ICT revolution (see South Africa Broadcast Act 1999).

## Practical Regulation: The Business Model

In this era of change in communications technologies, it is interesting to explore the existing regulatory control. For example, it appears that a licence is not required to own a satellite dish and decoder in South Africa. What is to prevent an overseas satellite television channel from broadcasting its signal to South Africa, and selling decoders and subscriptions in Johannesburg? Can the definitions of broadcasting be extended to such a service, for the purposes of business? In fact such television services already exist, such as the national broadcasts of DWTV (Germany) CFI (France), though these are free-to-air non-commercial national channels. They do not even need a decoder for reception. What if commercial services were started? Does the sale of decoders constitute a broadcasting activity? New South African legislation defines these services to an extent, but other territories have not made such definitions in legislation.

The answer to many questions of how regulation can affect television services is that of the business model. Maybe the legislation in a particular territory does not provide for a particular modern communication technology. This means that either, a business will not start up to offer a television service that might be deemed illegal, since it is a poor investment risk, or a business will start up without regulation.

## Practical Regulation: Political Control

In our discussion of models of regulation we talk about specific policies and legislation. This legislation needs to be implemented by a body that is free of commercial and political interference, such as an independent regulatory authority. The method of appointment of regulators is an important facet of legislation. In examples of legislation, appointment of the regulatory executive may be done by a government minister, which may be subject to political influence, or by a panel drawn from civic institutions, or from nominations submitted by a cross parliamentary committee, or from public nominations following advertisement.

Where the state owns a broadcaster or other communications infrastructure, it is able to control programming to a high degree, even when that broadcaster is protected by legislation, through appointment of the executive. This influence may extend to other broadcasters, especially in socio-political environments where government decree carries more authority than legislation and rule of law.

# Regulation in Africa

Legislation that governs regulation of broadcasting in Africa was often modeled on legislation from the colonising nations of the last century. In Francophone territories, co-operation agreements have resulted in introduction of regulatory mechanisms that allow for independent broadcasting, and most territories are considering or have reviewed broadcast legislation in the last decade. Definition of satellite TV and convergent information is a central issue to new legislation.

## African Charter on Broadcasting 2001

The African Charter on Broadcasting was launched as an official activity of the Africa Commission Human and People's Rights meeting held in Pretoria in May 2002. The Charter expands, to broadcasting and electronic media, the ideals of the 1991 Windhoek Declaration, which inspired the independent press in the region and worldwide a decade ago.[viii]

The Charter says that 'freedom of expression includes the right to communicate and access to means of communication', and includes the following declarations:

- The frequency spectrum is a public resource, which must be managed in the public interest.

- The legal framework for broadcasting should include... respect for freedom of expression, diversity, and the free flow of information and ideas, as well as a three-tier system for broadcasting: public service, commercial and community.

- All State and government controlled broadcasters should be transformed into public service broadcasters, that are accountable to all strata of the people as represented by an independent board, and that serve the overall public interest, avoiding one-sided reporting and programming in regard to religion, political belief, culture, race and gender.

- Community broadcasting is broadcasting which is for, by and about the community, whose ownership and management is representative of the community, which pursues a social development agenda, and which is non-profit.

The right to communicate includes access to telephones, email, Internet and other telecommunications systems, including through the promotion of community controlled information communication technology centers.

## Broadcast Regulation Models in Africa: Three Cases

Legislation that affects broadcasters and other information providers are extensive documents, and this is complicated by the necessity to examine

the actual implementation of regulation in each country, which makes an adequate survey of Africa's legislation impossible in the space allowed for this paper. Below is a survey of legislation in three of Anglophone Africa's biggest economies: Kenya, Zimbabwe and South Africa. South African legislation is examined as representing the most forward thinking legislation for information and communications, Zimbabwe as representing a repressive interpretation of the latest trends in regulation, while Kenya is discussed as a nation that still has to define its regulation of broadcast, satellite and other information services.

# Broadcast Regulation in South Africa

## Constitutional Rights: Freedoms and Rights to Access

### Bill of Rights

According to the Bill of Rights, as contained in South Africa's Constitution, 1996 (Act 108 of 1996), everyone has the right to freedom of expression, which includes:

- Freedom of the press and other media
- Freedom to receive or impart information or ideas
- Freedom of artistic creativity
- Academic freedom and freedom of scientific research.

Various laws, policies and organisations act to protect and promote press freedom in South Africa. Press Freedom Day is celebrated annually on October 19.

## Legislation

### Redefining Communications and Information

The Department of Communications is the centre of policy making and policy review for the posts, telecommunications and broadcasting sectors in the country. This includes policy making that affects State owned

enterprises such as Telkom SA Ltd, the South African Post Office (Pty) Ltd, Sentech and the South African Broadcasting Corporation (SABC), as well as the regulators, the Independent Communications Authority of South Africa (ICASA) and the Universal Services Agency (USA). All these, including the Department, fall under the Cabinet portfolio of the Ministry of Communications. The Department aims to enable ordinary people to have access to Information and Communication Technologies (ICTs).

The Department of Communications is redefining South African broadcast legislation, which may set a lead for other African territories. The objectives seek to facilitate the theme of bridging the digital divide. The catch phrase represents the hope that convergence of internet, telecommunications and television might hold a solution to the problems of Africa's chronic lack of development.

The Department is examining the move to digital broadcasting, through its Digital Broadcasting Advisory Board (DBAB), which it hopes will free up bandwidth for commercial services such as interactive TV, and educational services based on video on demand. The plans are ambitious, but the dream of developing a digital backbone for convergent communication services may represent competition for some commercial services and opportunity for others. The Department has determined that it restructures publicly owned broadcast signal provider, Sentech, to reposition the organisation as multimedia digital company, to exploit opportunities in the multimedia environment, to facilitate entry of Sentech into the telecommunications sector, to develop a digital terrestrial backbone and to launch a pay TV service.

This last objective, a pay TV service, might compete with commercial DTH (Direct To Home) satellite pay TV operator, MultiChoice. Publicly owned transmission network, Sentech, established the satellite platform VIVID to be an alternative low cost DTH satellite platform, partly in order to increase geographical coverage of the country for South African public broadcasters. VIVID has been a free-to-air satellite service since 1999, but on 2 August 2001, VIVID encrypted its distribution of South Africa¹s terrestrial free-to-air channels. These include the SABC channels, BopTV and e.tv. The VIVID footprint extends throughout southern Africa, and this meant that neighbouring countries could receive the service when it was free-to-air, which meant that the territorial limits of some programme licensing agreements might have been exceeded. The encryption of the

## South African Broadcasting Act 1999

The Act defines the 'South African Broadcasting System' as owned by South Africans, and places expectations on that system in terms of contributing to the enlightenment and moral fibre of South Africans. The Act:

- provides a Charter for the South African Broadcasting Corporation Ltd;
- establishes the Frequency Spectrum Directorate in the Department;
- establishes the South African Broadcasting Production Advisory Body; and
- seeks to regulate broadcasting services that are provided by means other than radio frequencies, i.e., satellite and cable.

### Definitions of Broadcasting and Satellite TV

The Act recognised satellite broadcast services (TV channels) as subject to broadcast regulation, for the first time. In its definitions, "satellite broadcasting service" means a service which is broadcast by transmitters situated on a satellite; "broadcaster" means any person who composes or packages or distributes television or radio programme services for reception by the public or sections of the public or subscribers to such a service irrespective of technology used"; and "broadcasting" means any form of unidirectional telecommunications intended for the public, sections of the public or subscribers to any broadcasting service having appropriate receiving facilities, whether carried by means of radio or any other means of telecommunication or any combination".[ix] Cable and satellite pay TV are regarded as broadcasting activities according to this Act, and interactive services, including data and voice transmission, are excluded by the definitions of broadcasting as unidirectional. Other unidirectional services such as video on demand, and dissemination of text-only services are specifically excluded from the definition of broadcasting.

Chapter III of the Act, Classification of Broadcasting Services, re-emphasises that the act will cover satellite services requiring that 'any

person who intends to provide a broadcasting service, including distribution services whether satellite or terrestrial, or any other form of distribution which offer programming to the public is required to obtain a licence']. A consequence of this is that MultiChoice may be required to obtain new licences for the channels on the multi-channel satellite pay TV service called DStv. The carrier of these services is required to have a "multi-channel or signal distribution licence" See reference to Chapter VII of the Act, below. But the Act stated that any services in existence at the time of the Act would automatically be licensed on application, unless the regulatory authority decided otherwise.

Chapter III recognises that foreign services may reach South Africa, but that South Africa has no power to legislate these services: 'This section must not be construed to mean that a broadcaster licensed or authorised to provide service to a foreign country by the appropriate authority and whose signal is incidentally received in South Africa, is required to hold a licence in South Africa.' The Act does, however, say that if these broadcast services are to be formally promoted or sold to the public in South Africa, those making such offerings must obtain a licence. Indeed, each individual TV 'channel provided in a multi channel environment must be authorised by the Authority upon application by the person offering a broadcasting service to the public'.[x]

The Act defines the following Classes of broadcast licences:

1. Public broadcasting service;
2. Commercial broadcasting service; and
3. Community broadcasting service.

And provides that broadcasting licences are issued in 11 types including: free-to-air television service; satellite free-to-air television service; satellite-subscription television service; and multi-channel satellite distribution.[xi]

Chapter VII of the Broadcasting Act deals with Signal Distribution and Multi Channel Distributions. This refers to licences needed by the carriers of the various broadcasting services (TV channels), which, as stated above, already need broadcast licences. Such signal distributors include Sentech and Orbicom.

Telecommunications legislation, especially in a convergent environment, also licenses carriers of communications. The convergence of ICT means that the distinction between signal carriers as

telecommunications, or broadcasting carriers is becoming less meaningful. This recognised by the Broadcasting Act, to the extent: that it does recognise signal carriers as a separate entity to broadcasters; and by the management of broadcast frequencies under a Frequency Spectrum Directorate in the Department of Communications. The Directorate will unify frequency management, which had been allocated to various government agencies, such as broadcasting, defence, and telecommunications.[xii]

The problems of jurisdiction over licences and services were resolved to some extent by the Independent Communications Authority Act of 2000, which merged the regulatory authorities for broadcasting and telecommunications into one body, the Independent Communications Authority of South Africa (ICASA). According to the ICASA web site, until the restructuring of the new regulator has been completed, ICASA will operate with two divisions. The former IBA will constitute the broadcasting division, while the former SATRA departments will constitute the telecommunications division. The ICASA Council will oversee both divisions.

## Redefining Broadcasters as Providers of Content (Information)

The Broadcasting Act appears to be transitional toward a regulatory separation of broadcasting content (information), from the transmission of that content (communication). As constituted, the Act regulates both broadcasting and signal distribution, but also defines the separation.

Later legislation (Telecommunications Amendments Act 2001) seeks to regulate carriers of telecommunications. In a convergent world, it is apparent that broadcast signal distributors/carriers, and telephony's "carriers of telecommunications", are differentiated not by the content they carry, but solely by the technical form of communication utilised: the former uses electromagnetic frequencies, and the latter, land lines (and mobile telephony). It seems logical to regulate these Carriers and Signal Distributors together as "Communications carriers", in classes of licences defined by their utilisation of either land line or electromagnetic frequencies.

A redefinition of broadcast regulations as content (electronic information) regulations might see provision of access to broadcast and internet as different classes of public "Information", based on the

distinction of interactivity. Information defined in two classes: broadcast, including pay TV; and interactive services (such as internet). The interactive class of information (internet) is not available as a public service, since it must be 'called for' by the user (an arguable point), so it is not subject to the same restrictive regulation as broadcast content, but rather subject to positive development regulation.

The highlights below demonstrate that the South African Broadcasting Act is concerned to regulate content (information) of broadcasters. The Act intends broadcast regulation to:

- contribute to democracy, nation building, the provision of education and strengthening the moral fibre of society
- provide for a three-tier system of public, commercial and community broadcasting services
- establish a strong and committed public broadcaster to service the needs of all South Africans
- promote the production and distribution of local content, through the establishment of the South African Broadcasting Production Advisory Body.[xiii]

However, the Act falls short of a harmonised re-definition of broadcasting, including satellite TV, as being part of the "local provision of access to information". It is restricted from doing this since the current situation separates broadcast from telecommunications information. Harmonisation under the ICT scheme would see Information regulation governing local broadcasters and pay TV agencies, while regulation of Communications would govern signal carriers and providers of access to them (cable and frequency transmission, and consumer connections to same).

Much of the Act is given over to re-defining the South African Broadcasting Corporation (SABC). It guarantees the independence of the SABC as public broadcaster, with the Government holding 100% of the shares in the SABC as a limited liability company.

## Digital Broadcasting & Production Advisory Bodies

Early in 2001, the Minister responsible for the Department of Communications jointly launched the Digital Advisory Body and the

Broadcast Production Advisory Body. The latter will promote the production of local content, the production of materials that will meet the needs of the community sector, and the foreign sale of local products. The Digital Broadcast Advisory Body will advise the Minister on digital broadcasting and economic and other implications of converting from analogue to digital transmission.[xiv]

## South African Telecommunications Amendments Act of 1999

### New Licences for Information and Communications Services

The Telecommunications Amendments Act of 1999 seeks to promote new convergent services, and competition in the communications sector. It has mandated ICASA to implement these goals. ICASA is grappling with the extent to which convergence will merge the traditional boundaries within communications. The Act attempts to create a communications sector called "multimedia", in a compromise effort to protect the traditional markets of existing carriers of telephony and broadcasting, while simultaneously promoting the development of digital media platforms. As a result, the existing operators are complaining that the definition of multimedia does not work.

The Act mandates a Second National Operator (SNO) for telephony, which will compete with Telkom, the state-owned telecommunications provider. The creation of the SNO was the cause of some debate, but the principal of competition is relatively straightforward. The proposed new licence for multimedia services is, however, a more contentious issue. The Act proposes that Sentech, South Africa's government owned "common signal carrier", is licensed to provide additional services of multimedia, multimedia networking and an international telephony gateway referred to as the "carrier of the carriers". Sentech is already licensed through the broadcasting Regulations to be a common signal carrier for broadcasting. Under the proposed multimedia licence from the Act Sentech may not provide telephony services to the end user, but might provide them for others licensed to do this, e.g. the SNO.[xv]

The proposed new multimedia licence for Sentech, would allow Sentech to provide convergent media services to the public, and has generated debate in South Africa from interested parties in telecommunications and broadcasting. The Independent Communications

Authority of South Africa, ICASA, gazetted proposed licence conditions in December 2001, and invited comment. In June 2001, ICASA held hearings on the proposed conditions for the 15year licence to be issued to Sentech by May 7 2001. Several interested parties made submissions, which are detailed in the newspaper story 'Reviewing a One-of-a-Kind Licence': Mail & Guardian (Johannesburg); March 1, 2002.

The main issues that emerged are:

- Problems of definition of a multimedia service (which might, in the convergent multimedia environment, include TV, internet, voice and e commerce), and;

- How such a service will impact on the traditional business activities of telephony and broadcasting, and;

- Is regulation of internet necessary: why regulate what was previously unregulated?

### Defining Multimedia:

Signal carrier Orbicom says that the gazetted notice for the new multimedia licence, as issued by ICASA, alters and broadens the definitions of multimedia contained in the Telecommunications Amendments Act. A lengthy definition says that Sentech will supply (some) broadcast and multimedia services, but will not carry (traditional) telephony services. These distinctions may be difficult in a convergent environment, and avoid the difficulty of distinguishing 'multimedia' from 'internet'.[xvi]

The new licence may allow Sentech to provide interactive and pay television services. Orbicom says that it is beyond ICASA's powers to provide for a wider definition of multimedia service than the one contained in the Act. Orbicom says that multimedia services are properly construed as broadcasting services, and that it would be unconstitutional if the multimedia licence awarded to Sentech authorises it to deliver a telecommunications service.

### The New Licence Might Conflict with Traditional Business:

Submissions from Orbicom and Telkom contain reference to the possibility that the regulations may impinge on their businesses, and

highlight the difficulties of defining "multimedia" as distinct from broadcasting or internet. Orbicom is the signal carrier for the MultiChoice pay TV network, so would be threatened by any moves by Sentech to create a digital media platform that might carry video, or pay television services. Telkom is also concerned that the new Sentech services might cut into their (present) monopoly of telephony. Telkom argues that the proposed Sentech licence provides for "multimedia services", and claims that simple internet traffic is not a multimedia service: e-commerce, text, data and graphics do not constitute integrated content and should be removed from the multimedia licence proposal to be awarded to Sentech. Telkom also argues that Sentech's carrier of the carriers licence, should be limited from carrying international telephony traffic.[xvii]

## The New Licence Might Not Be Viable

The licencee (Sentech) says that the new licence envisages services that are not yet viable. Sentech argues that the proposed R250-million licence fee is exorbitant and stands as a "barrier of entry". Telecommunications service providers such as Vodacom and MTN and Cell C for example, are required to pay a fixed licence fee of R100-million together with an annual amount of 5% of their audited annual operational income. It is only the demand for voice services, says Sentech, which might generate revenue for a multimedia service or network provider, as opposed to the more specialised multimedia telecommunication services and value added network services.[xviii]

## Is Regulation of Internet Services Unnecessary?

The Cape Telecommunications User's Forum objected in its submission to ICASA that the issuing of a multimedia licence to Sentech "will create a precedent for the regulation of services that have previously been unregulated, including Internet content provision, online banking and commerce services". The forum argues that the impact of Sentech's proposed multimedia licence will also affect the providers of content and media services negatively. [xix]

# Legislation in Kenya

The Panos publication, Up in the Air: the state of broadcasting in Eastern Africa provides an excellent survey of legislation and policy in East Africa, and is also a good model for the issues involved. Panos is an international non-profit institute working with partners worldwide to stimulate informed public and policy debate and build media capacities on developing country issues. Due to limited space this chapter will provide only brief summaries of observations discussed more fully in Up in the Air. [xx]

## Legislative Reform

In 1996, the Kenyan government adopted a policy framework paper, "Economic Reforms 1996-1998", with support from IMF and the World Bank. One component of the reforms relates to the liberalisation and restructuring of the telecommunications sector. Two bills prepared by the government, namely the Kenya Communications Act and the Postal Corporation Act, have become operational as of July 1999. A nine-man transitional management committee was appointed to liquidate the Kenya Posts and Telecommunications Corporation (KPTC). This allowed the separation of postal and telecommunications services and the restructuring of KPTC into three entities: Telecoms Kenya Ltd., Kenya Postal Corporation, and Communications Commission of Kenya (CCK), the latter acting as the licensing and regulatory authority.

## Kenya Communications Act, 1998

The Kenya Communications Act, 1998 established the regulatory authority for telecommunications, the Communications Commission of Kenya, the duties of which are to provide licences to telecommunications operators, issue frequencies to these operators (including broadcasters), type approve telecommunications equipment (including broadcast transmission equipment) and manage the frequency spectrum. [26]

## Constitutional Reform?

Panos says that the Constitution needs reform and can borrow from the South African Bill of rights regarding free flow of ideas and notes four existing limitations in the law, including restrictions of the enjoyment of fundamental rights and freedoms. The authority to broadcast, publish newspapers, prohibit publications and invoke the Preservation of Public Security Act is in the hands of the Minister for Information and Broadcasting and the President.

With respect to broadcasting, Panos says that: a key concern is that there are no clearly defined, publicly debated and publicly known criteria and procedures for issuing broadcast licences or allocating frequencies. The Kenyan Union of journalists in 1998 devised a Mass Media Bill, as a model for future legislation. Kenya Community Media Network (KCOMNET), has also devised sample legislation with a three tiered approach to regulating broadcasting.[xxi]

# Regulation in Zimbabwe

## The Zimbabwe Broadcasting Services Act 2001

### Satellite Defined as Part of Zimbabwe Broadcast System

The Zimbabwe Broadcasting Services Act 2001 says that international satellite services become part of the Zimbabwe broadcasting system when they are processed in Zimbabwe: "the operation in Zimbabwe of a broadcasting system, includes the operation in Zimbabwe of broadcasting apparatus that is connected to a broadcasting system operated outside Zimbabwe" and "the provision, reception or transmission of a broadcasting service includes the provision or reception within, or transmission to, from or within, Zimbabwe of such service transmitted by satellite or any other means".[xxii]

Other references to satellite broadcasting are in the definitions of "broadcasting service", which "shall include the delivery of television programmes by any means including satellite and cable, to those with the means to receive them". The act also introduces licences for those who wish to provide a "a subscription satellite broadcasting service"; "a broadcasting service which transmits programmes by satellite, whether by means of encoded or unencoded signals... and which is made available to

persons on payment of a subscription fee". The Act allows three months from enactment, for existing suppliers of those services to apply for a licence.

Having defined satellite broadcasting as part of the Zimbabwe broadcasting system, the Act contains little legislation specific to satellite broadcasting, except in that it specifies "Every subscription satellite broadcasting licensee shall transmit an unencoded signal from a public broadcaster". Presumably, the onus is on the local operator giving access to the foreign service to arrange for transmission of the local public broadcaster, and also to ensure that the content delivered complies with other local content requirements discussed below.

## Political Control

The Act created a Broadcast Authority of Zimbabwe (BAZ) to receive broadcast licence applications, though none have yet been granted. Critics of the Act [14] say that it gave Zimbabwe's Minister of State for Information and Publicity, Professor Jonathan Moyo, too much control over regulatory authorities and broadcasters. The board is appointed directly by the Minister: Part II, 4, (2). "the Board shall [be]... appointed by the Minister after consultation with the President and in accordance with any directions that the President may give him".[xxiii]

Despite the fact that Minister will appoint the executive of the regulatory authority, key phrases in the Act remove power from the regulator. The regulatory function is limited to an advisory one: "to receive, evaluate and consider applications for the issue of any broadcasting licence or signal carrier licence for the purpose of advising the Minister on whether or not he should grant the licence". To re-emphasise this point: "Subject to this Act, the Minister shall be the licensing authority for the purpose of licensing any person to provide a broadcasting service or operate as a signal carrier in Zimbabwe."[xxiv]

The Act wishes to regulate the political content of broadcasts. "A licensee shall make one hour... per week of its broadcasting time available for the purpose of enabling the Government of the day... to explain its policies to the nation". There are stringent requirements for broadcasters of political matter, which is extended to include current affairs: " if a broadcaster broadcasts matter relating to a political subject or current affairs, being matter that is in the form of news, an address, a statement, a

commentary or a discussion, the broadcaster must cause a record of the matter to be made in a form approved in writing by the Authority". Other local programme content is specified in schedules to the Act, as being 75% for television broadcasters (within two years) and 30% of weekly airtime for subscription television broadcast services.[xxv]

In common with similar legislation in South Africa, the Zimbabwe Broadcasting Act requires the broadcasting system to foster the national identity. But Zimbabwe goes one step further; the Authority is also charged with "the preservation of the national security and integrity of Zimbabwe". Foreign participation is not allowed, since broadcasters must be 100% owned by Zimbabwe resident citizens. No licensee can employ a non-citizen of Zimbabwe without authorisation from the Minister.[xxvi]

## Amendment of the Broadcasting Services Act 2001

In August 2001, a few months after bringing the Broadcasting Services Act into law, the government evoked the Presidential Powers (Temporary Measures) Act to amend the Zimbabwe Broadcasting Corporation (ZBC) Act and the Broadcasting Services Act 2001 to form a new company to provide transmission services to broadcasters. The amendment also made ZBC a duly licensed broadcasting entity under the Broadcasting Services Act. The justification of the statutory instrument was that the transitional period granted by the Broadcasting Services Act 2001 expired the previous month and there was thus need to extend the period in order to process the issuance of licences to broadcasters.[xxvii]

Other than controlling the broadcasting spectrum, the new company would provide satellite broadcasting services and subscription television services. The company is also mandated to expand multi media services by providing Internet, web development and e commerce services across the country. Another of its roles would be to provide a state of the art production plant for audio tape, compact discs and digital videodiscs and to set up sound recording studios and facilities for video and film production.[xxviii]

# Conclusions

## Present Regulatory Situation

Legislation governing broadcasting is being reviewed throughout Africa, in the light of satellite television and other information communication technologies (ICTs), which may not be covered by existing broadcast regulation. Satellite services are coming under new regulatory scrutiny, and other transmission methods might become viable for television services. This means the novelty of trying to regulate global content delivered by satellite and cable.

