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CHAPTER 6

THE MARKET FOR LOYALTIES AND THE USES OF COMPARATIVE MEDIA LAW

Monroe E. Price

We have seen in the previous chapter the use of foreign models and comparative media law in several areas important to the drafting of the Indian Broadcasting Bill. These included the licensing of satellite broadcasting services, the licensing of DTH providers, requiring in-country uplinking, the level of foreign equity required for certain kinds of providers, and cross-media ownership restrictions. We also observed certain methodological problems involved in conducting comparative studies and in gathering, interpreting, and presenting data.

This chapter provides a theoretical perspective on the use of media law models in such a comparative effort. We pursue the question posed in the introduction: is media law so country specific, so tied to the mores, history, political structure, regulatory style, and state of the creative industry in a particular place that influences from other contexts are only marginally helpful? Or, on the contrary, is media law, especially in international societies, so much a part of an increasingly transnational whole that any attempt at identifying sharp local differences, unique in style and outcome, is virtually doomed?

I. THE MARKET FOR LOYALTIES

I have attempted to develop an explanatory approach for many examples of media legislation in my book, *Television: the Public Sphere and National Identity*.¹ I made the general and expansive claim that all broadcast regulation is an effort within a society to maintain or adjust a cartel, and not just a cartel of businesses, but one involving the dominant mix of political views and cultural attitudes. I posited that, while such legislation was often justified in terms of preserving or strengthening national identity, national identity was, at bottom, the set of political views

¹ MONROE E. PRICE, *TELEVISION: THE PUBLIC SPHERE AND NATIONAL IDENTITY* (1995).

and cultural attitudes which could maintain the existing power structure. I suggested that, while there were several ways to define "national identity," including a discovery of the "true" or "historic" national identity of a state, this slightly cynical definition (one defined by the power structure so as to maintain its power) enhances our understanding of media legislation from a comparative approach.

If this is true, if broadcast regulation can be seen in this light, then the project of broadcast reform, such as the current reform undertaken in India, takes on new meaning. Broadcast reform would be necessary in a state either if: (1) the existing set of broadcasting laws is inadequate at performing the cartelization function; or (2) the "national identity" has changed or is changing and legislation is necessary to legitimate the new players and, in turn, to protect them against unregulated challenge. A variation on the second premise posits: sharp challenges to the status quo can only be absorbed by opening the system to new players or, put differently, it is only by discussing the possibility of broadcast reform and the hope of expanded entry that the existing cartel can maintain its dominant regulatory position.²

In the Indian context, the issue of cartelization has always loomed large. The Broadcasting Bill, after all, is partly about legitimating, for the first time, competitive private terrestrial broadcasters who might challenge the relative Doordarshan monopoly. The Indian debate, as well, has concerned the very structure of Doordarshan and its relationship to the Government. While this is not an issue in the draft Broadcasting Bill, it is very much part of the reform agenda as indicated by the decision of the Government to implement the Prasar Bharati Act, thus providing more autonomy to Doordarshan.

² In developing a framework for comparative analysis of European media policy making, Karen Siune, et al., defined policy making as "a reaction to a challenge, a reaction that is intended to find a reasonable balance between 'forces of change' and 'forces of preservation'." They also stated that "[i]n the current process of adaptation to technological progress public action strategies in most European countries may seem to be a reaction to the risk of disintegration, especially in cultural matters, in the broadest sense." This logic can also be noticed at the Indian level and underlines partly the concept of the market for loyalties. *NEW MEDIA POLITICS: COMPARATIVE PERSPECTIVES IN WESTERN EUROPE* ch. 2 (Dennis McQuail & Karen Siune eds., 1986).

A. *Examples of the Market for Loyalties*

Before turning further to India, some examples of media statutes reflecting national identity in this cartelized sense may be useful. In Italy, the very architecture of public service broadcasting in the early 1990s reveals a conscious design to accommodate the system of political parties, with Christian Democrats controlling the first channel, Socialists the second, and the former Communist PADS the third.³ In Germany, by constitution and statute, regulation is purposefully inclusive: public broadcasting corporations are obliged to adhere to a rule of internal pluralism, enforced by a governing board, the *Rundfunkrat*, in which the opinions, values, interests, and perspectives in the society must be rigorously represented.⁴ The statutory ideal is for broadcasting to mirror society's composition, but the consequence has been a rough parceling out of licenses among dominant political parties. Specific state broadcasting agencies which supervise the private license holders must assure the realization of the goal that the entirety of the three program channels is pluralistic, i.e., the total of them articulate the plurality of opinions and voice the views of the relevant political, ideological, and social forces and groups of civil society.⁵ The same is true in Belgium, which has a complex broadcasting system due to its different internal cultural and broadcasting policies. The members of the governing body of the public service broadcasters are appointed by Parliament, and its composition reflects the power of the different so-called political pillars (Catholics, Socialists and Liberals). Moreover, in an effort to maintain the so-called "cultural pact" which reflects the "national identity," internal job promotions have not been awarded according to qualifications, but for party loyalty.⁶

³ For a recent account of the crumbling of this architecture, see Robert Graham, *PM Rules the Airwaves: How Berlusconi Won Control of Broadcasting*, FIN. TIMES (London), July 2, 1994, at 4, available in LEXIS, World Library, Arcnws File; see also Don Sassoon, *Italy: The Advent of Private Broadcasting*, in THE POLITICS OF BROADCASTING 119 (Raymond Kuhn ed., 1985).

