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CHAPTER 5

A METHODOLOGICAL PERSPECTIVE ON THE USE OF COMPARATIVE MEDIA LAW

Monroe E. Price and Stefaan G. Verhulst

During the debate over the Indian Broadcasting Bill, one of the most interesting and potentially useful documents was the "Survey of National Broadcasting, Cable, and DTH Satellite Laws" ("Survey" or "Paul Weiss Survey") submitted to the Joint Parliamentary Committee entrusted with the task of fine-tuning the Bill.¹ This Survey was submitted on behalf of the Working Group on the Broadcasting Industry, a subcommittee of the American Business Council ("Working Group" or "Group"). The Survey examines and compares the relevant regulatory regimes of several selected nations² and is, therefore, helpful in understanding the possible benefits and limitations of comparative media law as an aid to legislation and law reform.

There is an increasing demand today for such comparative research, partly due to the growing internationalization and the concomitant export and import of social, cultural, and economic manifestations across national borders. Yet, few have examined the potential methodological issues that exist in the preparation of such work.³ The purpose of this chapter is to analyze the possibilities, limitations, and pitfalls of comparison, and to probe problems

¹ The Broadcasting Bill was immediately referred to a Joint Parliamentary Committee after its introduction in the Lok Sabha in May 1997. The Committee, headed by Sharad Pawar, comprises 20 Lok Sabha members and 10 from the Rajya Sabha (the two Parliamentary Houses). At its first meeting on June 16, the Committee singled out the "contentious" issues of cross-media holdings and foreign equity together with an action plan to examine these issues in more detail. The plan included inviting media companies to make representations on the two issues as well as other provisions of the proposed Bill. It was also stated that the intention of the Committee was to study the models in large democracies such as the US and the United Kingdom ("UK"). Despite the traditional practices of Parliament, the documents and evidence submitted to the Committee were not made public.

² The report examines the relevant laws, regulations and orders of the European Union ("EU"), France, Germany, Italy, UK, Canada, US, Australia, Hong Kong, Indonesia, Japan, Korea, Malaysia, and Taiwan, the Republic of China.

³ Cf. *COMPARATIVE METHODOLOGY: THEORY AND PRACTICE IN INTERNATIONAL SOCIAL RESEARCH* (Else Oyen ed., 1990).

of definition, methodology and presentation. These issues are present in any comparative media structure study, and the Paul Weiss Survey is used as a way of exploring these questions.

I. BACKGROUND: THE PAUL WEISS SURVEY

After the announcement by the Minister of Information and Broadcasting, S. Jaipal Reddy, that a bill had been prepared and was to be submitted to Parliament, a number of the affected broadcasting entities (especially those who were broadcasting via a satellite uplink from Hong Kong and Singapore)⁴ formed a loose association to consider arguments against the most severe and potentially discriminatory aspects of the proposed legislation. The group soon discovered that key issues in the Bill, such as mandatory uplinking within India, a cap on foreign equity participation, and stringent cross-media ownership rules, were being justified by reference to media laws and reforms elsewhere, especially laws of Western Europe. The Ministry of Information and Broadcasting emphasized the relevance of European and other broadcasting models in its *Issues and Perspectives* note, which clarifies the underlying rationales of the Bill: "[F]or formulating a basic framework of the broadcasting law . . . we should follow a model which is already tried and tested elsewhere in the world. . . . For this purpose, broadcasting systems in six countries i.e. USA, UK, France, Germany, Italy and Australia have been studied."⁵ The note establishes, as well, that the UK provides the most relevant model for the basic framework of the proposed Broadcasting Bill. In addition, the note maintains its use of comparisons from other jurisdictions to justify various sections of the Bill.

The Working Group, having read the draft Bill and the statements concerning its history and basis, considered that the purported justifications of the Bill, deeply embedded in the material referred to by the Ministry, were based on misleading information, or at least upon a misconception of the practices of the relevant countries. As a result, the Group engaged the law firm Paul, Weiss,

⁴ The group of broadcasters includes ESPN India, GE International Operations (CNBC), MTV, MGM Gold, Encore International Inc., Motion Picture Association of America, Innerasia Consulting Group, Space Systems/Loral, News Television India (STAR TV), Turner International, Sony Entertainment, Discovery Channel, United International Holding, and Panamsat.

⁵ MINISTRY OF INFO. AND BROAD., *BROADCASTING BILL: ISSUES AND PERSPECTIVES 2* (1996) [hereinafter *ISSUES AND PERSPECTIVES*].

Wharton, Rifkind and Garrison ("Paul Weiss") to conduct a survey of national broadcasting, local delivery systems, and satellite laws. The assumption of the Working Group was that a neutral and informed report, based on such a survey, would help the Parliamentary Committee see the need for an alternative approach from the one contained in the Bill. Phillip L. Spector,⁶ a partner of Paul Weiss in Washington, D.C., who has a longstanding expertise in satellite regulation and in regulation of broadcasting in various parts of the world, was placed in charge of the Survey. The terms of reference stated that the information gathered in the Survey would be factual, tailored to the needs of the Joint Parliamentary Committee, and comprehensive, summarizing the practices of countries which were cited or seemed otherwise relevant. Most importantly, the Survey would present this information in a readily understandable way. In this respect, the Survey would not have explicit conclusions or recommendations.

