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RESEARCH ARTICLE



Live broadcasting of cricket in India & Pakistan: right to information, commercialization & competition issues

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ABSTRACT

The liberalization of the electronic media in sub-continent brought new choices for the viewers, but also highlighted the complex interplay of rights of various actors when it came to the live broadcasting of cricket. There is “right to information” in viewing live transmission of championship matches, with a corresponding service obligation on the national TV to broadcast such matches. This public interest in watching live transmissions, which are carried over air waves –a public property– comes in conflict with auctioning broadcasting rights exclusively to a highest bidder. In India, the right of the viewers is protected through the Sports Act of 2007, which traces its origin in a series of superior courts’ judgments spanning over 22 years from 1995 to 2017. Pakistan is lagging behind in definitively protecting the right of viewing sports events, and through Indian experience, could avoid the difficult path of formulating public policy ex post facto.

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Good afternoon, ladies and gentlemen. Welcome to the first telecast of a sporting event. I’m not sure what it is we’re doing here, but I certainly hope it turns out well for you people who are watching.

– Bill Stern, announcing a 1939 baseball game between Columbia and Princeton Universities.¹

I. Introduction

The marriage between sporting events and broadcasting, officiated by Bill Stern in 1939, has come a long way since then. The electronic media has gone through a revolutionary and exponential change globally, including Pakistan and India. In Pakistan, from one public TV channel in the 1990 s, there are over 129 channels presently available,² while in India over 866 indigenous channels are being aired currently.³ The liberalization of the electronic media market in Pakistan started in

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¹Phillip M. Cox II, ‘Flag on the Play? The Siphoning Effect on Sports Television’ (1995) 47 Federal Communications Law Journal 571, citing Lee Green, *Sportswit* (1984) 48.

²Pakistan Electronic Media Regulatory Authority, Government of Pakistan, Annual Report 2015–18, 15, <http://www.site.pemra.gov.pk/pemgov/wp-content/uploads/pub-rep/annual_report_2015-18/FLASH/annual_report_15-18.pdf> accessed 18 May 2020 (‘Annual Report 2015–18’).

the early 2000s, with the setting up of Pakistan Electronic Media Regulatory Authority (“PEMRA”) and granting of licences for cable and satellite channels. Similarly in India, the first private satellite TV channel, Aaj Tak, was permitted to uplink in December 2000 from the Indian soil; prior to this, private TV channels were uplinked only from foreign shores.⁴ Liberalization brought new choices in television channels and content (sports, news, entertainment, etc.) for the viewers, but also highlighted the complex interplay of rights of various actors when it came to the live broadcasting of important sports events, in particular, cricket. Cricket, brought to colonial India by the British, became the favourite game in the sub-continent⁵ with the advent of satellite television channels and live transmission of cricket matches that coincided with the Indians winning the Cricket World Cup in 1983 and the Pakistanis winning the Cricket World Cup in 1992.⁶ The combination of winnings and live transmissions helped cricket gain popularity over field hockey, which is the “national game” of both countries, and in which the two countries jointly hold 11 Olympic gold medals.⁷

Live transmission of sports events is a distinct relevant product market, different from other TV programmes, as they are real-life events filled with suspense, and therefore appeal to the viewers at the time of their occurrence.⁸ The suspense and entertainment value of a sporting event loses its appeal if the telecast is delayed.⁹ There is a public interest (right to information) of residents in viewing of live transmission of championship matches in which their national team is playing, with a corresponding service obligation on the national TV to broadcast such matches. This public interest element in watching live transmissions, which are carried over air waves – a scarce natural resource and public property – comes in conflict with the pure commercial transaction

³Ministry of Information and Broadcasting, Government of India, Annual Report 2018–19, 90, <<https://mib.gov.in/sites/default/files/Annual%20Report%202018-19.pdf>> accessed 21 April 2020 (‘Annual Report 2018–19’).

⁴ibid.

⁵*Union of India et al. v Board of Control for Cricket in India et al.*, Civil Appeal No 10733–10733 of 2017 (Supreme Court, 22 August 2017) [2] (“*Uoi v BCCI*”):

The precise origin of the game of cricket, though largely unknown, has been traced, at least, to the late 15th Century England. With the expansion of British Empire the game of cricket travelled to different parts of the globe including India.

⁶See Nalin Mehta, ‘Batting for the Flag: Cricket, Television and Globalization in India’ (2009) 12(5–5) *Sport in Society* 579, 581 (arguing that the emergence of Cricket as the new “national game” does not necessarily stem from some peculiar Indian affiliation for the game but is inextricably linked to the expansion of Indian television and a confluence of factors that came together).

⁷List of Olympic Medallists in Field Hockey’ (*Wikipedia*) <https://en.wikipedia.org/wiki/List_of_Olympic_medalists_in_field_hockey> accessed 21 April 2020.

⁸*Nat’l Collegiate Athletic Ass’n v Bd. of Regents of Univ. of Oklahoma* 468 U.S. 85 (1984) (college football broadcasts defined as a separate market. The Court found that intercollegiate football telecasts generate an audience uniquely attractive to advertisers and that competitors are unable to offer programming that can attract a similar audience); *International Boxing Club of New York, Inc. v United States* 358 U.S. 242 (1959) (championship boxing events are uniquely attractive to fans and hence constitute a market separate from that for non-championship events); *Times–Picayune Publishing Co. v United States* 345 U.S. 594 (1953) (telecasts of college football which rests on generic qualities differentiating viewers is a separate market).

⁹See M. Agnes Siedlecki, ‘Sports Anti-Siphoning Rules for Pay Cable Television: A Public Right to Free TV?’ (1978) 53 *Indiana Law Journal* 821, 22:

Sports events have great entertainment value only at the time of their occurrence. If siphoned, viewers without cable service would be entirely deprived since delayed broadcast presumably would have little appeal. Dramatic programs, on the other hand, could be aired over conventional television at a later time with little loss in entertainment value. Second, the supply of sports events is, in theory at least, inelastic. If siphoned, there would be no similar substitute. In the case of dramatic fare, however, additional movies or series could easily be produced to meet the increased demand.

of selling broadcasting rights exclusively to the highest bidder. The conflict between public interest in watching live transmission of sports events of national importance and the commercialization of their broadcasting rights has been reconciled by various countries through anti-siphoning laws.¹⁰ “Siphoning is said to occur when an event or program currently shown on conventional free television is purchased by a cable operator for the showing on a subscription cable channel”¹¹ to the exclusion of free-to-air television. In 2001, TV Denmark 1 Ltd. acquired exclusive Danish TV rights for the 2002 World Cup for transmitting the Danish team’s matches to viewers in Denmark who subscribed to its cable and satellite channel. The British Independent Television Commission (“BITC”) thwarted TV Denmark’s plans by refusing to grant consent, required under Section 101 of the U.K. Broadcasting Act of 1996, for exercising exclusive rights, and thus Danes were able to watch their team play live on free-to-air TV.¹² The House of Lords upheld the BITC’s decision. It noted that “the possibility that anyone who did not subscribe to pay-TV might be deprived of the opportunity to watch [sporting and non-sporting events of national interest] resulted in political pressure which led, first, to domestic legislation in the United Kingdom and then to a European Directive on the subject”.¹³

The European Parliament and Council on 30 June 1997 adopted the European Directive 97/36/EC,¹⁴ which amended the EC Directive 89/522/EEC generally known as the *Television Without Frontiers Directive*.¹⁵ Council Directive 97/36/EC has now evolved into a comprehensive Audiovisual Media Services Directive of 2010 (“AMSD”).¹⁶ AMSD aims to protect the “right to information” of the public through ensuring wide access to television coverage of events of major importance to the society, such as the Olympic Games, the football World Cup and the European football championship.¹⁷ Article 14 directs the Member States:

to ensure that that broadcasters under its jurisdiction do not broadcast on an exclusive basis events which are regarded by that Member State as being of major importance for society in such a way as to deprive a substantial proportion of the public in that Member State of the possibility of following such events by live coverage or deferred coverage on free television.¹⁸

¹⁰For instance, Broadcasting Services Act 1992 (Australia). Specifically, s 115 states:

Minister may protect the free availability of certain types of programs:

(1) The Minister may give notice, by legislative instrument, specifying an event, or events of a kind, the televising of which should, in the opinion of the Minister, be available free to the general public.

Presently, the US does not have any laws restricting siphoning. However, in 1968, the Federal Communications Commission (“FCC”):

set out strict limitations on the sale of sports programming to pay television operators in order to “protect the present television structure”. These limits prohibited “specific event” (such as the NCAA men’s basketball tournament and the Super Bowl) from being sold to anyone other than broadcast television.

See Cox (n 1) 571.

¹¹*Home Box Office, Inc. v F.C.C* 567 F.2d 9 (D.C.Cir.), cert. denied, 434 U.S. 829 (1977), 25.

¹²*Regina v Independent Television Commission, Ex Parte TV Denmark 1 Ltd.* [2001] UKHL 42 [6].

¹³*ibid.*

¹⁴Council Directive 97/36/EC of 30 June 1997 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, [1997] OJL 202/60.

¹⁵Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities [1989] OJL 298/23.

¹⁶Council Directive 2010/13/EU of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services [2010] OJL 95/1.

¹⁷*ibid* Preamble [49] (notice all examples of events of major importance are sporting events).

In India, the “right to information” of the viewers in watching live sports events of national interest are protected through the Sports Act of 2007, which traces its roots and subsequent interpretation in the litigation before the superior courts in a series of judgements spanning over a period of twenty-two years from 1995 to 2017. Pakistan is lagging behind in definitively protecting, through legislative measures, the right of viewing sports events of national interest. Pakistan can learn from the Indian experience and avoid the expensive and expansive path of formulating public policy *ex post facto* through litigation and judge-made law.

This paper canvasses the history of liberalization of electronic media in Pakistan and India, and the competition issues posed by liberalization in the audiovisual broadcasting rights for the sport of cricket. Part II documents the broadcasting regime pertaining to live transmission of cricket matches in Pakistan. It highlights the roles of Pakistan Television (“PTV”), and Pakistan Cricket Board (“PCB”), and the instances of blackout of important cricket matches owing to successive government’s lack of vision in protecting the general public’s right to information. Part III gives an overview of the evolution of legal regime through legislation and case law pertaining to live transmission of cricket matches in India. The paper concludes with some lessons for Pakistan and developing countries in designing an optimal regime for the broadcasting of sports events of national importance live on free-to-air television.

