A Human Rights Perspective in the Broadcasting Bill Debate

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CHAPTER 4

A HUMAN RIGHTS PERSPECTIVE IN THE BROADCASTING BILL DEBATE

Mark N. Templeton*

A discussion about broadcasting and telecommunications in India should focus on the right of Indian citizens to seek, receive, and impart information, but the debate surrounding the Broadcasting Bill, 1997 has paid insufficient attention to these fundamental freedoms. These principles require governments to extend non-trivial amounts of broadcasting freedom to individuals and organizations; they also serve as standards by which to judge proposed legislation. Although the principles do not mandate a particular broadcasting system, they do favor a regime in which private programmers have a high amount of discretion and governments act primarily to encourage competition and to address market failures.

The Indian Constitution, the Indian Supreme Court, and the international human rights treaties ratified by the Indian Government all affirm some form of the right to seek, receive, and impart information. Article 19 of the Indian Constitution states that “[a]ll citizens shall have the right to freedom of speech and expression.”1 The Hero Cup decision says that “the right to freedom of speech and expression also includes the right to educate, to inform and to entertain and also the right to be educated, informed and entertained.”2 The International Covenant on Civil and Political Rights (“ICCPR”) states that “[e]veryone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers,

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1 INDIA CONST. art. 19(1)(a).
either orally, in writing or in print, in the form of art, or through any other media of his choice.\textsuperscript{3}

Overlooked in the debate about the Broadcasting Bill, 1997 is a comprehensive discussion of the meaning of this fundamental right. Instead, commentators and critics have focused on the concerns of satellite broadcasters and cable operators and on the effects of specific provisions of the proposed legislation on the distribution of video programming.\textsuperscript{4} To the extent that they have mentioned the freedom of expression, they have done so mainly either in a description of the Hero Cup decision or in a tag line, attempting at the last moment to give some weight to their analyses.\textsuperscript{5}

Human rights activists have been notably silent on the issue. Perhaps they think they have more pressing concerns, such as researching and reporting on more traditional violations of civil and political liberties, such as extrajudicial killings and preventative detentions. Perhaps they are more interested in the Right to Infor-


\textsuperscript{4} See, e.g., Namita Bhandare, Pulling the Plug, India Today, July 28, 1997, at 72; Chari Soni, Needed, Transparency of Intentions, Statesman (New Delhi), June 8, 1997, at 6; Kaverree Bamzai, Broadcast Bill Not to Harp on Using Indian Satellites, Indian Express (New Delhi), May 15, 1997, at 3; Another Prasar Bharti?: Wake Us Up When the Broadcasting Bill Is Passed, Indian Express (New Delhi), May 1, 1997, at 8.

\textsuperscript{5} Only three weeks prior to the start of the Monsoon Session of the Lok Sabha did a handful of articles begin to discuss these issues in much depth. See, e.g., Amit Agarwal & Paromita Mukhopadhay, Doordarshan Rules, OK?, Sunday, July 12, 1997, at 18; A.G. Noorani, Broadcast Law — I: Challenge Before Jaipal Reddy, Statesman (New Delhi), July 7, 1997, at 6; A.G. Noorani, Broadcast Law — II: The Fairness Doctrine, Statesman (New Delhi), July 8, 1997, at 6; A.G. Noorani, Broadcast Law — III: Where is the Autonomy?, Statesman (New Delhi), July 9, 1997, at 6; Bhaskar Ghose, What's the Frequency?, Telegraph (Calcutta), June 9, 1997, at 6. Stories about the notification of the Prasar Bharati Act in August have shown greater sophistication on the part of journalists. See, e.g., Amit Agarwal, Ruling the Air-Waves, Sunday, Aug. 3-9, 1997, at 22; Saibal Chatterjee, An Act Too Late, Outlook, Aug. 6, 1997, at 69; Namita Bhandare & Namrata Joshi, Too Little Too Late, India Today, Aug. 4, 1997, at 72. See also discussion infra note 42 (reviewing the Prasar Bharati Act and the various forms of government sponsorship of public broadcasting). More typical, however, was the Bhandare article regarding the Broadcasting Bill cited above which devoted almost two full pages to a discussion of how the Bill would affect each of the major satellite players, included one paragraph on the Hero Cup decision, and concluded: "But for television viewers there is a larger issue at stake: freedom of speech and the right to tune into the world." Bhandare, supra note 4, at 73.
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mation Act which promises more transparent government. Perhaps they realize that the international instruments contain contradictory provisions, and that the Indian Constitution exceptions clauses make it difficult to make a simple, straightforward argument about the form the new Broadcasting Authority should take. Perhaps they think there is a lack of urgency; after all, these issues were discussed in 1995 and again in 1997, but the Lok Sabha as a whole has not debated the legislation yet. Perhaps they think that the satellite broadcasters and cable operators will fight for media freedoms, and that the human rights community can spend its limited time and energy elsewhere.


7 For example, the Indian Constitution lists limits on the freedom of speech and expression described above:

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.

India Const. art. 19(2). The ICCPR also imposes limits on the freedoms:

The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) for respect of the rights or reputations of others;

(b) for the protection of national security or of public order (ordre public), or of public health or morals.

ICCPR, supra note 3, art. 19, para. 3. This chapter attempts to craft a practical vision of a broadcasting regime based on these rights and their limitations.