⁴ See generally VINCENT PORTER & SUZANNE HASSELBACH, PLURALISM, POLITICS AND THE MARKETPLACE: THE REGULATION OF GERMAN BROADCASTING (1991).

⁵ Under an inter-Lander treaty entered into in 1991, the existence of external pluralism is presumed if each of three program channels produced in Germany by three different private broadcasting corporations and broadcast nationwide can be received by more than half the population in Germany. *Id.*

⁶ For a detailed analysis, see JEAN-CLAUDE BURGELMAN, OMROEP EN POLITIEK: HET BELGISCH AUDIOVISUEEL OMROEPBESTEL ALS INZET EN RESULTANTE VAN PARTIIPOLITIEKE MACHTSTRATEGIEEN (1990).

Turkey provides another dramatic example of the effort to maintain control over competition in the market of loyalties, here explicitly in the name of national identity. Since the rise of Kemal Ataturk, the Turkish Government — at least until the middle of the 1990s when realignment occurred — considered what has been called Islamic fundamentalism a threat to the secular state. Advocates of secularism, and certainly those in control of the state prior to the mid-1990s, sought to limit the use of the mass media to their religious competitors. The Turkish Radio and Television Authority (“TRT”) was not only monopolistic, but was in essence the voice of the State, disseminating the unitary ideology and culture of Turkish republicanism; it found itself highly susceptible to government intervention.⁷ Charged by statute with “promoting the values of country, unity, republic, public order, harmony, and welfare and to strengthen the principles of Kemal Ataturk’s reforms[,]”⁸ TRT has been an instrument for cohesiveness in an environment riven by alternate national identities. When TRT was attacked for broadcasting programs that legitimated Islamic fundamentalism, a doctrine considered hostile to the secular state, the Agency’s Director-General was forced by the Government to resign.⁹

The structure of broadcasting is also related to current views concerning federalism and relative autonomy. In Europe, where there is an effort to build what Michael Keating has called stateless nations, like Catalonia and Scotland,¹⁰ broadcasting policy will, over time, reflect internal political adjustments. Systems that have been tightly controlled from the center, in terms of access of images to populations or subsidization of messages of political

⁷ See Asu Aksoy & Kevin Robins, *Gecekondur-Style Broadcasting in Turkey: A Confrontation of Cultural Values*, INTERMEDIA, June-July 1993, at 15; see also Haluk Sahin & Asu Aksoy, *Global Media and Cultural Identity in Turkey*, 43 J. COMM. 31 (1992).

⁸ ELI NOAM, TELEVISION IN EUROPE 258 (1991).

⁹ See *id.*

¹⁰ At the time of writing, a referendum on devolution in Scotland was scheduled to take place. It was, however, expected that devolution, if it happens, would affect broadcasting in a number of ways.

All channels will experience change: the BBC will be under pressure to supply far more Scottish originated programmes, Scotland’s ITV companies will be looking to claw back even more sovereignty over their air time and Channels 4 and 5 will need to improve their Scottish production and extend the diversity of representations of Scotland on screen.

Jane-Ann Purdy, *Assembly to Change Channels*, SCOTSMAN, May 16, 1997, at 29, available in LEXIS, World Library, Curnws File. All this will be heavily influenced by the machinations of the new Assembly. See *id.*

unity, will give way to more decentralized methods of deciding both.

B. *The Market for Loyalties and External Voices*

These examples address the use of law to preserve, adjust, or expand a cartel of loyalties internally and render some division of that internal market. In the world of "globalization," a major challenge to any existing cartel can be deemed to come from abroad. Indeed, the possibility of such a threat can be used, and certainly has historically been used, as a device to build internal support for the existing power structure. In the world of easy data and information transmission, the external threat can be deemed cultural, not military, and ideological, not solely based on force in the traditional sense.¹¹ Here, again, the use of a cultural threat is not a new one, but it becomes, somehow, universalized. The Indian Broadcasting Bill, at least those parts that restrict entry by foreign competitors, can be read as an example of the use of cultural threat to justify protection of the existing cartel.

While law has been used in the past to protect internal producers of national identity from external competition, the effectiveness of law to accomplish so protective an umbrella is now under question. For most of the century, the international order assumed that radio transmissions should be contained primarily within the boundaries of one nation; the international function was to dispense frequencies so as to assure that these conditions of market division were met and enforced.¹² Over the twentieth century, international regulations and arrangements were built to reinforce the national impulse, to limit broadcasting to indigenous, high-quality transmissions of good quality within the frontiers of the

¹¹ The use of a foreign treaty is, of course, a well-known military and political strategy countries are using to create internal coherence or to redeem the authority of unpopular governments, as first described by the Prussian military theorist Carl von Clausewitz. In the days of the Falklands War, Margaret Thatcher could, for instance, whip up a degree of popular support by waving the flag for "our Boys." See BRUCE D. PORTER, *WAR AND THE RISE OF THE STATE: THE MILITARY FOUNDATIONS OF MODERN POLITICS* (1994); JOHN KEEGAN, *A HISTORY OF WARFARE* (1993).

