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<td><strong>Author(s)</strong></td>
<td>Maheta, Aruna.</td>
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Paper No. 15
MEDIA REGULATION IN INDIA


Regulation of the media in India is plagued by a fundamental dilemma in the political philosophy of the country. On the one hand, the nation aspires to be a democracy, and values the right to freedom of speech. On the other, it remembers centuries of foreign domination and fears for the unity of this large country, which is split by language, religion, caste and class. This predicament is clearly reflected in the Constitution. Article 19(1) guarantees the right to freedom of speech and expression, while Article 19(2) allows the state to impose restrictions “in the interests of the sovereignty and integrity of India, the security of the state, friendly relations with foreign states, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence”[1]. Further, Article 358 allows the state to completely suspend this right during emergencies, a power that was effectively used in India’s brush with dictatorship from 1975-77. Except for this brief hiatus, independent India has enjoyed a large, vibrant and free press, while, at the same time, its government kept a tight leash on the electronic media.

Government control of electronic media relies primarily on the Indian Telegraph Act of 1885, which gave government “the exclusive privilege of establishing, maintaining and working telegraphs,” as also the power to grant such licence to others. The definition of “telegraph” was broadened to include radio and television broadcasting, as well as telecommunications. This act allowed government to justify its monopoly of the electronic media, as also to ban uplinking to a satellite by a private party from India. It also provided the basis for severe content regulation of all forms of electronic media, prohibiting the use of such networks for pornography, as well as material that might disturb communal harmony, relations with foreign countries, etc.

While there were repeated calls for provision of autonomy to the public electronic media and for their more widespread and better use, it was only in the 1990s that the issue began to be treated with some urgency. The reason for this change is priorities was, of course, the availability of satellite TV broadcasts from CNN and Star TV, and the resultant explosive growth in cable TV. More than 40 channels now beam into India. Estimates of the number of satellite dishes vary from 100,000 to 500,000. In only 6 years cable TV operators had connected 12 million TVs, equal to the entire telephone population. Until 1990 there were only 2 government-controlled channels, which were produced and broadcast terrestrially by Doordarshan (DD)’, so the government had no need for a cable and satellite TV policy. This lacuna, and the resultant lack of any regulation of the industry, allowed private enterprise to flourish. By 1997, satellite TV reached approximately 30% of 60 million TV homes. However, despite the increased attention that media regulation has been receiving in the 1990s, the country has not yet reached consensus on an appropriate broadcasting policy.

* India did have a brief exposure to DTH as early as 1975-1976, when the Satellite Instructional Television Experiment reached 2400 villages via an American satellite.
The regulation of media can meaningfully be divided into 2 broad areas, content and distribution.

The Regulation of Content
The 1952 Cinematography Act created an apparatus for the censorship of films intended for public viewing. However, by government notification, DD was exempted from provisions of this act. Regulation of broadcasting content was covered by policy guidelines of the Ministry of Information and Broadcasting, most recently the 1982 News Policy for Official Media. This covers the selection of news items for presentation, coverage of politicians, crime, calamities, public disturbances, insurgency, opinions, etc. The policy seeks to promote development and nation-building by putting a rather positive slant on government efforts. It also seeks to enhance national integration and communal peace, for instance, by not identifying the communities involved in communal riots, by taking care not to offend any particular community or religion, and by suppressing news that might encourage secessionist activities[2].

This policy was successfully challenged in 1989 by Cinemart Foundation, producers of a film on the Bhopal gas tragedy called "Beyond Genocide", which won a national award. When DD refused to telecast the film, even though the screening of all national award-winning films was part of government policy, the matter was taken to the High Court. The court ruled against the government, stating that only a valid law could curtail the fundamental right to freedom of speech on television, not a mere departmental rule.

The problem that has occupied national attention far more is the blatant misuse of the electronic media by the ruling political party. As early as 1964, the Chanda Committee report observed that "Suspicion of official information has deepened in India because of an incorrect, even improper, use of media for personalized publicity and an undue accent on achievements." Over the years, this abuse of political power led to mounting demands for autonomy to be granted to the official media, culminating in the Prasar Bharati Act of 1990[3]. DD’s monopoly had, in any case, disappeared with the arrival of channels broadcast via satellite. These channels were drawing advertising revenue away from DD, as well as presenting news and other programmes that not only made a mockery of governmental attempts to distort the news, but also made DD look rather shoddy. Autonomy to DD was seen as a means to fight the competition.

While paying lip sympathy to autonomy for the electronic media, the government was loath to grant it in practice, since DD was a very useful mouthpiece for the ruling party. In the 1995 Supreme Court judgement in the Union of India vs. Cricket Association of Bengal, Justice Jeevan Reddy observed: "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 view points and opinions which is essential for the growth of a healthy democracy." The act was finally notified only in 1997, when the fall of the governing coalition was very much on the cards. According to journalist Pritish Nandy, the United Front coalition took the step only because "this was the surest way to get into the history books as the good guy"[4].
The Regulation of Distribution

Cable TV, as mentioned above, was launched in India in a policy vacuum. This situation was corrected by the 1995 Cable Act, which sought the registration of service providers, who were allowed maximum 49% foreign equity. It sought to enforce content regulation on programmes carried or produced by them, and a must-carry stipulation for at least two DD channels. Since the cable network was already fairly large by then, government could not have introduced any serious restrictions without triggering a public outcry. Despite this, the act was never seriously enforced by the local authorities entrusted with the responsibility.