8 Private broadcasters in India have made arguments that sound like those that human rights activists would advance. For example, news magazines reported that the lawyers for STAR TV told the Delhi High Court that the Government's ban on DTH service violated their client's right to freedom of expression. See Saibal Chatterjee, Sudden Blackout, OUTLOOK, Aug. 6, 1997, at 68; Paromita Mukhopadhyay, Far from Home, SUNDAY, July 27-Aug. 2, 1997, at 16. Private broadcasters and cable operators in Europe have had success with arguments based on similar principles in European human rights documents and the constitutions of European states. See Informationsverein Lentia v. Austria, 276 Eur. Ct. H.R. (ser. A) at 16-17 (1993) (holding that the state is the ultimate guarantor of a pluralism of views in a democratic society but that Austria had no pressing need for a public monopoly based on the facts of the case and the experience of comparable European states); Autronic v. Switzerland, App. No. 12726/87, 12 Eur. H.R. Rep. 485 (1990) (holding that the right to seek and receive information allows individuals to receive unencoded signals broadcast from foreign satellites); Gropper Radio v. Switzerland, App. No. 10890/84, 12 Eur. H.R. Rep. 321 (1990) (holding that article 10, paragraph 2 of the European Convention on Human Rights ("European Convention") allows a state to regulate retransmission of signals from an unlicensed foreign broadcast station for technical reasons only). See also
I. THE NEED FOR A HUMAN RIGHTS PERSPECTIVE

But those concerned about civil and political rights should make their own arguments and should comment on this proposed legislation themselves. First, their interests are not always aligned with those of the broadcasters and cable operators. Commercial telecasters generally want to maximize revenues, whereas free speech advocates generally want to maximize diversity and the amount and quality of content. Because human rights advocates have a different intellectual approach to the issues, they may identify problems with the proposed legislation which the broadcasters and others may overlook but which may affect the common interests of all parties. Second, politicians and the public may discount the arguments of the satellite broadcasters because of the broadcasters' financial interests or because of the foreign ownership of some leading operators. The economically disinterested voice of the human rights groups will have more credibility in these political debates.


9 See text infra Part IV.

10 Some governments have alleged bias on the part of human rights workers; one technique is claiming that other governments pay human rights workers to attack them. Furthermore, some politicians and academics have rejected human rights as a "Western" idea. Most recently, at the Association of South East Asian Nations summit in Kuala Lumpur in July 1997, Malaysian Prime Minister Mahatir Mohammad called for a review of the Universal Declaration of Human Rights, stating that it had been drafted by the Western nations with little input from Asia and represented primarily a Western perspective.

Nonetheless, the Indian Government pledged to uphold these principles when it voted in favor of the Universal Declaration of Human Rights ("Universal Declaration") in 1948 and when it acceded to the ICCPR in 1979. It is worth noting that two Indians — Lakshmi Menon, Deputy Foreign Minister, and Kamaladevi Chattopadhyay, a noted social activist — were associated with the drafting of the Universal Declaration. At the 1945 San Francisco conference, the Indian Government discussed the mistreatment of Indians under the South African system of apartheid as a human rights issue. See Ravi Nair, International Accountability and National Sovereignty, SEMINAR, May 1993, at 17.

Academics and non-Western human rights activists have challenged the notion that African, Asian, and Latin American perspectives on human rights are different from European and North American ones. Amartya Sen has written recently:

It is important to state at the outset that there are no quintessential values that separate the Asians as a group from people in the rest of the world and which fit all parts of this immensely large and heterogeneous population. . . .
Furthermore, broadcasting freedoms are instrumentally important to the other goals of those interested in civil and political rights. First, more media outlets mean more channels through which human rights activists can distribute information about the misbehavior of the police, the military, and insurgent groups. Although newspapers cover some of these issues, they reach only part of the Indian public; satellite television communicates with the literate and the illiterate. A transparent government becomes

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To conclude, the so-called Asian values that are invoked to justify authoritarianism are not especially Asian in any significant sense. Nor is it easy to see how they could be made, by the mere force of rhetoric, into an Asian cause against the West. The people whose rights are being disputed are Asians, and, no matter what the West's guilt may be (there are many skeletons in many closets throughout the world), the rights of Asians can scarcely be compromised on those grounds. The case for liberty and political rights turns ultimately on their basic importance and on their instrumental role. And this case is as strong in Asia as it is elsewhere.

Amartya Sen, Human Rights and Asian Values, New Republic, July 14 & 21, 1997, at 33, 34, 40. The Asia-Pacific NGO Human Rights Congress has asserted that there is no difference between the Asian and Western conceptions of human rights:

Because of Asian Governments' over-emphasis on cultural specificities as a means to escape international scrutiny, the need for regional human rights instruments like the European Convention for the Protection of Human Rights, American Declaration of the Rights and Duties of Man and African Charter on Human Rights and Peoples' Rights to defend and promote human rights, has not been realized. It reflects the hollowness of the self proclaimed 'Asian Concept of Human Rights.' In fact, many of the proponents of 'Asian Concept of Human Rights' cannot articulate the difference with the Universal Declaration of Human Rights except in terms of justifying human rights abuses, legitimizing authoritarian laws and the patriarchal State.


11 "This is particularly so in a country like ours where about 65 per cent of the population is illiterate and hardly 1-1/2 per cent of the population has an access to the print media which is not subject to pre-censorship." Secretary, Ministry of Info. & Broad. v. Cricket Ass'n of Bengal (1995) 2 S.C.C. 161, 229. While most Indians cannot afford their own satellite dishes, many can pay approximately $2 to $3 per month for a cable connection. Furthermore, there are countless stories about members of the smallest and poorest villages gathering together to watch the latest programs via satellite. For discussions of the impact satellite television is having on Indian society generally, see Amrita Shah, Hype, Hypocrisy & Television in Urban India (1997); Sevanti Ninan, Through the Magic Window: Television and Change in India (1995).