¹² One of R.H. Coase's early economic analyses of law showed how regulation in Britain was used to limit competition from radio signals originating in France and Luxembourg. R.H. COASE, *BRITISH BROADCASTING: A STUDY IN MONOPOLY* (1950). What became the BBC emerged, in part, as a legal expression of fear that unregulated trans-border data flow might injure British nationhood.

country concerned.¹³ In the interludes between great wars, there were bilateral and multilateral agreements to control propaganda subversive to the state system. For example, the League of Nations-sponsored Convention Concerning the Use of Broadcasting in the Cause of Peace provided:

The High Contracting Parties mutually undertake to prohibit and, if occasion arises, to stop without delay the broadcasting within their respective territories of any transmission which to the determinant of good international understanding is of such a character as to incite the population of any territory to acts incompatible with the internal order or the security of a territory of a High Contracting Party.¹⁴

The 1989 European Broadcast Directive illustrates the evolution in Europe from the longstanding approach of exclusion based on national borders to a common union within the community of members based on encouraging free competition for identity while also seeking to regulate competition, even if mildly from outside the community.¹⁵ In the 1994 GATT negotiations,¹⁶ the EU reserved

¹³ See *President Pushes TV Marti; ITU Pushes Back*, BROADCASTING, Apr. 9, 1990, at 37 (discussing message from International Frequency Registration Board, an arm of the International Telecommunication Union, to the State Department concerning the legality of TV Marti, the American initiative to bring its television to Cuba); see also Steven Ruth, Comment, *The Regulation of Spillover Transmissions from Direct Broadcast Satellites in Europe*, 42 FED. COMM. L.J. 107 (1989).

¹⁴ International Convention Concerning the Use of Broadcasting in the Cause of Peace, Sept. 23, 1936, art. I, 186 L.N.T.S. 301, 309. Similarly, in the Litvinov Agreement the US and the U.S.S.R. both promised not to spread propaganda hostile to the other and not to harbor groups working toward the overthrow of the other. Exchange of Communications Between the President of the United States and Maxim M. Litvinov People's Commissar for Foreign Affairs of the Union of Soviet Socialist Republics, reprinted in 28 AM. J. INT'L L. 2 (Supp. 1934).

¹⁵ See generally THE POLITICAL ECONOMY OF COMMUNICATIONS: INTERNATIONAL AND EUROPEAN DIMENSIONS (Kenneth Dyson & Peter Humphreys eds., 1990).

¹⁶ The quota measure was especially (e.g., 50% European works) controversial. Immediately after the Broadcasting Directive was formally adopted, the US objected that some parts of the measure were contrary to GATT. Shortly thereafter, US officials filed a trade complaint with GATT to protest the Directive's quota clause as an "unfair trade practice." Responding to the US complaint, the EC argued that the Directive did not come within the scope of GATT since, first, GATT rules did not apply to services and, second, the quota principle was intended to protect cultural sovereignty and, thus, could well be exempt from the usual GATT restrictions. See Kelly L. Wilkins, Recent Development, *Television Without Frontiers: An EEC Broadcasting Premiere*, 14 B.C. INT'L & COMP. L. REV. 195, 206-07 (1991).

Other issues discussed at the 1994 Uruguay Round (GATT), matters in which the US regarded the EU as behaving in a discriminatory fashion, were subsidies for the sector and the blank tapes levy. At the last moment, the audiovisual sector was removed from GATT at the request of, and thus a "victory" for, France and the European audiovisual sector.

film and television programming from the general lowering of trade barriers on the ground that a European cultural space ought to be preserved, strengthened, and protected from the supposed Hollywood influx. And Canada, on the one hand, and Malaysia on the other, are countries with very different traditions that seek to deploy law, or law in conjunction with the structure of the industry, in an effort to control the relationship between images from abroad and imagery from within. Canada does so in a context in which there is already a rather open society; Malaysia does so in a context in which televised images from abroad traditionally have been tightly controlled.

Considering all of this together, the old ideal — conformity of signal transmission to national borders — has changed in the period of ascending globalism. The excitement, the association with freedom, the attraction to capital lie with the transnational, the accumulation of audience and markets. “Space” (the idea of the unregulable, open skies), both in terms of the locus for transmission and the absence of authority, is said to be replacing “place” (in the sense of the national and the regulable). In the 1970s, the United Nations discussed principles which would not only bar certain kinds of programs from direct broadcast satellites,¹⁷ but would require consultations with governments whose audiences were targeted and, in some exemplars, require national consent for direct broadcast signals that were specifically directed from one state to the territory of another. Opposition to radio pirates was applauded. Twenty years later, though, that is now altered. The efforts of countries to control their information space is questioned in terms of emerging international norms.

The task is to understand which measures, administered in what way, represent an acceptable bridge between concepts of space and concepts of place. To take an example, prohibitions, or restrictive and prohibitive licensing of the ownership of satellite dishes, can be viewed as too rigid an interference with the right to receive information, especially if it is related to a general effort to

The EU was not obliged to apply Most Favored Nation status nor to increase market access, and the US was free to retaliate.

¹⁷ Such broadcasts included “material publicizing ideas of war, militarism, nazism, national and racial hatred and enmity between peoples, as well as material which is immoral or instigative in nature or is otherwise aimed at interfering in the domestic affairs or foreign policy of other States.” *Preparation of an International Convention on Principles Governing the Use by States of Artificial Earth Satellites for Direct Television Broadcasting*, U.N. GAOR, 27th Sess., Annex, Agenda Item 37, at 3, U.N. Doc. A/8771 (1972).

foreclose a diversity of sources of information. In some countries, law sometimes takes the place of force in achieving a desired censorious result.

