Broadcast Regulation and Public Right to Know

The question of how satellite television is to be regulated has been differently interpreted in India. The orthodox viewpoint of airwaves "belonging" to the public is one that is difficult to enunciate especially with regard to the principles of instrumentality and agency. While constitutional provisions ensuring "freedom of expression" remain open-ended on the matter of regulation, the debate itself has juxtaposed the interests of the television networks vis-à-vis the ministry of information and broadcasting, while the public, in whose ostensible interests the debate is being waged, remains entirely in the dark.

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Satellite broadcasting is a visible presence in everyday life and one of the faster growing sectors of the last decade or more. But in India it has largely functioned within a legislative and regulatory vacuum. This is a reality that lends itself to different interpretations. Champions of the free market would see the electronic media in India as testimony to the entrepreneurial dynamism that has been unleashed since liberalisation became the reigning ethos of economic policy. In this perception, the revolution in media matters has not come a moment too soon, since creativity has remained suppressed far too long under the meddlesome regulatory zeal of the government. Even if governments were to rouse themselves out of the inertia of incomprehension and seek to legislate for the broadcast sector, they are unlikely to get very far, since the inherent dynamism of the sector would elude all efforts at regulation.

Unsurprisingly, this version of events has held the field with little challenge, since the media, uniquely among industries, is in a position to mould public perceptions about itself. In brief and sporadic intervals, though, an alternative perspective is heard, which purports to speak on behalf of an ill-defined "public interest". The broadcast industry has in this account remained for too long free of constructive legislative inputs, since every effort at regulation, in part because of the ill-remembered days of the controlled economy, has swiftly come undone. In the circumstances, the broadcast industry, dominated by giant media houses, has managed to colonise the electromagnetic spectrum for private benefit, flouting an explicit judicial finding that the airwaves are the property of the public.

Since the Supreme Court's judgment of 1995 in the case of the Cricket Association of Bengal versus the Ministry of Information and Broadcasting, it has become part of the orthodoxy on media regulation that the airwaves belong to the public. It is a principle that lends itself to easy and often rather passionate enunciation. Unfortunately, very little of the same passion, not to mention clarity, has been evident in negotiating two basic issues involved in translating this principle into practice: instrumentality and agency. What possible agency could operationalise the constitutional principle that the airwaves belong to the public? And what instrumentality could this agency, when it is appropriately empowered, deploy in pursuit of its mission?

Early in August 2006, the ministry of information and broadcasting (MIB) posted on its official website, the draft of a law, titled the Broadcast Services Regulation Bill (BSRB), which sought, among other things, to provide legal backing for the principle of the public ownership over the airwaves.[1] Apart from this rather laudable object, another of the stated purposes of the bill was to give legislative backing to the numerous regulatory orders pertaining to satellite broadcasting, issued since the mid-1990s.

A first evaluation of the BSRB reveals that it does not spend much time or effort on the issue of agency. Like many other legislative initiatives, the BSRB displays the conceit of governments that believe they can appropriate the mantle of speaking on behalf of the public. And where instrumentality is concerned, the BSRB displays very little creativity, falling back instead on the discredited old device of reserving for the government the arbitrary – and in the final instance, overbearing – powers of police enforcement inherited from colonial law. Judging from its fleeting appearance in the public discourse, the BSRB could well be another legislative effort defeated by a deficit of the policy imagination, not to mention the assiduous efforts of powerful lobbies.

As if to reaffirm that the power to mould public opinion suffers from a serious skew, the media industry was permitted by circumstances, to have its say on the BSRB well before the public was brought into the discussion. Public perceptions of a major legislative initiative, in short, were moulded by the industry that has the greatest stake in diluting the scope of the law and preserving the largest area of autonomy for itself. This is a situation abounding in curiosities, though there is little novelty in the media being, uniquely among business sectors, the arbiter of public opinion in matters involving itself.

Media Groups

Towards the end of July 2006, Delhi's leading newspaper, which has recently acquired a presence in Mumbai, carried a sequence of three articles warning that the proposed broadcast legislation was a significant threat to all the free speech guarantees of the Indian Constitution. All three articles were published under the caption, 'Media Muzzled' and their basic purport was that the BSRB embodied a familiar pattern of official paranoia and unreason. "Every few years", began the

first of the articles, "a nervous government decides that the media has gone overboard and must be subject to regulation. Democracy and free speech do not mean spreading canard about public authority, endangering national security and allowing for obscenity, runs the argument (sic)". With the draft of the BSRB having leaked out, the article continued, considerable "disquiet" had arisen over what looked like "another attempt ... to muzzle the media".[2]

Inevitably and it must be said, rather self-servingly, the media chose to highlight those provisions of the BSRB that endowed the government and its official machinery with punitive powers. There was moreover a consistent attempt to play up the circumstances under which the media would become the target of vindictive official action. The country's largest English newspaper, for instance, observed in its report, that the BSRB "expanded on the already existing draconian provisions present in the Cable Network Regulations Act and the direct-to-home (broadcasting) guidelines". The news report then went on to describe, with little attention to nuance or detail, the powers of search and seizure that the BSRB proposed to invest the government with, before concluding with an account of the penalties that the media would attract if it incurred official displeasure.[3]

A recent debutant among Mumbai newspapers, that seemingly represents the new era of cross-linked media partnerships, had meanwhile, had its say on the matter. Under a vivid and exhortatory headline, the newspaper – in which both India's largest satellite broadcaster and the company that owns the country's largest circulated newspaper have equity investments – urged that the BSRB be "killed". Effortlessly conflating the rights of the media into those enjoyed by the public under the Constitution, the newspaper asked: "What is it with our officialdom that when it comes to fundamentals of democracy they can't seem to get it after five decades of experience? Their latest attempt at bullying the citizen is a bill that the information & broadcasting ministry (sic) has drafted, ostensibly to restrain media monopolies but in fact to subvert freedom of the press, and therefore of the right to free expression as guaranteed by our fine Constitution drawn up in 1950".[4]

Sifting through this relentless campaign against the BSRB, it would be possible to discern two quite distinct currents of opinion. There is one perception that tends to view the rights of the media as a category apart, deserving protection in themselves. Then there is another, that views the media as an institution embodying the broader civil rights of the citizens of India.

