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# The role of the state and self-regulation in journalism: the balance of power in Portugal

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## Introduction

It is widely accepted that journalism plays a relevant role in forming the concepts, images and belief systems used to interpret the world. There is a strong dispute however as to the best approach to ensure the positive functions of this performative role and to reduce the negative social consequences of journalist's actions and omissions. Though in different ways, media regulation[1] is expected to raise journalistic standards and therefore to contribute to the expansion of public and private media social responsibilities.

Quite frequently the opposition between journalistic duties and obligations, on the one hand, and media freedom, on the other hand, has been dichotomized as if both dimensions were not constitutive of democratic societies. Commercial media companies tend to argue for more autonomy in order to pursuit their business objectives, suggesting that the market is the most adequate regulatory mechanism. Differently, other social actors have been defending a progressive sophistication of regulation, particularly state-centred, as a last resort to ensure fundamental values in an increasingly commercially-driven environment. Though the balance of power between state-centred regulatory bodies and professionally-based mechanisms differ quite considerably from country to country, the overall regulatory construct is designed to induce change in the name of the 'public interest' and it is the ongoing result of different (often conflicting) views regarding the role of the state in society.

This article focuses on the intricate regulatory mechanisms of the journalistic profession in Portugal. It presents the main traits of the legal apparatus relevant to the journalistic activity, the state media regulatory entity (ERC- *Entidade Reguladora para a Comunicação Social*) and the diverse journalistic self-regulatory instruments, namely newsroom councils, internal codes, newsroom stylebooks, the journalistic deontological code, the deontological council, ombudsman and media criticism.

Analysing the journalistic regulatory apparatus and its historical development, this chapter argues that general interest values cannot be guaranteed by a single regulatory body, legal

[1] For the purposes of this paper, we will use Black's definition of regulation: 'the sustained and focused attempt to alter the behaviour of others according to defined standards or purposes with the intention of producing a broadly identified outcome or outcomes, which may involve mechanisms of standard-setting, information-gathering and behaviour-modification' (Black, 2002, p. 20). For more on the concept of regulation, see, inter alia, Hans-Bredow-Institute for Media Research at the University of Hamburg (2006); McGonagle (2003); Palzer (2003).

setting or individual action. Indeed, the Portuguese case shows that, despite the prominence of state media regulation, the efficiency of the system depends on the overall functioning of the entire regulatory construct. Professional self-regulation and citizens' participation are perceived as indispensable pillars in the development of a responsible and accountable media culture.

## Why regulating the media at all?

Quite often media regulation is perceived as uniquely (or mostly) as a state-centred activity, developed according to the so-called 'command-and-control' model (Black, 2002), and primarily focused on the economic welfare of consumers in an open market society. This view has been increasingly challenged over the last years. Regulation should be regarded not only in a 'negative' way (to prevent any area of activity, or institution, or company, from causing harm to basic rights and needs of people in a community), but also in a 'positive' mode (to enhance and actively stimulate an area of activity, or institution, or company, to fulfil those basic needs and expectations, under the supposition that in a community there is such thing as the 'public interest', which deserves to be protected).

Regulation should also be perceived as a much wider set of rules, prescriptions, orientations and mechanisms than those put in practice by the state, in a top-down, unilateral approach. Actually, as Black (*ibid*., p. 3-4) puts it, power and control are nowadays exercised throughout society in a variety of ways and, so, the regulatory systems existing within social spheres can be seen 'as equally, if not more, important to social ordering as the formal ordering of the state'. Regulation 'occurs in many locations, in many *fora*' (*ibid.,* p.4), and so a 'decentred' perspective is more suitable if we want to understand its complexity in contemporary societies.

Furthermore, regulation should not be restricted to the correction of market failures or abuses; that is to say, to the goal of welfare economics. If it was traditionally regarded (and dealt with) as such, regulatory concerns have recently expanded to other areas of social life. This means that instead of treating people basically as 'consumers' (or even as 'customers'), they are also perceived as 'citizens'. And this opposition of terms – 'citizens' versus 'consumers' – runs in parallel with other oppositions that usually structure regulatory discourse: 'needs versus wants, society versus individual, language of rights versus language of choice, and regulation *for* the public interest versus regulation *against* consumer detriment' (Livingstone *et al*., 2007, p. 65, emphasis added). This broader perspective is

particularly relevant in what concerns media regulation, even if we assume that 'the citizen interest is, by contrast to the consumer interest, difficult to define clearly and unambiguously' (*ibid*., p. 73). The fact is that regulation of the free 'marketplace of ideas' can't be regarded (like the marketplace of goods) just in terms of economic theory – and of its accordance to the supply-and-demand rules –, but also in terms of political, democratic theory, taking into consideration its importance for the building up of well-informed, self-governing citizens (Napoli, 1999).

Lastly, regulation should not be treated as a technical activity but also as a kind of moral activity (Silverstone, 2004). The right question to be asked by the regulatory discourses must be 'regulation for what, and for whom?', as Silverstone puts it (*ibid*., p. 446). This means that, in the sensitive domain of mass media, regulation must be concerned not only with their production and content, but with their real contribution to a 'critical literacy' of mediated communication, as well as to the development of a 'civic sense' that stresses the responsibilities each one of us should feel for 'the other'. And this concern with 'media civics' is, again in Silverstone's words (*ibid*., p. 448), something 'crucial to citizenship in the 21st century'.