The ideals behind the legislation are underpinned by human rights, public ownership of the frequency spectrum, and the preservation of national identity. It is also hoped that provision of universal access to information can significantly contribute to the development of Africa.

The actual legislation, and implementation of regulations, can be restrictive of independent broadcasting and free expression, especially of political views and news. Legislators should be particularly careful to preserve these aspects of the new broadcasting, or access to information systems they define. Legislation can be enacted and interpreted in ways that are more, or less, friendly to constitutional rights. South Africa is a leading nation in the development of new legislation to embrace the digital information age in full recognition of human rights issues. Kenya and other African countries still need to update their legislation to reflect human rights and information communication policy. Zimbabwe's latest legislation, while recognising some concepts of a modern broadcasting system, pays little heed to constitutional rights and uses new legislation to establish government control over broadcasting.

## Regulating Satellite Television at the Point of Public Access

This paper discusses the principles by which regulators may seek to define broadcast systems in their countries. Broadcasting, satellite TV and internet content, might be conceptualised as electronic media content, or a part of information. Regulation of global information (content) providers is increasingly difficult for national governments, but the degree to which local populations have access to such content, can be regulated

through the providers of public access to information. Freedom of access to information dictates that few restrictions on access to content must be in place. But there are many positive aspects to information regulation: fostering a national identity; recognition of diversity and stimulation of the local content production industry.

Regulation of global content/information, such as satellite television, can only be effective at the point of local access to information, to the public. This is separate from regulation of communications technology (such as landline/cable, terrestrial broadcast, satellite), which carries the information. Nor are global television channels the providers of local access to content/information. Local providers of access to information are local re-broadcasters and subscription agencies. Free-to-air DTH satellite channels which have no representation in a particular territory might be deemed unregulatable by that territories government, in line with Open Skies policy, but when that information channel starts a commercial operation that supplies access to the channel (information), then it can be regulated. Such commercial operations would include subscription sales, advertising sales and even advertising to promote access to that channel. In definitions of a broadcast system, one might say that: (local) providers of access to information to the public must have a license. Provision of access to information consists of any commercial activity that promotes public access to an information service, as distinct from access to communications (i.e. with no information content).

Thus, global information cannot be regulated locally, but regulators can provide for the production and dissemination of local content to local and global audiences through:

i) Information regulation: requiring providers of public access to information (local broadcasters, pay TV subscription agencies, ISPs) to contribute toward local content aspirations through licence fees and levies on income (advertising, subscription). Establishment of public broadcasters and other content production mechanisms such as film, video and electronic content creation boards or funds.

ii) Communications regulation: requiring (local) providers of public access to communications technologies (signal carriers and cable networks), to promote universal public access to the communications system (including broadcast &

telecommunications networks); and to properly develop and maintain the system and contribute with licence fees and levies to regulators funds such as universal access and local content funds;

Broadly speaking, existing broadcast regulations might to be modified to apply to all content (electronic information), with broadcast and internet as different classes of information, based on the distinction of interactivity. Existing national telecommunications regulations might be modified to apply to all communications access providers, including the broadcast signal carriers currently regulated as part of broadcast regulations.

These functions are closely related, and in South Africa, the regulatory authority for broadcasting and telecommunications has been merged. Legislation and regulation of these sectors might become further harmonised and unified, retaining the main distinctions of information and communication.

## Regulation of International Satellite Signals

In traditional broadcasting, providers of communication could be asked to regulate the content (information) which is carried to the public, but this is increasingly difficult in the interactive age where the public can ask for content (information) from any global provider. The local providers of public access to information can, however, be regulated. This requires defining the communications system of the nation. In this way existing or modified legislation and government policy as it affects content, can be regulated at the point of access to communications.

This chapter proposes that international signal transmission should remain subject to ³open skies² policy, and free of content regulation. Under this global policy, content, or information, providers can only be regulated in their home bases. Possibilities do exist for global content regulation. The internet does contain a framework for regulation, by the allocation of domain names that already exists, but the number of websites globally defies meaningful regulation.

In the meantime, states which wish to fully regulate or promote digital content, or information, dissemination, will define their broadcasting system, and focus on regulation of the local providers of access to content.

## End Notes

i Programming information available on the ABN website: <http://www.africanbroadcast.com/programming/schedule.asp>

ii ECA/NICI: http://www.bellanet.org/partners/aisi/nici/Default.htm

iii South Africa Broadcasting Act, No 4 of 1999: http://www.polity.org.za/govdocs/legislation/1999/act99-004.html

iv Zimbabwe Broadcasting Services Act, Act No. 3/2001

v De Klerk, P., The Formulation of a Regional Regulatory Policy. Paper presented at the Regional Satellite Regulatory Policy Workshop. 31 August 1997. Johannesburg.

vi MISA: Cable News Network banned from national broadcaster. 09/01/2002. http://www.misanet.org/alerts/20020109.zimbabwe.2.html

vii South Africa Broadcasting Act, No 4 of 1999: http://www.polity.org.za/govdocs/legislation/1999/act99-004.html

viii African Charter on Human Rights: http://www.misanet.org/

ix South Africa Broadcasting Act, No 4 of 1999: http://www.polity.org.za/govdocs/legislation/1999/act99-004.html

x Ibid.

xi Ibid.

xii Ibid.

xiii Ibid.

xiv Telephone Interview with Allison Gillwald, Digital Broadcasting Advisory Board

xv Reviewing a One-of-a-Kind Licence: *Mail & Guardian* (Johannesburg); March 1, 2002: http://allafrica.com/stories/ 200202280687.html

xvi Ibid.

xvii Ibid.

xviii Ibid.

xix Ibid.

xx PANOS: Up in the Air: the state of broadcasting in Eastern Africa. Kenya broadcast regulations: http://www.econewsafrica.org/panos/K_regulation.html

xxi Ibid.

xxii Zimbabwe Broadcasting Services Act, Act No. 3/2001

xxiii Ibid.

xxiv Ibid.

xxv Ibid.

xxvi Ibid.

xxvii MISA: Government calls new media company to life 28/08/2001. http://www.misanet.org/alerts/20010828.zimbabwe.0.html

xxviii Ibid

# Chapter 4

# MEDIA PLURALISM AND DIVERSITY: A CRITICAL REVIEW OF COMPETING MODELS

*Francis Nyamnjoh*

## Abstract

Media ownership and its relationship to the role of the media in general and broadcasting in particular is an essential question in the building democratic societies. Private and public ownership needs to be reviewed in a historical context, including the current context which is characterised by the dominance of global privately owned commercially driven media.

The importance of both public and private ownership must be recognised, whilst at the same time we need to critically note their short comings in catering for the information and communication needs of societies. This is central to media pluralism and diversity.

Media policy and regulation, which promotes all forms of ownership and promotes new forms of ownership is key to the realisation of pluralism and diversity.

The collective and community ethos of African societies is an element that should be taken into account in creating pluralistic and diverse media systems. We must be wary of the marginalisation of such ethos and its possibility to produce democratic forms of politics by the promotion of a dominant neo-liberal form of democratic politics.

# Introduction

Media pluralism and diversity remains an unanswered question almost everywhere, despite the current semblance of universality of the neo-liberal model championed by the USA and global capitalism. At the heart of the pluralism and diversity debate is another question: what regime of media ownership and control best guarantees the greatest utility to the greatest number? How the issue of ownership and control has been addressed in different contexts through history has largely depended on prevalent assumptions about the 'individual' and 'society' — autonomy and social control. Different cultural and economic experiences have informed different philosophies of personhood and agency, which in turn have resulted in different ideas of property rights, and social control. Hence, whether the media are owned by collectivities or individuals or both, depends very much on what philosophies of personhood, agency, property rights and social control are dominant in any given context. In general, two schools of thought have dominated debate and practice in this area.

On the one hand are propagators of the belief in the possibility of an autonomous individual with interests superior to any alliances or relationships he or she may forge with others as fellow members of a group, community, society, nation or state. This idea which has traditionally informed most media systems in the USA, is best epitomised by such notions as: 'private property', 'free market', 'deregulation', 'free flow of information', 'consumer sovereignty', and 'liberal democracy'. It is disciples of this school of thought who are currently celebrating the virtues of media globalisation and the benefits of neoliberalism to the information and communication needs of global consumer citizens.

On the other hand are advocates of collective interests, who privilege media systems with the mission of promoting and protecting the concerns, values and aspirations of groups, cultural communities and whole societies, and who do not believe that it is enough merely to assume that the media are of service to the community by being of service to individual consumers. They insist on public service or community media, with the mission of representing the interests of different cultural groupings and social categories. Until recently and largely influenced by Marxism and Socialism, European countries tended to share this pre-occupation, hence direct involvement of states and governments with media ownership and control.

In Africa however, where the colonial experience is the most recent in the world, media ownership and control patterns have tended to ignore both individual and community interests, inspired by the colonial obsession with central control and readiness to devalue the humanity of colonial subjects. The consequence has been media systems that have served governments and states, without necessarily serving the nation or individual consumers. Despite this appropriation of the media by the ruling elite, African societies do share in philosophies of ownership and control that could easily reconcile the dichotomy between individual and public interests, which one notices in the history of media appropriation in the West.

This chapter makes a critical appraisal of the various media ownership and control philosophies, highlighting their strengths and weaknesses. It suggests that the best way forward may well be with media systems that bridge, marry or reconcile individual interests with collective or community interests. It is as much an illusion to talk of an autonomous individual (complete and entire in him/herself), just as it is an illusion to imagine a community that is totally deaf to the interests of the individuals who constitute it.

Communities are made up of interconnected individuals with diverse interests, who are constantly negotiating and renegotiating relationships, recognition and representation. To invest exclusively in the individual, is to miss out on this reality of sociality and conviviality forged through relationships with others. Equally, to consider the collectivity simply as a dictatorship is to ignore the fact that without individual agency seeking conviviality through interdependence or interconnectedness, there would be no group and community interests (cf. Nyamnjoh 2002). The chapter thus calls for a media future where pluralism and diversity are guaranteed by media systems providing both for individual interests and the interests of various collectivities however defined or constituted.

# Competing Claims to Pluralism and Diversity

Issues articulated in most national communication policies usually border on the roles the public and private sectors should play towards communication and media institutions and activities within the national territory. Explicitly or implicitly, what is stressed in these policies and their implementation is to a large extent determined by what assumptions

about personhood and agency are shared by the policy makers in a given society. While some governments and states advocate private initiatives in the setting up and operation of communication facilities, others argue in favour of state or government ownership and control. Taking a more conciliatory stance are those uncomfortable with both exclusive state or government monopolies on the one hand, and purely commercial or private systems on the other.

The whole debate is centred on how best the interests of the public could be served by communication, and also on whether the public interest is seen as a composite of individual interests, as collective group interests, or as a marriage of individual and group interests. The two basic philosophies stand out clearly: some advocate and practise the 'public service' view and others the 'business' view.

# The Public Service Model

The public service view is one in which media are seen as 'an enriching and limited resource' that should be employed most judiciously to serve the needs and aspirations of 'the entire spectrum of society' (Adkins 1985:54). It expects media to function as a public utility 'in the service of the public sphere', guaranteeing that 'all members of society have access to the information and knowledge they need in order to perform their civic duties', or simply to satisfy their interests and preferences as individual readers, listeners and viewers (Syvertsen 1999:6). Such media should be informative and educational, capable of stimulating thought, developing latent tastes for good art of all kinds, and encouraging a proper sense of values, as well as enhancing wisdom (Beadle 1963:93). It should provide content that examines public issues 'with an incisively critical eye' and services that 'provide fora for debate' (Findahl 1999:18). The position of the public service advocates is that collective interests cannot be served if the media are left entirely in the hands of the private sector; they see the need for partial or total state regulation (Curran 1988:292).

# The Business Model

The business view, on the other hand, maintains that only when operated as privately owned business can the media satisfy the whole of society.

The free competition among the forces in the marketplace inevitably brings the public more services and pleasure. Only if government interference and manipulation can be avoided will broadcasting be free from undesirable influences and free to serve the public more effectively.

Perhaps one should add immediately that these distinctions are more ideal than real, for there is hardly any country in the world where absolute freedom is guaranteed, or where there is no attempt by the state to regulate communication and the media (Hamelink 1983:111-12; Downing 1986; Wells 1987:34; Findahl 1999:14). Media practitioners and 'journalists everywhere have to work within certain confinements, whether of law, custom or economics' (Head 1963:595). For as Beadle (1963:51) rightly notes, 'abstract appeals for liberty', though always exciting, are 'seldom satisfying, because they beg too many questions. Whose liberty? Liberty of what? Liberty for what? How much liberty ?'

The ideal of free press, inherent in Western discourse, has given the mistaken view that Western media systems are indeed totally free of state interference and regulation. Thus, Western media have generally been presented to the rest of the world as free and unrestricted systems that operate in an environment where there is 'free flow of information', and for which reason, Western countries have often posed as pace-setters for the rest of the world. Theirs is a position hotly contested in countries and regions where the free flow of information is generally said to be hampered through state regulation of media content (Wells 1987:24-42).

# Debates on Ownership and Control Models

We can understand how the various ownership and control policies are translated into reality, by referring to discussions and research findings by some communication scholars. I use broadcasting as an example because, although in most societies it is taken for granted that there should be a private press free from rigid government control, there usually tends to be some controversy on and around broadcasting, with government interference and regulation more apparent.

# On Public Ownership and Control

Raymond Williams, one of those who have most reflected on the topic, identifies two types of ownership and control patterns of broadcast

institutions in Europe and North America. The one is capitalist and commercial (but whose proponents, for rhetorical purposes, prefer to describe as 'free' and 'independent', as opposed to 'monopoly' and 'state control'), and the other is public service or non-commercial. His distinction is between institutions which are privately owned, operated and funded with advertising revenue, and which have as 'their primary aim the realisation and distribution of private profit on invested capital', and other institutions whose concerns are not to make profit but which devote revenue 'almost wholly to production and development of the broadcasting service' (Williams 1979:266).

In the USA, unlike their commercial counterparts, which are funded with advertising revenue, public service television not only has its production funds subject to central control, but it is 'member-supported, and survive with great difficulty only by constant local fund-raising' (Williams 1979:266). Mulcahy and Widoff (1986:31) find the use of the term 'public' rather misleading in the American context where, unlike in France and Britain, such broadcasting is independent of the state financially, administratively, and in the elaboration of its policies. They note that 'one of the outstanding questions facing public broadcasting is how to administer a national program without a national policy – indeed, where national policymaking has been virtually prohibited' (1986:32). They argue that 'any discussion of public broadcasting must emphasize the highly circumscribed and decentralized character of the system, especially if compared to the commercial networks' (1986:31). Furthermore, juxtaposed with commercial television, public broadcasting in the US, despite its 'significant presence, has a decidedly minority share of viewership'.

Attractive though the idea of public service broadcasting may be, affirms Williams, it can only function effectively if there is no 'ambiguity about the public interest' and if 'its relation to the state' is clearly defined. Yet it is not always easy to say with required precision what in effect constitutes 'public interest', and what is the relationship between the public institutions charged with promoting such interest and the state. Though Williams is in favour of public service broadcasting, he does not think that state monopolies, as were found in some Western societies and developing countries at the time he wrote, are the best way of ensuring this. The reason for his scepticism is that whenever that is the case, 'the state can be correctly identified with a partisan version of the public interest.' In France, where competitive versions of public interest are

active, 'the equation between state and public interest is especially vulnerable, and this leads not only to internal conflicts but ... to complicated international pressures' (1979:267).

In France, the constant interference with broadcasting by government along party-political lines proves Williams' point that state monopolisation of broadcasting could lead to all sorts of complications in a multiparty state. Although France has carried out 'a rapid and confused process of deregulation which has led to an explosion in the number of radio and television networks' in the country (Betts 1988:3), the tradition in the past has been for every government that comes to power to seek total control of broadcasting by placing its own people at the head of the broadcast institutions. Accordingly, there have been ten regulatory structures since World War II, each replacing the other to reflect changes in the political arena. Betts describes the nature of the struggles by various governments to control broadcasting in France, and uses Mitterand and Chirac as examples.

According to Betts (1988:3), the tradition after every general election in France has been for 'heads to roll' in the broadcasting sector – 'with the new government appointing its supporters and friends to the key jobs'. Thus, following the 1981 elections, the victorious Socialists not only 'placed their cronies at the head of the public networks', but also reformed the broadcasting authority in order to secure the necessary influence over the regulation of broadcasting. The Socialists were 'anxious to ensure that the right would find it hard to regain control of the broadcasting sector when it came back to power'. To do this, they decided to emulate Britain whose public service broadcasting is 'flanked by a private sector'.

The Socialists then proceeded 'to create two new private commercial networks and one private pay television channel to compete against the existing three public television networks'. However, immediately the right came back to power after the 1986 elections,

> Mr Jacques Chirac, the Gaullist Prime Minister, set about dismantling the broadcasting structure set up by the Socialists. The heads of the public networks were replaced and the concessions granted to the new private channel operators were cancelled. The broadcasting authority was replaced by a new Commission Nationale de la Communication et des LibertÈs (CNCL), a supposedly independent body dominated by Gaullist representatives (Betts 1988:3).

Prime Minister Chirac did not stop at that, but proceeded to the privatisation of TF-1, France's 'oldest and most influential network', thus scoring a further political victory over the Socialists, who favour nationalisation and more central control.

The French state gives subventions or assistance to newspapers and news organisations in a way unparalleled elsewhere in the West. More than 50% of the resources of Agence France Presse (AFP) for example, come by way of subscriptions from the administration. Recently, laws have been passed limiting the concentration of ownership, which was already becoming a menace to press pluralism. In 1984, the Pierre Mauroy government passed a law making it impossible for any group of newspapers to get bigger by buying off others. And a commission was created to oversee the transparent application of this law. Although the commission was abolished two years later by the right-wing government, the law against concentrated ownership was, however, maintained.

The regulation of broadcasting is done through an 'independent authority', the Conseil SupÈrieur de l'audiovisuel (CSA), which took over from the defunct Haute AutoritÈ de la communication audiovisuelle (HACA) and the commission national de la communication et de libertÈ (CNCL) in 1989. The CSA grants broadcasting licenses and ensures that TV channels in particular respect the requirement for pluralism in information and assists in the production of French programmes. Until 1982, French broadcasting was a state monopoly. In 1982, HACA was created to coordinate state broadcasting institutions and ensure a certain independence vis-‡-vis political authorities. In 1986, HACA was replaced by the CNCL whose mission was to encourage free competition and pluralism in media content. Although CSA replaced CNCL in 1989, its functions are similar to those of its predecessors: the need to guarantee pluralism and fairness in news; organise the broadcast of election campaigns; issue frequencies to different operators; monitor radio and television channels; oversee programme content; protect human dignity and children (CSA: La Lettre, No.112, Janvier 1999:3). However, a lot of French interventionism in the media is bound to be affected as new European Community de-regulation and liberalisation laws are designed and impressed upon EU member states.

This struggle between conservative and socialist governments to control the media in France speaks for itself; it brings out the demerits of excessive central control and clearly points out how governments might use their positions as custodians of the public interest to secure and

consolidate power for themselves, their parties and supporters. Williams can thus be said to argue for policies that foster pluralism, though not commercialism, in broadcasting. To him it is possible for the broadcast media to be plural without being commercial and public service without becoming the mere mouthpiece of the government or being reduced to a mere state monopoly. He is apprehensive of any other form of political organisation but that which Schlesinger (1978) terms 'democratic pluralism', wherein power is shared by 'competitive political parties' in a way that is balanced, and that allows no particular interest to weigh too heavily upon the state. The BBC, which supposedly subscribes to the very same democratic pluralism (Seaton 1988:263-72), is Williams' example of an independent public service broadcasting institution. It is 'supposed to be ... a marketplace for ideas and competing viewpoints, endorsing none, admitting all, a national institution above the fray' (Schlesinger 1978:166).

For one to have an idea of what Williams is advocating, a brief presentation of the BBC is in order. The BBC was created to reflect the plurality of British society in politics and culture. It is public property, governed by an authority, whose individual members are publicly appointed by the state for a defined and limited term of office. Its authority is answerable to Parliament, to which it is supposed to make annual reports through the Postmaster General. It operates under terms of reference designed by Government and approved by Parliament, and it is subject to certain overt Government powers of control over the content of its programmes. It has powers to produce its own programmes. Concerning funding, 'the BBC lives on an agreed proportion of the licence revenue and is forbidden to broadcast advertisements'. However, the fact that 'the BBC derives its revenue through the agency of a government department – the Post Office', 'gives the Government a financial hold over the BBC which can be used to hold back development'. Although the government has power under the BBC's licence to instruct it 'to broadcast or to refrain from broadcasting something specific or some particular class of material', the BBC has an important safeguard against the government using such powers to the detriment of the institution in that the BBC is 'authorized to announce publicly that ... [it is] broadcasting or refraining from broadcasting something on government instructions. So the government cannot use its powers secretly, and any instruction given by government is open to comment and criticism by parliament and press' (Beadle 1963:64-67).

Though Williams endorses the BBC as a public institution that is free and independent from direct and blatant state interference and manipulation, he cautions against any uncritical acceptance of the institution's independence. Although direct pressures by the state are rare, the fact that the government appoints the public authorities that oversee the institution is enough for a certain measure of long-term influence on the part of the government. Any attempts to introduce the direct election of the institution's authorities and to bring about 'democratic representation or control by actual producers and broadcasters' within the corporation have continued to be 'very vigorously opposed', suggesting that the appointed authorities are all part of 'a complicated patronage system on which the real state, as distinct from the formal state, effectively relies' (Williams 1979:267).