Debating Media Rights

It is a well-established principle in Indian jurisprudence that the media enjoys rights coterminous with the public. This is quite unlike the situation in the US, where the First Amendment to the Constitution – whether by oversight or intent – ensured that the "press" enjoys rights that go beyond the public right to free speech.[5] In contrast, the Indian Constitution confers on the media no more and no less, than the rights due to it as an institution that benefits from the public right to free speech and expression, as enshrined in Article 19(1)(a).

Media freedom is derived from the right to free expression, which in turn is related to the public right to information. Media freedom and the public right to free speech, are coextensive in Indian jurisprudence. Commercial media institutions and the private individual derive identical rights from a single article of the Indian Constitution. But since the right to information is a counterpart right to free speech, the media's freedom is in part the fulfilment of the public right to information. From here, it would be a short transition to a legal doctrine that media freedom is justified – in whole or in part – by the public function it performs, of informing citizens and the wider community about the various facets of their lives and the times they live in. This is the constitutional position as advanced in significant judgments involving the media, such as Sakal Newspapers versus the Union of India[6] and Bennett Coleman and Company Ltd versus the Union of India.[7]

The latter judgment is especially significant for the insights it affords into the media as an institutional beneficiary of the public right to free speech. At issue in the Bennett Coleman case was a government directive limiting the allocation of newsprint to publishers in accordance with their reported consumption of the commodity. In a context of acute shortage, it seemed that the only means available to keep the newspaper industry functioning was to ration the allotment of newsprint. This made it imperative that newspapers publish no more than 10 pages. Those that did were obliged to bring down their daily offering to that number. They would not be permitted to reduce circulation to maintain or increase the number of pages. To provide a full day's complement of news, publishers could rationalise their allocation of space between editorial and advertisement material. Or they could maintain profitability by curtailing news coverage to accommodate advertisements.[8]

All this would seem a thoroughly unwarranted intrusion into the micromanagement of a newspaper. Expectedly, the entire scheme was held to be in violation of the Constitution by the Supreme Court. The majority opinion in the case, authored by justice A N Ray, held that the "individual rights of freedom of speech and expression of editors, directors and shareholders, are all expressed through their newspapers". But if this seemed too narrow a construction of a fundamental right, the Court, a few paragraphs on, applied the necessary remedies, though without explaining the logic through which the rights of "editors, directors and shareholders" mutated into a right enjoyed by all citizens. "It is indisputable" said the Court, "that by freedom of the press is meant the right of all citizens to speak, publish and express their views. The freedom of the press embodies the right of the people to read. The freedom of the press is not antithetical to the right of the people to speak and express".[9]

This judicial formulation presented in an incipient form, a potential area of conflict in the relationship between the media and the public. In one formulation, the public is given the "right to read" all that it is provided by the "editors, directors and shareholders" of the press. In another, the public is accorded the right to "speak and express". In its elision of the reasoning by which one species of rights is transformed into another, the Supreme Court majority in the Bennett Coleman judgment lost an opportunity to provide some measure of clarity on this issue.

To some degree, that absence in judicial reasoning was remedied in the significant dissent entered by justice K K Mathew in the Bennett Coleman case. Alone on the bench of five judges that heard the case, the judge spoke of press freedom in terms of the preservation of social diversity and choice. The Court had before it the challenge of ensuring that the appropriate conditions existed for bringing "all ideas into the market (to) make the

freedom of speech a live one having its roots in reality". In pursuit of this ideal, it was necessary as a first step, to recognise that "the right of expression" would be "somewhat thin if it can be exercised only on the sufferance of the managers of the leading newspapers".

Freedom of expression, in other words, also involved the right of access to media space. And this requirement would be met only through the "creation of new opportunities for expression or greater opportunities (being provided) to small and medium dailies to reach a position of equality with the big ones". This was as important, said justice Mathew, "as the right to express ideas without fear of governmental restraint".[10]

Free Speech and the Right of Access

"Access" was one of the crucial questions raised in justice K K Mathew's dissent: access both of the public to the media environment and of the media organisation to the essential resources of its trade. Though the latter was the key issue before the bench, the dissenting judgment tied it into the larger question of the public function of a newspaper and its socially enjoined duty to reflect the diversity of its milieu.

Though these criteria are not quite so easily transported to the broadcast domain, the underlying principles have a certain universality. Newsprint in the 1970s was regarded as a scarce commodity, much as the electromagnetic spectrum was in the early years of satellite broadcasting. Newsprint has since become abundantly available, much like frequency slots for broadcast channels. Advertisement revenue, then regarded as a limited resource, has since grown enormously, though the competition between newspaper groups for cornering increasing shares of this expanded cake, has greatly intensified. And even if the proliferating broadcast channels of the last decade and a half have not been very transparent in their financial accounting, the mere fact that they exist is sufficient proof that the aggregate of advertisement spending in the Indian economy has been percolating, albeit in varying degrees, to all of them.