Once there is a wide consensus that the media, in general, and journalism, in particular, play a significant role in society, regulatory mechanisms have been put in place in almost all advanced democracies. Significantly, as Reinard and Ortiz point out, 'scholars with an interest in international development have found the study of mass communication regulation a valuable index of national development' (2005, p. 603). Briefly we shall put forward some reasons for this correlation.

First of all, the particular nature of the service (provision of discursive products) provided by the media to society should be considered. The relevance of both entertainment and informative content to community life makes it impossible to think about these narratives as mere commodities, freely traded in the marketplace and subject to no other law rather than supply-and-demand. Notwithstanding different views regarding such thing as 'common good', it can be generally agreed however that the media 'make a necessary contribution to the working of a modern social system', including here 'many basic and sensitive social and political processes' (McQuail, 2005, p. 238)[2]. And 'necessity, if nothing else, brings with it an obligation' (*ibidem*), particularly in an area where important consequences, both for individuals and the society as a whole, can arise from its concrete way of doing things. So, it

[2] Wahl-Jorgensen & Galperin (2000, p. 38) argue that far from being a simple commodity like 'cans of fruit and bars of soap', the mass media should actually be viewed as 'the sole site for political agency in late modernity' – this meaning that they are 'the place where we may get together to justify the norms on which we act, and build the solidarity we need to live together'.

is the simple idea of a pluralistic, democratic functioning of a society (where a free flow of information runs together with the supply of all the information and opinion necessary for citizens to actively participate in the common life) that seems to require media responsibility and some kind of accountability, either to prevent any harm to basic rights, or to foster their positive contributions to the community[3].

The correct articulation of the two (sometimes conflictive) poles of freedom and responsibility implied in media activity has been discussed for decades, especially in the context of the so-called '*social responsibility theory*'. This theory was clearly systematized by Siebert, Peterson & Schramm in 'Four Theories of the Press' (1956), but its roots can be found either in the work of the Hutchins Commission (1947), in the USA – with its well-known final report, '*A Free and Responsible Press*' – or in a variety of measures taken in European countries during the first half of 20th century, for example those who led to the building up of a public broadcasting service[4]. Common to these reflections and efforts was, after all, the 'need in democratic societies to develop a workable philosophy of and policies for the press' (Christians & Nordenstreng, 2004, p. 4), under the supposition that media have a duty to serve society and the liberal/libertarian model, with its emphasis only on the individual freedom as a 'natural' and 'nonnegotiable' right, can't apparently fulfil that duty in proper terms.

The Hutchins Report clearly stressed the idea that the *right of the press* to be free is inseparable from the *right of the people* to have a free press and, going a step further, the supplementary right of the people to have '*an adequate press*' (Nerone *et al.,* 1995, p. 97). So the shift somehow turns from the rights of the press to the rights of the people. Even the individual right to free expression (which is not exactly the same thing as the right to a free press) should be regarded, in this context, not as a *natural* right, but as a *moral* right. And a moral right, as it was put by Siebert, Peterson & Schramm (1956/1965, p. 96), evoking the

[3] Even more than two sides of a coin, or two poles in a constant fight with each other, 'rights' and 'responsibilities' (rights to free speech and to free press, responsibilities for its adequate use) should be regarded as intimately bound together, like two strings that make a rope, to use Vernon Jensen's metaphor (*apud* Johannesen, 2001, p. 2008). This author even suggests the use of a new term, '*rightsabilities'*, to stress how both concepts depend from each other, and how the first one can never be understood without the last one.

[4] Recalling the 'Protocol on Public Service Broadcasting' adopted by the European Union (EU) in 1997, in Amsterdam, Christians & Nordenstreng (2004. p. 7-8) underline the 'vital point' that 'public broadcasting (vs. commercial broadcasting) should be understood in the EU as part of the cultural and social sphere based in national priorities, instead of the economic sphere based on free competition within the broader European scale. Accordingly, public service broadcasting is defined at the constitutional level as an exception to the principle of a free European market'. This helps the authors to assert that 'the Social Responsibility theory prevails in the deep structures of political economy and media policy', and, therefore, 'one is entitled to say that the spirit of Hutchins [Report] is very much alive in Europe today'.

Hutchins Report's background, is 'a value which I am not free to relinquish, as I am free to relinquish a personal interest'. Besides, this moral right to free speech is inseparable from a complementary duty, a duty towards one's consciousness and towards the others; that's why, according to the social responsibility theory, one's right to free expression 'must be balanced against the private rights of others and against vital social interests' (*ibid*., p. 97).

The importance granted to the people's *right to free expression* as the cornerstone and sort of 'founding myth' of journalism (Giroux, 1991, p. 129) should be balanced, in this context, with other similarly fundamental societal bedrock: the people's *right to information* – complete, comprehensive, pluralistic, true and fair information, and essential to civic participation in a democratic society. And free competition in a free market place does not mechanically guarantee this basic right.

As a matter of fact, the rationale for 'a free and responsible press', in the terms that it has been developed over the last decades, stresses the importance of a 'negative' freedom (or '*freedom from'*) as well as of a 'positive' freedom (or '*freedom for'*). Removing obstacles to the free functioning of the press (as the liberal tradition insists) is only part of the story. The other half derives from the obligation for the press to actively fulfil its duties towards the citizens and the society as a whole, giving a positive/constructive content to a free environment. Freedom can't be dissociated from the conditions of its effective exercise.

