Hurdles to Inclusive Media Access in India: An Analysis of the Law Concerning Democratic Use of the Media[1]

The issue of access to media for citizens in order to express their voices has been a murky one in India. Access to expression in the media for different and different kinds of citizens has a direct correspondence with media diversity in the country, at least with source diversity: The more different the kinds of people who have access to media, the more the diversity. Consequently, the more inclusive the media is in terms of sources of opinions.

In judicial discussions in the country, the issues of freedom of speech and expression and diversity within media has often been posed as two opposing issues, in that media diversity is articulated separately and not seen as a part of freedom of speech itself. This has been especially true in the case of jurisprudence around newspapers. In case of television, while media diversity and access to variety of sources and opinions to viewers through television has been framed as a part of the right to freedom of speech and expression, its articulation has actually come in the form of State speech and expression. The present paper hopes to trace this process of legal articulation of media diversity, in the background of two important liberal theories of public speech which have been and can be used to justify two separate lines of legal opinion, and which legal scholarship in recent times has used to understand the framework of speech laws[2]: John Stuart Mill's Marketplace of Ideas, and Jurgen Habermas' Public Sphere.

The present paper analyses legal and judicial arguments and discussions concerning media freedoms and media diversity to distinguish two distinct understandings of speech made through and speech received through media. The attempt is to see the linkages of these two distinct understandings with the theories of Marketplace of Ideas and the Public Sphere. The hope is that this exercise will also provide an insight into how the issue of inclusive access to media and media diversity have been framed in Indian judgments through negotiations between the Marketplace of Ideas and Public Sphere theories.

The Unbridled Marketplace of Ideas as the Upholder of Freedom of Speech

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2 Laura Stein, Speech Rights in America: The First Amendment, Democracy and the Media (University of Illinois Press, 2007).

A series of cases brought before the Supreme Court from 1960s to 1980s, —dubbed popularly as the “Newspaper cases” serve as the starting point for my analysis of legal conception of inclusive media in the country. The first of these was *Sakal Newspapers* v. *Union of India*[3] in 1961 whereby a legislation regulating the price of newspapers according to the number of pages they have, in order to promote “more equal” competition between big and small newspapers, the Newspapers (Price and Page) Act 1956, was challenged in the Supreme Court by a big newspaper and some of its readers. The challenge was raised on the grounds of Article 19(1)(a) of the Constitution of India, which guarantees the Right to Freedom of Speech and Expression. The petitioners argued that regulating the number of pages in a newspaper would lead to the regulation of the volume of circulation of newspapers, by having impact on the number of advertisements a newspaper could carry, and the consequent rise in the price of the newspaper. The argument thus was that the unregulated marketplace of newspapers is an efficient protector of freedom of speech and expression of the citizens. In other words, as long as the marketplace of ideas, the marketplace of newspaper media is left untouched by the State, the freedom of speech in society will remain protected. The concept of freedom of speech and expression is thus conceptualised in terms of a lack—the lack of State interference in the marketplace of place. This argument was in fact upheld by the Supreme Court in the present matter.

Articulation of Media Diversity through a Critique of the Marketplace

But what are the implications of such an unbridled marketplace for inclusive access to media for citizens? Here, I refer to inclusive access in terms of both, the kinds or groups of citizens which get to represent and speak for themselves in the media by accessing it, as well as access to a diversity of sources and viewpoints in the media to other citizens. A distinct line of legal reasoning in India has pointed towards the shortcomings of the Marketplace of Ideas approach in this regard. This is done through the critique of the unfairness of the marketplace, where only those with adequate purchasing power get to express their opinions.

This line of reasoning is apparent in the Government’s argument made in *Sakal Newspapers*. Here, the Government uses the basis of “the interests of general public” under Article 19(6) of the Constitution to defend the Newspaper (Price and Page) Act 1956. Article 19(6) actually provides exceptions to the Right to Freedom of Trade, Business, Occupation and Profession under Article 19(1)(g). In this case interestingly, the Government uses Article 19(6) to develop an argument for the promotion

3 AIR1962 SC305

of media diversity through a regulation which allows for the amplification of the voices of even smaller newspapers. The idea is that when smaller voices of opinion can be as accessible to the public as the voices of big media, then only can the goal of media diversity and an inclusive media from the end of both the news-content maker, and the news-content receiver, can be achieved. This by itself embodies an implicit critique of the Marketplace of Ideas as it seeks to recalibrate the so-called "competition in the marketplace of ideas." It is consequently noteworthy then that the value of media diversity is outlined by the Government, not as an extension or an expansive interpretation of the Freedom of Speech and Expression under Article 19(1)(a), but rather, in opposition to the free "trade" in ideas in the marketplace.