While the increased distribution of information to the illiterate might not have much of an effect on the democratic process in states like Kerala, which in 1991 had a literacy rate of 94% for men and 86% for women age seven and higher, it might have a large effect in states such as Bihar, which had a literacy rate of 55% for men and 23% for women age seven and higher. See Jean Dreze & Amartya Sen, India: Economic Development and Social Opportunity 47 (1995). Satellite television may impact the political situa-
even more accountable if information about its activities is disseminated widely. More privately owned outlets also mean greater exposure of the Indian people to a wide range of opinions, and not just those that favor the Government and its policies. They also expose Indians to the customs and practices of other countries; this can be positive from a human rights perspective if Indians see the police and military in other countries treating their countrymen with respect, and if they witness the international community criticizing other governments for human rights violations. Second, translating human rights ideals into constructive, practical plans for the media and telecommunications sector will improve the credibility of the human rights movement generally.

Those interested in civil and political liberties should feel a sense of urgency about this proposed legislation. If the Bill improves the current regime, why not work for its passage? Why not acquire now the tools and the increased distribution that it seems to offer for human rights work? If the proposed legislation makes the status quo worse, why wait to oppose the Bill? Why risk losing the opportunity to educate the public about the legislation’s failings and to encourage members of Parliament to amend it?

What is clear, then, is that there is a need for a sophisticated human rights perspective on the Broadcasting Bill specifically and media and telecommunications in India generally. As stated previously, this perspective should rest primarily on a rigorous discussion of the practical meaning of the fundamental right to seek, receive, and impart information in the ICCPR and the freedom of speech and expression in the Indian Constitution.

II. CONSTRUCTING A POSITIVE VISION

Human rights treaties seem to approve of a system in which there is a role for both private and public broadcasters. The ideal structure seems to be one in which the government assigns frequencies to private persons, enforces antitrust laws to prevent too

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12 It is hard to imagine many situations in which the government-owned and operated media would be more critical of the state than the private media would be.

13 For example, the American program COPS shows that police in the US follow certain procedural rules in tracking, arresting, and interrogating alleged criminals because the US Constitution and the courts require them to do so.
much concentration in the media sector, monitors the frequencies to ensure compliance with the broadcasting codes, commissions and distributes programming that the free market undersupplies, and subsidizes non-commercial speech by community organizations and private individuals.

Even though the instruments do not discuss a private right of broadcasting explicitly, one can construct a private right for broadcasting from various principles listed in the main international and regional human rights treaties. The agreements discuss the freedom of expression and the right to seek, receive, and impart information widely. The instruments also contain other rights which

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14 The exception is the European Convention which states: "Everyone has the right to freedom of expression. This right shall include the 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 licensing of broadcasting, television or cinema enterprises." European Convention for the Protection of Human Rights and Fundamental Freedoms and Nine Protocols, Nov. 4, 1950, art. 10, para. 1, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953) [hereinafter European Convention]. Declarations by international bodies subsequent to the signing of the international agreements discussed in this section recognize the existence of both print and electronic mass media, the rights of individuals to have access to these forms of communication, and the responsibilities of those who participate in them. The General Conference of the United Nations Educational, Scientific and Cultural Organization ("UNESCO") has noted that the media has a significant role to play in the strengthening of peace and international understanding, that the media should present different aspects of the subjects it discusses, that persons should have access to a wide variety of media sources, and that governments should not hinder or harm journalists in their activities. Declaration on Fundamental Principles Concerning the Contribution of the Mass Media to Strengthening Peace and International Understanding, to the Promotion of Human Rights and to Countering Racialism, Apartheid and Incitement to War, U.N. Educational, Scientific and Cultural Organization, Gen. Conf. Res. 4/9.3/2, 20th Sess., arts. I & II (1978) [hereinafter UNESCO]. Freeing the broadcasting sector would help significantly in achieving the stated objectives of UNESCO.

relate to and rely on the wide dissemination of facts and opinions in a society, such as the rights to education, to take part in government, and to participate fully in a society’s cultural life. Individuals also have some freedom to choose their occupations and to employ their private property as they see fit, within the bounds established by law. Taken collectively, these principles imply a right for persons to broadcast their views and to receive those of others.

The Indian Government is obligated to honor these fundamental principles and international treaties. First, the Indian Government has committed itself to respect and to implement the provisions of the agreements it has ratified, which include the ICCPR and the Universal Declaration. It is legally and morally wrong for a government to pass a piece of legislation that contravenes treaty provisions such as these. Second, these international instruments create a body of customary international law. Even if India has not ratified a particular treaty, the world community will judge India by these civil and political standards. Third, the rights and responsibilities embodied in these agreements are similar to

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16 The right to education depends on access to information at a reasonable price and in a meaningful way. See Universal Declaration, supra note 15, art. 26; African Charter, supra note 15, art. 17; Cairo Declaration, supra note 15, art. 9; European Convention, supra note 14, protocol I, art. 2.

17 The treaties discuss the right of individuals to take part in government directly or indirectly through representatives. To do so intelligently, voters need to have information about the problems they face collectively and about those who seek to represent them. See Universal Declaration, supra note 15, art. 21; ICCPR, supra note 3, art. 25; African Charter, supra note 15, art. 13; American Convention, supra note 15, art. 23; European Convention, supra note 14, protocol I, art. 3.

18 The right to participate fully in one’s culture depends on having the intellectual and material tools for doing so. See Universal Declaration, supra note 15, arts. 22 & 27; ICCPR, supra note 3, art. 22; African Charter, supra note 15, art. 22.

19 The right to choose one’s occupation means that individuals can select careers in which they engage in expressive acts, and that commercial enterprises can arise to collect, organize, and disseminate the works of these persons. See Universal Declaration, supra note 15, art. 23; ICCPR, supra note 3, art. 22; African Charter, supra note 15, arts. 10 & 15; Cairo Declaration, supra note 15, art. 13.