The principal restraint then to using the electromagnetic spectrum as a public resource lies not in its scarcity, as in the powers and privileges that the government may have arrogated to itself. In this respect, the Supreme Court ruling in the airwaves case has been very clear: the government may have a custodian's responsibility, but no inherent right to monopolise the airwaves, since the spectrum belongs to the people. As justice P B Sawant put it, in one of two concurring judgments in the case: "the airwaves or frequencies are a public property. Their use has to be controlled and regulated by a public authority in the interests of the public and to prevent the invasion of their rights".[11] In other words, the uppermost concern in the deployment of the airwaves would be the preservation of the people's right to free speech and its correlate: the right to information. In justice Sawant's words: "the right to freedom of speech and expression also includes the right to educate, to inform and to entertain and also the right to be educated, informed and entertained". The challenge of regulation is to harmonise the two, one of which is the "right of the telecaster" and the other, "that of the viewers".[12]

In turn, this requires a regulatory response that departs from an absolutist notion of media freedom. "Broadcasting freedom", in the words of justice B P Jeevan Reddy – author of the other opinion in the airwaves case – "involves and includes the right of the viewers and listeners who retain their interest in free speech". With public interest being dominant rather than private profit, justice Reddy observed, "European courts have taken the view that restraints on freedom of broadcasters are justifiable on the very ground of free speech". The reason simply is that "freedom of expression includes the right to receive information and ideas as well as freedom to impart them".[13]

The airwaves judgment, in short, urges the adoption of a new paradigm that transcends the dichotomy between government control and free enterprise. On one side, it asserts in justice Sawant's words, the paramount need to "rescue the electronic media from the government monopoly and bureaucratic control and to have an independent authority to manage and control it". When the electronic media is controlled "by one central agency or (a) few private agencies of the rich", there is a need for another body, "representing all sections of society".[14] Justice Reddy observed that the nature of this body was for the legislative authorities to determine. The central point simply, was that "private broadcasting, even if allowed, should not be left to market forces, in the interest of ensuring that a wide variety of voices enjoy access".[15]

With these being the central principles, the Supreme Court directed – in justice Sawant's words – that "the central government shall take immediate steps to establish an independent autonomous public authority representative of all sections and interests in the society to control and regulate the use of the airwaves".[16] Justice Reddy laid down the principles on which this body should function: "it is the duty of the State to see that airwaves are so utilised as to advance the free speech right of the citizens which is served by ensuring plurality and diversity of views, opinions and ideas. …The free speech right guaranteed to every citizen of this country does not encompass the right to use these airwaves at his choosing. Conceding such a right would be detrimental to the free speech rights of the body of citizens inasmuch as only the privileged few – powerful economic, commercial and political interests – would come to dominate the media."[17]

Before turning again to the BSRB to examine how well it fulfils the specifications laid down by the country's highest judicial body, it may be useful to consider two concrete policy-decisions taken by the government in 2006. These could be tested for their conformity with the constitutional principles laid down in the airwaves judgment.

Record in Community Radio

Early in December 2006, the MIB announced detailed policy guidelines on community radio services (CRS). This was a long-delayed correction for the unduly restrictive policy introduced in December 2002, which reserved community radio for "well established education institutions". Even so, the policy as it stands now is rife with clauses requiring CRS applicants to meet a number of stringent requirements. In the case of aspirants other than publicly funded and managed educational institutions, sanction for entering the CRS domain would be subject to clearance from the ministry of home affairs and the defence ministry, not to mention the allocation of a radio frequency by still another ministry. Programmes broadcast over the community radio should be designed to serve a "specific well-defined local community" and should be relevant to its "educational, developmental, social and cultural needs". Broadcasts that relate to "news and current affairs and are otherwise political in nature" are

South Asian Network for Development and Environmental Economics

Winter 2007 Research Competition

Deadline: March 22, 2007

The South Asian Network for Development and Environmental Economics (SANDEE) invites research pre-proposals on the interlinkages among economic development, poverty and environmental change. Pre-proposals, if accepted, will lead to an invitation to submit a full research proposal. Four thematic areas have been identified for the current round of research grants. While some common research questions are identified below, researchers can explore a wider range of questions within each sub-area.

1. Economics of Natural Resource Use and Regulations

Large groups of people depend on land, forests, rivers and other natural resources. Market as well as non-market processes facilitate the extraction, exchange and consumption of these goods and services. Some natural resources are undervalued and over-extracted, while others may be underutilized. Four policy questions are of interest: What specific regulations and institutional innovations can correct existing market and policy failures? What are the implementation challenges associated with accurately pricing natural resources and services? Is there a role for new policy instruments such as 'payments for environmental services?' And, how do we account for environmental costs in designing economic policies (including trade, macro etc.)?

2. Economics of Pollution Management

Dirty water, waste, toxic chemicals, and indoor and outdoor air pollution have serious implications for human health and productivity. What are some viable policy instruments (taxes, subsidies, user-fees etc.) or institutional changes (community water user groups, private contracts for waste management etc.) that can contribute to clean air and water? And what are the distributional outcomes associated with these instruments? The private sector has an important role to play in cleaning up the environment – whether through the use of abatement technologies, new innovations or increased efficiency. What economic incentives or disincentives would promote increased private sector participation in improving environmental quality? What are some political-economy considerations?

3. Economics of Coastal / Riverine Zone Management

Coastal/riverine communities are vulnerable to sudden on-set of disasters, long-term impacts of climate change, as well as on-going erosion of coastal resources. Can economic instruments (fees, permits, subsidies) be used to better manage coastal development? What incentives and dis-incentives lead to inefficient use of coastal/ riverine resources, particularly fisheries? Further, what is the role of insurance markets in responding to coastal/riverine disasters? What is the role of natural and man-made barriers in mitigating disasters? How can we value the services provided by natural barriers? How and what kind of institutional change will improve well-being or reduce disaster risks?

4. Economics of Climate Change

The scientific evidence is quite overwhelming that Planet Earth's average temperatures are rising. This has both a large direct impact due to productivity losses etc., but also in terms of adaptation and mitigation costs that society will have to bear. How will the agricultural output change? How will sea level rise affect coastal communities? Rising temperatures will affect precipitation, and therefore river flows and groundwater stocks. How would this impact on human well-being? What kind of costs are involved in mitigating risks? How much would communities have to spend in order maintain equivalent well-being to adapt to the rising temperatures?

SANDEE supports economics research related to environmental problems. Thus, pre-proposals that do not have a strong economics component will not be considered. Pre-proposals are sought from junior to mid-career faculty and researchers; multidisciplinary/ country projects and use of secondary data are encouraged. Institutional affiliation is required for receiving support. Pre-proposals will be evaluated on their academic merit and policy significance. Selected researchers will be invited to submit a full research proposal.