In their critical review of the work 'Four Theories of the Press', Nerone *et al.* (1995, p. 84) even considered that this 'positive freedom' is 'the conceptual axis around which social responsibility [theory] revolves'. In this sense, freedom (of expression, of the press) is not an 'unconditional' right, but instead something that 'involves the necessity of assuming and performing duties beyond self-interest', because, in this perspective, 'the self, community, and universal humanness are interdependent and consubstantial' (Nerone *et al.,* 1995, p. 86-87). Thus, for someone to be free means 'to have the use of one's powers of action (i) without restraint or control from outside, and (ii) with whatever means or equipment the action requires' (*ibid*., p. 94). Likewise, for the press to be free means being '*free from*' any restraints or pressures to its functioning, but also being '*free for*' the search and attainment of the purposes defined by its unavoidable ethical sense and by the basic social needs it is supposed to serve. What the press does wrong, is something that must be criticized (and regulated); similarly, what the press does not do at all, but should do, is similarly a matter for concern (and for regulation) on the behalf of the public interest.

If the basis of most arguments regarding the need for media and journalistic regulation is the 'public interest', how could it possibly be defined? Despite some conceptual disorientation, this vague notion is central to democratic societies. It is so because it represents 'the values

of any particular society' (Morrison & Svennevig, 2007, p. 45). Therefore, every society should work on its understanding of 'public interest' in order to foster its pursuit and to prevent abuses under its name. As a matter of fact, it is well known that 'it is difficult at times to separate what the public is interested in from that which is in the public interest' (*ibid*., p. 50), even when some issues covered by the media are justified by the professional use of the traditional 'news values'. Recently, Morrison & Svennevig (2007) suggested that the alternative concept of 'social importance' would be preferable to the one of 'public interest'. And they explain it in the context of their research about acceptable or unacceptable intrusions, by the media, into someone's privacy:

> For intrusion to be justified it had to expose something that had importance for a collective – it could not be justified on grounds of personal interest, or even the interests of many if the knowledge provided did not impact in some collective manner (Morrison & Svennevig, 2007, p. 59).

The alternative term of 'social importance' could, in their opinion, not only 'get rid of the troublesome referent, *the public*, and the cognitively bothersome word, *interest'* (*ibid*., p. 61, emphasis by the authors), but also introduce a notion of proportion that could be useful for practical decisions:

> The term 'the public interest' has a gravitas attached that makes it too severe a test for intrusion of privacy – it has little sensitivity. Social importance can be scaled from very high social importance to very low social importance. Once the level of social importance is understood, it then follows that the degree of intrusion considered to be appropriate is dependent upon that the importance; it is almost arithmetic (*ibid*., p. 61).

This concept of 'social importance' (linked to an idea of social solidarity, of some social cohesion based on commonly shared values) could then, according to these authors, be used as some kind of test of the public interest in any particular situation, helping to give it a more concrete meaning. Besides, this perspective of the 'public interest' would help to put it in the field of the political and social issues, which seems to be specially relevant in a time when an 'economic-led approach, operationalised in terms of market research, is emerging as dominant' (Lunt & Livingstone, 2007, p. 5) to define the 'public interest'.

## Moving regulation forward: from responsibility to accountability

Regulation takes place because the media have responsibilities[5] towards society. The general consensus regarding media responsibilities has led societies to develop some sort of media regulation. What is highly disputed, however, is the 'the degree and kind of obligation that might be involved' in those responsibilities, and 'how [they] should be promoted' (McQuail, 2005, p. 249). Reducing media responsibility to a word or to a couple of good intentions, without any practical follow-up, wouldn't serve society. That's why, after defining a proper conduct – which is the task of responsibility – one must move towards the real obligation to execute it – which is the task of accountability. As Hodges (1990) puts it, someone is responsible '*for*' something (for an obligation, for a need), and the next step implies that someone is also accountable '*to*' (in the case of the media, to the people, to the citizens, to society). Accountability, to use McQuail's words (1997, p. 515), 'refers to the processes by which media are called to account for meeting their obligations'. Responsibility without accountability would risk being an empty concept; likewise, accountability must be put in practice through different instruments and mechanisms that allow the several actors of the communication process to actually ask for media's accounts and to get some answers from them[6]. And this leads us to regulation in its multiple forms.

To understand regulation in a 'positive' sense means that the state-media/market-media relationship should be overtaken. In addition to these fundamental dimensions, another pillar must be equated: citizens themselves. 'Discussions of democracy and the media, however the relationship may be formulated, miss the point if they concentrate on the sterile debate between state and the media' (Collin Sparks, *apud* Josephi, 2005, p. 579). Reducing

[5] These responsibilities are diverse, according to their source and to the degree of compulsion involved – and, therefore, they stress differently the kind of regulatory mechanisms that should be most adequate in each case. The three main types of media responsibility, following Hodges (1990) and McQuail (1997), are the '*assigned*' responsibilities (mostly covered by law and serving to balance media freedom with the rights of other members of society and the public interest), '*contracted*' responsibilities (arising because of some implied covenant between press and society, maintained by convention and mutual agreement), and '*self-imposed*' responsibilities (referring to voluntary professional commitments to observe certain ethical standards and to serve public purposes). And 'a full consideration of media accountability' has to take account of all the categories (McQuail, 1997, p. 516).

