FREEDOM OF EXPRESSION AND THE REGULATION OF TELEVISION TO PROTECT CHILDREN:

Comparative Study of Brazil and Other Countries

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Introduction

Countries around the world regulate broadcasting, and television in particular, with a view, among other things, to protecting children. It is universally recognised that children are impressionable and vulnerable, and that television is a powerful medium that can potentially cause them harm. Commercial incentives create pressure on broadcasters to disseminate material that may be challenging for children, and the State needs to take measures to counteract this tendency. At the same time, such measures normally take the form of restrictions on freedom of expression, with the attendant risks of over-reach and of undue State control over the media.

International law provides clear standards against which restrictions on freedom of expression, including to protect children, must be assessed if they are to be considered justifiable. The practice of democratic States illustrates the ways they have sought to ensure adequate protection for children while not unduly limiting or controlling broadcasters. These are, therefore, both important sources of inspiration for how to create an appropriate balance between protecting children and respecting the fundamental right to freedom of expression.

This issue has become not only a matter of public debate in Brazil, but also the subject of a constitutional challenge. Specifically, a Direct Action of Unconstitutionality (ADI 2404) has been filed by the Brazilian Labor Party (PTB) against the Statute of the Child and Adolescent[1] (Children's Act), which lays out the main framework for regulating broadcasting to protect children in Brazil. This law, along with its implementing regulations, establishes a detailed framework for protection which revolves mainly around a set of progressive watersheds, or times before which material deemed unsuitable for children of different ages may not be broadcast. The law has been subject to widespread criticism by the private sector since it was first adopted and *amicus curiae* briefs have been presented on both sides of the case, by broadcasters and civil society groups.

In the case, which is currently before the Supreme Court of Brazil, four judges[2] have already published their decisions, all four holding that the system is unconstitutional on the basis that it unduly restricts freedom of expression. On 30 November 2011, Justice Joaquim Barbosa of the Supreme Court interrupted the proceedings under a local procedural rule permitting consideration of a case to be suspended so as to allow for more time to consider the issues involved.

This comparative Study is intended as a contribution to the discussion about the case from the Centre for Law and Democracy (CLD). The case raises important issues relating to freedom of expression, one of the key human rights that CLD promotes. We believe that an outline of relevant international standards, as well as the practice of a number of democratic States, will aid Brazilian judges come to the best possible resolution of this

[1] Law n° 8,069, July 13, 1990.
[2] Justices Dias Toffoli, Luiz Fux, Carmen Lúcia Rocha Antunes and Ayres Britto.

case, and also help other stakeholders, including the government, better understand the various issues involved.

The Study starts by outlining relevant international standards, including those relating to the freedom of expression and protection of children, as well as prior censorship, which has come up as an issue in the case. It provides a brief outline of the Brazilian legal framework for protection of children from harm through television, which is the subject of the local legal challenge. The main body of the Study provides an outline of the systems to regulate broadcasting in the interests of protecting children in six countries from around the world, namely Canada, France, India, South Africa, the United Kingdom and the United States. A number of factors were taken into account in the choice of these countries, including their geographic spread, their level of democracy, similarities with Brazil (such as size, diversity and/or wealth), and the range of different regulatory options they represent. Finally, the Study provides an analysis, based on international law and the comparative survey, of the Brazilian rules.

I. International Standards

I.1 Guarantees and Restrictions

The right to freedom of expression is guaranteed in Article 19 of the *Universal Declaration on Human Rights* (UDHR),[3] as follows:

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

Freedom of expression is also guaranteed in the *International Covenant on Civil and Political Rights* (ICCPR),[4] a treaty ratified by 167 States, including Brazil, as of March 2012,[5] also in Article 19, as follows:

> (1) Everyone shall have the right to freedom of opinion.
> (2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or through any other media of his choice.
> (3) The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
> (a) For respect of the rights and reputations of others;
> (b) For the protection of national security or of public order (ordre public), or of public health or morals.

[3] United Nations General Assembly Resolution 217A (III), 10 December 1948.
[4] UN General Assembly Resolution 2200A(XXI), adopted 16 December 1966, in force 23 March 1976.
[5] Brazil acceded to the ICCPR on 24 January 1992.

International law recognises that freedom of expression is not absolute, but places strict conditions on any restrictions on this right, which must comply with the provisions of Article 19(3) of the ICCPR. This imposes a strict three-part test for restrictions.[6]

First, the restriction must be provided by law. This implies not only that the restriction is based on a legal provision, but also that the law meets certain standards of clarity and accessibility. The European Court of Human Rights has elaborated on the requirement of "prescribed by law" under the ECHR:

> [A] norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.[7]

Second, the restriction must pursue one of the legitimate aims listed in Article 19(3). It is quite clear from both the wording of the article and the views of the UN Human Rights Committee that this list is exclusive and that restrictions which do not serve one of the legitimate aims listed are not valid.[8] It is not sufficient, to satisfy this part of the test, for restrictions on freedom of expression to have a merely incidental effect on one of the legitimate aims listed. The measure in question must be primarily directed at that aim.[9]

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

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

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

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[6] This test has been affirmed by the UN Human Rights Committee. See *Mukong v. Cameroon*, 21 July 1994, Communication No.458/1991, para.9.7. The same test is applied by the European Court of Human Rights. See *The Sunday Times v. United Kingdom*, 26 April 1979, Application No. 6538/74, para. 45.

[7] *The Sunday Times*, *ibid.*, para. 49.

[8] See *Mukong*, note 6, para. 9.7.

[9] As the Indian Supreme Court has noted: "So long as the possibility [of a restriction] being applied for purposes not sanctioned by the Constitution cannot be ruled out, it must be held to be wholly unconstitutional and void." *Thappar v. State of Madras*, [1950] SCR 594, p. 603.

[10] See, for example, *Thorgeirson v. Iceland*, 25 June 1992, Application No. 13778/88, para. 63.

I.2 The Importance of the Media

In most countries, the mass media is the main means through which public debate is conducted, as a result, the right to freedom of expression is of particular importance to the media. The Inter-American Court of Human Rights has stated: "It is the mass media that make the exercise of freedom of expression a reality."[11] In a Declaration adopted in 2003, the African Commission stressed "the key role of the media and other means of communication in ensuring full respect for freedom of expression, in promoting the free flow of information and ideas, in assisting people to make informed decisions and in facilitating and strengthening democracy."[12]

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

> [T]he free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion.[13]

In a similar vein, the European Court has emphasised:

> Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of their political leaders. In particular, it gives politicians the opportunity to reflect and comment on the preoccupations of public opinion; it thus enables everyone to participate in the free political debate which is at the very core of the concept of a democratic society.[14]

I.3 Independence of Oversight Bodies

Ensuring respect for freedom of expression does not imply that the State may not engage in regulatory or oversight activities. It is, for example, widely recognised that broadcasters must be regulated, if only to ensure that the audiovisual spectrum used for broadcasting, which is a limited public resource, is distributed in a rational and fair manner which avoids interference and ensures equitable access.[15] Broadcast regulation is also needed to ensure plurality and diversity in the airwaves.

However, if such regulatory or oversight bodies are under the control of the government, they are likely to be pressured into exercising their powers in a manner which undermines rather than promotes respect for rights. Thus, governments and businesses can be expected to want to minimise access of their critics and competitors to the broadcast media. It is thus vital that these bodies be protected, legally and practically, against

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[11] *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85 of 13 November 1985, Series A, No. 5, para. 34.
[12] *Declaration of Principles on Freedom of Expression in Africa*, adopted by the African Commission on Human and People's Rights at its 32nd Session, 17-23 October 2002.
[13] UN Human Rights Committee General Comment 25, issued 12 July 1996.
[14] *Castells v. Spain*, 24 April 1992, Application No. 11798/85, para. 43.
[15] See, for example, *Red Lion Broadcasting Co., Inc., et al. v. Federal Communications Commission, et al. No. 2*, 395 U.S. 367, 389 (1969).

political, commercial and other forms of interference. This problem is even more severe if regulation is undertaken directly by a government body, such as a ministry.

The need for independence of broadcast regulators finds strong support in international decisions and statements. This was stressed in the 2003 Joint Declaration by the (then) three specialised mandates for the protection of freedom of expression – the United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media and the Organization of American States (OAS) Special Rapporteur on Freedom of Expression – which stated:

> All public authorities which exercise formal regulatory powers over the media should be protected against interference, particularly of a political or economic nature, including by an appointments process for members which is transparent, allows for public input and is not controlled by any particular political party.[16]

The need for protection against political or commercial interference was also noted in the *Declaration of Principles on Freedom of Expression in Africa* (African Declaration), Principle VII(1) of which states:

> 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.[17]

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

> Member States should ensure the establishment and unimpeded functioning of regulatory authorities for the broadcasting sector by devising an appropriate legislative framework for this purpose. The rules and procedures governing or affecting the functioning of regulatory authorities should clearly affirm and protect their independence.