20 The freedom to dispose of one’s property as one wishes, within the bounds established by law, indicates that persons may be able to use their wealth to pay for the distribution of their views. See Universal Declaration, supra note 15, art. 17; African Charter, supra note 15, art. 14; American Convention, supra note 15, art. 21; European Convention, supra note 14, protocol I, art. 1.

21 Declarations by international bodies subsequent to the signing of these treaties recognize the existence of the mass media. See, e.g., UNESCO, supra note 14.
those in the Indian Constitution, particularly with regard to the freedom of speech and expression. Since the Government is bound to follow its own Constitution, it may conform to the international standards whether it would do so intentionally or not.

Admittedly, working with these instruments is challenging. Their provisions seem idealistic rather than realistic. Many of their principles come into conflict with one another directly or indirectly, in theory and in practice. It is hard to determine what tens or hundreds of different framers intended the provisions to mean. And it is difficult to get guidance from the practices at the time the Constitution and Charter were drafted because the technology has changed significantly since then.\textsuperscript{22}

Given that individuals have the rights described above, there may be practical reasons for governments to assign frequencies to those who want to use the electromagnetic spectrum. Conflicting claims to the same space on the dial would lead to chaos. The body politic and those who wish to broadcast have an interest in having the government resolve quickly which parties have rights to which frequencies; in all likelihood the courts would take too long to resolve competing common law-type property rights.\textsuperscript{23} Governments

\textsuperscript{22} The Constituent Assembly finalized the Indian Constitution on November 26, 1949; it came into force on January 26, 1950. Radio broadcasting was quite limited in India in the late 1940s; at the time of India's independence from England, the Government owned and operated 11 stations. Television did not come to India until 1959, more than a year after the Russians launched Sputnik in October 1957. \textit{See} Shah, \textit{supra} note 11, at 74-75; P.C. Chatterji, \textit{Broadcasting in India} 40-52 (2d ed. 1991). It is highly unlikely that members of the Constituent Assembly could have predicted how broadcasting would evolve in the 10 years after the Assembly, much less in the 50 years to come.

India ratified the ICCPR in 1979. At that time, its primary experience with satellite broadcasting had been SITE, lasting from August 1975 through July 1976. The US National Aeronautics and Space Administration ("NASA") and the Government of India arranged for a NASA satellite to beam programs to approximately 2500 direct reception television sets across the country. The Government provided approximately four hours of educational programs per day. \textit{See} Chatterji, \textit{supra}, at 53. It is unclear if the United Front Government realized fully in 1979 that foreigners would be able to broadcast via satellite into India. Previously, the Congress-led Government has shown concern about Pakistan beaming signals into Kashmir and Punjab; the Government opened India's third and fourth television facilities in Srinagar and Amritsar in 1972 and 1973, respectively, to combat this foreign threat. \textit{See} Chatterji, \textit{supra}, at 52.

find themselves needing to mediate between those parties who wish to use the same distribution system at the same time. 24

Society has a legitimate interest in placing some limits on private broadcasting by preventing concentration in the media sector. Citizens are entitled to a wide range of opinions from a wide variety of sources. For a marketplace of ideas to function, there needs to be a market (i.e., many providers of information and ideas, many different types of information). Domination of the media by a few persons could lead to the exclusion of certain information, ideas, or entertainment, whether intentional or not; 25 it might also make it difficult for others to exercise their rights to share their views, regardless of whether those views are similar to or different from those of the oligopolists. Strict enforcement of the antitrust laws seems to be a reasonable way of preventing such concentration and does not conflict with any provisions in the human rights treaties. 26

The international instruments recognize that governments have the right to regulate the content of speech and expression because of other social concerns. The ICCPR, the American Con-

with Thomas W. Hazlett, The Rationality of U.S. Regulation of the Broadcast Spectrum, 33 J.L. & Econ. 133 (1990), reprinted in Krattenmaker, supra, at 59, 61-67 (arguing that U.S. broadcasters generally respected each other's property rights in the electromagnetic spectrum prior to regulation by the US Government in 1927).

24 For a detailed discussion of the pitfalls of a licensing system, see Lucas A. Powe, Jr., AMERICAN BROADCASTING AND THE FIRST AMENDMENT 49-193 (1987). He identifies numerous cases in which those in power in the American Government used the licensing and renewal process to reward those who supported them and to punish those who did not.

25 The counter argument is that a monopolist is better able to fulfill market demand. In Schurz Communications, Inc. v. FCC, 982 F.2d 1043 (7th Cir. 1992), Judge Posner proposed a thought experiment: imagine a world in which there are only two channels. Ninety percent of the audience wishes to hear popular music and 10% classical music. A monopolist who owns both channels will devote one to popular music and one to classical music; two competing operators, each of whom owns a channel, will aim to capture the 90% of the market that wants popular music. Therefore, the monopolist will serve preferences better.

There are two responses to this argument. First, a monopolist may try to charge monopoly prices for his or her entertainments; the prices in a free market would be lower and make the programming more available to advertisers and viewers. Second, there are limited incentives for a monopolist to maximize viewer preferences. A monopolist can show viewers something close to what they would chose to watch in an ideal world; because the program is close enough, people still look at it, but they do not get as much utility or pleasure out of it as if it was their top choice. Furthermore, this dynamic harms democratic society if it reduces the quantity and quality of news available to citizens.