[6] As McQuail (1997, p. 517) suggests, media accountability can assume different modes, according to the degree of coercion involved and to the main purpose intended: on one pole, the mode of *'liability'*, characterized by 'an adversarial relationship', deals mostly with issues of harm caused by the media and with material sanctions that can punish that behaviour; on the other pole, the mode of *'answerability'*, more concerned with improving mass media quality, and specially open to voluntary negotiations and interactions in order to achieve the resolution of differences. Meanwhile, 'there is a range of possibilities in between these alternative models', adds McQuail (*ibidem*). And the preference for one or other of these poles (the first more suitable for public regulation, the second closer to self-regulation mechanisms) somehow depends on the choice for a particular perspective of political organization of the media system.

regulatory concerns to the market-media relationship – under the supposition that it is the best way of preserving both media freedom and consumers' freedom to choose – leads us to forget that 'there is no such thing as a naturally and neutrally regulating media marketplace' (Wahl-Jorgensen & Galperin, 2000, p. 31). Instead, to leave things dependent only on the unrestrained functioning of the marketplace means to be taken by 'the subtle and not-so-subtle ways in which it imposes its own regulatory logic' (*ibidem*). Furthermore, to reduce freedom to the possibility of buying one or another newspaper, or of switching this or that TV channel, hoping that (according to the old libertarian traditions) some kind of 'self-righting process' will select the best and eliminate the worst, seems to be little to expect for a participatory citizenship in a democratic society. Once again, it's the consumer-centred perspective taking over the citizen-centred perspective:

> When access to the public forum is structured around the possession of money and power, of stock and professional position rather than the level to which the individual is affected, a significant step on the road toward the complete deterioration of rational public debate, or communicative action, has been taken (Wahl-Jorgensen & Galperin, 2000, p. 33-34).

Moving citizens from the sidelines of the communication process (or just from the 'audience', as they are commonly treated) to the public arena where they really belong (Nordenstreng, 1997) means a new understanding of the freedom of expression and of the right to communicate. This right, actually, is a right 'for all citizens rather than [for] the media and its professionals' (*ibid*., p. 14). And, if it is so, citizens must also be a part in media regulation – together with the state, the market and the media themselves.

A citizen-centred perspective of these issues, instead of a media-centred one, tries to change a situation where, in general terms, 'the people have become the *target* of influence' of the mass media, while, according to the general theory of democracy (the sovereignty of the people), 'they should have been the *source* of influence' (*ibid*., p. 16-17, emphasis added). And if people are to be a central partner in media regulation processes, it is because the media must be accountable in the first place to the people they work for – and in whose name they claim to work.

Meeting these same concerns, Bardoel & d'Haenens (2004) suggest that 'the 'switch' to a citizen-based perspective [of the media] will have to be made more often', particularly in the present (and evolving) conditions induced by new media:

> Where formerly the government and the market fought for priority, today we are more likely to hear the slogan: 'Citizens first, then the market, and the government last'. Along with this, we see in this sector that with the variety of what is on offer and the arrival of new media, power has in fact shifted from the sender to the receiver (Bardoel & d'Haenens, 2004, p. 172).

This reinforces the idea that, as far as media regulation is concerned, 'the traditional legal and market-oriented accountability mechanisms alone are no longer sufficient', and so it seems advisable 'to bring back the citizen in the media and media policy debate' (*ibidem*). In fact, if citizens are to play an effective role in the regulatory processes, one assumption must be definitely challenged: that freedom (freedom of expression, freedom of the press) is necessarily inconsistent with accountability. As McQuail puts it:

> Normative media theory has allowed the debate to be narrowed down to a choice between freedom of the media market on the one hand and control or censorship by the state in one form or another on the other, as if greater accountability can only be achieved by sacrificing more freedom. This ignores the complexities of what freedom means in media publication, the inevitability of constraint in public communication and the diversity of means by which the interests of 'society', as variously manifested, can be identified, expressed and achieved, without violating the essence of freedom of expression. It also ignores the many responsibilities that are actually and properly entailed in the exercise of freedom by public media (McQuail, 2005, p. 237).

So, the core of this challenge is not the simple refusal of any regulatory mechanisms or instruments, but the need to find 'effective *means* of accountability that would be consistent with the notion of responsibility (…) and also with essential principles of free expression' (*ibid*., p. 242, emphasis by the author). Moreover, the whole task of media regulation would be best achieved – either in terms of efficiency or in terms of, so-to-speak, civic and democratic pedagogy – if responsibilities are dispersed amongst various actors: the state, the market, media companies, media professionals and the public. In an attempt to systematise the different levels in which the regulatory effort may take place, we can follow the outline designed by McQuail (1997; 2005):

- the *frame of law and formal regulation* – the level of political accountability, comprising regulatory documents concerning what media may and may not do. The main issues here relate mostly to prevention of alleged harm to individuals;
- the *market frame* – the level of accountability linked to the processes of demand and supply in a free and competitive marketplace, which should, at least in theory, encourage 'good' and discourage 'bad' performance;
- the *frame of public responsibility* – the level of public accountability referring to the assumption that media organizations are economic companies, but are also social institutions that fulfil certain important tasks, subsumed under the definition of the 'public interest';

- the *frame of professional responsibility* – the level of professional accountability, the one that 'arises out of the self-respect and ethical development of professionals working in the media (…) who set their own standards of good performance' (McQuail, 2005, p. 247).