C. *Advertising in the Market for Loyalties*

Regulation of advertising can be used as an example to show how this process of controlling information, or using law, operates. In a market for loyalties, advocates for disparate national identities will predictably have different attitudes toward the use of ordinary commercial advertising on television and the kind of Western programming that ordinarily accompanies it.¹⁸ The preoccupation that governments have long had with limiting advertising messages and excluding competition from commercial broadcasters suggests that the impact of programming on public allegiances yields a substitute for more traditional packages of identity. Advertising can persuade individuals to consume rather than to save and invest, with consequences for particular visions of the public good. In this sense, marketers of pure national identities, and ideologies that parade as such, compete with sellers of consumer goods who are trying to impress the citizen with another identity. Here the question is how a person, certainly one in a developed society, decides, at the margin, whether a higher or lower percentage of disposable income should go to the state (in taxes), say, for education or environmental protection (to be generous), or, instead, for personal goods like food or television sets or automobiles.¹⁹ In a society of poverty, or where there are passionate masses reflecting on how their lives should be led, the impact may not be measurable in money alone, but in a purer form of sheer human loyalty.

The effect of advertising and of modern Western-style programming in the market for loyalties may also support certain groups. Proponents of some identities recognize the indirect, supporting role that the barrage of traditional commercials, for everything from orange juice to computers, might play in connection with their own narrations of future happiness. Parties advocating a more rapid transition to a marketplace economy in states ambi-

¹⁸ For an understanding of these issues, see STEVEN H. SHIFFRIN, *THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE* (1990).

¹⁹ The notion of elasticity of demand comes into play here. Sellers of ordinary goods often want to know whether — and how much — an increase in price will decrease demand for their product. Manufacturers of national identities, including the state itself, must (in the economic model) ask the same question.

tious to increase their gross national product may see the political benefits of a citizenry exposed to the culture of advertising and consumerism as containing indirect or secondary messages of political significance. That is, apparently, a sufficient explanation for the actions of the Narasimha Rao Government in the early 1990s, as explained in Professor Sinha's chapter in this volume.

We see assertions of national identity in the interstices of commercials, in their depiction of idealized home life, opportunities to travel, or a certain idea of traditional family values.²⁰ Arguably, one message of the sellers of toothpaste and automobiles is the claim that the opportunity to have maximum choice to consume is good. Those who fashion legislation may temper advertising by restricting television, restricting the content of advertising, or confining it to certain channels or times. All these steps may reflect — though not always — a perceived relationship between advertising's impact and the nature of the political system.

If the images of consumer society are supportive of the party in power, then that can be ground enough for their advocacy of an increase in advertiser-supported broadcasting. Alternatively, a ruling coalition may see the images of advertising and the narratives of foreign programs as a threat to its continued hold on government.²¹ These often-foreign images are then characterized as subversive.²² It is as if, though this may not always be the case, they advocate by the basic aspects of their story lines a view of the individual that is wholly at odds with the reigning perspective.²³ These dominant forces fear that the successful penetration of the world view contained in Western advertising might yield a claim for political change.²⁴ The most avid proponents of free market television

²⁰ See CECELIA TICHY, *ELECTRONIC HEARTH: CREATING AN AMERICAN TELEVISION CULTURE* (1991).

²¹ See MARIKA NATASHA TAISHOFF, *STATE RESPONSIBILITY AND THE DIRECT BROADCAST SATELLITE 13* (1987).

²² These images are usually labeled "American" for convenience, though they may originate from many sources and from companies that are not controlled by US citizens.

²³ Certainly, in the Islamic world, this is the view of the influence of Western television.

²⁴ Zhao Shuifu argued that international satellite dissemination conducted by Western developed countries threatens the independence and identity of China's national culture, which includes loving the motherland, hard work, advocating industry and thrift, taking a keen interest in science, attaching importance to culture, and stressing national courage. Precisely because of this, according to Shuifu, the infringement of overseas radio and television and the influence they bring hampers the expansion of national spirit. Zhao Shuifu, *Foreign Dominance of Chinese Broadcasting — Will Hearts and Minds Follow?*, *INTERMEDIA*, Apr.-May 1994, at 8.

have, consistent with this position, argued that the images of Western society, including its advertising, are entitled to some of the credit for the fall of the Berlin Wall and the collapse of the Soviet Union.²⁵ The point here, of course, is not the truth of the claims about the impact of messages, but the perception of that impact and the rhetorical use of it in rendering markets more open or closed.

Constitutional rules like article 19 in India, the First Amendment in the US, the Television Without Frontiers Directives, and other international human rights conventions like the European Convention play a special role in limiting the cartelization of the market for loyalties. These provisions — constitutional, treaty, or basic laws — are essentially curbs on the power of a local political cartel to use law and regulation to screen out voices that seek to alter the current power structure and especially those that seek to use broadcasting, despite the cartel's power to force such change. How these documents are used — or not used — is the subject of an essay in this volume by Mark Templeton.

Taking the market for loyalties approach seriously, broadcast reform would look to countries that face similar problems in preserving (or modifying) the cartel and employ the tools found successful in those other places. Those in charge of the cartel of loyalties would want to find devices to place the power of destabilizing images in what are deemed safe hands. Safe hands might be local hands, corporate hands, or transnational hands; but the question would generally be whether those hands are as non-threatening as possible.