SANDEE's grants are in the range from $10,000 to $15,000 for 12-24 months. Please visit www.sandeeonline.org for responses to frequently asked questions and for examples of previously funded proposals.

The guidelines and format for pre-proposals are presented on SANDEE's website (http://www.sandeeonline.org). **Pre-proposals need to be directly loaded on to the website by March 22, 2007.** Pre-proposals received after this date will not be accepted.

specifically proscribed. Sponsored programmes would not be permitted except where the sponsor is an arm of the government. Advertisements and public announcements that yield revenue would be permitted to the limit of five minutes in an hour's broadcast. All earnings would necessarily have to be used in meeting operational and capital costs. A surplus, if available, could, with the explicit written permission of the MIB, be transferred into the primary activity of the organisation running the service.[18]

This regime of policy may be instructively compared with that prevalent in the realm of private radio broadcasting. In July 2005, policy guidelines were announced under which bids were invited for the second round of allocation of FM radio broadcast circles. Under the tendering principles drawn up, allocations were to be made on the strength of the entry fee offered by each bidder. Moreover, a share of annual revenue would be paid by the operator as a form of annual fee for the use of the broadcast spectrum. Advertisements would be the principal revenue source, but there would be no limit imposed on the quantum of advertising that each broadcaster could carry.[19]

When it came to the allocation of frequencies for FM radio broadcasting, the government seemed inclined to view the airwaves as a public resource to be auctioned off to the highest corporate bidder. After the bidding for FM radio licences that ensued, the vast majority was granted to companies or entities that were already strongly established in other sectors of the media.[20] Entertainment Networks (India), a company owned by the *Times of India* group, which happens to be the largest enterprise in the print media, won 25 FM radio broadcast circles, to add to the seven that it was running under its brand name, Radio Mirchi. South Asia FM, a company controlled by the Chennai-based satellite broadcaster, Sun TV, won no fewer than 23 FM circles in the northern part of the country. This is quite apart from the 18 it won in the south through its affiliate company, Kal Radio. Sun TV, it needs to be added, had in early 2006, bought up the Tamil daily, *Dinakaran*, then ranked third in terms of readership in Tamil Nadu. With an aggressive price-cutting campaign, it had soon catapulted the newspaper to an undisputed second position in the market and quite possibly the first – though this remains contentious – in the readership stakes.[21]

Sun TV is a media entity that began in the realm of cable and satellite (C and S) broadcasting and rapidly expanded its influence into print and radio. The *Times of India* group, headquartered in Delhi, offers another case study of a business group of considerably greater vintage, diversifying out of print into TV, radio, internet advertising and a variety of other media ventures, with little resistance from regulatory policy.[22]

These two routes to media consolidation, though different, would be regarded with equal concern under any reasonable regime of supervision over the right to information. But with policy being inattentive, these are by no means the only pathways available for well-endowed business houses that seek to capture increasing shares of the space available for information transactions.

It takes only a cursory glance at the last round of licences allocated for FM radio, to see that any notion of cross-media ownership restrictions has effectively been shredded and the pathway opened up for growing business monopolies in the media. Illustratively: the *Rajasthan Patrika* group, a significant player in the newspaper space in Rajasthan state, was awarded four FM circles, while *Malayala Manorama* and *Matrubhumi*, the two largest newspaper groups in Kerala, were awarded four each in their home state, and the *Mid-day* group of Mumbai was given six circles, all of them in highly lucrative metropolitan cities. HT Media and Entertainment, a company controlled by the *Hindustan Times* group – with its significant print media presence in Delhi and Mumbai – was awarded radio licences in both these cities, with the two metropolitan centres of Kolkata and Bangalore also thrown in as a bonus.

Beyond this story of media consolidation, a significant new presence was entering the scene. Adlabs Films, flush with an infusion of funds after its takeover by the Reliance-ADAG group – one of the country's biggest industrial conglomerates – won no fewer than 45 circles in the 2006 round of FM radio allocations.[23]

Growing Corporate Control

These quite unconcealed concessions to corporate control over the airwaves should be seen in the context of existing global norms on cross-media ownership restrictions. These norms indeed, have been repeatedly affirmed in India by broadcast legislation that curiously, seldom makes it beyond the first draft to the stage of enactment. Though the evolution of the new media and the realities of convergence with information technology have often allowed big media corporations to effect a flanking operation around them, cross-media ownership restrictions remain a valuable part of the statute in several countries.[24] In recent years, a move by the Federal Communications Council (FCC) in the US to undo some of the restraints on cross-media ownership, was met with a vigorous public signature campaign that effectively forced the regulatory body to retreat.[25] This is in some measure, an index of the value attached by the public to the sustenance of these norms.

A monopoly over the airwaves was part of the initial conditions in India, in contrast with the US, which began with a large assortment of broadcasters that were rapidly consolidated into a handful of dominant entities. It might appear that an oligopoly of private broadcasters – however small in number – would be far preferable to a government monopoly. Interestingly though, in the doctrine of fundamental rights laid down by India's Supreme Court, the fact of monopoly ownership over broadcast platforms does not, in itself, constitute a curb on the twin rights of information and free speech. It is only from the denial of public access to the broadcast media, that such an abridgment of the fundamental rights could be deemed to occur.[26] In other words, the existence of a monopoly broadcaster does not in itself negate free speech, provided the right to public access is ensured.

The history of the legislative effort to transform a zealously guarded governmental monopoly over the airwaves into a more benign public trust is rather well recorded.[27] Aside from the advisory bodies that were periodically commissioned to come up with creative solutions, the first concrete effort at legislation was the Akash Bharati bill, introduced in Parliament after much deliberation, only to lapse with the dissolution of the sixth Lok Sabha in 1979. Its successor, renamed the Prasar Bharati bill, was enacted but not notified when the National Front government elected in 1989 – comprising numerous fragments, with one conspicuous exclusion, from the political formation that had dominated the sixth Lok Sabha – passed into history. It took till 1997, with another avatar of the National Front in power – now called the

United Front – for Prasar Bharati to be notified and thus become law.

