

EXAMINING THE CONSTITUTIONALITY OF THE BAN ON BROADCAST OF NEWS BY PRIVATE FM AND COMMUNITY RADIO STATIONS

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*In 1995, the Supreme Court declared airwaves to be public property in the seminal case of *The Secretary, Ministry of Information and Broadcasting v Cricket Association of Bengal*, and created the stepping stones for liberalization of broadcasting media from government monopoly. Despite this, community radio and private FM channels, in their nearly two decades of existence, have been unable to broadcast their own news content because of the Government's persisting prohibition on the same. In this paper, we document the historical developments surrounding the issue, and analyse the constitutional validity of this prohibition on the touchstone of the existing jurisprudence on free speech and media freedom. Additionally, we also propose an alternative regulatory framework which would assuage the government's apprehensions regarding radicalisation through radio spaces, as well as ensure that the autonomy of these stations is not curtailed.*

I. INTRODUCTION

While there is no separate chapter in the Constitution of India dealing with the freedom of the press, evolving jurisprudence has led to the understanding that freedom of the press was intended to be included within the ambit of freedom of speech and expression.¹ This

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1 *RP Limited v Indian Express Newspapers* AIR (1989) SC 180.

understanding broadly relies on two facets: *first*, that freedom of expression includes within it the right to disseminate and circulate information;² and *second*, the press comprises of individuals who enjoy a fundamental right to free speech in their individual capacity.³ Thus, the freedom of the press is a manifestation of the freedom of speech and expression accorded to the individuals who constitute the press.

The courts have, on multiple occasions, emphasised the importance of media and its role in the propagation of ideas and information.⁴ While the judicial decisions referred to here have focused on the traditional press, i.e. print media, the Supreme Court affirmed in *Secretary, Ministry of Information and Broadcasting v Cricket Association of Bengal*⁵ that the same rights extended to electronic media like television and radio.

However, currently, there is a blanket ban on community and private FM channels from curating their own news content. The governing regulations only allow them to broadcast news which has already been aired by All India Radio (AIR) without any ‘modifications’.⁶ The government has defended these regulations by arguing that these radio channels could sensationalise news and such rights could be misused by radical elements, especially in areas affected by insurgency.⁷

In this paper, we argue that to the extent that community radio channels and private FM channels perform the function of dissemination of news and current affairs, they perform the functions of the press, and thus ought to be subject to the same freedoms and liabilities as the traditional press and other media.

This paper is divided into four parts. In the second part, we document the chronological developments in law, policy and legal challenges surrounding this issue. In the third part, we use these facts and derive from constitutional jurisprudence to examine the constitutionality of the regulations that prohibit community radio and private FM channels from curating and broadcasting their own news content. Specifically, we draw from constitutional jurisprudence to argue that the said prohibition does not fulfil the conditions under Article 19(2) and Article 19(6),⁸ and thus is an invalid restriction on the freedom of the press. In

2 *Express Newspapers v Union of India* AIR (1986) SC 872.

3 (1948) 7 Constituent Assembly Debates 780.

4 *Sanjoy Narain, Editor in Chief v Hon'ble High Court of Allahabad* [2011] Cr Appeal No. 1863/2011; *Express Newspapers v Union of India* AIR [1958] SC 578; *Romesh Thapar v State of Madras* [1950] SCR 124, *Sakal Papers v Union of India* [1962] AIR 305.

5 *The Secretary, Ministry of Information and Broadcasting v Cricket Association of Bengal* (1995) SCC (2) 161.

6 Order No.104/103/2013-CRS, Ministry of Information and Broadcasting (2017) <<https://mib.gov.in/sites/default/files/Amendment%20in%20policy%20guidelines.pdf>> accessed 10 July 2019 (MIB 2017).

7 Karan Kaushik, ‘Community Radio Stations Upset With I&B order’ (*India Legal*, 18 February 2017) <<http://www.indialegalive.com/constitutional-law-news/special-report-news/community-radio-stations-upset-sc-order-20245>> accessed 10 July 2019.

8 DD Basu, *Law of the Press* (5th edn, Lexis Nexis 2010).

the fourth part, we suggest a broad regulatory framework for community and private FM channels.

II. THE LEGAL HISTORY

1. The Evolution of the Ban on Broadcasting of News by Radio Channels

In 1995, the Supreme Court of India, in *The Secretary, Ministry of Information and Broadcasting v Cricket Association of Bengal*, declared that airwaves and frequencies were public property.⁹ Since then, advocates of community radio have been pushing for the democratisation of radio by setting up a system of not-for-profit radio stations which would cater to the specific needs of the multitude of communities across India.¹⁰

In a parallel development, the AIR commenced FM broadcast, wherein some slots were given to private producers.¹¹ In 1999, the Government rolled out a policy for 'Expansion of FM Radio Broadcasting Through Private Agencies (Phase I)', which allowed fully-owned Indian companies to set up private FM radio stations.¹²

In 2002, the Government approved a policy to grant license for setting community radio stations in India. This license was given only to certain educational institutions, including the Indian Institutes of Technology (IITs) and the Indian Institutes of Management (IIMs).¹³

Post the Phase I guidelines, the Government sought to reformulate its policy, and accordingly set up the Radio Broadcast Policy Committee in 2003, which *inter alia*, recommended that the ban on curating and broadcasting news imposed on radio stations be waived off on several grounds.¹⁴ *First*, the report noted that the policy in respect of radio broadcasters varied from the policy for print and television broadcasters.¹⁵ *Second*, the Committee pointed out that the objective of privatisation of the radio sphere was to promote diversity of content and provide information, and yet these were being curtailed by the ban.¹⁶

9 The Secretary (n 5).

10 Community Radio India, *Community Radio Movement in India* (Internet Archives, 28 May 2013 <https://web.archive.org/web/20130528114539/http://www.communityradioindia.org/cr%20scenario/cr_scenario.html> accessed 10 July 2019).