The rhetoric of broadcasting reform is, almost by definition, different from the substance of broadcasting reform, except in a few limited instances. Few modern and democratic governments, or participants in policy making, would articulate a policy of regulatory reform saying explicitly that it was designed to keep them in power. An authoritarian society with a monopoly on information and which represents itself as an authoritarian society might have little difficulty marrying rhetoric to reality. Threats to the monopoly must be defeated, and making that explicit may be part of the ideology of control.

²⁵ See, e.g., SUBCOMM. ON INT'L OPERATIONS, HOUSE OF REPRESENTATIVES, 102D CONG., REPORT OF THE PRESIDENT'S TASK FORCE ON U.S. GOVERNMENT INTERNATIONAL BROADCASTING (Comm. Print 1992).

In most modern societies, however, the elegant language of democracy and openness must be observed even while pursuing the restrictions and cartel-producing results that would be predictable in most markets for loyalties. This is so for several reasons. First, each era has its style and vocabulary in statutes as well as in dress and modes of living. Ours is a style of openness, pluralism, and freedom to receive and impart information. With very few national exceptions, the style is used to the extent possible — in background documents, speeches, findings, and prologues to statutes where that technique is used. Second, the rhetoric or style of openness is, as indicated above, itself a tool of seeming inclusion.²⁶ This is the Orwellian point: the political use of language to cover behavior that is its opposite. Finally, the substance of restriction may ultimately be tested in the courts as well as in the court of public opinion. The language of openness may be considered part of a strategy to convince courts that an otherwise restrictive statute falls within the norms of a constitution or international convention.

II. INDIA, THE BROADCASTING BILL AND THE MARKET FOR LOYALTIES

What are the implications of this approach for understanding the Indian Broadcasting Bill? As various accounts in this volume suggest, much of the history of broadcasting and the press in India is consistent with the market for loyalties theory of broadcasting regulation. The delay in introducing television, the delay in investing in color television, the extremely close relationship between Doordarshan and the Government, the delay in implementing Prasar Bharati, the ban on uplinking, and the virtual prohibition of private terrestrial broadcasters are all consistent with the notion of control of the balance of the voices in the society.

Despite the invocation of Western models and precedents, the implicit strategy of the Broadcasting Bill is to adopt those devices available to restrict competition as well as those measures necessary for reasons of technology, public opinion, and constitutional requirement to allow new entrants. Such a strategy, under a "market for loyalties" analysis, is the outcome of rational behavior by those in power seeking to maintain it. Such a strategy is necessarily

²⁶ Some argue that freedom of expression and openness can even be seen as an ideology, used or abused by different groups in society. See, e.g., Fredrick Schauer, *The First Amendment As Ideology*, 33 WM. & MARY L. REV. 853 (1992).

antecedent to the search for statutory language (including statutory models from abroad) that will enshrine the new arrangements. The world's regulatory practices then present a tool kit which can be examined for techniques and instruments that will together be thought to bring about the desired result.

Given a definition of national identity based on a defense of power by those in control, there are strong implications for any media legislative reform, including the Indian Broadcasting Bill. Those responsible (at the highest level) for drafting and adopting broadcasting reform would introduce just such pieces of "reform" legislation that perform the function desired. In the case of the Broadcasting Bill, if an important function is posited as protecting an existing cartel of loyalties against new challengers, then many of the additions are readily explicable.

For example, one debated issue in the Indian Broadcasting Bill concerned cross-media ownership. An important part of that debate dealt with the expansion of the power of newspapers through acquisition of television licenses. A cross-media ownership rule that curbed these newspapers could have been and was framed in terms of frustrating monopolies. But the rule could also be read as assuring some effort to support a status quo in the distribution of political power. Barred from ownership of television stations, newspapers that represented a particular point of view or segment of a coalition could not gain additional power. The issue would be decided against a background in which there is question whether newspapers have too much influence within parties and whether the larger newspapers and the parties they represent, if they expand, will break the balance of relationship with smaller parties or other forces within the society.

The effect of provisions in the Bill on the internal balance of political forces was augmented by the effect on that balance of what might be called "external influences." Here the licensing of DTH providers and satellite channels comes into play. The critical point is not the direct effect such television might have directly on the young, but, in a stronger sense, the extent to which such television loosens the hold of the existing political hegemony. Foreign signals — or foreign content — may be thought to break down loyalties to significant aspects of the existing power structure.

Some groups might object to foreign signals on principle, but they might also realize that, for reasons relating to that principle, over time images have power to wean people from their prior alle-

giances. If this threat is deemed sufficiently grave it could lead to a joint effort by otherwise squabbling internal forces who agree to put aside their differences; whatever coalition exists internally could be undone if the new television incorporates influences so powerful that they shake most previously conceivable iterations of the status quo.

It is quite easy, then, to look again at the 1997 Indian Broadcasting Bill in the light of this analysis. The most potent threats to the existing cartel, the dominant voice of those in power, are said to be the foreign satellite television broadcasting services. While most of the rhetoric has been about this source of challenge, the Bill is more comprehensive. Because newly issued terrestrial television licenses could be extremely potent challengers as well, they might have more immediate access to homes than those dependent on cable television with its monthly and additional charges and may represent indigenous political forces that have obvious and passionate, information-hungry constituencies. Similarly, cable television could be a threat if it were organized such that cable operators had wide choice as to what should appear on the television screen. All of these are subject to regulation and control as to entry.