The government that soon followed, allowed the ordinance notifying Prasar Bharati to lapse and a few months afterwards, disbanded the board of trustees that had been appointed to supervise the functioning of the public broadcaster. In all these respects, the government led by the Bharatiya Janata Party (BJP) signalled that it preferred the strict control over the airwaves to the doctrine of freedom upheld by the Supreme Court. The entire episode seemed to underline a certain reality about the political tutelage that broadcasting reform has laboured under. Where governments unsure of their tenure are in power, led by political formations that are convinced of their imminent mortality, there is a possibility that the oppressive, official, hold over the airwaves will be relaxed. This is a narrow window of political opportunity that would invariably be shut tight when governments are led by parties that believe, for whatever reason, in their historical destiny as eternal wielders of political power. The Congress Party's persistent record of default on the Prasar Bharati Act, the United Front's restoration of the agenda of broadcasting reform and the BJP's unceremonious termination of the experiment, bring to mind the very strong warning issued by justice Reddy in the airwaves case: "Government control in effect means the control of the political party or parties in power for the time being. Such control is bound to colour and in some cases, may even distort the news, views and opinions expressed through the media. It is not conducive to free expression of contending viewpoints and opinions which is essential for the growth of a healthy democracy."[28]

Viewed in this context, it is rather easy to point out the many deficiencies of the BSRB, especially when assessed against the stated purpose of operationalising the airwaves judgment. Drafted in 2006, when the government monopoly had been irreversibly eroded, the BSRB should reasonably have been expected to take into account the experience of corporate control over the airwaves and factor this into its regulatory philosophy. Though a first glance would show that the BSRB does indeed pay due obeisance to the objectives of preserving diversity of choice on the airwaves, these turn out on closer examination, to be no more than a token acknowledgement. Correlatively, the clause that vests the government with the power to curb monopolies in the media is numerically imprecise and unaccompanied by any construction of a mode of intervention to secure the public interest.[29]

Broadcast Bill and Its Newest Avatar

This is to be contrasted with the Broadcast bill mooted in 1997 as a means of ensuring a reasonable framework of rules for private broadcasters, even as the counterpart policy initiative of notifying Prasar Bharati brought government channels under a variety of public control. Drafted during a brief interlude of openness within the MIB, the 1997 bill provided for "inter-category restrictions on licences (for broadcasting) as well as on the number of licences within a category". It restricted the "ownership and control of a broadcasting company by newspaper proprietors up to 20 per cent and vice versa" and specifically prohibited religious bodies, political organisations, foreign nationals and entities, and advertising agencies from holding broadcasting licences in India. Further, it limited a single person or entity to licences in any two (or less) of the following activities: terrestrial radio, terrestrial television, satellite television or radio, direct-to-home broadcasting, and local C&S delivery.[30]

A prolonged legislative vacuum ensued once the 1997 draft lapsed, during which facts on the ground were altered by the country's big media players, progressively making the job of regulation more difficult. Powerful print media groups moved into the broadcast sector, and others that had begun as C&S broadcast companies, integrated horizontally into the newspaper industry. C&S companies in turn ventured into the domain of retail distribution of television signals and succeeded in establishing their dominance in the most lucrative markets.

For reasons that have more to do with the evasion of tough decisions than with inherent difficulties, the rules evolved for radio have been immensely more stringent than those applicable to TV. This is in part because the stakes in TV broadcasting are high and the power of the medium so great, that multinational media enterprises and big domestic corporations have always been an aggressive presence influencing policy decisions. Even if governments would like to pretend otherwise, there is little question that policy decisions in the broadcast sector broadly fit into one of two categories: they are either defensive responses to predatory moves by media corporations, particularly those of foreign origin, or signals of acquiescence in the larger designs of these corporations, dressed in the garb of pragmatism.

Towards the end of 1996, News Television India, a corporate entity owned by the global media czar Rupert Murdoch, announced its readiness to start "direct-to-home" (or DTH) telecasts in India. This was followed by an advertising campaign in the print media promising Indian TV viewers a new deal that would secure them their independence from the ever-unreliable local cable operator. By April 1997, this campaign had peaked and the Murdoch enterprise seemed all set to manoeuvre its way past the areas of silence in the prevalent policy, to begin an entirely new category of broadcast services. After months of silence which had been construed as acquiescence, the government in July 1997 issued a formal notification prohibiting the transmission or reception on Indian soil of any broadcast signal above the frequency range of 4800 megahertz. In effect, this prohibited the commencement of DTH broadcasts in India.[31]

If this was a defensive policy response, the official attitude towards uplinking from Indian territory for broadcast through satellite, bears all the telltale scars of compliance with an agenda set by players operating beyond the reach of regulatory efforts. The story begins in May 1991 when the Hong Kong based STAR TV network began beaming programmes into India, where audience interest had already been stoked by the satellite broadcast network CNN's coverage of the Gulf War some weeks before. The first of many committees to examine possible policy and regulatory responses, constituted almost immediately afterwards, submitted its recommendations by October 1991.[32]

Certain conditions were taken for granted in all the early, official, examinations of the broadcasting reform. Though thinking on autonomy for the sector had evolved over the years, there was little acceptance yet that the government monopoly over the airwaves would have to yield to new realities. The most that would be conceded was a degree of access for the public to broadcast platforms, that would nevertheless remain the exclusive domain of the government.

The number of broadcast channels beaming into India was by now proliferating.

Yet the government remained unwavering in its refusal to allow any Indian entity to establish an upward link to a satellite for diffusion of broadcast signals over the country. This compelled a number of Indian broadcasters to physically transport their programmes on magnetic media to other countries – notably Singapore – from where an uplink was established for beaming signals into India.