Media Diversity as the Building Block of a Democratic Public Sphere

It is only later, in 1972, in the case of *Bennett Coleman and Others* v. *Union of India*[4] that the articulation of media diversity is done in the positive terms of interaction within a public sphere, rather than in negation of the marketplace of ideas. The facts in *Bennett Coleman* are quite similar to that in *Sakal Newspapers*—in light of scarcity of imported newsprint, the Government comes up with a regulation—the Newsprint Control Order, 1962 under Section 3 of the Essential Commodities Act 1955, in order to limit the number of newspapers a single legal entity can publish and circulate, the maximum number of pages any newspaper can have, and the amount of newsprint which can be allocated to each newspaper. While the majority of the Court in a judgment uses the Marketplace of Ideas theory to reason that such a regulation is against the freedom of speech, as it impinges on competition in the marketplace of ideas, one lone judge, Justice K.K. Mathew, attempts to articulate the concept that media diversity is essential to a democratic and inclusive public sphere.

In his dissenting opinion, Justice Mathew does this by developing media diversity as an extension of the Right to Freedom of Speech and Expression under Article 19(1)(a), rather than in negation of the Marketplace of Ideas approach through Article 19(6). He does this by focusing on the interpretation of the word "abridges" under Article 13 of the Constitution, which among other things, lays down that—

4 AIR1973 SC106

"The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void."

The Part of the Constitution that the abovementioned provision refers to is Part III, which embodies the Fundamental Rights, and Articles 19(1)(a), 19(1)(g) and 19(6) all fall under this Part of the Constitution. Justice Mathew reasons that the Newsprint Control Order, 1962 does not "abridge" the freedom of speech of the citizens. Rather, it *enhances* the freedom of speech by giving equal opportunity to both big and small newspapers to circulate their speech and opinions in similar volumes, so that everyone can have equal access to both. He further elaborates in his judgment that such access is essential if a public sphere of democratic discussions is to be constructed in the country. The rationale is that since diverse citizens are able to access the media to both spread and receive opinions from diverse sources because of the Newsprint Control Order, the Order in fact does nothing to "abridge" Article 19(1)(a), but only expands it. In this manner, with the imagination of democratic communication in the public sphere, there is a widening of the scope of Article 19(1)(a) to include media diversity.

From a Democratic Public Sphere to a State-Defined Public Sphere

The foundations of this imagination of the democratic public sphere however, seem weak, when in the 1995 case of *Secretary, Ministry of Information and Broadcasting* v. *Cricket Association of Bengal,*[5] the Supreme Court conflates media diversity in television to the promotion of public broadcasting. This case comes soon after the liberalisation of television media in the country. It concerns the issue of whether private broadcasting in India is covered under Article 19(1)(a)—in other words, if the use of airwaves for the purpose of private broadcasting is regulated, will it impinge upon the Right to Freedom of Speech and Expression guaranteed by the Constitution? The Court uses the expansive interpretation of freedom of speech and expression under Article 19(1)(a) to include media diversity within its ambit. However it also seems to hold the opinion that such diversity can be best achieved only through the means of public broadcasting. While an attempt is made by the Court to distinguish between the "public" and the "State" to point out that public broadcasting does not refer to State broadcasting, however keeping in mind the structure of the public broadcaster in the country, such a distinction becomes mere rhetoric. Additionally, the implicit call in this

5 AIR1995 SC1236

judgment is that of the inferiority of the Marketplace of Ideas in a democratic setup as against the diversity embedded Public Sphere. But this public sphere is conceptualised as being contained only within the institution of the public broadcaster. This becomes problematic from the viewpoint of all— freedom of speech, media diversity and inclusive access to media in the country.