II. Broadcasting regime for cricket matches in Pakistan

A. Historic overview

“This is Pakistan Broadcasting Service” – these were the first words ever broadcasted over the radio on 14 August 1947, when Pakistan got its independence from Britain.¹⁹ On 26 November 1964, the Pakistan Television Corporation (“PTV”) was established and the same day the first-ever news was broadcasted from Lahore.²⁰ On 22 December 1972, PTV, for the first time, transmitted – live via satellite from Australia – a cricket match that was played between Pakistan and Australia. Colour transmission started from 20 December 1976. In 1983, PTV created its sports division to “keep the viewers abreast with the National and International sports events”.²¹ PTV remained the sole provider of television services till the end of 1980s. On 15 July 1990, Pakistan’s first private TV Channel, Peoples Television Network (“PTN”), started its transmission. PTV enjoyed monopoly over the production and live transmission of cricket matches involving Pakistani team until 1993, when the Pakistan Cricket Board (“PCB”) for the first time sold its TV rights to International Management Group/Trans World International (“IMG/TWI”), a New York-based global sports and event management company.²²

¹⁸ibid art. 14(1).

¹⁹Pakistan Broadcasting Corporation, Government of Pakistan, 200, <http://www.pbs.gov.pk/sites/default/files/50_years_statistics/vol1/14.pdf> accessed 21 April 2020.

²⁰‘Pakistan Television Corporation’, <<http://www.ptv.com.pk/ptvCorporate/Introduction>> accessed 18 May 2020.

²¹‘Pakistan Television Corporation’ (Wikipedia) <https://en.wikipedia.org/wiki/Pakistan_Television_Corporation> accessed 21 April 2020.

²²Email from the Chairman of PCB, Mr. Najam Sethi on file with the author. For more information on IMG/TWI see ‘IMG (Company)’ (Wikipedia) <[https://en.wikipedia.org/wiki/IMG_\(company\)](https://en.wikipedia.org/wiki/IMG_(company))> accessed 21 April 2020.

B. Liberalization of electronic media

On 1 March 2002, the then President of Pakistan promulgated the Pakistan Electronic Media Regulatory Authority Ordinance, 2002 (“PEMRA Ordinance”) that was meant to usher in a new era in electronic media broadcasting services.

The PEMRA Ordinance has the following objectives:

- (i) to improve the standards of information, education and entertainment;
- (ii) to *enlarge the choice available to the people of Pakistan in the media for news, current affairs, religious knowledge, art, culture, science, technology, economic development, social sector concerns, music, sports, drama and other subjects of public and national interest*;
- (iii) to facilitate the devolution of responsibility and power to the grass-roots by improving the access of the people to mass media at the local and community level; and
- (iv) to ensure accountability, transparency and good governance by optimising the free flow of information.²³

The underlying objective of the Ordinance is to promote “freedom of speech” through the optimization of “free flow of information in the electronic media”.²⁴ This was to be done by making more choices available to the people of Pakistan in the subjects of public and national interest, including sports. The Ordinance, however, exempted national broadcasters, *i.e.*, Pakistan Radio, and Pakistan Television Corporation (“PTV”), from its application,²⁵ perhaps because national broadcasters have the universal service obligation of ensuring that news of public importance reaches every corner of the country through its terrestrial network.²⁶

To ensure that liberalization did not result in unfair competition or undue concentration of media ownership, Section 23²⁷ of the PEMRA Ordinance prevented monopolization: (i) by annulling any exclusive arrangement between the private broadcaster and the national broadcaster (PTV) with respect to airtime, programmes or advertising material, which may have given undue advantage to new media enterprises in establishing themselves; and (ii) by requiring PEMRA to ensure, before issuing a licence, that no media enterprise acquires monopoly power in any given subject or geographical area, so

²³Pakistan Electronic Media Regulatory Authority Ordinance 2002 as amended by PEMRA (Amendment) Act 2007 (“PEMRA Ordinance”) (emphasis supplied).

²⁴*Independent Newspapers Corporation (Pvt) Ltd. v Federation of Pakistan* 2017 PLD 289 [9]. The liberalization was also believed to help counter Indian media influence. Television in Pakistan – an Overview, available at “Television in Pakistan—An Overview” (*Pakistan Advertisers Society*, 7 October 2020) <<http://pas.org.pk/television-in-pakistan-an-overview/>> accessed 21 April 2020 (“Television in Pakistan—An Overview”).

²⁵PEMRA Ordinance (n 23) s 37.

²⁶*Pakistan Broadcasters Association v PEMRA* 2016 PLD 692 [29] (“PTV is a national strategic organization with its own dynamics”) (“*PBA v PEMRA*”).

²⁷PEMRA Ordinance (n 23) s 23:

23. Exclusion of monopolies.- (1) No person shall be entitled to the benefit of any monopoly or exclusivity in the matter of broadcasting or the establishment and operation of broadcast media or distribution service or in the supply to or purchase from, a national broadcaster of air time, programmes or advertising material and all existing agreements and contracts to the extent of conferring a monopoly or containing an exclusivity clause are, to the extent of exclusivity, hereby declared to be inoperative and of no legal effect.

(2) In granting a licence, the Authority shall ensure that open and *fair competition* is facilitated in the operation of more than one media enterprise in any given unit of area or subject and that *undue concentration of media ownership* is not created in any city, town or area and the country as a whole.

Provided that if a licensee owns, controls or operates more than one media enterprise, he shall not indulge in any practice which may impede fair competition and provision of level playing field (emphasis supplied).

that diversity and plurality in content may be achieved. In order to implement the spirit of Section 23, PEMRA introduced the Pakistan Electronic Media Regulatory Authority Rules, 2009 (“Rules”).²⁸ Rule 13(3) mandates that a licensee who owns or controls a distribution licence shall not be given a landing rights permission or broadcast media licence and similarly Rule 13(4) mandates that a broadcast media licensee shall not be given distribution service licence. These Rules were challenged in the Lahore High Court, which declared them constitutional.²⁹ On appeal to the Supreme Court of Pakistan in *Re MAG Entertainment*,³⁰ the Court upheld the Rules. The Court endorsed the PEMRA’s view that:

vertical integration, which would come about as a result of the broadcasters being allowed to also hold distribution licences, would be detrimental to the public interest in that it would stifle choice which PEMRA is mandated to encourage.³¹

The Court noted that the Rules do not violate the appellant’s fundamental right to free speech and expression guaranteed under Article 19 of the Constitution:

Article 18 of the Constitution allows for the regulation of businesses. This regulation may be in the form of licenses which carry certain conditions to protect the public interest. In this particular matter the public interest is best served by ensuring that the ‘media market’ is one where genuine competition prevails.³²

The Court leaned in favour of public interest in healthy competition in media markets and the resulting choices that come with it.

For the purposes of cable TV licences, geographical areas are categorized as rural and urban and accordingly have different licence fees.³³ The licensees of urban area are not allowed to compete in the rural areas and vice versa, and the boundaries “defined as rural should not be included in the urban area”; otherwise, the distinction in the category of licences on the basis of areas would be meaningless.³⁴

Since 2002, PEMRA has issued 91 licences for satellite channels, out of which 88 are operational and only one licence was issued in the category of Sports.³⁵ It has also provided 33 landing rights,³⁶ which together makes 121 channels, excluding eight channels belonging to the PTV network. With PTV channels, it makes 129 channels. PTV Sports, a satellite-based 24-hour sports channel, was launched on 11 January 2012.³⁷ After prolonged struggle, it got the status of a terrestrial, cable and satellite channel.³⁸

²⁸Pakistan Electronic Media Regulatory Authority Rules 2009 (‘Rules 2009’).

²⁹*Independent Newspapers Corporation (Pvt) Ltd. v Federation of Pakistan & others* 2017 PLD 289.

³⁰*MAG Entertainment (Pvt.) Ltd. v Independent News Papers Corporation (Pvt.) Ltd.* 2018 SCMR 1807 (“*MAG Entertainment*”).

³¹*ibid* [11].

³²*ibid*.

³³Rules 2009 (n 28) schedule–B Table-IV.

³⁴*Muhammad Ashraf v PEMRA* 2011 YLR 1578 [6]. The case is overruled by the Supreme Court in *MAG Entertainment* (n 30) to the extent it held that vertical integration is allowed.

³⁵Satellite TV Channels issued category-wise are: News/Current Affairs: 26, Entertainment: 37, Regional Language: 18, Specialized Subjects: 4, Health: 4, Sports: 1, Agriculture: 1. See Annual Report 2015–18 (n 2) 25.

³⁶Landing rights are permissions that operators must obtain for their satellite to be used in a particular country. Landing rights allow countries to regulate which foreign satellites serve their territory; Zubair Qureshi, ‘At Threshold of DTH, PEMRA Urged to Grant Licences to New TV Channels’ (2018) WLNR 15181073.

³⁷See ‘PTV Sports’, <<http://www.ptv.com.pk/ptvFamily>> accessed 23 May 2020.

³⁸kram Junaidi, ‘Senate Committee Criticizes PTV’s Decision to Abstain from Bidding’ *Dawn (News.)* (10 May 2013) <<https://www.dawn.com/news/1047444>> accessed 21 April 2020.

Sports viewers can watch the live transmission of PTV Sports on terrestrial network, cable TV service, satellite service, IPTV and online live streaming links.³⁹

Terrestrial TV broadcasting was and remains the domain of PTV, which covers 90% of the population, and is available for free.⁴⁰ By the end of 2013,⁴¹ terrestrial network had 54% share of national viewership compared to 46% held by satellite and cable channels. However, satellite and cable channels have extended their reach in rural areas, and as of 2018, the terrestrial network has 46.432% share of national viewership compared to 53.57% held by satellite and cable channels.⁴²

(i) *Compulsory broadcasting of PTV channels by cable operators*

PEMRA (Distribution Service Operations) Regulations, 2011 mandates distribution service licensees to carry compulsory channels, *i.e.*, television channels of national broadcaster (PTV) as part of basic services, in addition to non-commercial educational and health-related TV channels provided to their subscribers.⁴³ This is to ensure a balance between commercial and non-commercial content, and government and non-government opinion.