11 Zohra Chatterji, 'Radio Broadcasting in India', <http://www.skoch.in/images/stories/knowledge_repository/Digital/15-ch-15.pdf> accessed 18 July 2019.

12 *ibid.*

13 Community Radio Facilitation Centre, *Policy Guidelines for setting up Community Radio Stations in India* (Ministry of Information & Broadcasting, 2002, updated in 2006) (Community Radio Facilitation Centre).

14 Ministry of Information & Broadcasting, *Report of the Radio Broadcast Policy Committee* (2003) <<https://www.mib.gov.in/broadcasting/report-radio-broadcast-policy-committee-0>> accessed 10 July 2019.

15 *ibid.*

16 *ibid.*

These recommendations were echoed in the 2004 Telecom Regulatory Authority of India's (TRAI) Consultation Paper, which noted that the promotion of broadcast of news on radio channels could be a means to promote local content on channels.¹⁷ Additionally, the paper also noted that, as a safety precaution, the channels should be made to adhere to the AIR Code, which lists the types of content that cannot be broadcast through AIR, including criticism of friendly countries, attack on religion or communities, and so on.¹⁸

Despite these developments, in 2006, when the scope of the policy for setting up community radio stations was broadened to include non-profit organisations, it still expressly excluded individuals from setting up community radio stations and prohibited the existing stations from broadcasting news and current affairs completely.¹⁹ The latter prohibition was also reflected in the Grant of Permission Agreement (GoPA) for community radios.²⁰

Similarly, in 2005, the Government liberalised some regulatory aspects of radio broadcast with the Phase II scheme on FM Radio, but retained the blanket ban on broadcast of news and current affairs.²¹ The same is reflected in the GoPA for establishing, maintaining and operating community radio stations, released in 2006.²²

In 2008, TRAI considered the issue again, in greater detail, in its 2008 Consultation Paper deliberating on issues regarding Phase III policies for private FM broadcasting.²³ It was noted that the Federation of Indian Chambers of Commerce and Industry (FICCI) was of the opinion that broadcasters must be allowed a particular slot to broadcast news, on the basis that the same is allowed on private television channels, the internet, and newspapers.²⁴ FICCI also shed light on concerns of accessibility, highlighting that access to newspapers, TV sets, and/or cable connections require a certain level of literacy.²⁵

TRAI, however, also noted that due to the 'exhaustive coverage' possible through FM radio broadcasts, news on the radio had the potential to create an immediate major

17 Telecom Regulatory Authority of India (TRAI), *Consultation Paper on Licensing Issues Related to 2nd Phase of Private FM Radio Broadcasting* (2004) <<https://main.trai.gov.in/sites/default/files/consultationFMradio.pdf>> accessed 10 July 2019.

18 News Services Division All India Radio, *All India Radio Code* <<http://www.newsonair.com/AIR-Code.aspx>> accessed 10 July 2019.

19 Community Radio Facilitation Centre (n 13).

20 Grant of Permission Agreement to Establish, Maintain, and Operate Community Radio Station', cl 5(v).

21 Ministry of Information and Broadcasting, *Policy on Expansion of FM Radio Broadcasting Services Through Private Agencies (Phase-II)* (2005) <<http://mib.gov.in/sites/default/files/fm3.pdf>> accessed 10 July 2019.

22 Grant of Permission (n 20) cl 23.4.

23 TRAI, *Consultation Paper on Issues Relating to 3rd Phase of Private FM Radio Broadcasting* (2008) <https://main.trai.gov.in/sites/default/files/cpaper8jan08_0.pdf> accessed 10 July 2019.

24 *ibid.*

25 *ibid.*

impact, which made corrective action and damage control difficult.²⁶ In light of the same, TRAI recommended that ‘news and current affairs must not be permitted till [an] effective monitoring mechanism is put in place’.²⁷ As a compromise, TRAI suggested that radio broadcasters could be allowed to broadcast the ‘exact same news and current affairs content’ already aired by AIR or Doordarshan.²⁸

The Phase III policies for FM Radio, published in 2011, followed this stance and permitted FM Channels to carry the AIR news bulletin, unaltered, on their channels.²⁹ The blanket prohibition on news was further relaxed to some extent since the new policy deemed certain items as ‘non-news’, and thereby permitted FM channels to broadcast the following categories of content:

- (a) Information pertaining to sporting events excluding live coverage. However, live commentaries on local sporting events may be permissible;
- (b) Information pertaining to traffic and weather;
- (c) Information pertaining to coverage of local cultural events and festivals;
- (d) Coverage of topics pertaining to examinations, results, admissions, career counselling;
- (e) Information regarding employment opportunities; and
- (f) Public announcements pertaining to civic amenities like electricity, water supply, natural calamities, health alerts, etc. as provided by the local administration.³⁰

Broadcast of other forms of news or current affairs by private FM radio channels was still prohibited.³¹

For community radio stations, in 2013, the Ministry of Information and Broadcasting (MIB) maintained at the 3rd National Community Radio Sammelan that community radios would not be allowed to broadcast news for the foreseeable future, but could be allowed to rebroadcast the AIR news bulletin unedited.³² This was subsequently confirmed by a notification in 2017 to that effect.³³

26 *ibid.*

27 *ibid.*

28 *ibid.*

29 Ministry of Information and Broadcasting, *Policy Guidelines on Expansion of FM Radio Broadcasting Services through Private Agencies* (2011) <https://mib.gov.in/sites/default/files/PolicyGuidelines_FMPhaseIII%20%281%29.pdf> accessed 10 July 2019 (MIB).