II. THE STRUCTURE OF THE SURVEY

The first important question in developing the Survey was the choice of issue areas and countries as the basis of comparison; they are the ones "considered to be . . . critical . . . in terms of comparisons to models elsewhere."⁷ The issues selected were as follows:

1. foreign ownership restrictions directed at cable service providers and satellite-delivered television program channels, as well as DTH satellite service providers;
2. cross-media ownership restrictions among DTH and cable service providers and satellite-delivered channels;
3. requirements of auctions for DTH and cable service provider licenses and other restrictive rules concerning the licensing of broadcasting services;
4. requirements for uplinking of satellite broadcasting services within a country; and
5. requirements or strong preferences for the use of orbital slots licensed by the country to providers of DTH or other satellite channel delivery services.

⁶ Together with Patrick S. Campbell, Marcia Ellis and Douglas Melcher, all at Paul Weiss. Stefaan Verhulst, one of the co-authors of this chapter, was engaged as a consultant on European law. The Survey was delivered to the Joint Parliamentary Committee on July 17, 1997.

⁷ See PAUL, WEISS, WHARTON, RIFKIND & GARRISON, SURVEY OF NATIONAL BROADCASTING, CABLE, AND DTH SATELLITE LAWS at ii (1997) [hereinafter PAUL, WEISS].

The issues reflect, in part, the primary concerns of the Working Group. These are most, but far from all, of the issues that dominated both the media and political agenda of broadcasting reform. Noteworthy are those issues where comparative models might have been relevant but were excluded either for reasons of time, unavailability of information, or other reasons. For example, the proposed Indian Broadcasting Bill has very restrictive foreign equity limitations for the licensing of terrestrial broadcasters. A comparative study might have demonstrated that the proposed Indian approach is more exclusionary than the international norm. Similarly, the Paul Weiss Survey did not include a discussion of restrictions on program content. Here too, much could be learned from the practices and regulations of other countries.

It is also possible, perhaps likely, that these excluded issues, such as foreign ownership of terrestrial broadcasting licenses and program content limitations, were not so high on the agenda of the Working Group. Here, the structure of the Survey was itself a reflection of emerging trends in transnational broadcasting where ownership regulation is more contested than programming regulation. The shaping of the Survey implies a higher tolerance for country-by-country program standards than for what might be deemed anti-competitive uses of foreign equity requirements to limit entry into the new technological modes of broadcasting delivery. Similarly, this shaping of the Survey suggests a division between the old technology and the new, with a more universal acceptance of foreign equity limits in traditional forms of delivery of imagery, such as terrestrial television (the scarcity rationale), than in the new and developing forms, such as cable and satellite.

Strictly speaking, the Survey is a form of comparative analysis in which it is the task of the reader to draw interpretive conclusions from the formatted material. The Survey seeks to describe a particular set of issues, country by country, not to draw conclusions as to what conditions lead to what combination of approaches or what combination of approaches is dominant. Nor does the Survey characterize a particular form of government as, say, authoritarian or democratic. In the section on Europe, there are some internal distinctions noted, as, for example, where French practice is contrasted with Italian practice. Here, too, country-by-country regulation is described within the constraints of the EU (or the Council of Europe). One function of the Survey is to show that, despite harmonization of European legal systems, there are deep-

seated differences in ideology, political attitudes, and social and economic policies. Even in Europe, fundamental moral values and philosophies, attitudes to law, and judicial, executive and administrative procedures still have not been wholly reconciled, and these differences are reflected in national media policies.⁸

The Paul Weiss Survey is composed of brief country-by-country discussions, reduced to a set of summary tables. There are tables for the Indian Broadcasting Bill, EU member states, North America, and for Asian/Pacific countries. The table for India serves as a reference point. The EU and its members seem to be those countries, characterized by the Indian Government as "leading democratic countries,"⁹ that are deemed the most influential models for Indian decision makers. The North American table is included because of the relevance of Canadian practices — particularly its historic cultural wariness towards the US — and the jurisprudential role that American precedents play, especially given the American origin of most companies in the Working Group. The Asia/Pacific Table is included for many reasons, but partly because the Indian Government has seemed, from time to time, to describe itself as different from, more democratic than, and with a tendency to be more open than, countries like Malaysia and Singapore.

Geography is one convenient, but by no means the only, method of organizing information for purposes of comparison. The same broadcasting rules could be presented in a tabular way where the organizational principle was related to annual per capita income, length of history of independence, relative level of restrictions, or history and experience with private commercial television. Another possible approach to organizing information concerning regulation — one far more difficult and perhaps impossible — would be to deal with context, not with rules. Societies would be organized by the variety and number of images (through television) that could be received by individuals, which might or might not be a reflection of the formal rules within broadcasting regulation.

Geography does not necessarily distinguish between culture-importing and culture-exporting countries. Canada and the US, both parts of the North American table, are fundamentally similar

⁸ See, e.g., DAVID GOLDBERG & STEFAAN VERHULST, *EUROPEAN MEDIA POLICY: COMPLEXITY AND COMPREHENSIVENESS* (1996).

⁹ *ISSUES AND PERSPECTIVES*, *supra* note 5, at 1.

and archetypically different. Australia and Taiwan, both parts of the Asian/Pacific table, share geography, but come from extremely different traditions. These countries are part of a common physical field of distribution of signals and share similar broadcast strategies, and for that reason may be compared, although in other ways they have histories that complicate this form of organization.

III. THE OUTCOMES OF THE SURVEY

As indicated above, the Paul Weiss Survey is a form of comparative media law research which characterizes and summarizes but refrains from drawing conclusions. The task of the Survey was to present to decision makers in India a summary of practices in response to contentious issues and questions which are critical to the architecture of the proposed Bill.

