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Regulation of Concentrated Media Ownership: An Essential Step to Preserve Free Speech

by
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INTRODUCTION

In 2012, Independent Media Trust (IMT), a subsidiary of Reliance Industries Limited, advanced a loan to the Network 18 Group, through the subscription of Zero Coupon Optionally Convertible Debentures (ZOCs). These debentures came with the option of being converted into equity anytime in the ten years that followed.¹ This loan was advanced to Network 18 to pick up stakes in Andhra Pradesh-based Ramoji Rao's Eenadu Network, in which Reliance already had a stake.² Since Eenadu is the most widely read Telugu daily³, it hardly came as a surprise when Reliance sought to indirectly acquire a stake in Eenadu, given that Reliance has major gas projects in Andhra Pradesh where it had met with considerable opposition from the ruling Congress government.

Corporations acquiring stakes in media houses is certainly not a new development. In 2012 itself, prominent industrialists like Abhay Oswal and Aditya Kumar Mangalam Birla acquired stakes in NDTV and TV Today respectively in addition to Ambani's acquisition of stakes in Network 18.⁴ The KK Birla Group already has a stake in Hindustan Times and Mukesh Ambani's younger brother Anil Ambani has an investment in UTV Bloomberg through Reliance Capital.⁵ Large businesses acquiring an interest in the media houses purely for commercial purposes should not raise any controversy as over the years, increased audience and advertising revenues have made media stocks a profitable investment and the media business has prospered in an unregulated environment. However, the public



interest demands action when the business aspect of the media seeks to exercise the editorial function in an attempt to restrict the free flow of information and shape the public opinion.

A free press plays a crucial role in democracy. The general populace depends on the press for credible information regarding the state of affairs in a nation. The foundation of debate and discussion in a democratic society is thus laid down by the press. The freedom of speech and expression of the press is, therefore, quintessential for any democracy. Recognising the role played by the press in a democracy, the Supreme Court has ruled that the liberty of the press and free expression are essential parts of the right to freedom of speech and expression under Article 19(1)(a).⁶ However, this freedom is severely compromised when the powerful are able to manipulate public opinion by fixing the premises of discourse rather than allowing the same to be developed through unbiased and objective criteria.

In this article, the author firstly outlines the importance of free speech in a democracy, following which he highlights the problem which concentrated ownership of large media houses presents. This is followed by an analysis of the nature of free speech and how free speech demands plurality in opinions that are a part of the discourse in which media plays a crucial role. In the end, the author concludes that to


preserve a democratic culture, it is essential that concentration of ownership of media houses is prevented because concentrated ownership can palpably affect editorial decisions.

NECESSITY OF FREEDOM OF SPEECH

The presence of a multitude of opinions is necessary for a democracy. John Stuart Mill, the 19th- century philosopher, highlighted importance of the presence of differing opinions in his essay *On Liberty* where he said:

*"The peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error."*⁷

Any democratic culture is recognised by democratic participation which means that it transcends the boundaries of caste, class and other unjust

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hierarchies allowing ordinary individuals to have a greater say in the future of the institutions that govern them.⁸ Any discussion presumes the presence of more than one perspective. Therefore, the presence of different, varying opinions is necessary in a democracy for any meaningful discussion to take place. This creates an atmosphere where the public can deliberate issues that are of concern to it and allows engagement which is the essence of a democratic culture.

The foundation for such a culture is laid down by the freedom of speech and expression. Wherever the guarantee of freedom of speech and expression is absent, speech may be countered with a chilling effect, and any opinion not in line with that of the dominant group is likely to be suppressed. This is antithetical to a democratic culture. Where there is no freedom of speech and expression, the discourse is likely to be controlled by dominant groups and it may be moulded to suit the interests of such groups in the absence of any meaningful democratic discussion or deliberation.

The importance of freedom of speech was recognised by Justice Holmes in a famous dissent in *Abrams v. United States*.⁹ In this case, the defendants had thrown circulars from a building to encourage a strike as a resistance to the participation of the United States in World War I. Justice Holmes ruled that a free trade of ideas was necessary in order to achieve the ultimate good because the competition of market would allow only the best idea to be accepted and prevail and truth would be the ground for such acceptance.¹⁰

The concept was eventually modified by Justice Douglas in *United States v. Rumely* from the free trade of ideas into a marketplace of ideas where he ruled, "Like the publishers of newspapers, magazines, or books, this publisher bids for the minds of men in the market place of ideas."¹¹ Thus, the idea that where there exists a competitive market for ideas, the truth (being the most desired outcome) will eventually prevail, became the dominant belief of the times.

