BROADCASTING CONTENT COMPLAINTS COUNCIL

REPORT ON CLAUSES 8.2 AND 10.2 OF POLICY GUIDELINES FOR UPLINKING OF TELEVISION CHANNELS FROM INDIA

BROADCASTING CONTENT COMPLAINTS COUNCIL
Indian Broadcasting Foundation, B-304, Ansal Plaza, Khelgaon Marg, New Delhi 110 049
Email: bccc@bccc.co.in **Website:** www.ibfindia.com **Tel:** 91 11 4379 4400 **Fax:** 91 11 4379 4455

REPORT ON CLAUSES 8.2 AND 10.2 OF THE UPLINKING GUIDELINES

TABLE OF CONTENTS

1. INTRODUCTION

1.1 Free and fair flow of information is the primary entitlement of citizens in a democracy. It generates awareness of critical developments, both nationally and internationally. This awareness is crucial, particularly in the context of globalization and liberalization. Such flow of information also facilitates transparency, accountability and vigilance by the citizens in the governance of the country, and is hence critical to the proper functioning of democratic institutions. The cultural value of such information is similarly tremendous.

1.2 The television is the primary tool of the citizens to access this information and awareness. News channels and social media broadcast through this medium deliver information easily, widely and promptly in the hands of the citizens.

1.3 Importantly, the television is also a valuable tool for the realization of the ideal contained in Art. 19(1)(a) of the Constitution – of the freedom of speech and expression. It provides space for the creative expression of people to reach a large audience.

1.4 Accordingly, by its emphasis on speech, expression and information, the television contributes significantly to the construction of a healthy and vibrant democracy.

1.5 Even the SUPREME COURT, in its landmark *Airwaves* judgment, recognized the importance of this medium, and held:[1]

[1] *Secretary, Ministry of Information and Broadcasting, Government of India* v. *Cricket Association of Bengal*, AIR 1995 SC 1236 : (1995) 2 SCC 161.

Most people obtain the bulk of their information on matters of contemporary interest from the broadcasting medium. The television is unique in a way in which intrudes into our homes. The combination of picture and voice makes it an irresistibly attractive medium of presentation. It has tremendous appeal and influence over millions of people. Television is shaping the food habits, cultural values, social mores and what not of the society in a manner no other medium has done so far.

1.6 Given the indispensability of free broadcast on the television to this end, the telecast of channels on the television must be prohibited only in the most severe circumstances. A high threshold needs to be fulfilled to sustain the *absolute* refusal of telecast of channels on the television. As per the SUPREME COURT in the same *Airwaves* judgment, television channels need to be free from the control of the government and its censorship.

2. BACKGROUND

2.1 In the context of television channels, the Policy Guidelines for Uplinking of Television Channels from India contain some important grounds on which such abovementioned prohibition and censorship may be imposed by the government. These Guidelines are formulated by the Ministry of Information and Broadcasting, and are in consonance with the mandate expressed in the Cable Television Networks (Regulation) Act, 1995 (hereinafter the "Act") and the Cable Television Networks Rules, 1994 (hereinafter the "Rules").

2.2 Various iterations of the guidelines that have been issued by the Ministry of Information and Broadcasting (hereinafter the "MIB") from time to time. The most recent of these (and also the one currently in force) is the consolidated and revised set of the Policy Guidelines for Uplinking of Television Channels from India issued on 5th December, 2011 (hereinafter the "Uplinking Guidelines"). The Uplinking Guidelines deal *inter alia* with grant of permission to uplink television channels from India. The Guidelines contain a provision in Clause 10.2 that prescribes certain conditions for renewal of permission for a television channel. It states:

> *Renewal of permission will be considered for a period of 10 years at a time, subject to the condition that the channel should not have been found guilty of violating the terms and conditions of permission including violations of the programme and advertising code on five occasions or more. What would constitute a violation would be determined in consultation with the established self-regulating mechanisms.*

2.3 In other words, this provision grants television channels "five strikes", after which they may be refused their right to broadcast. It provides that the license of a television channel may not be renewed in case the television channel has previously breached (been "*found guilty*" of) the terms and conditions of permission five or more times. These terms and conditions include the programme and advertising code contained in the Rules as well.

2.4 Clause 10.2 further provides that the self-regulating mechanisms will be *consulted* in order to determine *what would constitute a violation.*

2.5 On 7th May 2012, a meeting was held under the Chairmanship of the Additional Secretary with representatives of some self-regulatory authorities, i.e. NBSA (NBA), BCCC (IBF) and ASCI to discuss what would constitute a relevant violation under Clause 10.2 of the

Uplinking Guidelines. The minutes of this meeting were circulated by Office Memorandum dated 22nd May 2012. Subsequently, on 13th August 2012, an Office Memorandum was received by BCCC from the MIB requesting it to send it's comments pursuant to the discussions in the 7th May 2012 meeting. This is the background to the drafting of the instant Report.

2.6 This Report seeks to analyze the challenges that are posed by Clause 10.2 of the Uplinking Guidelines and also advance recommendations by which the various shortcomings of this provision may be overcome.

2.7 It may also be pointed out that closely related to Clause 10.2 is the provision in Clause 8 of the Uplinking Guidelines which provides for imposition of certain offences and penalties, and provides as follows –

"8. OFFENCES AND PENALTIES

8.1. In the event of a channel/teleport/SNG/DSNG found to have been/ being used for transmitting/ uplinking any objectionable unauthorized content, messages, or communication inconsistent with public interest or national security or failing to comply with the directions as per para 5.9 above, the permission granted shall be revoked and the company shall be disqualified to hold any such permission for a period of five years, apart from liability for punishment under other applicable laws.

8.2.Subject to the provisions contained in para 8.1 of these guidelines, in the event of a permission holder violating any of the terms and conditions of permission, or any other provisions of the guidelines, the Ministry of Information and Broadcasting shall have the right to impose the following penalties:

8.2. 1. In the event of first violation, suspension of the permission of the company and prohibition of broadcast/ transmission up to a period of 30 days.

8.2.2.In the event of second violation, suspension of the permission of the company and prohibition of broadcast up to a period of 90 days.

8.2.3.In the event of third violation, revocation of the permission of the company and prohibition of broadcast up to the remaining period of permission.

8.2.4.In the event of failure of the permission holder to comply with the penalties imposed within the prescribed time, revocation of permission and prohibition of broadcast for the remaining period of the permission and disqualification to hold any fresh permission in

future for a period of five years.

8.3. In the event of suspension of permission as mention in Para 5.9 or 8.2 above, the permission holder shall continue to discharge its obligations under the Grant of Permission Agreement including the payment of fee.

8.4.In the event of revocation of permission, the fees shall be forfeited.

8.5.All the penalties mentioned above shall be imposed only after giving a written notice to the permission holder."

2.8 It may be seen that the MIB has the right under Clause 8.2 to impose certain penalties upon a "violation". Similar to the five strike rule in Clause 10.2, Clause 8.2.3 provides for the three strike rule, whereby the permission of the company may be revoked and its broadcast prohibited in the event of three "violations".

2.9 It is relevant to point out that the phrase "violation" that is used in Clause 10.2 is also used in Clause 8.2. By the accepted principles of statutory interpretation, this phrase must have the same meaning in both Clauses as the draftsman is intended to have used the same word with the same meaning in one instrument. Since Clause 10.2 provides for "consultation" with the established self-regulatory mechanisms to determine what is a "violation", it would appear that this consultation should also extend to determine the scope of the "violation" under Clause 8.2 as well.

3. THE FIVE-STRIKE RULE AND THREE STRIKE RULE

3.1 There are several problems with the Five-Strike Rule in Clause 10.2 of the Uplinking Guidelines (and by analogy also the Three Strike Rule in Clause 8.2.3 of the Uplinking Guidelines, the effect of which is dealt with hereinafter wherever relevant). Two of these stand out which warrant meticulous consideration.

3.2 *First*, are the questions of Constitutionality of the provision. In its current shape, Clause 10.2 of the Uplinking Guidelines (and also, by analogy, Clause 8.2) grossly offends Arts. 19(1)(a) and (g) of the Constitution, by unreasonably restricting the freedom of speech and expression, and also the freedom of trade and profession of the broadcasters. For the same reason, it also adversely affects the right of the citizens to access free and complete information.