Inherent Illogic of Broadcast Regulation

This was a situation rife with ironies. Singapore till today zealously guards its airwaves, allowing incoming broadcasts only with a time delay, so that diligent censors continually monitoring the signals can screen out any material deemed objectionable. But despite all its authoritarian attitudes, the government of Singapore had little reservation early in the C&S television boom, in allowing uplinking from its territory. The Indian government in contrast, disallowed any uplinking of broadcast signals, but effectively admitted that it was powerless to monitor or regulate incoming television programmes. To draw attention to this contrast is not to endorse the Singaporean policy of censorship, or to advocate a police regime that would monitor all broadcasts for conformity with an official line. Rather, it is only to underline the inherent illogic of the Indian government's position, which remained a persistent feature for long years into the C&S television boom.

By late-1996, a minor concession was granted with domestic C&S broadcasters being allowed to uplink to satellites owned by India's Department of Space, for the limited purpose of gathering "news feeds" from remote locations. Though successive committees had recommended that uplinking rights be granted to Indian-owned broadcasters, the government dithered endlessly over what always seemed a fairly simple issue.[33] By early-1998, the Murdoch-owned STAR TV contracted with an Indian production company to provide the feed for a 24-hour news channel. Senior officials of STAR TV, many of whom had till just prior to joining the Murdoch enterprise, been working for the MIB, were then under investigation in matters involving possible conflicts of interest and even corruption. But then prime minister I K Gujral found little amiss in throwing open the premises of his official residence for the inauguration of STAR's 24-hour news channel. Uplink rights were granted, ostensibly for a trial period of six weeks, so that the news channel could provide coverage of the upcoming general elections to Parliament.[34] And once the uplink right was granted to a foreign-owned broadcaster, there was no credible basis on which it could be denied to Indian entities.

Against this background, it is easy to guess why policy on radio continues to remain excessively restrictive: the poor cousin within the broadcasting family has simply not had any powerful lobbies arguing its case.[35] A record of inconsistent – even duplicitous – standards, is especially evident in the record on community broadcasting. The concept note prepared by the MIB in 1996, by way of a preface to the legislation it proposed to bring in, mentioned community broadcasting as an "extremely useful" device in "providing voices to the local community in managing their affairs and participating in (the) overall developmental process". It proposed moreover, to award broadcasting licences in restricted areas – "on the basis of either a restricted bid or no bid at all" – to local organisations "to facilitate better education and communication".[36]

Since these words were written, big business control over the airwaves has only been consolidated. In the process, the priorities of community broadcasting and public access to the airwaves have vanished from the policy discourse. It was only several months after the spectrum auction for FM radio that the union cabinet finally approved a policy that would open up opportunities in community radio to entities other than privileged universities and institutions of learning. And with all the changes that have grudgingly been allowed, the policy on CRS remains highly restrictive in terms of eligibility, content and revenue sources.

These multiple forms of control over CRS stands in striking contrast to the total absence of any regulation over TV broadcasts. Regulatory efforts in C&S TV in fact, are currently focused on the cable operator rather than the broadcaster. The onus of ensuring that all material broadcast is in conformity with the "programme code" and the "advertisement code" rests entirely with the cable operator. This curiosity of Indian broadcast law has been inscribed into the Cable Television Network Rules of 1994 and continues to hold the field till now. The "programme code" in turn, is a bunch of fairly vacuous strictures that have in practice been reduced to nullity.[37]

Revisiting Ratios

Where regulatory efforts threaten to have a substantive impact on media monopolies and thus on the overall ambience of the right to information and free speech, these are swiftly abandoned for reasons that should not challenge an average intelligence. A recent move by the central government, to limit the advertisement time that particular television channels carry, was abandoned within a month of its announcement, without any kind of public debate.[38] While the proposal may seem absurd on the face of things, it has a long and hoary vintage as a regulatory device with a vital bearing on the fundamental rights. Successive press commissions in India have for instance, suggested that the limitation of advertisement revenue earned by particular media organisations, though seemingly an intrusion into their rights, is a necessary evil in the larger cause of the rights to information and free speech. Both the price-page schedule, which requires newspapers to price their product in accordance with number of pages printed, and the directive to limit the number of pages that a newspaper publishes, have been ruled unconstitutional by the Supreme Court in the Sakal and Bennett Coleman cases.[39] Yet they continue to be advocated – not just by control fanatics in the government but also by people with vital stakes in the industry – as an imperative of media regulation.

In 2003 for instance, the Indian Parliament's standing committee on information technology urged the government to prescribe a "ratio for coverage of news contents and advertisements in newspapers". This was necessary since, as the Committee observed, "a tendency is being noticed in the leading newspapers to provide more and more space for advertisements at the cost of news items". Though in itself, this was not a cause for public concern, there was adequate reason to worry, that with advertisement expenditure migrating towards particular newspapers, others that catered to lower income groups – of lesser importance to advertisers – would be starved of revenues and be compelled to cut back on newsgathering expenses. This in turn, would impair the socially desirable objectives of ensuring diversity and plurality of news media.[40]

The print media, despite all its traditions in India, is today rapidly losing its rich

plurality, as the pressure mounts for conformity with the demands of advertisers and the affluent. The broadcast media because of its specific features, is more prone to surrender its autonomy when faced with advertiser interests.[41] The public character of the airwaves as a resource, could in short, soon be completely subverted by a sustained campaign of disinformation that essentially denies the public its right to know. Circumstances perhaps have never been more appropriate than now, for a credible regulatory authority, committed to the public interest, to revisit the issue of advertisement and subscription revenue. There is also the need to examine the issue of cross-media ownership restrictions from a public interest viewpoint, rather than the governmental-bureaucratic perspective that has so far been customary in India.

The latest visitation of a law for the broadcast sector, the BSRB, proposes as a public authority to regulate the airwaves, a "Broadcasting Regulatory Authority of India" (or BRAI) that will have the final word in matters related to the broadcast spectrum. Perhaps some of the true motivations behind the BSRB as a legislative proposal would become clearer if the mandate that it invests the BRAI with were to be examined.