30 *ibid.*

31 *ibid.*

32 Krishnadas Rajagopal, ‘Why Can’t FM Stations Broadcast News, asks SC’ *The Hindu* (January 18, 2017) <<https://www.thehindu.com/news/national/Why-can%E2%80%99t-FM-stations-broadcast-news-asks-SC/article17042358.ece>> accessed 10 July 2019.

33 MIB 2017 (n 6).

Subsequently, there has been a government mandate on the Electronic Media Monitoring Centre (EMMC) to monitor the content on private and community radio channels.³⁴ This has also been followed up by a government notification which mandated existing committees responsible for monitoring content on television, to also monitor content aired by these channels.³⁵

In the minutes of a meeting held by the Community Radio Station (CRS) cell of the MIB, it was noted that an advisory was issued to all CRS to broadcast a message every two hours, which would convey to the listeners that they had the prerogative of filing a complaint with the MIB, should they be ‘offended’ by the content being broadcast.³⁶

2. The Common Cause Petition

In 2013, Common Cause filed a Public Interest Litigation (PIL) in the Supreme Court praying for the quashing of provisions in the policy guidelines which prohibited the broadcast of news and current affairs content on FM and community radio stations.³⁷ There were two broad arguments that Common Cause had relied on to challenge the aforesaid policy restrictions. *Firstly*, they argued that the provisions of the Policy Guidelines and the GoPA that prohibited such broadcast were violative of article 19(1)(a) of the Constitution, which also includes within its ambit the right to receive diverse interpretations of news, current affairs and other sources of information. *Secondly*, they argued that these Policy Guidelines were arbitrary and discriminatory in nature because no such restrictions were put on TV channels and print media which disseminated news. They argued that in view of such arbitrary discrimination, these Policy Guidelines were thus violative of article 14 of the Constitution.³⁸

Common Cause also pointed out the potential harms arising out of such restrictions: in a country like India where radio broadcast can form an accessible source of information for the bulk of the population, clamping down on the medium would be violating these citizens’ right to receive information. Further, they argued that community radio should not be restricted to broadcasting only government advertisements or information about Union Government schemes because it was important for these radio stations to engage with local

34 Ministry of Information and Broadcasting, ‘EMMC to monitor Indian Community Radio’ <<http://crfc.in/emmc-to-monitor-indian-community-radio/>> accessed 30 July 2019.

35 ‘Committees monitoring television content asked to also oversee private radio stations’ *Firstpost* (6 August 2017) <<https://www.firstpost.com/india/committees-monitoring-television-content-asked-to-also-oversee-private-radio-stations-3900841.html>> accessed 30 July 2019.

36 Ministry of Information and Broadcasting (CRS Cell), ‘Minutes Of The Inter Ministerial Committee (TIWC) Meeting Held On 20.12.2018 Under The Chairmanship Of Secretary (I&B)’ <https://mib.gov.in/sites/default/files/Minutes%20of%20IMC%20Meeting%2020-12-2018%20compressed_0.pdf> accessed 19 July 2019.

37 Common Cause, ‘The Common Cause Petition- Bar on News Broadcast by Private Radio Stations’ (Common Cause) <<http://www.commoncause.in/uploadimage/case/134737590144377597SC13-Writ.pdf>> accessed 10 July 2019.

38 *ibid.*

issues as well.³⁹

The petition claimed that India may be the only democratic country in the world where private players are barred from airing news or cultural affairs. Common Cause argued that this policy of privileging Prasar Bharti over other players, and according legitimacy to only AIR news over other sources is undemocratic.⁴⁰

Common Cause prayed to the Supreme Court to issue a writ of certiorari or a direction of similar nature to quash the said provisions of the policy, and to issue a writ of mandamus or any other direction to the Government to allow private FM Radio stations and community radio stations to broadcast their own news and current affairs.⁴¹

On 14 February, 2017, the Supreme Court observed that the Union Government's counter-affidavit highlighted the gradual progress of its policy guidelines in the context of news broadcast by private and community radio channels. The counter affidavit filed by the Government also submitted that the revised guidelines now permitted these stations to broadcast news and current affairs that were sourced exclusively from AIR. The Bench, however, asked why news sourced from AIR should be forced on private radio stations and why they could not be allowed to source content from newspapers and TV channels which existed in the public domain, and were already being regulated by the Government. The Court then granted six weeks' time to the Government Counsel to obtain instructions. The matter was posted for hearing on 5 April, 2017.⁴²

However, no documents were filed in the court as of 3 April, 2017 despite the Court's orders. In the hearing dated 18 January, 2018, the Court ordered that the reply of the government should be placed on record. On 12 April, 2018, however, the petition was dismissed due to a technical infirmity. On reaching out to Common Cause, they informed us that the organisation was in the process of filing a restoration application in the court.

III. A CONSTITUTIONAL ANALYSIS OF THE PROHIBITION

The Supreme Court, on multiple instances, has held that article 19(1)(a) encompasses not just the right to disseminate information but also the right to receive information.⁴³ The imparting, as well as receiving of information, have been understood as a fundamental right within the scope of article 19(1)(a).⁴⁴ In *State of Uttar Pradesh v Raj Narain*, the Supreme Court held that article 19(1)(a) not only guarantees the freedom of speech and expression

39 *ibid.*

40 *ibid.*

41 *ibid.*

42 Common Cause, 'The Status of the Common Cause Petition' (Common Cause) <http://www.commoncause.in/ppil_details.php?id=30> accessed 10 July 2019.

43 *Hamdard Dawakhana v Union of India* (1960) 2 SCR 671; *Indian Soaps & Toiletries Makers Assn. v Ozair Husain* (2013) 3 SCC 641.