Beyond this, it may be noted that international law promotes self-regulation over statutory regulation where self-regulatory systems are effective. Thus, Principle IX(3) of the African Declaration states:

> Effective self-regulation is the best system for promoting high standards in the media.

I.4 Children and Freedom of Expression

The right to freedom of expression, as guaranteed in Article 19 of the ICCPR – which includes the right to seek and receive, as well as to impart, information and ideas –

[16] Adopted 18 December 2003.
[17] Adopted by the African Commission on Human and Peoples' Rights at its 32nd Session, 17-23 October 2002.

applies to everyone, including children. The provisions of Article 19 of the ICCPR are repeated almost verbatim with specific reference to children in Article 13 of the Convention on the Rights of the Child (CRC),[18] which defines a child as a person who is less than 18 years old. At the same time, the Convention recognises that children will not be afforded equal opportunities to express themselves in matters affecting them. For this reason, Article 12(1) provides specific protection for the right of the child to have his or her say, and for his or her views to be given due weight, as follows:

> States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

The implications of Article 12 have been elaborated in some detail in General Comment No. 12, adopted by the Committee on the Rights of the Child on 20 July 2009.[19]

Article 17 of the CRC addresses the issue of children and the media. The main focus is on ensuring that children have access to the material they need to promote their development. But there is also recognition that there may need to be special measures to limit media content to protect children. The relevant part of Article 17 states:

> States Parties recognize the important function performed by the mass media and shall ensure that the child has access to information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health.
> To this end, States Parties shall:
> …
> (e) Encourage the development of appropriate guidelines for the protection of the child from information and material injurious to his or her well-being, bearing in mind the provisions of articles 13 and 18.

Article 18 focuses on the idea of parents having primary responsibility for children.

There has been little legal elaboration of these issues by international courts.

I.5 Prior Censorship

Under general international law, prior restraints on freedom of expression are not entirely ruled out, but they are regarded with the greatest suspicion. Thus, the European Court of Human Rights has frequently reiterated the following warning of the problems with prior censorship:

> The dangers inherent in prior restraints are such that they call for the most careful scrutiny on the part of the Court. This is especially so as far as the press is concerned, for news is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest.[20]

[18] UN General Assembly Resolution 44/25, adopted 20 November 1989, in force 2 September 1990.
[19] Available at: http://www2.ohchr.org/english/bodies/crc/comments.htm.
[20] See, for example, *Ekin Association v. France*, 17 July 2001, Application No. 39288/98, para. 56.

The *American Convention on Human Rights*[21] takes a particularly strong line against prior censorship, stating, at Article 13(2):

> The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:
>
> (a) Respect for the rights or reputations of others; or
>
> (b) The protection of national security, public order, or public health or morals.[22]

However, it explicitly recognises the possibility of prior censorship in one circumstance, in Article 13(4):

> Notwithstanding the provisions of paragraph 2 above, public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence.

This is a clear statement of the importance attached to the need to protect children against harmful material disseminated in the form of public entertainment, including through broadcasting.

The issue of prior censorship of the media has rarely come before international courts. An important case in this regard is the *Case of "The Last Temptation of Christ" (Olmedo-Bustos et al.) v. Chile*, decided by the Inter-American Court of Human Rights.[23] The Court did not define carefully the nature of prior censorship, in part because that was not really at issue in the case.[24] However, the Court did recapitulate the following argument of the Commission:

> Subsequent liability is regulated in Article 13(2) of the Convention and is only admissible in a restricted way, when necessary to ensure respect for the rights or reputation of others. This restriction of the possibility of establishing subsequent liability is set out as a "guarantee of freedom of thought, so that certain people, groups, ideas or mediums of expression are not excluded, *a priori*, from public debate". This type of restriction was not used in the instant case, but the cinematographic work was censored before it was exhibited.[25]

It is submitted that this is a correct appreciation of the reasons behind the strong rules against prior censorship, namely that individuals should have the opportunity to present their views, and then risk subsequent liability, rather than having those views shielded in the first instance from public debate. Put differently, subsequent liability affords the

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[21] Adopted at San José, Costa Rica, 22 November 1969, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, in force 18 July 1978.

[22] See also the Declaration of Chapultepec, adopted by the Hemisphere Conference on Free Speech, Mexico City, 11 March 1994.

[23] 5 February 2001, Series C, No. 73.

[24] The case involved a refusal to allow a film to be distributed, and hence clearly represented prior censorship.

[25] *Ibid.*, para. 61(e).

author the chance to defend his or her statements in the courts of both law and public opinion. The idea is compendiously summed up in the phrase "publish and be damned".[26]

II. The Brazilian System

The Constitution of Brazil provides for strong guarantees of freedom of expression. The key guarantees are in Article 5(IV), which provides that "expression of thought is free", and Article 5(IX), which provides: "[T]he expression of intellectual, artistic, scientific, and communications activities is free, independently of censorship or license". Chapter V of the Constitution, entitled Social Communication, sets out a number of specific rules relating to the means of communication, including the media. Article 220 reiterates the main guarantee, while paragraph 2 of that Article states: "Any and all censorship of a political, ideological and artistic nature is forbidden."

Paragraph 3 of Article 220 is of particular relevance here, stating:

> It is within the competence of federal laws to:
>
> i) regulate public entertainment and shows, it being incumbent upon the Government to inform on their nature, the age brackets they are not recommended for and places and times unsuitable for their exhibition:
>
> ii) establish legal means which afford persons and families the possibilities of defending themselves against radio and television programmes and schedules which go contrary to the provisions of article 221, as well as against publicity of products, practices and services which may be harmful to health or to the environment.

Another relevant provisions is clause IV of Article 221, which calls on broadcasting to respect the "ethical and social values of the person and the family".

The key primary legislation under review in case ADI 2404 is the Children's Act. Articles 75 and 76 of this law state:

> Art. 75. Every child or adolescent shall have access to the public entertainment and shows classified as suitable to his age bracket.
>
> Paragraph. Children of less than ten years of age may only enter and remain in localities of presentations or exhibitions when accompanied by their parents or guardian
>
> Art. 76. Radio and television stations may only exhibit educational, artistic, cultural and informative programs in the schedule recommended for the juvenile population.
>
> Paragraph. No show will be presented or announced without notification as to its classification, before its transmission, presentation or exhibition.

Article 254 of the law, in Chapter II on Administrative Infractions, provides:

> Art. 254. Transmit shows by radio or television at a time different from that authorized or without notification of its classification:

[26] Attributed to Arthur Wellesley, Duke of Wellington, in response to a threat by courtesan Harriette Wilson to publish her memoirs, including his letters to her.

> **Penalty** - fine of twenty to one hundred reference wages; double that amount in case of repetition, it being permitted to the judicial authority to suspend the programming of the station for up to two days.

Article 254 is the key provision that is subject to challenge in the ADI 2404 case.

The Ministry of Justice has adopted Ordinance No. 1220[27] to give effect to these rules. Article 17 of this Ordinance calls for the classification of audiovisual works, based on the criteria of sex and violence, into six different categories, free, and not recommended, respectively, for children under the ages of 10, 12, 14, 16 and 18. Pursuant to Article 19, the first two categories may be shown at any time, while the others may only be shown at progressively later times, specifically after 20:00 (for material classified as 12), 21:00, 22:00 and finally 23:00 (for material classified as 18). Between 23:00 and 06:00, there are no (sex and violence related) restrictions on what may be shown, although these programmes remain subject to laws of general application (for example relating to defamation or invasion of privacy).

Only entertainment programmes are subject to the requirement of classification, and Article 5 of the Ordinance specifically exempts journalistic or news programmes, sports, electoral programmes and advertising from the classification requirement.

The specific classification standards were established though a broad consultative process during 2005 and 2006, under the guidance of the Ministry of Justice, which included a number of public hearings held throughout Brazil and with the participation of media companies, research centres, teachers, lawyers, professionals, NGOs and the general public. Such consultation is not, however, a requirement of the law.

In terms of process, the classification is done by the 'owner' of the work. The Ministry of Justice then monitors programming, and members of the public may also present claims of wrong classification (Articles 7-10 and 12-14 of the Ordinance). The Ministry of Justice may reclassify programmes as necessary, and the owner may, in this case, lodge an appeal (Article 11).