C. *PCB and broadcasting rights for cricket*

Soon after the independence in 1947, professional and amateur cricket started in Pakistan. Cricket matches were organized informally until 1 May 1949, when the Board of Control for Cricket in Pakistan (“BCCP”) was established.⁴⁴ In 1994, BCCP was reorganized and constituted as a statutory body established under Section 3 of the Sports (Development and Control) Ordinance, 1962 with a new name, Pakistan Cricket Board (“PCB”).⁴⁵ PCB got its new Constitution in 2014.⁴⁶ Article 4 of the Constitution lays down the objects, powers and functions of the PCB.⁴⁷ The main functions of the PCB are to promote and develop all forms of domestic and international cricket and regulate all formats of cricket; to organize tournaments and national/international matches within Pakistan or abroad.⁴⁸

PTV, being a State Corporation and the only TV content producer before the entry of private channels, was responsible for the production and broadcasting of cricket matches

³⁹Pakistan Television Corporation Launches PTV Sports’ *Pakistan Live News* (12 January 2012) <<http://news.paktron.net/2012/01/pakistan-television-corporation.html>> accessed 21 April 2020.

⁴⁰Television in Pakistan – An Overview (n 24).

⁴¹Latest Data on market share is not available in public domain. Data from 2013 are used to give an estimate of how the market has evolved and reflects the current market condition with \pm 10% difference. The number of sports channels has not changed either.

⁴²Planning Commission, Ministry of Planning, Development and Reform, Government of Pakistan, Annual Plan 2018–19, 79, <<https://www.pc.gov.pk/uploads/annualplan2018/Annual.pdf>> accessed 21 April 2020.

⁴³Pakistan Electronic Media Regulatory Authority (Distribution Service Operations) Regulations 2011 ss 2(d), 2(i) & 8(8).

⁴⁴‘Pakistan Cricket Board’ (*Wikipedia*) <https://en.wikipedia.org/wiki/Pakistan_Cricket_Board> accessed 21 April 2020; ‘Some Dates in Pakistan Cricket History’ *ESPN Cricinfo* <<http://www.espncricinfo.com/wisdenalmanack/content/story/152363.html>> accessed 21 April 2020.

⁴⁵The Sports (Development and Control) Ordinance 1962.

⁴⁶*Munda Eleven Cricket Club v Federation of Pakistan MPLD* 2017 Lahore 802 (Constitution of Pakistan Cricket Board was made specifically to promote and regulate the conduct of its members, and to regulate the affiliation of constituent members, which was purely the internal management of the Board. The Constitution of Pakistan Cricket Board is non-statutory in nature and actions under the same could not be challenged under the Constitutional jurisdiction of the High Court.)

⁴⁷Constitution of the Pakistan Cricket Board 2014.

⁴⁸*ibid* art. 4(vii).

until 1993, when the BCCP (PCB's predecessor) started selling audiovisual rights for cricket to private channels. PCB auctions TV broadcasting rights (without bifurcating terrestrial, cable and satellite rights); global radio broadcasting rights; wireless mobile telephony and SMS rights; and media rights (which includes TV, radio, mobile TV, etc.) on tournament/event basis as well for a specified period of time, and on territorial basis, *i. e.*, one licence for Pakistan and one for other regions excluding Pakistan.⁴⁹ Presently, the broadcasting rights for international matches, for the period of 2015 to 2020 are with PTV and Ten Sports, who made a joint bid for a sum of 150 USD million.⁵⁰

D. Liberalization and viewers' sufferings

With the opening up of the market and the entry of new channels, the underlying ethos of broadcasting sports events of national interest as a "public good" changed, taking the form of a commercial transaction alone. The cricket-loving viewers who had access to only terrestrial network suffered because PTV was, at times, not able to broadcast important matches on its terrestrial network. For example, in 2003, after a competitive bidding, PCB sold the TV broadcasting rights for a five-match series between Pakistan and New Zealand to Geo TV Network. PTV alleged that the bidding process was not fair, and a dispute brewed between PTV and PCB over broadcasting rights. PEMRA weighed-in in favour of PTV and refused to give uplinking⁵¹ permission to Geo, and therefore the first one-day match played in Lahore was not televised. This was the first time since 1967 that an international cricket match played by the Pakistani cricket team was not aired in Pakistan.⁵² Angry fans flooded the PCB's offices with calls. The matter was resolved when the then-President of Pakistan, who was also, *ex officio*, the patron-in-chief of the PCB, intervened and the parties agreed for a joint broadcast of the remaining matches, with PTV televising the matches for viewers in Pakistan and Geo TV transmitting the signal abroad.⁵³ This was not the first time that a President of a country had to intervene to ensure broadcasting of the public's favourite sporting event on free television. In 1972, President Richard Nixon of the United States had to make a personal appeal to the National Football League to stop local blackout of any game which the network was telecasting in the country.⁵⁴

Terrestrial viewers have suffered time and again. In 2007, PTV did not broadcast the Twenty20 World Cup; in 2009, PTV did not buy the rights for the Pakistan – Australia test series played in the United Arab Emirates ("UAE") as it was not a profitable commercial venture.⁵⁵ In 2013, PTV once again failed to bid for the TV rights for Pakistan's cricket series against Sri Lanka and South Africa (played in the UAE) for

⁴⁹See Tender advertisements: Pakistan Cricket Board, 'Invitation for bids: Media rights for Pakistan Super League 2016–18' <http://www.pcb.com.pk/images/news_images/fdb2a0c35f90.jpg> accessed 22 April 2020; Pakistan Cricket Board, 'Invitation to bid: TV Broadcasting rights for Domestic Cricket Season (2014–15)' <http://www.pcb.com.pk/downloads/tv_rights_domestic_2014_15.jpg> accessed 22 April 2020; Pakistan Cricket Board, 'Invitation to bid: Pakistan vs Australia series in October–November 2014 and Pakistan vs New Zealand series in November–December 2014' <http://www.pcb.com.pk/downloads/bid_pak_nz_pak_au.jpg> accessed 22 April 2020.

⁵⁰PCB sells broadcasting rights for \$150 m' (2015) WLN 9750044.

⁵¹"Uplinking" means transmission of audio-video signal from the ground transmission facility to a satellite, in order to transmit any programme within or outside Pakistan. PEMRA Ordinance (n 23) s 2(w).

⁵²Lahore match hit by television rights row' *Hindustan Times* (29 November 2003) <<https://www.hindustantimes.com/india/la-hore-match-hit-by-television-rights-row/story-i0rwOUv2jLmcivsaE9HGJ.html>> accessed 21 April 2020.

⁵³Umar Farooq, 'Geo Super got 'fair deal' on TV rights – Channel head' *ESPN Cricinfo* (8 September 2013) <<http://www.espncricinfo.com/pakistan/content/story/669399.html>> accessed 21 April 2020.

⁵⁴Cox (n 1) 575.

lack of funds. The Senate Committee on Information and Broadcasting took notice of this, and expressed displeasure over PTV's decision to not participate in the bidding.⁵⁶

The move to a competitive environment, coupled with advances in broadcasting technology, worked against the viewers who have access only to PTV's terrestrial network. The new-comers invested in new modes of broadcasting, *i.e.*, satellite transmission, and with the revenues from advertising were able to out-bid PTV. The result of this was that the viewers, who could not switch to new modes of technology – either owing to lack availability of services in their area or because of costs of switching, suffered as their favourite sporting events at times were not aired on the terrestrial network.

Recognizing PTV's long-standing role in broadcasting cricket matches, PCB requires the successful bidders of broadcasting rights to "share the feed with the terrestrial network (PTV) at a price".⁵⁷ PCB, however, could bifurcate the broadcasting rights, based on terrestrial broadcasting and Cable & satellite-based broadcasting, as is done by International Cricket Council ("ICC"),⁵⁸ and sell (or give for free) the terrestrial rights to PTV itself, and thereby also avoid the potential competition issue of entering into an exclusive arrangement and granting monopoly right to a single broadcaster.

E. Freedom of speech & expression, and right to information

Article 19 of the Constitution of Pakistan grants freedom of speech and expression to every citizen, whereas Article 19A grants the right to have access to information. Article 19 and Article 19A are the two sides of a same coin. Indeed, major jurisdictions, such as the United States and Europe, have interpreted the freedom of speech and expression to include rights to receive information, as discussed below. Article 19 reads as follows:

Every citizen shall have the right to freedom of speech and expression, and there shall be freedom of the press, subject to any reasonable restrictions imposed by law in the interest of the glory of Islam or the integrity, security or defence of Pakistan or any part thereof friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, commission of or incitement to an offence.⁵⁹

The freedom of speech and expression includes the "broadcast of ideas, culture, history, literature, opinions, thoughts, emotions and art through the medium of plays and dramas".⁶⁰ However, the right to freedom of speech and expression, as guaranteed, is not absolute, unlimited or unfettered but subject to reasonable restrictions imposed by the law.⁶¹

In *Pakistan Broadcasters Association* ("PBA") case,⁶² the broadcasters challenged a PEMRA regulation that limits the duration and frequencies of commercials/

⁵⁵To save Rs 32 m PTV failed to show Pak-Australia series' *World of Cricket* (12 May 2009) <<http://www.worldofcricket.net/phpBB3/viewtopic.php?f=3&t=3171&p=55200#p55200>> accessed 21 April 2020 (Mr. Arshad Khan, Managing Director, defended his decision not to bid, as it was not commercially viable).

⁵⁶Ikram Junaidi, 'Senate Committee Criticizes PTV's Decision to Abstain from Bidding', *Dawn (News)* (10 May 2013) <<https://www.dawn.com/news/1047444>> accessed 21 April 2020.

⁵⁷Farooq (n 53).

⁵⁸See *Independent Music Group SMC (PVT) Ltd. v Federation of Pakistan*, CP No 3 of 2011 (Supreme Court, 24 January 2011) (Independent Music had the rights to broadcast an ICC cricket event in Pakistan on cable and Satellite broadcast platforms, whereas PTV secured terrestrial broadcasting rights for the same events for Pakistan from ICC).

⁵⁹The Constitution of Pakistan 1973, art. 19.

⁶⁰*Leo Communication (Pvt.) Ltd. v Federation of Pakistan* PLD 2017 Lahore 709 [12].

⁶¹See *Talal Chaudhry v The State* 2019 SCLR 542; *Syed Masroor Ahsan and others v Ardeshir Cowasjee and others* PLD 1998 SC 823; *Baz Muhammad Kakar v the Federation of Pakistan* PLD 2012 SC 923.

advertisements during prime time (19:00 hrs to 22:00 hrs). PBA argued that the freedom of expression of the media secured and guaranteed under Article 19 of the Constitution of Pakistan could not be subject to restrictions and constraints other than as specifically provided under the provision. The Court noted that:

The concept of freedom of media is based on the premise that the widest possible dissemination of information from diverse and antagonistic sources is sine quo non to the welfare of the people. Such freedom is the foundation of a free government of a free people. Any attempt to impede, stifle or contravene such right would certainly fall foul of the freedom guaranteed under Article 19 of the Constitution of Pakistan.⁶³

The Court underscored the nexus between “freedom of media” and “competitive media markets”, as the latter with “diverse and antagonistic sources” ensures the welfare of the people through “widest possible dissemination of information”.