The Broadcasting Bill, whether purposely or not, seems designed to deal with influences that could be seen as hegemony-threatening institutions. Television licenses would be granted by a broadcasting authority so composed that it is itself a reflection of the hegemony and certain to be sensitive to its needs. The foreign equity prohibition is another reflection of this attention to the special power of terrestrial broadcasting licenses. Cable television is not only subject to a license itself, but all programming on its channels can be taken only from licensed sources. And the cultural invaders are dealt with through the uplinking requirement and the foreign equity caps. Cross-media ownership prohibitions and restrictions on the number of licenses can be read as establishing legal barriers to the accumulation of significant media power by a dissident to challenge effectively the dominant voice of Doordarshan and other participants in the hegemony.

But the legislation not only restricts, it expands the number of voices, altering or legitimating the existing alteration of a previous status quo. Is such an expansion consistent with the "market for loyalties" theory? The answer lies in how the law determines who is a favored entrant and why. Law, here, can only act as an indica-

tor of intention; the actual administration of the law will determine how the expansion takes place. The Broadcasting Bill, for example, somewhat controversially excludes religious organizations from gaining ownership of a terrestrial license, perhaps because of a fear that the power of television and the power of religion, together, too considerably facilitates the development of an uncontrollable and effective base of challenge.

It is here, too, where the composition of the regulatory authority becomes important, as it is in all societies. The chapter in this volume by Professor Prosser underscores this point. There is rarely anything like complete "autonomy" in such agencies charged with issuing licenses and determining whether the terms of such licenses are being met. But in terms of fidelity to the "market of loyalties" analysis, it is important to determine how controlled and how subject to the influence of the governing structure the authority might be.

Virtually no law can wholly exclude programming from abroad. As S. Jaipal Reddy, the Minister of Information and Broadcasting, has said, India will not be King Canute, seeking to hold back the waves. The incapacity to exclude, however, means finding a way to legitimate and, at the same time, limit an opening that has the inherent capacity to control. The proposed Broadcasting Bill accomplished this in several ways. The primary method was to require uplinking within India for signals that would be directed to an Indian audience (either through cable, direct broadcast, or DTH delivery). Unabashedly, this was thought to be a necessary element of control, an opportunity to have a physical capacity to block, censor, or discipline an entity involved in programming that was considered forbidden.

How does DTH satellite delivery of television channels figure in this under the Broadcasting Bill? Foreign ownership aside, DTH is often deemed to provide the greatest challenge to the existing cartel in the market for loyalties. It appears beyond reach, though it may not be. It appears to be outside the tradition of legal controls over physical matter, though, again, that may be solely because of undue apprehension. Since it would be inconsistent with the desirability of the new rhetoric to exclude DTH as a competitor, a second strategy would be to provide a mechanism in which delay is a likelihood, or one in which the DTH system would go to a favored provider along the lines of the Malaysian model in which

MEASAT, with close ties to the Government, received a virtual DTH monopoly.

The viability of a nation-state depends in part on its ability to invent and nourish national traditions. India, at the time of the Broadcasting Bill debate, was about to celebrate its fiftieth anniversary of independence. However complex the nature of that celebration, it would be immediately comprehended that weakening Doordarshan was against the nation-building vein. In India, the difficulties of nation building are linked to the history of broadcasting and are reflected in other essays in this volume. It was useful to the nation if television provided or nourished new mythologies, new leaders, new histories, or new narratives, and it would be useful if it could continue to do so. But processes of transformation require central direction; that is why harnessing media in the project of change has always been a governmental objective in India as well as elsewhere.

III. THE INEVITABILITY OF COMPARATIVE MEDIA LAW

All this leaves the very difficult question of assessing the nature of broadcast reform in the comparative paradigm. Is media law so country specific, so tied to the mores, history, political structure, regulatory style, and state of the creative industry in a particular place that influences from other contexts are only marginally helpful? Or, on the contrary, is media law, especially in international societies, so much a part of an increasingly transnational whole that any attempt at identifying sharp local differences, unique in style and outcome, is virtually doomed? This essay has been an effort to develop and apply a comprehensive theory — one that has implications in each setting. There is, however, a related mode of comparison: the actual importation of chunks of law from one setting to another. The industry that exists in transferring media law expertise from one place to another certainly claims to perform a function far different from the one that we have so far been discussing.

Thus far in this chapter, the emphasis has been on what we learn from comparative media law analysis about the kinds of strategies that governments follow when they believe that the national identity that has achieved a sufficient degree of political stability is threatened. But this is not the whole story. Media law and policy seem to be like a set of interchangeable machine parts: the ways states deal with problems that are common to many or all of them.

It is as if there is an inventory of applications; the task of the expert is to identify a country or countries with a similar attitude toward the degree of openness in speech, find the bit of law that deals with the particular issue involved (e.g., cross-media ownership or control of obscenity), and then help to retool or modify that bit for adoption elsewhere.