As is clear from Article 254 of the Children's Act, cited above, breach of these rules may lead to fines and, in case of repeated breaches, the judicial authorities may suspend the station from broadcasting for up to two days. The law is somewhat ambiguous as to who has the power to impose fines. Although it would seem that this power vests in the Ministry of Justice, in practice the Ministry does not impose fines and, instead, this is done only by the courts.

[27] July 11, 2007.

III. Comparative Analysis[28]

This part of the Study describes the systems that are in place to protect children from content broadcast via television that may be harmful to them in six countries, namely Canada, France, India, South Africa, the United Kingdom and the United States. As noted above, these countries were chosen to provide some geographic and cultural scope, as well as to focus on democratic countries which may claim some degree of similarity with Brazil.

Two main systems are in place across these countries to protect children. First, all of these countries have in place oversight systems which prohibit broadcasters from disseminating material which is harmful for children, usually based around a watershed, or indicative time outside of which children are deemed likely to be watching television. Second, many countries have established a system of warnings for certain types of programmes – news and sports are sometimes excluded, with the focus being on entertainment programmes – to inform parents and guardians about the sensitivity of programmes. These often involve a system of indicating during the transmission of a programme what age group the programme is generally deemed to be appropriate for. In other countries, the warning may simply indicate what sorts of sensitive content are found in the programme. In some countries, notably Canada and the United States, age-based ratings can be picked up through 'V-chip' technology in TVs, VHS and digital decoders. Parents can then programme these devices so as to block programmes with certain ratings from being shown.

The specific type of material that is covered by these rules varies among countries. In Canada, for example, the types of content that are regulated are violence, sexual content and coarse or offensive language, while in the United States, the focus is more narrowly on indecency and profanity.

Beyond the general categories of content that are regulated, what is specifically prohibited varies from culture to culture and from country to country. In the more relaxed European states, nudity may be permitted on television at any time, with limitations focusing only nudity in a sexual context. The United States, on the other hand, applies much stricter standards regarding nudity, is relatively permissive in relation to offensive language, and does not even regulate violence. The outrage which accompanied the brief display of Janet Jackson's breast during the American Superbowl in 2004 was greeted with smiles and sometimes surprise in many parts of Europe.

[28] For a broad comparative analysis of broadcasting systems in different countries, as relevant to the Brazilian context, see Mendel, T., and Salomon, E., *The Regulatory Environment for Broadcasting: An International Best Practice Survey for Brazilian Stakeholders* (2011: Brasilia, UNESCO). Available at: http://www.unesco.org/new/en/communication-and-information/resources/publications-and-communication-materials/publications/full-list/the-regulatory-environment-for-broadcasting-an-international-best-practice-survey-for-brazilian-stakeholders/.

III.1 Canada

The body with primary responsibility for regulating broadcasting in Canada is the Canadian Radio-television and Telecommunications Commission (CRTC), established pursuant to the Broadcasting Act.[29] Although the Act does not explicitly state that the Commission is independent, this is implicit in the structure and role of the Commission, as well as the fact that, under Canadian common law, administrative bodies are entitled to a wide measure of autonomy. In practice, the Commission operates at arms length to government and is fully independent in its actions.

Section 5 of the Broadcasting Act gives the Commission broad powers to regulate broadcasting, subject to the policy standards set out in the law, stating:

> [T]he Commission shall regulate and supervise all aspects of the Canadian broadcasting system with a view to implementing the broadcasting policy set out in subsection 3(1) and, in so doing, shall have regard to the regulatory policy set out in subsection (2).

Section 10(1)(c) gives the Commission specific powers to make regulations, "respecting standards of programs and the allocation of broadcasting time for the purpose of giving effect to the broadcasting policy set out in subsection 3(1)".

In practice, the vast majority of Canadian broadcasters, with the notable exception of the public broadcaster, the Canadian Broadcasting Corporation (CBC), are members of both the Canadian Association of Broadcasters (CAB),[30] an industry association representing broadcasters, and the Canadian Broadcast Standards Council (CBSC).[31] The CBSC was created and is funded by the CAB, but it is an independent body with mixed representation of broadcasters and members of the public. Standards are adopted by the CAB, but complaints are processed and implemented through the CBSC, thus providing distance from the industry.

A key aspect of this system is the formal recognition of CBSC as the relevant decision-maker in relation to complaints regarding its members. Thus, in a 1991 Public Notice, the CRTC stated that, "it intends to refer complaints from members of the public about programming matters that are within the Council's mandate to the CBSC for its consideration and resolution."[32] Later, the CRTC formalised the system, as follows:

> [T]he Commission requires the licensees of conventional television stations, networks and specialty programming undertakings to comply with the CAB code [on violence] as a condition of licence. Similarly, the Commission requires pay television and pay-per-view services to adhere to their industry code on violence as a condition of licence. The Commission generally suspends the application of this condition of licence for television licensees who are members in good standing of the CBSC.[33]

[29] S.C. 1991, c. 11. Available at: http://laws.justice.gc.ca/en/C-22/FullText.html.
[30] See http://www.cab-acr.ca/.
[31] http://www.ccnr.ca/.
[32] Public Notice CRTC 1991-90, Canadian Broadcast Standards Council, 30 August 1991.
[33] Public Notice CRTC 1996-36, Policy on Violence in Television Programming, 14 March 1996.

Thus, as long as licensees are in good standing with CBSC, the CRTC will allow that body to deal with standards complaints. However, failure to remain in good standing with the CBSC may lead to sanctions, including potentially licence revocation, being applied by CRTC. So, while membership in the CBSC is formally voluntary, in practice the CBSC rules are binding on its members. Furthermore, complaints always lie to the CRTC from CBSC decisions.

The CAB has two main codes dealing with children's issues, the Code of Ethics[34] and Voluntary Code Regarding Violence in Television Programming.[35] Clause 4 of the former addresses children, highlighting the susceptibility of children to influence and calling on broadcasters to take care in programming directed at children. Clause 10 sets out the basic framework for the watershed, stating: "Programming which contains sexually explicit material or coarse or offensive language intended for adult audiences shall not be telecast before the late viewing period, defined as 9 pm to 6 am." The core standard is that material which is suitable only for adult audiences must not be shown before 21:00. It may be noted that broadcasters which operate across the many time zones that exist in Canada are responsible for ensuring compliance in each separate time zone in which they operate.

The Code on Violence focuses on children under 12 years of age, and mandates "very little violence, either physical, verbal or emotional" for them. These codes have been specifically endorsed by the CRTC.

The actual standards are relatively permissive and the trend is towards greater permissiveness. Nudity alone will not normally be considered to be problematical, absent a sexual context. A good example of borderline content may be found in the CBSC case of *Global re ReGenesis ("Baby Bomb")*,[36] where a panel split on whether a programme aired between 20:00 and 21:00, which depicted sexual activity but without actually showing details, fell foul of the rules.

In *Bravo! re the film The House of the Spirits*,[37] the panel held that a scene of a man and woman engaged in sexual activity shown through a sheer curtain was not so extreme as to be considered to be viewable only by adult audiences. If coarse language is beeped out, it will not normally be found to breach the rules. Violence must normally involve "person-inflicted or intentional violence", so that things like car crashes or other forms of violence will not engage the rules.

[34] Available at: http://www.cbsc.ca/english/codes/cabethics.php.
[35] Available at: http://www.cab-acr.ca/english/social/codes/violencecode.shtm. As in many countries, advertising is dealt with separately.
[36] CBSC National Conventional Television Panel, CBSC Decision 04/05-1996, 20 January 2006. Available at: http://www.cbsc.ca/english/decisions/2006/060411.php.
[37] CBSC National Specialty Services Panel, CBSC Decision 00/01-0738, 16 January 2002. Available at: http://www.cbsc.ca/english/decisions/2002/020314.php.

In late 1997, Canada put in place a TV Classification System for English-language programmes.[38] The specific rating system was designed by the Action Group on Violence on Television (AGVOT), which represents all sectors of the broadcasting industry, and is applied for most broadcasters by the CBSC. In this role, the CBSC acts as a clearinghouse for classification information, monitors the appropriateness of classification and serves as an arbitrator in disputes regarding classification. Individuals who believe the system is not being applied properly may also approach CRTC directly and, as with the watershed, CRTC directly regulates broadcasters who are not members of CBSC.

News and sports programmes are exempt from the classification system. Otherwise, the system involves six levels of classification, namely C (suitable for all ages), C8 (suitable for children aged eight and older), G (suitable for general audiences or family viewing), PG (parental guidance advised), 14+ (suitable for children aged fourteen and older), and 18+ (suitable for those aged eighteen and older). Programmes with an 18+ rating may only be shown after the watershed at 21:00.