If the first frame addresses typically to the '*assigned'* responsibilities of the media – and calls, therefore, for some formal, 'centred' regulation – the last two frames relate more to the '*contracted'* and the '*self-imposed*' responsibilities, thus asking for self-regulatory (or co-regulatory) instruments and mechanisms. Nevertheless, the entire regulatory building for the media should pay attention to all these layers at a time, because that seems the only way to search for an adequate balance of power between the state, the market and society. This attempt means, after all, an on-going struggle for a balanced relationship between *individual* and *collective*, between *people-as-consumers* and *people-as-citizens*, between *freedom* and *responsibility*.

**Journalism regulation and the pervasive Portuguese state**

Though it has been argued that regulation should not be seen as a process tied exclusively or even predominantly to the state, the Portuguese state plays an all-encompassing role in the regulation of the journalistic activity. First of all, there is a wide legal framework which is developed by state institutions, predominantly by the government and approved by the Parliament. The Constitution is by far the most critical legal construct and it has a number of prerogatives with a direct incidence in the journalistic profession. It deals with fundamental rights and duties (articles 16, 17, 18, 19, 25, 26) with freedom of expression and freedom of information (article 37), with freedom of the media (article 38), with the media regulatory entity (article 39) and with right to reply and political broadcasts (article 40).

The core of the constitutional protection of the journalistic activity *per se* is in article 38. This article clearly demonstrates the relevance given by the constitutional legislator to journalism as a pillar of the democratic regime. Fundamental journalistic rights are inscribed here, namely freedom of expression and freedom of creation, right to participate in the editorial orientation of the medium, right to access to news sources, right to independence and right to profession secrecy (including the protection of news sources). But article 38 goes beyond the protection of the journalistic activity *strictu sensu*. It contemplates a number of media companies' principles which are perceived as indispensable for an adequate journalistic performance. These are the principles of transparency of financing and property, the

principle of non-concentration, the principle of non-discrimination and the principle of independence form the economic and political power.

In addition to the Constitution, there is a vast range of laws and legal diplomas which outline the regulatory construct in which Portuguese journalists operate (see, *inter alia*, Carvalho, A., Cardoso, A., & Figueiredo, J., 2005). The sectorial laws (Press Law, Television Law and Radio Law) are pivotal in this context. The Press Law (*Lei de Imprensa*) is a detailed document contemplating journalists and citizens' rights and duties in terms of public information. The public interest of the press is underlined and the conditions for access to the market are set out. This law also considers the specific responsibilities of the journalistic companies, publishers, editors and journalists. Both the Television Law (*Lei da Televisão*) and the Radio Law (*Lei da Rádio*) aim to regulate the access to the television activity and their exercise within the national territory. These are meticulous documents covering a wide array of issues from fundamental freedoms and rights up to technical aspects. Programming strategies and content (pluralism, diversity, prohibited material, etc.). The specific nature of public television and radio is also contemplated. Furthermore, other general laws such as the Penal Code (*Código Penal*), Penal Process Code (*Código do Processo Penal*) and the Civil Code (*Código Civil*) also have a number of articles directly linked with the journalistic performance.

As a legislator, the sate goes far beyond the production of legal tools specifically related to the journalistic profession. Media companies are part of a wider economic apparatus which is under the scope of national laws and is supervised by economic regulatory bodies such as the Competition Authority (*Autoridade da Concorrência*). It is also up to the state to define the main rules for the development of the technological infrastructures (access to the infrastructure and services markets, spectrum allocation, etc.) It is up to the Communications Authority (ICP-*ANACOM – Autoridade Nacional das Comunicações*) to ensure the regular functioning of the so-called 'technical' facet (despite the economic interests involved) of media and communications.

As an external regulator of the journalistic activity, the state is not merely a legislator. The state plays a fundamental role also as *owner* and as a *subsiding entity* of media companies. Like most European countries, the Portuguese state owns a public television and radio company called *Rádio e Televisão de Portugal (RTP).* RTP runs the following eight television channels: RTP 1 (generalist), RTP 2 (generalist), RTP Açores (regional), RTP Madeira (regional), RTP Internacional (international), RTP África (international), RTP N (news) and RTP Memória (nostalgic), and the subsequent seven radio channels: Antena 1 (generalist/talk radio), Antena 2 (classic music), Antena 3 (adult contemporary/urban), RDP

África (international), RDP Madeira (Ant 1) (regional), RDP Madeira (Ant. 3) (regional) and RDP Açores (regional). Furthermore, the state has a strong position in the national news agency LUSA.

The overt rationale for the state's intervention as proprietor of media companies relates to the exceptional value of public service radio and television, and of the national news agency. Being the owner (either totally or partially, as in the case of LUSA) of such socially relevant tools, the state aims to guarantee that citizens are served at the highest possible standard (both in terms of programming and information) and, at the same time, the public service media are expected to act as a system regulator, stimulating the quality of the entire media system. Whether this has ever materialised or not is not the main focus of the article (for more on the relationship between public service media and the political power in Portugal, see Sousa & Santos, 2005; Sousa, 1996). What seems nevertheless quite evident is that owning the media and defining the basic rules of their action, namely through concession contracts, the state outlines its vision regarding what public service media should be and how they should behave. The constitutional guarantee of public service media independence form the political and economic power is ensured (or attempted) by the existence of a media regulatory body, *Entidade Reguladora da Comunicação Social*.