In the post-Cold War world, this task of discovery and transference has been institutionalized and, at least with respect to Central and Eastern Europe and the former Soviet Union, financed by supplier governments. The USAID in the US and the Know How Fund in the UK are examples of this approach. Both have provided grants or contracts to experts to help use national donor expertise to assist in fashioning the media structures in the newly independent or transitional states. Why is this the case? The export of broadcasting systems from the West is deemed important because of a deeply held belief that a democratic media under the rule of law is central to the development of a democratic society. It may also be an aspiration by the exporting country that the adoption of a particular style of system of legal regulation will result in continued relations and the export of television product. In the case of India, the process of providing technical assistance was not, however, a function of foreign governments, nor did it need to be. The Ministry itself and technicians of the Government engaged in research to determine appropriate models abroad. In addition, assistance on these questions have come from the multinational broadcasters themselves, not well-meaning British or French or American public agencies.

Just as there is a functional value to government proponents of foreign models, the same is true for advocacy by private groups. To be sure, transnational companies often cite those examples from abroad that serve their purposes. But they also have a broad interest in consistent and well thought-out legislation of varied impact. It is important, for example, for businesses that are transnational to face government approaches in different national contexts that are as similar as possible. Those companies that seek to do business globally and want to program regionally desire, appropriately, to have some common vocabulary, some common approaches in the absence of a supranational authority. There is a stake in having common language in statutes, and common philosophies in enforcement. These transnational companies need predictability in terms of investment and in terms of the consequences of program-

ming decisions. Overlap, consistency, the evolution of common forms of regulation — all of these lead to efficient and, perhaps, better products.

Foreign models can, of course, provide standards which are, though non-binding, influential assessments of what responsible officials elsewhere, presented with similar problems, have done. As has been indicated, one of the principal examples of the invocation of foreign law as a model in the Indian Broadcasting Bill debate was the decision of the Supreme Court of India in *Ministry of Information & Broadcasting v. Cricket Ass'n of Bengal* in 1995.²⁷ Not only did the decision purport to rely very strongly on American and European precedents, but the documents surrounding the presentation of the Broadcasting Bill, which repeatedly cited these precedents as if they were influential, perhaps compelling, had been absorbed by the policy makers rather than merely reiterated. Justice S. Jaipal Reddy's opinion dealt with the exploration in European and American jurisprudence of the rights of viewers and listeners as opposed, as it were, to the rights of broadcasters. He was relying on interpretations of human rights and constitutional provisions from abroad not because they were binding, but because they provided insight from highly respected individuals who held positions similar to his own, dealing with fundamental documents much like article 19 of the Constitution of India. Where there was a consensus among interpreters, and where that consensus has gained added sanction from being incorporated into international documents, they were found to be influential.

Justice Reddy used the Hero Cup case to rethink article 19 doctrine, to use modes of analysis that had arisen elsewhere, and to determine whether it should be used in the interpretation of the Constitution of India. This was a great and creative use of foreign models: not mechanically, not to further a particular private or cartel view, but rather, in a reasoned way, to determine an alternate idea of speech and the role of government. Justice Reddy's Hero Cup opinion emphasized that Parliament and the Government were mandated by the Constitution to restructure Doordarshan and AIR so that they would be under an autonomous public authority — roughly the result of the then-shelved Prasar Bharati law — and also to have a form of media architecture that permitted independent competition with the government outlets.

²⁷ Secretary, Ministry of Info. & Broad. v. Cricket Ass'n of Bengal (1995) 2 S.C.C. 161.

These are all considerations — strategic, modular, analytic — which seem to militate in favor of the extensive use of comparative models. Yet, without question, some aspects of media law are specifically local and tied deeply to their context. In India, concerns about religion and media are very different from those in the US or Europe. It is not possible to take media-related rulings that stem from the Establishment Clause of the American Constitution and import them, uncritically, into the Indian (or other) setting. Language, too, has extraordinary variables that are so tied to social structure that media rules concerning them have to be dealt with carefully. The Canadian approach, for example, to the decentralization of language rules, and the policies which govern language use in broadcasting, can be influential; but powerful cultural, social, and political differences need to be taken into account.

There are ways, moreover, in which the complexities, technical details, and the very structure of media laws arise out of a specific tradition. In the US, there is a complicated relationship between rules, licensing, and sanctions for the violation of rules. When the fairness doctrine existed and was in full force, for example, it was not enough to know the content of the doctrine; its true meaning could only be understood by knowing when and whether the FCC enforced it, how much of a sanction would be imposed, and whether violation of the doctrine would be relevant at the time of a license renewal. The fact that renewals are now almost automatic, itself, would change the dynamic of a rule's meaning. Thus, at times, societies that enforce a rule readily and harshly (say, closing down a newspaper for violation of a rule against obscenity) consider that they are adopting a standard that exists in another place. But rules come conditioned with an entire cohort of conditions, assumptions, and rules for enforcement. A true adoption does not take place — and maybe never can take place — without bringing the surrounds along with the actual rule.

One other point should be made. No matter what is actually said, however deferential or absorbing a society seems to be to models from abroad, the greatest source for law is internal to the country. Even in the most difficult transitions — those from the authoritarian Soviet regimes to the democratic democracies — what went before was highly relevant to what went after. Language, mode of thinking, and regulatory perspectives are ingrained and inherent. Even where models are specifically adopted — say, the model of the BBC for an autonomy of public service television

— old habits of relationships between governments and bureaucracies cannot easily be avoided. In the Indian Broadcasting Bill, and in *Prasar Bharati*, not only the years of independence, but the years of colonial administration provide a backdrop to the design and implementation of the regulatory authority. The chapters of Se-vanti Ninan and Nikhil Sinha underscore this point.

