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CENSORSHIP OR DEMOCRATIZATION? THE MEDIA REGULATION IN BRAZIL

ABSTRACT

This article aims to reflect on the project model of media regulation, mostly what is under discussion in Brazil, and especially how it is affected by the distribution of broadcasting concessions. The media regulation project proposes, among other topics, the economic regulation that attempts to control the formation of monopolies and oligopolies of communication groups in the country. The link between electronic media and political and economic groups mischaracterizes the pluralism of media and information that are the pillars of democratic societies. In this paper, we will discuss the concept of cross-ownership, which has no limitations in Brazil, and how a possible economic regulation will not constitute a type of programming or content censorship, but inspired by examples of regulation of other countries, would seek to fulfill its basic role as social interlocutor, with greater democratization of content and a greater plurality of information.

KEYWORDS

Media regulation; broadcasting concessions; radio and TV; Brazil

INTRODUCTION: THE MEDIA MODEL IN BRAZIL

The formation of monopolies, oligopolies and the concentration of mass media ownership in the hands of a few business groups first started with the distribution of public concessions to privately owned broadcasting groups that initially held the financial resources to develop the technology and those who were trusted and respected by the government, or who were allies of the president in Brazil. “Although the concession is public, it is used for private purposes, supporting a concentrated communication system that prevent the manifestation of diversity and plurality” (Informativo Intervozes, 2007, p. 3).

The regulatory project of broadcasting in Brazil was created almost entirely based on a private model. While in the United States, for example, the Federal Communications Commission (FCC) is responsible for regulating the transmission of sound signals since 1934, the attempt in Brazil to put into practice a similar law appeared only in 1962, when the Brazilian Telecommunications Code was approved (*Código Brasileiro de Telecomunicações – CBT*) numbered 4117, which is still in effect today, partially repealed by law 9.472/97, except the law about the provisions relating to broadcasting.

According Cassiano Ferreira Simões and Fernando Mattos (2005), although some of CBT's articles have a very State character, such as Article 10, Chapter III "it competes exclusively to the Union (the State) the direct exploitation (...) the telegraph public services, interstate telephone services and radio (...) including those of broadcasting" (Brazil, 2007, p. 86). Nevertheless, the CBT constitutes a private model of exploitation that did not prevent the country from the formation of monopolies. The main concern of the law was political, and not economic.

According to Simões and Mattos (2005, pp. 38-39), what can be noticed is that an essentially public service, such as the radio and the television, "is based on a largely liberal model, performed by the private sector and with a clear need for regulation in a country with statist tradition", where the regulatory model almost disappears even with the dual state personality of owner/regulator.

The CBT was created to regulate all types of electronic communication but, in 1997, the General Telecommunications Law, number 9472, removed the telephony services from the CBT. To Simões & Mattos (2005, p. 40) the creation of the General Law served to separate telecommunications from broadcasting. Such division demonstrated even more the lack of concern for the formation of monopolies in telecommunications and broadcasting in Brazil, where the cross-ownership is allowed due to a model created and developed to favour the large groups of communication, during and after the military regime. According to the authors, this was on the model on which the television and the radio in Brazil were built: "markedly inspired by liberal views, but without a regulation truly concerned with the best levels of taxation that would allow its development and defend its plurality". The authors conclude that the only concern when creating such laws was the maintenance of the control by the military and centralized governments in power.

The radio and television, when emerged, could be regulated as a strict public service under state control, which is the case of the Western

European countries, or as a public service under private exploitation, as in the United States – a country of strong economic foundations based on the capitalism, but where there was a concern about controlling the activity and operation of broadcasting through specific laws and regulations, the most relevant being the Communications Act of 1934, created in order to encourage competition and avoid monopolization (Ramos, 2005, p. 66).

On one hand, the model of regulation in the US is private based on the stimulation of competitiveness, able to generate three major chains which are the CBS, NBC and ABC. In Brazil, control only generated more concentration by the big media groups who maintained their power or generated other large, hegemonic and private groups which worked in agreement and closely linked to the official powers, the case of *Diários Associados* and *Rede Globo* (Simões & Mattos, 2005, p. 41).

André Deak and Daniel Merli, in the article “Owners of TVs and Radio stations, MPs disrespect the constitution” (Rolling Stones, 7th edition - April 2007) claim that there were

27 senators and 53 deputies who were business partners or related to owners of communication concessionaires of public service. It is important to highlight also that Article 54 of the Brazilian Federal Constitution of 1988 prohibits senators and deputies from “signing or maintaining contract with (...) public utility companies

risking the loss of the current mandate under Article 55, in case of no with the rules set by the previous article.

Despite the constitutional ban, 10% of federal deputies (53 of 513) legislating from 2007 to 2011, and 33.3% of Brazilian senators had concessions, that is, 27 of the 81 MPs. From those, 15 were in the Northeast, 5 in the North, 3 in the Southeast, 2 in the Midwest and the South. In the Northeast, only the state of Pernambuco had no senator owning broadcasting concessions.