Indeed, as an external regulator, the state also has a say in the system as a media *financing entity*. Once again the underlying principle of the state's financial support of the media system relates to the exceptional value of media in a democratic society. Helping financially the media companies, the state hopes to regulate the market and to ensure diversity and pluralism. Public service broadcasting and the regional press are the main beneficiaries of the state's financial support. RTP is financed annually whilst the regional press has to apply for subsidies and is strongly supported on the expedition costs. The end result of the state's support of the regional press is not yet fully understood but authors such as Ferreira (2005) argue that consequences of this support are disastrous. Poor quality regional press is said to be maintained merely due to subsidies and the editorial independence of newspapers and radio stations is undermined.

As we have seen, the legal framework defines the basis of the state's understanding about the societal expectations regarding the media performance in general and the journalistic activity in particular. But if a legal system is to be more than dead letter it needs implementation mechanisms. The *Entidade Reguladora para a Comunicação Social* is the newly-created body designed to implement the law and to ensure that journalists behave up to certain standards. The Portuguese Constitution has one article (nº 39) dedicated to this

media regulatory institution. The Constitution states that, in addition to the courts, the media should be regulated by an external independent entity. It is up to the ERC to ensure:

a) the right to information and to press freedom;

b) non-concentration of the media;

c) the independence of the media from political and economic power;

d) the respect for personal rights, freedoms and guarantees;

e) the respect for the professional rules of the media professions;

f) the possibility of expression and confrontation of divergent opinions;

g) the exercise of political broadcasts and the right to reply.

According to the fundamental law, the board of the media regulatory entity is to be designated by the Parliament. Both the Constitution and the Law nº 53/2005 of 8 November which sets up the ERC (it started operating in 2006) reflect the legislator's preoccupation with the independence of the regulator. Despite the infancy of the ERC, Portugal has a thirty year tradition of media regulation, although up to 1989 the regulator merely covered the public sector media. The ERC is the successor of the High Authority for the Media (*Alta Autoridade para a Comunicação Social*), the first regulatory entity to have the responsibility for both private and public media. From the High Authority for the Media, the ERC inherits a legacy of public distrust in its efficiency and independence. In this context, the ERC's Law attempts to reinforce its human, technical and financial resources as well as its independence from the political power of the day and from media companies.

The 'pure' state-regulatory model, in which no social actors are represented (apart from an advisory council with no effective powers) was strongly criticised by the national Journalist's Union (*Sindicato dos Jornalistas*) and by the Confederation of the Media Companies (*Confederação de Meios da Comunicação Social*). The minister responsible for the media, Augusto Santos Silva (in press), has strongly defended the model, arguing that it is necessary to avoid the 'capture of the regulator' by private/corporatist interests. The minister argues that the ERC is one pillar of the regulatory construct and this one, in particular, is exclusively concerned with the defence of the public interest (in press). It is nevertheless one of the ERC's functions to promote other forms of co-regulation which is extremely incipient.

The absence of interest representation and the notorious reinforcement of the ERC's powers (ranging from recommendation to the withdrawal of operating licences) has been cause for much concern in the journalistic profession. Indeed, the ERC has to ensure that the journalistic codes of conduct are followed but – despite the constitutional guarantees of

independence from the political and economic power – there is a strong suspicion regarding the ERC's capability and fairness. The ERC's ability to defend citizens from the media negative externalities and to positively influence the programming and the journalistic output has yet to be proven.

## The blurred domain of journalistic self-regulation

Through legal and administrative mechanisms, the Portuguese state has the capability to define the main traits of the conditions under which the journalistic profession is exercised. The state's ability to legislate penetrates what is frequently perceived as self-regulatory mechanisms (e g. journalists' professional statute, public service broadcasting ombudsperson, etc.). But if the state regulates self-regulation, can we talk about self-regulation? If that is the case, what sets self-regulation apart from the state regulation? In Moreira's perspective (1997), three main aspects characterise self-regulation. First of all, it is a *particular form* of regulation, not absence of regulation. Secondly, it is *collective* regulation, as there is no individual self regulation; self-discipline or self-restraint are not forms of self-regulation. Self-regulation implies a collective organization which establishes and imposes rules and a specific discipline to its members. Lastly, it is a *non-state* regulation, independently from its private or public legal nature (Moreira, 1997, p.52-53).

Contrary to state regulation, self-regulation is a private domain process, even if its consequences are felt in the public realm (Aznar, 2005). Hoping to qualify its professional performance and to strengthen the social contract with the public, Portuguese journalists have, in fact, set up (or have contributed to) a number of so-called self-regulatory mechanisms, though often as an integrant part of the legal sphere. Despite the intertwined nature of self-regulation, we shall briefly cover some institutions which are perceived as mechanisms of journalists' autonomous regulation.

The Journalist's Statute (*Estatuto do Jornalista*) is law (nº 1/99 of 13 January). In addition to the detailed clarification of what it is be a journalist, the Journalist's Statute defines the professionals' rights and duties. It pays a great deal of attention to the access to official sources, access to public places, professional secrecy, participation rights, and specific duties regarding rigor, impartiality, non-discrimination, privacy, and other aspects of accuracy and the preservation of human dignity. This document reflects what society expects from journalists and it makes clear the particular rights they can benefit from in their professional activities. The Journalist's Statute can also be seen as a primordial definer of the journalists'

identity as it states both what it is to be a journalist and how is he/she supposed to behave. Still, if the Journalist's Statute is approved by a Parliamentary majority, even if eventually against the vision of the journalists' representatives, can it be seen as a self-regulatory tool? As it stands, it does not necessarily translate the journalists' perception of their own nature, rights and social responsibilities.