The ratings themselves must be shown for at least 15 seconds each hour in the upper-right corner of the programme, and be of a minimum size. The C8 rating is shown alongside as an example. Furthermore, if a programme contains content which is potentially unsuitable for some viewers, such as violence, coarse language, or nudity, members of the CBSC are required to air a disclaimer at the beginning of the programme and at the end of each commercial break, advising viewer discretion (such disclaimers are only required for the first hour if airing after 21:00; see Clause 11 of the CAB Code of Ethics). These advisories are the main tool for addressing challenging programming which children may be watching after 21:00.

In terms of sanctions, the vast majority of cases are finally settled at the level of the CBSC. The CBSC normally requires the offending station to broadcast an admission of their violation and to write a letter to the complainant explaining the measures they have taken to ensure that the violation will not be repeated. There have been several cases over the years where entire programmes have been cancelled for being completely inappropriate for broadcasting in Canada, usually on a 'voluntary' basis by the station in response to a CBSC decision. Stations always have the option of moving a programme which is merely inappropriate for children to after the watershed.

The regulator, the CRTC, has the power to warn and fine broadcasters, as well as to revoke or suspend licences in extreme cases. In July 2004, the CRTC revoked the licence of Genex Communications for its Quebec City radio station CHOI. In 2002, CRTC had put Genex Communications on notice following 47 complaints received between 1998 and 2001 about a variety of issues including inappropriate language, sexually explicit and racist comments, and hate propaganda. The station's failure to resolve the matter finally led to the licence revocation. An appeal from this decision based on the right to freedom

[38] See Public Notice CRTC 1997-80, Classification System for Violence in Television Programming, 18 June 1997. There is a separate system for French language television.

of expression as protected under the Canadian Constitution was rejected by the courts.[39] We are not aware of any case where a licence has been suspended simply for broadcasting programming which was inappropriate for children.

III.2 France

Regulation of broadcasting in France is undertaken by the Conseil supérieur de l'audiovisuel (CSA), an independent statutory body (autorité administrative indépendante), established through 1989 amendments[40] to the main 1986 Law relating to freedom of communication.[41] The independence of the CSA is guaranteed by Article premier of the 1986 law and an attempt has been made to provide structural guarantees for that independence. It is composed of nine members, appointed by the President of the Republic but nominated in equal proportion by the Presidents of the Republic, National Assembly and Senate respectively. The term of office is six years and may be neither renewed nor abrogated. The President of the CSA is designated by the President of the Republic.[42] Compared to many regulators, the structural guarantees of independence for the CSA are relatively weak and, should one party control all three appointing bodies, it would exercise considerable potential power over the CSA. Furthermore, this is a real threat in practice, given that the process of appointments is not open and involves little external participation.

Pursuant to Articles 5 and 8 of the 1986 law, members of the CSA are subject to strict conflict of interest and professional secrecy rules which prevent them from engaging in activities deemed to be incompatible with their mandate (for example, holding elected office) or expressing their opinion on matters which have been or are being considered by the CSA. The CSA is funded entirely out of the State budget.[43]

Articles 1 and 15 of the Law relating to freedom of communication provide the basis for regulating content to protect children. Article 1 provides for freedom of communication through broadcasting, but allows for this to be limited where necessary to protect children and adolescents. Article 15 expands on this, indicating that programmes which are likely to harm the physical, mental or moral development of children may not be shown when children are likely to be listening to or watching them. This may be avoided either through distributing the programmes at an appropriate time or through technological means. Where such programmes are shown (including at an appropriate time), they must carry a warning indicating the risk of harm, which must be shown throughout the programme. Technical controls are envisaged for mobile television and television on demand. Finally, programmes which are likely to cause grave harm to the physical, mental or moral development of children may never be disseminated through the

[39] *Genex Communications v. Canada (Attorney General)* (F.C.A.), 2005 FCA 283, [2006] 2 F.C.R. 199.
[40] Law No. 89-25 of 17 January 1989. The changes introduced in 1989 were incorporated into the 1986 Law. References to the 1986 Law will be as amended.
[41] Law No. 86-1067 of 30 September 1986, as subsequently modified. Available online, in French, at: http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000006068930&dateTexte=20101203.
[42] Article 4.
[43] Article 7.

broadcast media.[44]

These national rules are supported by European rules. The European Union Audiovisual Media Services Directive, which applies to the whole of the European Union, including the France and the United Kingdom, directs Member States to "take appropriate measures to ensure that television broadcasts by broadcasters under their jurisdiction do not include any programmes which might seriously impair the physical, mental or moral development of minors, in particular programmes that involve pornography or gratuitous violence."[45] What this means in practice is that 'adult' material cannot be broadcast when children are likely to be watching or listening, or has to be encrypted.

To put this into effect for television, the CSA adopted Recommandation du 7 juin 2005 aux éditeurs de services de télévision concernant la signalétique jeunesse et la classification des programmes (Recommendation of 7 June 2005 to the editors of television services for the identification and classification of youth programs).[46] This requires editors to establish viewers' commissions to rate programmes, and to notify the CSA of the membership of these commissions. Programmes must be allocated one of five ratings, general, and not suitable, respectively, for children under the ages of 10, l2, 16 and 18. The under 10 rating must be shown for five minutes at the beginning of each programme and for one minute after each interruption,[47] while the other ratings must be shown for the duration of the programme. Programmes rated 12, 16 and 18 may not be shown, respectively, before 22:00, 22:30 and midnight.

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[44] The relevant part of Article 15 in the original states:

> Le Conseil supérieur de l'audiovisuel veille à la protection de l'enfance et de l'adolescence et au respect de la dignité de la personne dans les programmes mis à disposition du public par un service de communication audiovisuelle.
>
> Il veille à ce que des programmes susceptibles de nuire à l'épanouissement physique, mental ou moral des mineurs ne soient pas mis à disposition du public par un service de communication audiovisuelle, sauf lorsqu'il est assuré, par le choix de l'heure de diffusion ou par tout procédé technique approprié, que des mineurs ne sont pas normalement susceptibles de les voir ou de les entendre.
>
> Lorsque des programmes susceptibles de nuire à l'épanouissement physique, mental ou moral des mineurs sont mis à disposition du public par des services de télévision, le conseil veille à ce qu'ils soient précédés d'un avertissement au public et qu'ils soient identifiés par la présence d'un symbole visuel tout au long de leur durée.
>
> À cette fin, il veille à la mise en œuvre d'un procédé technique de contrôle d'accés approprié aux services de télévision mobile personnelle ainsi qu'à la mise en œuvre de tout moyen adapté à la nature des services de médias audiovisuels à la demande.
>
> Il veille en outre à ce qu'aucun programme susceptible de nuire gravement à l'épanouissement physique, mental ou moral des mineurs ne soit mis à disposition du public par les services de communication audiovisuelle.

[45] Article 22.1 of Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) (codified version).

[46] Available at: http://www.csa.fr/Espace-juridique/Deliberations-et-recommandations-du-CSA/Recommandations-et-deliberations-du-CSA-relatives-a-la-protection-des-mineurs/Recommandation-du-7-juin-2005-aux-editeurs-de-services-de-television-concernant-la-signaletique-jeunesse-et-la-classification-des-programmes.

[47] Some other options are also provided.

The ratings are applied by the television stations, but the CSA has developed a set of criteria to be taken into account when rating programmes.[48] The CSA monitors programmes after distribution and also responds to complaints, and it has the power to adjust the rating. Where a programme is wrongly rated, the CSA will normally just send a warning letter to the offending station. In more serious cases, it may send a formal notice to the station and, for repeated breaches it may impose sanctions, ranging from fines to, theoretically, revocation of the licence. All of these are made public. In 2009, the CSA received 1610 complaints, split almost evenly between programmes and advertisements, and intervened in 40 cases, in most cases asking stations to upgrade their ratings to a higher age bracket.[49]

III.3 India

India is a bit different from the other countries described here in two respects. First, regulation of broadcasting is undertaken directly by the government, through the Ministry of Information and Broadcasting, rather than through an independent regulatory body. Second, private television broadcasting is limited to cable and satellite distribution systems, and the airwaves are dominated by public television.

The Telecom Regulatory Authority of India (TRAI)[50] is an independent regulatory body which was created by the Telecom Regulatory Authority of India Act, 1997.[51] It is responsible for considering licence applications and making recommendations to the Ministry of Information and Broadcasting regarding licensing, but the final decision rests with the Ministry. TRAI plays no role in the regulation of broadcasting content.