44 *People's Union of Civil Liberties v Union of India* (2002) 3 SCR 294.

but also ensures the right of citizens to receive information regarding matters of public concern.⁴⁵ In *Secretary, Ministry of Information and Broadcasting v Cricket Association of Bengal*, the Supreme Court held that the right of dissemination included the right of communication through any media: print, electronic or audio-visual.⁴⁶

The freedom of the press also implies that the choice of what is to be printed in the editorial or the news-columns of a newspaper should rest with the editor of the paper, and not any public official or even the Government.⁴⁷ This can be extended to the private FM channels and the community radio stations as well, so far as their news dissemination function is concerned. By dictating the types of information and news items that could be broadcast, the Government is therefore indirectly interfering with the autonomy of these channels; almost akin to an interference with the editorial policies of a newspaper, which in itself is a problematic exercise.

With that note, it is now pertinent to test the current restriction against the touchstone of existing constitutional principles. The first question we must examine is whether the prohibition falls within the scheme of article 19(2), that is whether the prohibition qualifies the constitutional protection rendered to certain instances of speech restriction.

1. Article 19(2): Reasonable Restrictions

A particular restriction on the freedom of expression must pass a dual test of reasonableness and proportionality to be deemed constitutional. We will be discussing the touchstone of these tests in the coming sections.

1.1. The Test of Reasonableness

For a speech restriction to be 'reasonable', it must fulfil two tests.⁴⁸ *First*, it ought to fall within the scope of grounds specified under articles 19(2) and 19(6); *second*, the restriction must be rationally or proximately connected to the purported intention of the legislation.⁴⁹

In a counter affidavit in the Common Cause petition, the government had argued that permitting community radio and FM radio channels to broadcast news could threaten national security and public order.⁵⁰ So for fulfilling the first prong of the test, it must be seen whether the Government's concerns fall under the ambit of 'public order' and 'security of the State' as interpreted under article 19(2).

45 *State of Uttar Pradesh v Raj Narain* (1975) SCR (3) 333.

46 *The Secretary* (n 5).

47 *Express Newspapers Pvt Ltd v Union of India* (1959) 1 SCR 12.

48 DD Basu (n 8) 20.

49 *ibid.*

50 Karan Kaushik, 'Community Radio Stations Upset With I&B order' *India Legal* (18 February 2017) <<http://www.indialegallive.com/constitutional-law-news/special-report-news/community-radio-stations-upset-sc-order-20245>> accessed 10 July 2019.

We must clarify here that ‘public order’ and ‘security of state’ forms a system of concentric circles, where security of state is the innermost circle, followed by public order.⁵¹ The security of state is endangered by crimes committed with the intention of overthrowing the government,⁵² levying of war or rebellion against the government.⁵³

While the first part of the test would be a factual issue, establishing that a restriction falls within the ambit of article 19(2) means that it must also be tested against the touchstone of the ‘proximate link’ doctrine. This implies that a hypothetical or remote link of a speech restriction to the plausibility of disturbance to public order or security of state would not be enough to justify the restriction. As has been laid down in the case of *The Superintendent of Prison v Ram Manohar Lohia*, this link must be proximate and/or imminent.⁵⁴ Further judicial decisions have clarified the scope of this doctrine. In the case of *S Rangarajan v P Jagjivan*,⁵⁵ for instance, the Supreme Court had equated the relationship between speech and consequences akin to a ‘spark in a powder keg’.⁵⁶ In 2011, the Supreme Court further clarified the scope of the doctrine in the case of *Arup Bhuyan v State of Assam*⁵⁷ by limiting state interference in free speech to only instances where it ‘incites to imminent lawless action’.⁵⁸

In that light, it would be useful to consider first whether there exists any proximate link between the prohibition and the government’s apprehensions. Generally speaking, neither the possibility of abuse nor the difficulty of monitoring a right, are grounds of negating the right itself. More specifically, in terms of broadcast, the broad range of circulation or its greater impact cannot be the rationale for denying the broadcast or restricting its content.⁵⁹ The State cannot negate liberty because of its own inability to deal with a hostile audience.⁶⁰

Additionally, in over two decades of the existence of community radio and private FM channels, there does not seem to be a single instance of these spaces misused in the manner posited by the government.⁶¹ There are already some checks in the existing regulatory

51 DD Basu, *Shorter Constitution of India* vol 1 (14th edn, LexisNexis Butterworths Wadhwa, 2011).

52 *Santokh Singh v Delhi Administration* (1973) SCR (3) 533.

53 DD Basu (n 8).

54 *The Superintendent of Prison v Ram Manohar Lohia* (1960) SCR (2) 821.

55 *S Rangarajan v P Jagjivan* (1989) SCR (2) 204.

56 *ibid.*

57 *Arup Bhuyan v State of Assam* Cr. Appeal 889/2007.

58 *ibid*; *Clarence Brandenburg v State of Ohio* (1969) 395 US.

59 *The Secretary* (n 5).

60 *S Rangarajan* (n 55).

61 ‘No formal complaint on Community Radio Station misuse: Govt’ *The Economic Times* (22 December 2015) <<https://economictimes.indiatimes.com/industry/media/entertainment/media/no-formal-complaint-on-community-radio-station-misuse-govt/articleshow/50282020.cms?from=mdr>> accessed 18 July 2019.

system which may serve to prevent the possibility of abuse. This includes eligibility norms which dictate organisations wishing to set up a community radio channel having a track record of three years of existence and service to the community to be considered for a license.⁶²

These norms, along with other stringent regulatory requirements, which would continue to exist even if the government decides to remove the ban, create a system where any content generated would be subject to a high level of scrutiny. Such a system removes the possibility of these broadcasting spaces being tools of persisting, systematic violations of public order, or situations of upsetting the security of state. The government is yet to show any evidence to the contrary. The argument here must be backed by quantitative evidence; the absence of which makes the submission moot, and hypothetical.