The BSRB conceives of a situation when the central government will, by notification, transfer all "proceedings pending" before the existing frequency spectrum oversight body, the Telecom Regulatory Authority of India (or TRAI) to the BRAI. It is significant that over the weeks between June and August 2006 – with the BSRB being debated in public – TRAI had sought for the first time to go beyond its assigned job of mediating between telecom companies and adjudicating on matters of frequency spectrum allocation, to seek to establish its authority over the tariffs levied by C&S companies.[42] This was within TRAI's mandate as the regulator of the broadcast sector, a status it was conferred with in 2004, ostensibly to hasten the process of convergence between broadcasting, communications and information technology.[43] Yet it was never a secret that the MIB was particularly unhappy with this seeming encroachment into its domain. The emergence of the TRAI in its avatar as regulator of subscriber rates that C&S broadcasters could charge, created a further sense of alarm within the MIB, at the possibility that a rival body could win immense populist acclaim in ostensible pursuit of the public cause. The BSRB in other words, was no more than a temporary expedient in a long-running bureaucratic turf war. That, finally is the most charitable assessment that can be made of the last effort to provide a legal framework for the Indian broadcast sector. EPW

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Notes

1 The text of the Broadcast Services (Regulation) Bill was for long a mystery, with one commentator going to the extent of observing as late as July 28, 2006, that despite all the comment that had been heard in public forums, the bill was not officially "in the public domain". This commentator, who happened to be chairperson of the Public Service Broadcasting Trust, had by his own account "requested a copy" of the bill from the MIB, and been told that he could not "legitimately" be given one. "This means", he wryly concluded, "that all those in possession of a copy of the bill and those writing about it are in violation of the Official Secrets Act". (See Rajiv Mehrotra, 'Social Justice on the Airwaves', *The Hindustan Times*, July 28, 2006, p 11). The full draft of the bill was finally posted on the MIB website on August 11, 2006, with the stated purpose of inviting public comments on an issue of general importance. The bill and the consultation paper that explains its concepts and intents, are available at this writing at the following web address: http://mib.nic.in/informationb/POLICY/BroadcastingBill.htm.

2 'Media Muzzled I: Is the Broadcast Bill Media Friendly?', *The Hindustan Times*, Delhi, July 26, 2006, p 11.

3 'New Broadcast Bill Just a Rehash of Existing Provisions?', *The Times of India*, Delhi and Mumbai, July 3, 2006.

4 'Kill this Broadcast Bill before It Kills Your Rights', *Daily News and Analysis*, Mumbai, July 1, 2006. This newspaper was launched in the Mumbai market in 2004 and its principal financial backers are the Zee Telefilms group, which operates a number of entertainment and news channels and is by far India's largest satellite broadcaster, and the Dainik Jagaran group, publishers of the newspaper that was reckoned by the last round of the National Readership Survey, to have a readership of 21 million.

5 The first amendment to the US constitution forbids Congress from making any law "abridging the freedom of speech, or of the press". This has led to a considerable jurisprudential debate in the US to determine whether freedom of the press is in some way a redundancy given the unequivocal fashion in which the First Amendment upholds the freedom of speech. The judicial consensus has tended to the view that it is not, which means in effect, that the press enjoys rights that go beyond the public right to free speech. This question is addressed, with appropriate referencing, in an earlier article by this author, 'The Challenge to the Media', *Seminar*, Number 551, July 2005, pp 41-45 (available at this writing at the website: www.india-seminar.com.

6 1962 SCR (3) 842; this is the standard citation format, in which SCR stands for *Supreme Court Recorder*.

7 1973 SCR (2) 759.

8 A fuller examination of both the *Sakal* and the Bennett Coleman judgments is available in a recent article by this author. See 'Freedom, Responsibility and Regulation', *Seminar*, Number 561, May 2006, pp 20-25; available at this writing through the website: www.india-seminar.com.