Curran (1988:300) provides evidences of how the Thatcher administration appointed BBC officials on a partisan basis, and how the government exerted pressure on its board of governors for the suppression of certain programmes of which it disapproved. But Williams thinks that no matter the amount of pressure which might be brought to bear on the BBC, no interference by the government or state can be as rigid as the formal control through a ministry of information, as applies elsewhere in France. The fact that there is political pluralism (epitomized by 'competitive political parties') makes any rigid or formal control a virtual impossibility (Williams 1979:267).

Further developments in British broadcasting have revived debates about how public interest can best be served. In May 1988, for example, the government created a Broadcasting Standards Council (BSC) to monitor 'taste and decency' on radio and TV under the chairmanship of Sir Rees-Mogg. The BSC was charged, inter alia, with previewing imported programmes in order to guard against excessive 'sex and violence' on British TV. The move attracted criticism, not least from the BBC and IBA, who considered the BSC's right to preview as an interference with their traditional 'systems of self-regulation'. Opposition politicians, on the other hand, criticised the government for using sex and violence as a pretext to ensure its political convenience and to 'inhibit those who dare to criticise' it. In the right to preview is the presupposition that a single group of people appointed by the ruling government can determine morality for a country of over fifty six-million people. The Broadcasting Standards Council became part of the Broadcasting Act of 1990.

# The Public Service Model in Africa

It is important to mention Africa in relation to the public service model, though the subscription of most African states and governments to this model has tended to be more rhetoric than practice. It is however necessary to situate postcolonial tendencies in historical perspective. In opting for rigid state ownership and control of the media, postcolonial governments were just as keen as their colonial predecessors in justifying why the media, needed to be controlled tightly. Though power was a common appetiser for both states, the postcolonial leaders marshalled additional rhetoric to justify rigid control of the media. From the early days of independence until recently, it was common for states to claim that centralism was necessarily the best way of attending nation-building and development. Central control of the media was justified as less wasteful of limited resources, and as guaranteeing the political stability badly needed for rapid development and for catching up with the West. Generally, governments claimed that once their states had become more mature and stable, they would loosen their grip and become more tolerant of media pluralism and diversity. This position was similar to that of the colonial states, which saw the importance of free and private initiative in the media only towards or at the end of their colonial stay. These similarities generally point to how much the postcolonial leaders had learnt from their colonial predecessors, the rhetoric of liberalism notwithstanding.

Again, just as the colonial state was most rigid about broadcasting and relatively more tolerant of the print media, so too have been the governments of postcolonial Africa. Broadcasting was singled out as needing to be watched at close range. This was also because radio (and later television) was/were largely considered the most available and accessible of all the media, and as capable of instant effects and with enormous potential for nation-building and development. In most countries, from independence to the late 1980s when the clamour for liberalisation intensified, journalists in the state media were little more than public relations men and women for the government and ruling party. Their role as mouthpieces or 'errand boys' committed them much less to the truth and the public service than to building a positive image, selling the ideas and promoting the interests of the state and ruling elite. Instead of serving as active and critical vehicles of information and communication, such media were confined to feeding the public with

doctored events and information tailored to serve the sensitivities and expectations of those at the helm of state. Thanks perhaps to years of socialisation or to strategic self-interest, some of these journalists grew to take for granted the truth of what they were fed, which they in turn presented with conviction and persuasion to the public as if it were the fruit of professional and disinterested journalism. In this way, they could be compared to night-soil men or scavengers for the powerful, dutifully cleaning up mess and litter generated by arrogance, ignorance and complacency, while in turn reducing everyone else to scavengers in situations of social decadence and economic downturns. Sacrificed in the name of unattainable nation-building and development, were media pluralism and diversity, under the colonial and postcolonial corruption of the public service model in Africa.

# On Private Ownership and Control

Proponents of commercial or competitive broadcasting in the West do more than just share Williams' pluralism and stance against state monopoly over broadcast institutions. It is their contention that the state must not interfere in any way with the free market forces that shape the state of affairs. They are firmly convinced that when ownership is private, free and open to competition, the audiences who 'are sufficiently sophisticated' are the sole judges of what is good or bad in the television and radio programmes that should be freely available (Wells 1987:31). Thus, in order to guarantee a free marketplace of entertainment, ideas and serious information, public service seen as monopolistic tendencies must be guarded against.

To Seiden (1974:15-16), this involves the elimination of public ownership of any kind, which he seems to see as the only real threat to a free and open marketplace. His position is that government-supported media must not be tolerated, for such 'support necessarily goes hand-in-hand with government control'. He argues that it is precisely the absence of government financial support and/or interference in the selection of the persons involved in media operation that has given the American communication system a unique position as champion of press freedom. He cites France and Britain as states where the government interferes either directly or indirectly with the media.

It is important for the American communication system to reflect the general economic structure of the American society, Seiden argues. But this can only happen if government ownership and interference is minimized, given that such involvement on the part of the government inevitably leads to attempts by the latter to conceal and falsify information. Hence the need to maintain a permanent state of tension between the government and the media, making sure that the sharp lines separating their interests are reinforced. Though he is rather worried that this ideal might be compromised by a new breed of media practitioners who, to paraphrase him, see themselves most elitistly as educators rather than informers, thus making the distinction between 'news' and 'editorials' less clear.

Seiden makes certain assumptions that others would find to be rather uncritical and therefore difficult to swallow. There is nothing wrong with his seeing the media as watchdogs against political or economic control and manipulation. But one wonders why he should think that such control or manipulation is only possible by the government. Perhaps this is the result of his view of monopoly as possible only when there is state intervention or public control. Finally, if the American communication system is really the free and open marketplace Seiden claims it is, there is apparently no reason why he should be worried about the new breed of journalists who blur the distinction between news and editorials. For one should normally think that audience sovereignty would overrule in the long run. For, who else than the audience can decide what it wants?

As Seiden himself argues, the fear that owners and employees of the mass media possess the power over the audience is quite unjustifiable in a free market situation. He maintains that audience sovereignty is being assured by means of constant audience polls. Through polls the audience determine television and radio programmes, and through the circulation figures newspapers and magazines learn the audience's desires. Granted that these audience studies are constantly carried out and that they are constantly consulted by the journalists and broadcasters, how sure is Seiden that, as consumers, the audiences have not come to want only what the media owners and employees have made them to want? Furthermore, Seiden does not say how one should distinguish between the audience who rejects a media product because he or she does not want it, and the other who does so because he cannot afford it. For, as far as the argument in favour of commercial broadcasting goes, it seems to imply that in the American society the consumer's problem is not that of means, but that of

deciding on what to spend the means. However, the fact that the media are available does not necessarily imply that they are affordable, as our discussion of the Internet indicates. Yet nonaffordability as a first rate consumer does not imply total exclusion, especially in cultures that stress interdependence and conviviality between individual and group interests.

Another point made in favour of privately owned media is the importance of using advertising revenue to finance these institutions. According to William G. Harley, communications adviser to the US delegation to the Unesco General Conferences in the 1970s (Wells 1987:26), such a form of funding is advantageous in that it helps the media to withstand pressures from the government and 'private interest groups', at the same time as it permits the establishment of a plethora of newspapers, magazines and broadcasting stations, which, thanks to their multiplicity, freedom and independence, 'guarantees that no single voice or group of voices can ever achieve predominance.' Motivated by profit though they may be, the private media safeguard the rights of people and pose as constructive critics of government.

In a study of the very same American society that has permitted Seiden and others to argue the way they do, Bagdikian (1985) comes out with strikingly different but more critical conclusions. The focus of his argument is that the media, in addition to providing entertainment and selling merchandise, must be in a position to create 'a rich marketplace of ideas and serious information'. Bagdikian considers diversity and richness in the media, as the most essential ingredients for the survival of democracy. But unlike Seiden, he does not think that the absence of government ownership, support or intervention is enough to guarantee this diversity and richness in the marketplace of freedom and open competition. He is very aware that diversity and richness or freedom and democracy are much easier to talk about than to actually implement. As he remarks, 'public acceptance of a full range of public ideas does not emerge solely from exhortations for tolerance. It comes from experiencing diversity. A public used to a narrow range of ideas will come to regard this narrowness as the only acceptable condition' (1985:99).

Bagdikian argues that the media in the USA are becoming ever more homogeneous in content and structure even though the population is growing larger, more diverse and confronted with fast changing circumstances (1985:98). This, according to him, is a direct consequence of the growth of control by a relatively small number of corporate hands. If private ownership were all there is to ensure richness and diversity in

the media as it has been argued, one may well ask why in a supposedly diverse society as America, the media are so homogeneous in content that 'most newspapers and broadcast programs [are] uniform in basic content, tone and social-political values' (Bagdikian 1985:100)? This is a fact which leads Aggarwala to conclude that 'the danger to press freedom inherent in the domination or control of the media by big business may be less obvious than that arising from government subsidy or control of the media but it is not any the less insidious' (1985:50).

It has been argued that, with few exceptions, most owners who buy and set up private broadcasting institutions are motivated more by the drive to make profit than by a genuine desire to promote richness and diversity in the public mind. The mere fact that commercial broadcasting relies on advertising revenue imposes certain limitations to the type of programmes produced or broadcast. As early as the 1960s, academics were already seriously concerned with the problem of the media's widespread dependence on advertising revenue. This, to Halloran (1963:40), reduces broadcasting and the other media to mere profit-making organisations for those whose major purpose is to sell. In such circumstances, he argues, the main aim of a paper or a programme in the radio or television is, 'to get a large audience as quickly as possible so that advertisers may be attracted and held'. These commercial pressures, together with pressures of a political, organisational or professional nature, constitute 'the complex of constraints' to the media's role as 'autonomous 'watch-dogs'', and with which the media and practitioners must constantly negotiate (Gallagher 1982; Head 1963).

Such plurality without diversity is growing worldwide, since the demise of the Soviet Bloc and bipolarity in the late 1980s. Current debates on media ownership and control are informed by and largely focused on the effects of globalisation of neoliberalism on media scenarios throughout the world. Inspired by narrow, individual-centred philosophies of personhood, agency and property rights, neoliberalism is aggressive in its sacrifice of community rights and group interests, as it pursues profit through the illusion of promoting the interests of the autonomous individual as consumer and citizen. Almost everywhere, old patterns informed by more inclusive philosophies of ownership and control, are giving way to new configurations with a focus on the individual, consumerism and exclusion. National, state-owned, public service media systems are yielding to commercial pressure and its emphasis on 'profit over people' (Chomsky 1999). Propelled by 'the incessant pursuit of

profit' global media entrepreneurs are asking for little short of unregulated commercial exploitation and concentrated ownership of media (McChesney 2001:1-4). The trend is clearly towards global oligopolies, and the guiding logic of the media firms is, as Robert McChesney puts it: 'get very big very quickly, or get swallowed up by someone else.' Firms, he argues, 'must become larger and diversified to reduce risk and enhance profit-making opportunities, and they must straddle the globe so as to never be outflanked by competitors' (McChesney 2001:3-9).

An obvious casualty of this shift in philosophies of ownership and control is the traditional emphasis on public service media that guarantee cultural pluralism and diversity, by providing for groups and social categories that otherwise are ignored or marginalised by the market. This tradition of public service media, while not denying the articulation of individual interests, believed that the greatest good came from a negotiated balance between various individual interests as part of a community. Media conceived in this tradition stressed negotiation, interconnectedness and harmony between individual interests and community expectations. Within the ownership logic that inspired the public service media, the freedom to pursue individual or community goals existed within a socially predetermined framework that emphasised conviviality with collective interests while simultaneously allowing for individual creativity and self-fulfillment. It was therefore a philosophy of ownership and control that sought to marry individual and group or community property rights, rather than seeking to impose the illusion of the autonomous individual.

In Europe for example, the shift in philosophies has meant that since the 1990s, the market-driven ideas of public service broadcasting serving the interests and preferences of individual media consumers have taken precedence over media in tune with the expectations of particular cultural communities such as ethnic minorities, religious and linguistic groupings (Syvertsen 1999; Sˉndergaard 1999). With a focus on consumption as the ultimate unifier, a supreme indicator of cultural sophistication and symbol of civilisation, individuals are seen and treated as autonomous agents glued together by a selfless market slaving away for their cultural freedom, development and enrichment as global citizens. This development blurs the traditional distinction between public service and commercial media, and passes for public service even the greedy and aggressive pursuit of profit without people. It also blurs the distinction between national media and world services targeting foreign territories, by

emphasising the 'unregulated flow' and 'transnationalisation' of the streamlined, standardised and routinised cultural products of the media industries of the West (cf. Golding and Harris 1997). Not only is the traditional idea of public service radio and television fast becoming outmoded, calls for some ground rules to protect cultural diversity have simply been greeted with the rhetoric of free flows at worst or with token concessions to 'cultural minorities' at best. What is more, the corporate media are in a particularly powerful position, given their dual role as players and umpires in the game of profit (McChesney 2001:3-9). They 'enjoy an enormous leeway to negotiate and protect interests from the vantage of prior monopoly positions', and 'do not have to bend over backwards to strike deals. It is generally the case that they decide and the world follows suit '(Thomas and Lee 1998:2). And if they decide to invest mostly in tastes informed by a very narrow understanding of culture, then cultural richness and diversity suffers, as the likelihood of cultural imperialism, trivialisation and misrepresentation increases. Given the freehand and caprice of the cultural industries and their investors, the piper may well be under-tasked with tunes of little significance as creativity, diversity and variety are downplayed in the interest of homogeneity and profitability.

This implies that, their rhetoric of benevolence and munificence notwithstanding, the global media corporations are more about closures than free flows among the world's cultures. The corporate media promote a largely one-way flow in cultural products that favours a privileged minority as it compounds the impoverishment of the majority through closures and containment (cf. Golding and Harris 1997). As 'empires of image and of the imagination' the corporate media control global markets and global consciousness (Murdock 1994:3), mostly by denying access to creativity perceived to stand in the way of profit, power and privilege. The results are streamlined, standardised, routinised or McDonaldised cultural products devoid of complexity, richness and diversity that command a disproportionate share of the global market. The tendency is to mistake plurality for diversity, oblivious of the possibility that an appearance of plenty could well conceal a poverty of perspectives (Murdock, 1994:5).

This literally leaves ordinary consumers, marginal communities, and whole cultures at the mercy of the McDonaldised news, information and entertainment burgers served them in the interest of profit by the global corporate media. Because the global media system 'advances corporate and commercial interests and values and denigrates or ignores that which

cannot be incorporated into its mission', content becomes uniform, regardless of the nationalities or cultural identities of shareholders. This is hardly surprising since wanted are passive, depoliticised, unthinking consumer zombies more prone 'to take orders than to make waves' by questioning the 'light escapist entertainment' menu presented them by the chosen pipers (McChesney 1998:7). In this regard, it could be argued, as McChesney (1998:6; 2001:13) has done, that the basic differences are not between nation-states as such, but between the rich and the poor (whom I term 'consumer citizens' and 'consumer subjects' respectively), across national borders. However, the fact remains that the investors, advertisers and affluent consumers whose interests the global media represent, are more concentrated in and comprise a significant proportion of the populations of the developed world, than is the case in Africa where only an elite minority are involved and hardly any local cultural tunes get chosen for the global pipers to perform.

Adkins (1985:55) sees three major undesirable effects of commercialism in broadcasting. First, the pressure to build up large audiences in order to satisfy the advertisers causes programmes that appeal to the smaller interest groups to be eliminated or given less attention. 'The complete spectrum of public interests and needs can no longer be served,' and the programme types that survive are those that appeal to 'the largest shares of audience and the specific age and socio-economic groups wanted by the advertisers'. Second, emphasis is placed not on educative and informative programmes but on those with 'the strongest appeal to most basic human interests', such as violence and sex, in order to retain the attention of the audience. Third, any programme content likely to bring about a significant drop in audience figures must be avoided. Thus, because emotion is 'more gripping than fact,' the news programmes tend to focus on the sensational and to shove aside 'the heavier items involving complicated explanations, little action or comparative numbers'. The stories which are preferred become those with exciting visual content, and 'oversimplification of complex issues seems necessary to avoid the risk of boring and losing the audience'.

However, Adkins fails to say whether these characteristics are exclusive to the commercial media or simply tend to be more pronounced here than elsewhere in the non-commercial state-owned systems. But, like Aggarwala, he is equally aware of the shortcomings of a state-dominated broadcast system, where non-commercialism, it must be noted, is not synonymous with public service mission or content. This is evidenced in

his argument that the answer for a free broadcast system is neither exclusive state monopoly nor total commercialism, but a balance between the two (Adkins 1985:55). This point is echoed by de Sola Pool (1977:32), who argues that a country which opts to develop broadcasting either as 'an entertainment medium to serve advertisers' or as 'a propaganda medium for the government', is bound to fail to meet the other needs of its plural society. Though de Sola recognises that a mixed system is probably the best, he however advocates that in looking for alternative ways of funding, control, and organisation of broadcast systems, each country must do well to determine how broadcasting ought to relate and interact with other social institutions, and what role it must play in propagating the richness, diversity, and aspirations of the society.

Aware that press freedom is threatened by the control or domination of the media by the government, as well as by the media's ownership by or dependence on big business, and that in both cases public interests are relegated to a back seat, Aggarwala advocates 'free media' independent of big business and/or government control or domination' (1985:50-51). But how these 'free media' can be brought about remains the unanswered question, though he does not hide his admiration for BBC's 'excellent, top-quality television and radio fare'. Concluding his observation of the Italian situation where there is a mixture of state and private broadcasting, Rando (1986:39) is less optimistic. Attractive though the idea of free and unrestricted media might be at a theoretical level, says Rando, in reality governments are most unlikely to surrender regulation, and the economics of broadcasting (especially in television) are such that a 'genuine pluralism of content' is out of the question, even where there is a plethora of stations. In this way, a democratic and free media system appears to be possible neither in exclusive private control, nor in total state monopoly, nor in a mixture of both state and private enterprise. But for many practical purposes, much could be realised in Africa under a careful balance between public and private concerns, especially given the possibility of domesticated democracy and media informed by ethics grounded in popular notions of personhood and agency.

# Global Oligopolies and Global Censorship

The rhetoric of free-flow of information propagated by the USA in particular, has been applied globally; the idea being to spread and

legitimate the economic, political and cultural system which has made such a policy possible. This has given rise to controversial accusations of cultural imperialism on the part of some, and their refutation by others (cf. Hamelink 1983; Golding and Harris 1997). Way back in the 1970s, Schiller (1977) affirmed that the US had used its doctrine of 'Free Flow of Information' as a 'highly effective ideological club' to promote its political and economic values by whipping 'alternate forms of social organization' into a ridiculous defensiveness. Thanks to such an ideological club, Wells argues, the US was able, for a long time in UNESCO, to impose its preferences upon weaker countries and interests 'by isolating, minimising and/or neutralising the opposition' (Wells 1987:20-21). For two decades and more, thanks to the doctrine, the US imposed itself at the centre of the world political and economic stage, and flooded the international community with its cultural material (Schiller 1977, 1983), ending up with a globally positive export balance in every sphere of culture including the knowledge industry, where its 'unrelenting one-way traffic' or 'inward-directed focus' was 'so pronounced that almost no room ... [was] left for imports' (Gareau1987:598-600; see also Nossal 1998:12). The information poor of the Third World thus saw themselves as victims of a free-flow doctrine that 'promoted not so much a balanced exchange as a 'one-way flow' of messages moving vertically from 'dominating' to 'dominated', with they 'being reduced to the role of passive consumers' (Wells, 1987:37). The USA and Europe alone 'produce almost 70 per cent of the world's books' in their 'increasingly privatized and commercialized' knowledge industries (Hamelink, 1995:20-21). There was no evidence of cultural pluralism or diversity in the production, distribution and consumption of culture.

On the other hand, such accusations of cultural imperialism have been contested vigorously by other researchers. Cantor and Cantor (1986) for example, argue against what 'critics from the left imply' about the domination of the world TV by US culture, in the form of American-made programmes. They invoke the argument that the audiences are sophisticated and powerful enough to determine or choose what appeals to them, and thus do not need anyone to plead their case for them. This argument is traditional to the US and Britain, who see Third World audiences as being 'sufficiently sophisticated to judge the worth of information they receive and to discount alien value-loading', and the global free-flow of information must therefore not be impaired by such reasoning (Wells, 1987:31). In 1980s the US and Britain suspended their

membership of UNESCO in protest against what they saw as policitisation, when the Third World member states asked for a decolonised, democratic, participatory, and multi-way New World Information and Communication Order.

Dissatisfied with the 'domination of global informastion flows by Western news agencies, radio and television concerns', Third World countries called for cultural and political protection against hostile or unfriendly propaganda (Wells, 1987:34-41) from the 'unrelenting one-way traffic' (Gareau, 1987:598-600) of the information superpowers of the West. They argued that the prevailing structurally imbalanced information relationships be redressed, and that it be recognised that any unrestricted global flow of information could only benefit the West (the US most especially), which 'spearhead technological advance in the communication sector and produce the bulk of the hardware traded internationally' (Wells, 1987:37). They saw the state of affairs 'as a threat to survival of traditional forms of communication and culture, and as discouraging local creativity', and 'precluding new entry at the international and/or national levels'. They favoured policies that guarantee national sovereignty and self-determination, and make it possible for states to actively intervene at the local, national, regional and global levels 'to rectify market distortions and ensure greater balance in the allocation of relevant resources' (Wells, 1987:39-41).

Needless to say that the concerns of the developing countries were dismissed by American and British media leaders and governments, who branded them as 'an attempt by Third World governments, despots and dictators all, to regulate and restrict the media and to use the media for their own propaganda purposes', and reiterating 'total, uninhibited, free and unbiased information flows' (Aggarwala, 1985:45). Since then, concentrated ownership and control has only grown globally, and media content has become less and less representative of the diverse cultures of the world. The G8 countries have continued to act to ensure even less diversity, and to limit the social shaping of new information and communication technologies to the barest minimum and by the big players of the North only. At the G7 conference in Brussels in February 1995 for example, ministers adopted 'Core Principles' on the 'Information Society'.