Differently from the Journalist's Statute, the Deontological Code (*Código Deontológico dos Jornalistas Portugueses*) is the end result of professionals' deontological concerns, as they were discussed and approved by the professional group itself. The present-day code was approved in 1993, following a consultation process (see http://www.jornalistas.online.pt, retrieved April, 04, 2007).

The code sets the standards of the journalists' professional behaviour. It mentions, amongst many other aspects, rigour, honest interpretation of the facts, the attention that should be given to different parts in a given conflict, plagiarism, sensationalism, identification of news sources, the usage of adequate means to obtain information, the safeguard of citizens' rights and human dignity, independence and professional integrity.

It is up to the Deontological Council of the Journalists' Union (*Conselho Deontológico do Sindicato dos Jornalistas*) to guarantee that the Deontological Code is respected. Therefore, it might be argued that both the Deontological Code and the Union's Council are typically self-regulatory institutions as journalists themselves set the rules and developed a monitoring system and an implementation mechanism to enforce those rules amongst the Union's members. Scrutinizing, issuing statements and recommendations, the deontological council expects to ensure that ethical values are preserved and therefore journalists are increasingly dignified.

There is however an unsolved difficulty with the present-day model. The deontological code was approved within the journalist's union framework and the deontological council is a structure of the very same union. Nevertheless, to become a journalist is not necessary to belong to the Journalist's Union (or to any union for that matter). It is therefore difficult to argue that both the deontological code and council express the standards set by the entire class but simply reflect the understanding of the professionals which are in the Journalist's Union.

Clearly professional self-regulation goes beyond the rules of the corporation and has its own mechanisms within particular newsrooms. In Portugal, Newsrooms Councils (*Conselhos de Redacção*) are probably the most well-known of these institutions. Newsroom councils are committees elected by all journalists of newsrooms with more than five professionals. In

smaller news companies all journalists are part of the *Conselho de Redacção*. The institution of Newsroom Councils draws from the constitutional prerogative of journalists' participation in the editorial orientation of the news media they work in (article 38). The establishment and the functioning of these particular councils are inscribed in both the Journalist's Statute (*Estatuto do Jornalista*, see article 13) and in sectorial laws. The Press Law, for example, details (article 23) the role of the Newsroom Council. Indeed, it covers a considerable ground: it has a say in the nomination of the newsroom directorship, in the editorial statute of the medium, and plays a role in the appreciation of ethical and disciplinary issues. The Newsroom Council represents the vision of the professional body of journalists regarding fundamental labor and deontological questions. It implies that the direction of a newspaper, radio or TV station cannot decide by itself in crucial issues such as editorial orientation or disciplinary matters.

Somehow, the Constitution and the media laws intended to guarantee power distribution in the newsrooms. This preoccupation dates back to the mid-1970's revolutionary period when the first Press Law established the institution of press councils in all newsrooms with much wider powers than today. At the time, newsroom councils had binding powers in matters such as the nomination of the directorship or editorial options. Today the relevance of Newsroom Councils varies considerably amongst newsrooms, as most of its attributions are merely advisory. However, generally Portuguese journalists strongly value this institution (see Fidalgo, 2002).

Another institution imposed by law within the framework of the particular setting of each medium is the Editorial Statute (*Estatuto Editorial*). The Press Law asserts (article 17) that all news media should adopt an editorial statute stating clearly its orientation, objectives and the respect for deontological principles, professional ethics and the public's good faith. The Editorial Statute is signed by the medium's director after a hearing with the Newsroom Council and ratified by the medium's owner. The statute should be public and sent to the media regulatory entity. The Editorial Statute is a social contract of the news media with their employees and with the public.

The Editorial Statute is linked with the newsroom style books. Though not all Portuguese news media have adopted style books, they became important tools for the newsroom internal functioning and not just for technical reasons (Fidalgo, 2006). In fact, like in most countries, the first generation of style books could be seen as essentially a writing manual. Today several newsrooms have adopted far more sophisticated newsroom tools. In addition to crucial aspects regarding news writing and content, a second generation of stylebooks is incorporating detailed aspects regarding the editorial orientation, ethical and deontological

issues. The publication of such style books is also an empowering instrument for readers, listeners and viewers, as they have access to newsroom rules and guide-lines. The social contract with public is therefore strengthened.

**Media Regulation and power: looking for an (im)possible balance**

When looking at the journalistic regulatory architecture in Portugal, it is clear that it has changed considerably over recent years: legal instruments have been developed and the links between different social actors have complexified. Despite the efforts of journalists themselves, the state appears to be the most relevant actor in the sphere of media and journalistic regulation in Portugal. The state – as a legislator, as a media owner and as a financing entity of the system – is at the centre of the most visible 'sustained and focused attempt to alter the behaviour' (Black, 2002). Analysing the overt dimension of media regulation in Portugal, it could be argued that the state is still the most powerful actor, probably because other regulatory mechanisms are still incipient. Co-regulation is embryonic and journalists themselves are still struggling to go beyond very fragile modes of professional self-regulation. The traceable reinforcement of state regulation might be perceived as a consequence of the professional failure to ensure self-regulation.