After the 1995 Supreme Court judgement, which ruled that "airwaves constitute public property and must be utilised for advancing public good, and asked for a broadcasting policy, work began on a comprehensive broadcasting bill. This assumed urgency in 1996, when Star TV announced plans to offer Direct To Home (DTH) services. Government was determined to avoid a fait accompli of the kind it encountered in cable, so it banned via ordinance the use of Ku Band antennae without licences. Star TV has taken the matter to court, and a decision is still awaited.

Terrestrial broadcasting is still reserved for government, though this may change with the broadcast bill now under discussion.

The Broadcast Bill

In May 1997, a Broadcast Bill was introduced in Parliament, however the subsequent political uncertainties and turmoil in Parliament prevented its discussion and passage. The bill seeks to address the portrayal of violence and sex on television, promote national integration, ensure time for programmes for children, and encourage programming of Indian origin. While allowing private satellite broadcasters, the bill restricts foreign equity to 49%*. For companies engaged in terrestrial broadcasting, no foreign equity is permitted. Sports and international news channels are exempt from licencing provisions, provided they remain free-to-air and carry limited advertising, which takes the BBC, CNBC and CNN off the hook. Doordarshan (DD) is exempt too, since it is defined as a "public-service broadcaster".

The bill gives the central government emergency powers to stop any broadcasting service considered prejudicial to friendly relations with foreign countries, public order, security of state and communal harmony. It divides broadcast services into six categories: terrestrial radio, satellite radio, terrestrial TV channels, satellite TV channels, DTH (direct-to-home) broadcasters and local delivery services (cable). An operator can get a licence for only one category. Owners in any category, or in the print media cannot hold more than 20 per cent stake in any other broadcasting company, such as a television channel. [5]

At the moment, private uplinking is prohibited under the Indian Telegraph Act, forcing Indian channels to send their software overseas for uplinking. The Broadcast Bill goes to

* The National Agenda formulated by the BJP-led ruling coalition plans to reintroduce this bill with a foreign equity cap of 20%.
the other extreme, making it mandatory for uplinking to take place from India. There is a provision for the establishment of an independent regulator, the Broadcasting Authority of India (BAI), which may declare an event taking place in India to be of national interest, which would confer a mandatory right of broadcasting to the public service broadcaster. There is a provision for issuing licences to educational institutions and organisations such as NGOs for non-commercial broadcasting in a restricted area on the basis of either a restricted bid or no bid at all. Otherwise, the bill provides for auctioning of licences for cable and DTH. For cable, up to two licences will be issued per telecom circle (roughly equal to a state), with some degree of protection for existing operators, while for DTH, not more than two will be issued nationwide. This bill will supersede the 1995 Cable Act. The extent to which the new government will tinker with this bill before submitting it to Parliament is not yet clear.

The Print Media
Print Publications are required to register with the Press Registrar under the Press and Registration of Books Act, 1867, and furnish it information relating to ownership, editorial control, etc. (Foreigners are excluded from both). The Press Council Act was enacted in 1965, and under it, the Press Council was set up in 1966. It aims to preserve the freedom of the press and to foster high journalistic standards. Its functions include the evolution of a code of conduct for the print media, and deals with complaints against the Press. For this, it is vested with some powers of a civil court. Though, under normal circumstances, the Press in India is relatively free, it comes under rigid censorship during a declared emergency, as happened in 1975-77.

In 1985, Parliament passed the Anti-Defamation Law, which mandated jail terms for “any writers or speakers who knowingly harm others’ reputations.” As a result of vociferous and unrelenting protests from the Press, the law was revoked only a month later[6].

Radio
This medium seems to have received only peripheral attention in the broadcasting regulation debate. Radio has a long history of cross-border penetration, and enjoys relative freedom from content regulation. It has the advantage of low cost of software production, distribution and reception, and is likely to grow very rapidly through the use of satellites. For instance, this year, WorldSpace plans to provide people in Asia, Africa and America, access to 75 channels of digital-quality music, news and other information via satellite from around the globe through a $200 radio [7]. There is need to radically liberalize this medium to exploit its tremendous potential in development, particularly in light of the improving ability of the Internet to carry radio.

* The Press Council Act was repealed under Emergency in 1975, and the Press Council abolished. In 1978, the Act was reenacted, and the Press Council was re-established in 1978.
The Internet

The Internet functions in a gray legal area. While the Indian Telegraph Act is applicable, and requires the service provider to ensure that nothing obscene or objectionable is carried by the network, this requirement is almost entirely ignored. Subscribers are not allowed to use the Internet connection for Telephony or Fax applications. VSNL, the only ISP that provides connections to the general public, has made the threat that subscribers who violate this “would be permanently debarred from using Internet services.”[8] Lately, it has been noticed that VSNL has been preventing Web access to the sites of companies such as Vocaltec and Net2Phone[9].