3.3 *Second*, are the various problems with the substance of Clause 10.2 (and also by analogy Clause 8.2). The drafting of these Clauses of the Uplinking Guidelines is not altogether perfect, and hence their interpretation is fraught with ambiguity. Various issues arise in relation to the substance of the rule, the answers to which are not immediately apparent – what is the nature of a "violation" which warrants refusal of renewal license under Clause 10.2 and/or which warrants revocation of permission under Clause 8.2? What is the precise meaning of "found guilty" in Clause 10.2? What is the role of the 'self-regulating mechanisms' envisaged under Clause 10.2? Whether the provision in Clauses 8.2 and 10.2 are to take effect for all applications of renewals made henceforth, or for all violations that may occur henceforth? Whether there is scope for any appellate mechanism? These are important questions and hence deserve a detailed treatment, especially given the serious consequences entailed by Clauses 8.2 and 10.2.

3.4 Both these issues are dealt with below.

Questions of Constitutionality

3.5 The value of free speech and expression has found affirmation in several landmark constitutional decisions. One may look to the exposition by SH Kapadia, CJ in the *Sahara* case as an illustration of this affirmation, which sets the tone for the exercise of free speech by all kinds of media in India –

"*Freedom of expression is one of the most cherished values of a free democratic society. It is indispensable to the operation of a democratic society whose basic postulate is that the government shall be based on the consent of the governed. But, such a consent implies not only that the consent shall be free but also that it shall be grounded on adequate information, discussion and aided by the widest possible dissemination of information and opinions from diverse and antagonistic sources. Freedom of expression which includes freedom of the press has a capacious content and is not restricted to expression of thoughts and ideas which are accepted and acceptable but also to those which offend or shock any section of the population. It also includes the right to receive information and ideas of all kinds from different sources. In essence, the freedom of expression embodies the right to know*."[2]

3.6 The contours of the freedom of speech and expression, contained in Art. 19(1)(a) of the Constitution have been very widely described. This freedom includes the right to "*express one's convictions and opinions freely, by word of mouth, writing, printing, picture, or electronic media*."[3] The freedom of expression inherently includes the presence of a second party, by whom such expression is received. This implies that the freedom of speech and expression implicitly includes the right to propagate, circulate and publish ideas.[4]

3.7 The Supreme Court has expounded at length on the freedom of speech and expression associated with television media and broadcasters as well. For instance, in the *Airwaves* decision[5], it was held that the right enshrined in Art. 19(1)(a) includes *the right to educate, to inform and to entertain and also the right to be educated, informed and entertained*. While the former set of rights belong to the television broadcasters, the latter set of rights belong to the viewers. In the same case, while referring to the German *Third Television* and *Fourth Television* cases, the Court held that the freedom of broadcasters implies freedom from State control, especially in the form of censorship –

"*The theoretical foundation for the claim for access to broadcasting is that the freedom of speech means the freedom to communicate effectively to a mass audience which means*

---

[2] *Sahara India Real Estate Corporation Ltd.* v. *Securities and Exchange Board of India*, C.A. No. 9813 of 2011 and C.A. No. 9833 of 2011.
[3] *PUCL* v. *Union of India*, AIR 1997 SC 568.
[4] *Romesh Thappar* v. *State of Madras*, AIR 1950 SC 124.
[5] *Secretary, Ministry of Information and Broadcasting, Government of India* v. *Cricket Association of Bengal*, AIR 1995 SC 1236 : (1995) 2 SCC 161.

through mass media... The obligation of the state to ensure the right of freedom of speech and expression to all its citizens creates an obligation on it to ensure that the broadcasting media is not monopolized, dominated, or hijacked by privileged, rich and powerful citizens in general."[6]

3.8 Pertinently, in the above *Airwaves* case, the Court recognised the difference between the broadcasting media on the one hand and the press on the other. It was held that the freedoms and restrictions on the broadcasting media should be assessed independently and hence an analogy with the rights of the press involved in the print media, in this context, would be misplaced.

3.9 Given the paramountcy granted to the rights of broadcasters as an independent category unto themselves, the restrictions imposed on such rights must satisfy the test of reasonableness contained in Art. 19(2) of the Constitution of India. Art. 19(2) of the Constitution states as under:

Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the state from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the state, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.

3.10 Accordingly, the test of constitutionality of the Uplinking Guidelines, including Clauses 8.2 and 10.2 thereof, must fulfil the test of reasonableness of restriction on the grounds mentioned in Art. 19 (2).

3.11 Given the language of Clause 10.2, and the consequence of non-renewal of licence that is entailed by the five strike rule contained therein, it is certainly arguable that Clause 10.2 would not pass Constitutional muster. Similar is the case with Clause 8.2. While it is true that violations contained in the Programme Code and the Advertising Code contain grounds similar to the ones mentioned in Art 19(2), the restriction contained in the Clauses 8.2 and 10.2 also takes effect on *additional considerations*, such as a violation of the conditions of permission contained in the terms of the license itself.

3.12 Furthermore, as Clause 10.2 stands, restrictions of a such far-reaching extent (i.e. non-

[6] *Secretary, Ministry of Information and Broadcasting, Government of India* v. *Cricket Association of Bengal*, AIR 1995 SC 1236 : (1995) 2 SCC 161.

renewal of the license), can be imposed even for five singular instances of a relevant 'violation'. Similarly, in the case of Clause 8.2, three singular instances of a relevant "violation" would involve a revocation of the licence of a channel for the remainder of the period of the licence. In the absence of any clarity on what would constitute a relevant violation, it is possible that even discrete, non-continuous, and minor infractions would lead to triggering of the consequences envisaged under the Clauses. Given this, it is certainly arguable that Clauses 8.2 and 10.2 suffer from grave unreasonableness and disproportionality and hence do not satisfy the requirements of restraint as envisaged under Art. 19(2).

3.13 Additionally, the effect of Clauses 8.2 and 10.2 is that the restraint effectively becomes operative not only after a violation has occurred, but the threat of suspension/non-renewal has a "chilling effect" on free speech by hanging as a Damocles Sword on the neck of the broadcasters even in the absence of any violation. Restraint in this form immobilizes the ability of the broadcasters to transmit information, knowledge and entertainment, in contravention of the law laid down in the abovementioned *Airwaves* case.

3.14 It may also be relevant to mention the decision in *Romesh Thappar*,[7] where the Supreme Court importantly held that it is not the *form* of the law, but the *effect* of it which must determine constitutionality. The effect of Clauses 8.2 and 10.2 being to restrain free speech and expression, these Clauses have a potentially serious constitutional infirmity.

3.15 There is another set of freedoms which are offended by Clauses 8.2 and 10.2 of the Guidelines. These are contained in Art. 19(1)(g) of the Constitution which embodies the freedom of trade and profession. Specifically, Art. 19(1)(g) states that all citizens shall have the right *to practise any profession, or to carry on any occupation, trade or business*. Art. 19(1)(g) is circumscribed by the limitations contained in Art. 19(6) of the Constitution, namely:

Nothing in sub-clause (g) of the said clause shall effect the operation of any existing law in so far as it imposes, or prevent the state from making any law, imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub-clause, and, in particular, nothing in the said sub-clause shall affect the operation of any existing law in so far as it relates to, or prevent the state from

[7] *Romesh Thappar* v. *State of Madras*, AIR 1950 SC 124.

making any law relating to,-

i) the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, or

ii) the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise.

3.16 As per Art. 19(1)(g) of the Constitution, therefore, broadcasters and owners of channels have the right to carry on the business of their choice without imposition of undue restrictions by the State. Art. 19(6) places limited restrictions on the rights of citizens to practise their trade, profession or business.

3.17 Courts have, in several cases, analysed whether the requirement of a license to practise one's business constitutes a restriction, and thereafter, whether the same is reasonable or not. For instance, in *State of Madras* v. *VG Row*,[8] the Supreme Court held that it would be absolutely unreasonable and unwarranted to make the exercise of fundamental rights guaranteed in the Constitution absolutely dependant on the discretion of administrative authorities, unless there exist exceptional circumstances to justify the same. Accordingly, if an authority possesses absolute discretion to grant or withhold or revoke a permit for the practise of any business or trade, then such a condition will be unreasonable.[9] There are only limited exceptions to this rule, namely, a business which is inherently dangerous,[10] in times of emergency,[11] in respect of businesses which affect the economy,[12] etc.