1.2. The Test of Proportionality

The Court, in addition to this, has also included a ‘proportionality’ test to assess the reasonableness of a restriction. Under this doctrine, while imposing restraints, it needs to be looked into whether the appropriate or the least restrictive choice of measures have been made by the state to achieve the object of the regulation.

As *Chintaman Rao v The State of Madras*⁶³ notes:

the phrase “reasonable restriction” connotes that the limitation imposed on a person in the enjoyment of the right should not be arbitrary or of an excessive nature, beyond what is required in the interests of the public. [...] Legislation which arbitrarily or excessively invades the right cannot be said to contain the quality of reasonableness and unless it strikes a proper balance between the freedom guaranteed in article 19(1)(g) and the social control permitted by clause (6) of article 19, it must be held to be wanting in that quality.⁶⁴

This is echoed in *Mohd. Faruk v State of Madhya Pradesh and Ors*⁶⁵

The Court must in considering the validity of the impugned law imposing a prohibition on the carrying on of a business or profession, attempt an evaluation of its direct and immediate impact upon the fundamental rights of the citizens affected thereby and the larger public interest sought to be ensured in the light of the object sought to be achieved, [and should ensure that] no case for imposing the restriction is made out [if] that a

⁶² Community Radio Facilitation Centre (n 13).

⁶³ *Chintaman Rao v State of Madras* (1950) SCR 759.

⁶⁴ *ibid.*

⁶⁵ *Mohd. Faruk v State of Madhya Pradesh and Ors* (1970) SCR (1) 156.

less drastic restriction may ensure the object intended to be achieved.⁶⁶

Thus, any restriction that is arbitrary or excessive compared to the sought object can be struck down by the court. In the present case, the restrictions imposed by the Government cannot be said to be reasonable under the ‘proportionality’ test. If the object of the Government is to prevent the sensationalisation of news on private FM channels and community radio, then it could always lay down a code of ethics for these channels to follow, along the lines of News Broadcasters’ Association’s ‘Code of Ethics and Broadcasting Standards’ which is a self-regulating code aimed at promoting journalistic standards and ethics for television news. Like regulation for other media shows, there are proportionate methods to regulate the dissemination of news and current affairs. We have further discussed this line of thought in the subsequent sections.

1.3. Prior restraint

The Government, through its regulations that prohibit community radio stations and FM channels from broadcasting certain kinds of information, can also be said to be indulging in ‘prior restraint’, i.e. ‘government action that prohibits speech or other expression before the speech happens.’⁶⁷

As Gautam Bhatia notes:

Prior restraint [...] is considered one of the most serious infringements of the right to freedom of speech and expression. It vests censorial power in the hands of a non-judicial, administrative body. Unlike subsequent punishment for speech, prior restraint chokes off the marketplace of ideas at its very source. Instead of requiring the government to justify why it wishes to regulate or restrict speech, it places the burden of going to court and having the prior restraint lifted, upon the *speaker*, who wishes to exercise her constitutional rights.⁶⁸

The Supreme Court of India has broadly set precedents against prior restraint, except when exercised in exceptional circumstances.⁶⁹ More specifically, in *Brij Bhushan v The State of Delhi*,⁷⁰ the Supreme Court clearly stated that ‘the imposition of pre-censorship on

66 *ibid.*

67 Cornell Law School, ‘Prior Restraint’ (*Legal Information Institute*) <https://www.law.cornell.edu/wex/prior_restraint> accessed 19 July 2019.

68 Gautam Bhatia, *Offend, Shock or Disturb: Free Speech Under the Indian Constitution* (OUP 2016).

69 *Romesh Thappar v State of Madras* is seen as setting a precedent against broad prior restraint. See Gautam Bhatia and Vasudev Devadasan, ‘Judicial Censorship, Prior Restraint and the Karnan Gag Order’ (*Indian Constitutional Law and Policy*, 9 May 2017) <<https://indconlawphil.wordpress.com/2017/05/09/judicial-censorship-prior-restraint-and-the-karnan-gag-order/>>. accessed 10 July 2019. Also see *R Rajagopala v State of Tamil Nadu* (1994) SCC (6) 632.

70 *Brij Bhushan v The State of Delhi* (1950) SCR 605.

a journal is a restriction on the liberty of the press which is an essential part of the right to freedom of speech and expression declared by art. 19(1)(a).⁷¹ In the case, the Supreme Court declared an order that allowed State scrutiny of the material before it was published as unconstitutional.⁷²

However, prior restraint has been permitted in situations with emergencies pertaining to public order.⁷³

More pertinently, in *KA Abbas v Union of India*,⁷⁴ the Supreme Court notably upheld the provisions of the Cinematograph Act that allow the Government to screen and censor films before they are released to the public.⁷⁵ In *Sahara India Real Estate v Securities & Exchange Board of India*, the Supreme Court noted the jurisprudence on prior restraint, and carved out an exception for such restrictions ‘only when necessary to prevent real and substantial risk to the fairness.’⁷⁶ The case also highlighted that prior restraint has been held permissible when there are chances of appeal, a particular time period within which a decision has to be made by the state, or there are other measures that make the Government accountable.⁷⁷ No such circumstances exist in the regulations that prohibit community radio stations and FM channels from broadcasting original news.

Constitutional scholar Gautam Bhatia draws a conclusion from some of these cases that prior restraint ‘in the interests of public order is justified under Article 19(2), subject to a test of proximity’.⁷⁸ As discussed earlier in this paper, the current restrictions on FM channels and community radio stations do not meet the proximity tests.