PROBLEM WITH CONCENTRATED OWNERSHIP

When non-media entities with other commercial interests acquire an interest in media outlets, legitimate concerns arise with regards to the presentation of the news. For example, when the CBI mentioned Kumar Mangalam Birla in its investigation of the Coalgate scam, the only major

newspaper to not run the news on the front page was the Hindustan Times, in which the KK Birla Group had a stake.¹² Similarly, when Subrata Roy was arrested in relation to the non-refund of Rs. 20,000 crores to the investors, Sahara Group did not air the news on its TV channels.¹³ In such cases, therefore, where the business wing of the media makes editorial decisions, the objectivity of the news content is impacted severely.

Another problem with commercial interests being intertwined with the content is that the media broadcasts are in relation to the biases of perspectives. The role of a media outlet is to offer to the public multiple perspectives on an issue. This allows the public to choose the perspective which fits best with their individual beliefs, values and truth systems. This is the primary reason for the existence of a marketplace of ideas. However, when the broadcast of certain perspective serves the vested commercial interests of those in control of the media houses, the media houses serve only as propagandist mechanisms rather than providers of objective news. This is especially evident in the times of elections. A recent study indicated that Narendra Modi almost got a third of the total news coverage during the 2014 Lok Sabha elections, significantly more than any of his opponents.¹⁴ When the coverage given to one candidate is significantly more than the coverage given to the other candidates, public opinion is inevitably influenced to create bias. When individuals and groups that have a stake in the media houses also have an interest in the election of a certain candidate, they are likely to cover that candidate extensively and in a positive light. Any news that may present such a candidate in a negative light may not be published. This is opposed to the interest of general public which requires publication of content based on an objective criterion. By shunning objectivity in such cases, the media houses function as propagandist mechanisms guided by the interests of their owners.

NATURE OF FREE SPEECH AND THE MEDIA

The freedom of speech and expression is, by its very nature, interactive.¹⁵ It cannot exist in isolation. The nature of the right demands participation by means of interaction through agreement, disagreement, praise and criticism of opinions in the public sphere. The role played by the media in this system is crucial. The media, on a macro scale, is the channel through which the interaction between different individuals, groups and ideologies take

place. Thus, it serves as an entry point to the marketplace of ideas. If the marketplace of ideas is to be competitive, it requires free entry of different ideas and opinions.

When newspapers and news channels serve as gatekeepers of the marketplace, it is important that the vested interests of those who own these channels do not affect the ideas that enter the public space. There are two ways in which it can be ensured that there is freedom for ideas to enter the public sphere for discussion and deliberation. The first is the existence of competition, which allows numerous options for an idea to enter the marketplace. Therefore, where the vested interests of the owner of one publication may not allow an idea to be published, the presence of other publications ensures that the idea eventually enters the public sphere.

But the interactive nature of free speech means that an idea entering the

marketplace is only valuable when it is accessible to the public for debate and discussion. Readership and viewership with respect to the newspapers and news channels are the primary gauge of such accessibility. Therefore, where there exists a monopoly of certain media houses as far as readership and viewership are concerned, the presence of competitors is of no consequence. If the idea is rejected by a group of monopolists with a reader/viewer base, it is extremely difficult for it to enter the marketplace for deliberation and discussion itself. The broadcast by a competitor who enjoys a little share of the market would be inconsequential as far as the engagement of the idea is concerned. In such a case, the exercise of freedom of speech and expression is futile.

The second means to ensure that there is freedom for ideas to enter the public sphere for discussion and deliberation is to strictly separate the business aspect of the news industry from the editorial aspect. Where the business aspect of the news industry tries to suppress the editorial independence (which is essential to objectively determine the suitability of content for its publication in a newspaper or broadcast on television) vested interests are bound to come up whenever the editorial discretion is to be exercised. Regulation of ownership of the media houses is a means to circumvent this divergence.

The owners of the media houses exercise control over the entity through equity ownership, the appointment of directors as well as shareholding and loan agreements. The larger the share of an owner, the more is the possibility of editorial control being exercised by him. The concentration of control in a few hands has a negative impact on media diversity and plurality.¹⁶ Therefore, a cap on the percentage of shares that one company or individual



can own in a media enterprise, either by himself or through immediate relatives, would ensure that participation in the functioning of the enterprise by the owners does not stifle editorial discretion because of the control that the owners may exercise.

Yet such regulatory policy may itself suppress plurality if it is enforced across the entire industry, without any guidance and direction. When, for example, a person wants to start a small newspaper to be distributed locally, a cap on the investment may put an additional burden on him to find investors, in spite of having sufficient funds to finance the operation himself. In a scenario where such a newspaper is not run to make profits but to simply express the beliefs of the owner in the exercise of his right to free speech, investors would be hard to find. In such cases, the cap on ownership is likely to unreasonably restrict the right to free speech of an individual.