3.18 However, not every provision which grants an administrative authority this discretion is unconstitutional. It will only be in cases where this discretion is not curtailed by guidelines or policy.[13]

3.19 Further, in the case of *Dwarka Prasad* v. *State of UP*,[14] the Supreme Court held that "*the power of granting or withholding licenses or fixing the prices of goods necessarily*

[8] *State of Madras* v. *VG Row* AIR 1952 SC 196.
[9] *Harishankar Bagla* v. *State of MP*, AIR 1954 SC 465.
[10] *Cooverjee B. Bharucha* v. *Excise Commissioner*, AIR 1954 SC 220.
[11] *Harishankar Bagla* v. *State of MP*, AIR 1954 SC 465.
[12] *Glass Chatons Importers and Users Association* v. *Union of India*, AIR 1961 SC 1514; *Daya v. Joint Chief Controller, Import and Export*, AIR 1962 SC 1796.
[13] *MB Cotton Association v. Union of India* AIR 1954 SC 634.
[14] *Dwarka Prasad* v. *State of UP* AIR 1954 SC 224.

has to be vested in certain public officers or bodies, and they would certainly have to be left with some amount of discretion in these matters. But a law or order which confers arbitrary and uncontrolled power upon the executive in the matter of regulating trade or business in normally available commodities cannot but be held to be unreasonable."[15]

3.20 The case of *Assistant Collector of Customs* v. *Charandas Malhotra* perhaps provides the closest analogy to the issue at hand.[16] In that case, the Supreme Court held that "*a provision for cancellation of a licence (in respect of a trade which is not necessarily dangerous) or for confiscation without giving a reasonable opportunity to be heard against the proposed order, would be an unreasonable restriction*."

3.21 Under Clauses 8.2 and 10.2, the broadcaster's right to practice his business of broadcasting can be curtailed by the suspension/non-renewal of the license. Neither Clause 8.2 nor Clause 10.2 provides any scope for the broadcaster to make a representation after a sufficient number of violations are triggered to defend the suspension of existing permission/refusal of renewal of licence after three and five violations respectively. This is so even when an opportunity of being heard may have been provided at previous instances of violations. However, for these specific penalties, there exists no provision of the right to be heard. The only relevant provision is Clause 8.5 that provides for only "giving of a written notice" without providing even an opportunity of hearing. Accordingly, as per the *ratio* of the abovementioned case, the restriction imposed by Clauses 8.2 and 10.2 on the freedom of the broadcasters to practise a business of their choice by placing this practise subject to the availment of a license, and then refusing the same without any representation, is an unreasonable restriction.

3.22 Accordingly, there is a strong case to say that Clauses 8.2 and 10.2 violate the rights enshrined in Art. 19(1)(a) and Art. 19(1)(g) of the Constitution. As will be seen, these Constitutional concerns ultimately dovetail into the issues with the substance of the Clauses, which is dealt with in detail next. It is imperative therefore to deal with the issues that relate to the substance of the Clauses, to also ensure a cure of the various Constitutional infirmities pointed out above.

---

[15] *Dwarka Prasad* v. *State of UP* AIR 1954 SC 224; DD Basu, SHORTER CONSTITUTION OF INDIA, (13th edn., 2003) at 231.
[16] *Assistant Collector of Customs* v. *Charandas Malhotra* AIR 1972 SC 689.

Issues with the Substance of the Clauses

3.23 The drafting of Clauses 8.2 and 10.2 (as they stand presently) raise the following questions:

i. What is the nature of a "violation" which warrants refusal of renewal of license under Clause 10.2 and/or which warrants suspension of licence under Clause 8.2?

ii. What is the precise meaning of "found guilty" under Clause 10.2?

iii. What is the role of the 'self-regulating mechanisms' envisaged under Clause 10.2?

iv. Whether the provisions are to take effect for all applications of *renewals* made henceforth, or for all *violations* that may occur henceforth?

v. Whether there is scope for any appellate mechanism?

'Violations'

3.24 As described earlier, the terms and conditions of permission are contained in the Uplinking Guidelines, and also in the Act and the Rules. Five "violations" of any of the terms and conditions of permission, which include the obligations contained in the Guidelines, the Act and the Rules, can eventually invite the application of the sanction under Clause 10.2. The operation of Clause 8.2 would be on similar principles.

3.25 On a perusal of the Uplinking Guidelines, the Act and the Rules, it appears that these instruments contain obligations of different kinds and of varying degrees of seriousness. However the Uplinking Guidelines do not distinguish between the *legal* consequences of different violations, even though their *factual* effects (in terms of gravity of harm caused etc.) may be very different.

3.26 In part this is a result of the unhappy language used in Clauses 8.2 and 10.2. The meaning of the word "violation" does not adequately encapsulate within it the seriousness of such violation. As per the dictionary meaning, "violation" only means a "breach" or "infraction".[17] The word "violation" leaves it entirely open whether the violation is required to be "serious"; whether it requires any attendant "mental state", i.e. whether it must be "negligent", "reckless", "deliberate", "*mala fide*" etc.

3.27 For the purpose of Clauses 8.2 and 10.2, a reading of the Guidelines along with the Act and the Rules suggests that minor and completely unintended infractions are placed

[17] **See for instance** – http://dictionary.reference.com/browse/violation

on the same pedestal as grave breaches.

3.28 For instance, Clause 4.1.2 of the Uplinking Guidelines, read with Clause 5.8 of the Uplinking Guidelines expresses a policy decision of the MIB to ensure that news agencies operating in India are owned and managed entirely by Indians in the preservation of the national interests of the country.[18] The severity of a violation of this obligation is obviously very grave.

3.29 At the same time, the channels are also required to abide by obligations that are *not* of such a grave nature. As an example, Rule 6(1)(b) of the Rules casts an obligation on the channel to not telecast programmes which offend '*good taste and decency*'. This obligation pertains to content regulation, which lies first and foremost within the prerogative of the channel itself. The phrase '*good taste and morality*' is inherently subjective, such that content which offends the '*taste'* of one individual may not offend the taste of another. It is dependant not only on the age and location of the individual, but also their cultural and social background. At the same time, the nature of the programme also needs to be accounted for, such that the suitability of the content in an adult programme is not the same as that of a children's programme. The expectation which the programme itself holds out, therefore, is different. In that case, it is often sufficient, in order to reverse and/or mitigate harm, to cease the telecast of the offensive material in itself. Therefore, if the broadcaster takes the impugned material off air promptly, the severity of the violation of an already subjective nature will be mitigated even further.

3.30 This was the case in, for example, a complaint filed against the radio channel Kerrang! in UK pertaining to their morning show called Rick Shaw. On 16 June 2005, they aired two songs containing the words "*shit*" and "*motherfucker*". This offended the 'good taste and morality" of one listener, who complained of these songs being aired as part of an early morning show. The channel apologized, and thereafter also removed all songs containing such offensive terms from its morning shows. The matter was considered resolved.[19] Based on a bare reading of the provisions, the same case in India, under Clauses 8.2 and/or 10.2, would presumably be treated differently. The broadcast would offend Rules 6(1)(a) and (d) for being offensive to '*good taste and morality*' and containing '*obscene*' material. While the channel may be directed to undertake the same measures as aforesaid in response to a complaint, this minor infraction committed

[18] Preamble, Policy Guidelines for Uplinking of Television Channels from India, 5th December 2011.
[19] **See** – http://stakeholders.ofcom.org.uk/enforcement/broadcast-bulletins/obb_47/

inadvertently will then additionally be counted as a strike in the channel's tally if that is considered a relevant "violation" under Clauses 8.2 and 10.2 of the Guildelines. The accumulation of merely *five* such tallies over the prolonged period of *ten* years places the right of the broadcaster under serious jeopardy of being suspended (and the three strike rule in Clause 8.2.3 operates on a similar logic).

3.31 Unfortunately, currently there are no provisions in the Guidelines that codify the penalties that can be imposed in proportion to the *factual seriousness* of the "violation" in question. Even in Clause 8, the *seriousness of the violation* is not expressly factored into when determining the response of the relevant authority. The only relevant differentiator is the *number of times* a "violation" has been committed.

3.32 It is submitted that suspension of broadcast and the threat of refusal of license has a chilling effect on the broadcasters. They are thereby driven to telecast only conservatively harmless 'material' for fear of the threat of suspension. This chilling effect is inimical to the free and unrestrained access to information and expression by end-users. Especially so, when these violations are predicated on a violation of the freedom of speech and expression of the citizens under Art. 19(1)(a) of the Constitution. Equating minor infractions with serious breaches for the purpose of determining renewal of the license under Clause 10.2 or for the purpose of determining suspension under Clause 8 of permission, is not only disproportionate but also unreasonable.