26 For an extensive discussion of the threats of media monopolies to the rights of listeners and to other speakers, see Ben H. Bagdikian, THE MEDIA MONOPOLY (5th ed. 1997) and a set of articles under the heading Media Moguls & Megalomania, INDEX ON CENSORSHIP, Sept.-Oct. 1994, at 14.
vention, and the European Convention all recognize limits for the sake of national security,\textsuperscript{27} the rights and reputations of others,\textsuperscript{28} as well as public order, morals, and health.\textsuperscript{29} The ICCPR and the American Convention also limit war propaganda\textsuperscript{30} and speech or expressive acts that incite national, racial, or religious hatred and that lead to discrimination, hostility, violence, or other similar illegal action.\textsuperscript{31} The American Convention permits the regulation of entertainments to protect children’s morality\textsuperscript{32} and grants a “right of reply” to those “injured by inaccurate or offensive statements or ideas disseminated to the public in general by a legally regulated medium of communication.”\textsuperscript{33} And the European Convention provides for the protection of information shared in confidence.\textsuperscript{34} The African Charter does not limit the freedom of speech and expression directly, but does state that these rights are realized “within the law,”\textsuperscript{35} suggesting that a state has broad regulatory latitude. These provisions state that the freedom of speech and expression is not absolute; the treaties recognize that there are particular circumstances in which other social interests outweigh these rights. With regard to media and telecommunications, the net effect of these provisions is that governments are entitled to regulate the transmission of these types of content and may establish and enforce broadcasting codes covering these topics.

The human rights treaties say that governments should follow certain procedures when regulating speech and expression. First, states must act “by law”; in other words, they must follow procedures established by international or regional agreements, by their own constitutions, or by rules previously determined by the state.\textsuperscript{36}

\begin{footnotesize}
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\item \textsuperscript{27} ICCPR, supra note 3, art. 13; American Convention, supra note 15, art. 13, para. 2b; European Convention, supra note 14, art. 10, para. 2.
\item \textsuperscript{28} ICCPR, supra note 3, art. 19, para. 3a; American Convention, supra note 15, art. 13, para. 2a; European Convention, supra note 14, art. 10, para. 2.
\item \textsuperscript{29} ICCPR, supra note 3, art. 19, para. 3b; American Convention, supra note 15, art. 13, para. 2b; European Convention, supra note 14, art. 10, para. 2.
\item \textsuperscript{30} ICCPR, supra note 3, art. 20, para. 1; American Convention, supra note 15, art. 13, para. 5.
\item \textsuperscript{31} ICCPR, supra note 3, art. 20, para. 2; American Convention, supra note 15, art. 13, para. 5.
\item \textsuperscript{32} American Convention, supra note 15, art. 13, para. 4.
\item \textsuperscript{33} Id. art. 14.
\item \textsuperscript{34} European Convention, supra note 14, art. 10, para. 2.
\item \textsuperscript{35} African Charter, supra note 15, art. 9, para. 2.
\item \textsuperscript{36} ICCPR, supra note 3, art. 19, para. 3; see African Charter, supra note 15, art. 2; American Convention, supra note 15, arts. 27 & 30; European Convention, supra note 14, art. 10, para. 2.
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Only those who have the authority to make these types of decisions may do so, and they must not do it in an arbitrary or capricious manner. Second, signatories can restrict rights only for the purposes listed in the text; they may not impose on the freedoms any more than necessary. Third, the restrictions must be reasonable and necessary. In the broadcasting context, these provisions mean that the government should interfere minimally with broadcasters' and cable operators' programming selections.

Applied correctly, the limitations on the rights of broadcasters actually further the freedom of speech and expression by taking into consideration viewers' rights. Concentration in the media sector may distort both the type, amount, diversity, and price of entertainment and information provided; the enforcement of antitrust regulation should minimize these problems. Viewers may have legitimate concerns about young persons accessing materials that may harm their social and moral development; "safe-harbor" provisions which lead certain programming to be aired later in the evening may be appropriate under certain circumstances. It is in the interests of listeners — and the rest of society — that broadcasters do not whip the population into a frenzy with national, racial, or religious hatred. These examples show that the right to seek and receive information may lead to legitimate and necessary limitations on the right to disseminate information. This observation is not inconsistent with a human rights approach to these issues.

This vision for broadcasting also has a role for the state as a provider and distributor of programming. The free market may undersupply certain types of content. For example, private broad-

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37 The right to equal protection supplements the explicit procedural guarantees. See Universal Declaration, supra note 15, arts. 2 & 7; ICCPR, supra note 3, arts. 2, 3, 14 & 26; African Charter, supra note 15, arts. 3 & 19; American Convention, supra note 15, arts. 1 & 24; European Convention, supra note 14, art. 14.

38 See Universal Declaration, supra note 15, art. 30; ICCPR, supra note 3, art. 5; American Convention, supra note 15, arts. 29 & 30; European Convention, supra note 14, art. 17.


40 See Action for Children's Television v. FCC, 58 F.3d 654 (D.C. Cir. 1995) (en banc) (holding that the Government's interest in protecting children is compelling and outweighs the freedom of terrestrial broadcasters to air indecent programming at any time they desire), cert. denied, 64 U.S.L.W. 3455 (1996). But see J.M. Balkin, Media Filters, the V-Chip, and the Foundations of Broadcast Regulation, 45 Duke L.J. 1131 (1996) (arguing that new technologies that allow viewers to screen programs on a more selective basis may reduce the need for safe-harbor provisions for indecent programming).
casters may not provide sufficient amounts of vocational programming because those who seek training do not have a lot of disposable income and are, thus, not a desirable audience for advertisers. While it is in the interests of these persons and of society as a whole that these persons receive the training they desire, the market cares only about the immediate advertising revenue and production costs. It would seem to be appropriate, then, for the government to take an active role to ensure that this type of programming is provided. It should own and operate its own network for this purpose and others like it, so that the government does not need to require private programmers to carry such content. To do so might interfere with the broadcasters’ and cable operators’ rights not to express themselves on certain issues. Furthermore, the government should be able to comment on matters of public interest through the broadcast spectrum; it should be entitled to counter directly misinformation supplied or misrepresentations made by the private broadcasters.