However, conclusions are readily inferred from the Survey, as they were meant to be. The Survey is studiously factual and carefully objective but is also an advocacy document prepared at the behest of third parties seeking to yield changes in the Broadcasting Bill. It is an advocacy document of a particular kind; it is premised on the notion that accurate information will be a more effective form of argument than impassioned rhetoric. Of course, there are difficult questions imbedded in this form of objectivity: how to select information, which information to exclude or include, or in this case, which countries to exclude or include, even whether asking the question on a country-by-country basis is appropriate. The approach is especially applicable here where the methodology of comparative media law and policy is used both to justify and to influence law reform and legislation.

The outcomes are striking. The Indian table, a description of the proposed Broadcasting Bill, is the referent. It depicts the family of restrictions that exists in the Bill. Mandatory national uplinking is conjoined with channel leasing, restrictions on foreign ownership, restrictive, auction-based licensing of cable and DTH, and strong preferences for the leasing of satellites using national orbits. The tables indicate that none of the comparison countries have the package of combined restrictions and limitations as are present in the Broadcasting Bill. Elements of the Bill, though, may be present in some countries, and concerns that prompted the provisions of the Indian Bill may exist elsewhere as well. However, a canvass of the Survey demonstrates that it is highly unusual to require — as India does — mandatory uplinking from within the

boundaries of a state. Moreover, few of the comparison countries license satellite television broadcasting services, and none license such services uplinked from outside national boundaries. Limitations on foreign equity ownership in satellite television broadcasting services are therefore mostly limited to domestic services. None of the countries in the comparison group auction DTH and cable licenses (as opposed to spectrum allocations). Finally, the Survey shows that no country in the comparison group has as rigid a cross-media ownership restriction or limitation on the number of licenses as India. These conclusions are more valid for European and North American countries but, even looking beyond these preferred models, very few countries have the same combination of competition-depressing factors, mandatory uplinking, satellite television broadcast service licensing, cross-media restrictions, and content restrictions as are present in the Broadcasting Bill.

IV. CAVEATS

Comparative media law studies of the kind reflected in the Paul Weiss Survey are still at the pioneering stage¹⁰ and are both difficult and risky. It is, therefore, necessary to examine the limitations and potential pitfalls of such studies.

Comparisons can lead to fresh, exciting insights and a deeper understanding of issues that are of central concern in different countries. They can lead to the identification of gaps in knowledge and may point to possible directions that could be followed, directions that previously may have been unknown to observers or, in this case, legal reformers. Comparisons may also help to sharpen the focus of analysis of the subject under study by suggesting new perspectives.

Comparative research also poses certain well-known problems (e.g., accessing comparable data and comparing concepts and research parameters).¹¹ These are general problems which confront all cross-national research. Additionally, when comparing different jurisdictions and legal systems further pitfalls can be noticed: (1) linguistic and terminological perspectives; (2) cultural differ-

¹⁰ For earlier notable contributions comparing media laws, see ERIC BARENDT, *BROADCASTING LAW: A COMPARATIVE STUDY* (1993) and WOLFGANG HOFFMANN-RIEM, *REGULATING MEDIA: THE LICENSING AND SUPERVISION OF BROADCASTING IN SIX COUNTRIES* (1996).

¹¹ See LINDA HANTRAI & STEEN MANGEN, *CROSS-NATIONAL RESEARCH METHODS IN THE SOCIAL SCIENCES* (1996).

ences between legal systems; (3) the potential of arbitrariness in the selection of objects of study; (4) difficulties in achieving "comparability" in comparison; (5) the desire to see a common legal pattern in legal systems (the theory of a general pattern of development); (6) the tendency to impose one's own (native) legal conceptions and expectations on the systems being compared; and (7) dangers of exclusion/ignorance of extralegal rules.¹²

The authors of the Paul Weiss Survey forthrightly provide three possible sources of limitations in their own introduction: first, whether the statutory and secondary material available to those engaged in comparative research is adequate for describing the laws of particular countries; second, whether the rapid and constant change of broadcasting and telecommunications law makes it such that information, even if correct when stated, is soon out of date; and finally, even if information is available and correct, whether it is possible to summarize, compress, or reduce it adequately to elements that are comparable. These are questions of organization, terminology, and presentation. Each of these survey-related caveats is worth discussing in detail, while also accounting for the more general methodological problems of comparative research.

A. *Limitations on Availability of Statutory and Other Regulatory Material*

Despite the researchers' expertise and experience in the field, the absence of ready, comprehensive, and up-to-date material remains a definite limitation on the capacity to undertake meaningful comparative media law and policy research. This shortcoming limits the way researchers, advocates, and legislators can use comparative research in their process of reform.

This limitation has also been recognized by some regional authorities which are highly dependent on comparative material in order to monitor the implementation of existing multilateral agreements, for instance, or to highlight the need for action in certain areas. This is especially true since an important function of comparative law research is its significant role in the preparation of projects for the international unification of law.¹³ As the best ex-

¹² See 1 KONRAD ZWEIFERT & HEIN KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW (Tony Weir trans., 1989).