Until the early 1990s, there was a public broadcasting monopoly in India. FM radio was opened up only in 1999, when the government invited bids for private stations, but these are still prohibited from carrying news and current affairs programming. Community radio was first authorised for educational institutions in 2002, and then the sector was opened up to not-for-profit bodies in 2006. Cable and satellite broadcasting appeared in India in the early 1990s and was subject to regulation first through the Cable Television Networks Rules, 1994 (Cable Rules)[52] and then the Cable Television Networks (Regulation) Act, 1995 (Cable Act).[53]

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[48] Available, in French, at: http://www.csa.fr/Television/Le-suivi-des-programmes/Jeunesse-et-protection-des-mineurs/La-signaletique-jeunesse/La-classification-des-programmes-par-les-chaines-de-television.

[49] See CSA, *Protection de l'enfance et de l'adolescence à la télévision, à la radio et sur les services de médias audiovisuels à la demande: Bilan De L'année 2009 et du 1er Semestre 2010*. Available at: http://www.csa.fr/Etudes-et-publications/Les-brochures/Protection-de-l-enfance-et-de-l-adolescence-a-la-television-a-la-radio-et-sur-les-services-de-medias-audiovisuels-a-la-demande-Bilan-de-l-annee-2009-et-du-1er-semestre-2010.

[50] TRAI's official website is: www.trai.gov.in.

[51] No. 24 of 1997. Available at: http://www.trai.gov.in/trai_act.asp.

[52] Available at: http://www.mib.nic.in/writereaddata%5Chtml_en_files%5Cactsrules/Cable%20Television%20Networks%20Rules%20,%201994%20as%20amended%20(updated%20upto%2027.2.2009.pdf.

[53] Available at: http://www.indiaip.com/india/copyrights/acts/cable1995/cableact1995.htm.

The Cable Act and Cable Rules require all cable operators to ensure that the programmes they disseminate conform to a programme code and an advertising code. The actual codes are found at sections 6 and 7 of the Cable Rules. The programme code contains a number of rather general rules which do not specifically provide for protection of children, other than a rule prohibiting the denigration of children. At the same time, it contains sufficient language – for example relating to good taste and decency, obscenity, encouraging violence – to ground protection of children, as well as a general reference to material which "is not suitable for unrestricted public exhibition". Cable operators have argued that they bear a disproportionate burden of responsibility for controlling the content of television channels, since they are the only part of the broadcasting chain currently subject to regulation.

The Ministry of Information and Broadcasting enforces the programming and advertising code through *suo moto* monitoring; there is no system for complaints. If the Minstry considers any programme or advertisement not to be in conformity with the codes, it has the power to regulate or prohibit the transmission or re-transmission of that content. Pursuant to these powers, MIB sends show-cause notices to TV channels which have violated the codes. In practice, however, it would seem that only a few such show-cause notices have actually been issued under these rules.[54]

Government control over broadcasting was challenged in a 1995 case decided by the Supreme Court of India, *Secretary, Ministry of Information & Broadcasting v. Cricket Association of Bengal*.[55] A key part of the decision held that the airwaves were a limited public resource which was an important means of exercising the right to freedom of expression, namely broadcasting. As a result, it was constitutionally impermissible for the government to control the sector and it was, instead, under an obligation to create "an independent autonomous public authority representative of all sections and interests in the society to control and regulate the use of the airwaves."[56]

This decision has still not been implemented but there have been a number of developments in recent years. For example, in July 2007 the Ministry for Information and Broadcasting prepared a Broadcasting Services Regulation Bill, 2007 and accompanying Content Code, known as the Self-Regulation Guidelines for the Broadcasting Sector, and announced a two-week consultation process. The broadcast industry voiced vehement opposition to certain provisions in the Bill and several sections of the Code. A solution was found in the commitment by the two main organisations representing television broadcasters – the Indian Broadcasting Foundation (IBF)[57] and the News Broadcasters Association (NBF)[58] – undertaking to draft their own guidelines for self-regulation.[59]

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[54] See Ministry of Information and Broadcasting, *Details of Orders/Warnings/Advisories issued to private TV Channels for violation of Programme or Advertising Code*. Available at: http://mib.nic.in/ShowContent.aspx?uid1=2&uid2=83&uid3=0&uid4=0&uid5=0&uid6=0&uid7=0.
[55] [1995] 2 SCC 161; AIR 1995 SC 1236. Available at: http://openarchive.in/judis/10896.htm.
[56] *Ibid.*, para. 124.
[57] See http://www.ibfindia.com/.
[58] See http://www.nbanewdelhi.com/.
[59] See infochange, *Broadcast regulation in the public interest: A Backgrounder*. Available at: http://www.altlawforum.org/law-and-media/publications/broadcasting-law-in-india-a-backgrounder.

In August 2008, the NBA announced it was setting up the News Broadcasting Standards Disputes Redressal Authority and an accompanying Code, which both came into being in October 2008. The nine-member Authority, headed by a former Chief Justice of India, includes four editors from different news channels and four 'eminent persons' drawn from different walks of life. For its part, the IBF set up the Broadcasting Content Complaints Council, an independent body with thirteen members. Chaired by a retired Supreme Court or High Court judge, the Council also includes four broadcasters, four non-broadcaster members and four members from national level statutory commissions.

The IBF's *Self Regulatory Content Guidelines for Non News & Current Affairs Television Channels*[60] focus heavily on protection of children, providing for two levels of rating – G (general), suitable for all audiences and R (restricted), not suitable for children and youth (specific ages are not provided). R-rated programmes may only be shown between 23:00 and 05:00. Categorisation is based on seven themes, including crime and violence, sex, obscenity and nudity, horror and the occult, drugs, smoking, tobacco, solvents and alcohol, religion and community, harm and offence, and general restrictions.

III.4 South Africa

In South Africa, the Independent Communications Authority of South Africa (ICASA) is responsible for regulating broadcasting. As its name suggests, this is intended to be an independent authority. Its governing legislation sets out a clear procedure for appointment of the members of its governing board:

> The Council consists of seven councillors appointed by the President on the recommendation of the National Assembly according to the following principles, namely—
>
> (a) participation by the public in the nomination process;
>
> (b) transparency and openness; and
>
> (c) the publication of a shortlist of candidates for appointment, with due regard to subsection (3) and section 6.[61]

Subsection 3 requires members to be committed to freedom of expression and other positive social values, to have relevant expertise and, collectively, to be representative of South Africa as a whole. Section 6, for its part, prohibits individuals with strong political connections, as well as those with vested interests in telecommunications or broadcasting, from becoming members.

On 6 July 2009, ICASA issued the Regulations Regarding the Code of Conduct for Broadcasting Service Licensees,[62] pursuant to section 54 of the Electronic Communications Act (ECA).[63] Section 54 calls on ICASA to prescribe a code of conduct which shall be binding on broadcasters.

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[60] Available at: http://ibfindia.com/pdf/1311341602.pdf.
[61] Section 5 of the Independent Communications Authority of South Africa Act, No. 13 of 2000.
[62] General Notice 958 of 2009.
[63] No. 36 of 2005.

Section 5 of the Regulations sets out a number of issues to be avoided in children's programming, including harmful or disturbing themes, violence, threats to one's sense of security, for example through portraying domestic conflict, matters that may have a negative influence on children, for example in relation to the use of matches, and offensive language.

Section 6 addresses the watershed, which runs from 21:00 to 05:00 and applies to children under 18 years of age. Material containing explicit violence, sexual conduct and/or nudity, or grossly offensive language and intended for adult audiences may not be shown before the watershed. For programmes that are shown outside the watershed but which may not be suitable for all children, broadcasters must provide sufficient information to allow parents and guardians to make suitable choices. There is also recognition that progressively more adult material may be suitable as the watershed period advances (i.e. later at night).

To supplement this official system, section 54(3) of the ECA provides for recognition of an effective self-regulatory system as follows:

> The provisions of subsection (2) do not apply to a broadcasting service licensee who is a member of a body which has proved to the satisfaction of the Authority that its members subscribe and adhere to a code of conduct enforced by that body by means of its own disciplinary mechanisms, provided such code of conduct and disciplinary mechanisms are acceptable to the Authority.

The Broadcasting Complaints Commission of South Africa (BCCSA)[64] has been recognised as an oversight body meeting the conditions of section 54(3) of the Electronic Communications Act.[65] The BCCSA was created by the National Association of Broadcasters (NAB),[66] the industry body, in 1993, and, although it continues to be funded by NAB, it is functionally independent of it. BCCSA members are appointed by an independent panel chaired by an independent person (up to now by a retired Judge of the Court of Appeal), along with other persons appointed at an AGM of the BCCSA. At the insistence of the regulator, BCCSA's constitution was amended so that all candidates for membership are nominated by members of the public. A new code, the *BCCSA Free-To-Air Code Of Conduct For Broadcasting Service Licensees 2009*, came into force on 1 January 2011. The code contains almost identical rules relating to children to those found in the ICASA code. The BCCSA has the power to fine members up to R60,000 (approximately USD8,000) for breach of its rules.