The government should also facilitate the presentation of views alternative to its own and those of the private broadcasters. Clearly, the government does not have the financial resources to fund fully everyone who wants to own and operate their own broadcasting enterprise. But the government can make time available to those who wish to share their views with their fellow citizens. It could use a first-come, first-serve method or a lottery for allocating time to different persons for non-commercial purposes. These individuals and groups would then be able to realize fully their constitutional right to disseminate their views widely, and the body politic would benefit from hearing alternative ideas and information.41

Thus, a mixed system appears to be best in light of the goals of the human rights movement. It recognizes that persons have a right to disseminate their views through wires and the electromagnetic spectrum, and that other persons are entitled to receive these ideas and opinions. It acknowledges that there is a practical role for government in ensuring that private parties do not interfere with each other’s transmissions. Such a system allows government to intervene when broadcasters air content that is socially disrup-

41 A Bangalore-based organization has advanced similar proposals for community radio stations. See, e.g., What Happened to the Humble Radio?, PIONEER (New Delhi), June 17, 1997, at 14.
tive or hurtful, and it looks to the state to fix market failures such as the underproduction of certain types of programming and the underrepresentation of certain voices in the social, political, and cultural debates.\textsuperscript{42} The public and private broadcasters thus serve as a check on each other’s excesses, while each focuses on different types of issues. The net result is that citizens have the fullest form of their freedoms as both speakers and viewers.\textsuperscript{43}

III. LIMITATIONS OF A HUMAN RIGHTS PERSPECTIVE

A human rights perspective does not answer every question about the form of the new broadcasting authority or the structure of the media sector. Human rights instruments are better at listing lofty goals and setting minimum standards of treatment than at giving specific instructions about the form that a particular right is to take in a society.\textsuperscript{44}

\footnotesize
\textsuperscript{42} Theoretically, then, a human rights perspective does not necessarily require the Indian Government to set up an autonomous broadcasting agency, as is done under the Prasar Bharati Act, if the State licenses a large number of private and community broadcasters. The proposal in this chapter allows for more active participation by the Government in the provision and selection of programming than do other schemes which perceive a more limited role for the State. While it is true that autonomous public broadcasters should remedy market failures, they may not, so the government may be compelled to act in order to protect the rights of viewers to seek and receive information. For a helpful comparison of the different styles of public broadcasting in Europe and the evolution of those approaches, see BARENDT, supra note 8, at 50-74.

\textsuperscript{43} Other forms of the human rights argument in media and telecommunications place greater emphasis either on the rights of the broadcasters or on the rights of the viewers. These sets of rights are bound to conflict in some situations. For example, a listener-based approach is more likely than a speaker-based approach to view favorably requirements that broadcasters provide free time to candidates for political office, that they show at least a minimal amount of educational programming, and that they present all perspectives on social and political issues. The academic literature regarding the regulation of broadcasting in the US offers a rich discussion of these conflicts. \textit{See}, e.g., THOMAS G. KRATENMAKER & LUCAS A. POWE, JR., \textit{Regulating Broadcast Programming} (1994); Balkin, \textit{supra} note 40; Powe, \textit{supra} note 24; Owen M. Fiss, \textit{Free Speech and Social Structure}, 71 \textit{Iowa L. Rev.} 1405 (1986); Stephen L. Carter, \textit{Technology, Democracy, and the Manipulation of Consent}, 93 \textit{Yale L.J.} 581 (1984); Lee C. Bollinger, Jr., \textit{Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media}, 75 \textit{Mich. L. Rev.} 1 (1976); L.A. Powe, Jr., \textit{”Or of the [Broadcast] Press,” 55 Tex. L. Rev. 39} (1976); Jerome A. Barron, \textit{Access to the Press — A New First Amendment Right}, 80 \textit{Harv. L. Rev.} 1641 (1967). The goal of the system described in this chapter is to minimize the conflict between these sets of rights and to maximize the enjoyment of them by both sets of parties. \textit{Cf.} KRATENMAKER & POWE, \textit{supra}, at 317-22 (articulating three principles for the regulation of the media by government and arguing that no one principle should be favored over the others).

\textsuperscript{44} An analogy can be made to criminal law and criminal procedure. Human rights instruments are better at stating what types of punishments the state should not impose (e.g.,
Under many theories about the role of human rights, states have wide latitude in defining what these rights entail. For example, different societies are likely to have different conceptions of "public morality" and "public order." Different countries have different histories, demographics, laws, and domestic and international interests; their judges may construe treaty provisions differently from those who preside in other countries. Different legal systems may allocate property rights differently; what is owned and controlled privately in one country might be owned and controlled by the collective in another, and one's right to use or to direct what is owned by the collective may vary from society to society.

The treaties allow governments to balance rights when they come into conflict. Journalists may have a free speech right to describe a criminal proceeding, but defendants have a right to a fair trial; reporters may have the freedom to communicate facts to their readers, but those they cover may have a right to privacy. These situations require a state to balance the conflicting rights, and, in some cases, the human rights instruments permit a government to subordinate the right to seek, receive, and impart information.

Human rights treaties justify better claims of private individuals of a right to broadcast than those of private companies. Almost all of the international instruments guarantee rights to individuals, not to corporations or partnerships. Although it is possible to argue that the freedoms of association and of occupation imply that collections of individuals in corporate form have similar rights

the death penalty) than in establishing specific sentences for specific crimes (e.g., 5 to 10 to 25 years in prison for illegal possession of narcotics). The treaties are better at identifying principles for criminal procedure (e.g., that suspects should not be tortured) than at fixing every last detail about how the state treats criminals (e.g., whether prisoners' diets include meat). States have a great deal of flexibility in determining the exact form of these systems once they have complied with the basic standards established by the human rights treaties and principles.