¹³ The political aim behind such unification is to reduce or eliminate, so far as desirable and possible, the discrepancies between the national legal systems by inducing them to adopt common principles of law. The method used in the past and still often practiced

ample of this problem, the Council of Europe in 1992 established the European Audiovisual Observatory¹⁴ to assist in assuring that each member state's broadcasting laws are available and as transparent as possible. More recently, the European Commission developed an even more sophisticated system. The "Communication Concerning Regulatory Transparency in the Internal Market for Information Society Services"¹⁵ states that the regulatory activity for which the ground is being prepared in the member states might, if it is not monitored, jeopardize the objective of attaining an internal market.¹⁶ Re-fragmentation and overregulation are cited as possible consequences of the lack of transparency and comparative data. The Commission proposed four features to obtain greater transparency:

1. a binding legal instrument;
2. a prior information procedure (member states will be obliged to notify the Commission of any draft rule or regulation which will be applicable to Information Society services at a stage in its preparation in which substantial amendments can still be made);
3. a consultation procedure (after notice, a standstill period of three months starts to run during which member states and the Commission may intervene to make comments and opinions); and
4. a committee (to administer the procedure).

today is to draw up a uniform law on the basis of work by experts in comparative law and to incorporate it in a multipartite treaty which obliges the signatories, as a matter of international law, to adopt and apply the uniform law as their municipal law.

¹⁴ Established in December 1992, the European Audiovisual Observatory is a public service organization dedicated to gathering and distributing information on the European audiovisual sector. Currently, 33 European states as well as the European Commission are members of the Observatory. Created under the auspices of Audiovisual Eureka, the Observatory functions within the legal framework of the Council of Europe and carries out its mission with a network of partners, correspondents, and professional organizations. The Observatory publishes economic, legal, and practical information regarding broadcasting and new media and runs a legal information service desk.

¹⁵ Communication from the Commission to the European Parliament, the Council and the Economic and Social Committee Concerning Regulatory Transparency in the Internal Market for Information Society Services: Proposal for a European Parliament and Council Directive Amending for the Third Time Directive 83/189/EEC Laying Down a Procedure for the Provision of Information in the Field of Technical Standards and Regulations, COM(96)392 final.

¹⁶ *Id.* at 23.

At a more international level, the OECD publishes yearly its *Communications Outlook* which includes an overview of the relevant regulatory regimes and policies on telecommunications and broadcasting in specific countries.¹⁷ The case studies largely depend upon the accuracy and expertise of the civil servants who were contacted by the OECD and are, therefore, not always up-to-date or reliable. Moreover, some of the contacted states were reluctant or too late in sending the needed material, making it difficult to draw general conclusions.

But even where there is an organized and institutionalized effort, it is difficult to capture and transmit the nuances of each state's communications and broadcasting regulation and policy. Each law is the result of different initiatives, actions, and logics from various institutions and actors. To understand, for example, broadcasting regulation in the UK (e.g., on issues of ownership), one must have access not only to acts of Parliament, but to policy documents of the Department of Culture, Media and Sport (the former Department of National Heritage), the Department of Trade and Industry, decisions of regulatory agencies such as the Independent Television Commission ("ITC" or "Commission") and the Office of Fair Trading, as well as judgments of the courts. In addition, UK broadcasting (and ownership) policy is — as with other countries — highly influenced by regional obligations (e.g., articles 85 and 86 of the Treaty of Rome) and may be a function of other bilateral or multilateral agreements, including those leading to the formation of the World Trade Organization. Furthermore, court decisions are more important in a common law system than, say, France or Germany, where the civil law culture dominates.

Comparisons — especially abstracted and telegraphed comparisons — encourage a search for certainty (or a kind of statement of certainty) where certainty may not exist. The complicated nature of determining which documents from which agencies are relevant in ascertaining the nature of a state's position on a particular question is a marker of potential uncertainty. In France, for instance, the Act of September 30, 1986 still forms the regulatory basis and framework for broadcasting.¹⁸ However, in order to adapt the legal framework to comply with legal, technical, and market developments, the Act has been modified and amended by

¹⁷ OECD, *COMMUNICATIONS OUTLOOK* 1997 (1997).

¹⁸ Act No. 86-1067 of Sept. 30, 1986 on the Freedom of Communication.

countless laws making it a complex and risky operation, even for an experienced French lawyer, to determine which section has been amended by which law and which new article applies to which situation. A similar situation of complexity and uncertainty existed in Australia until a new regulatory framework was introduced on July 1, 1997, which in itself brings new uncertainties and potential legal challenges.

The same imbalance characteristic of other aspects of international trade and knowledge is also presented in this area of media law and policy. Libraries that may have electronic databases filled with European policies and decisions often are likely to be more limited in terms of their resources concerning other regions of the world. The quality of comparison is a function of the quality and availability of information. In the case of the Paul Weiss Survey, the authors compensated for the lack of printed information by drawing on resources from around the world, including the staff of their Hong Kong office.

Even if the statutes and decisions are available, formal language and legal terminology within statutory or regulatory material are potentially misleading as the exclusive source of law.¹⁹ Words alone do not convey the manner in which concepts are variously carried out and enforced. In some societies, a formal prohibition may be quite strict, but the practice may be quite lenient. A similar divergence may exist when interpreting constitutional principles. US courts, for example, regard freedom of speech almost entirely as a liberty *against* the state, while constitutional courts in Europe treat similar language as incorporating a value which authorizes or directs affirmative state action. It is a difficult task for the comparatist to know how such a deviation between language, practice, and interpretation should be classified and conveyed. This problem can likewise be translated into a concern for the availability of data. A researcher must mediate between, on the one hand, the necessities of concluding and communicating and, on the other, exploring practices far more subtle and complex than the language of law and regulation provides.²⁰ The Paul Weiss Survey is careful to

¹⁹ A fairly extensive literature acknowledging the importance of language as a factor in comparative research and law exists. See, e.g., BERNHARD GROSSFELD, *THE STRENGTH AND WEAKNESS OF COMPARATIVE LAW* ch. 13 (1990).