As part of the system of regulation, programmes broadcast in South Africa are required to carry one of five ratings, namely Family (suitable for the whole family), PG (children under ten must be accompanied by parents), 13 (not suitable for children under 13), 16

[64] See: http://www.bccsa.co.za/.
[65] Technically, the BCCSA was recognised by ICASA's predecessor, the Independent Broadcasting Authority, under the section 56(2) of the Independent Broadcasting Authority, No. 153 of 1993, which is identical to the new provision.
[66] http://www.nab.org.za/.

(not suitable for children under 16 and may not be shown before 21:00), and 18 (not suitable for children under 18 and may not be shown before 22:00). Films rated R18, which denotes strong sexual content, may not be shown on television.

An example of the application of these rules was a case in 2011, in which Multichoice was fined R20,000 (approximately USD2,700) for broadcasting a film rated 18LV at 21:30. An exacerbating factor was that the electronic programme guide (EPG) indicated a PG13 rating, so that the parental guidance lock system (analogous to the V-chip) did not work.[67] In a 2003 case, e.tv was found not to have breached the code when it showed the soft porn film Emmanuelle at 01:00.[68]

III.5 United Kingdom

Ofcom, the broadcast regulator in the United Kingdom, was set up by the Office of Communications Act 2002,[69] while details of its remit and powers are contained in the Communications Act 2003.[70] The Act defines a clear remit for Ofcom, which include licensing, monitoring, dealing with complaints and issuing sanctions. Ofcom is given the power to develop and apply guidelines explaining the basic content standards set out in the Act, and to develop and publish its own internal procedures.

In 1995, a new process of 'independent appointments' was put in place for all public appointments in the United Kingdom. Although the relevant Secretary of State continues to appoint the non-executive members of Ofcom, appointments are made on the basis of recommendations reached through the standard public appointments procedure. This stipulates that all public appointments should be based on merit and subject to scrutiny by at least one accredited independent assessor. All the candidates put forward for ministerial selection should meet these criteria.[71]

Ofcom's board consists of five members and a chairman, appointed through the independent appointments process, together with three executive members, selected from the senior staff group and including the Chief Executive Officer. The current membership of Ofcom includes a former broadcasting manager and newspaper editor, as well as a competition economist. It is agreed that in practice Ofcom operates independently of the Government of the United Kingdom, as well as of commercial broadcast operators and service providers.

Ofcom's general duties with regard to broadcasting include securing:

- the application, in the case of all television and radio services, of standards that provide

[67] Case No. 21/2011, 14 June 2011. Available at: http://www.bccsa.co.za/images/hearings/JUDGEMENTS%202011/PDF%20FILES%20FOR%20WEBSITE/MULTICHOICE/case%20no%20-%2021-2011.pdf.
[68] See http://www.news24.com/SouthAfrica/etv-wins-Emmanuelle-case-20020313.
[69] Available at: http://www.opsi.gov.uk/acts/acts2002/ukpga_20020011_en_1.
[70] Available at: http://www.opsi.gov.uk/acts/acts2003/ukpga_20030021_en_1.
[71] See the website of the Office of the Commissioner for Public Appointments, at: http://www.publicappointmentscommissioner.org/.

> adequate protection to members of the public and all other persons from both unfair treatment in programmes included in such services….[72]

Section 319 of the Communications Act 2003 requires Ofcom to adopt a code setting out "standards for the content of programmes" that ensure compliance with the 'standards objectives'. These are elaborated in Section 319(2) and, for current purposes, include:

> (a) that persons under the age of eighteen are protected; …
> (f) that generally accepted standards are applied to the contents of television and radio services so as to provide adequate protection for members of the public from the inclusion in such services of offensive and harmful material.

For purposes of implementation of these requirements, Ofcom has adopted, and from time-to-time updates, the Ofcom Broadcasting Code, the latest version of which came into effect on 28 February 2011.[73]

The Code contains a number of rules relevant to the protection of children. Section 1 of the Code, which reflects the requirements of section 319(2)(a) of the Communications Act, is the most pertinent. It prohibits absolutely the broadcasting of material that "might seriously impair the physical, mental or moral development of people under eighteen" (section 1.1). Broadcasters must also take "all reasonable steps" to protect under eighteens (section 1.2). This has been understood as ensuring that, even after the watershed, material which is increasingly adult in nature must be phased in. This is supported by section 1.6, which prohibits an 'unduly abrupt' transition to adult material after the watershed.

Special rules apply to children, defined as people under the age of 15 years. Material which is 'unsuitable' for children must not be shown on television outside of the watershed, which runs from 21:00 to 05:30 (section 1.4). Beyond this, broadcasters must protect children by "appropriate scheduling from material that is unsuitable for them" (section 1.3). This means that even before the watershed, certain material should not be shown when very young children can be expected to be watching. More challenging material should be accompanied by appropriate warnings (section 1.7). The Code sets out detailed and specific rules for various types of challenging material, including coverage of offences involving under eighteens, "Drugs, smoking, solvents and alcohol", "Violence and dangerous behaviour", "Offensive language", "Sexual material", "Nudity", "Films, premium subscription film services, pay per view services", "Exorcism, the occult and the paranormal", and the involvement of people under eighteen in programming.

Respect for the Code is a licence condition for most broadcaster (with the exception of certain public broadcasters, notably the BBC). Ofcom has a developed set of procedures for considering breaches of the Code, which may be in response to a complaint from a member of the public or as a result of its own monitoring. It very rarely imposes sanctions on broadcasters that breach the code, and instead normally just issues a finding

[72] Section 3(2)(e) of the Communications Act 2003.
[73] The Code is available at: http://stakeholders.ofcom.org.uk/broadcasting/broadcast-codes/broadcast-code/.

to that effect and publishing this in its Broadcast Bulletins, which are available on its website. If the breach was newsworthy, then newspapers pick up on it and give it more publicity. This 'naming and shaming' is very effective, as no broadcaster wants its competitors or its audience to know that it has broken the rules.

However, in certain cases, for example when a broadcaster breaches the Code deliberately, seriously or repeatedly, Ofcom may impose statutory sanctions. The sanctions available to Ofcom include a decision to:

> I) issue a direction not to repeat a programme or advertisement;
> II) issue a direction to broadcast a correction or a statement of Ofcom's findings which may be required to be in such form, and to be included in programmes at such times, as Ofcom may determine;
> III) impose a financial penalty;
> IV) shorten or suspend a licence (only applicable in certain cases); and/or
> V) revoke a licence (not applicable to the BBC, S4C or Channel 4). [footnotes omitted][74]

In most cases, the maximum financial penalty for commercial television or radio licensees is £250,000 (approximately USD390,000) or 5% of the broadcaster's 'Qualifying Revenue', whichever is the greater. The same maximum of £250,000 also applies to the BBC.

Ofcom has published *Recent Ofcom decisions on the protection of children* on its website,[75] highlighting a number of cases going back four or five years where it held broadcasters to be in breach of the rules on protection of children. A reasonably typical case involved a music video broadcast around 16:00 on a Sunday afternoon that included offensive language such as 'fuck' and 'hoe' (derogatory slang for 'whore').[76] Ofcom held that there was a breach of its Code in relation to sections 1.14 (most offensive language may not be broadcast before the watershed), 1.1.6 (offensive language may only be broadcast before the watershed if this is justified by context) and 2.23 (material which may cause offense must be justified by the context).

An interesting case was a programme called Play, aimed at younger children, which showed young kids playing in a pond and stream, unsupervised by adults.[77] Ofcom held the programme to be in breach of Code section 1.13, which prohibits the display of dangerous behaviour which is likely to be imitated.

There is no system of ratings for television in the United Kingdom. The British Board of Film Classification (BBFC)[78] has a rating system for films, involving six levels of

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[74] Ofcom, *Procedures for the consideration of statutory sanctions in breaches of broadcast licences*, Available at: http://stakeholders.ofcom.org.uk/broadcasting/guidance/complaints-sanctions/procedures-statutory-sanctions/.
[75] Available at: http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/ofcom-for-parents/Recent-Ofcom-Decision.pdf.
[76] *Ibid.*, 50 Biggest Selling RnB Hits of the Noughties, Kiss TV, 10 July 2011, 15:44.
[77] *Ibid.*, Play, Five1, 22 January 2011, 08:30.
[78] See http://www.bbfc.co.uk/.

classification, much along the lines of many of the other classification systems described here.