3.33 It is submitted that for an infraction to count as a relevant "violation" which would trigger an action under Clause 8, and also trigger a strike under Clause 10.2, it must be "sufficiently serious", else these provisions of the Guidelines run the risk of grave Constitutional infirmity. Further, any reading of the Guidelines to the contrary, would not only be anachronistic to the Constitutional values of a liberal democracy, but would also be inconsistent with prevailing practices worldwide.

International Approaches

3.34 This section sets out broadcasting practices from some other countries around the world.

UK – OFCOM

3.35 The model adopted by the Office of Communications (Ofcom) in the United Kingdom is exemplary. The Ofcom is a body constituted for the purpose of, *inter alia*, regulation of

broadcasting and provision of television and radio services. It is headed by the Ofcom Board, which is its main decision-making body. It is constituted by a Non-Executive Chairman, and Executive and Non-Executive Directors. There is an internal body within the Ofcom, known as the Content Board, which is responsible for the legislation and enforcement of quality standards on the television and the radio.[20]

3.36 The Ofcom has graded sanctions for violations for its Broadcasting Code (containing *inter alia* a set of regulations that the various broadcasters must ensure that their content satisfies). These sanctions include:[21]

i. Issuing a direction not to repeat the telecast of a programme or advertisement;

ii. Issuing a direction to broadcast a correction or a statement of Ofcom's findings in the form as determined by Ofcom;

iii. Imposing a financial penalty;

iv. In limited cases, shortening or suspending the license of the broadcaster;

v. Revoking their license.

3.37 The Ofcom imposes the higher grades of penalties only if the broadcaster continues to violate the Code despite the imposition of the lower grade of penalties. In fact, even the lower grade of penalties is imposed *only if* the violation is *serious, deliberate, repeated or reckless*.[22] To determine whether a breach is *serious, deliberate, repeated or reckless*, the Ofcom accounts for the following factors[23] –

- The degree of harm, whether actual or potential, caused by the contravention, including any increased cost incurred by consumers or other market participants;
- The duration of the contravention;
- Any gain (financial or otherwise) made by the regulated body in breach (or any connected body) as a result of the contravention;
- Any steps taken for remedying the consequences of the contravention;
- Whether the regulated body in breach has a history of contraventions (repeated

[20] Available at <http://www.ofcom.org.uk/about/how-ofcom-is-run/>.
[21] **See** – http://stakeholders.ofcom.org.uk/broadcasting/guidance/complaints-sanctions/procedures-statutory-sanctions/
[22] **See** – http://stakeholders.ofcom.org.uk/broadcasting/guidance/complaints-sanctions/procedures-statutory-sanctions/
[23] **See** – http://www.ofcom.org.uk/about/policies-and-guidelines/penalty-guidelines/

contraventions may lead to significantly increased penalties);

- Whether in all the circumstances appropriate steps had been taken by the regulated body to prevent the contravention;
- The extent to which the contravention occurred intentionally or recklessly, including the extent to which senior management knew, or ought to have known, that a contravention was occurring or would occur;
- Whether the contravention in question continued, or timely and effective steps were taken to end it, once the regulated body became aware of it; and
- The extent to which the level of penalty is proportionate, taking into account the size and turnover of the regulated body.

3.38 The conditions under which the license of the channel can be revoked are contained in, *inter alia*, S.238, Communications Act, 2003. S.238 provides as follows:

238. Revocation of television licensable content service licence

(1) OFCOM must serve a notice under subsection (2) on the holder of a licence to provide a television licensable content service if they are satisfied—

(a) that the holder of the licence is in contravention of a condition of the licence or is failing to comply with a direction given by them under or by virtue of any provision of this Part, Part 1 of the 1990 Act or Part 5 of the 1996 Act; and

(b) that the contravention or failure, if not remedied, would justify the revocation of the licence.

(2) A notice under this subsection must—

(a) state that OFCOM are satisfied as mentioned in subsection (1);

(b) specify the respects in which, in their opinion, the licence holder is contravening the condition or failing to comply with the direction; and

(c) state that OFCOM will revoke the licence unless the licence holder takes, within such period as is specified in the notice, such steps to remedy the failure as are so specified.

3.39 As per the provisions of 'this Part' of the UK Communications Act, 2003, license

holders are required to abide by the conditions of their license.[24] This requirement is similar to the one contained in Clause 10.2 our Uplinking Guidelines. Similarly, the obligations contained in Part 1 of the 1990 Act[25] and Part 5 of the 1996 Act[26] must also be abided by. However, the Ofcom takes several measures *before* revocation in case of a breach of these obligations. First, under S.236, the broadcaster is required to take remedial action. Secondly, under S.237, a penalty may be imposed upon the broadcaster. Finally, S.238 is resorted to. Even under this provision, a notice is first served upon the channel, containing directions to be followed in case of a contravention. That notice also cannot be served unless the broadcaster has been heard in the matter of contravention. Evidently, revocation of license is perceived to be a measure of the last resort.

3.40 More relevant to this discussion, however, is S.230 of the Communications Act, 2003. This provision makes it apparent that a broadcaster or a channel bears a *right* to renew its license. Accordingly, renewal cannot be refused, for it would offend the right of renewal of the broadcaster. It is only in exceptional situations that this statutory right may be lawfully curbed. Those conditions are contained jointly in S.229 and S. 230.

3.41 The Ofcom is required under S.229 to submit a report to the Secretary of State in *anticipation* of the end of each licensing period. This report must contain details pertaining to the conditions of the license and the arrangements of renewal. In case the Ofcom is of the opinion that the license of the broadcaster should not be renewed, the same must be expressed as a recommendation to the Secretary of State in the report. The Secretary of State, under S.230, is empowered to refuse the revocation of license of the broadcaster. S.230 reads as under:

> ***230. Orders suspending rights of renewal***
>
> *(1) This section applies where the Secretary of State has received and considered a report submitted to him by OFCOM under section 229.*
>
> *(2) If—*
>
> > *(a) the report contains a recommendation by OFCOM for the making of an order under this section, or*
> >
> > *(b) the Secretary of State considers, notwithstanding the absence of such a*

[24] S.236(1), UK Communications Act, 2003.
[25] Available at <http://www.legislation.gov.uk/ukpga/1990/42/part/I>.
[26] Available at <http://www.legislation.gov.uk/ukpga/1996/55/part/V>.

recommendation, that it would be appropriate to do so, he may by order provide that licences for the time being in force that are of the description specified in the order are not to be renewable under section 216 or 222 from the end of the licensing period in which he received the report.

(3) An order under this section preventing the renewal of licences from the end of a licensing period must be made at least eighteen months before the end of that period.

(4) The Secretary of State is not to make an order under this section preventing the renewal of licences from the end of the initial licensing period unless he has fixed a date before the end of that period as the date for digital switchover.

(5) Where the Secretary of State postpones the date for digital switchover after making an order under this section preventing the renewal of licences from the end of the initial licensing period, the order shall have effect only if the date to which digital switchover is postponed falls before the end of that period.

(6) Subsection (5) does not affect the power of the Secretary of State to make another order under this section after postponing the date for digital switchover.

(7) An order under this section with respect to Channel 3 licences must be an order of one of the following descriptions—

(a) an order applying to every licence to provide a Channel 3 service;

(b) an order applying to every licence to provide a national Channel 3 service; or

(c) an order applying to every licence to provide a regional Channel 3 service.

(8) An order under this section does not affect—

(a) the person to whom a licence may be granted on an application made under section 15 of the 1990 Act or under paragraph 3 of Schedule 10 to this Act; or

(b) rights of renewal in respect of licences first granted so as to take effect from the beginning of a licensing period beginning after the making of the order, or from a subsequent time.

(9) No order is to be made containing provision authorised by this section unless a draft of the order has been laid before Parliament and approved by a resolution of

each House.

(10) Subsection (8) of section 224 applies for construing references in this section to the date for digital switchover as it applies for the purposes of that section.

(11) In this section— "initial licensing period" means the licensing period ending with the initial expiry date; and "licensing period" has the same meaning as in section 229.

3.42 The most relevant provision in S.230 is sub-section (9). It amplifies the rigidity of the rule of renewal in the absence of extenuating circumstances. It states that an order refusing renewal of license cannot be passed by the Secretary of State unless a draft of the order is presented to the Parliament, and the Parliament has approved the same by a Resolution of each House.