In addition to the 53 deputies and 27 senators who were media owners, 40 of *Rede Globo*'s generators (a type of license given to media groups that allows them to produce content and to become affiliated to a nationwide network, for example, *Jangadeiro TV*, from the state of Ceará, creates content and is an affiliate of *Rede Globo*) are in the hands of politicians, as well as 705 television retransmitters (RTVs); In total, the numbers of concessions in the hands of politicians amount to 128 television generators and 1765 retransmitters. Of the 80 members of the Commission for Science, Technology, Communications and Informatics of the National Congress, at least 16 members are directly related to radio or TV. In 2004 alone,

10 deputies voted for the renewal of their own concessions. The most amazing numbers relate to the concessions for community radio. The Intervezes group (2007), estimates that half of the 2.205 permits given for this type of radio service between 1999 and 2004 are under the control of political groups and parties.

CROSS-OWNERSHIP WITHOUT LIMITS

Unlike other countries, Brazil does not legally prohibit the cross-ownership and there are not proper laws to limit cross-ownership, that is, the same group holding a newspaper, a radio station and a television station (open signal and closed) in the same city or state:

The cross-ownership refers to the fact that a single owner, individual or company, control different media sources - newspapers, magazines, radio AM, FM radio, television, cable TV, internet provider - in the same market, be it local, regional or national. (Lima & Rabelo, 2015)

In order to avoid cross-ownership and the concentration of media under the power of a few groups, countries like France, the United Kingdom and the United States have created specific rules intending to guarantee the society is not harmed by monopolies and oligopolies when providing such public service, even though some of these countries may have allowed the flexibilization of the law, as the United States did in 2007. There, the exception has been granted in accordance with the development of new technologies that led to some specific cases and places to be allowed to operate despite cross-ownership. In such cases, the audience of the TV channel and the number of independent media present in the same location must be taken into account. But this flexibility is for the twenty largest areas of the North American market, which has 210 areas in total, and only occurs if the network is amongst the 4 most watched and if there are another 8 independent media sources (Brant, 2011).

Brant (2011) points out two reasons, among others, to justify why it is necessary to control cross-ownership. The first is economic, which indicates that, as in all areas, the concentration of any industry in the hands of few business groups is harmful to society because it affects the costs and the quality of supply, and discourages innovation and competition. The second reason has more social aspects and takes into account the social function of mass media. "The media are the main area of circulation of ideas, values

and points of view, and therefore are the main sources for citizens in the daily process of exchanging information and culture”. Brant believes that the cross-ownership does not reflect the diversity and plurality of society and there is the risk of loss of certain views or values which may be deliberately not discussed by such media, which constitutes a threat to democracy.

MEDIA REGULATION IN OTHER COUNTRIES

The concern in establishing a media regulation project is a reality around the world, and despite the different scenarios and social and political contexts of each country, we can see that any attempt at media regulation aims to ensure greater control of communication groups in order to establish the democratic character of the social function of media.

In an article published in the *Observatório do Direito a Comunicação (Right to Communication Observatory)*, João Brant (2011), coordinator of the Intervozes – Social Communication Brazilian Group – explains that in France there are rules at local and national levels regarding the cross-ownership. For example, no person or group is allowed to own both a television/radio license and a general-circulation newspaper distributed in the same range as the TV and Radio. In the United Kingdom, no individuals or companies can be granted a license for Channel 3, which according to Brant is the second largest television network and the first among private networks, if they already hold one or more national newspapers that reach, together, 20% of the market share.

Luiza Bandeira, Alessandra Corrêa, Marcia Carmo e Cláudia Jardim (2014) make a brief comparison between the media regulatory projects in the United States, United Kingdom, Venezuela and Argentina.

The authors claim that in the United States, for example, the focus of the regulation project is economic, and the contents produced are controlled by the public opinion and the market itself, which means that there may be direct interference from the Judiciary in the case of transgressions. The cross-ownership is prohibited, the channels are required to broadcast a minimum of three hours per week of children’s educational programs and content considered “indecent” are subject to payment of fines and legal proceedings in court.

In the UK, recent scandals involving tabloids called for a review of legislation to curb abuses of the press. Therefore, for newspapers and magazines, the Press Recognition Panel was established in the end of 2014, aiming to be self-regulated and with the power to impose fines and demand

corrections and apologies. Membership is not mandatory but is encouraged through certain benefits. For radio and TV there is already another regulatory group, the Ofcom, responsible for protecting the population from offensive material or invasion of privacy, for example, and also responsible for radio, TV, Internet, telephone and postal services.

In Venezuela, as a result of a polarized political scenario, the coup and protests across the country, the focus of the media regulation project is the freedom of speech for the press. A law from 2005 – *Ley Resorte: Social Responsibility in Radio and Television* – was intended to promote press freedom especially for opposition to the government at the time of the President Hugo Chavez. Of course that, as legislators, owners of the concessions and responsible renewing such concessions, the government would still be able to use the available resources to reduce the presence of opponents in the media. Contents that “incite violence and public disorder” are not allowed, the channels are required to broadcast a minimum of 50% nationally produced content, the actual duration of the concessions was shortened and they could not be passed on hereditarily. Sanctions can range from loss of signal for up to 72 hours to revocation of the concession. In 2010 the new standards for Internet content are also included in the law.