These Core Principles as presented by the German Government position paper titled 'Germany and the Global Information Society' (see Federal Republic of Germany, 1996:834-837), comprise: 1.) 'Promotion of Dynamic Competition' in order to ensure greater choice, higher quality

and better access; 2.) 'Promotion of Private Investment,' given the enormous financial commitment required to make the environment competitive; 3.) 'Establishment of an Adaptable Legal Framework' liberalising telecommunications and providing market participants with clear ground rules for investment; 4.) 'Guaranteed Open Network Access' to make possible a world-wide exchange of information and services that is open and free of discrimination; 5.) 'Ensuring Universal Service' is the responsibility of all participating nations who have the duty of protecting net operators from inappropriate financial burdens; 6.) 'Promotion of Equal Opportunities' to all members of the public to access the new information and communication services must be encouraged, and anything aimed at separating and isolating some groups in society discouraged; 7.) 'Promotion of Program Diversity as well as Cultural and Linguistic Diversity' should be the aim of the information society; 8.) 'Mutual Encouragement and Support in the Development of the Information Society' through the exchange of especially successful experiences between countries in the establishment and application of modern information and communication infrastructure; 9.) 'Guaranteed Broad Access through Education and Training' places new requirements on all levels of the educational system; 10.) 'Guaranteed Adequate Protection of Content' through legal measures such as internationally accepted intellectual property rights and personal data protection.

# By Way of Conclusion

The above debates on models of media ownership and control, taken together, indicate that democracy is both an individual and a group right, and that the media can only provide for genuine pluralism and diversity by recognising and creating space for this reality. The debates suggest that individuals and groups must be allowed the creative interdependence to explore various possibilities for maximising their rights and responsibilities within the confines of the economic, cultural and political opportunities at their disposal. Inclusion, not exclusion, seems the best way forward in our quest for media pluralism and diversity, given the uncertainties to which we as individuals, groups and states are subjected under global media and global consumer capitalism. To achieve this, there is need a richer idea of democracy to replace the current fixation with liberal democracy.

Popular and ideological representations of liberal democracy treat its promise of rights and empowerment for the individual as a fait accompli. The tendency is to minimise the power of society, social structures, and communal and cultural solidarities by 'trumpeting instead the uncompromising autonomy of the individual, rights-bearing, physically discrete, monied, market-driven, materially inviolate human subject' (Comaroff and Comaroff 1999: 3; Young 1995:162-166). It is commonplace to assume the nation-state both as the best form of political organisation and also as an encroachment on the autonomy of the individual. Multiparty electoral politics is seen as the sole guarantor of democracy and also as the deterrent to state control and repression. This reasoning is predicated upon the assumption of no intermediary communities or loyalties between the state and the individual as an autonomous agent who is free to elect and to be elected. Furthermore, assumed legal rights and political choices for the individual are automatically associated with economic, cultural and social opportunities, often packaged and presented in the media as though availability were synonymous with affordability. It seldom occurs that proponents of this doctrine distinguish between their rhetoric of rights and the reality of indignities that makes self-determination an illusion for most. Exploitation and subjection, globalisation of poverty and zombification (cf. Mbembe 2001; Comaroff and Comaroff 2000; Moore and Sanders 2001) invite scrutiny of claims of rights and freedoms uninformed by the difficulties, impossibilities or transience of being an autonomous individual under neo-liberalism. A critical look beneath the rhetoric of rights appears to point to the fact that being an individual in the liberal democratic sense of the word is both a process and a luxury that few can afford in reality. There are more confinements and closures than the rhetoric of rights, openness and free flows suggests. Such mitigation when unrecognised, as is often the case, could be quite misleading, as noted in our discussion of the models above.

In the quest for a richer and more negotiated notion of democracy, African cultures have got an important contribution to make. Throughout the continent, a common political culture in most indigenous communities 'demands the involvement of everyone in promoting the common good', and people participate 'not because they are individuals whose interests need to be asserted, but because they are part of an interconnected whole.' Participation is based 'not on the assumption of individuality but on the social nature of human beings', and is 'as much a matter of taking part as

of ... sharing the burdens and the rewards of community membership'. It is also more than just 'the occasional opportunity to choose, affirm or dissent', in that it requires active involvement in the process of decision-making and community life in general (Ake 2000:184).

Drawing from this communal understanding of democracy, the way forward should be media models that recognise and provide for the creative ways in which different peoples the world over merge their traditions with exogenous influences to create realities that are not reducible to either but enriched by both. The media and the liberal democratic rhetoric of rights that has tended to dominate media content, must listen to, and take on board, creative responses by other cultural communities, informed by their traditions, historical experiences, and socio-economic circumstances in our global village. As media and communication scholars, we would be contributing to this process if our work reflects the reality of democracy as an unending project, an aspiration subject to renegotiation with changing circumstances and growing claims by individuals and groups for recognition and representation.

# Chapter 5

# VIABILITY AND SUSTAINABILITY OF PUBLIC SERVICE BROADCASTING

*E.A. Mbaine*

## Abstract

Public service broadcasting plays a critical role in a situation where structural imbalances and scarcities of media access can undermine democratisation and development. In a majority of cases public service broadcasters are still government-controlled broadcasters and are under funded by African governments although they are expected to do a lot on behalf of the government's political and developmental agenda. The reliance by public broadcasters on advertising can also have the effect of squeezing out commercial and other broadcasters.

For this reason, government controlled broadcasters need to be transformed into public service broadcasters, with clearly defined public service mandates, that enjoy editorial and programming independence, are governed by independent bodies and accountable to all sections of society.

Public service broadcasting requires adequate, secure and predictable forms of public funding (a mixture of the license fee and public grants) which is not subject to 'arbitrary interference'. If advertising and commercial sponsorship are allowed as an element of public funding, the question is how to prevent advertisers and commercial sponsors from determining the programming of public broadcasters.

# Brief History of 'Public' Service Broadcasting in Africa

Most African countries inherited national broadcasting institutions at independence created for propaganda purposes during the colonial era but elected to retain their monopoly over the airwaves. It was not only the monopoly that was continued, but also the tradition of using broadcasting as an instrument to propagate government ideas and policies. In practice therefore national broadcasters, although officially designated as public service broadcasters became state broadcasters i.e. broadcasting was in all respects owned, controlled and financed by the state. The political culture of the colonial state, which conflated rather than distinguished a government in power and state institutions, was carried into the post colonial period. State control was therefore government control. The post-colonial state broadcasters did not enjoy the operational and editorial autonomy that their European equivalents enjoyed.

The role of national broadcasters in both colonial and post-colonial Africa was mainly to support the ideology of the government and party in power and generally play a propaganda role for the government. To ensure that broadcasting played this role, editorial independence was not respected. The justification used for control by post-colonial governments was that media and in particular broadcasting with its wide reach was an important tool for forging national unity, promoting development and fostering a national identity and protecting national culture. While the imperative to create a sense of nationhood, forge a national culture and identity and address questions of socio-economic development in nations emerging out of the ravages of colonialism cannot be denied, it did not follow that centralised control was the only option.

Control by a central authority i.e. the ruling party and government inevitably obscured the necessity of alternative ideas and programmes. It also led to the suppression of any notions of pluralism and diversity of ideas and opinions and in conceptualising national identity and culture. In short the role of broadcasting as a provider of impartial and balanced information, reflecting contending views and opinions, acting as agency of safeguarding human rights, exposing abuse of power and corruption and promoting robust debate and discussion was not considered a priority. The logic of editorial control was that representation of alternative views especially those outside the ruling party was a direct political challenge

and a threat to the party's hold on power. The democratic role of the media was not seen as part of a participatory path to socio economic development. Rather it was viewed as a dangerous challenge not to be brooked.

Not long after independence, state control of broadcasting became the norm and was further strengthened when political pluralism and in some countries civilian government was abolished in favour of one party states and military governments between the 1960s and 1990s. The combination of authoritarian government and strict control of broadcasting negated lack of socio-economic development and in some countries failed to actually enhance national unity.

Institutionally, as part of the controls the state broadcasters were usually placed under a government ministry or department, and ministry responsible for information, and/or broadcasting. The Ministry and the Minister acted not only as policy makers but also regulators of broadcasting. Employees of the state broadcaster were to all intents and purposes civil servants under the daily direction of the Minister and the President or Prime Minister. This arrangement meant that state broadcasters had no operational autonomy. Editorial staff forfeited the independence they required as professionals who were expected to make decisions based on professional values, especially in relation to selection of news and programming. The Minister in consultation with the President or Prime Minister appointed the board of the broadcaster, which usually consisted of party loyalists or people with known sympathies and leanings towards the ruling party's political project. Either the Minister or the board in consultation with the President appointed the senior managers.

The entire system further meant that editorial and programming independence of the broadcaster did not exist to any appreciable degree. News bulletins were testimony to this lack of independence as they usually featured the President and other top ruling party officials as the key newsmakers whose pronouncements were broadcast without regard to any criteria of newsworthiness. Official statements were broadcast as the unquestionable truth. Critical views from outside the party or government were treated as heresy. As the late veteran Zimbabwean journalist William Musarurwa once remarked, it was the case of 'minister' and 'sunshine journalism'. At any rate most African governments saw and used the state media as instruments of maintaining power and hegemony. The net consequence of state control of broadcasting was also to equate public media with government and party media and propaganda.

However, the late eighties and early nineties brought with them several developments that propelled changes in the broadcasting landscape on the continent. These changes are related to global political developments that happened at the same time or soon after the collapse of the Soviet Union and the socialist regimes of Eastern and Central Europe. These changes have had ramifications for Africa as a continent.

These global political developments, among other changes, generated changes from one state party systems and military regimes to multiparty political systems, with active opposition political parties readying themselves to contest for power. In many countries across the continent there have been changes of government through elections. It is also true that there are many cases where multi party elections have not resulted in any changes due to ballot rigging and other irregularities resulting in elections being declared unfair and not free.

The changes also brought into sharp focus demands for freedom of expression and of the press by political reformers, journalists, academics, human rights organisations, students and other organisations in civil society. Those campaigning for a new political dispensation inevitably linked political reforms or democracy with the need for alternative channels and sources of information and communication. Freedom of information and free flow of information became part of the demands.

In the broadcasting arena there were demands for liberalisation of the airwaves, which was a call for the right to own private radio and television stations and an end to monopoly of broadcasting. In relation to the state broadcasters reformers wanted them to be freed from of editorial control and manipulation by party and government apparatchiks. Two tendencies emerged: one which believed that privatisation of state media was the solution and the other wanted state media to be transformed into public service media, enjoying operational and editorial and programming independence. Democratisation as the process of political reform became popularised and powered the agenda for media pluralism on the African continent.

Changes in the post Cold war economic sphere also provided impetus for demands for media pluralism. Just as political liberalisation ushered in political pluralism economic reformers preferred liberalisation over state control and command economics, which were considered to have failed to deliver economic prosperity and development. To these reformers economic liberalisation meant processes of deregulation, commercialisation and privatisation of state enterprises. These policy

preferences were extended to the broadcasting arena. The belief was that the private media were necessary because they would be free and independent from state control. In come countries like Ghana, Mali and Uganda, private FM Stations became an important medium of democratic expression and played critical roles in elections.

As a result, the African broadcasting landscape between 1990 and the beginning of the 21st Century has been characterised by not only the old state broadcasters in various states and stages of being transformed in one way or another, but also private broadcasters and in some countries community broadcasters and a multi channel environment as well as satellite and pay channels. While state broadcasters remain dominant in terms of reach as the new private radio and television stations tend to restricted to urban areas they certainly no longer enjoy a legislated monopoly, save in a few countries. In the new context state broadcasters lost audiences to the new entrants who often appeal more to younger urban viewers with western popular music as their core programming.

In the new political, economic and technological context, calls for the liberation of national broadcasters from state or government control have increased. Debates centre around the creation of public service broadcasters which are publicly owned, enjoy levels or forms of public funding which enable them to provide the widest range of programming and guarantees their editorial from political and economic interests. The debates also recognise the need for new regulatory frameworks, which include independent regulation of broadcasting separate from government ministries.

Media advocacy organisations and individuals in civil society who favour this approach to broadcasting are sceptical about private broadcasting as an answer to the discredited state broadcasters and perceive public service broadcasting as a critical element of a pluralistic and diverse broadcasting environment. They point to the bias towards popular western music or sensationalised news reporting as a weakness of the private commercially driven systems, which sacrifice quality and editorial integrity in pursuit of profit. They caution therefore against throwing out the baby with the bath water. Public service broadcasting is not synonymous with state broadcasting, although both the colonial and post independence history seem to suggest they are. Democratic transitions and the developmental agenda media reform activists are better served by a three tier system of broadcasting which has both a public service broadcasting at the core, commercial or private broadcasting and

community broadcasting. They point out that given the lack of development in Africa and the high costs of setting up private radio and television stations, public service broadcasting is still a prerequisite for democratisation and development. They point out that private broadcasters are likely and have shown in the brief period of their existence since the 1990s that they serve or seek to serve affluent audiences who can attract advertisers, and that in programming will not necessarily be diverse and cater for the broadest range of information, entertainment and cultural needs of all the audiences. As primarily businesses they pursue strategies that make them profitable.

Despite the changes that began in the late 1980s and 1990s, it should be mentioned here that most African governments still exhibit a "critical shortage" in democratic practice: rigged elections, use of brutal force against political opponents, human rights violations by the army and other people in authority, corruption and non-transparency, among other malpractices. In effect, most African governments cannot sit comfortably in a situation where the media is free to report and comment on the conduct of the leaders, in public affairs. Thus, where the media has been liberalised (usually through a slow and painstaking process), governments have retained control over the public for hegemonic purposes.

It is important to discuss the merits of public service broadcasting and reflect on the importance of transforming broadcasters be transformed into genuine public service broadcasters capable of serving the democratic and developmental needs of Africans.

# The Role of Public Service Broadcasting

Historically broadcasting came onto the scene long after the press had won freedom from direct government control in democratic societies. Radio and television required the use of a public resource, the frequency spectrum; and hence attracted licensing and regulation, both of which necessitated restricted entry (Ferguson, 1990).

The term "public service broadcasting" has been used as a synonym for the original European broadcasting corporations, which were set up as licence fee funded monopolies in the inter-war period. These institutions have been characterised by their attempts to bring into being a culture and a shared public life to the whole population within the nation state (Mpofu, 1999).

The idea of public service broadcasting has, according to Siune (1998), always embodied the following elements:

- A commitment to balanced scheduling
- Broadcasting institutions as public bodies with financial independence from government and commercial sources.
- The service should be provided to all in return for a basic payment usually in the form of a licence fee.
- Political content that is obliged to be balanced and impartial.

To these elements can be added that public service broadcasting should deliver programmes to audiences whereas commercial or private broadcasting operates on a logic of delivering audiences to advertisers.

The South African Broadcasting Act No. 4 of 1999 provides a useful reference to the ideal roles of public service broadcasting, it states, that such service must:

- make services available to South Africans in all the official languages;
- Reflect both the unity and diverse cultural and multilingual nature of South Africa and all of its cultures, realities and regions to audiences;
- provide significant news and public affairs programming which meets the highest standards of journalism, as well as fair and unbiased coverage, impartiality, balanced and independence from government, commercial and other interests;
- include significant amounts of educational programming, both curriculum based and informal educative topics from a wide range of social, political and economic issues, including, but not limited to, human rights, health, early childhood development, agriculture, culture, justice and commerce and contributing to a shared South Africa consciousness and identity;
- enrich the cultural heritage of South Africa by providing support for traditional and contemporary artistic expression;

- strive to offer a broad range of services targeting, particularly, children, women, the youth and the disabled;
- Include programmes made by the Corporation as well as those commissioned from the independent sector; and
- Include national sports programming as well as developmental and minority sports.

A publication by the World Radio and Television Council (2000) defines public service broadcasting thus:

> Neither commercial nor State-controlled, public broadcasting's only *raison d' etre* is public service. It is the public's broadcasting organization; it speaks to everyone as a citizen. Public broadcasters encourage access to and participation in public life. They develop knowledge, broaden horizons and enable people to better understand themselves by better understanding the world and others.

Encapsulated within the definitions quoted above is the popular notion that public service broadcasting is characterised by programming that is broad and diverse and addresses all citizens rather than some citizens through both general programmes that are of high quality and specific programmes catering for special interest, tastes, minorities and marginalised groups. There is also a notion that of public service acts broadcasting as an agency for providing a diversity of information, education and entertainment necessary for democratic life for all its audiences without discrimination on socio economic grounds and without undue deference to powerful or dominant groups or interests. Public service broadcasting is also expected to nurture, reflect and represent the plurality and diversity of cultures as they exist and evolve in a society and other societies that make up the world. Public service broadcasting can be said therefore to have both a democratic and developmental role. Africa is a continent in need of and in various stages of democratisation and development. It needs public service broadcasting organisations as both agents and indices of democratisation and development.

# Organisation of Public Service Broadcasting

To enable public service broadcasting to play these roles, particular institutional and organisational arrangements are necessary. As discussed above, the institutional and organisational arrangements of the colonial, post-independence and the pre 1990s period did not allow the flourishing of genuine public service broadcasting. Instead, the location of national broadcasters within government ministries delivered state broadcasting as a service to power and authoritarian rule and not to citizens and democratic life. There were also arrangements consistent with a monopoly situation where the state broadcasters did not have to compete for audiences and with private owned commercially driven broadcasters. The new institutional and organisational arrangements will need to ensure the viability and sustainability of public service broadcasting as a distinct type of broadcasting central to democratic public life in the context of competition in a multi channel environment. Therefore policy and regulatory reforms have been characterised since the 1990s by calls for liberalisation of the airwaves.

# Policy and Regulatory Reforms

Most African countries have not deliberately and clearly articulated media and broadcasting policies. But, as Barker (2001) has noted, no policy might be a policy goal in itself. It seems, that the idea of liberalising the airwaves has been taken to be a policy in itself. Its most concrete manifestation has been to license private broadcasters. In some cases the licensing has been done by ministries in ways that are not transparent or in line with any explicitly stated policy goal. Most countries have not developed media and broadcasting policies which take into account the broader communication landscape, which takes into account the needs, funding and financing, market size and technologies. The tendency has been for policy to be imbedded in broadcasting legislation. Explicitly stated media policy would address questions of pluralism and diversity in ownership and content and how to achieve the same.

Another manifestation of new policy directions has come out of economic liberalisation policies more than media or broadcasting policy reference here is made to. the decision to reduce state subsidies to national broadcasters and leave them to raise revenue from commercial sources,

which is part of broader economic policies to reduce subsidies to state enterprises. The policy of reducing subsidies to state enterprises and commercialising them has been applied in a blanket fashion to state broadcasters without regard to their role if they were transformed into genuine public broadcaster, which would require public funding. In other words, because of a lack of broadcasting policy a national broadcaster have been treated as a state owned tyre manufacturing factory, an enterprise best left to the private sector.

Across the continent but not necessarily in every country there are attempts to create new regulatory frameworks for broadcasting. The most concrete manifestation is to create a regulator for media, broadcasting or communications, which is located outside the Ministry of Information or Broadcasting or Communications as way of giving it independence or autonomy. The regulator depending on the country has a role to play in licensing of new stations as well as monitoring and frequency allocation. In relation to the national broadcaster the reforms included in varying degrees new inclusive and participatory systems of appointing the board of the national broadcaster, which reduces the powers of the Minister and the President while giving the board and broadcasters more operational and editorial independence.

In many cases across Africa where such regulatory frameworks and regulators were set up the motivation was to free broadcasting from state control as part of securing not only media freedom but political pluralism. In others, parties competing for political power did not want their competitors controlling the media during elections.

It must be pointed out that where they occurred, these reforms were by no means sweeping and a complete break with the past. Just as the process of creating pluralist political systems has not been smooth and in some cases has suffered reversals and setbacks or distortions, the reforms have also been halt gradual and are still continuing. A few examples below will suffice. It is also true that independent regulation and public service broadcasting is new to everyone including reformers who have grown accustomed to government or state broadcasting as the norm.

Quite a number of countries especially in West and North Africa as part of processes of dismantling one party states and military regimes through national conferences, agreed on commissions or councils to regulate broadcasting. Increased clamours for freedom of association and expression resulted in the reform of most media laws with the effect of allowing private broadcasters to operate, except, notably, in Guinea

Conakry where only state-owned radio and television exist. Subsequent to the political changes of 1990s, laws that allowed the liberalisation of the airwaves were enacted in Mali (1992), Ghana (1992), Senegal (1995), Nigeria (1995), Ivory Coast (1996), Burkina Faso (1996), Benin (1997) and Togo (1997) (Baglo, 2001).

In Southern Africa, a process of multi party talks for a new democratic dispensation in South Africa led to the creation of the Independent Broadcasting Authority (IBA) in 1993 to regulate broadcasting prior to the first multi party democratic elections in the public interest. To a large extent this move was informed by the desire to ensure that the national broadcaster hitherto a state broadcaster, underpinning apartheid, would perform an impartial role in the historic elections. Although civil society and media reform activists wanted much more radical reforms and broadcasting policies, the two dominant political parties the liberation movement the African National Congress (ANC) and the then ruling National Party were not in support (Barnett,1999). They were more focused on reforms necessary to ensure a media that would not be biased during the elections (Barnett, 1999). In July 2001 the IBA was merged with the telecommunications regulator the South African Telecommunications Regulatory Authority (SATRA) to form the Independent Communications Authority of South Africa (ICASA), which is charged with regulating both broadcasting and telecommunications in the 'public interest'.

It has not been the case however that all the new regulatory framework and regulators entrench the principle of independence from both government and commercial interests and all broadcasters. In Zambia, for example, although a process of liberalisation of the airwaves was started in 1994, the unreformed state broadcaster the Zambia National Broadcasting Corporation (ZNBC), acts as a national broadcasting regulator! In practice therefore the state not only still controls the national broadcaster, but also regulates broadcasting. It is surprising that liberalisation of the airwaves in Zambia and in other African countries has taken a disturbing turn where licenses are awarded to powerful interests that are either connected to the government or to companies owned or controlled by government ministers.

In Zimbabwe, the Broadcasting Authority of Zimbabwe (BAZ) has only advisory functions as the Minister of Information and Publicity in the President´s office is the licensing authority. It is not surprising that Zimbabwe is one of those few countries where the unreformed state

broadcaster does not play an impartial role in elections and no private or community broadcasters have been licensed to operate. Most of the other Southern African countries including Malawi, Mozambique and Botswana have taken steps towards creating autonomous regulators and some reforms of the state broadcasters.

In West Africa in the Gambia the for example the minister of Communications is empowered to license the establishment of any electronic media. In addition, he has powers of censorship. The minister in his absolute discretion administers the law and regulations, and no criteria have been described that are required to be fulfilled by the applicants (Baglo, 2001).

In Southern Africa, South Africa leads in terms of the creation of independent regulatory frameworks. There has been a definite change to the processes of appointment to the board of the regulator, board of the public broadcaster and management and staff of the public broadcaster. The direct role of the minister in charge of communications and the President have been reduced or are shared by the regulator and include public nominations and hearings in the case of the boards and boards appointing management and management appointing staff. However, the dominance of a political party can still undermine or limit the extent of the independence of the processes.

In most African countries these processes are still dominated by the minister and the President and thereby undermining the operational and editorial independence of the broadcaster. This is mainly because some governments have continued to retain control of national radio and television, in spite of liberalisation process. The reason most African governments continue to hang onto national broadcasters (most of them in a sorry state of disrepair) is because they want their own voice to dominate the national airwaves. Most importantly, it gives these governments an opportunity to counter criticism from the private print media and the those urban FM stations which carry news and political commentary or host talks shows in which political issues are raised.