3.43 Therefore, even in the presence of violations of the licensing conditions, regardless of the severity and frequency, the refusal of renewal of the license can be made in very *exceptional* circumstances. That decision by the Ofcom is reviewed at multiple levels – by the Secretary of State, and also by the Parliament. This elucidates that the freedom of communication and information is paramount in the UK model, to be deviated from in *exceptional* circumstances.

3.44 It may be noted that the Ofcom has published certain guidance notes, which are useful a helpful summary of the actual operation of the various regulations. The most relevant of these include the "Procedures for investigating breaches of content standards for television and radio", "Penalty guidelines", and "Procedures for the consideration of statutory sanctions in breaches of broadcast licences". These are appended respectively as **Annexures 1, 2 and 3** to this Report.

COUNTRIES IN THE EUROPEAN UNION[27]

3.45 Several countries in the European Union also follow a combination of fines and suspensions as sanctions for violations, suspension being resorted to in very extreme circumstances, even though there is no uniform EU law on the subject. One could look at a few examples.

[27] Centre for Media and Communication Studies, HUNGARIAN MEDIA LAWS IN EUROPE: AN ASSESSMENT OF THE CONSISTENCY OF HUNGARY'S MEDIA LAWS WITH EUROPEAN PRACTICES AND NORMS, available at <https://cmcs.ceu.hu/sites/default/files/field_attachment/news/node-27293/Hungarian_Media_Laws_in_Europe_0.pdf>.

FRANCE[28]

3.46 The High Council for Broadcasting (Conseil supérieur de l'audiovisuel – CSA) is the relevant broadcasting regulatory authority in France. CSA's sanctioning powers include the right to terminate and revoke broadcasting licenses. It regularly imposes sanctions, although the most common penalty is a formal notice.[29] The CSA has also revoked many broadcasting licenses for more serious violations—often for repeated breaches of licensing and frequency-usage agreements or provisions regarding incitement to hatred—although to date this level of sanction has been imposed mostly on radio broadcasters. It should be noted, too, that the CSA's sanctioning powers apply to public and commercial broadcasters, Internet-based TV and radio, and on-demand media, but does not include the print and online press, which are largely self-regulated and bound to rules in separate legislation and subject to sanctions by the French courts.

3.47 The CSA may impose a range of penalties—including formal notices, fines, sanctions and termination—for breaches to content and competition-related regulations in the Freedom of Communication Act of 1986, media-related provisions in the penal codes, various broadcasting decrees issued by French Parliament, and the CSA's own resolutions.[30] Upon determining a breach to the above mentioned regulations, the CSA may first serve producers and distributors of radio or television broadcasting services with a formal notice to comply with these obligations.[31] If a producer or a distributor of a radio or television broadcasting service fails to comply with the formal notice served, the CSA may, considering the seriousness of the breach, issue one of the following penalties[32]:

---

[28] **See** – http://medialaws.ceu.hu/france4_more.html

[29] For instance in 2010, the CSA handed down 91 formal notices, initiated 7 penalty proceedings, and imposed 4 sanctions. See CSA Annual Report 2010: http://www.csa.fr/upload/publication/Syntanglaisrap2010.pdf.

[30] Freedom of Communication Act (No. 86-1067 of 30 September 1986), not including 2009 amendments, available in French at: http://www.legifrance.gouv.fr/html/codes_traduits/libertecom.htm; an unofficial English-language translation of the amended Act (Number 2009-258 of 5 March 2009) provided by the University of Luxembourg, available at: wwwfr.uni.lu/content/download/31271/371434/.../France_translation_1.pdf.

[31] Article 42 of the Freedom of Communications Act 1986, (No. 86-1067 of 30 September 1986), not including 2009 amendments, available in French at: http://www.legifrance.gouv.fr/html/codes_traduits/libertecom.htm; an unofficial English-language translation of the amended Act (Number 2009-258 of 5 March 2009) provided by the University of Luxembourg, available at: wwwfr.uni.lu/content/download/31271/371434/.../France_translation_1.pdf.

[32] Article 42(1) of Freedom of Communications Act 1986 (No. 86-1067 of 30 September 1986), not including 2009 amendments, available in French at:

• Suspension of the authorisation or a part of the programme for a maximum of one month at most;

• Reduction of the term of the authorisation within the limit of one year;

• A pecuniary penalty possibly accompanied by a suspension of the authorisation or a withdrawal of the authorisation if the breach does not constitute a criminal offence;

3.48 The amount of financial penalties is determined according to the severity of the breach committed; however, the fines may not exceed 3 percent of the total revenue of the previous years income, and 5 percent in the case of a repeated breach to the same regulation.[33] In the event a media outlet within France's jurisdiction broadcasts programs in breach of the fundamental principles laid down in the Freedom of Communications Act of 1986, including respect of human dignity, pluralism of opinion, law and order, protection of minors, and incitement to hatred or violence on grounds of gender, lifestyle, religion or nationality, the CSA is entitled to order the termination of the channel's transmission. The CSA can withdraw a license without formal notice in cases in which the media outlet fails to report substantial changes in the data on which the license was granted, including changes to ownership, management and shareholder status.[34]

3.49 Appeals against the CSA's decisions can be filed with the Conseil d'Etat, in which case the decision is suspended until the Court issues a decision, unless the license revocation was initiated on grounds the media outlet violated public order, public security or health.[35] The Conseil d'Etat must issue a ruling within three months, and this cannot be

---

http://www.legifrance.gouv.fr/html/codes_traduits/libertecom.htm; an unofficial English-language translation of the amended Act (Number 2009-258 of 5 March 2009) provided by the University of Luxembourg, available at:
wwwfr.uni.lu/content/download/31271/371434/.../France_translation_1.pdf.

[33] Article 42(2) of the Freedom of Communications Act 1986 (No. 86-1067 of 30 September 1986), not including 2009 amendments, available in French at:
http://www.legifrance.gouv.fr/html/codes_traduits/libertecom.htm; an unofficial English-language translation of the amended Act (Number 2009-258 of 5 March 2009) provided by the University of Luxembourg, available at:
wwwfr.uni.lu/content/download/31271/371434/.../France_translation_1.pdf.

[34] Article 42(9) of the Freedom of Communications Act 1986, (No. 86-1067 of 30 September 1986), not including 2009 amendments, available in French at:
http://www.legifrance.gouv.fr/html/codes_traduits/libertecom.htm; an unofficial English-language translation of the amended Act (Number 2009-258 of 5 March 2009) provided by the University of Luxembourg, available at:
wwwfr.uni.lu/content/download/31271/371434/.../France_translation_1.pdf.

[35] Article 42(9) of the Freedom of Communications Act 1986, (No. 86-1067 of 30 September 1986), not including 2009 amendments, available in French at:
http://www.legifrance.gouv.fr/html/codes_traduits/libertecom.htm; an unofficial English-language

appealed.

DENMARK[36]

3.50 The Radio and Television Board (i.e. RTB), is the regulatory authority for commercial broadcasters. It has the power to suspend or revoke licenses for breaches to both technical and content-based regulations detailed in the Radio and Television Broadcasting Act (the "BAct").[37] It is important to note that Danish media regulations have few content-based restrictions and gives wide room for freedom of speech. The RTB uses a system of graduated sanctions that includes: 1) protest of infringement; 2) warnings about suspension, if not redressed or if repeated; 3) suspensions (temporarily, from one hour to three months); and 4) license revocation.[38] Decisions made by the RTB can be brought to the ombudsman, and can be reviewed by the courts. Appeals do not suspend the decision. The court's decision can be appealed to a higher court, and if allowed by the independent appeals board, also to the high court.[39]

CZECH REPUBLIC[40]

3.51 After repeated and severe violations to certain provisions in the Broadcasting Act—including breaches to content regulations —and after fines have been repeatedly levied, the Czech broadcasting authority, the Council for Radio and Television Broadcasting (RRTV), can revoke a broadcaster's license.[41] The RRTV can revoke a license not only for breaches to regulations on protection of minors, as stated above, but also for violating a number of other content regulations.

3.52 According to Section 63 of the Broadcasting Act, the RRTV can revoke a

---

translation of the amended Act (Number 2009-258 of 5 March 2009) provided by the University of Luxembourg, available at: wwwfr.uni.lu/content/download/31271/371434/.../France_translation_1.pdf.