The Supreme Court, whilst drawing distinctions between print media and electronic media, noted that:

TV channels for their transmission had to use *air waves which constituted public property*, whereas the right guaranteed by Art.19 of the Constitution though secures right to receive and disseminate information but *did not guarantee use of public property*, which could be availed only if the law permitted and to the extent and in the manner prescribed thereby. Since there is a paucity of air waves/frequencies, it is imperative for the State to ensure that the same were used *in the best public interest, and the interest of the viewers/listeners being paramount, had precedence over the interest of broadcasters*.⁶⁴

The 2016 Supreme Court decision, by reckoning airwaves as public property and by holding that the public interest of viewers/listeners takes precedence over the commercial rights of broadcasters, put in place an important pillar necessary for building a regime which ensures live transmission of important sports events on terrestrial network.

In 2010, the Constitution of the Islamic Republic of Pakistan was amended and Article 19A was added in the Chapter that lists Fundamental Rights. Art 19A reads as follows: “Every citizen shall have the right to have access to information in all matters of public importance subject to regulation and reasonable restrictions imposed by law”.⁶⁵

In *Dr. Shahid Masood v Federation of Pakistan*,⁶⁶ the Petitioner filed a suit against cable operators, who allegedly discontinued the transmission of ARY and Geo channels. The Supreme Court of Pakistan, whilst declaring the actions by cable operators illegal, noted that every citizen has a right “to have access to information in all matters of public importance as guaranteed by the . . . provisions of Article 19-A of the constitution”.⁶⁷ The *Shahid Masood* case highlighted that right to have access to information includes access to licenced TV channels as a matter of public importance.

In India, the Supreme Court, in line with the American and European interpretation of freedom of speech, has interpreted Art. 19(1)(a) of the Indian Constitution guaranteeing freedom of speech and expression to include the right to receive information.⁶⁸

⁶²*PBA v PEMRA* (n 26).

⁶³*ibid* [12].

⁶⁴*ibid* [29] (emphasis supplied).

⁶⁵Constitution of Pakistan 1973, art. 19(A).

⁶⁶*Dr. Shahid Masood v Federation of Pakistan* 2010 SCMR 1849.

⁶⁷*ibid* [11].

In *Board of Education v Pico*,⁶⁹ the United States Supreme Court, whilst interpreting freedom of speech guaranteed under First Amendment, noted that “the Constitution protects the right to receive information and ideas”:⁷⁰

This right [to information] is an inherent corollary of the rights of free speech and press that are explicitly guaranteed by the Constitution, in two senses. First, the right to receive ideas follows ineluctably from the *sender's* First Amendment right to send them: “The right of freedom of speech and press ... embraces the right to distribute literature, and necessarily protects the right to receive it ... *The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers.*” More importantly, the right to receive ideas is a necessary predicate to the *recipient's* meaningful exercise of his own rights of speech, press, and political freedom.⁷¹

In *Red Lion Broadcasting Co. v FCC*,⁷² the United States Supreme Court dealt with a case involving public broadcasting over radio. The Court noted that:

the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. *It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.*⁷³

Here the right of the viewers and listeners is the right to information which trumps the broadcasters’ “right of free speech by means of radio communication”.⁷⁴ The First Amendment preserves “an *uninhibited marketplace of ideas* ... rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee”.⁷⁵ The public has the right to “receive suitable access to social, political, aesthetic, moral, and other ideas and *experiences*”⁷⁶ that cannot be constitutionally abridged. The word “experiences” here include viewer’s experience of watching live sports events on TV. The Court underscored the strong nexus between freedom of speech and right to information, on the one hand, and competition, *i.e.*, uninhabited marketplace of ideas on the other hand, which envelops both the receivers and senders of the ideas.

The situation is no different in Europe where the European Court of Human Rights (“the HR Court”) has interpreted Article 10 of the European Convention on Human Rights of 1950 (“ECHR”) granting freedom of expression⁷⁷ to include the

⁶⁸*Uol v BCCI* (n 5) [25]; *Ministry of Information and Broadcasting v Cricket Association of Bengal* AIR 1995 SC 1236.

⁶⁹*Board of Education, Island Trees Union Free School Dist. No. 26 v Pico* 457 U.S. 853 (1982) (“*Board of Education v Pico*”).

⁷⁰*ibid* citing *Stanley v Georgia* 394 U.S. 557 (1969) 564; See *Kleindienst v Mandel* 408 U.S. 753 (1972) 762–763.

⁷¹*ibid* 867 (footnotes omitted, and emphasis supplied).

⁷²*Red Lion Broadcasting Co. v F.C.C.* 395 U.S. 367 (1969).

⁷³*ibid* 390 (emphasis supplied).

⁷⁴*ibid.*

⁷⁵*ibid.*

⁷⁶*ibid.*

⁷⁷Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) ETS 5, art. 10:

Freedom of expression

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licencing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with its duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary for a democratic society, in

right to receive information. In *Autronic AG v Switzerland*,⁷⁸ Autronic, a private company dealing in home electronics, applied for permission to receive through private dish aerial, uncoded television programmes intended for the general public from a Soviet telecommunications satellite. The Swiss authority, on failing to receive consent from the broadcasting state, refused the application. Autronic complained of a violation of Article 10 of the ECHR. The HR Court noted that the protection of Article 10 applies to “everyone”, both natural and legal persons, including “profit-making corporate bodies”.⁷⁹ It further held that “the reception of television programmes by means of a dish or other aerial comes within the right laid down [under] ... Article 10(1)” and the refusal by the Swiss authority to lawfully receive transmission amounted to “interference by public authority” with the exercise of freedom of expression.⁸⁰

In *Khurshid Mustafa v Sweden*⁸¹ the petitioner complained that a condition in his tenancy agreement that prohibited installation of outdoor TV antennae without specific permission from the landlord, which was upheld by the local court, violated his right under Article 10 of the ECHR. The HR Court held that “where the desired information was available without the broadcasters’ restrictions through the use of the technical equipment at issue, the general principles of freedom of expression become applicable, as appropriate”.⁸² Any restriction imposed by the government must meet the test of “necessity in a democratic society” which “requires the Court to determine whether the interference complained of corresponded to a ‘pressing social need’”.⁸³

The above US and European case law has become a benchmark for the protection of the right to information in most developed countries, and including Pakistan and India.

F. Current state of broadcasting regime

From the above discussion, the salient points are summarized below:

- (1) PTV has to compete with private broadcasters to get audiovisual rights of cricket matches from PCB;
- (2) PCB, when auctioning broadcasting rights, does bifurcate them on geographical area and not on technology basis, *i.e.*, terrestrial and cable, and satellite (and now mobile TV and online streaming);
- (3) PCB requires private broadcasters, who won the broadcasting rights, to share the terrestrial feed with PTV on a mutually agreed fee⁸⁴;
- (4) PEMRA requires all cable television operators to carry PTV’s channels as part of basic service⁸⁵;

the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

⁷⁸*Autronic AG v Switzerland* (1990) 12 EHRR 485.

⁷⁹*ibid* [47].

⁸⁰*ibid*.

⁸¹*Khurshid Mustafa v Sweden* (2011) 52 EHRR 24.

⁸²*ibid* [41].

⁸³*ibid* [42].

⁸⁴PCB recognizes PTV’s longstanding role in the broadcasting of Cricket matches, and acknowledges PTV’s “customary right” in broadcasting.

- (5) PTV is a national strategic organization and does not come under the ambit of PEMRA⁸⁶;
- (6) Every citizen has a right to have access to information in all matters of public importance⁸⁷;
- (7) Air waves are public property and should be used in the best public interest⁸⁸;
- (8) The interest of the viewers/listeners being paramount, they have precedence over the interest of broadcasters⁸⁹;
- (9) Viewing of sports is a matter of a public and national interest (PEMRA Ordinance).⁹⁰

India shared a common history with Pakistan and faced similar issues pertaining to live broadcasting of cricket matches on state-owned broadcaster's terrestrial network. Through a series of court cases, India has developed a legal regime for the mandatory sharing of live broadcasting signals of sporting events of national importance with its national broadcasters for re-transmission on its terrestrial network and Direct to Home service. In the next section, we take a look at those developments and cases that led to the evolution of public policy in this important area of public life.

III. Legal regime for broadcasting of cricket matches in India

A. Historic overview

Public broadcasting in India started in 1927, with the first radio service provided by the Indian Broadcasting Company Limited ("IBC"). In March 1930, the IBC went bankrupt, and in April 1930 broadcasting was placed under the direct control of the Government of India, which commenced Indian State Broadcasting Service.⁹¹ In 1936, Indian State Broadcasting Service was changed to All India Radio ("AIR"), which was placed under the control of Department of Broadcasting and Information in 1941. Television service was started in 1959 on an experimental basis by AIR. Regular television service was launched on 15 August 1965, under the aegis of Doordarshan ("DD").⁹²

In 1990, India corporatised the public broadcasting services through the promulgation of the Prasar Bharati (Broadcasting Corporation of India) Act (1990) ("Prasar Bharati Act"). The Prasar Bharati Act, which became effective on 15 September 1997, established the national broadcasting corporation, Prasar Bharati, which is responsible for organizing and conducting public broadcasting services, with the aim to inform, educate and entertain the public. Section 12(2)(e) of the Act stipulates that "Prasar Bharati shall, *inter alia*, be guided by the objective of providing adequate coverage to sports and games so as to encourage healthy competition and the spirit of sportsmanship".⁹³ Prasar Bharati

⁸⁵See Part [II(B)(i)] of article.

⁸⁶*PBA v PEMRA* (n 26) [29].

⁸⁷Constitution of Pakistan 1973, art. 19(A).

⁸⁸*PBA v PEMRA* (n 26) [29].

⁸⁹*ibid.*

⁹⁰See PEMRA Ordinance (n 23) Preamble.

⁹¹Sevanti Ninan, 'Broadcasting Reform In India: A Case Study in the Use of Comparative Media' (1997) 5 *Cardozo Journal of International and Comparative Law* 341, 43.