What is fairly clear, however, is that in a period of globalization, when technology and the changes that technology mandates have so substantial an impact on practices around the world, comparative approaches become essential. The impetus for knowledge about another country's practices in media regulation becomes almost as important as knowing generally about another country's practices in trade. Regional approaches to media imagery, the impact of multilateral agreements and investments on media practices, and the very requirements of those participating in the market all require a process of borrowing or coordination. It is in that sense that comparative law studies become inevitable. The only question is how thoroughly they are conducted and how the complex aspects of the context in which media laws are embedded are understood.

IV. CONCLUSION

Lurking behind all of these issues relating to the use of comparative models is another more difficult question: whether technology — especially transborder technology like satellite and the Internet — intrinsically confounds and resists law, making law a negotiation between state and supplier rather than an order from government to citizen. This question is frequently posed in terms of whether or not there is some degree of technological determinism that makes legal reforms that are not sensitive to them virtually irrelevant. On the Internet, this question has arisen in the context of regulating obscenity or defamation and also adopting a regime that would assure that the copyrights or intellectual property rights of authors and programmers are properly recognized and that compensation for those rights is efficiently enforceable. Already in the US, the Supreme Court has struck down — though not on the unprincipled grounds of technological determinism — congressional efforts to regulate the Internet to prohibit certain “indecent programming” directed to or available to the young. Vagueness, the availability of alternatives, and, in some sense, the very spirit (this

resistance to law) of the Internet frustrate the imposition of certain legal standards.

Domesticating the Internet, which has had a regulation-free and transnational beginning, is one of the obvious challenges or threats and seems quite difficult.²⁸ But the situation may be the same for maintaining the domestication of broadcasting structures that are increasingly like (if not converging with) the Internet system. Here, one may put aside the necessary aspects of regulatory machinery, such as technical aspects of spectrum allocation or even the mechanics of licensing. These aspects of law ordinarily follow industrial precedents, often, in fact, incorporating agreements among the affected businesses which are then enshrined into law. But even those attributes of law that are deemed pertinent to a particular evocation of national identity — regulation of foreign investment, quotas, content norms, and other aspects of law which affect the distribution of television, its availability and cost to large numbers of citizens — are increasingly beyond national power. These laws that seem exceedingly important to a culture may be hard to shape and harder to enforce. It is these provisions that are often invoked by reference to other laws, but where the very availability of law in a global society is most questionable.

Throughout the enterprise, dealing both with the new technologies and the old, not only the translation of words, or even of concepts, but the translation of deeply engaged settings and the machinery of administration must be taken into account. The words of article 19 of the Constitution of India or the First Amendment to the US Constitution, for example, are embedded in the music of their context. For people working in this area, a serious

²⁸ Some have suggested that in the case of the Internet, as an international phenomenon, only a unique set of international treaties can effectively serve to regulate the new services. This view overlooks, however, an important part of the nature of the international community. The international community can agree and act quite decisively where there is a common consensus about values to be protected and the means necessary to protect them. *See, e.g.*, Concerning Problems of Criminal Procedure Law Connected with Information Technology, Recommendation No. R(95)13 (visited Oct. 10, 1997) <http://www.privacy.org/pi/intl_orgs/coe/info_tech_1995.html> (representing a regional multilateral effort by the Council of Europe to increase levels of cooperation in investigation of computer rules). Likewise, the international community becomes powerless to effect change where such consensus does not exist or breaks down as a consequence of different cultural sensitivities (e.g., the regulation of political speech, obscenity, etc.). Moreover, in some countries the concern is more cultural and especially linguistic: there are fears about English language-dominated information services. The same can be said in the case of transnational approaches to regulate broadcasting.

problem involves the portability of these magic constitutional words or their continental equivalents. It is sometimes difficult for those from Washington or Boston who market the First Amendment in Kiev, Kuala Lumpur, Bangkok, or Budapest to understand or translate the complexities of its adaptation. One cannot talk of "judges," of "neutral principles," or of "accountability of government officials to a rule of law" without sensitivity to the differences that may unravel the hidden meanings of these terms.

Even sophisticated experts, schooled in the relativism of anthropology and sociology, find it hard to sort out the comparative aspects of all these questions and to help determine what element from the bundle of historically enacted statutes should be adapted to what context. It is easier to conclude that laws and institutions come in ready-made, almost modular packages, such as model statutes or constitutions. Various units for archiving and evaluative analysis automatically come to mind. These include the persistence of a monopoly in state television, the existence of prior censorship of the press, arbitrariness and corruption in frequency allocation, and recognition of the rights of journalists. Examination of the formal framework can also focus on depoliticizing the appointment of chief executive officers of public service broadcasters, broadening the composition and appointment of supervisory or regulatory bodies, and applying the rule of law to the decisions of government agencies.

The post-modern, post-critical, post-legal realist is more than a naturalist working with cabinets stuffed with statutes, pinned like butterflies under glass. To examine change formally, there is the project of chronicling specific statutory drafts and laws, country by country, organizing them by category, and engaging in a textual analysis comparing proposed and achieved transformations in one state to those in another. But far more is necessary, far more understanding, far more in terms of context, far more in terms of matching the legal equivalents of modern technology to the situation at hand.