45 See American Convention, supra note 15, art. 8, para. 5; European Convention, supra note 14, art. 10, para. 2.

46 See Universal Declaration, supra note 15, art. 12; American Convention, supra note 15, art. 11; European Convention, supra note 14, art. 8.

47 Article 2 of the African Charter refers to individuals. See African Charter, supra note 15. Article 1 of the American Convention refers to persons, but says that "[f]or the purposes of this Convention, 'person' means every human being." American Convention, supra note 15, art. 1, para. 2. Only the European Convention refers to "everyone" in the first and subsequent articles. See European Convention, supra note 14.
for disseminating their views publicly, most of the treaties do not extend their rights to companies per se. Human rights instruments do not offer the best support for private corporate broadcasters in this regard.\textsuperscript{48}

Human rights treaties are moderately more helpful for establishing that foreigners have a right to broadcast. Almost all of the treaties state that the member states must extend all rights and responsibilities to all individuals under their jurisdiction.\textsuperscript{49} Therefore, foreigners should be entitled to those protections.\textsuperscript{50} What is unusual in the case of satellite broadcasting is that foreigners may not strictly be subject to the jurisdiction of these states: they never set foot in the countries and do not necessarily conduct any business there in the sense that they may not exchange money or physical goods. It would be possible to argue that the rights do not extend to foreigners because they never permit the Government to place any responsibilities on them. It is also worth noting that the European Convention states that "[n]othing in Articles 10, 11 and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens."\textsuperscript{51} The Convention does not define political activity, but one could imagine a scenario in which a government classifies news broadcasts as a form of political activity and thus limits the rights of foreign

\textsuperscript{48} That said, the Indian Supreme Court essentially extended the freedom of speech and expression to news organizations in Bennett Coleman v. Union of India, A.I.R. 1973 S.C. 106, 115. As Durga Das Basu explained:

It has, however, been held that though a company, not being a 'citizen,' may not be entitled to a fundamental right under Art. 19, and may not be entitled to apply for enforcement of such right under Art. 32 or 226 of the Constitution, the rights of its shareholders are necessarily affected where the rights of the company are affected. Hence, where a newspaper company is incorporated in India, its Indian shareholders, who are citizens of India, may challenge the constitutionality of a law of Government order which infringes the freedom of expression of such Press or newspaper. . . .


\textsuperscript{49} See ICCPR, supra note 3, art. 2; American Convention, supra note 15, art. 1; European Convention, supra note 14, art. 1; African Charter, supra note 15, art. 2.

\textsuperscript{50} India has declared that "[w]ith reference to article 13 of the International Covenant on Civil and Political Rights, the Government of the Republic of India reserves its right to apply its law relating to foreigners." CENTRE FOR HUMAN RIGHTS, supra note 3, at 10. Article 13 pertains to the expulsion of aliens lawfully in the territory of a state party to the Covenant. This is the only reservation of the Government of India with respect to the ICCPR that relates to foreign persons; the Government has made no formal declarations limiting the application of article 19, the right of freedom of speech and expression, with regard to foreigners.

\textsuperscript{51} European Convention, supra note 14, art. 16.
broadcasters, even those who uplink from the country's own soil. Although India is not a signatory to the European Convention, its courts might look to it for guidance in determining what types of limitations are acceptable under customary international law.\textsuperscript{52}

Human rights treaties do not set crucial quantitative measures. Human rights principles say that a diversity of viewpoints is good, that people from different backgrounds should be able to express themselves, and that concentration of the media is problematic: the challenge is translating those ideals into numerical guidelines for foreign equity and cross-media holdings. Some foreign equity and some cross-media holdings are bound to be good,\textsuperscript{53} but it is unclear what percentage of each is in society's best interest. The numbers written into the legislation may have a huge effect on the types of programming available to Indian citizens, especially if they require some of the foreign broadcasters to shut down their operations. But human rights treaties do not give much guidance as to the optimal level of these key measures.

Human rights arguments regarding broadcasting are likely to frustrate people of almost all persuasions.\textsuperscript{54} They say that speech can be regulated, but not by too much and only for certain reasons. They say that individuals have a right to express themselves, but that the government may punish them after the fact for what they have said. They do not establish an absolute right for corporations

\textsuperscript{52} The argument that foreigners have a right to broadcast would not sway Justice Jeevan Reddy. In his concurrence in the Hero Cup case, he stated that "[t]he foreign agency cannot claim or enforce the right guaranteed by Article 19(1)(a)" because they are not citizens. Secretary, Ministry of Info. & Broad. v. Cricket Ass'n of Bengal (1995) 2 S.C.C. 161, 295.

\textsuperscript{53} Foreign owners may have more technical expertise, more money to spend on programming, and a different perspective than domestic broadcasters, and those who own multiple media outlets can realize cost savings which they may then invest in better programming. Thus, some may be concerned that foreign broadcasters may outbid domestic media outlets for locally produced programming consistently because the foreign broadcasters may have greater financial resources than do the domestic media companies. It is important to remember that the domestic production companies benefit from this type of competitive dynamic. When the supply of programming increases in response to the overwhelming demand for it from broadcasters, the viewers will benefit because they will have more choices for information and entertainment. Furthermore, while it is true that the lack of "deep pockets" may hinder domestic broadcasters in a bidding war for programming, they may have a superior amount of non-monetary resources, such as knowledge about audience taste, which may level the playing field.

\textsuperscript{54} Human rights law is not that different from constitutional law in this regard, except that the binding authority of the later is generally not questioned.
or foreigners to broadcast. And they provide only general guidance in answering key quantitative questions.