⁹²Prof. W. A. Qazi, 'Radio and Television as Mass Media', 7, <<http://www.ddegjust.ac.in/studymaterial/mmc-1/mmc-104.pdf>> accessed 18 May 2020.

offers its public broadcasting services for television through DD and on radio through AIR. Before Prasar Bharati was established, DD was directly operated by the Ministry of Information and Broadcasting (“MIB”). The Broadcasting Wing of the MIB grants licences for Direct to home (“DTH”) and Head-end in the Sky (“HITS”) services,⁹⁴ and grants permission for new satellite channels.⁹⁵

Before the entry of private channels in India, DD, for the broadcasting of sports events, would require the organizers of the events to bear the cost of production of content, and also pay DD for broadcasting the event, whilst retaining all advertising revenues generated during the broadcast.⁹⁶ India liberalized the electronic media market in the early 1990s, and Trans World International (“TWI”), WorldTel and Star TV were among the first private broadcasters that entered the Indian market. In 2000, the first private satellite TV channel was permitted to uplink from the Indian soil; prior to this, private TV channels were uplinked only from foreign shores.⁹⁷

B. BCCI and broadcasting rights for cricket

The Board of Control for Cricket in India (“BCCI”) is the governing body for cricket in India. The BCCI is a society registered under the Tamil Nadu Societies Registration Act, 1975 as a private society. It is an autonomous body, with private administration, and is not linked to any governmental authority including the Government of India. The BCCI is not expressly recognized by Government of India (“GOI”) as a regulator of cricket in India.⁹⁸ Despite the absence of official blessing, BCCI acts as a *de facto* regulator and has the following object clauses in its Memorandum of Association:

Clause 2(a): To control the game of cricket in India and give its decision on all matters including women’s cricket which may be referred to it by any member association in India.

Clause 2(d): To arrange, control, regulate and finance visits of an Indian Cricket Team to tour countries that are members of ICC or elsewhere in conjunction with the bodies governing cricket in the countries to be visited’.

Clause 2(s): To select teams to represent India in Test Matches, One Day Internationals and Twenty/20 matches played in India or abroad, and to select such other teams as the Board may decide from time to time.

Clause 2(v): To appoint India’s representative or representatives on the ICC and other Conferences, Seminars, connected with the game of cricket.⁹⁹

⁹³The Prasar Bharati (Broadcasting Corporation of India) Act 1990, s 12(2)(2)(e).

⁹⁴HITS service is a mix of satellite and cable TV. The HITS operator uplinks the TV broadcast to a satellite, which is down-linked by multi-system operators and local cable operators and distributed to individual consumer’s premises through a cable network.

⁹⁵Annual Report 2018–19 (n 3) 25, 90.

⁹⁶See *Ministry of Information and Broadcasting v Cricket Association of Bengal* AIR 1995 SC 1236 [106]–[107] (“*Ministry of Information and Broadcasting*”).

⁹⁷Annual Report 2018–19 (n 3) 90.

⁹⁸*Sh. Surinder Singh Barmi v BCCI*, Case No 61/2010 (Competition Commission of India, 8 February 2013) [8.13] (“*Barmi v BCCI (I)*”).

⁹⁹*ibid* [8.14]; The Board of Control for Cricket in India, Memorandum of Association (15 September 2012) <<https://bcc-static-files.s3.amazonaws.com/bcci/document/2018/12/14/929b7bd4-049f-42e4-be3c-8fb56efce7bb/BCCI-Rules-and-Regulations.pdf>> accessed 18 May 2020.

Commenting on this anomalous status of the BCCI, the Competition Commission of India, in an abuse of dominance case against BCCI,¹⁰⁰ noted:

[T]hat the historical evolution of BCCI has enabled it to attain a monopoly status in the organization of cricket events in India. BCCI assumes the role of de facto regulator of cricket in India on account of the pyramid structure of sports governance and endorsement from ICC as the national body for cricket in India. ICC declares its members like BCCI as the ‘custodian’ of cricket in the concerned territory and vests them the right of deciding on any matter relating to the said sport.¹⁰¹

In *Zee Telefilms Ltd. v Union of India et al.*,¹⁰² the Supreme Court of India addressed the question of whether the BCCI falls with the description of “other authorities” within the meaning of Article 12 of the Constitution of India.¹⁰³ The Court noted that the conduct of both the BCCI and “the Union of India clearly go to show that *sub silentio* both the parties had been acting on the premise that the [BCCI] is recognized as the only recognized National Federation for the purpose of regulating the game of cricket in India”.¹⁰⁴ The Court further noted that “there does not exist any legislation made either by any State or by the Union of India regulating and controlling the cricketing activities in the country”.¹⁰⁵ And it further noted the Union of India has granted exemption from payment of Income tax to the BCCI, keeping in view the functions and objectives of the BCCI, particularly its objective to promote the sport of cricket. The public nature of the functions performed by the BCCI makes it subject, like other State authorities, to constitutional challenges.

In early 1993, just like the PCB in Pakistan did in the same year, for the first time the BCCI sold television rights for an India–England series to TWI. DD, who would get the fee to broadcast and the fee from advertisers, had to pay 1 USD million to TWI to buy the rights for broadcasting of matches in India.¹⁰⁶

C. Government monopoly in broadcasting was shattered (SC, 1995)

In 1993, the Cricket Association of Bengal (“CAB”) organized a six-team One Day International (“ODI”) cricket tournament as part of its diamond jubilee celebrations to be held later that year. The event, named the Hero Cup, was the first tournament held in India to be broadcast live on a satellite channel. The CAB had, after protracted negotiations, rejected DD’s demand to pay technical charges/production fee of INR 500,000 per match for broadcasting the matches, and instead gave the broadcasting rights to TWI. At this juncture, the Ministry of Information and Broadcasting stepped in and announced on 5 November 1993 that according to Indian Telegraph Act of 1885, “no agency other

¹⁰⁰See Part [III(B)] of article.

¹⁰¹*Surinder Singh Barmi (Informant) v The BCCI*, Case No 61/2010 (Competition Commission of India, 29 November 2017) [35] (“*Barmi v BCCI (II)*”).

¹⁰²*Zee Telefilms Ltd. v Union of India et al.*, WP (Civil) No 541 of 2004 (Supreme Court, 2 February 2005) (“*Zee Telefilms*”).

¹⁰³Constitution of India 1950, art. 12.

In this part, unless the context otherwise requires, the State includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India.

¹⁰⁴*Zee Telefilms* (n 102) 48.

¹⁰⁵*ibid* 37.

¹⁰⁶Borai Majumdar, ‘How Cricket was Sold in India’ *Open* (14 April 2012) <<http://www.openthemagazine.com/article/sports/how-cricket-was-sold-in-india>> accessed 21 April 2020.

than that belonging to or appointed by the GOI has a right to telecast any event live by uplinking signals from Indian soil”.¹⁰⁷

The CAB, at this point (8 November 1993), was constrained to approach the Court for relief and it did so by filing a writ petition in the Calcutta High Court praying that the respondent, GOI, may be directed to provide requisite permissions for telecasting and broadcasting of matches by TWI. The High Court passed an interim order directing the GOI not to obstruct existing arrangement between the CAB and TWI. DD blocked the uplink facility. As a result, the first match between South Africa and West Indies played on 14 November 1993 was blocked out. Compelled by the situation, the CAB approached the Supreme Court on 15 November 1993, which passed an interim order sitting “in judgment at 11:30 p.m. on a government holiday” directing, *inter alia*, that the Government provide TWI with uplink facility.¹⁰⁸

The final judgement in the *Ministry of Information and Broadcasting v Cricket Association of Bengal*¹⁰⁹ was delivered on 9 February 1995. A three-member bench of the Supreme Court of India made the following important observations:

- (i) that airwaves are public property;
- (ii) that a monopoly in broadcasting and telecasting is not permissible;
- (iii) that the *fundamental right to speech and expression* under Article 19 of the Constitution includes the right to be educated, informed and entertained, and that *includes viewing the game of cricket*; and
- (iv) that the rights of viewers, the public at large, are paramount.¹¹⁰

This was a seminal judgement that laid the foundations for later progressive opinions by High Courts and the Supreme Court.

D. The cable television networks (regulation) act, 1995

In the early 1990s, the growth of satellite networks in the West, and the availability of those networks signals through satellite communications in India, led to a new market of cable television networks and operators. At that time there was no regime in place for licencing and regulating the cable operators. Therefore, in 1995, the Indian Parliament enacted the Cable Television Network (Regulation) Act (“CTNA”)¹¹¹ with the objective of setting out the responsibilities and obligations of cable operators with respect to the quality of service, protection of copyrighted material, and protection of subscribers from obscene and anti-national content. Section 8 of the CTNA requires compulsory transmission of two channels of DD, as notified by the Central Government in the Official Gazette, to be carried out by the cable operators in their cable service, and re-transmitted without any deletion or alteration of any programme transmitted on such channels.¹¹²

¹⁰⁷ *ibid.*

¹⁰⁸ *ibid.*

¹⁰⁹ *Ministry of Information and Broadcasting* (n 96).

¹¹⁰ *ibid* [206].

¹¹¹ Cable Television Network (Regulation) Act 1995.

¹¹² Originally, it was the cable operator who was given the choice to “re-transmit at least two Doordarshan channels of his choice through the cable service” as per The Cable Television Networks (Regulation) Act 1995 (“CTNA”) s 8. CTNA s 8 was

E. Sharing of terrestrial feed for a fee: citizen v PB (Madras HC, 2004)

Another major development concerning cricket broadcasting rights in India took place in March 2004, when India was to tour Pakistan for a series of three Test matches, and five ODI matches. The global broadcasting rights were sold by PCB to Ten Sports, and DD was unable to secure terrestrial broadcasting rights from Ten Sports. When cricket fans realized that they may not be able to watch cricket series on their TV sets, a citizen's rights group filed a petition, titled *Citizen, Consumer and Civic Action Group v Prasar Bharati*¹¹³ ("CCCAG") in the Madras High Court. The petition argued that their fundamental right to speech and expression under Article 19(1)(a) of the Indian Constitution¹¹⁴ would be violated if the cricket series were not telecast on the terrestrial network.

The Court noted that the case presented "a rare piquant situation where citizens of India as a whole as also the Government which rules them are looking at the intervention of the court",¹¹⁵ and required the Court to strike a balance between the larger public interest of fundamental right of the television viewers in India and the commercial rights of Ten Sports and its assignees. The Court, echoing the opinion of the Supreme Court in *Ministry of Information and Broadcasting v Cricket Association of Bengal*,¹¹⁶ held that the "right to have access to the electronic media is a fundamental right to speech and expression coming within the ambit of Art. 19(1)(a) of the Constitution".¹¹⁷ The Court directed Ten Sports "to transmit the Indo-Pak cricket series scheduled from 13.3.2004, through Indian Doordarshan"¹¹⁸ along with the Ten Sports' logo, and whilst honouring all its advertisement contracts.