Thus, the extent of prior restraint that the State exercises on community radio stations and FM channels, i.e. full and explicit prohibition of broadcast of original news content, is greater than what has been seen as permissible by the courts and is unconstitutional.

1.4. Relaxation of tests based on the medium

The Government’s submission to the court in the *Common Cause* petition defended the current policies by also arguing that the accessibility and reach of radio necessitated stricter regulation of speech on the medium, and thereby a more relaxed application of the test of reasonableness.

71 *ibid.*

72 *Virendra v State of Punjab* (1958) AIR 896; *Babulal Parate v State of Maharashtra* (1961) SCR (3) 423; *Madhu Limaye v Sub-Divisional Magistrate* (1971) SCR (2) 711.

73 *ibid.*

74 *KA Abbas v Union of India* (1971) AIR 481.

75 *ibid.*

76 *Sahara India Real Estate v Securities & Exchange Board of India* (2012) SCC (10) 603.

77 *ibid.*

78 Gautam Bhatia, ‘Free Speech and Public Order’ (*Centre for Internet and Society*, 17 February 2016) <<https://cis-india.org/internet-governance/blog/free-speech-and-public-order-1>> accessed on 19 July 2019; Bhatia and Devadasan (n 69).

This issue was squarely addressed in *Secretary, Ministry of Information and Broadcasting v Cricket Association of Bengal*, where the Supreme Court considered ‘whether there is any distinction between the freedom of the print media and that of the electronic media such as radio and television, and if so, whether it necessitates more restrictions on the latter media’,⁷⁹ The Court clearly stated:

The virtues of the electronic media cannot become its enemies. It may warrant a greater regulation over licensing and control and vigilance on the content of the programme telecast. However, this control can only be exercised within the framework of Article 19(2) and the dictates of public interests. To plead for other grounds is to plead for unconstitutional measures.⁸⁰

This position was later affirmed by the Supreme Court in 2015 in the *Shreya Singhal v Union of India* judgement where the medium in question was the internet. In fact, in the case, the Additional Solicitor General made an argument similar to the one advanced by the Government in the *Common Cause* petition by noting, *inter alia*, that ‘rumours having a serious potential of creating a serious social disorder can be spread to trillions of people without any check [on the Internet,] which is not possible in case of other mediums’,⁸¹ and thus, ‘a relaxed standard of reasonableness of restriction should apply’⁸² when it comes to regulating speech on the internet. The Supreme Court, however, rejected this argument. The decision cited *Secretary, Ministry of Information and Broadcasting v. Cricket Association of Bengal* and unequivocally stated that they did ‘not find anything in the features outlined by the learned Additional Solicitor General to relax the Court’s scrutiny of the curbing of the content of free speech over the internet.’⁸³

Thus, jurisprudence on the issue is clear that while there maybe a valid classification between speech on different media of communication, any law restricting free speech that has the possibility of application for purposes not sanctioned by the Constitution is not permissible.⁸⁴ Therefore, the Government’s arguments that center around the nature of the medium of radio may be grounds enough for regulations that fit the Government’s particular objectives, but to the extent that they seek to restrict constitutionally protected speech, they are not maintainable.

1.5. Issues with a state monopoly on media

In the present case, the regulations and policy guidelines permit private FM channels and community radios to broadcast only certain kinds of information. Specifically, they

⁷⁹ The Secretary (n 5).

⁸⁰ *ibid.*

⁸¹ *Shreya Singhal v Union of India* (2015) 5 SCC 1.

⁸² *ibid.*

⁸³ *ibid.*

⁸⁴ *ibid.*

are prevented from broadcasting news about politics and current affairs, and can only rebroadcast the AIR news bulletin.

This makes the regulations run contrary to the Supreme Court's opinion in *Secretary, Ministry of Information and Broadcasting v Cricket Association of Bengal*, where it noted that:

[t]he right to use the airwaves and the content of the programmes [...] needs regulation [...] to prevent monopoly of information and views relayed, which is a potential danger flowing from the concentration of the right to broadcast/telecast in the hands either of a central agency or of few private affluent broadcasters.⁸⁵

Even twenty-three years after the judgment, AIR continues to have a monopoly in the dissemination of news and current affairs on radio. Not only does this infringe on the people's right to know and receive information about local political developments that may not find a place in the national broadcast of AIR, but it also prevents them from engaging with each other in debate and discussion. This is clearly detrimental to the idea of a normative plurality of opinion that the Supreme Court had espoused through its judgment in *Secretary*.

In *Indian Express Newspapers v Union of India*, the Supreme Court had held that 'the freedom of the press rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.'⁸⁶ Applying this interpretation to the present case, it could be said that AIR's monopoly over news prevents the listeners of private FM and community radio channels from accessing diverse sources of news. This is problematic when one considers that in the Indian context, freedom of speech and expression has always been valued for its instrumental role in ensuring a healthy democracy, and its power to influence public opinion.⁸⁷ In the present case, the government, far from facilitating any such condition, is instead actively indulging in guardianship of the public mind by deciding the types of information that could be broadcast on community radio networks.

IV. THE SOCIAL CONTEXT

The government's regulatory response to criticism has been to allow these channels to broadcast the AIR news broadcast verbatim.⁸⁸ But, as the facts show, the AIR broadcast

85 *ibid.*

86 *Indian Express Newspapers v Union of India* (1985) SCR (2) 287.

87 Gautam Bhatia, 'Sakal Papers v Union of India - I: Why do we have the freedom of speech?' (*Indian Constitutional Law and Philosophy*, 2 August 2013) <<https://indconlawphil.wordpress.com/2013/08/02/sakal-papers-v-union-of-india-why-do-we-have-the-freedom-of-speech/>> accessed 10 July 2019.