In Argentina, the focus is the dispute between the media corporations and the government, especially in reference to the Clarín group and the Kitchners. In this country, since 2009, there is the *Ley de Medios* (Media Law) with rules for radio and TV stating, for example, that minimum of 60% of national production and 30% of local news programs be mandatory, plus the limitation of concessions and concession period, in order to democratize communication and encourage competition. This law mainly affected the Clarín group, which would need to give up more than half of their TV concessions throughout the country. The group has adapted voluntarily to some of the demands, and others are being discussed in the courts.

In Bolivia, according to Gilberto Maringoni & Verena Glass (2012) the *Ley General de telecomunicaciones, tecnologías de información y comunicación* (General Law for telecommunicatons, information technology and communications) announced in 2011 by President Evo Morales, has similar fundamentals to Argentina and Venezuela in the use of public concessions and limitations imposed on media groups, also intending for the democratization of the broadcasting services. In Bolivia specifically, the law also refers to public biddings for concessions granting and the distribution of frequencies in order to favour the “original people” of the country, which means a portion of the concessions should be allocated to indigenous peoples,

peasants and afro-bolivians, subjected to the evaluation of their projects for the use of the concession.

Also according to Maringoni & Glass (2012), despite the movement around a new regulatory framework in Brazil in 2009, and the creation of specific standards for pay-TV services, for example, the country remains without specific legislation on the matter:

In Brazil, where the National Telecommunications Code of 1962 is still valid, despite the existence of new standards - such as the Cable Law (1994) and the Pay-TV Law (2011) - there is no comprehensive regulation in this area. A significant portion of organized society (popular movements and business organizations) and state representatives, held the First National Conference on Communications (Confecom) in the end of 2009, when six main points were discussed: a new regulatory framework for communication, regulation of article 221 of the Federal Constitution (which regards the television programming regionalization), copyright rights, public communication (State broadcasting), the civil framework of the internet and the realization of the National communication Council. Discussions are still awaiting an outcome. (Maringoni & Glass, 2012)

Barbosa and Moraes (as cited in Maringoni & Glass, 2012) state that, compared to other countries in Latin America, Brazil can be considered the slowest in terms of legislation, and that the resolutions obtained from the 2009 Confecom still only exist on paper. The authors also comment on the “inertia” of the various governments that have been in power since the promulgation of the 1988 Constitution in Brazil, and point out that the articles 220 and 221, supposed to prevent the formation of monopolies and oligopolies in mass media, have not yet, to this day, been put in motion.

CENSORSHIP OR DEMOCRATIZATION?

The discussion about media regulation in Brazil usually involves the theme of censorship *versus* democratization, which causes confusion as to the understanding of the real advantages and disadvantages of the regulatory framework for society, and the real intentions of both government and media groups as the commitment to quality of provision of public service information and communications in Brazil.

The communications area has been particularly sensitive to demands for new operating rules. Media companies,

since dealing with dissemination of ideas, values and subjective approaches, argue that the intention of those who advocate the creation of new standards is to implement the censorship and the restriction on the free movement of ideas. Supporters of the changes argue otherwise. Say the industry is monopolized and that a new legal agreement would be based on the defence of a pluralism of opinions. (Maringoni & Glass, 2012)

In a country where public concessions are in the hands of politicians, and media groups are tied to the government, important discussions such as the media regulation are not carry out due to power maintenance strategies. In this scenario, the censorship discourse can be considered more a manipulation tool and a way to slow down the process, than a legitimate freedom of speech argument.

An example of democratic country where the media is not properly regulated and therefore cause harm to society is Italy, where there is no law, for example, against cross-ownership. According to Ferdinando Giugliano and John Lloyd (2010), Silvio Berlusconi is the owner of the Mediaset group, with scope throughout Italy, and also owns shares and properties of all media in France, Spain and Portugal, what culminates in the “creation” of a new system called “Mediacracy”. The mediacracy, according to these authors, happens when a country, in this case, is governed by the media, be it a democratic or authoritarian country.

Berlusconi’s version is an extreme model and is based on the legal and cultural negligence of Italy regarding conflicts of interest. The result is a dominant politician, owner of the three major TV channels, the main publishing company, advertising companies and an empire of newspapers and magazines; and in power, he also controls the State television and the State broadcaster RAI. (Giugliano & Lloyd, 2010)

In fact Brazil is not making progress around the media regulation theme, the difficulties posed by cross-ownership without limits and the delay of successive governments to address the issue, result in a state where the Mediacracy prevents the implementation of a real media regulation project. Our understanding is that the media regulation does not intend to simply establish censorship, but in fact, with the right planning and proper commitment from the government, a regulation plan must be established so that the use of public broadcasting concessions serve to fulfil their social purpose within legal limits, and imposing appropriate sanctions for transgressors. As

we have seen in some Latin American models, only a serious regulatory plan will allow the constitutional right of access to information within the values of democracy, diversity and plurality to all citizens, prioritizing the interests of society and ensuring the end of a Mediocracy in our country.

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