[36] **See** – http://medialaws.ceu.hu/denmark3_more.html

[37] The Radio and Television Broadcasting Act established the Radio and Television Board (RTB) in 2001 as the independent regulator for all media under the Act's scope. The RTB is currently served by the Agency for Libraries and Media: http://www.bibliotekogmedier.dk/english/radio-and-tv/radio-and-television-board/.

[38] Ss 48-50 Radio and Television Broadcasting Act (BAct), available at: http://kum.dk/Documents/English%20website/Media/Promulgation%20of%20the%20Radio%20and%20Television%20Broadcasting%20Act%202010.pdf.

[39] **See** – http://medialaws.ceu.hu/denmark3_more.html

[40] **See** – http://medialaws.ceu.hu/czech2_more.html

[41] On Radio and Television Broadcasting Operation and Amendments to Other Acts (hereafter the "Broadcasting Act"), Act No. 231/2001, 17 May 2001, unofficial consolidated text available in English at: http://www.mkcr.cz/en/media-a-audiovize/act-no--231-2001--of-17-may-2001--on-radio-and-television-broadcasting-and-on-amendment-to-other-acts-84912/.

broadcaster's license if the broadcaster: obtains the license on the basis of false information in the license application or breaches the rules of cross-ownership; repeatedly commits a particularly serious breach of the license conditions; repeatedly commits a particularly serious breach of the obligations set out in Section 32 (1); and a fine has repeatedly been imposed upon the broadcaster for such breaches.[42]

3.53 Section 32(1) lists basic obligations for all broadcasters, which include the prohibitions on programming that promotes "war or show[s] brutal or otherwise inhumane behaviour in a manner that would involve its trivialisation, apology or approval;" that incites hatred for reasons relating to "gender, race, colour of the skin, language, faith and religion, political or other opinions, national or social origin, membership of a national or ethnic minority, property, birth or other status;" that contains subliminal communications; and that "may seriously affect the physical, mental or moral development of minors, in particular, programming involving pornography and gross violence as an end itself."[43]

3.54 The RRTV has no power to impose any interim injunction, temporarily suspend a media service or immediately remove a broadcaster's license. It can withdraw a license only after a series of conditions are met, which has served as an effective check on the RRTV's revocation powers, as this final sanction can only be applied after the process of repetitive penalisation and after all appellative procedures have been concluded. In addition, while breaches these content regulations can lead to the revocation of a broadcast license, in the course of nearly two decades the RRTV never revoked any radio or TV license for other than technical reasons—and never because of content. It is also important to note that nearly all the decisions made by the RRTV can be appealed with a complaint to a regular court.[44] In addition, the filing of an appeal has a suspensive effect on the sanction while the court considers the case. The court's decision can be further appealed at the three highest courts (Constitutional, Supreme and Supreme

[42] Broadcasting Act, Section 63, unofficial consolidated text available in English at: http://www.mkcr.cz/en/media-a-audiovize/act-no--231-2001--of-17-may-2001--on-radio-and-television-broadcasting-and-on-amendment-to-other-acts-84912/.
[43] Broadcasting Act, Section 32(1), unofficial consolidated text available in English at: http://www.mkcr.cz/en/media-a-audiovize/act-no--231-2001--of-17-may-2001--on-radio-and-television-broadcasting-and-on-amendment-to-other-acts-84912/.
[44] Per Act No. 150/2002, the Code of Administrative Justice, as well as Section 66 of the Broadcasting Act, unofficial consolidated text available in English at: http://www.mkcr.cz/en/media-a-audiovize/act-no--231-2001--of-17-may-2001--on-radio-and-television-broadcasting-and-on-amendment-to-other-acts-84912/.

Administrative courts) depending on the nature of the decision and court verdict.[45]

GERMANY[46]

3.55 The State Media Authority in Germany is competent to revoke the broadcasting license for the respective broadcasting service[47]—if "the broadcaster has repeatedly and seriously violated its obligations under this Act and has not complied with the instructions of the competent state media authority within the period specified by it."[48] The State Media Authorities are responsible for private broadcasters (national, regional or local) which they have licensed as well as for (illegal) unlicensed private broadcasters and private telemedia (online) services. In Germany, each of the country's 14 states have their own independent State Media Authority consisting of representatives of socially relevant groups and experts. In case of nationwide private broadcasters, the centralised organ of all State Media Authorities for licensing and supervision (ZAK) is competent to decide on infringements and license revocations. The competent State Media Authority will then issue the measure against the broadcaster.[49]

3.56 State Media Authorities can revoke a broadcaster's licenses on both structural and content-related grounds. Structural grounds for a revocation could include breaches of rules against media ownership concentration or cases when the licensee does not fulfill conditions the license contains, e.g. to broadcast a minimum amount of programming every day. Content-related grounds for revocation procedures are based on repeated and serious infringements to the various regulations and other instruments.

3.57 Measures are applied using a graduated approach, involving "admonition, prohibition, withdrawal and revocation."[50] In case the State Media Authority states decides that there

[45] **See** – http://medialaws.ceu.hu/czech2_more.html
[46] **See** – http://medialaws.ceu.hu/germany4_more.html
[47] For revocation procedures, see Article 29 of the Interstate Treaty on Broadcasting and Telemedia (the "Interstate Broadcasting Treaty" - RStV) in the version of the 13th Amendment to the Interstate Broadcasting Treaties, entry into force 1 April 2010; translation by the State Media Authorities for information purposes only, available at http://www.die-medienanstalten.de/fileadmin/Download/Rechtsgrundlagen/Gesetze_aktuell/13._RStV-englisch.pdf.
[48] As specified in Article 21 of the Interstate Treaty on Media between Hamburg and Schleswig-Holstein (Medienstaatsvertrag Hamburg Schleswig-Holstein - MStV HH SH), 13th June 2006, in the version of the third Interstate Treaty amending the Interstate Treaty on Media between Hamburg and Schleswig-Holstein dated 30th June 2009, HmbGVBl. S. 357, GVOBl. Schl.-H. S. 636; available in German at: http://www.ma-hsh.de/cms/upload/downloads/Rechtsvorschriften/3._MStV_Internet.pdf.
[49] **See** – http://medialaws.ceu.hu/germany4_more.html
[50] Interstate Treaty on Broadcasting and Telemedia (RStV), Article 38(2), translation by the State Media Authorities for information purposes only, available at: http://www.kjm-online.de/files/pdf1/RStV_13_english.pdf. 1

has been a breach of the above mentioned provisions, it is authorised to proceed against the broadcaster, i.e. the license holder which usually is a company or corporation. Hence, sanctions based on violations of the media law will usually be applied against companies, not individual persons. The grounds for proceedings against broadcasters are clearly stated in the interstate treaties and media laws, and all sanctioning measures are open to judicial review, infringements of constitutionally guaranteed freedoms of media outlets are unlikely.[51]

LATVIA[52]

3.58 The National Electronic Mass Media Council (NEPLP)[53] is responsible for ensuring that "electronic mass media" do not violate the terms of their licenses or programming and content regulations provided for in Latvia's media law.[54]

3.59 Violations that carry possible sanctions, as well as what standards the media authority applies when weighing its decisions, are explicitly defined in the Electronic Mass Media Law. Penalties are also detailed in the Latvian Administrative Violations Code.[55] According to Section 21 of the Electronic Mass Media Law, the National Electronic Mass Media Council can: annul a broadcasting permit if a broadcaster stops broadcasting or broadcasts irregularly; suspend a broadcaster's operations for up to seven days if that broadcaster has violated the law or failed to comply with the terms of its license; annul a broadcasting permit if the broadcaster has received three administrative punishments in one year, repeats a violation of the law or terms of its license within a month of receiving a warning for the same offence, violates the terms of its broadcast permit, does not broadcast to its entire coverage area, continues a violation for a month after being cited, or is guilty of crimes against the state.[56]

---

[51] **See** – http://medialaws.ceu.hu/germany4_more.html
[52] **See** – http://medialaws.ceu.hu/latvia_more.html
[53] National Electronic Mass Media Council (NEPLP), http://www.nrtp.lv/lv/padome/par-padomi/, was established the Parliament of the Republic of Latvia under the new *Electronic Mass Media Law* in July 2010. English-language translation provided by the *Valsts valodas centrs* (State Language Centre), available at: http://www.nrtp.lv/web/uploads/E1727_-_Electronic_Mass_Media_Law.pdf.
[54] Under the new Electronic Mass Media Law (2010), "electronic mass media" is defined as "mass media pursuing an economic activity," which encompasses broadcasting, radio, audiovisual on-demand services, public, commercial and non-commercial mass media across all transmission platforms—terrestrial, digital, satellite and cable.
[55] The Administrative Violations Code is available in Latvian at, http://www.likumi.lv/doc.php?id=89648,
[56] *Electronic Mass Media Law* (2010), Section 21, available at: http://www.nrtp.lv/web/uploads/E1727_-_Electronic_Mass_Media_Law.pdf