88 MIB 2011 (n 29); MIB 2017 (n 6).

is done in 20-30 major languages, through only 47 stations around the country.⁸⁹ In terms of reach, the AIR broadcast cannot possibly compete with community radios because of several reasons.

First, community radio stations can curate content that is immediately relevant to the community. For rural communities, these radio stations can broadcast information about local developments and policies that may have more impact on them than nation-wide Government schemes. *Second*, the local community networks are important because they can circulate information in the local dialect(s), which sometimes might change even within small clusters of villages.

One can see that the current Government regulation disproportionately affects particular communities. As the TRAI Consultation Paper pointed out in 2008, acquiring news from newspapers and television channels requires certain levels of literacy. Thus, for the illiterate and socio-economically disadvantaged citizenry, news on community radio may be the only viable source of news. These communities are being forced to rely on a single, centralised and regulated broadcast, which may be carrying irrelevant content in an incomprehensible language.

With the lowered costs of smartphones and internet access, several communities are being connected to new sources of information. While the digital empowerment of communities is commendable and necessary, its unintended consequences need to be battled with local initiatives. Disinformation campaigns and the propagation of misinformation are often successful because of the lack of understanding of how to trust news sources.⁹⁰ In such light, freeing up community radio channels to broadcast news can go a long way in battling online misinformation by creating resources in the local context. Often, community radio stations catering to rural communities will be run by locally-recognised faces, creating an inbuilt form of accountability.

The Government's concerns are countered by an example in South Asia itself: in Nepal, 250 community radio stations managed to broadcast news with very little repercussions, even during the period of civil war and monarchical authoritarianism.⁹¹

In such light, the government's continuous refusal to free up a vital channel of broadcasting can be seen as a persistent attempt to suppress the constitutional guarantees of a significant portion of the Indian populace.

89 Mayank Jain, 'Why India has only 179 community radio stations instead of the promised 4,000' (*The Scroll*, 11 May 2015) <<https://scroll.in/article/725834/why-india-has-only-179-community-radio-stations-instead-of-the-promised-4000>> accessed 10 July 2019.

90 UNESCO Series on Journalism Education, *Journalism, 'Fake News', and Disinformation* (UNESCO, 2018) <https://en.unesco.org/sites/default/files/journalism_fake_news_disinformation_print_friendly_0.pdf> accessed 27 July 2019.

91 UNESCO Chair on Community Media, *Time to join hands and strengthen CR sector in South Asia* (UNESCO, 15 November 2013) <<http://ucommedia.in/tag/supreme-court-of-india/>> accessed 10 July 2019.

V. THE WAY FORWARD

This section, *first*, for clarity for readers, summarises the existing framework required for setting up a community radio station (CRS). *Second*, we formulate a framework that balances the government's apprehensions vis-a-vis the free speech concerns outlined in the preceding sections.

1. The existing regulatory framework

As of now, an organisation that wants to operate as a community radio station (CRS) should be:

1. Constituted as a non-profit organisation and have a record of at least three years of service to the community
2. Designed to serve a specific well-defined local community
3. Its ownership and management structure should reflect the community it serves
4. The programmes it broadcasts must be relevant to the educational, developmental, social and cultural needs of the community and,
5. It should be a registered legal entity.⁹²

Community-based organisations that satisfy the above requirements, as well as educational institutions, are eligible to apply for CRS radio licences. Individuals, political parties and their affiliated organisations, profit-motivated organisations, and organisations banned by the Union and State Governments are not eligible to run a CRS.⁹³

The MIB invites applications once a year through national advertisement, but eligible educational institutions as described above can apply during the period between the two advertisements. A processing fee of ₹2500 is charged. The framework also requires applicants to get a clearance from the Ministry of Home Affairs (MHA), Ministry of Human Resources Development (MHRD) and Ministry of Defence (MoD). The framework creates an exception for universities, deemed universities and government educational institutions, who do not need a separate clearance from MHA and MHRD.⁹⁴

Once the Wireless Planning and Coordination (WPC) wing of the Ministry of Communication allots a frequency, a letter of intent (LoI) is issued. The MIB will, within one month of receipt of the application, either communicate its deficiencies or forward the copies to other ministries, which will communicate clearance within 3 months. In case of failure to do this, the case will be sent to a committee constituted under the chairmanship of the secretary of the MIB, who will decide on the issuance of an LoI.⁹⁵

Within one month of issuance of LoI, the applicant has to apply to the wing of the

⁹² Community Radio Facilitation Centre (n 13).

⁹³ *ibid.*

⁹⁴ *ibid.*

⁹⁵ *ibid.*

Ministry of Communication and IT for frequency allocation and clearance from the Standing Advisory Committee for Frequency Allocation (SACFA). On receipt of SACFA clearance, the LoI holder shall furnish a bank guarantee for a sum of ₹25,000 after which the LoI holder will sign a Grant of Permission Agreement (GoPA) which will help them seek a wireless operating license. Within 3 months of receiving all clearances, the permit holder needs to set up the CRS and notify the MIB about the date of the commissioning of the CRS. A failure to comply with the time schedules will result in cancellation of the LOI/ GOPA and forfeiture of the Bank Guarantee. The Grant of Permission Agreement is valid for 5 years and is non-transferable.⁹⁶

2. What could the future look like?

The submission of the Additional Solicitor General on behalf of the government, in *Shreya Singhal v Union of India*⁹⁷ is a useful starting point. While arguing for the constitutionality of (now struck down) section 66A of the Information Technology Act, he had drawn a demarcation between traditional media and the internet as a medium of speech. This differentiation, according to the Additional Solicitor General, was rooted in, *inter alia*, the former having an institutionalised system of policies to check against abuse. By the government's own logic, the existence of an institutional policy for medium of speech would warrant a lesser restriction on speech.

