

## What are the gaps in legislation and policy frameworks for ICTs?

### Guy Berger

ICTs continue to attract policy attention, including being referenced in the UN's new Sustainable Development Goals, and for good reason. They offer enormous benefits to humankind, although there are also risks that need to be addressed. So what are they?

The acronym ICTs can cover lots of things. In some contexts, it includes broadcasting; in others it is shorthand for the Internet (but not cellular telephony). It spans lots of hardware types, for sending, storing or receiving data, and even more software systems which set the hardware in motion. Think a broadcast tower, a Wifi router, a cellphone, a TV set, a satellite dish, a hard drive as the hard; and for the soft, consider electronic signal formats, compression technologies, operating systems, and applications. Some of their electronics work on an analogue basis, some are digital. Many are privately owned, some are common property. Some operate in a walled garden, and some are not interoperable or interconnectable. The purposes that all these ICTs serve are equally diverse – for enabling traffic light synchronisation, security camera operation, document preservation, drone attacks, commercial transactions, e-governance, interpersonal communications, among others.

The summary is: ICTs can span a very wide realm. But it is also reasonable to propose that most ICTs will converge around Internet hardware and software. Examples are the transmission of audio and video content, and of portable voice communications (like fixed line telephony which increasingly exploits VOIP technology).<sup>1</sup> Even one-way flow transmissions (*a la* broadcast mode) where there is no return path will simply be a stream on the Internet and part of the network of interconnected networks. In this way, the path ahead is one where most ICTs will be both digital, and technically interconnectable through Internet Protocol. And this will be whether they operate via wireless (including cellular data services, wifi, satellite, bluetooth), or via fixed connections like fibre optic or copper cable. Many expect that

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<sup>1</sup> There are exceptions: some parts of the wireless spectrum is more optimum for broadcast (eg. FM radio), and are not conducive to Internet use. But while Internet won't displace FM transmissions, many people will get FM radio content via Internet on different platforms.

the key action will be cloud-based, with data and software intelligence at the centres rather than in the devices at the edge.

### **Governance of ICTs: table and food**

So, we can begin to understand the governance of ICTs as converging around governance of the Internet. There's a metaphor of a table that can help to highlight some of the components at stake.<sup>2</sup> The table legs can be read as the physical infrastructures, and the table top as the fundamental interconnecting software (eg. IP, SSL, Domain names). Private companies, usually operating in national contexts, are usually the key decision-makers in the "legs"; groups like ICANN and the IETF make decisions for the "table top" level which holds the structure together. Governments sometimes regulate to shape the "table" to be more of a national or intranet, rather than a global platform, using blocking or filtering at this level, for example. They certainly affect the climate in which investment can flow into building the table... as well as what goes on it.

Next to consider in the metaphor is the table cloth – which reflects the cultures around the internet, a mix of sharing, commercial, security and interpersonal cultures, as well as a particular tapestry of languages. These serve to texture and colour what is placed on the table and where. Governance can impact strongly on this level too, such as in promoting digital content in indigenous languages, limiting excessive copyright regimes, and so forth.

Then move on to the eating utensils (knives, forks, chopsticks...) which equate to the applications ranging from the World Wide Web through to What's App and many more yet to come. These may be international subscribed to; controlled by volunteer experts or by companies, or circumscribed by governments.

One can translate the "food" as being content on the Internet, giving attention to its diversity (quality cuisine from a choice of cultures? Junk food?). Again there can be a range of policy actors involved here. Finally, who gets to sit at the table, whether they consume products and services, or whether they also prepare offerings or leave

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<sup>2</sup> Used by ICANN CEO Fahdi Chehadi at the World Association of Newspapers annual conference in Washington DC, June 2015.

data trails, what their competences are, are further matters related to governance issues.

At any rate, it is abundantly clear that there are numerous very complex considerations about the identities, roles, responsibilities, remits and capacities of actors concerning the shaping of the entire feast. What adds to the complication is the interdependence of the whole. For instance, is the question of what “food” is on the table a responsibility mainly of the Internet Service Provider, a hosting platform, a Social Network which does not produce its own content, a search engine or a Publisher (whether an individual or an institution)? Jurisdiction may be different at each, depending where the entity is located, where it is registered and where the places from where its data is stored and served from.