III.6 United States

In the United States, broadcasting is overseen and regulated by the Federal Communications Commission (FCC), created by the Communications Act 1934, as amended.[79] The five commissioners, including a Chair, are appointed by the President, with the "advice and consent" of the Senate.[80] Up to three commissioners may be members of the same political party, thereby indicating that the FCC, although formally labelled an 'independent agency', it is not 'independent' in the political sense, as required by international standards.[81]

Member of the FCC serve for five years. There are strong conflict of interest rules, which prevent members from holding any financial interest in any of the sectors they regulate. There are also clear prohibitions on any prospective or actual member of the FCC having any financial conflicts of interest, and this is one of the few reasons a member can be dismissed, along with bankruptcy, misbehaviour or incapacity.

In the United States, obscene content is not deemed to be protected by the First Amendment and broadcasters are prohibited from airing such content at any time. According to the U.S. Supreme Court, to be obscene, material must meet a three-prong test:

> The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[82]

The FCC does, however, regulate material that is merely indecent or profane. Section 326 of the Communications Act prohibits the FCC from engaging in censorship, stating:

> Nothing in this Act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.

However, the law in the United States also provides:

> Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or

[79] 47 U.S.C. Chapter 5, Wire or Radio Communication. Available at: http://www.law.cornell.edu/uscode/text/47/chapter-5.
[80] Section 4(a).
[81] See section 4(b)(5) of the Act.
[82] *Miller v. California*, 413 US 15 (1973), p. 24.

both.[83]

Balance is provided between these two competing values by imposing what is known as the 'safe harbor period' between the hours of 6 a.m. and 10 p.m., local time. During this time, when children are more likely to be in the audience, indecent and profane material may not be shown. According to the FCC: "Material is indecent if, in context, it depicts or describes sexual or excretory organs or activities in terms patently offensive as measured by contemporary community standards for the broadcast medium." Context is critical and the FCC looks at three main factors, namely "(1) whether the description or depiction is explicit or graphic; (2) whether the material dwells on or repeats at length descriptions or depictions of sexual or excretory organs; and (3) whether the material appears to pander or is used to titillate or shock." For its part, profane language "includes those words that are so highly offensive that their mere utterance in the context presented may, in legal terms, amount to a nuisance." Once again, context is important and there are no specific words which are inherently profane.[84]

In terms of process, reviews are normally initiated in response to complaints. Where the material appears to disclose evidence of a wilful or repeated violation of the indecency, obscenity and/or profanity prohibitions, the FCC will issue a Notice of Apparent Liability for Forfeiture (NAL), which sets out the breach and the fine the FCC is proposing to impose. The station may then provide its response. If the FCC finds a breach, it issues a Forfeiture Order imposing the fine.

The FCC has the authority to issue civil monetary penalties, revoke a license or deny a licence renewal application. Since the enactment of the Broadcast Decency Enforcement Act of 2005, broadcasters face significant financial consequences for the broadcast of obscene, indecent or profane material. This law allows the FCC to fine broadcasters as much as $550,000 for each utterance of profanity or display of indecent or obscene material in a particular broadcast, up to a maximum of $3,000,000. In practice, the FCC imposes a large number of fines on broadcasters. Thus, in the first six months of 2006, NALs totally nearly $4 million were issued, and the figure for 2004 is nearly $8 million.[85]

In addition, the broadcast of offending material remains a federal crime, allowing the Department of Justice to prosecute broadcasters who air such material. Violators, if convicted in a federal district court, are potentially subject to criminal fines and/or imprisonment for up to two years. In practice, no penalty more severe than a fine has so far been applied in the broadcasting context.

Perhaps the most famous case of indecency in the United States was the brief display of Janet Jackson's breast during the American Superbowl in 2004. The FCC held that this, as well as some of the words in the songs sung by Jackson, was indecent. They imposed

[83] 18 U.S.C. § 1464: Broadcasting obscene language.
[84] FCC, Obscenity, Indecency & Profanity – FAQ. See also the FCC *Fact Sheet*, available at: http://transition.fcc.gov/cgb/consumerfacts/obscene.pdf.
[85] FCC, *Indecency Complaints and NALs: 1993 – 2006*.

the maximum Forfeiture Order of USD550,000 on CBS, the station that broadcast the material.[86] Interestingly, the fine was revoked by the United States Court of Appeal, based on a previous decision of the United States Supreme Court.[87] In essence the Court held that the absence of an FCC policy on fleeting indecent images meant that its decision against CBS was "arbitrary and capricious", and therefore a breach of the First Amendment to the Constitution.

A key United States Supreme Court decision in this area is *FCC v. Pacifica Foundation*,[88] in which the constitutionality of the whole safe harbor system was challenged in the context of a radio broadcast containing foul language. The Court held that the imposition of fines for breach of the rules was not censorship, and hence not offensive to section 326 of the Act. In this regard, the Court stated:

> The prohibition against censorship unequivocally denies the Commission any power to edit proposed broadcasts in advance and to excise material considered inappropriate for the airwaves. The prohibition, however, has never been construed to deny the Commission the power to review the content of completed broadcasts in the performance of its regulatory duties.[89]

The Court also noted that, "of all forms of communication, it is broadcasting that has received the most limited First Amendment protection." Two reasons for this were of particular relevance in the case. First, broadcasting 'confronts' us in the privacy of our own homes, "where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder." Second, broadcasting is "uniquely accessible to children, even those too young to read."[90] Furthermore, the FCC power was not invalidated simply because it might deter certain protected speech, and time, manner, place constraints were legitimate in this context.

An appeal against the very idea of regulating indecent content is currently going through the courts. *FCC v. Fox Television Stations* (2012) is a continuation of the earlier Fox case which held that the fleeting expletives policy of the FCC was not arbitrary. The Appeal Court in that case had not, however, considered the constitutional argument that regulating indecency was a breach of the First Amendment. The Supreme Court remanded the case to the Second Circuit Appeal Court to decide that issue. The Appeal Court held that there was a constitutional breach and the matter is now before the Supreme Court.

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[86] Complaints Against Various Television Licensees Concerning Their February 1, 2004 Broadcast of the Super Bowl XXXVIII Halftime Show, Forfeiture Order, File No. EB-04-IH-0011, NAL/Acct. No. 200432080212, Adopted: February 21, 2006, Released: March 15, 2006.

[87] *CBS Corp. v. FCC*, 663 F. 3d 122 (2011). In the earlier Supreme Court case, *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009), the Supreme Court held that the FCC policy prohibiting even a single use of expletives was not arbitrary. However, as the FCC did not have a policy on fleeting indecency, the imposition of fines for this was arbitrary.

[88] 438 U.S. 726 (1978).

[89] *Ibid.*, p. 735.

[90] *Ibid.*, pp. 748-9.

There is also a programme rating system in the United States, known as the TV Parental Guidelines, developed by the television industry. Programmes are rated voluntarily by broadcasters and programme producers, and the ratings icon appears in the upper left corner of the TV screen during the first 15 seconds of the programme and thereafter every hour as necessary. There is also a TV Parental Guidelines Monitoring Board, made up of experts from the television industry and the general public, which promotes uniformity and consistency in applying the Guidelines. The Board also receives and reviews complaints about specific programme ratings.

The actual ratings consist of two elements, an age-based rating and content descriptors indicating that a program may contain suggestive dialogue (D), coarse or crude language (L), sexual situations (S), or violence (V). There are seven age ratings, Y, for all children, Y7, for children of age seven and above, Y7 – FV, for programmes which involve more intense fantasy violence, G, designed for general audiences (generally suitable for all ages although not specifically designed for children), PG, calling for parental guidance, 14, for children aged 14 and above, and MA, for mature audiences, specifically for children of 17 and above.

The ratings are designed to operate with the V-chip which by law must be installed in every television set of 13 inches or larger (approximately 32 cm) manufactured after January 2000. The V-chip may be programmed by parents to block automatically programmes with specified ratings from being shown on the television.

III.7 Conclusion

The systems in place in the six countries surveyed, while different, also have a number of important similarities. In all six countries, regulators ultimately have the power to impose serious sanctions on broadcasters for breach of rules which in every case involve some kind of watershed. These regulators are all independent bodies, with the exception of India, where the Supreme Court has held that the government must put in place an independent body, and the qualified case of the United States, where the regulator is not politically independent but, rather, politically balanced.