The lack of operational and editorial independence has grave implications for the viability of the public broadcaster in the new broadcasting context. In view of this, campaigns for broadcasting reform are still important across the continent. The African Charter for Broadcasting adopted in Windhoek in 2001[i] and the Principles for Freedom of Expression[ii] piloted through the African Commission and People's Rights adopted in Banjul, Gambia in 2002 are important

documents on which should guide these campaigns.

In East Africa Uganda liberalised the airwaves in 1992 and the first private radio began to broadcast in December 1993. However, the Electronic Media Statute, which was meant to regulate the industry, was to come three years later, in 1996. In Tanzania, the Broadcasting Services Act, which provides for the regulation of broadcasting through the Tanzania Broadcasting Commission (TBC), was enacted in June 1993 and marked the end of government monopoly in broadcasting (Temba, 2000). The Kenya government granted its first license and frequency to a private television station, the Kenya Television Network (KTN) in 1989, and becoming the first country in East Africa to liberalize broadcasting. However, the whole process has had a slow start and political factors have been cited as responsible for the non-transparent system that prevails in this sector in Kenya today (Odhiambo, 2001). KTN is a station owned by interests linked to the former ruling party KANU, which enjoyed power for 39 years before losing power to the opposition at the end of 2002. Kenya has not created an independent regulator and the national broadcaster the Kenya Broadcasting Corporation has not been reformed, and even in the 2002 elections, it did not play an impartial role. The national broadcaster even went to the extent of refusing to flight paid advertisements from the opposition National Rainbow Coalition (NARC) after initially accepting them and was criticised by the electoral commission and election observers.

The policy reforms and new regulatory frameworks have not as indicated earlier, addressed the question of funding and financing for public service broadcasters in the context of pluralism and competition. It appears that most African governments confuse giving financial autonomy to public broadcasters with reduction of public grants or subsidies and leaving them to seek revenue from commercial sources. It appears also that they do not recognise that this is a form of commercialisation (but a prelude to privatisation), and can defeat the mandate and uniqueness of public service broadcasting. It is also true that some governments, for example the South African and Zimbabwe governments have deliberately chosen to commercialise part or the whole of public broadcasting services rather increase public grants or subsidies. In South Africa the strategy is to through corporatisation allow the South African Broadcasting Corporation to have both commercial and public service divisions. The hope is that commercial services will cross-

subsidise the public services. As a policy response, commercialisation can also have a negative effect on the entire broadcasting system because the half reformed or unreformed state broadcaster can attract most of the advertising because of its reach. The effect of on other broadcasters especially start-ups would be negative. It is not an exaggeration to say that one of the major challenges facing public service broadcasting is to craft viable and sustainable funding and financing mechanisms.

# Funding of Public Service Broadcasting in Africa

Historically, a key defining feature of public service broadcasting, particularly in Europe is the predominance of public funding over commercial advertising and sponsorship. Such funding can take the form of government grants, license fee or levies for electricity bills. Public funding is considered to be critical to the ability of the public broadcasting service to offer a diversity of programming across all genres, which is not driven by advertisers.

Without adequate funding to cover the human and material resources, public service broadcasting is neither viable nor sustainable.

In Africa, the national broadcasters under both colonial and post-independence regimes have been funded through public grants or subsidies, license fees, commercial advertising and sponsorship.

In West Africa the predominant form of funding was direct government grants, which after independence far exceeded license fees because of deliberate increases in government spending. A good example is how public broadcasting was funded in Ghana. In the immediate post independence period of the 1960s, President Kwame Nkrumah provided large sums of government funds to Ghana Broadcasting service so that it could be used as political and developmental tool and to transmit broadcasts by African liberation movements across the continent.

Government funding came with control and lack of alternative views in news. Although a license fee was introduced with the advent of television, it was minimal and never meant to be a significant source of revenue for the national broadcaster. However, the military government that took over after the overthrow of Nkrumah introduced advertising as a source of revenue as well as commercially driven programming dominated by western programmes in particular popular music. However, the dominant source of revenue was still government funding even until 1995 (when the first private stations came on air). Even then according to

Apenteng (2002), only 26% of the Ghana Broadcasting Corporation's (GBC) revenue came from advertising. The GBC had never developed its capacity to collect the license fee or increase its capacity to get commercial revenue. Although the GBC's major source of revenue was still government funding this has dwindled as the economy declined and new economic policies, favouring withdrawal or gradual reduction of state subsidies were introduced in the 1990s. Government funding amounted to very little in relation to the needs of the broadcaster, leading to the decline of services.

In the new context of competition with new private stations, the GBC has increased its proportion of advertising revenue to state grants with the balance coming from television license fee, which have been declining. The government is determined to further reduce its grants as part of its public expenditure reduction strategy. In the foreseeable future GBC will have to generate most of its revenue from commercial sources.

In Southern Africa especially in South Africa and Zimbabwe broadcasting has been up until the mid 1990s a mixture of government grants/subventions, license fee and commercial advertising and sponsorship. Advertising and commercial sponsorships have in recent years been the largest sources of revenue for public broadcasters as government funding dwindled. In 2002 the SABC reported that only 3 percent of its funding came from government funds. South Africa's history of post independence public funding of public service broadcasting is very short, although recent policy debates and announcements by the ruling party point towards creating a public funding model for public service broadcasting channels. License fees, which should be paid by all set owners, have been difficult to collect, while the little funds collected could not cover ant major costs. Collection and compliance has been a major problem. Barker argues that public radio and television in Southern Africa have found their survival in commercialisation after losing their monopoly position "Faced with rising costs and decreasing government subsidy or the stopping of subsidies altogether, the intensification of commercialisation has become an imperative for public broadcasters throughout the region." (Barker 2001)

Funding for national or public broadcasters in Africa has always been a thorny issue, with governments utilising the services of the broadcaster while investing very little in return. Most of the broadcasters lack such basic equipment as recorders, cameras, editing suites, transport, telephone lines, fax machines and internet services. This is partly the reason why a number of them have lost staff to the new private stations,

in countries where private players have been allowed to operate broadcast stations.. In Southern and East Africa and in some countries in West and North Africa, advertising revenue contributes more than 50% and is therefore the predominant form of funding.

The effect of under funding has lead to lack of investment in new technologies, by public broadcasters, this failure to extend the service to all parts of the country, and inability to develop diverse programming and provide quality services to audiences and advertisers. As result in the era of competition with commercial broadcasters the public broadcasters find themselves in need of large injections of financial resources to refurbish their facilities, invest in new technologies to improve programme quality, and retain staff by paying better remuneration packages if they are not to lose staff to new private broadcasters. Failure to reinvent themselves could result in public broadcasters declining and losing audiences.

In many other countries like Ghana advertising as increasing as a source of revenue and it has directly influenced the nature of programming. In some cases people have been able to pay to be part of a news bulletin or to secure coverage of an event. The problem with reliance or dependence on advertising is that most of the African economies are small and advertising revenue is still meagre. Many economies have yet to recover from the command policies of the past even with economic reforms.

In Chad for example, the advertising is too small to support even the national broadcaster. With the advent of privately owned commercially driven stations, competition for the small advertising cake makes it even more difficult for all broadcasters. For the public broadcaster competition for advertising has implications for programming. offering and opens it for pressure towards programming which undermines its programming principles and therefore its character. Funding and financing of public service broadcasting has a direct impact on programming and the choices available to citizens.

# Programming in Public Service Broadcasting in Africa

According to the World Radio and Television Council public service broadcasting is typified by a distinct form of programming which diverse in three respects 'in terms of genres of programs offered, the audiences targeted and the subjects discussed' (2002: 10).

The history of state broadcasters as they emerged from the colonial and post independence era up to the 1990s is almost the exact opposite of such diversity. The tendency, which continues in some national broadcasters is the faithful reflection of ruling party and government views, lack of diversity of views in news, lack of controversy, lack of debates and live interviews, lack of coverage of the opposition during elections, and very little programming for rural and ordinary people.

Such an approach to news and current affairs programming undermines the public broadcaster's capacity to provide impartial information necessary for informed and democratic citizenship. It cannot therefore empower citizens to participate in the collective decisions that affect their lives and only strengthens those who hold undemocratic power. Diversity, controversy, debate and live interviews make the public service broadcaster an open public sphere in which all citizens regardless of socio-economic status, can enter to hear and be heard. However, it must be pointed out that the state broadcasters often use local languages much more and to that extent are responsive to their audiences. The problem often is that news content in African languages is not impartial and balanced and so language is being used for propaganda purposes.

In relation to entertainment, sport and culture, there was and still is a tendency towards lots of coverage for both local and international sport. Also noticeable is a predominance of foreign produced cultural and entertainment programming on television. Radio tends towards high levels of foreign popular music. The emergence of private radio stations has lead to even higher levels of foreign music. Without airplay, local and African music tends to be marginalized. What is lacking is, on both radio and television are locally made programmes on television, which reflect and represent local cultures and values and the creativity of African producers. High levels of foreign content also mean high usage of non-local languages. The foreign programmes of state broadcasters are also often evidence of the link with the former colonial powers. Francophone and Lusophone countries in import their programmes from France and Portugal and Brazil while Anglophone countries from the United Kingdom, North America, Australia and New Zealand.

Such a programming profile as described above cannot be described as public service programming. Key changes need to be made in programming values and practices to transform national/state broadcasters into genuine public service broadcasters. Diversity of programming

meaning a range of programmes from news to light entertainment should be a defining feature of the schedule.

To ensure that cultural and entertainment programming reflects, represents and nurtures national and local cultures, is important that public service programming include a significant amount of locally made productions. At the same time, it should be noted thatcarrying locally made productions does not mean the total exclusion of foreign made productions even when the subjects, situations or issues they reflect or represent would enrich the lives of local audiences. It is important therefore that the national broadcasting policies and regulation include prescriptions of local content in license conditions for all broadcasters.

Issues such as what constitutes local content and what percentages in which genres will be required need to be carefully attended to. Local content regulations should take into account the issue of quality, cost and sources of local productions. A useful approach, which would help public broadcasters to carry a diversity of programmes is a regulation requiring them to get a percentage of their local productions from independent producers and not necessarily produce it themselves. As ARTICLE 19 has cautioned, regulation and enforcement of local content conditions should not be used to undermine the programming independence of broadcasters. It is important therefore that regulation of such conditions be left to independent regulators whose mandate should include the promotion, support and protection of public service broadcasters.

Last but not least the question of language in public service broadcasting its very important in terms of accessibility and cultural identity. The tendency in broadcasting in Africa is to privilege foreign languages or the most spoken languages and to marginalize some African and minority languages. Authoritarian regimes have used state broadcasters in their projects of ethnic and cultural hegemony by privileging some languages over others. Public service broadcasters should avoid the same pitfalls. This tendency is most prominent in television in part because of its urban penetration and because of costs of sets its prevalence among the elite. Programmes in African languages are important since in many countries in Africa the largest majority are most competent in their languages. It is also the role of public service broadcasting to nurture Africa languages as way of affirming and promoting national and local identities.

# Viability of Public Service Broadcasting in Africa

The key question that policy and regulation frameworks need to address is the overall viability and sustainability of public service broadcasting in Africa as a distinct form which is accessible to all, addresses all and is characterised by diverse and actually relevant programming.

To be viable and sustainable, public service broadcasting requires two related aspects: new institutional and organisational arrangements within a broader broadcasting policy and regulatory framework, as well as adequate material resources or funding.

The new institutional and organisational arrangements must be part of a policy and regulatory framework, which recognises the necessity of public service broadcasting as the core of a pluralistic and diverse broadcasting system. Public service broadcasting in such a context must have operational and editorial independence. The new context of changes towards political pluralism and accountable forms of governance favours independent and transparent regulation. As the discussion above has noted, many countries have started moving in the direction of creating broadcasting regulatory frameworks, which recognise the importance of independent regulation.

The new institutional arrangements must entrench the principles of transparent, participatory and merit based appointments to boards, senior management positions and editorial positions in public broadcasters. Regulators and multi party committees of national assemblies or parliaments must drive such processes and not the minister or President. In essence such institutional arrangements are what constitutes operational and editorial autonomy. Bodies constituted in such a manner are better able to make the sound operational and editorial decisions that will ensure the viability and sustainability of public service broadcasting. In turn public service broadcasters regulated in transparent and open ways are better able to enjoy the confidence and support of the public.

Equally it is important that regulators be not only independent from political and economic interests but be adequately funded to regulate in ways which protect all broadcasters and the centrality of a public broadcasting service. Critical to such institutional arrangements is that the underpinning philosophy in policy and regulation is freedom of expression and freedom of the media as well as free flow of information and a pluralistic and diverse broadcasting sector.

The public broadcaster themselves need to part of new institutional arrangements in which a premium is placed on accountability. But they need to be accountable to multi party committees of parliament where no single person in particular may hold sway. They should submit their annual reports to parliament through a specified committee of parliament. In relation to content, they need to be accountable to independent regulators, self-regulating professional bodies of journalists on ethical and professional issues and the public through for example road shows and public meetings where they engage the public on their performance. At any rate it should be clear to citizens where they can register complaints or indeed praise and get a response.

The new institutional arrangements should amount to a change of ownership of state broadcasters from governments and ruling parties of the day to the public as citizens. If the public feels ownership of the public broadcasters there is a higher likelihood of their viability and sustainability. There is also a higher likelihood of support for public funding by citizens.

While the new institutional arrangements and policy will create an enabling and supporting environment for public service broadcasting, adequate, secure and predictable resources especially financial resources are absolutely critical to viability and sustainability. As indicated above, programmes whether produced in-house, bought from local producers or imported cost money. Operational costs have to be covered and facilities need to be maintained and/or upgraded and now competition exists for advertising. Any sources of funding must not undermine the operational and editorial independence of the public broadcaster.

The new institutional arrangements are linked to public funding because only an operationally and editorially independent public service broadcaster will have the legitimacy and credibility with citizens to earn their support: support in the double sense of their choice for its programmes and for any public funding which includes their direct contribution through license fees or levies. It stands to reason that only public service broadcasting which enjoys operational and editorial autonomy can attract funding and financing which ensures its viability and sustainability.

The adoption of new economic policies, which favour reduction or the elimination of subsidies to state linked enterprises mean that state grants will no longer be necessarily available. A rethink of such policies

as they relate to public service broadcasting in Africa is necessary. It is ironic that just some degree of operational and editorial independence is being given to public broadcasters to finally play their public service role while public funding is being withdrawn. This means that when they were state- funded through public money they did not serve the public. Now that they are beginning to serve the public, they cannot get public funding. If it is accepted that public service broadcasting is central to democratisation and development, it follows that it must be publicly funded. It also follows that arguments about other pressing priorities like education and health are not logical because allowed its proper role, public service broadcasting is an equally pressing priority.

The hope that advertising can be the main source of revenue for the entire broadcasting system including the public broadcaster is not realistic. It is true that public broadcasters because of their mass audiences have an attraction for advertisers. It does not follow that the advertising revenues are sufficient for the public broadcaster to fulfil its mandate. As the debates in South Africa in 2002 during the Broadcasting Amendment Bill process revealed, even if the SABC gets the lion's share of advertising on account of its reach, the number of channels some of which are commercial channels, the revenues would not be sufficient to fulfil its African languages mandate. Its television programming exhibits the same domination of foreign programmes as in other African countries. Its African language radio stations with the largest audiences (millions) get less advertising than urban FM stations broadcasting in English and dominated by popular music. Further, the new privately owned commercially driven broadcasters mean competition for advertising and sponsorship for the public service broadcaster. They are often an even more attractive proposition for advertisers looking for affluent audience and not the mass audiences. Television and the urban-based FM radio stations have that attraction. In this context, the survival and viability of the state broadcaster is put into an even sharper focus.

A funding mechanism, which while not excluding advertising but is not wholly dependent on it, needs to be devised. It is clear from developments in the 1990s that advertising is now a reality in funding public broadcasting services. This situation is not likely to be reversed. What is problematic is that it is developing into the main source of funding yet it is not only unpredictable but tends to skew programming and in the case of public service broadcasting is not adequate. To ensure that public service broadcasting maintains its identity and role, some

forms of public funding which are not subject to political manipulation and interference should be the predominant source of financial resources. Such forms of public funding, will have to take into account increases in costs and be sufficient to cover the operational and programming needs of a public broadcaster in a multi-channel competitive environment, which is still evolving.

The conditions prevailing in each region and country in Africa will have to be taken into account in choosing how to structure public funding. Suffice to say that options include a combination of a direct grant, voted by parliament, which is multi year in nature as among others the World Radio and Television Council (2000) recommends rather than yearly to enhance financial autonomy and enable long term planning, license fees for set owners or a levy on electricity bills if the infrastructure for billing and collection is sufficiently advanced. In many countries in Africa this might not be possible because electricity connections are not widespread or billing and collection are not sophisticated. The public grant should be voted by parliament separately from the budget of the ministry in charge of broadcasting to prevent interference. Accounting for the grant should also be directly supervised by parliament through a designated multi party committee.

Public service broadcasters, which have professional management and enjoy operational autonomy, should also improve license fee collection mechanisms and advertising revenue so that all revenue streams are maximised. The key to acceptance and compliance with license fees or paying levies is going to be whether indeed the public service broadcasters create through programming strong links and a sense of ownership by the broad public as audiences.

While it is realistic to recognise that advertising and commercial sponsorship will be part of the funding mechanism, advertising needs to be regulated in various ways including capping the ratio of advertising to public funding and amount of advertising within programmes and its exclusion from news and current affairs. Finally, public service broadcasters must be protected from having to devote their energies to seeking advertising and instead focus on putting together programming that is distinct and caters for all needs and tastes.

It must be taken into account that satellite broadcasters, new terrestrial channels, pay or subscription services will continue to compete for market share among the affluent audiences. New entrants also compete for human resources including editorial and production staff who might be

attracted by better remuneration packages. As the World Radio and Television Council (2000) points out, public service broadcasting cannot compete for advertising by abandoning all the other audiences and focusing on the affluent audiences in an attempt to either retain or gain market share. Such a strategy will skew its programming and alter its distinctness. It will also result in its benefit from public funding being questioned on the grounds that it does not offer anything different from the commercial broadcasters and so has an unfair advantage in that it receives public funding. Public service broadcasting should not ignore programmes for affluent audiences either because such programmes should form parts of its diverse range of programming.

Adequate funding, which is secure and is constantly reviewed, should be used towards fulfilling the public service broadcaster's role as the place of diversity of information, education and entertainment. It is necessary that the funding mechanism for the public broadcaster be enshrined in legislation such as a Broadcasting Act.

The transformation of state broadcasters into genuine public broadcasters therefore needs to involve the re-engineering of funding, changes in institutional arrangements which result in editorial and programming independence which can bestow credibility with audiences and by extension with advertisers and sponsors and enable the public broadcaster to 'compete' effectively with the new broadcasters. Finally, as the Charter on African Broadcasting and the Declaration on Principles of Freedom Of Expression in Africa says "African governments must pursue economic polices which enable broadcasting to flourish".

# Possible Advocacy Actions

What goes for public service broadcasting in most of Africa is really state or government broadcasting, with a tinge of public service broadcasting. There is thus need to transform the state broadcaster into a public service broadcaster.

The opening up of the airwaves has been a good step in the right direction, as it has broken the monopoly of the state on information within the broadcast media. However, opening the airwaves does not necessarily led to a pluralistic and diverse broadcasting landscape. Secondly, opening up the airwaves has also brought forth a flurry of competition in which

national broadcasters have had to wake up and provide better services, if only to survive.

New institutional arrangements in the context of broadcasting policies, which promote pluralism and diversity and entrench independent regulation and operational and editorial independence of public service broadcasters, are necessary. The formulation of new broadcasting policies needs to involve government, journalists and civil society in participatory processes. The context of democratic reforms is a good climate for an inclusive approach. Democratisation and development, will not be sustainable, as some countries have shown, if state broadcasters are not transformed into public service broadcasting which can play a critical role in promoting and defending new democratic values.

The African Broadcasting Charter formulated at the Windhoek + 10 conference in 2001 by a representative group of African media practitioners and The Declaration on Principles of Freedom of Expression adopted by the African Commission on Human and People's Rights in 2002 are sufficiently broad enough to be a blueprint for transformation of state broadcasters into public service broadcasters. The issues they highlight and the guidelines they offer are solid basis upon which to formulate advocacy programmes for different countries in Africa.

## End Notes

[i] The African Charter on Broadcasting was adopted the Windhoek + 10 Conference in August 2001. The conference was a follow up to the 1991 conference which adopted the Windhoek Declaration on Promoting an Independent on Promoting an Independent and Pluralistic Press.

[ii] The Declaration on Principles of Freedom of Expression was adopted by the African Commission for Human and People's Rights in Banjul, The Gambia in October 2002.

# Chapter 6

# ISSUES IN LOCAL CONTENT OF BROADCAST MEDIA

*Nixon Kariithi*

## Abstract

In the current context of liberalization of the airwaves there is a real danger of a plurality of channels broadcasting the same content. The tendency has been to go for popular music, sport and low budget films and drama imports and to avoid production of local programmes in local languages. Nevertheless, there are ideological, moral and economic imperatives for promoting local content.

The ideological and moral imperatives are related to the role of broadcasting and its relationship to audiences. Local content is important for achieving diverse programming and needs to be promoted. Local content regulations are an ideal way of promoting diversity in programming. Local content regulations can encourage the democratic roles of broadcasting as long as they are not administered in ways that undermine editorial, creative and programming independence. Local content quotas are identified as a key mechanism for promoting diverse programming. The licensing process conducted by independent regulators is a key mechanism for regulating for local content and should be stipulated in all licenses including commercial broadcasting licenses.

Local content regulation is a way of stimulating and developing a local production industry as well as economic activity in general. It is critical that ways of financing and creating professional skills for local content production be developed if local content quotas are not to become forever unfulfilled license conditions.

# Introduction

The recent expansion of broadcast media in Africa has also highlighted numerous gaps in policy. Among these is content regulation. Content regulation is highly sensitive and contentious, especially because it involves drawing a line between individual freedoms, constitutional guarantees, international agreements, and a society's endeavour to create a collective identity. Broadcast policies emerging in many Africa countries lack substantive engagement with the philosophy and principle of local content, and therefore offer little guidance to media institutions, media workers, and the general society. The aim of this chapter is to examine the state of local content regulation in Africa, highlight major issues relating to local broadcast content in Africa, and to identify advocacy issues for stakeholders. There are ideological, economic and moral reasons for promoting local content in broadcast programming. The ideological reasons include promoting national and collective identity, protecting cultural sovereignty, promoting national cohesion, engendering a culture of tolerance through pluralism in opinion and choice, and fostering democracy and democratic values. The economic reasons include promoting local talent, creating economic activities for the local population in broadcasting, and skills and technology transfer from developed to developing countries. Moral reasons include protecting the public against negative content that incites public disorder, offends public decency and good taste, or is culturally/ethnically inflammatory.