9 1973 SCR (2), p 760.
10 Ibid, pp 803-14.
11 1995 SCC (2) 161, para 124(i), SCC here refers to Supreme Court Cases in accordance with the accepted format of citation.
12 1995 SCC (2) 161, para 78.
13 1995 SCC (2) 161, para 181.
14 Ibid, para 107, 85.
15 Ibid, para 205.
16 Ibid, para 81.
17 Ibid, para 205.
18 The policy guidelines for community radio services are available in a document posed on the website of the Ministry of Information and Broadcasting. See: http://mib.nic.in/informationb/CODES/CRBGUIDELINES041206.doc.
19 The policy guidelines for the second round of FM radio broadcast licences are available at the website of the ministry of information and broadcasting, at the following URL: http://mib.nic.in/informationb/POLICY/frames.htm.
20 The details of the broadcast circles awarded after the last round of FM spectrum auctions, is available at this writing, from the website of the Ministry of Information and Broadcasting: http://mib.nic.in/fm/fmmainpg.htm.
21 It may not be out of place to mention here that Sun TV is a business group controlled by the family of the incumbent minister for communications and information technology, a first-term member of parliament from Tamil Nadu. Aside from the intrusion of monopoly elements into the media, which is an issue meriting considerable attention in itself, this also raises serious questions about conflicts of interest, which have surprisingly, not attracted much public comment or discussion. For a rare discussion in a public forum on the multiplicity of issues involved in Sun TV's expansion, see S R Ramanujan's column dated May 14, 2006 in www.thehoot.org, 'Why Is Tamil Media So Biased?
22 For an account of the *Times of India*'s growth, consolidation and diversification, see this writer's essay in *Himal South Asia*, August 2006, '*The Times of India's* Final Frontier', available at: http://www.himalmag.com/2006/august/essay.htm. Also see the article published in the Delhi-based magazine *Hard News*, 'Demoting News and the Reader', December 2006, pp 17-20, available at: http://www.hardnewsmedia.com/portal/2006/12/697. Both articles in turn, are derived from a case study on the media group published by the Inter-Press Service (Asia Pacific) in December 2006. See: '*Times of India*: A Catastrophic Success', in *Asia Media Report, A Crisis Within*, Inter Press Service (Asia Pacific), Bangkok, 2006, pp 99-110.
23 On the acquisition of Adlabs by the Reliance-ADAG group, see Sevanti Ninan, 'The New Moguls', *The Hindu*, Sunday magazine, October 8, 2006. Details of FM broadcast circles awarded till this point have been drawn from the source cited above, i e, http://mib.nic.in/fm/fmmainpg.htm.
24 The classic work on this issue of course is Ben Bagdikian's *The Media Monopoly*, Beacon Press, New York, 1983. Detailed rules on the cross-media ownership restrictions in force in the US can be found on the website of the Federal Communications Commission: http:// www.fcc.gov/ownership/rules.html. Illustratively, the rules that are currently in force prohibit "common ownership of a full-service broadcast station (television or radio) and a daily newspaper if the station's service area completely encompasses the newspaper's city of publication". The FCC's 2002 effort to relax these rules in some degree was met with an organised show of public dissent that compelled it to put the proposed changes on hold. It could be argued that none of the FM broadcast licences given out recently is a "full-service broadcast station", since they are all explicitly forbidden from engaging in news and current affairs. But with understanding of media economics having progressed much further since the US norms were written, it should be evident that dominance over the advertisement market, particularly in concentrated pockets of high-purchasing power demographic groups, is really the material issue.
25 Associated Press story, 'Media Ownership Issues Return to Spotlight', Washington DC, October 3, 2006. This story, issued just when the FCC was beginning a series of public hearings, usefully describes the level of mobilisation of consumer advocacy groups on the issue of cross-media ownership.
26 The precise formulation in justice Sawant's judgment is as follows: "A mere creation of the monopoly-agency to telecast does not per se violate Article 19(1)(a) as long as the access is not denied to the media either absolutely or by imposition of terms which are unreasonable. Article 19(1)(a) proscribes monopoly in ideas and as long as this is not done, the mere fact that the access to the media is through the Government controlled agency, is not per se violative of Article 19(1)(a)". 1995 SCC (2) 161, para 61.
27 A most comprehensive recent account, focused on television, is Sevanti Ninan, 'History of Indian Broadcasting Reform' in Monroe E Price and Stefaan G Verhulst (eds), *Broadcasting Reform in India, Media Law from a Global Perspective*, Oxford University Press, Delhi, 1998, pp 1-21. A comprehensive survey and critique, focused on radio, is available in Kanchan Kumar, 'Mixed Signals, Radio Broadcasting Policy in India', *Economic and Political Weekly*, May 31, 2003, pp 2173-82.
28 1995 SCC (2) 161, para 199.
29 Article 10 of the BSRB merely reserves for the central government "the authority to prescribe such eligibility conditions and restrictions with regard to accumulation of interest in the print and broadcast segments of the media as may be considered necessary from time to time, to prevent monopolies across different segments of the media as well as within the broadcast segment, to ensure diversity of news and views". The full text of the BSRB is available at the time of this writing at: http://mib.nic.in/informationb/POLICY/BROADCASTSERVICESREGULATIONBILL.htm.
30 The full text of the draft is available in Price and Verhulst (editors), op cit, pp 191-222. Also included (pp 223-33) is a concept note circulated by the ministry of information and broadcasting, explaining its overall approach to regulatory issues.
31 Sevanti Ninan, op cit, pp 18-19.
32 Ibid.
33 This complex regulatory history is summarised in two articles in the fortnightly magazine *Frontline*. See: 'Uplinking Rights, The Outlook for Private Indian Broadcasters', November 1, 1996, pp 93-4; and 'A TV Debate, Questions of Broadcast policy', February 21, 1997, pp 114-15.
34 This sequence of events is covered in concurrent issues of the weekly newsmagazine, *India Today*, especially in the special page titled "Teletalk", devoted to visual media issues.
35 Vinod Pavaral asks a pertinent question that still remains unanswered: "why does this government find Rupert Murdoch more trustworthy than a poor, unlettered dalit woman who wants to use a media channel to communicate?" See 'Breaking Free, Battle over the Airwaves', *Economic and Political Weekly*, May 31, 2003. This is the introductory piece to a collection of papers on broadcasting in India with a focus on community radio, a collection that includes inter alia, Kanchan Kumar, op cit.
36 Price and Verhulst (editors), op cit, p 233.
37 Among other things, the programme code explicitly forbids the broadcasting of material that contains the "criticism of friendly countries" or "criticises, maligns or slanders any individual in person or certain groups, segments of social, public and moral life of the country". Material that "denigrates children", or projects an "ironical and snobbish attitude in the portrayal of certain ethnic, linguistic and regional groups" is also forbidden. And in a revelation that would surely be of interest to the numerous channels that begin the day with astrological predictions – and the sports channels that preface the telecast of important cricket matches with the wisdom of tarot-card readers – anything that propagates "superstition and blind belief" is also proscribed.
38 *The Hindu*, 'Decision on Advertisement Component in TV Channels Withdrawn', August 20, 2006, available at this writing at: http://www.thehindu.com/2006/08/20/stories/2006082006131000.htm.
39 See footnotes 6 and 7 above.
40 Standing Committee on Information Technology, Thirteenth Lok Sabha, 63rd Report, Lok Sabha Secretariat, December 2003, pp 39-42.
41 The weekly newsmagazine *India Today*, part of a business group that includes two news channels – Aaj Tak in Hindi and Headlines Today in English – recently ran a cover story that was rather evocatively titled "Tamasha News". The subtitle read: "Sensational, Shocking, Pervasive, Trivial". But in a one-line summation of the purport of its story, the newsmagazine refrained from exercising its judgment on the merits of the phenomenon, perhaps because it could not be seen in public to be engaged in an act of self-condemnation. "Intense competition has compelled news channels to feed the voyeuristic appetite of today's viewers", it said, "for better or worse".
42 *The Hindu Businessline*, 'Pay Channels @ Rs 5 Per Month', September 1, 2006, page 1.
43 See the Press Trust of India story, posted on the website of *The Economic Times* on January 10, 2004, available at this writing at: http://economictimes.indiatimes.com/articleshow/415625.cms.