But small newspapers and news channels are hardly the gatekeepers of the marketplace of ideas because their reader and viewer base is extremely small. The gatekeepers of the marketplace are the traditionally established media houses with a wide reach in terms of the reader/viewer base and highest revenues in the relevant markets.¹⁷ It is these giants that need to be regulated to ensure that vested interests of the dominant owners do not affect the editorial independence. Therefore, to determine which media houses would come under the ambit of such regulatory policy, the revenues generated by the business as well as the size of operations (reader/viewer base) would be important factors to be kept in mind. The reach of these established media houses ensures the dissemination of information to the widest audience. This lays the foundation for a democratic discussion which is the object sought to be achieved by free speech because it ensures maximum engagement.

The established media houses differ from small newspapers because they are not just a means to promote the freedom of speech of the owners. These media houses provide an opportunity to exercise the freedom of speech to various other individuals as well. By providing individuals with a platform to exercise their freedom of speech, they serve an important public function. Therefore, the public interest demands a regulation of ownership of these enterprises to ensure that the right to freedom of speech and expression of individuals is protected from the concentration of power in the hands of a few owners. Freedom to publish means freedom to publish for all and it does not include freedom to keep others from publishing.¹⁸



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CONCLUSION

The presence of a plurality of opinions is a necessary condition for the marketplace of ideas to function in order to achieve the common good. The freedom of speech of the press exists to protect and encourage the plurality of opinions in the marketplace of ideas. However, the concentration of control of the media houses in few hands is in contravention with the larger public interest which demands the presence of a plurality of opinions. The concentration of ownership inevitably attacks the plurality of opinion by blurring the line that exists between the business aspect of media and the editorial function.

One way to protect this plurality of opinions is to ensure the existence of competition in the market. The existence of competition, however, is futile if certain media houses enjoy a monopoly of the readership/viewership. Readership/viewership and free speech are inextricably linked because of the interactive nature of free speech. Therefore, for the freedom of speech to actually exist, the competition needs to be meaningful.

However, a better means to ensure plurality is to regulate the ownership of the established media houses which enjoy a monopoly in the market in terms of the interaction with the audience by putting a cap on the maximum number of shares that can be owned by an individual. This restricts the concentration of control in the hands of a minority and therefore, protects editorial independence which is crucial if a plurality of opinions is to be ensured.

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¹ Sandeep Bhushan, 'Regulation' and 'Non-Media' Money in Media' *Economic and Political Weekly* (14 February 2015).

² Anuradha Raman, 'The Big ED in the Chair' (*Outlook*, 14 July 2014) <www.outlookindia.com/magazine/story/big-ed-in-the-chair/291311> accessed 13 November 2015.

³ Audit Bureau of Circulations, 'Details of language wise most circulated dailies for the audit period' (2013) <www.auditbureau.org/news/view/17> accessed 13 November 2015.

⁴ NewsLaundry Team, 'Who Owns Your Media?' (*NewsLaundry.com*, 2014) <www.newsLaundry.com/2014/02/05/who-owns-your-media-4/> accessed 13 November 2015.

⁵ Telecom Regulatory Authority of India, 'Recommendations on Issues Relating to Media Ownership' (2014) <www.trai.gov.in/WriteReadData/Recommendation/Documents/Recommendations%20on%20Media%20Ownership.pdf> accessed 15 November 2015.

⁶ *Bennett Coleman & Co v. Union of India*, (1972) 2 SCC 788.

⁷ John Stuart Mill, *On Liberty* (Longman Roberts & Green 1869).

⁸ Jack M Balkin, 'Digital Speech and Democratic Culture: A Theory Of Freedom Of Expression For The Information Society' [2004] 79 NYU L Rev.

⁹ 1919 SCC OnLine US SC 213 : 63 L Ed 1173 : 250 US 616 (1919).

¹⁰ *Ibid.*

¹¹ 1953 SCC OnLine US SC 28 : 97 L Ed 770 : 345 US 41 (1953).

¹² Samanth Subramanian, 'P for Pappu' (*The Caravan*, 1 December 2013) <www.caravanmagazine.in/perspectives/p-pappu> accessed 15 November 2015.

¹³ *Ibid.*

¹⁴ Rukmini S, 'Modi Got Most Prime-Time Coverage: Study' (*The Hindu*, 8 May 2014) <www.thehindu.com/elections/loksabha2014/modi-got-most-primetime-coverage-study/article5986740.ece> accessed 18 November 2015.

¹⁵ *Balkin* (n 8).

¹⁶ *Telecom Regulatory Authority of India* (n 5) 12.

¹⁷ Administrative Staff College of India, *Cross Media Ownership in India* (ASCI Staff and Consultancy, 2009).

¹⁸ *Associated Press v. United States*, 1945 SCC OnLine US SC 138 : 89 L Ed 2013 : 326 US 1 (1945).

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