If it seems noticeable that the state has extended its regulatory arm in the journalistic field, legislating inclusively about professional ethics, one could interrogate the efficiency of such accomplishment. Indeed, it is highly doubtful that more legal tools and a new state media regulatory body *per se*, even if necessary, have a significant impact in the overall quality of the journalistic output. Eventually the 'invisible' daily commercial pressures might have a more significant impact on the daily choices journalists are expected to make. Due to the increasing fragmentation of audiences and the concomitant reduction of advertising revenues, media companies are under increasing pressure and most journalists perform in commercial contexts.

If the defence of public interest depends on the overall functioning of the entire media regulatory construct, state and professional media regulation is far from sufficient. Indeed, citizens' participation – at different stages and levels – is an indispensable dimension in the continuous attempt to develop a responsible and accountable media culture. In Portugal, various mechanisms were put in place in order to make way for citizens' contributions. All newsrooms receive on a daily basis correspondence from their readers, listeners and viewers by highly differentiated means (phone calls, letters, e-mail, etc.). Frequently the media dedicate time/space to put forward views and opinions expressed by citizens, both in

terms of journalistic coverage and programming. More recently, another institution has emerged in order to represent/express people's opinions in the media companies – the ombudsman. In the daily press, these mediation experiences have started in 1997 and the initiative was taken by the newspapers themselves. In the broadcasting arena, the first experiences have started in 2006 but merely in the public service radio and television. The broadcasting company RTP acted according with the Ombudsman Law, approved by the Parliament.

Although the media give (some) time/space to the public, either directly or with the support of the ombudsman mediation, citizens must also play a more active role in the relationship with the media. If media are to be accountable to citizens, citizens must take (at least some) responsibility for the media they have (and especially for the media they want). As Daniel Cornu has underlined, together with the social responsibility of the media there is such thing as the 'mediatic responsibility of the society' (Cornu, 1999, p. 436). That's the point to which Silverstone (2004, p. 440) calls our attention, when he argues for our need to develop 'a responsible and accountable media culture' – more than just 'responsible and accountable media'. And he explains that this particular culture 'depends on a critical and literate citizenry, and a citizenry, above all, which is critical with respect to, and literate in the ways of, mass mediation and media representation' (*ibidem*).

The importance of deep and extended media literacy – regarded as 'a critical activity' and 'a civic activity' required for all citizens – is, thus, stressed by Silverstone as an alternative way to approach the media regulation issues in a long-term perspective. And media education plays here an important role. What he asks for is, actually,

> (…) a shift away from regulation as narrowly conceived in minds and practices of parliaments and councils, towards a more ethically oriented education, and towards a critical social and cultural practice which recognizes the particular characteristics of our mediated world. We once upon a time taught something called civics. It is perhaps time to think through what civics might be in our present intensely mediated century (Silverstone, 2004, p. 446).

Regulation, after all, is not just a matter of *production*. Media *consumption*, Cees Hamelink suggests, 'should be viewed, like professional media performance, as a social practice which implies moral choices and the assumption of accountability for these choices' (*apud* Silverstone, 2004, p. 448). So, the citizens themselves must also be accountable for their use of the media, because, as the 'ecological' perspectives argue, it is everybody's responsibility to take care of our *cultural* environment (where production and distribution of information play an increasingly central part), just like it is everybody's responsibility to take care of our *natural* environment. After all, what the media do or do not is, partly, the result of

their interaction with the publics they address to. So, 'if one accepts the interactive character of the professional-client relationship, it follows that media ethics cannot be limited to the rights and wrongs of the producers only and should also be ethics for media users' (Hamelink, 1995, p. 500).

A wider perspective of media accountability and media regulation, with an active involvement of all the actors of the communicative process, can be advocated not only by reasons of principles and values involved, but also by reasons of efficiency. The 'challenges to the existing regulatory framework posed by globalisation and technological developments' (Oreja, 1999) are real and, among other points, put the question of 'who' can regulate a media landscape that crosses national borders and opens so many self-publishing possibilities as never in the past. Apart from some necessary international collaboration in this field, the fact is that media regulation will be more and more difficult if carried, as it traditionally was regarded, within the borders of a country and the choices of a given political system. And this brings us back to the role of the citizens, on one hand, and to the importance of self-regulation, on the other.

Contemporary regulatory practice should be more and more open to 'policy tools that include both direct interventions and also indirect attempts to shape the market partly by engaging the public in various ways', as Lunt & Livingstone (2007) put it:

> In the communications sector (…), technological developments, such as digital switchover, broadband spectrum and convergence, are driving a shift from state regulation, strongly influenced by a public service ethos, to the complex delivery of diverse contents and services across multiple platforms to a media-literate public (Lunt & Livingstone, 2007, p. 3).

As for self-regulation, it poses important challenges to the media industry as a whole and to their professionals in particular. Notwithstanding, it will be more or less expanded and efficient according also to the stronger or weaker capacity of the citizens to demand it, and to involve themselves in some kind of co-regulatory mechanisms where they can have a voice too. After all, the various Media Accountability Systems (MAS) so publicised and recommended by Claude-Jean Bertrand – and including a vast array of self-regulatory and co-regulatory instruments – are very accurately defined as an 'arsenal for democracy' (Bertrand, 1999), thus fostering citizens to do their share in order to improve media quality and to enhance their own opportunities for civic participation.

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