²⁰ Esin Örüçü lists legal history, sociology of law, anthropology of law, international law, political science, and culture and development studies as playing a significant role in

note that it was restricting itself, to the degree possible, to the formal language of statutes.

Finally, meanings of the same word (even in the same formal language) may vary from country to country. The thing called a "network" in one country may be referred to only as a "channel" in another. Thus, it is not only the formal language of statutes that can be problematic; the translation of different laws and regulations into a common language can also be a potential minefield of misunderstandings. One example involves the original German text of the new 1996 Broadcasting State Treaty, the *Runfunkstaatsvertrag*, which became effective at the beginning of 1997.²¹ Paragraph 28.5 states that stronger anti-concentration regulations have been introduced for information-related "programmes." "Programmes," here, means television services or channels. Since no official translation had yet been developed, the authors of the Paul Weiss Survey had to confirm the proper meaning of the term by consulting with the relevant authorities and expert lawyers in the field.

B. *The Speed of Change of Regulation and Law Within the Telecommunications and Broadcasting Sector*

A second area where a caveat is important has to do with the pace of change. Comparative research usually provides only a snapshot of regulatory formations when a motion picture is required. Even during the three months of completing the Paul Weiss Survey, there was the impending likelihood of important national or regional decisions that could have impacted the final report, the tables, and the presentation to the Joint Parliamentary Committee.

While this is a problem of research generally, and certainly of research that depicts the way in which the world is organized as of a certain date, it is particularly true in the area of telecommunications and broadcasting. For example, at the moment, much is still being decided in the relations between the EU and its member states. In addition, there are complex arrangements among the Union's own institutions (e.g., the rivalry between European Parliament and the different directorates generals of the European

this process of understanding national and mixed legal systems. *STUDIES IN LEGAL SYSTEMS: MIXED AND MIXING* 335-52 (Esin Örüçü et al. eds., 1996).

²¹ *Runfunkstaatsvertrag* of 26 Aug. 1996.

Commission). Law and regulation (e.g., on audiovisual policy²² in general, or on issues of cross-ownership²³ in particular) are still fluid. Technology itself is changing, rendering old categories of regulation confusing and superfluous. The entrance of cable and satellite television, for instance, intensified the pressure or demand for certain kinds of program content across national borders.²⁴ Digital compression solves the problem of scarcity of transmission possibilities (frequencies) and makes a large part of the traditional justification for the regulation of broadcasting irrelevant. Convergence, a favorite doctrine of regulation analysts, suggests that existing categories for regulation are being confounded.

Fundamental changes, which are forcing the community of nations to confront problems of telecommunications, also make law far from static. The debate is not only whether regulation should take place at the transnational level, but whether communications are to be treated as culture or as trade. And while both approaches will undoubtedly be accommodated as an outcome

²² The European Commission, for example, recently considered a memorandum of Commissioner Marcelino Oreja, responsible for cultural and audiovisual policies, reviewing the situation and outlook for the audiovisual policy of the EU. He announced that he planned to present a number of initiatives in the forthcoming months, including the establishment of a high-level study group restricted to only a few members, which would have the task of studying developments in the sector and making recommendations for the future of EU audiovisual policy. Commission of the European Communities, Outlook on the European Union Audiovisual Policy, Press Release, IP/97/717, July 7, 1997, available in LEXIS, Intlaw Library, Rapid File.

²³ Already since the late 1980s, concerns have been expressed within the Community that competition policy fails to control media concentrations due to problems of market definition and issues of pluralism. At the end of 1992, the European Commission published a Green Paper which analyzed the issue of concentration in the media, discussed the need for action and suggested possible courses of action. Pluralism and Media Concentration in the Internal Market — An Assessment of the Need for Community Action: Commission Green Paper, COM(92)480 final. Option one was that no specific action should be taken at Community level; option two proposed cooperative action to ensure greater transparency of media ownership and control; option three proposed to eliminate differences (harmonization) between national restrictions on media ownership. The Green Paper launched a wide consultation process which culminated in the 1994 follow-up Commission Communication. Follow-up to the Consultation Process Relating to the Green Paper on "Pluralism and Media Concentration in the Internal Market — An Assessment of the Need for Community Action": Communication from the Commission to the Council and the European Parliament, COM(94)353 final. Since then, Commissioner Mario Monti (DGXV) has indicated that he is in favor of harmonizing national media ownership rules. However, an agreement on the proposal to be contained in a draft directive has still not been reached at the level of the Commission.

²⁴ See *NEW MEDIA POLITICS: COMPARATIVE PERSPECTIVES IN WESTERN EUROPE* (Denis McQuail & Karen Siune eds., 1986).

evolves, it is the very relationship between the two forces which is vital for shaping doctrine. There are many examples of this rapidity of change in the field of telecommunications and broadcasting. One highly technical, but important, example is whether DTH providers who, as is the practice, provide signals for pay to subscribers rather than free to air are "broadcasters" within the definition of section 310 of the Communications Act of 1934 of the US.²⁵ If a DTH provider is a "broadcaster" within that narrow definition, then foreign equity ownership restrictions apply.

At the time the Paul Weiss Survey was commenced, the staff of the Federal Communications Commission ("FCC") had determined that such a DTH provider was not a broadcaster and that the term "broadcaster" in US legislative interpretation was reserved to those, like traditional terrestrial providers, who furnished a free-to-air signal. At the same time, as the Survey notes, key figures in the Clinton Administration, including the Trade Representative, had written a letter to the Chair of the FCC, suggesting that this was an erroneous reading of the statute. The issue here is the way in which the very concept of DTH is conceptualized and how that conceptualization is harmonized within existing regulatory approaches.