As noted, every country uses some kind of watershed system for protection of children. In all but one case, this involves a single watershed, although several countries place an explicit obligation on broadcasters to phase in more adult material both before and after the watershed (i.e. not to show more challenging material when very young audiences might be expected to be watching or very adult material just after the watershed). France, alone among the countries surveyed, imposes a series of three watersheds for progressively older children.

In three countries – Canada, India and South Africa – there is some sort of formal recognition of the role of private bodies in conducting self-regulatory activities. In India, this is the result of a political stalemate rather than a legally entrenched system, while in both Canada and South Africa, private bodies have been legally recognised by the statutory regulator as being responsible for applying the standards to their members.

Significantly, in South Africa the private body has the power to fine its members, while in Canada and India their powers are limited to requiring offending members to broadcast a statement to this effect.

Several countries – Canada, France, South Africa and the United States – have in place a rating system in addition to the primary watershed system. In all but one of these countries, the system of ratings is mandatory (and can attract the same sanctions as breach of the watershed rules); in the United States, it is run on a voluntary basis. In many countries, ratings must be, or are in practice, accompanied by more detailed warnings describing the specific sorts of challenging material in programmes (such as sexually explicit material, violence and so on).

Most countries regulate for a range of challenging material, and in all countries except one this includes sexual content, violence and profanity; the United States alone does not regulate for violence.

All but one of the countries surveyed employs a dual monitoring and complaints system; India does not have a complaints system. In all countries, regulators may ultimately impose serious sanctions on offending broadcasters, including fines but also the possibility of licence suspension or even revocation. At the same time, these more serious sanctions are applied only extremely rarely in most countries. The United States is again an exception here, with a larger number of fines, often involving quite significant sums of money, being imposed, while fines are also not as uncommon in South Africa as in the other countries.

IV. Assessment of the Brazilian System

This part of the Study assesses the Brazilian system in light of international law and the comparative practice of the States reviewed above. It may be noted that some elements of the Brazilian system are reflected in many or even all of the systems surveyed, other elements are reflected in the practice of only a few countries while yet other elements are unique to Brazil. To assist in this part of the analysis, it is broken down into five parts, namely independent regulation, prior censorship, watersheds, ratings and sanctions.

Independent Regulation

It is clearly established that, under international law, only independent bodies should have the power to exercise regulatory powers in the area of broadcasting. The primary rationale for this is to prevent bodies which are under the control or influence of either the government or commercial interests from acting in ways which promote the interests of their masters, rather than the wider public interest in broadcasting, which includes respect for freedom of expression.

It is equally clear that the system in Brazil is not run by an independent body but, instead, by the Ministry of Justice. This is partially mitigated by the relatively limited role of the Ministry in overseeing the system. Thus, the specific classification rules were established through a broad consultative process rather than by the Ministry on its own. The Ministry

does not classify programmes itself, but just reviews the classifications adopted by broadcasters. Where the Ministry indicates that a programme should be reclassified, the broadcaster can appeal against this. While it would appear that the Ministry does have the power to impose fines, in practice it does not do this. Furthermore, more serious measures, such as licence suspensions, can only be imposed by the courts.

To further insulate this system from potential political interference, it is suggested that the Ministry establish an arms-length body, with independent members, to undertake the functions of monitoring and reviewing complaints, and of administering the classification and sanctions parts of the system.

It may be noted that better practice, where this is possible, is to engage in a form of co-regulation, and such systems are in place in Canada and South Africa, and, to a lesser extent, in India. In these countries, responsibility for oversight of the system is formally delegated to self-regulatory bodies. These operate at arms length to the broadcasting industry and are backed up by legal enforcement through the statutory regulator.

Prior Censorship

It is clear that the system in place in Brazil does not constitute prior censorship, at least as that is understood under international law. There are two main reasons for this. First, the system does not involve oversight of programming before it goes out, the hallmark of prior censorship. Instead, there is *post facto* monitoring, and the application of the rules after programmes have been shown. It is true that the Ministry may require an ongoing programme series to be moved to a different time slot, based on the maturity of the content it contains. But this does not constitute prior censorship. The same possibility is present in the United States, where the courts had no difficulty in concluding that the system did not involve prior censorship.

Second, the main evil of prior censorship is the complete suppression of expression before it reaches the public. This prevents the author from enlisting public opinion in his or her defence, and it also denies the reality testing that comes with the *post facto* application of sanctions. By this is meant that, in a *post facto* sanctions system, government claims that certain expression must be suppressed because it is harmful are not based on entirely theoretical considerations, but may be tested in a more realistic way, because the expression has in fact gone out and either caused harm or not.

This evil is simply not present in the Brazilian system for protection of children, or in any of the other systems surveyed. This is because these systems do not allow for the prior suppression of any particular expression but simply allow the authorities to require certain types of programmes to be pushed to a later time slot. For fairly obvious reasons, this does not engage the main problem with prior censorship. This, of course, is without prejudice to the subsequent application of sanctions for material – such as obscene material in the United States – which may never be shown on television.

A slight gloss is required here. The right to freedom of expression under international law protects the right not to speak, as well as the right to speak. It is thus arguable that the

mandatory display of ratings is a form of prior censorship, albeit of the 'positive' sort of requiring, in advance, speech that the author would not otherwise wish to disseminate. Even if this argument is accepted, this represents a very minimal interference with freedom of expression and it would fall within the scope of even the very limited acceptance of prior censorship to protect children found in Article 13(4) of the *American Convention on Human Rights*.

Watersheds

All of the systems surveyed impose a form of watershed, and in every country this is either accepted or has been upheld as legitimate by the courts. The ubiquity of this approach, along with the absence of any other apparently viable alternatives, bear testament to its legitimacy. Applying the test for restrictions on freedom of expression under international law – for this clearly represents a *prima facie* interference with freedom of expression – leads to the same result.

To meet the 'provided by law' criterion, the law needs to set out sufficiently clearly what may be shown and when. The application of fairly detailed codes of conduct in most of the countries surveyed, along with a developed body of decisions applying these codes, satisfy that condition. These systems aim to protect children, which is a legitimate aim for restricting freedom of expression under international law.

In terms of necessity, it is uncontroversial that these systems are rationally connected to the objective they seek to serve; moving challenging programming to later time slots will dramatically reduce the number of younger persons viewing the programming, thereby protecting them from potential harm. The system also appears to be the least intrusive effective system to achieve this end. While a simple rating system, leaving parents to decide what their kids may watch, would be less intrusive, it would be of doubtful effectiveness. Parents cannot be expected to have the time to monitor all of their children's viewing. Furthermore, many parents rely on television to occupy and entertain their children for part of the day. If stations are allowed to broadcast more challenging material whenever they want, even with a rating attached to it, parents may well be deprived of this possibility. Finally, in terms of proportionality, a watershed approach is minimally intrusive in terms of freedom of expression, while it brings significant benefits in terms of protecting children.

A question arises here as to whether the complex system in place in Brazil, with five different viewing periods, can be justified as necessary. It may be noted that all but one of the countries surveyed employ a simple one time period watershed (i.e. with two different viewing periods, before and after the watershed). Only France has a more complex system, with four different viewing periods. On the other hand, several of the systems call for a graduated approach both before and after the watershed, so that material which is not appropriate for seven year olds would not be shown in the afternoon, and material which is very adult in nature would not be shown immediately after the watershed.

It is recommended that the complex system of viewing periods in Brazil be reviewed, with a view to assessing whether or not such a complex system is really necessary to

protect children. Consideration should be given to reducing the number of viewing periods, and perhaps to replacing some of the hard time limits with a more general requirement of graduated dissemination of more mature material

Ratings

Several of the countries surveyed have in place mandatory rating systems, while in others voluntary systems are in place. As noted above, these are *prima facie* restrictions on freedom of expression, albeit of an extremely limited level of intrusion. Inasmuch as these enhance the protection of children by providing useful information to parents and guardians, and given their minimally intrusive nature, it is uncontroversial that they are justifiable as restrictions on freedom of expression.

Sanctions

In all of the countries surveyed, a range of sanctions are available to oversight bodies where broadcasters fail to respect the rules for protection of children. The vast majority of actual cases in these countries are resolved through simple warnings to broadcasters but more serious sanctions – including fines and even licence suspension and revocation – are also available in each country. Furthermore, in all of these countries, these penalties may be imposed, in the first instance, by an administrative regulatory body,[91] although this is always subject to appeal before the courts. By comparison, the regime of sanctions in Brazil is relatively protective of broadcasters, inasmuch as the more serious sanction of licence suspension may be imposed only by court order and the most serious sanction of licence revocation is not envisaged at all.

[91] In the case of India, it is the government that imposes such sanctions although, as noted, this has been held by the courts to be in breach of the constitution and, in practice, oversight is done by industry bodies.