What does all this mean for legislation and policy frameworks? First, let’s distinguish these two things. Policy designates the broad principles and objectives; law is one of the means for implementing a policy. In an ideal system, policy is developed to inform laws, and regulations follow based on these two antecedents. In practice, the sequence is often jumbled up. Laws are passed without explicit policy – meaning they have embedded in them, implicit and half-baked policy components.<sup>3</sup> In an ideal system, policy evaluation is built-in, and revisions are regularly introduced. In practice, the package of policy-law-regulation – even when done logically – is not assessed as a whole. The common verdict is: “We have great policies, but there are gaps in implementation”. However, because of the intrinsic integration of the chain, it is actually the policies that should be judged as poor - because they failed to anticipate the challenges of implementation. It does not help much in working only on the implementation side, without going back to the policy basics. There are distinctive elements in the different dimensions of policy, law, regulation, roll-out and effect, but they are interconnected.<sup>4</sup>

### **Unintended Consequences of policy**

Another common problem is a failure to identify unintended consequences of policy: instead, they are treated in isolation, as phenomena that have fallen from the sky,

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<sup>3</sup> The author gives an example here: “Convergence: the search for speed”. <http://mg.co.za/article/2005-09-28-convergence-the-search-for-speed>

<sup>4</sup> “Why policies matter for engendering plural, profitable & sustainable media in Africa. A primer for media leaders”. <https://guyberger.ru.ac.za/fulltext/kafmediapolicy.rtf>

and as if they have nothing to do with the social, political and economic arrangements for governing a society. The problems of policy and its significance, can however be avoided by having consultative policy processes, including in evaluation and review. Especially considering the complexity of actors in the Internet, the days of a government deciding unilaterally about what's best, represent a short-sighted way of working. Multi-stakeholder engagement is what makes sense in policy around ICTs.

To further link this discussion back to law and policy around ICTs in particular, it can be seen that there are different levels possible. There can be broad policy that deals with the whole field, and sub-policy domains that deal with the parts (eg. on digital local content, on universal access, etc).<sup>5</sup> There can be omnibus legislation, and there can also be different laws for different dimensions of ICTs. In the current period, there is likely to be some fragmentation, at least in regulation, that reflects the current state of convergence. One example is the regulation of film and video games offline, but not online. Another example is the regime for legal liability for content depending on whether an entity is recognised as media or one of several kinds of Internet intermediaries.

But at least at the policy level, the bigger picture should be the necessary starting point. It has to take into account the interconnecting aspects of ICTs, because what happens in one domain (eg. Digital TV broadcast policy) has impact for what happens in another (eg. Mobile Internet). There are also cross-cutting dimensions, such as human rights, security, gender equality, and environmental sustainability, for example, which the big picture needs to keep in mind.

In developing a holistic policy starting point, reference is understandably made to factors such as a country's government and its overall priorities, the economic situation, and to international relations. But something that also needs attention is the "beacon" of international standards.

There are international standards for radio wave emissions, and there are international standards for assignment of frequencies and transmission system (often on a basis of world regions), matters that are decided at bodies such as the

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<sup>5</sup> See Tina James, 2001. *An Information Policy Handbook for Southern Africa* –IDRC. <https://idl-bnc.idrc.ca/dspace/bitstream/10625/7521/1/120185.pdf>

International Standards Organisation and the International Telecommunications Union. There are standards that emerge out of commercial success by a company (eg. VHS over Beta), others from the consensus of experts (eg. IP version 6 to replace IP version 4). Policy ignores these technical standards at its peril.

### **Some agreements**

Normative standards are another issue to take into account. A norm can be said to become a global standard when it achieves a high level of stakeholder consensus. A pertinent example is the Universal Declaration of Human Rights (UDHR), agreed by all 193 member states of the United Nations. A more binding, but less universally signed-onto instrument is the International Covenant on Civil and Political Rights. These agreements set out norms at a general level, which means that there will be different models for more specific application. For example, each person has the right to dignity, but defamation laws vary around the world. Nevertheless, any national policy should always still be compliant with the international norm if it is to carry legitimacy. The same principle can be said to apply to policies at transnational level, such as policies on refugees, or policies by Internet intermediary companies on hate speech.