In Canada, as well, there were complicated pending developments at the time the Survey was being completed concerning the Government's attitude toward broadcast signals received domestically from DTH providers using non-licensed orbital slots. The Government issued a policy declaring it illegal for businesses to sell decoding devices and other objects necessary for receiving these foreign signals (usually from the US), and a court decision was pending. While the Survey was being completed, a decision of an intermediate court held that the government prosecutions were lawful.²⁶ It was not clear, nor would it be for months, what impact this decision would have and whether it would lead to a different form of negotiation between the US and Canada. This, too, is an example of a change in law that is hard to characterize and hard to reduce to tabular form.

EU legislation and its implementation is similarly complex and dynamic. The "TV Without Frontiers" Directive is a single-market

²⁵ Communications Act of 1934, 47 U.S.C. § 310 (1988).

²⁶ *Express Vu, Inc. v. NII Norsat Int'l, Inc.*, No. T-1639-96 (Fed. Ct. July 23, 1997), *appeal dismissed*, No. A-541-97 (Fed. Ct. App. Nov. 20, 1997).

instrument which governs transfrontier television broadcasting within the European Community ("EC").²⁷ However, for it to work effectively it is essential that certain elements are implemented in a common manner by all member states. One such element is the determination of which country should have jurisdiction over a broadcaster. From the EC perspective, the crucial factor is that each broadcaster should come under the jurisdiction of one — and only one — member state. In order to achieve that goal, it is clearly essential that a single system of determining jurisdiction be in operation throughout the Community.

This is where a problem has arisen. When member states came to implement the Directive at the national level, differing interpretations of the provisions on jurisdiction developed. In implementing the Directive, the UK, for instance, chose to use the locus of satellite uplink as the basis of jurisdiction. That was the criterion used in the Council of Europe's Convention on Transfrontier Television, which predated the Directive and was to some extent a model for European broadcasting regulation.²⁸ Other member states, however, used the broadcaster's place of establishment.²⁹

The situation did not cause too many practical problems for the UK because the vast majority of services uplinked from the UK were by broadcasters also established in the UK. In 1992, however, the European Commission initiated legal action against the UK on the ground that, by using the country of uplink as the basis of jurisdiction, the UK had misinterpreted the Directive. That process culminated in the judgment by the European Court of Justice ("ECJ") in September 1996, which recognized that "establishment" — having to do with the locus of the business — was the correct basis for determining jurisdiction.³⁰ Consequently, just as the Paul Weiss Survey was being submitted, the House of Lords

²⁷ Council Directive 89/552, 1989 O.J. (L 298). See also Council Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, 1997 O.J. (L 202).

²⁸ European Convention on Transfrontier Television, May 5, 1989, Europ. T.S. No. 132.

²⁹ A broadcaster's place of establishment is generally held to be the place in which it has its head office and where decisions about programming content are made. Uplink is the technical process whereby programs are broadcast from a specific transmitter on earth to a satellite, where they are subsequently downlinked back to satellite receptors on earth.

³⁰ E.C. Comm'n v. U.K. (*Re Television Broad. Directive*), 3 C.M.L.R. 793 (E.C.J. 1996).

adopted a new statutory order³¹ to implement the court's decision, changing the way satellite is regulated in the UK profoundly. Moreover, during the development of the Paul Weiss Survey, the "TV Without Frontiers" Directive was amended in ways that have implications on the regulatory framework of the member states discussed in the Survey.

C. Limitations Based on Selection, Comparability and Simplification

The difficulties involved in comparative media law and policy studies as a result of country selection have already been discussed. The Survey sought to include countries that the Indian decision makers considered relevant and important, especially democratic models that had some of the same concerns about values and public service broadcasting. Further, the Survey, if it were to be an effective commentary on restrictions, such as those on foreign equity holders and national uplinking, had to be sufficiently broad that a variety of models and examples would be included. On the other hand, because of limitations such as the availability of reliable information, some countries that might otherwise have been included in the study had to be excluded.

In general, the comparability of regulatory regimes depends on a number of factors, some constant, many transient. Some commentators³² list the following determinative factors: the cultural, political, and economic components of a society, the particular relationships that exist between the state and its citizens, a society's value system and its particular conception of the individual. Other general factors include the homogeneity of the society in question and its geographical situation, language, and religion. It was clear from the beginning of the Paul Weiss Survey that no other place in the world has India's unique history, diversity, and special cultural needs. Few places, for instance, have had to work out in so complex a fashion the complementary role between the country's center and its regions in formulating broadcasting and cultural policy. There are also few places becoming so fully integrated into the world political and economic discourse. Taken as a group, these form a set of characteristics unique to India that made comparison

³¹ Satellite Television Service Regulations, 1997.

³² See, e.g., PETER DE CRUZ, *A MODERN APPROACH TO COMPARATIVE LAW* (1993).

difficult. It is difficult to find countries that have achieved a similar stage of development given India's various levels of diversity.

The problem of simplification and definition is perhaps even more difficult than the problem of selection. Almost all forms of comparison require the articulation of similarities so that resemblance and differences can be noted. The structure of the Indian Broadcasting Bill featured definitional forms sufficiently new and distinctive that comparison required redefining aspects of other systems.³³ The best example of this is the definition in the Indian Broadcasting Bill of "satellite television broadcasting service" as "a satellite broadcasting service for providing video programmes," where a "satellite broadcasting service" as defined by section 2(ze) means "a service provided by using a satellite and received with or without the help of a local delivery system but does not include Direct-to-Home service."