# Defining Broadcast Media Content

Media content is a broad term with multiple meanings. Generally, media content encompasses the production and consumption aspects of audio and audio-visual media output. The production aspects relate primarily to the economic nature of media industries and the transnational nature of media products. Production of media content is an economic activity with a wide range of private and public benefits. Consequently, content production is deemed crucial not just for what it routinely provides to broadcasters, but also for the broad economic benefits that accrue to the content producers. In the present age of highly globalised cultures, media content produced for one society often has high resale value in other

societies so long as they have some cultural values in common with the original, or are willing to tolerate foreign values. In this case, one producer is then able to duplicate and resell one product.

The consumption aspects are often underlined by moral and ideological norms. Moral norms relate to what is acceptable as "good" or "bad" taste, and are generally based on the society's acceptance of common interpretations of good and evil. Ideological norms are less explicit, especially because they are often interpreted in such abstract terms as "protection and enhancement of national identity and cultural sovereignty".

These multiple definitions are however rooted in the deeper interpretation of the role of broadcasting in society. In many instances the frequency spectrum (air waves) are conceived as a limited natural resource whose use must not only enhance public good but also uphold public interest. Enhancing public good relates to improving the general welfare of society. Upholding public interest involves universal access to allotted frequencies, access to choice and diversity of choice. The attainment of access, diversity, equality and independence in broadcasting ensures a pluralism of information and opinion, and fosters democratic values.

Local media content is generally defined as programming that is produced under the creative control of nationals of the country. South Africa's Independent Communications Authority of South Africa (ICASA) defines local content as the imposition of licence conditions on broadcasters to oblige them to carry programme material that originates from and/or reflects all aspects of public life in their respective countries.[i] Such "origination" or "production" is generally interpreted to mean use of local human resources as well as local production and post-production of the programming. Use local of human resources implies the employment of local producers, directors, writers, actors and supporting cast, etc. Local production and post-production refers to the actual on-line editing, video and audio enhancement, and duplication. Consequently, the "local" in broadcast media content is primarily understood by its qualitative relevance, material benefit, and long-term contribution to preservation of cultures.

# Rationale for Regulating Local Content

The definitions are critical to understanding why governments regulate broadcast media content. The regulation of broadcast content, and indeed most broadcast regulation, endeavours to:

- Protect the identity, unity and sovereignty of the nation
- Promote pluralism in opinion and choice
- Promote a common sense of citizenship, promote tolerance, diversity and reconciliation
- ProSafeguard national security and security
- Fostering democracy and democratic values
- Improve local talent
- Improve economic opportunities for the national population
- Protect the public against negative media content (indecent or pornographic material, violation of privacy, dangerous practices, etc)

These objectives may be placed in three broad categories, namely, ideological, economic and moral. Ideological objectives for content regulation are premised on the notion that media content may have deleterious effects on existing norms and values among audiences. This presupposes that different societies have distinct norms and values, and that there is a desire among such societies to preserve these unique cultural qualities. Societies then regulate the extent to which media can use foreign content and, in the process, minimise their exposure to the pervasive qualities of foreign media content. In so doing, the countries protect their own national identity and culture. Without any regulation on content, it is feared that the imported content would flood the local broadcast media and overwhelm local cultural norms and values. One major assumption here is that indigenous media content poses no threat to national identity but instead contains elements that celebrate national unity and sovereignty. For example, Canada's Broadcasting Act (1991) provides that the country's broadcasting system should contribute to the maintenance and enhancement of national identity and cultural sovereignty. In addition, the broadcasters should:

- Serve to safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada.

- Encourage the development of Canadian expression by providing a wide range of programming that reflects Canadian attitudes, ideas, values and artistic creativity, by displaying Canadian talent in entertainment programming and by offering information and analysis concerning Canada and other countries from a Canadian point of view.

Similarly, Tanzania's Broadcasting Services Act (1993) requires broadcasters to encourage the development of Tanzanian and African expression and culture; serve the interests and needs of Tanzanians; and to contribute through programming to shared national consciousness, identity and continuity. The Act further requires broadcasters to provide programming that caters for culture, arts, sport and education pertaining to Tanzania and Africa.

The economic objectives are premised on the well accepted position that developed countries have superior technologies but saturated markets, while developing countries have less sophisticated technologies and large untapped markets. In economics theory, the benefits of local content requirements are felt mainly through backward linkages. Backward linkages exist when the growth of an industry leads to the growth of the industries that supply it; for example, growth of the broadcast industry may encourage the growth of production houses, which will lead to demand for independent producers and development of related skills in the country. In this circumstance, the broadcasting industry has a direct backward linkage to the production houses, and an indirect backward linkage to training institutions that develop the human skills and resources necessary to meet the rising demand from the production houses.

Local content regulations require broadcasters to use a certain proportion of their airtime to local productions, thereby promoting employment and technology transfer. Broadcasters keen to raise programming quality often motivate local production houses through such incentives as new contracts, funding, and training assistance.

The backward linkages generated by local content regulation will depend on the strategies taken by individual broadcasters or the industry in general. If backward linkages are achieved by sourcing content from local production houses, this may lead to transfer of knowledge and growth in the local production capabilities. On the other hand, backward

linkages realised from sourcing content through in-house arrangements or from business subsidiaries and affiliates will culminate in the upgrading of employee skills. Notably, most countries enact general statutory regulations and delegate interpretation and implementation to the regulation authorities. For example, Tanzania's Broadcasting Services Act (1993) requires broadcasters to:

- Encourage the development of Tanzanian and African expression and culture.

- Serve the interests and needs of Tanzanians.

- Produce programmes of high standards.

- Make maximum use of Tanzanian creative and other resources in the creation and presentation of programming.

- Contribute through programming to shared national consciousness, identity and continuity.

- Provide programming that caters for culture, arts, sport and education pertaining to Tanzania and Africa.

Similarly, Canada's Broadcasting Act (1991) requires that broadcasters, through their programming and employment opportunities arising out of its operations, serve the needs and interests, and reflect the circumstances and aspirations, of Canadian men, women and children. The Act further states that the programming should reflect equal rights, the linguistic duality and multicultural and multiracial nature of Canadian society, and the special place for minorities in society.

The moral objectives are premised on the need to preserve public decency and decorum. The objectives presuppose the existence of well-known measures of such often-subjective values as good taste, violence, crime and anti-social behaviour, defamation, privacy, etc. For example, Britain's Broadcasting Act (1990 and 1996) set up the Independent Television Commission (ITC), which in turn has developed a detail programme code on such moral/ethical issues as accuracy, impartiality, sexual portrayal, language, violence, taste and decency, and racial and religious offences.

The development of local content regulation is highly correlated to the general level of development of the broadcast sector in many countries. As such, Western European and North American countries have relatively longer history of local content regulation than African countries.

In almost all countries, however, local content regulation in many countries is rooted in the political philosophy of media and society. Media institutions have a critical role in democracies, namely, fostering public debate, representing broad opinion in deliberations, and being watchdogs and advocates for ordinary citizens. In doing so, media participate in promoting equality, national identity, diversity of opinion, and an informed citizenry. The media also assist in nation-building by engendering a common sense of citizenship, and by promoting tolerance, diversity and reconciliation. Such roles place media alongside such national institutions as the Church and other civil society institutions in advancing social stability and progress. Proponents of this philosophical position argue that media content should be regulated in order for the benefits of media in a democracy to be realised.

A complementary perspective to political philosophy is premised upon human entitlements provided for under a number of international declarations. Such declarations include the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR), African Charter on Human and People's Rights (the Banjul Charter), the European Convention on Human Rights (ECHR), and the Inter-American Convention on Human Rights (IACHR). The declarations underline basic human rights to freedom of expression and self-determination. Notably, media content that does not promote such tenets of democracy as diversity, access, and equality violates these declarations. In the context of local content, the declarations have been utilised to protect socio-cultural, political, and economic aspects of a society that were unique to a sovereign nation and needed to be distinguished from other aspects.

Most African countries are signatories to UDHR, the Banjul Charter, and at least one other declaration. For example, the Kenyan Constitution (revised 1998) state that "everyone has the right of freedom of opinion and expression; this right includes freedom to hold opinion without interference and to seek, receive and impart information and ideas through any media regardless of frontiers." Similarly, Section 16 of South Africa's Bill of Rights states "everyone has the right to freedom of expression, which includes freedom of the press and other media; freedom to receive or impart information or ideas; freedom of artistic creativity; and academic freedom and freedom of scientific research." Articles 9, 17 and 18 of The Banjul Charter (1982) state:

*Article 9:*

1. Every individual shall have the right to receive information.

2. Every individual shall have the right to express and disseminate his opinions within the law.

*Article 17:*

1. Every individual shall have the right to education.

2. Every individual may freely, take part in the cultural life of his community.

3. The promotion and protection of morals and traditional values recognized by the community shall be the duty of the State.

*Article 18:*

1. The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical health and moral.

2. The State shall have the duty to assist the family which is the custodian of morals and traditional values recognized by the community.

3. The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.

4. The aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs.

# A Framework for Local Content Regulation

Many African countries have no independent institutions to oversee broadcasting activities, although a growing number is beginning to create some. In those countries with functional regulatory authorities there are two models one is to bundle together broadcasting and telecommunications activities and another is to have separate regulators for the two sectors. In Kenya, South Africa and Nigeria, communications

regulatory bodies oversee operations in broadcasting and telecommunications simultaneously. Others, like Tanzania and Zimbabwe, have created separate regulators for the two activities. In countries with no regulatory agencies, government ministries directly manage broadcasting and telecommunication activities.

The present global trend of combining broadcasting and telecommunications regulation is an attempt to keep pace with the inevitable convergence of what was previously seen as disparate communication industries. In Africa, however, such practice overlooks the frailties of the communications sectors, economic development levels and the erratic nature of private investment initiatives in the sector.[ii] It is noteworthy that where different agencies regulate television and radio, a general statute is often applied across the industry as a preamble to more specific statutory regulation. In the United Kingdom, for example, the Broadcasting Act (1996) establishes the Radio Authority and the Independent Television Commission as the primary regulators of radio and television, respectively.

Some African countries have confusing structures for legislating broadcasting. For example, the Namibian broadcasting industry is subject to the Radio Act (1952), the Broadcasting Act (1991), and the Namibian Communications Commission (1992 & 1995). In Tanzania, several laws govern media operation, namely, the Newspaper Act (1976), Tanzania News Agency Act (1976 & 1992), the Radio Tanzania Act (1965), the Broadcasting Services Act (1993), and the Tanzania Telecommunications Act. In Kenya, the Book and Newspapers Act, the Films and Stage Plays Act, the Defamation Act, and the Copyright's Act work in tandem with the Kenya Broadcasting Act and the Kenya Communications Act. Streamlining such legislation to eliminate bottlenecks and inefficiencies is critical for the growth and development of broadcasting.

While some form of regulation of local content is always deemed necessary[iii], some observers support voluntary regulation as the most practical and efficient. Such self-regulation utilises independently appointed councils with mandate to set content guidelines, and run a complaints and sanctions system. Voluntary regulation is preferred because it gives broadcasters flexibility to develop strategies consistent with the growing multiplicity of broadcast media. For example, until 2000, Australia employed a voluntary system that required pay television to spend at least 10% of their programme budgets on local content. Proponents also argue that voluntary regulation is critical because of the declining distinctions between electronic and non-electronic media.

A competing argument calls for statutory regulation of media content primarily due to the growing commercialisation and global nature of media industries. Proponents emphasise media's increasing response to profit motives, the increased global nature of many media products, and the transnational (supranational in cases) nature of media organisations like CNN, BBC, Multichoice, and the SABC. Referring to studies showing that broadcast media are highly pervasive and influential, this school of thought considers it essential to maintain strong regulation on media content. At the very least, the school argues, a consistent statutory regulation should support any form of voluntary regulation.

Like voluntary regulation, statutory regulation comprises content guidelines, and a highly enforceable complaints and sanctions system. In the Gambia, for example, the National Media Commission Act (2002) sets standards for local content as well as considers and determines complaints against media personnel or institutions regarding content. Local content rules are difficult to design and implement primarily because they are expected to cover broad spectrum of qualitative and quantitative aspects of programming. Quantitative aspects are generally those that stipulate specific proportions of air time over a performance period to be devoted to local content. Performance periods are blocks of time during which the broadcaster is considered as having significant audiences for rating or regulation purposes. For example, in Australia, a single performance period is 6am to midnight. Many countries use hourly, weekly and/or annual basis as measures of performance periods. Different quantitative requirements on local content may be stipulated for public and private broadcasters, depending on how the extent to which each depends on advertising and general public expectations on them as sources of news, information and entertainment. On the other hand, qualitative aspects are those based on cultural, linguistic, gender, demographic, and other related values. For example, South Africa, Canada and Australia all have qualitative regulations on drama, films, children's programming, news, talk shows, music videos, etc. Today, most regulations attempt to regulate these two broad categories, albeit with varying degrees of success.

One common regulation strategy is the establishment of multi-level tier structure, with the basic tiers supporting general standards across all broadcast content and the higher tiers supporting the more specific standards. The general standards primarily include employment of local human capital, namely, use of local personnel for management, production, and programme financing. For example, for programming to

qualify as local content the ICASA Act (2000) of South Africa requires that:

- Programme directors and writers be South African citizens or permanent residents
- 50% of leading actors, 75% of supporting cast, 50% of crew be South African citizens or permanent residents
- Post-production be wholly done in South Africa
- 50% of financing should come from within South Africa

One clear disadvantage in these requirements is that they assume an abundant supply of appropriately skilled manpower, and availability of production technology and financing. It is noteworthy that in February 2002, ICASA moved to seek the requirements on post-production and financing, arguing that they discouraged investments and international collaborations among the country's broadcast production industry. ICASA proposes to lower the minimum South African financial contribution to 20%, and only require the utilisation of South Africans as key personnel in post-production.

Another disadvantage is the difficulty of monitoring and enforcing these requirements. A pool of skilled assessors is required, as well as a highly efficient mechanism of conducting regular independent checks and follow-ups. As such, most regulatory agencies do not enforce these requirements and rely on data and information supplied by broadcasters. Beyond the basic tier system, more specific regulations are designed for current affairs, talk shows, dramas, and children's programming. The criteria for developing these additional tiers are premised upon the need for broadcast programming to inform and educate audiences.

A second strategy is to allocate local content quotas that broadcasters must meet as part of their license conditions. Quotas are designed to improve both the quantity and balance of local content in the general broadcast offerings. Some quota allocation strategies include reruns of local productions. In almost all cases, quota strategies offer broadcasters a period within which to satisfy local quota conditions. South Africa and Zimbabwe have some of the most elaborate local content regulations stipulated in broadcasting Acts, and in the case of South Africa, in the license conditions of all broadcasters including the public broadcaster, privately owned radio and television stations and community radio stations.

# Issues in Local Content of Broadcast Media

Different broadcast licenses and license conditions are subject to different quotas. For example, public service broadcasters have different quota allocations from community television stations, commercial free-to-air television, and subscription television. Similarly, public service radio and commercial radio are often required to maintain different minimum quotas. As earlier stated, different minimum are used to reflect the extent to which a particular broadcaster is expected to rely on advertising as the primary source of revenue, as well as the particular broadcaster's role in public information, education and entertainment.

Studies of local content quotas around the world review mixed patterns. First, local content requirements for public service broadcasters are often considerably higher than commercial broadcasters. In South Africa, for example, public television should have at least 55% local content, while commercial free-to-air televisions are required to have 30%. Subscription television operators are required to have 8% local content. Public and community radio stations should have at least 40% local content, while private commercial stations should have at least 25%. In 2002, these quotas were being revised upwards. In Canada, public service broadcasters must meet a 60% minimum requirement for local content, while pay and speciality TV operators are mostly expected to offer at 20% of output as local content.

Second, local content quotas for commercial free-to-air television and commercial radio are generally at the same levels in many countries. For example, this is the case for South Africa (30% and 25%), Canada (30% and 35%), Bulgaria (both at 50%) and Malaysia (both at 80%).

Third, there does not appear to be any peculiar pattern across countries on the level of local content quotas imposed. For example, Portugal, Poland and South Africa require 30% of local content for commercial free-to-air television operators. South Korea, Latvia and Malaysia demand at least 80% of local content, while Zimbabwe demands 75%. The exception is a number of European Union countries that demand that a major portion of the "local" content be generally sourced from the Union. In practice, this implies that broadcasters have a bigger field from which to draw local content. This minimises short-term problem of securing content to meet minimum quotas. The regulations are likely to boost EU productions considerably, and in the process create a vibrant regional broadcast content production capability. This is a useful model for African countries, especially because many lack the infrastructure to produce significant amounts of local broadcast content.

# Challenges to Local Content Regulation

Many issues confound attempts to regulate local content. These challenges may be generally categorised as administrative, economic and ideological. Administrative challenges involve the ability of regulators to design and implement effective monitoring systems for local content. As has been demonstrated in South Africa and Malaysia, a dearth of human and infrastructural resources may force regulators to rely on updates supplied by broadcasting operators. Incidents of misreporting have been identified in the some countries. This greatly attenuates the regulators' ability to enforce strict guidelines or to apply sanctions. There is little that can be done to have effective regulation outside of creating large, bureaucratic inspection system. However, media analysts have in the past proposed the use of professional media associations – representing some of the major beneficiaries of local content regulations – in enforcing regulation.

Use of performance periods is common in the design of monitoring methodology. For example, in Australia, Canada and South Africa, local content regulations require radio stations to spread their minimum local content quotas evenly during the daily performance period (0500hours – 2300 hours). In South Africa, commercial radio stations keep daily logs detailing all music broadcast during the performance period, and submit them to the regulator four times annually. Public service stations and community broadcasters have simpler content reporting schedules.[iv] While these systems are criticised for being open to abuse, they could be improved by co-opting new stakeholders (for example, media workers) into the monitoring, reporting and enforcing. A number of electronic monitoring systems are in use in Europe and North America, but are expensive and their efficacy in capturing the entire repertoire of local music questionable.

The cost of producing local content is a factor that policymakers constantly overlook. In South Africa, local television production productions cost more than R3 000 (US$300) per minute. Production costs are even higher in other African countries where production activities are relatively less developed. In countries like Zimbabwe, where the local content quotas have been set at 75%, the annual cost of churning out local content is estimated by industry pundits at nearly US$60 million (based on a performance period of Noon to Midnight). Aside from the inhibitive costs, the initiative would employ literary tens of thousands of

technical and other personnel. Notably, the cost of local productions becomes highly contentious when broadcasters turn to cheap imported content. For instance, South African regulators estimate that overseas-sourced programmes costs US$30 per minute or one sixth of the cost of a local production.

There are numerous ways to circumvent the challenge of human and financial resources. First, policymakers often introduce local content quotas gradually, allowing broadcasters and other content producers time to gather prerequisite resources to support local production endeavours. For example, South Africa's policy gave the existing public television broadcaster five years within which to attain 50% local content. New public and commercial free-to-air broadcasters get 18 months and 24 months, respectively, to have at least 20% local content. Hungary gave television stations three years to grow local content from at least 15% to 20%, while Macedonia demands that all broadcasters increase local content from 20% to 40% over the same period. Another way is to recognise reruns of local programmes. For example, the Independent Communications Authority of South Africa (ICASA), notes that first repeats of local programmes count only half of a first-time screening, and further repeats count for nothing.[v]

The contemporaneous globalisation of trade and communications poses two major challenges. First, use of local content rules is under assault from international trade pacts such as the General Agreement on Trade and Tariffs (GATT), the World Trade Organisation, and a variety of regional pacts e.g. the European Union and the North American Free Trade Association (NAFTA). Generally, these agreements require ratifying countries to scrap tariffs on a wide range of specified locally-produced products, and to desist from engaging in trade protectionist policies such as export compensation, production subsidies or express market quota allocations. While many of these agreements were drafted with industrial production and manufacturing as their main focus, audiovisual services have recently been enjoined in the list of contentious products. For example, bilateral trade obligations forced Australia in 1999 to extend quota benefits enjoyed by Australian producers to New Zealand's film and television industry. Similarly, Indian producers are lobbying WTO to intervene in their quest to penetrate US television and movie markets. Under such circumstances, how can policy makers ensure that local content policy does not contradict trade agreements allowing importation of goods including media and entertainment goods? What if

the other country treated it as a free trade issue and actually threatened economic reprisals if the local content policy was upheld? In Africa, it is unclear whether any bilateral or regional agreements include the provision of full market access in the area of audio-visual services.

One way African countries could deal with this challenge is to set content quotas that recognised regional content as 'local' content. Setting up regional guidelines is especially possible for countries with a common language, for example, English, French, Arabic, Swahili or Hausa. Such regional content quotas could encourage exchange of programming, creating diversity, choice and cultural exchange. It is noteworthy that regional policies on local content are already in place in many European countries, including the Netherlands, Bulgaria, Romania and Slovenia (50% European broadcast productions for all commercial radio and TV). France requires up to 60% of television productions to be of European origin, while Spain demands that 50% of films broadcast be Spanish or European.

The second challenge produced by globalisation is that local broadcast industries are made to comply with content rules that do not apply to its main competitors, namely, transglobal satellite stations, print media and the Internet. The ongoing convergence of global communication systems implies that non-broadcast media is now able to provide audio-visual services that compete with radio and television but are not subject to the same legislation. For example, Internet radio and television operators as well as transglobal satellite stations are redefining broadcasting and offering significant competition to radio and television, but are so far not subject to any content or even licence regulations. Print media, which have also found new ways of marketing themselves in this age of multimedia platforms, have intensified their challenge to traditional broadcast media. Some analysts have called for the removal of regulations that render broadcasters uncompetitive against the wave of new challengers.

# Advocacy Issues in Local Content

The unresolved debate on local content opens up multiple avenues for media advocacy. First, a number of existing or proposed regulations curtail personal freedoms of expression and opinion, and unduly interfere with editorial independence. For example, The Gambia's National Media

Commission Act (2002) gives regulators wide-ranging powers to receive and determine complaints over media content as well as administer sanctions. Legislation that specifically demands media content to reflect national cultures and opinions inherently compromises people's cultural rights. In Kenya, the Books and Newspapers Act (2002) establishes a media council to adjudicate on complaints and administer sanctions to media professionals and organisations. In Zimbabwe, the Access to Information and Protection of Privacy Act (2002) lays down stringent conditions and sanctions for media organisations and journalists, a number of which infringe upon freedom of expression and freedom of the press.

Advocacy groups serving the African media should seek clarification on all regulations pertaining to local content and broadcasting activities. Such rules need to be clear, well documented, and easily interpreted. In addition, the groups should demand transparency so that broadcast regulation business is conducted in the public domain. Use of public domain here should include public hearings, open courts and open judgments. In all dealings, the regulator must remain accountable to all stakeholders and to the public interest principles enunciated earlier.