UNESCO is the part of the UN that deals with several non-technical dimensions of ICTs, and has developed normative standards relevant to an overarching policy towards ICTs. These are founded in the UDHR right to freedom of expression, which several UN bodies have affirmed applies both online and offline. At UNESCO, this has been elaborated to justify the Right to Information on the one hand, and the Right to Press Freedom on the other. Press freedom in turn, as a result of the 1991 Windhoek Declaration, endorsed back then by UNESCO member states, is interpreted to mean the more specific norms of media freedom, pluralism and independence.

What is clear in terms of international human rights law, is that norms should be understood precisely as referring to the normal state of affairs, and that any limitation should not be anything more than an exception. This balance between the two should never be inverted. What's more, is that any exceptions have to be meet certain conditions if they are to be justifiable. Thus, a restriction on the right to freedom of expression needs to have a basis in a law, and cannot be arbitrarily

introduced. The restriction also needs to be necessary within the framework of democracy, and also proportionate to its purpose. That means that, for example, to block YouTube as a whole, because some videos incite violence, would be disproportionate. And finally, a restriction can only be justified if it is for a legitimate purpose. In the UDHR, these purposes are set out quite widely, including objectives such as the rights of others, national security and public morality. But they do not include restrictions such as for political power reasons or for the personal whims of a leader. When it comes to more specific interpretation of these purposes, in national policy and finally law, there is a widespread understanding that narrow definitions are needed so as to prevent any exploitation of a rationale like “national security” to illegitimately limit the fundamental right at stake.

### **Developing ICT policy must uphold freedom of expression rights**

What all this means is that a holistic approach to developing ICT policy should expressly uphold the right to freedom of expression, and its corollaries of the rights to information and press freedom, and should further reaffirm the exceptional and proscribed nature of any restrictions. This is linked to the duty of the state to promote, protect and respect rights in all its actions, and to provide redress for violations. In more recent years, the UN has also affirmed that the private sector also has the duty to respect rights, and this principle is a further building block for an overarching ICT policy.

What is further important at the foundational level, is that a holistic ICT policy needs – especially in terms of the right to freedom of expression – to recognise the principle of media independence. Not all ICT counts as media, and indeed defining what does is part of policy development. But the wider principle at stake is that independence means there should be a preference for self-regulation. In matters of expression, the state is the last port of call of protection – and the right is seen as best protected if non-state actors are acknowledged as its custodians. In the media, this has taken the form of a code of professional ethics, operating bodies such as press councils and broadcasting complaints councils. In the private sector Internet intermediary space, there are increasingly systems operated at company level or industry level, to provide for redress where needs be. The balancing of rights – eg. the right to dignity on the one hand, and expression on the other; of privacy and expression; and even

of security and expression – is thus allocated, at least in the first instance, to the direct ICT-linked actors concerned.<sup>6</sup>

It remains to note that if ICT policy needs to reference human rights, the implications of these for other dimensions of ICT also need to be considered – and vice versa. In this regard, UNESCO has developed a tool that may be of value. This is the concept of Internet Universality,<sup>7</sup> which recognises that an Internet for everyone ought to be based on four principles – Human Rights, Openness, Accessibility, and Multi-Stakeholder participation. Therefore, balancing of rights not only needs to take into account the principles of international norms, but also what the impact is upon issues of openness, accessibility, etc. The other side of the coin is how policy designed for these latter aspects impacts on human rights.

Besides for general international normative standards like those mentioned above, policy should also take a bearing from international agreements such as the World Summit on the Information Society, and to interact with the Internet Governance Forum.

The Internet is not just a highly complex international entity on its own, but also in how it relates to national policies on entrepreneurialism, anti-monopoly measures, disability provisions, media and information literacy in the schools, and the very process of policy development and the implementation of governance. The policies of the private actors about and on the Internet represent a special dynamic. But unless all this is taken into account, ICT policy and legislation will have more gaps than a proverbial Swiss cheese. Do it properly, and the benefits will be evident for all to see.

***Guy Berger is director: Division for Freedom of Expression and Media Development at Unesco, Paris. He writes in his personal capacity.***

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<sup>6</sup> UNESCO, 2015. *Keystones to foster inclusive Knowledge Societies*,  
<http://www.unesco.org/new/en/internetstudy>

<sup>7</sup> <http://www.unesco.org/new/en/communication-and-information/crosscutting-priorities/unesco-internet-study/internet-universality/>