F. Cabinet directive for compulsory sharing of terrestrial feed and blackouts

Getting cue from the Madras High Court's opinion in CCCAG Case, the Indian Government, on 11 November 2005, issued Policy Guidelines for Downlinking of Television Channels ("2005 Downlinking Guidelines").¹¹⁹ These so-called guidelines

amended in 2000, wherein s 8(3) stated that the "Prasar Bharati may by notification in the official Gazette specify the number and name of every Doordarshan channel" CTNA was later amended in 2002, 2007 and 2011. In Pakistan, there is a similar legislation.

See Part [II(B)(i)] of article.

¹¹³*Citizen, Consumer and Civic Action Group v Prasar Bharati et al.*, WPMP No 6375 and 6376 of 2004 (Madras High Court, 12 March 2004) ["CCCAG v PB"].

¹¹⁴Constitution of India 1950, art. 19:

Protection of certain rights regarding freedom of speech, etc.

(1) All citizens shall have the right

(a) to freedom of speech and expression;

...

(2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause 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.

¹¹⁵*CCCAG v PB* (n 113) [3].

¹¹⁶*Ministry of Information and Broadcasting* (n 96).

¹¹⁷*ibid* [3].

¹¹⁸*ibid* [6].

¹¹⁹Ministry of Information and Broadcasting, Government of India, Policy Guidelines for Downlinking of Television Channels, F.No.13/2/2002-BP&L/BC-IV <<http://cablequest.org/pdfs/broadcasters/DOWNLINKING-GUIDELINES.pdf>> accessed 21 April 2020.

were, in fact, a directive covering all sports and required all sports channels/sports rights management companies having TV broadcasting rights to share “their feed with Prasar Bharati for national and international sporting events of national importance, held in India or abroad, for terrestrial transmission and DTH broadcasting”.¹²⁰ The 2005 Downlinking Guidelines were applicable to existing contracts, and the rights holders were “obliged to share the feed for all matches featuring India and finals of international competitions”.¹²¹

Ten Sports, which had broadcasting rights for Pakistan cricket and the India–West Indies Test and ODI series, challenged the *vires* of the 2005 Downlinking Guidelines in the Bombay High Court.¹²² They were also challenged in the Delhi High Court by ESPN-Star sports, which had rights for the Australia and England cricket matches.¹²³ The Bombay High Court did not allow the petition of Ten Sports, which then challenged the order before the appellate bench of the Bombay High Court. The appeal was later transferred to a Supreme Court bench, comprising Justice Ashok Bhan and Justice L. K. Palta, which restrained the Ministry of Broadcasting and Prasar Bharati from enforcing the 2005 Downlinking Guidelines against Ten Sports or ESPN-Star Sports.¹²⁴ The Court advised the government to enact a law on the matter. As a result, DD was not able to telecast live the India–Pakistan series held in Pakistan from 7 January to 19 February 2006, and was only able to show 90 minutes of highlights each day.¹²⁵ DD was also not able to telecast India–West Indies series held in West Indies in May 2006.¹²⁶

In January 2007, West Indies team visited India. Nimbus Communications Ltd. (“Nimbus”) held broadcasting rights. Nimbus required DD to encrypt the signal if the latter wished to get live feed; if not, DD could get a 15-minute delayed feed.¹²⁷ Nimbus and DD could not reach an agreement, and thus the first ODI between India and West Indies, held in Nagpur on 21 January 2007, could not be telecast on DD’s terrestrial network, depriving millions of cricket-fans from entertainment. This included some viewers with satellite connections as “Nimbus’ new sports channels, Neo Sports, was still not available in all parts of India”.¹²⁸ However, the Delhi High Court came to the rescue of fans, and ordered, as interim relief, that the DD could telecast the remaining ODI between India and West Indies and one ODI match of a series between India and Sri Lanka scheduled for February 2007, at the seven-minute delayed feed.¹²⁹ However, AIR was allowed to broadcast the matches live.¹³⁰

¹²⁰ibid [5.3].

¹²¹ibid [5.2.2].

¹²²*Taj Television (India) Private Limited v Union of India*, WP No 2975/2005 (Bombay High Court, interim relief denied, 21/12/2005).

¹²³*ESPN Star Sports v Union of India*, WP No 23832/2005 (Delhi High Court, No decision was rendered in the case by the High Court. The matter was transferred to the Supreme Court vide order dated 26 November 2008). See also Richard Sydenham, “Cricket-ICC and Broadcasters Oppose India TV Order” *Reuters* (22 December 2005).

¹²⁴*Taj Television (India) Private Limited v Union of India*, Special Leave to Appeal (Civil) 26849/2005 (Supreme Court, 9 May 2006); See also ‘Doordarshan Denied Telecast of West Indies Tour’ *ESPN Cricinfo* (9 May 2006) <<http://www.espnricinfo.com/wivind/content/story/246573.html>> accessed 21 May 2020.

¹²⁵‘Doordarshan not to Telecast India–Pakistan Series Live’ *ESPN Cricinfo* (10 January 2006) <<http://www.espnricinfo.com/india/content/story/232255.html>> accessed 21 April 2020.

¹²⁶‘DD Barred from Airing WI Series’ *Hindustan Times* (9 May 2006) ≤<https://www.hindustantimes.com/india/dd-barred-from-airing-wi-series/story-YFYhIV4BUREX20WQuS90gN.html>≥ accessed 21 April 2020.

¹²⁷*Board of Control for Cricket in India v Prasar Bharati Broadcasting and others*, LPA No 1327 of 2007 (Delhi High Court, 4 February 2015) [3] (“*BCCI v Prasar Bharati*”).

¹²⁸Mehta (n 6) 592.

G. Mandatory sharing of terrestrial feed: the sports ordinance/act, 2007

Perturbed by the refusal of Nimbus to share terrestrial feed with DD, the Indian Cabinet on 1 February 2007 approved the Sports Broadcasting Signals (Mandatory Sharing with Prasar Bharati) Ordinance, 2007¹³¹ (“Sports Ordinance”), which was promulgated by the President on 2 February 2007, prior to India’s series against Sri Lanka that started on 8 February 2007.¹³² The Sports Ordinance, a temporary legislation, was intended to give legal cover to the 2005 Downlinking Guidelines by making it retroactively effective from 11 November 2005, when the government notified the 2005 Downlinking Guidelines. The Ordinance made it mandatory for private broadcasters to share live broadcasting feed of all sports events of national importance with Prasar Bharati. With respect to cricket, sports events of national importance meant “all one-day internationals played in India and abroad [by Indian team], and Test matches played at home”.¹³³ Nimbus challenged the Sports Ordinance in the Delhi High Court, which, in an interim order, directed Nimbus to share the live telecast feed for India and Sri Lanka’s final ODI played on 17 February 2007.¹³⁴ The Sports Ordinance was placed before the parliament on 8 March 2007 and was adopted on the same day.¹³⁵

The Sports Broadcasting Signals (Mandatory Sharing with Prasar Bharati) Act, 2007¹³⁶ (“Sports Act”) came into effect on 19 March 2007, with the objective “to provide access to the largest number of listeners and viewers, on a free to air basis, of sporting events of national importance through mandatory sharing of sports broadcasting signals with Prasar Bharati”.¹³⁷ Section 3 of the Sports Act requires that all content-rights owners/holders mandatorily share with Prasar Bharati certain sports broadcasting signals, free of their advertisements, for re-transmission of the same on its terrestrial networks and DTH networks. Section 3(2) provides that the advertisement revenue sharing between the content rights owner/holder and Prasar Bharati shall be in the ratio of not less than 75:25 in case of television coverage and 50:50 in case of radio coverage. The revenue so earned by Prasar Bharati shall be used by it for broadcasting other sporting events.¹³⁸ Section 3 became the centre of the litigation that ensued.

¹²⁹*BCCI and Nimbus v Prasar Bharati Broadcasting Corporation and Union of India*, WP (Civil) 7655/2007 (Delhi High Court, 5 November 2007) (“*BCCI and Nimbus*”) (An appeal was filed against this order. The final decision was granted in *BCCI v Prasar Bharati* (n 127)); see also, PTI, “Telecast India-WI series with delay: HC” *Times of India* (23 January 2007) <<https://timesofindia.indiatimes.com/Telecast-India-WI-series-with-delay-HC/articleshow/1403569.cms>> accessed 18 May 2020.

¹³⁰Doordarshan to Telecast Next Four ODIs’ *ESPN Cricinfo* (23 January 2007) <<http://www.espnricinfo.com/india/content/story/277319.html>> accessed 21 April 2020.

¹³¹The Sports Broadcasting Signals (Mandatory Sharing with Prasar Bharati) Ordinance 2007.

¹³²Constitution of India 1950, art. 123 empowers the President to promulgate Ordinances during recess of Parliament. An Ordinance promulgated under art. 123 has the same force and effect as an Act of the Parliament, and must be placed before both Houses of Parliament and shall cease to operate at the expiration of six weeks from the reassembly of Parliament.

¹³³Nimbus Forced to Share Live Feed with Doordarshan: Cabinet Approves Ordinance on “Sporting Events of National Importance” *ESPN Cricinfo* (1 February 2007) <<http://www.espnricinfo.com/india/content/story/278448.html>> accessed 21 April 2020.

¹³⁴Nimbus forced to share live feed: Doordarshan to Telecast Fourth ODI live’ *ESPN Cricinfo* (15 February 2007) <<http://www.espnricinfo.com/indvsl/content/story/280449.html>> accessed 21 April 2020.

¹³⁵Combined Discussion On Statutory Resolution Regarding Disapproval of Sports Broadcasting Signals (Mandatory sharing with Prasar Bharati) Ordinance, 2007 (No. 4 of 2007) and Sports Broadcasting Signals (Mandatory sharing with Prasar Bharati) Bill, 2007, Lok Sabha (8 March 2007).

¹³⁶The Sports Broadcasting Signals (Mandatory Sharing with Prasar Bharati) Act, 2007 (“Sports Act”).

¹³⁷*ibid* Preamble.

¹³⁸*ibid* s 3.