In that light, we argue that abuse on community and private FM channels can also be kept under check by setting up of a nuanced regulatory framework in a similar vein to those already existing for the print and television media.

As we have discussed previously, there already exists a centralised procedure for setting up of a community radio channel. For additional safeguards, community radio channels and private radio channels can be arranged in a self-regulatory body in the likes of the NBSA, which would administer a code of standards for news aired on these channels. Adherence to the code would be voluntary. To ensure that a uniform standard of journalistic ethos is preserved across all mediums of news, this code would be emulating the existing best practices.⁹⁸ Among other things, we recommend the code to contain pointers regarding:

1. Impartial and objective reporting.
2. Ensuring that crime reporting does not titillate or glorify crime and violence.
3. Safeguarding the privacy of the individual subjects of the news.
4. Refraining from advocating superstitions and unscientific beliefs.

⁹⁶ *ibid.*

⁹⁷ *Shreya Singhal v Union of India* (2015) AIR SC 1523.

⁹⁸ News Broadcasters Association, *Code of Ethics and Broadcasting Standards* <http://www.nbanewdelhi.com/assets/uploads/pdf/code_of_ethics_english.pdf> accessed 19 July 2019; News Service Division, All India Radio 'AIR Code' <<http://www.newsonair.com/AIR-Code.aspx>> accessed 19 July 2019 (News Service Division).

5. Refraining from any content that pertains to unlawful acts under article 19(2).⁹⁹

Additionally, the code should adhere to reporting best practices during elections, as laid down by the election commission. These include:

1. No coverage of election speeches or other materials that incite violence against one group, based on the group's religion, caste or any other factor.
2. Balanced and objective coverage of political parties.
3. Producers of the show must record a copy of their programme, for reference in the instance of a dispute regarding the content.¹⁰⁰

At this juncture, we should point out that we recognise the flaws of the existing NBSA model of regulation. Practical issues like cross-media ownership, reporting of inaccurate news, unethical practices, are all problems that are plaguing the broadcasting media and its related regulatory body.¹⁰¹ The argument here therefore does not assume that the existing systems are flawless; instead, we engage with the arguments made by the Additional Solicitor General, which proclaimed that the government's magnitude of imposition of speech restrictions would be relaxed should the medium in question have an institutional regulatory framework.

We also recognise that there might be particular additional contextual concerns with the content aired on radio channels. Adequate research and engagement with relevant stakeholders would help to address these issues.

With regards to enforcement of this code, there is already parallel, monitoring mechanisms which would be scrutinising the content aired on these channels, the details of which have been discussed in the preceding sections.

With special reference to the meeting held by the CRS cell of the MIB, a two-pronged adjudication system can now be set up. Individual complaints can be placed before the MIB, which would forward them to the independent body. The independent body would also be responsible for formulating the larger norms of content regulation on these channels through its decisions in both individual complaints as well as in inter-channel disputes, in an open, participative manner. This, in the opinion of the authors, would be an effective, preliminary enforcement backbone to the new regulatory system discussed in the preceding sections.

VI. CONCLUSION

Amartya Sen in his works has compared the conditions and responses of a democratic society with a non-democratic society, in critical times like famines. He picked Botswana

⁹⁹ *ibid.*

¹⁰⁰ News Service Division All India Radio (n 98).

¹⁰¹ S Sivakumar, *Press Law and Journalists: Watchdog to Guidedog* (Universal Law Publications 2015).

and Zimbabwe as case studies for the former, and Sudan and Ethiopia, for the latter. On the face of a shortage in food supply in both these sets, the latter had massive famines, while Botswana and Zimbabwe did not.¹⁰²

He rationalised this phenomenon on the existence of an open media in the democratic countries, which was absent in the authoritarian countries, Sudan and Ethiopia. Existence of a free media meant that there was a possibility of the governments of the democratic countries facing intense opposition and open criticism in the news in case the shortage went from bad to worse. This, according to Sen, was what kept these governments on their toes.¹⁰³

In a similar vein, he also discussed the case of the Bengal Famine of 1943, which he attributed to the lack of democracy in colonial India, severe restrictions placed on the Indian press, and the practice of voluntary silence imposed by the British press. The aggregated effect of this was that there was not enough public discussion on the famine in Britain, and the policies needed to deal with it were never looked upon.¹⁰⁴

These ideas, in aggregation, seem to suggest that an open and deregulated media is an essential feature of a democratic society, and blackouts on the dissemination of information may result in the denial of vital socio-economic rights.¹⁰⁵

Accordingly, we argue that the Indian government's persisting decision to curb the autonomy of private and community radio channels to broadcast their own news, results in a state-sponsored information blackout for communities around India.

This is a problem the Indian democracy should be concerned with. A citizen's right to know is a fundamental liberty under article 21,¹⁰⁶ and this prohibition interferes with it severely. As pointed out, even in times of national crisis, let alone the daily efficient functioning of a democratic institution, what is needed the most is the existence of an open media which can critically examine public affairs. In terms of this ban, therefore, the autonomy of these channels continues to be curbed, with the result that an individual's liberty to disseminate as well as receive varied narratives through radio is infringed, and communities may be left with no other avenue to dissent or oppose the mainstream narrative.

102 Amartya Sen, *Development as Freedom* (OUP 2001).

103 *ibid.*

104 Amartya Sen, *The Idea of Justice* (Belknap Press 2011).

105 *Justice Puttaswamy v Union of India* WP 494/2012 [220] (Chandrachud, J).

106 *Reliance Petrochemical Limited v Indian Express Newspapers* (1989) AIR 190.