To achieve high levels of transparency and accountability, local content regulators must be independent from both government and media industry influence. One way of ensuring this would be have all stakeholders represented in the regulators' composition. Moreover, the content regulator actions must always be consistent with national laws and international statutes of human rights and civil societies. Advocacy groups should lobby the African Union to adopt African Charter on Broadcasting (2002) and for African countries to ratify the Charter to facilitate its operation and enforcement. African countries should also ratify other continental and international charters and protocols that recognise Africa's right to produce media that is relevant to its audiences and reflects the continent's rich cultural diversity.

Advocacy may happen in three steps. First, national, regional and international groups operating in Africa should commission studies to establish the extent to which African countries recognise local content as an issue requiring substantive regulation. The next step should comprise aggressive campaigns among media policy makers and the African publics on the need to need to introduce and promote local content regulations. Such campaigns must include engagements with the local broadcast operators with a view to raising public awareness on the

ideological, economic and moral rationale for regulating local content. Such engagements could be in the form of public debates, information campaigns, lectures, and symposia. Considering the dearth of local content information especially that pertaining to broadcast media, advocacy groups should also endeavour to add to the knowledge base through additional research as well as through interaction and exchange of relevant information between Africa and the rest of the world.

Short-term problems in human and technological capacity may be addressed by encouraging regional and continental indigenous programming exchange. However, such initiatives will best succeed if supported by local and regional professional media associations. Such organisations are already active in all regions of Africa and include the Media Institute of Southern Africa (MISA), Media Foundation for West Africa (MFWA), Eastern African Media Institute (EAMI), Uganda Media Women's Association (UMWA), Southern Africa Communications for Development (SACOD), Kenya Community Media Network (KCOMNET), Association Pour la Femmes et la Communication Alternative (Altercom), African Women Development Communication Network (FEMNET), World Association of Community Radio Broadcasters (WACRB), International Women's Media Foundation (IWMF), African Women's Media Center (AWMC), etc.

# Conclusion

It is important for African countries to design and implement some policy on local content for their respective broadcast industries. In a number of countries, broadcasting regulators already aim to have local content dominate all media genres within a stated time frame. Examples abound of countries whose local productions have achieved global popularity primarily because of the support on the home front. In the same vein, it is appreciated that institutionalising local content requires a large resource outlay that many African countries presently lack. The most feasible solutions involve setting quotas that rise gradually to the desired levels, guided by a combination of legislated and voluntary policies. Such quotas must reasonably fit such specific local nuances as sophistication of the broadcast industry, availability of funds for content producers, and the regulator's ability to effectively monitor such programming.

In all instances, the introduction of local content rules should not culminate in loss of media freedom or other individual and institutional freedoms guaranteed by national laws and international conventions. Local content rules must promote pluralism of opinion and diversity, as well as promote impartiality in political, social, cultural and religious discourses. The rules should be implemented through appropriate legal means. Such means must include establishment of an open and transparent system of broadcast licensing, monitoring and regulation. In addition, the system should be overseen by an independent regulatory institution, whose inception must be the product of broad-based consultation and engagement between all stakeholders in the broadcast media sector.

Finally, local content rules should take into account the human and technological capacities of the country or region. This will ensure that such rules are realistic, achievable, and sensitive to such special categories as community broadcasters. In tandem, the implementation of such rules should be progressive in order to give all stakeholders time to comply with the new requirements. Such flexibility is essential for the promotion of the sector's stability and viability.

# References

Canada's Broadcasting Act (1991)
Tanzania's Broadcasting Services Act (1993)
Britain's Broadcasting Act (1990 and 1996)
Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR), African Charter on Human and People's Rights (the Banjul Charter), the European Convention on Human Rights (ECHR), and the Inter-American Convention on Human Rights (IACHR).
South Africa's Bill of Rights
The Banjul Charter
Namibia's Radio Act (1952),the Broadcasting Act (1991), and the Namibian Communications Commission (1992 & 1995).
Tanzania's In Tanzania, several laws govern media operation, namely, the Newspaper Act (1976), Tanzania News Agency Act (1976 & 1992), the Radio Tanzania Act (1965), the Broadcasting Services Act (1993), and the

Tanzania Telecommunications Act.
Kenya's In Kenya, the Book and Newspapers Act, the Films and Stage Plays Act, the Defamation Act, and the Copyright's Act work in tandem with the Kenya Broadcasting Act and the Kenya Communications Act.
The Gambia's National Media Commission Act (2002)
South Africa's ICASA Act (2000)
General Agreement on Trade and Tariffs (GATT)
**Zimbabwe's** Access to Information and Protection of Privacy Act (2002)
African Union to adopt African Charter on Broadcasting (2002)

## End notes

[i] It is however noteworthy that local content is not necessary defined by political boundaries. In numerous European countries, local content is conceptualised to include products from countries with common language and culture.

[ii] Indeed, there are unique features of African radio, television, and telecommunications that call for separate legislation and regulatory agencies.

[iii] No level of media penetration or sophistication precludes the need for content regulation. Indeed, the United States and the UK are classic examples of countries battling to tighten content legislation in light of technological advances in satellite broadcasting and Internet communications.

[iv] ICASA concedes that a high volume of paperwork is generated by this system, and monitoring is generally problematic. Moreover, it is difficult to implement spot checks and the regulator relies on the honesty of broadcasters' logs.

[v] In 2001, repeats assisted the South African Broadcasting Corporation (SABC) in complying with the regulators' minimum requirement of 50% local content for public service broadcasters.

# Annex 1

# ACCESS TO THE AIRWAVES
# Principles on Freedom of Expression and Broadcast Regulation

## Acknowledgements

These Principles were drafted by Toby Mendel, Head of ARTICLE 19's Law Programme. They are the product of a long process of study, analysis and consultation overseen by ARTICLE 19 and drawing on extensive experience and work with partner organisations in many countries around the world.

These Principles elaborate a set of standards on how to promote and protect independent broadcasting and yet ensure that broadcasting serves the interests of the public. They address the complex issue of how to regulate in the public interest and yet prevent that regulation from becoming a means of government control. They also address the need for regulators to prevent commercial interests from becoming excessively dominant and to ensure that broadcasting serves the interests of the public as a whole.

These Principles are part of ARTICLE 19's International Standards Series, an ongoing effort to elaborate in greater detail the implications of freedom of expression in different thematic areas. They are intended to be used by campaigners, broadcasters, lawyers, judges, elected representatives and public officials in their efforts to promote a vibrant, independent broadcasting sector that serves all regions and groups in society.

## Background

These Principles set out standards for broadcast freedom. They apply to specific regimes for the regulation of broadcasting but also apply more generally to State and even private action in this area and the overall legal framework for freedom of expression. They recognise both the need for

independent broadcasting, free of government or commercial interference, and the need in some areas for positive action to ensure a vibrant, diverse broadcasting sector.

These Principles are based on international and regional law and standards, evolving state practice (as reflected, *inter alia*, in national laws and judgments of national courts) and the general principles of law recognised by the community of nations. They are the product of a long process of study, analysis and consultation overseen by ARTICLE 19, drawing on extensive experience and work with partner organisations in many countries around the world.

# Section 1   General Principles

*Principle 1: The Right to Freedom of Expression and Information*

1.1   Everyone has the right to freedom of expression, which includes the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, orally, in print, in the form of art, through the broadcast media or through any other media of his or her choice.

1.2   The right to freedom of expression includes both the right of broadcasters to be free of State, political or commercial interference and the right of the public to maximum diversity of information and ideas in broadcasting.

1.3   Broadcast content should never be subject to prior censorship either by the government or by regulatory bodies. Any sanctions for breach of regulatory rules relating to content should be applied only after the material in question has been broadcast.

*Principle 2: Editorial Independence*

2.1   The principle of editorial independence, whereby programming decisions are made by broadcasters on the basis of professional criteria and the public's right to know, should be guaranteed by law and respected in practice. It should be up to broadcasters, not the government, regulatory bodies or commercial entities, to make

decisions about what to broadcast, subject to Sections 6 (Content Issues) and 9 (Election Coverage).

2.2 This Principle protects both general editorial policy (it is not legitimate, for example, to prescribe how broadcasters should report on war or to require them to promote a certain economic model) and specific editorial decisions.

2.3 Broadcasters should never, subject to Principle 31 (Direct Access Political Broadcasts), be required to carry specific broadcasts on behalf of, or to allocate broadcasting time to, the government.

*Principle 3: Promoting Diversity*

3.1 Diversity implies pluralism of broadcasting organisations, of ownership of those organisations, and of voices, viewpoints and languages within broadcast programming as a whole. In particular, diversity implies the existence of a wide range of independent broadcasters and programming that represents and reflects society as a whole.

3.2 The State has an obligation to take positive measures to promote the growth and development of broadcasting, and to ensure that it takes place in a manner which ensures maximum diversity. It also has an obligation to refrain from imposing restrictions on broadcasters which unnecessarily limit the overall growth and development of the sector.

3.3 Effective measures should be put in place to prevent undue concentration, and to promote diversity, of ownership both within the broadcast sector and between broadcasting and other media sectors. Such measures should take into account the need for the broadcasting sector as a whole to develop and for broadcasting services to be economically viable.

*Principle 4: Emergency Measures*

The legal framework for broadcasting should not allow State actors to assume control of broadcasters – either over their equipment or their broadcasts – in an emergency. Should a genuine state of emergency arise which absolutely necessitates such measures,

special legislation can be passed at that time, to the extent strictly required by the exigencies of the situation, in accordance with international law.

*Principle 5: Liability for the Statements of Others*

Broadcasters should be protected against liability for the statements of others in the following circumstances:

• during a live broadcast where it would be unreasonable to expect the broadcaster to prevent transmission of the statement;

• where it is in the public interest for the statements to be broadcast, for example to demonstrate the existence of certain views in society, and the broadcaster does not adopt the statements;

• in the context of direct access political broadcasts (see Principle 31).

# Section 2   The Broadcasting Environment

*Principle 6: Universal Access*

6.1 The State should promote universal and affordable access to the means of communication and reception of broadcasting services, including telephones, the Internet and electricity, regardless of whether such services are provided by the public or private sectors. One idea in this regard is communication centres in libraries and other places to which the public has access.

6.2 The State should take measures to ensure maximum geographical reach of broadcasting, including through the development of transmission systems. Access to publicly owned transmission systems should, subject to capacity limits, be provided to all broadcasters at reasonable rates and on a non-discriminatory basis.

*Principle 7: Infrastructure*

7.1 The State should promote the necessary infrastructure for broadcast development, such as sufficient and constant electricity supply and access to adequate telecommunications services.

7.2 A special effort should be made to ensure that broadcasters can take advantage of modern information technologies, such as the Internet, and satellite and digital broadcasting.

*Principle 8: Economic Environment*

The State should promote a general economic environment in which broadcasting can flourish. Whether or not specific measures are required will depend on the context but any measures adopted should be fair, transparent and non-discriminatory. Measures may include:

• putting in place preferential tax, import duty and tariff regimes for broadcasters and for the purchase of receiving equipment (such as radios and televisions);

• reducing direct levies on broadcasters, for example through a low licence fee regime and preferential terms of access to the national transmission system; and

• providing adequate training opportunities.

# Section 3   Frequencies

*Principle 9: Frequency Planning*

9.1 Decision-making processes at all levels, international and national, about the allocation of the frequency spectrum between all frequency users should be open and participatory, should involve bodies responsible for broadcast regulation, and should ensure that a fair proportion of the spectrum is allocated to broadcasting uses.

9.2 A process should be put in place to develop a frequency plan for those frequencies allocated to broadcasting (broadcasting frequencies), in order to promote their optimal use as a means of ensuring diversity. The process should be open and participatory, and should be overseen by a body that is protected against political and commercial interference. The frequency plan, once adopted, should be published and widely disseminated.

9.3 The frequency plan should ensure that the broadcasting frequencies are shared equitably and in the public interest among the three tiers

of broadcasting (public, commercial and community), the two types of broadcasters (radio and television) and broadcasters of different geographic reach (national, regional and local).

9.4  A frequency plan may provide that certain frequencies should be reserved for future use for specific categories of broadcasters in order to ensure diversity and equitable access to frequencies over time.

# Section 4   Regulatory and Complaints Bodies

*Principle 10: Independence*

All public bodies which exercise powers in the areas of broadcast and/or telecommunications regulation, including bodies which receive complaints from the public, should be protected against interference, particularly of a political or commercial nature. The legal status of these bodies should be clearly defined in law. Their institutional autonomy and independence should be guaranteed and protected by law, including in the following ways:

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

*Principle 11: Explicit Guarantee of Independence*

The independence of regulatory bodies, as well as a prohibition on interference with their activities and members, should be specifically and explicitly provided for in the legislation which establishes them and, if possible, also in the constitution. While there is no particular form of words that must be used for this purpose, the following is one way of guaranteeing independence:

The [name of body] shall enjoy operational and administrative autonomy from any other person or entity, including the government and any of its agencies. This autonomy shall be respected at all times and no person or entity shall seek to influence the members or staff of the [name of body] in the discharge of their duties, or to interfere with the activities of the [name of body], except as specifically provided for by law.

*Principle 12: Broadcast Policy*

Legislation establishing regulatory bodies should set out clearly the policy objectives underpinning broadcast regulation, which should include promoting respect for freedom of expression, diversity, accuracy and impartiality, and the free flow of information and ideas. Regulatory bodies should be required to take into consideration and to promote these policies in all their work, and to act in the public interest at all times.

*Principle 13: Membership*

13.1 Members of the governing bodies (boards) of public entities which exercise powers in the areas of broadcast and/or telecommunications regulation should be appointed in a manner which minimises the risk of political or commercial interference. The process for appointing members should be set out clearly in law. Members should serve in their individual capacity and exercise their functions at all times in the public interest.

13.2 The process for appointing members should be open and democratic, should not be dominated by any particular political party or commercial interest, and should allow for public participation and consultation. Only individuals who have relevant expertise and/or experience should be eligible for appointment. Membership overall should be required to be reasonably representative of society as a whole.

13.3 The following exclusions or 'rules of incompatibility' should apply. No one should be appointed who:

- is employed in the civil service or other branches of government;

- holds an official office in, or is an employee of a political party, or holds an elected or appointed position in government;

- holds a position in, receives payment from or has, directly or indirectly, significant financial interests in telecommunications or broadcasting; or

- has been convicted, after due process in accordance with internationally accepted legal principles, of a violent crime, and/or a crime of dishonesty unless five years has passed since the sentence was discharged.

13.4 Members should be appointed for a fixed term and be protected against dismissal prior to the end of this term. Only the appointing body should have the power to dismiss members and this power should be subject to judicial review. A member should not be subject to dismissal unless he or she:

- no longer meets the rules of incompatibility, as set out above;

- commits a serious violation of his or her responsibilities, as set out in law, including through a failure to discharge those responsibilities; or

- is clearly unable to perform his or her duties effectively.

13.5 The terms and conditions of membership, as well as the responsibilities of members, should be set out clearly in law. No other terms, conditions or responsibilities should apply. In particular, no minister or other government representative should have the power to impose terms, conditions or responsibilities on members. Neither individual members nor the body itself should receive instructions from any body other than the one that appointed the members.

13.6 The rules relating to payment and reimbursement of members should be set out clearly in law in a manner that does not allow for discretion in relation to individual members. Members should be prohibited from receiving any funds in connection with their functions as members other than those provided for by law.

13.7 The power to adopt internal rules, for example relating to meetings and quorum, should either be set out in law or vest in the regulatory body itself.

*Principle 14: Remit*

14.1 The powers and responsibilities of regulatory bodies, for example in relation to licensing or complaints, should be set out clearly in the legislation which establishes them, and these powers and responsibilities should not be subject to change other than through amendment of the relevant legislation. These powers and responsibilities should be framed in such a way that regulatory bodies have some scope to ensure that the broadcasting sector functions in a fair, pluralistic and smooth manner and to set standards and rules in their areas of competence, given the complexity of these tasks and the likelihood of unforeseen issues.

14.2 The law should provide explicitly for clear, transparent and fair processes in relation to all powers exercised by regulatory bodies which affect individual broadcasters, either existing or prospective. All decisions should be subject to the principles of administrative justice and be accompanied by written reasons.

*Principle 15: Accountability*

15.1 Regulatory bodies should be formally accountable to the public through a multi-party body, such as the legislature or a committee thereof, rather than a minister or other partisan individual or body. Regulatory bodies should be required by law to produce a detailed annual report on their activities and budgets, including audited accounts. This annual report should be published and widely disseminated.

15.2 All supervision of regulatory bodies should be exercised in relation to actions already taken (*a posteriori*) and should never have the purpose of trying to influence an individual decision.

*Principle 16: Judicial Review*

All decisions of regulatory bodies which affect individuals should be subject to judicial review.

*Principle 17: Funding*

17.1 Regulatory bodies should be adequately funded, taking into account their mandates, by a means that protects them from arbitrary interference with their budgets. The framework for funding and for decisions about funding should be set out clearly in law and follow a clearly defined plan rather than being dependent on *ad hoc* decision-making. Decisions about funding should be transparent and should be made only after consultation with the body affected.

17.2 Funding processes should never be used to influence decision-making by regulatory bodies.

# Section 5   Licensing

*Principle 18: Licence Requirement*

Broadcasters should be required to obtain a licence to operate, subject to the principles set out in this Section. For purposes of this requirement, broadcasters may be defined to include terrestrial, satellite and/or cable broadcasting, but not the Internet.

*Principle 19: Responsibility for Licensing*

19.1 All licensing processes and decisions should be overseen by an independent regulatory body that meets the conditions of independence set out in Section 4.

19.2 The responsible regulatory body should be required to issue licences in accordance with the frequency plan and in a manner which promotes diversity in broadcasting. Licences should be issued to all three tiers of broadcasting and to both types of broadcasters.

*Principle 20: Eligibility*

20.1 There should be no blanket prohibitions on awarding broadcasting licences to applicants based on either their form or nature, except in

relation to political parties, where a ban may be legitimate. In particular, applicants should not be required to have a particular legal form, such as incorporation. Nor should certain types of applicants, such as religious bodies, be subject to a blanket ban on receiving licences. Instead, the regulatory body should have the power to make licensing decisions on a case-by-case basis.

20.2 Restrictions may be imposed on the extent of foreign ownership and control over broadcasters but these restrictions should take into account the need for the broadcasting sector as a whole to develop and for broadcasting services to be economically viable.

*Principle 21: Licensing Processes*

21.1 The process for obtaining a broadcasting licence should be set out clearly and precisely in law. The process should be fair and transparent, include clear time limits within which decisions must be made and allow for effective public input and an opportunity for the applicant to be heard. It may involve either a call for tenders or *ad hoc* receipt by the licensing body of applications, depending on the situation, but where there is competition for limited frequencies, a tender process should be utilised.

21.2 Licence applications should be assessed according to clear criteria set out in advance in legal form (laws or regulations). The criteria should, as far as possible, be objective in nature, and should include promoting a wide range of viewpoints which fairly reflects the diversity of the population and preventing undue concentration of ownership, as well as an assessment of the financial and technical capacity of the applicant. No one should be required to pay in advance for a licence they have not yet received, although a reasonable administrative fee for processing applications may be charged.

21.3 Any refusal to issue a licence should be accompanied by written reasons and should be subject to judicial review.

21.4 Where licensees also need a broadcasting frequency, they should not have to go through a separate decision-making process to obtain this frequency; successful applicants should be guaranteed a frequency appropriate to their broadcasting licence.

21.5 Successful applicants should have the option of undertaking transmission themselves or of contracting transmission services.

*Principle 22: Licence Conditions*

22.1 Licences may contain certain terms and conditions. Terms and conditions may be general, set out in legal form (laws or regulations), or specific to an individual broadcaster. Normally, the information set out in the broadcasting application will form part of the licence terms and conditions. No terms and conditions should be imposed which are:

• not relevant to broadcasting; and

• do not serve the objectives of broadcast policy as set out in law.

Furthermore, any specific terms and conditions should be reasonable and realistic given the licensee.

22.2 Licensees should have the right to apply to amend their licence conditions. Any amendments imposed by the licensing body should be subject to the principles of administrative justice and meet the conditions of Principle 22.1.

22.3 Clear time limits on the duration of different types of broadcast licences should be set out in legal form. These time limits should be sufficient to give applicants a realistic opportunity to recoup their investment in both financial and human terms. The time limits for licences may differ depending on the tier and type of broadcaster.

22.4 Licensees may be charged a licence fee but this should not be excessive taking into account the development of the sector, the competition for licences and general considerations of commercial viability. Fees for different types of licences should be set out in advance, according to a schedule.

22.5 Licensees should benefit from a presumption of licence renewal, although this may be overcome for public interest reasons or where the licensee has substantially failed to comply with the licence terms and conditions. Licence renewal may also provide an opportunity for both the licensee and the regulator to review licence conditions. Any refusal to renew a licence should be accompanied by written reasons.

# Section 6   Content Issues

*Principle 23: Administrative Content Rules*

23.1 Broadcasting laws should not impose content restrictions of a civil or criminal nature on broadcasters, over and above, or duplicating, those that apply to all forms of expression.

23.2 An administrative regime for the regulation of broadcast content, in accordance with the principles set out in this Section, may be legitimate. Where an effective self-regulatory system for addressing broadcasting content concerns is in place, an administrative system should not be imposed.

23.3 Any content rules should be developed in close consultation with broadcasters and other interested parties, and should be finalised only after public consultation. Agreed rules should be set out clearly and in detail in published form. The rules should take into account the different circumstances of the three tiers of broadcasting and the two types of broadcasters.

23.4 Responsibility for oversight of any content rules should be by a regulatory body that meets the conditions of independence set out in Section 4. It is preferable for a single body to apply content rules to all broadcasters.

*Principle 24: Positive Content Obligations*

24.1 Public broadcasters have a primary obligation to promote the public's right to know through a diversity of voices and perspectives in broadcasting and a wide range of broadcast material, in accordance with Principle 37 (Public Service Remit).

24.2 Subject to this Section, positive content obligations may be placed on commercial and community broadcasters but only where their purpose and effect is to promote broadcast diversity by enhancing the range of material available to the public. Such obligations are not legitimate where they have the effect of undermining broadcast development, for example because they are unrealistic or excessively onerous. Furthermore, such obligations should be sufficiently general in nature that they are politically neutral, clearly

define the type of material covered (so that there is no ambiguity), and not be excessively vague or general. Such obligations may be imposed, for example, in relation to local content and/or language(s), minority and children's programming, and news.

*Principle 25: Advertising*

25.1 The amount of advertising may be subject to overall limits but these should not be so stringent as to undermine the development and growth of the broadcasting sector as a whole. Agreements in some regions, such as the European Convention on Transfrontier Television, establish regional limits on advertising (in that case of 20%).