(i) Feed clear of advertisements: *Star Sports India vs Prasar Bharati (SC, May 2016)*

ESPN Software India (Pvt.) Ltd. (the predecessor of Star Sports) had broadcasting rights from the ICC for India. ESPN received the feed from the organizer of the event, ICC, and shared the same with Prasar Bharati pursuant to [Section 3](#) of the Sports Act. Prasar Bharati demanded that under [section 3](#), ESPN was to share feed “without its advertisement”. The relevant part of [Section 3](#) reads as follows:

3. Mandatory sharing of certain sports broadcasting signals.

(1) No content rights owner or holder and no television or radio broadcasting service provider shall carry a live television broadcast on any cable or Direct-to-Home network or radio commentary broadcast in India of sporting events of national importance, unless it simultaneously shares the live broadcasting signal, without its advertisements, with the Prasar Bharati to enable them to re-transmit the same on its terrestrial networks and Direct-to-Home networks in such manner and on such terms and conditions as may be specified.¹³⁹

ESPN filed a petition in the Delhi High Court seeking a declaration that its obligation to share live broadcast signals of sporting events of national importance with Prasar Bharati was discharged by sharing the live broadcast signal as received – with commercial advertisements – from the organizer of the sporting event.¹⁴⁰ ESPN argued that: (i) its obligation under the law was to share the live broadcast signal as it was received by it from the copyright owner of the broadcast *i.e.*, the sporting event organizer; (ii) the expression “its advertisements” in [Section 3](#) of Sports Act referred to the advertisements of the broadcaster in India and not the advertisements of the event owner; (iii) any modification in the feed received from ICC would be a breach of ESPN’s contractual obligations with the ICC; and (iv) the demand of Prasar Bharati that a clean feed be provided to it would be an act impossible of being performed by ESPN.

The Delhi High Court, whilst dismissing the petition, noted that the Sports Act “is not an expropriatory legislation”.¹⁴¹ Air waves and spectrum “are public property held in trust by the Government for the benefit of public good”.¹⁴² Whosoever uses the air waves would have to pay for the use thereof. “Revenue sharing of the gains made as a result of the broadcast . . . is akin to a joint venture where the owner of the spectrum or the air waves joins hand with the owner of the broadcast”.¹⁴³ The Court further noted that the language of [Section 3](#) is clear, and the words “without its advertisements” is a condition on “live broadcasting signal” shared by content owner, or content holder, or television or radio broadcasting service provider, *i.e.*, live broadcast signals have to be without any advertisements.¹⁴⁴ The Court thus dismissed the petition.

Star Sports, the subsequent broadcasting rights holder, filed an appeal before the Supreme Court of India, which upheld the decision of the Delhi Court.¹⁴⁵ In doing so, it concurred with the interpretation of [Section 3\(1\)](#) of the Sports Act done by the Delhi High Court that the live broadcasting signal to be shared by content owner/holder, or

¹³⁹Sports Act (n 136) s 3 (emphasis supplied).

¹⁴⁰*Espn Software India Pvt. Ltd. v Prasar Bharati et al.*, WP (Civil) 3611/2013 (Delhi High Court, 3 October 2013).

¹⁴¹*ibid.* [23]. But see *Uol v BCCI* (n 5) [28] ([Section 3](#) of the Sports Act is expropriatory in nature inasmuch as it curtails or abridges the rights of a content rights owner or holder and television or radio broadcasting service provider).

¹⁴²*ibid* [24].

¹⁴³*ibid.*

¹⁴⁴*ibid* [26].

¹⁴⁵*Star Sports India Pvt Ltd v Prasar Bharati et al.*, SLP (Civil) No 8988 of 2014 (Supreme Court, 27 May 2016).

television/radio broadcasting service provider, should be free of any advertisement.¹⁴⁶ Section 3 did not make any distinction between advertisements inserted by a broadcaster or an event organizer. It is thus immaterial, the Supreme Court noted, whether advertisements were shown because of an arrangement between the event organizer and the sponsors or as a result of an arrangement between the broadcaster and the sponsors. The Supreme Court also examined Section 3(2) of the Sports Act, reproduced below:

(2) The terms and conditions under sub-section (1) shall also provide that the advertisement revenue sharing between the content rights owner or holder and the Prasar Bharati shall be in the ratio of not less than 75:25 in case of television coverage and 50:50 in case of radio coverage.

Expounding on the rationale of Section 3(2), the Court noted that when the broadcaster shares signals with advertisements with Prasar Bharati for retransmitting the same on its terrestrial networks or DTH networks, or with AIR live broadcasting on radio, the advertisement revenue is to be shared with Prasar Bharti, as the viewership/audience gets multiplied.

The purpose is obvious ... When live broadcasting signal is shared containing advertisements, those advertisements have much larger viewership because of its telecast/broadcast on Prasar Bharati. The benefit of advertisement in such a case would accrue to those who have booked the advertisements and the service provider [broadcaster], in such an eventuality would definitely be in a position to charge much more from the advertisers. It is a matter of common knowledge that rates of advertisement go up when circulation thereof is enhanced.¹⁴⁷

Section 3(2) thus prevents free-riding by broadcasters through sharing live transmission laced with advertisements with Prasar Bharati, thereby reaching its viewership, which “is far more reaching insofar as Indian population is concerned as it reaches almost every nook and corner of the country”.¹⁴⁸ The Supreme Court thus found no merit in the appeal and dismissed it with costs.

(ii) Clear feed for transmission to terrestrial network & DTH only: union of India v BCCI (SC, 2017)

Soon after the Sports Act was enforced, BCCI and Nimbus filed a suit in the Delhi High Court for striking down, *inter alia*, Section 3 of the Sports Act, to the extent it relates to cricket test matches and also declaring as null and void Notification dated 13 September 2000, issued by the Central Government, notifying DD1 (National) channel and DD (News) channel as mandatory channels to be carried compulsorily by the Cable Operators.¹⁴⁹ The main contention was the re-telecast, by cable operators, of the signals shared by Nimbus – and other broadcasters who later became a party to the litigation as they became broadcasting rights holder – under Section 3 of the Sports Act with Prasar Bharati. Section 8 of the Cable Television Networks (Regulation) Act, 1995 (“Cable Act”) requires cable operators to mandatorily carry in their cable service such DD channels that may be notified by the Central Government. The combined effect of Section 3 of the Sports Act and Section 8 of the Cable Act was that the sharing of live

¹⁴⁶*ibid* [33].

¹⁴⁷*ibid* [32(b)].

¹⁴⁸*ibid* [31].

¹⁴⁹*BCCI and Nimbus* (n 129).

transmission of sports events by private broadcasters with Prasar Bharati was intended for the benefit of viewers who have access only to the terrestrial network or DTH, but the transmission was available to cable subscribers free of any additional fee by virtue of mandatory carrying of DD channels by cable operators.

A single bench of the Delhi High Court dismissed the petition.¹⁵⁰ However, a Division Bench allowed the appeal. The Division Bench noted that the re-telecast by cable operators put private broadcasters at an unduly disadvantaged position, first, by reduced advertisement revenue and the second by reduced subscription revenue: “Those homes which were connected via cable networks would have paid for receiving the live broadcast signals had Prasar Bharati through Doordarshan [compulsory channels] not provided the same free of cost to the cable operators”.¹⁵¹ The Division Bench thus held that the signals received by Prasar Bharati from the private broadcasters should not be placed in the designated DD channels that were to be compulsorily carried by the cable operators under Section 8 of the Cable Act.

Aggrieved by the order of the Division Bench of the Delhi High Court, the Union of India, Prasar Bharati, and others preferred an appeal before the Supreme Court of India.¹⁵² The Supreme Court noted that the objective of the Sports Act is to provide access to the largest number of listeners and viewers, on a free to air basis, of sporting events of national importance through mandatory sharing of sports broadcasting signals with Prasar Bharati; Section 3 of the Sports Act is a significant provision to further this objective: “The plain language of the Section 3 of the Sports Act, makes it clear that the obligation to share cast on the content rights owner or holder etc. with Prasar Bharati is to enable Prasar Bharati to transmit the same on ‘its terrestrial and DTH networks’”,¹⁵³ and “not to Cable Operators so as to enable the Cable TV operators to reach such consumers who have already subscribed to a cable network.”¹⁵⁴

The judgement drew a balance between the rights of the broadcasters and the consumers’ (public) interest in viewing sports events of national importance. Broadcasters are protected from free-riding by cable operators. The Court thus saved the broadcasters from the loss of revenue from subscription and reduced advertisement revenues. And viewers, who only have access to the free-to-air terrestrial network or free DTH networks of DD, are provided with live transmission of cricket matches and other events of national importance.

(iii) Effect of the Supreme Court’s judgements

The net effect of the two judgements of the Supreme Court enhances consumer welfare and removes distortions to market conditions. *Star Sports India v Prasar Baharati* (2016) ensured that Prasar Bharati receives live feed without any advertisements either from the broadcaster or from the content owner (event organizer). If it were to receive live feed with advertisements, then Prasar Bharati must also share at least 25% of the advertisement revenue. *Union of India v BCCI* (2017) in turn ensured that the feed which private

¹⁵⁰ibid.

¹⁵¹*BCCI v Prasar Bharati* (n 127) [58].

¹⁵²*Uoi v BCCI* (n 5).

¹⁵³ibid [28].

¹⁵⁴ibid [31].

broadcasters share with Prasar Bharati would not get relayed on DD channels, which are compulsorily carried by cable operators.

The two judgements acting in tandem would neutralize the harm or benefit, if any, imposed on a private broadcaster by compulsorily sharing live feed with Prasar Bharati. The possibility of undue benefit, which a broadcaster or content owner could get by sharing live transmission with advertisements with Prasar Bharati and thereby reaching a larger audience – with the possibility of obtaining higher fees from advertisers – is eliminated by the 2016 Judgement. The possibility that a broadcaster will suffer a loss from reduced subscription revenues in the event that viewers, who are on a cable network, free-ride by watching important sports events on DD channels carried by their cable operator is eliminated by the 2017 judgement. The broadcaster would not suffer any advertising or subscription loss by sharing live feed with Prasar Bharati, as the relevant market in which Prasar Bharati is operating is different, *i.e.*, viewers having access to only free-to-air terrestrial network or free DTH network, and the market for which a broadcaster would get rights from the event organizer remain unchanged, *i.e.*, cable and satellite channels.¹⁵⁵

The majority of the population in India, which still does not have access to cable or satellite channels, would get guaranteed broadcasting of sports events of national importance. Overall all stakeholders having an interest in the live transmission of important sporting events gets a fair deal – a win-win for all!

H. Cricket boards and competition issues

One of the roles of cricket boards is to organize tournaments, and national and international matches. Tournaments are important for the promotion of the sport and the players, and provide a source of entertainment for viewer, and a source of revenues for the organizers. Although earning revenue by selling broadcasting rights should be a by-product of organizing a tournament, when greed takes precedence over the objective of promoting the sport, revenues from the sale of broadcasting rights dictates whether tournaments be organized or not, and if so, where.