The setting up of the Telecom Regulatory Authority of India (TRAI) has introduced a new element in the regulation of the Internet in India. Its authority has been challenged by the government Department of Telecommunications in court, and is not yet clear what the role of the TRAI will be in this field.

The Internet is likely to have momentous impact on broadcasting. It already carries radio beyond the control of any regulator, and will do the same for TV, once the bandwidth available to it increases. It does not respect national boundaries, and its users are fierce defenders of the right to free speech, which, as in the case of the print media, will make intrusive regulation difficult.

Controversial Issues in the Broadcasting Bill

Since it deals with a large number of issues in a complex and rapidly changing area, and attempts to reconcile huge differences in perception, the proposed bill has come in for much criticism. Major issues include:

1. Extent of Foreign Equity: The bill proposed a 49% cap, which the ruling coalition wishes to reduce to 20%. Besides significantly reducing the flow of funds to this industry (which has significant employment and export potential), it has been argued that this step does not address the fundamental problem, which is media concentration. Even with 20% stake in a company one can be the dominant partner. There is no allowance for foreign equity in a cable company.

2. Cross-service restrictions: Preventing, for instance, a terrestrial broadcaster from receiving a licence for a satellite channel reduces economies of scale and synergy. Given the rather small percentage of Indians that watch any one of several dozen available satellite channels, it has been argued that there is hardly a danger of concentration of viewership with a few entities. It has been proposed that the UK model be employed, which uses an index of market share rather to determine if there is a concentration of media, rather than equity holding.[10]

3. Narrow focus: With technological advances, it is now possible to carry TV signals over a phone line, provide phone connections over cable, radio over the Internet, etc. The bill is silent on these aspects. Having a separate broadcast regulator, telecom regulator and spectrum management authority will lead to lack of a coherent policy and loss of synergy [11]. On the other hand, allowing cable operators to offer
telephony and Internet would not only enhance their profitability and the revenues that accrue to government, it would significantly help in the nations' development.

4. Mandatory Uplinking: This 180-degree turn, from a situation where uplinking from India was prohibited for private parties, is unrealistic. If neighboring countries all put this into their laws, it would become impossible to utilize the large footprint of satellites to broadcast to more than one country, and put further stress on the limited number of slots available for geo-stationary satellites. Uplinking facilities are expensive, and Indian channels have long-term agreements with such service providers in Hong Kong and Singapore, that they cannot easily withdraw from.

5. Auctioning of Licences: India's experience with this in telecom has been poor. Disputes between the parties have led to long delays, and companies in areas such as cellular and e-mail are not viable in the long-term, because they pay fixed huge licence fees, irrespective of revenue [12]. A percentage of revenue or profits, as in taxation, would be a better approach.

6. Events of National Interest: Mandatory right to broadcast given to the public broadcaster is tantamount to a monopoly. The public broadcaster would hardly be willing to pay large sums for something it is entitled to by law, thus giving it an unfair advantage over all other broadcasters, and making such events unattractive for them. This would also deprive the producers of the events of considerable revenue.

7. Size of Cable Circle: It has been argued that a state is too large for a cable operator to effectively cover, and that a district might be a more appropriate size.

8. Content: It is not clear how the government plans to regulate content in a medium where live broadcasts are frequent, not to mention the plethora of channels that will need to be monitored.

9. Foreign broadcasters: It is also not clear how foreign companies using satellites and slots that do not belong to India will in any way be affected by this bill. Placing restrictions solely on Indian companies would put them in a disadvantage in international competition, which can hardly be the intention of this bill.

10. Internet: The Internet is already an effective radio carrier, and increasing bandwidth being made available to it will allow it to do the same for TV. A broadcast law that does not take any notice of this very important medium is doomed to obsolescence not long after the ink on it is dry.

Conclusion
State paranoia is incompatible with the expectations and aspirations of citizens in a democracy. This contradiction has bedeviled Indian policy makers. It therefore comes as little surprise that after 50 years of independence, providing only a modicum of autonomy to the public broadcaster "was the first concrete step forward in implementing Indian broadcasting reform," according to Sevanti Ninan. Yet, even that may not have come about, but for the vagaries of the volatile Indian political situation.
While politicians and academics debate, technology marches inexorably forward, and both, the elimination of government monopoly and the attempt at broadcasting regulation are mere reactions to this. Gilmore made the famous comment that "the Internet treats censorship as a fault, and routes around it," thereby suggesting that the only way to censor it was to keep it out altogether. Satellites have taken even that option away from broadcasting regulators, who may learn the hard way that their attempts at regulating the airwaves meet with no more success than those of their ancient predecessor, Canute, who lost out to waves of a different kind.

5 Bhandare, Namita: Broadcasting Bill: Pulling the Plug, Error! Bookmark not defined.
8 Message from VSNL to all subscribers, January 5, 1998.
9 See, for instance, Error! Bookmark not defined.
10 The Broadcast Bill, 1997, suggestions for changes – A submission to the Select Parliamentary Committee on Broadcasting, EIU-IMA India, 1997.