Here, India was defining the channel, not the carrier, in a way that had little similarity elsewhere, especially in Europe and the

³³ There is, however, a world-wide confusion on how to define satellite broadcasting in general. The International Telecommunication Union ("ITU"), for instance, distinguishes broadcasting satellite services ("BSS") from fixed satellite services ("FSS"), which have different regulatory implications especially at the level of coordination and registration. BSS are intended for direct reception by the general public, which includes both individual and community reception. This aspect of the ITU rules establishes that BSS transmissions are delivered either to individual consumers with a small dish at their home or to cable, MMDS, or SMATV headends for retransmission to consumers via cable. FSS services are provided between specified fixed points, typically involving telecommunications services. When the distinction between BSS and FSS was made, it was not feasible for consumers to receive FSS transmissions without very large antennas. Since then, however, satellite technology has improved, and a substantial number of both C- and Ku-band FSS receivers are now used to deliver entertainment programming directly to viewers. The use of FSS frequencies for "BSS-like" services is often referred to as DTH service.

At a national level, some regulators in Canada, for instance, refer to the industry generally as DTH. The FCC chose years ago to use the term "direct broadcast service" ("DBS") when discussing both domestic policy matters and BSS with regard to ITU spectrum allocation matters. In its latest report on the video market, the FCC included both BSS and Ku-band FSS services as DBS. Other regulators in Europe avoid these terms and simply refer to both FSS and BSS as "satellite broadcasting." Within the satellite industry, most refer to direct broadcasting services using the BSS as DBS, and those using the FSS as DTH. However, as the WTO telecoms talks and other high-level meetings have proven, this confusion is of high significance for operators since depending on how they use these frequencies, it could FSS as DTH. However, as the WTO telecoms talks and other high-level meetings have proven, this confusion is highly significant for operators since depending on how they use these frequencies, it could shape their future regulatory burdens and responsibilities. For an interesting discussion of this confusion, see G.E. Oberst, *Defining Satellite Broadcasting*, VIA SATELLITE, May 1, 1997, available in WESTLAW, Iac-Prompt File.

US. In the US, the relevance of "channel" for regulatory purposes had applied to terrestrial services and was recognized and defined for must-carry purposes on cable television. In Europe and elsewhere, it was the satellite providers which were regulated and the subject of obligations. But the idea of licensing specific channels for non-terrestrial services was largely an innovation in the Indian Bill. This made comparison either too easy or too difficult. Comparison was simplified because a similar form of regulation, with the channel as the defining element, was rare; it was difficult because a conclusion that no similarities existed might not tell the whole story. While Canada, for instance, did not license channels, a process existed in some countries for approving which satellite-delivered channels could be carried, at least on cable television systems.

Cross-media ownership comparisons provided a similar problem. The Indian Broadcasting Bill seemed highly unusual in terms of its prohibitions against ownership of DTH systems and other media. But it was unclear whether this absence of law elsewhere was because of an intrinsic difference between new media and old (in terms of cross-ownership policy) or because governments had not yet addressed the issue.

The need to clarify was the aesthetically appealing side of the need to simplify. Clarifying made it necessary to determine what was actually auctioned in countries like the US (where auctions take place) and what was being proposed for auction in India. The need to simplify helped find the difference between licensing and auctioning spectrum, on the one hand, and licensing or auctioning the right to use spectrum for a delivery platform, on the other. The same need to clarify appeared when considering the licensing regime of satellite services within the EU. As explained above, confusion existed in determining which criterion (uplinking or establishment) should be used to consider which jurisdiction applies. Interestingly, when a service was not established in a European member state (e.g., Doordarshan), it did not need a license at all within the EU.

V. CONTEXT

Whenever it is proposed to adopt a foreign solution that is said to be superior, two questions must be asked: first, whether the solution has proved satisfactory in its country of origin, and second, whether it will work in the country which has proposed to adopt it.

It may well prove impossible to adopt a solution tried and tested abroad, without modification, because of differences in court procedures, the powers of the various authorities, the working of the economy, or the general social context into which it would have to fit.

A problem to be addressed in any comparative study is, therefore, one of context. In terms of media law and policy, for example, it is important to understand the reasons that a comparison is being made, reasons that may not have to do with the law itself, but with the objectives of law. Often the goal of a broadcast regulatory structure is to increase the diversity of voices or to enhance the right of a citizen to receive or impart information. A restriction on foreign ownership may have a totally different impact in a society rich in broadcast signals from one where such signals are few and competition is just beginning. For example, a society like Canada, in which there is a broad array of signals coming from outside its borders, may have a different basis for regulation from a society in which few or no such signals exist. The law proposed may be the same, but its impact on citizens would be far less restrictive in Canada than in a less signal-rich society. There are differences between societies, like the US, where restrictions are few, but signals from outside the country are rare, especially relative to other Western countries. Rules do not often reveal these differences in context, even though contextual differences may justify their very uniqueness. Context can reveal whether a society's rules are supported by unusual problems of language diversity, national security, or adjustment to democratic values. All of these problems are the bases for departures from what might be deemed an international (or Western) norm. A rule does not disclose on its face whether it exists primarily to protect national values and aspirations or to protect entrenched competitors.