(i) BCCI and broadcaster's prohibited agreement: IPL case (CCI, 2017)

On 30 November 2007, the BCCI issued an international tender for the media rights for the Indian Premier League (“IPL”) for a period of 10 years, commencing 2008 and ending 2017 on a worldwide basis. The contract was awarded to a joint-bid by World Sports Group and Sony, for an offer of 1 USD.026 billion.¹⁵⁶ The media rights agreement contained a non-compete clause, Clause 9.1(c)(i), which reads as follows:

BCCI represents and warrants that it shall not organize, sanction, recognize, or support during the Rights period another professional domestic Indian T20 competition that is competitive to the league.¹⁵⁷

¹⁵⁵For instance see *KPN BV v Commission* Case T-370/17 (Judgement of the General Court, 23 May 2019) (free-to-air and Pay TV channels are separate relevant product markets).

¹⁵⁶*Barmi v BCCI (I)* (n 98) [5.3].

¹⁵⁷*ibid* [8.55].

The matter was reported to the Competition Commission of India (“CCI”), which took cognizance of the matter and found that the BCCI has dominance in the relevant market for “organization of professional domestic cricket leagues/events in India”.¹⁵⁸

BCCI enjoyed dominant position in the relevant market owing to its market share, size, resources and economic power, dependence of consumers and high entry barriers.¹⁵⁹

Moreover, Section 32 of the ICC Manual stipulates that only the BCCI has the exclusive authority to sanction/approve cricket events in India. Any match or tournament not approved by BCCI would be regarded as “disapproved cricket” in India.¹⁶⁰

In support of the restrictive clause, BCCI argued that it was inserted at the behest of the bidder, as (i) the market for IPL was nascent; (ii) broadcast of IPL was for a limited time during a year, therefore resulting in limited time for recouping of investment; and (iii) the inherent constraints in the broadcasting market.¹⁶¹ The Commission rejected the arguments adduced by BCCI and noted that BCCI was not “able to show how the impugned restriction serves the legitimate interest of cricket in the country and the consumers in the relevant market”.¹⁶² The restriction reflected the intent of BCCI to foreclose competition.¹⁶³

The CCI imposed a fine of INR 520 million rupees (\$8 million) on the BCCI for abusing its dominant position, by restricting and foreclosing competition in the relevant market of organization of professional domestic cricket leagues/events in India.¹⁶⁴

(ii) 2015 Pakistan/India MoU

In 2014, the PCB and the BCCI signed an MoU for six series to be played between the two countries over a period of eight years from 2015 to 2023. The first of the series, comprising three Tests, five ODIs and two T20 matches, was to be played in December 2015 in UAE. The broadcasting rights for the series organized by the PCB were with Ten Sports, and the BCCI was not willing to negotiate with Ten Sports for broadcasting rights for India. It was reported that the BCCI had proposed that the series be organized in India. However, the PCB did not agree to the proposal as that would mean “sharing a part of the moolah raised through broadcast rights with BCCI”.¹⁶⁵ A senior PCB member was quoted as saying: “Why should we do that? We all know that India-Pakistan matches are the most lucrative of all the cricket matches. As it is, the Indian board is quite rich. Why should we compromise with our opportunity to make some money?”¹⁶⁶ The 2015 series did not happen, nor did any other series agreed upon to take place. PCB took legal action by filing a complaint

¹⁵⁸*Barmi v BCCI (II)* (n 101) [5.1].

¹⁵⁹*ibid* [5.2].

¹⁶⁰*ibid* [35].

¹⁶¹*ibid* [45].

¹⁶²*ibid* [48].

¹⁶³*ibid*.

¹⁶⁴The Commission’s first decision came on 8 February 2013, which was appealed and the Court remanded the case to the Commission to reconsider. On reconsideration, the Commission again came to the same conclusion and imposed the same penalty. The second decision of the Commission was issued on 29 November 2017.

¹⁶⁵Archana Shukla, ‘TEN-sion Rising over India vs Pakistan Broadcast Rights Issue’ *Indian Express* (12 May 2015) <<http://indianexpress.com/article/sports/cricket/ten-sion-rising-over-india-vs-pakistan-broadcast-rights-issue/>> accessed 21 April 2020.

before the ICC against the BCCI for not honouring the MoU and claimed 70 USD million in lost revenues. The ICC, however, dismissed the claim of PCB.¹⁶⁷

The two boards were driven by the urge to make money which took precedence over the primary objective of promoting the sport. They thus engaged collectively in the conduct of restricting output in the most important market of cricket matches between Pakistan and India.

IV. Lessons from the Indian experience

India has ironed out issues arising from the conflict between public interest of freedom of expression and commercial interest through expensive and expansive litigation. The take-aways from the Indian experience are:

- (i) that a monopoly in broadcasting and telecasting is not permissible;
- (ii) that airwaves are a public property;
- (iii) that the fundamental right to speech and expression includes viewing the game of cricket;
- (iv) that the rights of viewers, the public at large, are paramount;
- (v) Since broadcasting is carried over airwaves, it must be shared with the owner of airwaves, *i.e.*, the public at large, and the national broadcaster is the representative of the public;
- (vi) the national broadcaster must re-telecast the live feed on its terrestrial and DTH networks only, so that people who are connected to cable network do not get a free ride;
- (vii) the live feed shared with the national broadcaster should be free of advertisements from the broadcaster or content owner – this way: (i) the private broadcaster will not be able to expand its viewership to the viewers on terrestrial network and gain unjust enrichment through higher advertisement revenues; and (ii) the national broadcaster will have the opportunity to enter into advertisement agreements for its viewership and raise revenues for discharging its public obligation of broadcasting sports events of national interest;
- (viii) the requirements on the private broadcaster to share the live feed free of advertisements, and on the national broadcaster to rely such live feed on its terrestrial and DTH networks, will even out any benefit or harm the private broadcaster may suffer from the obligation to share live feed with the national broadcaster, as the two are operating in different relevant markets;
- (ix) that the abuse of dominance by the BCCI, by agreeing not to authorize any other competitive league, was penalized by the Competition Commission of India.

¹⁶⁶*ibid*; See also Sahil Bhalla, 'What's Coming in the Way of Indo-Pak Cricket is not Politics but Television' *Scroll.in* (14 May 2014 2015) <<https://scroll.in/field/727241/what-s-coming-in-the-way-of-indo-pak-cricket-is-not-politics-but-television>> accessed 21 April 2020.

¹⁶⁷PCB case against BCCI dismissed by dispute panel' *ICC* (20 November 2018) <<https://www.icc-cricket.com/news/915817>> accessed 21 April 2020.

V. Concluding remarks

The right to information, we have seen, “is a necessary predicate to the *recipient’s* meaningful exercise of his own rights of speech, press, and political freedom”.¹⁶⁸ The freedom of speech, thus, inherently includes the right to information, and the uninhibited marketplace of ideas, which envelops both the receivers and senders of the ideas. Competition in media markets is necessary to protect freedom of speech. Courts in major jurisdictions, *i.e.*, the US, Europe, and UK, as well as in Pakistan and India, have held that the rights of the viewers and listeners is paramount in comparison to that of the broadcasters. It is the inalienable fundamental right of the public to “receive suitable access to” experience live broadcast of sporting events of national importance. While the technology has enhanced viewing experiences for some, it has also marginalized a sect of the society which cannot afford to have access to cable and satellite channels. Advances in technology are constantly marginalizing poor people. For instance, in order to book a ride-hailing service like Uber, one needs to have a smartphone and a credit card. Anyone who does not have a smartphone and a credit card is automatically disqualified from availing the service. In such a scenario, there is a pressing responsibility on the government to ensure that the fundamental rights of the people are not suppressed and it takes measures to alleviate the negative effects of the digitalization of the economy.

This paper has traversed the developments in the sale of audio-visual rights for live transmission of cricket matches in India and Pakistan and has also touched on how similar issues were addressed by the courts in developed jurisdictions. The commercialization of media rights by cricket boards, in the absence of any policy for the sale of audio-visual rights of sports events of national importance by the government, resulted in lack of access to live transmission by a large segment of the population that had access to the terrestrial network only. The possibility that a certain segment of a population may lose access to live transmission of sports events of national interest as a result of liberalization of the media sector remained a blind spot for policy-makers. While opening up of the broadcasting sector to the private firms brought more choices for the consumers and thus enhanced their experiences, the commercialization failed to safeguard the general public interest to receive suitable access to experience live broadcast of important sporting events on free-to-air service. National broadcasters failed at times to procure broadcasting rights from private-sector broadcasters. Litigation in India by different stakeholders, which spanned over a lengthy period of 22 years from 1995 to 2017, built piece by piece elements that ensured mandatory access for national broadcaster to broadcasting signals of important sports events for re-transmission on its terrestrial and DTH networks.

Pakistan, while treading on the same path as the Indian broadcasting sector did, is still lagging behind in drawing a balance between commercialization of broadcasting rights and the public interest in viewing sports events of national importance through live transmission. Pakistan could avoid lengthy litigation and can learn from the Indian experience and avoid blackouts of important cricket matches for the majority of viewers having access to PTV’s terrestrial network only, by taking legislative measures similar to the Sport Act. Leaving the public’s right to viewing importance cricket matches to the whims of the PCB, who may require the winner of the broadcasting rights to share terrestrial feed with the

¹⁶⁸*Board of Education v Pico* (n 69) 867.

PTV, amounts to a breach of responsibility on the part of the government. Replicating substantive elements of the Sports Act would safeguard the interest of the viewers. In particular [Section 3\(2\)](#) of the Sports Act 2007, which allows broadcasters to share the feed with advertisement and proportional advertising revenue with the national broadcaster, would be a useful tool for the PTV, which, at instances has argued about the lack of finances or commercial viability to bid for broadcasting rights.¹⁶⁹ The Government of Pakistan could amend the PEMRA Act or the Sports Ordinance by inserting provisions relating to mandatory sharing of broadcasting signals of sports of national importance with the PTV.

Sports regulatory bodies, in particular the BCCI and the PCB, must act with the primary objective of promoting the sport they are regulating, by organizing tournaments and matches as an opportunity for players to demonstrate their skills and for the public to have a spectacle to watch, rather than as a source of earning revenues from the sale of broadcasting rights. They should not engage in activities that stifle the sport by refusing to agree on the venue of tournament which dictates who would get to sell the broadcasting rights or by entering into non-compete agreements with broadcasters and therefore withholding organizing tournaments, and restricting competition in the ancillary markets.

Disclosure statement

No potential conflict of interest was reported by the authors.

¹⁶⁹See (n 55) and accompanying text.