3.60 Section 26 of the Electronic Mass Media Law stipulates a set of restrictions regarding programming content: "programmes and broadcasts of the electronic mass media may not contain: 1) stories which accentuate violence; 2) materials of a pornographic nature; 3) incitement to hatred or discrimination against a person or group of persons on the grounds of sex, race or ethnic origin, nationality, religious affiliation or faith, disability, age or other circumstances; 4) incitement to war or the initiation of a military conflict; 5) incitement to overthrow State power or to change the State political system by violence, to destroy the territorial integrity of the State or to commit any other crime; or 6) stories which discredit the statehood and national symbols of Latvia."[57]

3.61 Violations of any of the above-mentioned restrictions are punishable under the Administrative Violations Code, while failure to meet the specific terms of a broadcast permit is a violation of the media law. If the National Electronic Mass Media Council determines there is a violation, it can initiate an administrative procedure. If a media outlet is found guilty of a violation, the Council can either impose a monetary sanction in accordance with the Administration Violations Code or apply other sanctions as provided in Section 21 of the Electronic Mass Media Law. If a media outlet is found to commit three administrative violations during one year, the Council has the right to annul the license.

3.62 The Administrative Violations Code clearly details the violations and the assessable penalties that can be levied by the National Electronic Mass Media Council.[58] It includes maximum fines for violating a number of specific provisions. Section 66 of the Electronic Mass Media Law establishes the procedures and standards by which the Council must carry out its decisions, which include weighing the usefulness of the necessity of the sanction to attaining the legal goal, whether the fine serves the public interest, and whether the fine would constitute a disproportion restriction of human rights. All administrative decisions can be appealed in administrative court.

SLOVAKIA[59]

[57] Electronic Mass Media Law (2010), Section 26, available at: http://www.vvc.gov.lv/export/sites/default/docs/LRTA/Likumi/Electronic_Mass_Media_Law.doc.
[58] According to Section 215.9 of the Administrative Violations Code, the Council "shall examine administrative violation matters provided for in Section 166.13, paragraphs one and two; Sections 173.2, 175.9, 201.5 and 201.32 of the Administrative Code, if the administrative violations are committed in the area of electronic public communications equipment, http://www.likumi.lv/doc.php?id=89648.
[59] http://medialaws.ceu.hu/slovakia_more.html

3.63 In Slovakia, the RVR regulates public and private TV.[60] The RVR can use a range of sanctions against media under its oversight for breaches to a number of technical and content-related regulations and obligations contained in the Law on Broadcasting and Retransmission. Content regulations include a set of "duties" which oblige media to ensure plurality of opinions, objectivity and non-partiality of news and current affairs programmes, and to distinguish facts from opinions and to uphold rules for broadcasting during elections campaigns. In addition, there are a number of provisions in concerning the protection of human dignity, the protection of minors, and the right of reply, along with other content restrictions.[61]

3.64 For breaches to the above regulations, the RVR can: (a) warn the broadcaster of the infringement; (b) require the broadcaster to announce the infringement; (c) suspend part of or the entire programme in breach of the law; (d) impose a fine; (e) withdraw the license. The law also specifies two conditions when the RVR to revoke a license immediately: first, if the broadcaster propagates violence and in open or hidden form incites to hatred, vilifies, or defames on the basis of gender, race, colour of skin, language, belief or religion, political or other opinion, ethnic or social origin or membership to a nationality or ethnic group; second, if the broadcaster promotes war or depicts cruel or in other way inhumane behaviour in a way that it is improper derogation , apology or approval. However, this can only be done if the broadcaster despite previous sanctions has repeatedly and deliberately and seriously continued to breach these rules.[62]

3.65 The RVR can impose a fine if the broadcaster, operator of retransmission (either legal or natural person), or provider of audiovisual on demand media services, after a written warning from the RVR, repeatedly breaches the obligation of which it was previously warned. The RVR can suspend for no more than 30 days a broadcast of a particular show for serious breaches to both technical and above mentioned content-related broadcasting obligations contained in the Broadcasting and Retransmission Act. For license revocations, the RVR is empowered to terminate a broadcast license for airing content which "repeatedly intentionally and seriously" breaches the obligations to protect human

[60] Council for Broadcasting and Retransmission (RVR): http://www.rada-rtv.sk/en/.
[61] Law on Broadcasting and Retransmission, §16(a), available at: http://www.culture.gov.sk/uploads/88/tA/88tAUy0RyjKu4YqYKYRqew/act_broadcast.pdf.
[62] **See** – Law on Broadcasting and Retransmission, available at: http://www.culture.gov.sk/uploads/88/tA/88tAUy0RyjKu4YqYKYRqew/act_broadcast.pdf.

dignity despite imposed sanctions.[63]

3.66 The RVR applies three general principles in its sanctioning decisions: "prevention," "graduality" and "adequacy," which means that the RVR determines the level of sanction while taking into account seriousness, method, duration, consequences and impact of the breach along with any sanctions imposed by the self-regulatory body.[64] Media outlets can appeal to the RVR's revocation decisions to the Supreme Court within fifteen days of the decision. In exceptional cases, the decisions of the Supreme Court can be appealed to the Constitutional Court.[65]

RECOMMENDATIONS

3.67 It is recommended, in light of the need for unrestrained and fearless telecast, proportionality, constitutionality and consistency with international standards that the MIB also adopt a model in line with the above-mentioned practices.

i. There should be a gradation of "violations", ranging from mild to severe;

ii. As a general practice sanctions imposed should be in the nature of fines and directions for correction;

iii. Fines should be substantial in case of serious violations, and not merely token fines;

iv. Sanctions under Clause 8.2 and Clause 10.2 that attract the consequences of these provisions should be imposed only in cases of repeated and extremely severe violations;

v. Factors that should be accounted for to determine the severity of the violation include:

a. <u>the degree of breach</u>- this refers to the extent and the severity of the breach

Eg., the telecast of a 2 second obscene scene in a movie is less severe than the telecast of an entire pornographic movie during prime time.

a. <u>the duration of the breach</u>- the time period for which the breach was alive

Eg., as per Rule 5.3 of the Guidelines, the company is required to keep a record of the content uplinked for a duration of 90 days. Failing to keep such record for a period of 2 days is less severe than for a period of 7 days.

[63] S 54(1)(e) Law on Broadcasting and Retransmission, available at: http://www.culture.gov.sk/uploads/88/tA/88tAUy0RyjKu4YqYKYRqew/act_broadcast.pdf.
[64] **See** – http://medialaws.ceu.hu/slovakia_more.html
[65] **See** – http://medialaws.ceu.hu/slovakia_more.html

b. the harm caused as a result of the breach- whether, and to what extent, has any injury been caused to the objectives of the restrictions

Eg., airing material in contravention of Rule 6(b) of the Programme Code, which contains a criticism of friendly countries, leads to a strain on the diplomatic relations between India and that country is a strenuous harm arising out of the violation of the broadcaster.

c. the reversibility of the harm- whether the harm can be corrected through any measures

Eg., the harm arising out of airing defamatory material on television can be conveniently reversed by issuing an apology and corrections.

d. measures taken for correction of the breach, etc.- whether the broadcaster has actually taken any measures for the correction of the breach

Eg., if the telecaster inadvertently broadcasts offensive material, and immediately takes the same off air, and also issues an apology simultaneously, the same must be accounted for as relevant measures taken to correct the breach.

vi. Suspension and revocation of license must be resorted to in exceptional circumstances, and only in cases of repeated and extremely severe violations;

vii. Additionally, while passing the relevant order of sanction, the deciding authority in "effective consultation" with the self-regulatory bodies, should also factor if the self-regulatory bodies have already taken cognizance of the violation and whether any penalty has been imposed thereby, before arriving at their decision.