Another way to look at the problems of context is to examine issues presented by country-by-country analyses. In its discussion of Australia, for example, the Paul Weiss Survey accurately reports that, while the Australian Broadcasting Authority ("ABA") "generally does not auction subscription broadcasting services licenses[.]" "[a]uctions are sometimes used for commercial broadcasting services (i.e., services that are not DTH or cable television subscription services)."³⁴ This statement, accurate as a summary,

³⁴ PAUL, WEISS, *supra* note 7, at 39.

cannot, of course, convey Australia's troubled history of regulation, re-regulation, bankruptcy and reorganization.³⁵ This history afflicted the development of DTH as a competitor for terrestrial television and as a mechanism to provide better competitive service to wide reaches of the country. Auctions were held for satellite television services, but this meant that ill-prepared licensees, willing to make unrealistic bids, constrained the DTH monopoly position and could not perform the social tasks assigned to them.

Germany provides another example. Like most other European countries, Germany is in the process of relaxing its media ownership regulations. The outcome of ongoing negotiations on the issue of media ownership between the two major political parties (CDU and SPD) has been incorporated into the updated version of the *Rundfunkstaatsvertrag*. As the Paul Weiss Survey notes, the *Rundfunkstaatsvertrag* stipulates that "an illegal level of media concentration is reached if a single satellite television holding company (not a single broadcasting service) captures more than a thirty percent share of the total annual viewership."³⁶ The context of this statement is important. The previous regulations demanded that no company should control more than one general channel and one specialized channel.³⁷ Moreover, the current level of thirty percent is set so high that it is not reached by any broadcaster, including the two major conglomerates, Kirsch and Bertelsmann. The loosening of the regulations has also led to a merger of the broadcasting activities of Bertelsmann/Ufa and CLT/RTL into one single company, Ufa/RTL, it now being the most extensive television actor in Europe.

Describing and analyzing Italian media policy has always been problematic because of its chaotic development, mainly due to political changes. The Paul Weiss Survey describes the situation as it was at the moment of submission, but volatility is hard to communicate. The economy, politics, and media have always been closely linked in Italy. The disappearance of the old political establishment from 1992 to 1994 has sent shock waves through the mass media system. The transition governments of those years and the Berlusconi Cabinet succeeded, to some extent, in ending the domi-

³⁵ See generally JENNIFER CRAIK ET AL., *PUBLIC VOICES, PRIVATE INTERESTS: AUSTRALIA'S MEDIA POLICY* (1995).

³⁶ PAUL, WEISS, *supra* note 7, at 19.

³⁷ For a discussion of the German media policy, see PETER HUMPHREYS, *MEDIA AND MEDIA POLICY IN GERMANY* (1994).

nation of the former parties over the RAI (the public service broadcaster) governing bodies and channels. But, at the same time, the Berlusconi monopoly of commercial television channels came under fire from opposition forces, which also strongly pushed toward a reform of Italy's Broadcasting Act.³⁸

Parliament, at the end of 1995, after more than one year of heated discussion, had not succeeded in finding a viable agreement on new legislation on antitrust nor on the entire radio-television system. The three referenda promoted in the spring of 1995 to bypass the Parliamentary stalemate and to introduce some severe anti-concentration measures missed the target, as the majority of citizens voted against the proposed prohibition to own more than one television channel (first referendum), against the ban on commercial breaks (second referendum), and in favor of a partial privatization of RAI (third referendum). Finally, as the Paul Weiss Survey observes, the new Prodi Cabinet presented a legislation proposal which, if approved, is likely to introduce profound changes in Italy's media domain.

During the preparation of the Paul Weiss Survey, the European Parliament and the Council of Ministers finally adopted the new text of the "Television Without Frontiers" Directive, the main objective of which is to create the conditions necessary for the free movement of television broadcasts. Directive 97/36/EC, which modifies Directive 89/552/EEC, the "Television Without Frontiers" Directive, is the result of two years of intensive negotiations between the EC institutions. Awareness of the context and compromises made during the review permits a better understanding of the new rules. One major issue of dispute was the quota principle. Article 4 of the 1989 Directive stated that member states must ensure that broadcasters reserve the majority of transmission time for European works; the fear was that American programs would otherwise swamp the European market. The types of programs excluded from the quotas (news, sports, events, games, advertising, and teletext services) indicated that the concern was for the European film industry. Article 5 dealt with quotas for independent works (ten percent), which aimed to safeguard the smaller independent sector. The quota principle was highly controversial

³⁸ See Gianpietro Mazzoleni, *Towards a Videocracy? Italian Political Communication at a Turning Point*, 10 EUR. J. COMM. 291 (1995).

and was a major dispute at several meetings on the General Agreement on Tariffs and Trade ("GATT").

During the review of the 1989 Directive, some member states, such as France, supported by the European Parliament, suggested that the quota levels be raised and made more certain. It was generally considered a victory for American program producers when the European Parliament finally voted in November not to tighten the EU's broadcast restrictions on foreign products. The Parliament narrowly approved a measure allowing each of the fifteen EU countries to grant exemptions on a case-by-case basis to the remaining fifty-one percent of EU-produced content on broadcast, cable, and satellite television channels, which can be considered a further watering down of the restrictions. The Parliament decided that instead of greater restrictions, newer methods such as incentives should meet the same objective.

VI. CONCLUSION

It is not only wise, but inevitable, that policy makers aiming at broadcast reform will seek to learn from practices in other systems. The goal of this chapter was to examine the challenges presented in engaging in the process of comparative analysis. We have used the Paul Weiss Survey, designed to aid the legislative review in India, as an example of the complexities of change. We have also tried to address the difficulties imposed by language, technological change, and context. The Study indicates both the strengths and limitations of an exercise in comparative media analysis.