25.2 Public service broadcasters should be subject to fair competition rules in relation to any advertising they carry. In particular, they should not be allowed to take advantage of public funding to offer advertising at below market rates.

25.3 A separate administrative regime for regulating the content of advertising, in accordance with the principles set out in this Section, may be developed.

# Section 7   Sanctions

*Principle 26: Process for Applying Sanctions*

Sanctions should never be imposed on individual broadcasters except in case of a breach of a clear legal requirement or licence condition and after a fair and open process which ensures that the broadcaster has an adequate opportunity to make representations. Sanctions should be imposed only by a body which meets the conditions of independence set out in Section 4. Sanction decisions should be published and made widely available.

*Principle 27: Proportionality*

27.1 A range of sanctions should be available to regulatory bodies. Sanctions should always be strictly proportionate to the harm

caused. In assessing the type of sanction to impose, regulatory bodies should keep in mind that the purpose of regulation is not primarily to 'police' broadcasters but rather to protect the public interest by ensuring that the sector operates smoothly and by promoting diverse, quality broadcasting.

27.2 In most cases sanctions, particularly for breach of a rule relating to content, should be applied in a graduated fashion. Normally, the sanction for an initial breach will be a warning stating the nature of the breach and not to repeat it. Conditions should be placed on the application of more serious sanctions – such as fines and suspension or revocation of a licence – for breach of a rule relating to content. In such cases fines should be imposed only after other measures have failed to redress the problem, and suspension and/or revocation of a licence should not be imposed unless the broadcaster has repeatedly been found to have committed gross abuses and other sanctions have proved inadequate to redress the problem.

27.3 Broadcasters should have a right to appeal to the courts for judicial review of the imposition of any serious sanctions.

# Section 8   Access to State Resources

*Principle 28: Non-discrimination*

28.1 Access to State resources, including the placement of State advertisements, should always be provided in a fair and non-discriminatory manner, subject to Principle 36 (Funding Public Broadcasters).

28.2 The provision of information by officials to the media should not discriminate between public, commercial and community broadcasters.

28.3 Any public funding for commercial and/or community broadcasters should serve the goal of promoting diversity. Allocation of funds should be on the basis of clear criteria set out in advance, and should be undertaken by a regulatory body that meets the conditions of independence set out in Section 4.

# Section 9   Election Coverage

*Principle 29: Adequate Public Information*

29.1 States have an obligation to ensure that the public receive adequate information during an election, including through broadcasting, about how to vote, the platforms of political parties and candidates, campaign issues and other matters of relevance to the election. Such information should be made available through news and current affairs programmes, special election programmes, direct access political broadcasts and, where allowed, commercial political advertisements.

29.2 Public broadcasters have a primary obligation in this regard but obligations may also be placed on commercial and/or community broadcasters, in accordance with this Section, provided that these obligations are not excessively onerous.

29.3 Broadcasters should be required to ensure that all election coverage is fair, equitable and non-discriminatory (see Principle 31.1).

29.4 Any obligations regarding election broadcasting should be overseen by a regulatory body that meets the conditions of independence set out in Section 4.

*Principle 30: Voter Education*

States are required to ensure that voters understand the technicalities of voting, including how, when and where to register and to vote, their right to choose candidates freely and by secret ballot, and the importance of voting. Where this is not already provided for in other ways, public broadcasters should carry voter education programmes. Commercial and/or community broadcasters may also be required to carry voter education programmes.

*Principle 31: Direct Access Political Broadcasts*

31.1 Public broadcasters should be required to grant political parties and/or candidates direct access airtime, on a fair, equitable and non-discriminatory basis, for political broadcasts. Commercial and/or

community broadcasters may also be required to grant parties and/or candidates direct access airtime for political broadcasts. The term 'fair, equitable and non-discriminatory' applies to the amount of airtime granted, the scheduling of the broadcasts and any charges levied. Public broadcasters should, and commercial/community broadcasters may, be required to provide technical assistance to parties and candidates for purposes of production of direct access political broadcasts.

31.2 Broadcasters should not be allowed to refuse to carry obligatory direct access political broadcasts unless they clearly and seriously breach a legal obligation. At the same time, broadcasters should be protected against legal liability for direct access political broadcasts, in accordance with Principle 5.

*Principle 32: Commercial Political Advertisements*

Where parties and candidates are permitted to purchase broadcast time to air political advertisements, broadcasters should be required to make such time available on an equal, non-discriminatory basis to all parties and candidates.

*Principle 33: Rapid Redress*

The body responsible for overseeing election broadcast obligations should ensure that prompt redress is available to parties and candidates for election-related violations, including in response to complaints. The oversight body should, in this context, have the power to impose a range of remedies including requiring the offending broadcaster to carry a correction, retraction or reply. The decisions of this body should be subject to judicial review.

# Section 10 Public Service Broadcasters

*Principle 34: Transformation of State/Government Broadcasters*

Where State or government broadcasters exist, they should be transformed into public service broadcasters, in accordance with this Section.

*Principle 35: Independence*

35.1 Public broadcasters should be overseen by an independent body, such as a Board of Governors. The institutional autonomy and independence of this body should be ensured in the same way as for regulatory bodies, in accordance with Section 4. In particular, independence should be guaranteed and protected by law in the following ways:

- specifically and explicitly in the legislation which establishes the body and, if possible, also in the constitution;
- by a clear legislative statement of goals, powers and responsibilities;
- through the rules relating to appointment of members;
- through formal accountability to the public through a multi-party body;
- by respect for editorial independence; and
- in funding arrangements.

35.2 The governing body should be responsible for appointing the senior management of public broadcasters and management should be accountable only to this body which, in turn, should be accountable to an elected multi-party body. The appointments process for senior management should be open and fair, individuals should be required to have appropriate qualifications and/or experience, and the rules of incompatibility for regulatory bodies, as set out in Principle 13.3, should also apply to senior management. Individual members of management should have a right to written reasons for any serious disciplinary action against them, including dismissal, and to judicial review of such actions.

35.3 The role of the governing body should be set out clearly in law. The role of the governing body should include ensuring that the public broadcaster fulfils its public mandate in an efficient manner and protecting the broadcaster against interference. The independent governing body should not interfere in day-to-day decision-making, particularly in relation to broadcast content, should respect the principle of editorial independence and should never impose prior censorship. Management should be responsible for running the

broadcaster on a day-to-day basis, including in relation to programming matters.

*Principle 36: Funding Public Broadcasters*

Public broadcasters should be adequately funded, taking into account their remit, by a means that protects them from arbitrary interference with their budgets, in accordance with Principle 17.

*Principle 37: Public Service Remit*

The remit of public broadcasters is closely linked to their public funding and should be defined clearly in law. Public broadcasters should be required to promote diversity in broadcasting in the overall public interest by providing a wide range of informational, educational, cultural and entertainment programming. Their remit should include, among other things, providing a service that:

- provides quality, independent programming that contributes to a plurality of opinions and an informed public;
- includes comprehensive news and current affairs programming, which is impartial, accurate and balanced;
- provides a wide range of broadcast material that strikes a balance between programming of wide appeal and specialised programmes that serve the needs of different audiences;
- is universally accessible and serves all the people and regions of the country, including minority groups;
- provides educational programmes and programmes directed towards children; and
- promotes local programme production, including through minimum quotas for original productions and material produced by independent producers.

# Annex 2

# AFRICAN CHARTER ON BROADCASTING

*Acknowledging* the enduring relevance and importance of the Windhoek Declaration to the protection and promotion of freedom of expression and of the media;

*Noting* that freedom of expression includes the right to communicate and access to means of communication;

*Mindful* of the fact that the Windhoek Declaration focuses on the print media and recalling Paragraph 17 of the Windhoek Declaration, which recommended that a similar seminar be convened to address the need for independence and pluralism in radio and television broadcasting;

*Recognising* that the political, economic and technological environment in which the Windhoek Declaration was adopted has changed significantly and that there is a need to complement and expand upon the original Declaration;

*Aware* of the existence of serious barriers to free, independent and pluralistic broadcasting and to the right to communicate through broadcasting in Africa;

*Cognisant of the fact* that for the vast majority of the peoples of Africa, the broadcast media remains the main source of public communication and information;

*Recalling* the fact that the frequency spectrum is a public resource, which must be managed in the public interest;

**We the Participants of Windhoek + 10 Declare that:**

# Part I: General Regulatory Issues

1.  The legal framework for broadcasting should include a clear statement of the principles underpinning broadcast regulation, including promoting respect for freedom of expression, diversity, and the free flow of information and ideas, as well as a three-tier system for broadcasting: public service, commercial and community.

2. All formal powers in the areas of broadcast and telecommunications regulation should be exercised by public authorities which are protected against interference, particularly of a political or economic nature, by, among other things, an appointments process for members which is open, transparent, involves the participation of civil society, and is not controlled by any particular political party.

3. Decision-making processes about the overall allocation of the frequency spectrum should be open and participatory, and ensure that a fair proportion of the spectrum is allocated to broadcasting uses.

4. The frequencies allocated to broadcasting should be shared equitably among the three tiers of broadcasting.

5. Licensing processes for the allocation of specific frequencies to individual broadcasters should be fair and transparent, and based on clear criteria which include promoting media diversity in ownership and content.

6. Broadcasters should be required to promote and develop local content, which should be defined to include African content, including through the introduction of minimum quotas.

7. States should promote an economic environment that facilitates the development of independent production and diversity in broadcasting.

8. The development of appropriate technology for the reception of broadcasting signals should be promoted.

# Part II: Public Service Broadcasting

1. All State and government controlled broadcasters should be transformed into public service broadcasters, that are accountable to all strata of the people as represented by an independent board, and that serve the overall public interest, avoiding one-sided reporting and programming in regard to religion, political belief, culture, race and gender.

2. Public service broadcasters should, like broadcasting and telecommunications regulators, be governed by bodies which are protected against interference.

3. The public service mandate of public service broadcasters should clearly defined.

4. The editorial independence of public service broadcasters should be guaranteed.

5. Public service broadcasters should be adequately funded in a manner that protects them from arbitrary interference with their budgets.

6. Without detracting from editorial control over news and current affairs content and in order to promote the development of independent productions and to enhance diversity in programming, public service broadcasters should be required to broadcast minimum quotas of material by independent producers.

7. The transmission infrastructure used by public service broadcasters should be made accessible to all broadcasters under reasonable and non-discriminatory terms.

# Part III: Community Broadcasting

1. Community broadcasting is broadcasting which is for, by and about the community, whose ownership and management is representative of the community, which pursues a social development agenda, and which is non-profit.

2. There should be a clear recognition, including by the international community, of the difference between decentralised public broadcasting and community broadcasting.

3. The right of community broadcasters to have access to the Internet, for the benefit of their respective communities, should be promoted.

# Part IV: Telecommunications and Convergence

1. The right to communicate includes access to telephones, email, Internet and other telecommunications systems, including through the promotion of community-controlled information communication technology centres.

2. Telecommunications law and policy should promote the goal of universal service and access, including through access clauses in privatisation and liberalisation processes, and proactive measures by the State.

3. The international community and African governments should mobilise resources for funding research to keep abreast of the rapidly changing media and technology landscape in Africa.

4. African governments should promote the development of online media and African content, including through the formulation of non-restrictive policies on new information and communications technologies.

5. Training of media practitioners in electronic communication, research and publishing skills needs to be supported and expanded, in order to promote access to, and dissemination of, global information.

# Part V: Implementation

1. UNESCO should distribute the African Charter on Broadcasting 2001 as broadly as possible, including to stakeholders and the general public, both in Africa and worldwide.

2. Media organisations and civil society in Africa are encouraged to use the Charter as a lobbying tool and as their starting point in the development of national and regional broadcasting policies. To this end media organisations and civil society are encouraged to initiate public awareness campaigns, to form coalitions on broadcasting reform, to formulate broadcasting policies, to develop specific models for regulatory bodies and public service broadcasting, and to lobby relevant official actors.

3. All debates about broadcasting should take into account the needs of the commercial broadcasting sector.

4. UNESCO should undertake an audit of the Charter every five years, given the pace of development in the broadcasting field.

5. UNESCO should raise with member governments the importance of broadcast productions being given special status and recognised as cultural goods under the World Trade Organisation rules.

6.   UNESCO should take measures to promote the inclusion of the theme of media, communications and development in an appropriate manner during the UN Summit on the Information Society in 2003.

# Annex 3

# AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS
## Declaration of Principles on Freedom of Expression in Africa

## Preamble

*Reaffirming* the fundamental importance of freedom of expression as an individual human right, as a cornerstone of democracy and as a means of ensuring respect for all human rights and freedoms;

*Reaffirming* Article 9 of the *African Charter on Human and Peoples' Rights;*

*Desiring* to promote the free flow of information and ideas and greater respect for freedom of expression;

*Convinced* that respect for freedom of expression, as well as the right of access to information held by public bodies and companies, will lead to greater public transparency and accountability, as well as to good governance and the strengthening of democracy;

*Convinced* that laws and customs that repress freedom of expression are a disservice to society;

*Recalling* that freedom of expression is a fundamental human right guaranteed by the *African Charter on Human and Peoples' Rights,* the *Universal Declaration of Human Rights* and the *International Covenant on Civil and Political Rights,* as well as other international documents and national constitutions;

*Considering* 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;

*Aware* of the particular importance of the broadcast media in Africa, given its capacity to reach a wide audience due to the comparatively low cost of receiving transmissions and its ability to overcome barriers of illiteracy;

*Noting* that oral traditions, which are rooted in African cultures, lend themselves particularly well to radio broadcasting;

*Noting* the important contribution that can be made to the realisation of the right to freedom of expression by new information and communication technologies;

*Mindful* of the evolving human rights and human development environment in Africa, especially in light of the adoption of the *Protocol to the African Charter on Human and Peoples' Rights on the establishment of an African Court on Human and Peoples' Rights,* the principles of the *Constitutive Act of the African Union,* 2000, as well as the significance of the human rights and good governance provisions in the New Partnership for Africa's Development (NEPAD); and

*Recognising* the need to ensure the right to freedom of expression in Africa, the African Commission on Human and Peoples' Rights declares that:

# 1. The Guarantee of Freedom of Expression

1.  Freedom of expression and information, including the right to seek, receive and impart information and ideas, either orally, in writing or in print, in the form of art, or through any other form of communication, including across frontiers, is a fundamental and inalienable human right and an indispensable component of democracy.

2.  Everyone shall have an equal opportunity to exercise the right to freedom of expression and to access information without discrimination.

# 2. Interference with Freedom of Expression

1.  No one shall be subject to arbitrary interference with his or her freedom of expression.

2. Any restrictions on freedom of expression shall be provided by law, serve a legitimate interest and be necessary and in a democratic society.

# 3. Diversity

Freedom of expression imposes an obligation on the authorities to take positive measures to promote diversity, which include among other things-:

- availability and promotion of a range of information and ideas to the public;

- pluralistic access to the media and other means of communication, including by vulnerable or marginalised groups, such as women, children and refugees, as well as linguistic and cultural groups;

- the promotion and protection of African voices, including through media in local languages; and

- the promotion of the use of local languages in public affairs, including in the courts.

# 4. Freedom of Information

1. Public bodies hold information not for themselves but as custodians of the public good and everyone has a right to access this information, subject only to clearly defined rules established by law.

2. The right to information shall be guaranteed by law in accordance with the following principles:

- everyone has the right to access information held by public bodies;

- everyone has the right to access information held by private bodies which is necessary for the exercise or protection of any right;

- any refusal to disclose information shall be subject to appeal to an independent body and/or the courts;

- public bodies shall be required, even in the absence of a request, actively to publish important information of significant public interest;

- no one shall be subject to any sanction for releasing in good faith information on wrongdoing, or that which would disclose a serious threat to health, safety or the environment save where the imposition of sanctions serves a legitimate interest and is necessary in a democratic society; and

- secrecy laws shall be amended as necessary to comply with freedom of information principles.

3. Everyone has the right to access and update or otherwise correct their personal information, whether it is held by public or by private bodies.


# 5. Private Broadcasting

1. States shall encourage a diverse, independent private broadcasting sector. A State monopoly over broadcasting is not compatible with the right to freedom of expression.

2. The broadcast regulatory system shall encourage private and community broadcasting in accordance with the following principles:

- there shall be equitable allocation of frequencies between private broadcasting uses, both commercial and community;

- an independent regulatory body shall be responsible for issuing broadcasting licences and for ensuring observance of licence conditions;

- licensing processes shall be fair and transparent, and shall seek to promote diversity in broadcasting; and

- community broadcasting shall be promoted given its potential to broaden access by poor and rural communities to the airwaves.

# 6. Public Broadcasting

State and government controlled broadcasters should be transformed into public service broadcasters, accountable to the public through the legislature rather than the government, in accordance with the following principles:

- 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;
- public broadcasters should strive to ensure that their transmission system covers the whole territory of the country; and
- the public service ambit of public broadcasters should be clearly defined and include an obligation to ensure that the public receive adequate, politically balanced information, particularly during election periods.

# 7. Regulatory Bodies for Broadcast and Telecommunications

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.

2. The appointments process for members of a regulatory body should be open and transparent, involve the participation of civil society, and shall not be controlled by any particular political party.

3. Any public authority that exercises powers in the areas of broadcast or telecommunications should be formally accountable to the public through a multi-party body.

# 8. Print Media

1.  Any registration system for the print media shall not impose substantive restrictions on the right to freedom of expression.

2.  Any print media published by a public authority should be protected adequately against undue political interference.

3.  Efforts should be made to increase the scope of circulation of the print media, particularly to rural communities.

4.  Media owners and media professionals shall be encouraged to reach agreements to guarantee editorial independence and to prevent commercial considerations from unduly influencing media content.

# 9. Complaints

1.  A public complaints system for print or broadcasting should be available in accordance with the following principles:

    *   complaints shall be determined in accordance with established rules and codes of conduct agreed between all stakeholders; and

    *   the complaints system shall be widely accessible.

2.  Any regulatory body established to hear complaints about media content, including media councils, shall be protected against political, economic or any other undue interference. Its powers shall be administrative in nature and it shall not seek to usurp the role of the courts.

3.  Effective self-regulation is the best system for promoting high standards in the media.

# 10. Promoting Professionalism

1.  Media practitioners shall be free to organise themselves into unions and associations.

2.  The right to express oneself through the media by practising journalism shall not be subject to undue legal restrictions.

# 11. Attacks on Media Practitioners

1.  Attacks such as the murder, kidnapping, intimidation of and threats to media practitioners and others exercising their right to freedom of expression, as well as the material destruction of communications facilities, undermines independent journalism, freedom of expression and the free flow of information to the public.

2.  States are under an obligation to take effective measures to prevent such attacks and, when they do occur, to investigate them, to punish perpetrators and to ensure that victims have access to effective remedies.

3.  In times of conflict, States shall respect the status of media practitioners as non-combatants.

# 12. Protecting Reputations

1.  States should ensure that their laws relating to defamation conform to the following standards:

    *   no one shall be found liable for true statements, opinions or statements regarding public figures which it was reasonable to make in the circumstances;

    *   public figures shall be required to tolerate a greater degree of criticism; and

    *   sanctions shall never be so severe as to inhibit the right to freedom of expression, including by others.

2.  Privacy laws shall not inhibit the dissemination of information of public interest.

# 13. Criminal Measures

1.  States shall review all criminal restrictions on content to ensure that they serve a legitimate interest in a democratic society.

2.  Freedom of expression should not be restricted on public order or national security grounds unless there is a real risk of harm to a legitimate interest and there is a close causal link between the risk of harm and the expression.

# 14. Economic Measures

1.  States shall promote a general economic environment in which the media can flourish.

2.  States shall not use their power over the placement of public advertising as a means to interfere with media content.

3.  States should adopt effective measures to avoid undue concentration of media ownership, although such measures shall not be so stringent that they inhibit the development of the media sector as a whole.

# 15. Protection of Sources and other journalistic material

Media practitioners shall not be required to reveal confidential sources of information or to disclose other material held for journalistic purposes except in accordance with the following principles:

*   the identity of the source is necessary for the investigation or prosecution of a serious crime, or the defence of a person accused of a criminal offence;

*   the information or similar information leading to the same result cannot be obtained elsewhere;

- the public interest in disclosure outweighs the harm to freedom of expression; and

- disclosure has been ordered by a court, after a full hearing.

# 16. Implementation

States Parties to the African Charter on Human and Peoples' Rights should make every effort to give practical effect to these principles.

**Adopted by the African Commission on Human and Peoples' Rights. October 2002.**

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# ARTICLE 19
## THE GLOBAL CAMPAIGN FOR FREE EXPRESSION

**ARTICLE 19** takes its name and purpose from Article 19 of the Universal Declaration of Human Rights.

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

**ARTICLE 19** works impartially and systematically to oppose censorship worldwide. We work on behalf of victims of censorship – individuals who are physically attacked, killed, unjustly imprisoned, restricted in their movements or dismissed from their jobs; print and broadcast media which are censored, banned or threatened; organizations, including political groups or trades unions, which are harassed, suppressed or silenced.

**ARTICLE 19**'s programme of research, publication, campaign and legal intervention addresses censorship in its many forms. We monitor individual countries' compliance with international standards protecting the right to freedom of expression and work at the governmental and inter-governmental level to promote greater respect for this fundamental right.

**ARTICLE 19** has established a growing international network of concerned individuals and organizations who promote awareness of censorship issues and take action on individual cases. We have a global law programme and regional programmes in Africa, Asia, Europe and the Middle East.

**ARTICLE 19** is a non-governmental organization, entirely dependent on donations (UK Charity No. 327421). For more information and subscription details please contact:

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# BROADCASTING POLICY AND PRACTICE IN AFRICA

'Broadcasting is by far the most important source of information, as well as of entertainment, for most people in countries around the world. High levels of illiteracy along with the difficulty of distributing newspapers mean that broadcasting is the only media which is accessible for many people. For the poor, newspapers may be prohibitively expensive, and some people simply find it easier and more enjoyable to watch or listen to the news than to read it. Furthermore, broadcasting plays a very important role as a cheap, accessible form of entertainment.

As a result of its centrality as a source of information and news, and its growing profitability, governments and dominant commercial interests have historically sought to control broadcasting. All too frequently, the public broadcaster operates largely as a mouthpiece of government rather than serving the public interest. In many countries, broadcasting was until recently a State monopoly, a situation which still pertains in some States. In other countries, private broadcasting is becoming increasingly important and a variety of mechanisms have been used to try to control it. Governments have exerted control through the licensing process while commercial interests have sought to monopolise the broadcasting sector and to focus on low-quality but profitable programming.'

**Access to the Airwaves, Principles on Freedom of Expression and Broadcast Regulation, ARTICLE 19.**

**XIX**

**ARTICLE 19**
GLOBAL CAMPAIGN FOR FREE EXPRESSION