IV. The Value of a Human Rights Approach

Despite these failings, a human rights perspective does have value in this debate. Whether or not the human rights treaties give clear guidance on how to resolve competing values, they do identify issues for examination and consideration — issues that most parties in the debate have not discussed publicly.55

A human rights perspective leads one to ask why the proposed legislation criminalizes the reception of “unauthorized” signals. Section 21 of the draft Bill states:

A person who in contravention of the provisions of this Act . . . receives any broadcasting service which is neither a licensed service nor a permitted service . . . shall be guilty of committing an offence of illegal broadcasting and on conviction, shall be punishable with imprisonment which may extend upto five years, or with fine which may extend upto rupees ten lakhs [US 28,000] and in second and every subsequent offence such fine may extend to rupees fifty lakhs [US 140,000], or with both.56

Therefore, a person could be imprisoned for watching a satellite service that is not uplinked from Indian soil and that does not qualify for a special news or sports channel exemption under section 22; it is worth noting that the exemption is, for the most part, only available for channels which fulfill the Broadcasting Authority’s “programme standard”57 or which carry no more than a limited number of advertisements.58 The reception of “unauthorized” shortwave broadcasts would also lead to criminal liability.59 These provisions seem to cut against the values listed in human rights agreements by interfering with the rights of viewers to seek and receive information. They attempt to restrict speech for reasons not listed specifically in any of the treaties. Furthermore, they punish not the speakers, but the listeners for actions that the speakers failed to take (i.e., registering with the Indian authorities).

55 To my knowledge, no person has acknowledged any one of the following three points with more than a one or two-sentence paragraph.
57 Id. § 22(iii).
58 See id. § 22(ii)(b).
59 Id. § 21.
A human rights perspective asks if the draft legislation gives the Government too much ability to regulate content. For example, the draft Bill appears to give the State a back door for regulating access to the World Wide Web. Although the responsibility for overseeing these resources may appear to belong to other authorities and ministries, the Bill does give the Broadcasting Authority the right to regulate services which transmit audio, visual, or audio-visual programming, "irrespective of the means of delivery of that service."

A program is "any matter the purpose of which is related to entertain, educate or inform the public . . . but does not include any matter that is wholly related to or connected with any private communication." Private communication means "(i) a communication between two or more persons that is of a private or a domestic nature; (ii) an internal communication of a business, government agency or other organisation for the purpose of the operation of the business, agency or organisation; and (iii) communications in such other circumstances as may be prescribed." A World Wide Web site could be regulated under these definitions because it displays a visual image, may entertain or inform the public, and is not a private communication. Needless to say, such regulation would reduce the freedom of expression already available to the Indian public and probably treads on constitutionally protected speech.

A human rights perspective leads one to ask if it is appropriate to prevent whole classes of persons from owning and operating broadcast stations. Schedule I of the draft Bill states that political groups, religious groups, advertising agencies, and foreign individuals and companies are ineligible. In general, these disqualifications apply not just to the bodies themselves, but also to their officers and to the organizations that control these bodies. But the Supreme Court has stated that Indian citizens have a right to express their views and to hear the views of others; they are also entitled to the widest range of opinions. The Bill's restrictions curtail the free speech rights of these individuals and organizations and

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60 Id. § 2(c)(iii).
61 Id. § (2)(za).
62 Id. § 2(z).
63 The Internet can also be used for the transmission of real-time audio signals. See Gurpreetesh Maini, Global Radio on Internet, PIONEER, May 24, 1997, at 7.
64 Secretary, Ministry of Info. & Broad. v. Cricket Ass'n of Bengal (1995) 2 S.C.C. 161, 298.
reduce the diversity of information and opinions available to the public. They are a form of prior restraint based on the status of the speakers and not on the content of their speech.

These are just three straightforward examples how the draft Bill appears to limit the freedom of speech and expression in ways not recognized as legitimate by the international human rights instruments and the Indian Constitution. One could generate similar critiques of the Bill's provisions regarding foreign equity, cross-media holdings, and direct content restrictions. Although the issues regarding these topics would be more complicated, the central finding would be the same: the Bill hinders the rights of Indians to receive, seek, and impart information.

V. Conclusion

One sees three positive aspects of a human rights approach to broadcasting legislation. First, human rights treaties establish fundamental values: the freedom of speech and expression is generally positive, restrictions on the right to seek, receive, and impart information are generally negative. Second, one can construct a positive vision of the role of the broadcasting authority and the structure of the media sector by attempting to maximize these principles with a mixed approach in which there is a role for private broadcasters, private citizens, and the government. Third, these principles provide tools for analyzing the proposed legislation to determine the extent to which it jeopardizes these values.

Just because human rights instruments have their limitations does not mean that they are worthless. Just because there are contradictions in some of their principles does not mean that their values are insignificant. If one judged laws solely on the basis of internal logical or moral consistency, one would reject many laws and most constitutions. Instead, societies work with the texts that they have in order to govern themselves.

The freedom of speech, expression, and broadcasting is of vital importance to individuals and to society. It is necessary for the development of a free conscience and self-fulfillment. It is essential for academic inquiry and artistic expression. It is a fundamental requirement for people to participate in democratic decision making. And it helps individuals and society determine the correct course of action.65

65 See id. at 213.
Human rights activists have been remiss not to focus on these issues or to contribute their position to this debate. These issues merit their attention now. A mixed system maximizes the values contained in these treaties, ensures fundamental freedoms, minimizes impositions on the right to seek, receive, and impart information, and addresses concerns about the dominance of any group of persons or the government. Those who care about civil and political rights can take the arguments listed here and lobby based on them.