'Found Guilty'

3.68 The phrase 'found guilty' in Clause 10.2 is also problematic. The term '*found guilty*' has a fixed meaning under criminal law.[66] 'Guilty' implies 'culpable', 'criminal', or 'having committed an offence'.[67] Pertinently, the phrase 'found guilty' has the same meaning as the word 'convict', such that both are used interchangeably.[68] 'Convict'

[66] P. Ramanatha Aiyar, THE LAW LEXICON: THE ENCYCCLOPAEDIC LAW DICTIONARY WITH LEGAL MAXIMS, LATIN TERMS, WORDS & PHRASES, (3rd edn., Gurgaon: LexisNexis Butterworths Wadhwa Nagpur 2012) at 667.
[67] P. Ramanatha Aiyar, THE LAW LEXICON: THE ENCYCCLOPAEDIC LAW DICTIONARY WITH LEGAL MAXIMS, LATIN TERMS, WORDS & PHRASES, (3rd edn., Gurgaon: LexisNexis Butterworths Wadhwa Nagpur 2012) at 720.
[68] *Emperor* v. *Lakshman Shivram*, 35 Bom LR 1018.

means '*to condemn… usually by a judgment of Court or by the verdict of a jury*'.[69] Specifically, the phrase relates to a proof of guilt of an *offence* or a *crime*.[70] Its use, therefore, in the context of a provision which invites *civil* liability only, is misplaced. Consequently, it leads to greater ambiguity.

3.69 Further in the context of the practices adopted by the MIB currently, the phrase lends itself to nebulousness. This is because the MIB could possibly take action against an infraction through several different ways. It may issue a show-cause notice to the offending channel, a warning, or an advisory. It is not in all cases that a penalty under Clause 8 needs to be imposed on the channel for a "violation", or that the "violation" must count as a strike for the purpose of Clause 10.2. These warnings and advisories do arise out of infractions, but may not be a relevant "violation" for the purpose of Clause 8 or Clause 10.2. Warnings, advisories etc. hence need not necessarily be equated with a finding of "guilt".

Lack of Fora for Appeal

3.70 An analysis on constitutionality and a comparison with other jurisdictions demonstrates the indispensability of free and unhampered television broadcast to a healthy democracy. Refusal of renewal of license to broadcast has a negative effect on the freedoms of trade and speech of broadcasters. To secure these freedoms, the renewal of a license has been elevated to the status of a statutory *right* in the United Kingdom. Even in other jurisdictions, this decision is required to be ratified at *several* levels to ensure that refusal is not accorded in a case which does not deserve the severity.

3.71 Under the current Indian model, however, this decision is in the hands of the MIB (subject to a relevant "consultation", which is discussed later) as per Clauses 8.2 and 10.2 of the Guidelines. It needs to first be decided whether a violation has occurred or not, and (for the purpose of Clause 10.2) after five such violations, one would automatically imply a refusal of renewal of license. Neither the Act nor the Guidelines nor the Rules provide any scope for an appeal from this decision.

3.72 It is now well-settled that there exists no inherent right to appeal, and that it must be

[69] P. Ramanatha Aiyar, THE LAW LEXICON: THE ENCYCCLOPAEDIC LAW DICTIONARY WITH LEGAL MAXIMS, LATIN TERMS, WORDS & PHRASES, (3rd edn., Gurgaon: LexisNexis Butterworths Wadhwa Nagpur 2012) at 349.
[70] P. Ramanatha Aiyar, THE LAW LEXICON: THE ENCYCCLOPAEDIC LAW DICTIONARY WITH LEGAL MAXIMS, LATIN TERMS, WORDS & PHRASES, (3rd edn., Gurgaon: LexisNexis Butterworths Wadhwa Nagpur 2012) at 349.

expressly conferred by law.[71] The only conferment of the right to appeal is by way of S.15 of the Act, which states as under:

> *(1) Any person aggrieved by any decision of the court adjudicating a confiscation of the equipment may prefer an appeal to the court to which an appeal lies from the decision of such Court.*

3.73 This provision under S.15 of the Act grants a right of appeal only against the decision of the Court under Ss.11 and 12 of the Act, which grant render the equipment of a cable operator liable to confiscation in case he is contravening Ss.3, 4A, 5, 6 or 8 of the Act. These include, *inter alia*, the Programme Code, the Advertising Code etc. S.15 does not grant a right to appeal from a decision pertaining to a finding of "violation" of the conditions of permission of license, or to the renewal of a license. The absence of an express right to appeal not having been granted to the broadcasters, the same does not vest in them inherently.

3.74 Accordingly, the aggrieved parties are left with only the Writ remedies contained in Art.32, and more widely, Art.226 of the Constitution.

RECOMMENDATION

3.75 The decision of the relevant Adjudicatory Body pertaining to the imposition of fines, issuance of directions, suspension and/or revocation of the license, should be made appealable.

Role of Self-Regulating Mechanisms

3.76 Clause 10.2 provides for a consultation system with the 'self-regulating' mechanisms to determine a "violation". Since the penalty under Clause 8 is also triggered by a "violation", it would appear that the provision of consultation would extend to that clause as well.

3.77 The reference in the Clause is to "consultation" with the self-regulating bodies such as the BCCC, ASCI, NBSA etc. All these bodies have floated Codes and Charters of Ethics, by which they seek to regulate their own conduct as broadcasters. These Codes stipulate the Principles on the basis of which their telecasts should be founded. For instance, the Principles contained in the News Broadcasters Association call for a deference to

[71] *Gansa Bai* v. *Vijay Kumar*, AIR 1974 SC 1126; *Special Military Estates Officer* v. *Muni Venkatramaiah*, (1992) SCC 168; *Raja Himanshu Dhar Singh* v. *Additional Registrar, Co-Operative Societies, Uttar Pradesh*, AIR 1962 All 439.

impartial and objective reporting, respect for the right to privacy etc. The Indian Broadcasters Foundation, regulating the conduct of non-news and current affairs channels, seeks to ensure compliance with the Rules through its Self-Regulatory Content Guidelines. These prescribe, *inter alia*, telecast of programmes unsuitable for children; being mindful of the sensibilities of the audience etc. In fact, this also provides a sophisticated grievance redressal mechanism by instituting a two-tier regulation network under the aegis of the BCCC.

3.78 A consultation process with these mechanisms, at least in so far as content related violations are concerned, is welcome. It respects the autonomy of these bodies in so far as their content is concerned, and also the need to minimize intervention by the government.

3.79 It is unclear, however, as to what the provision intends by providing for a consultation with these self-regulation mechanisms to determine *what constitutes a violation*. There are several possibilities:

i. The MIB will apply the Codes of the self-regulating bodies in addition to the various compliances spelled out in Clauses 8.2 and 10.2.

ii. Before the Rule comes into effect or is implemented, the MIB will consult the self-regulating bodies and/or their Codes to ascertain the definition and scope of a "violation" generally;

iii. The self-regulating bodies and/or their Codes will be consulted on a *case-to-case* basis to determine whether the terms and conditions of permission have been violated in the *instant case*;

3.80 Therefore, the precise scope of the term 'consultation' is suspect. The Oxford English Dictionary defines the term as[72] –

> *1. The action of consulting or taking counsel together; deliberation, conference; 2. A conference in which the parties, e.g. lawyers or medical practitioners consult and deliberate. 3. The Action of consulting*

3.81 In the Black's Law Dictionary,[73] the definition of 'consultation' is as follows –

> *Consultation: Act of consulting of conferring; e.g. patient with doctor; client with lawyer. Deliberation of persons on some subject. A conference between the counsel*

[72] *Oxford English Dictionary* (Oxford Publishing, 2001) at p 183.
[73] **See** – *Black's Law Dictionary* (West, 8th Edition, 2004).

engaged in a case, to discuss its questions or arrange the method of conducting it.

3.82 Again, in Stroud's Judicial Dictionary, the meaning of the term is provided as under[74]-

Consultation: (New Towns Act, 196 (9 & 1) (Geo. 6.C.68), s 1(1), 'consultation with any local authorities 'Consultation means that, on the one side, the Minister must supply sufficient information to the local authority to enable them to tender advice, and, on the other hand, a sufficient opportunity must be given to the local authority to tender advice" per Blucknil, L.J. in Rollo v. Minister of Town and Country Planning (1988) 1 All E.R. 13 C.A see also Fletcher v. Minister of Town and Country Planning (1947) 2 All E.R. 99

3.83 Further, in *Corpus Juris Secundum* it is provided[75] -

Consultation: The word 'consultation' is defined general as meaning the act of consulting; deliberation with a view to decision; and judicially as meaning the deliberation of two or more persons on some matter; also council or conference to consider a special case. In particular connections, the word has been defined as meaning a conference between the counsel engaged in a case, to discuss its question or to arrange the method of conducting it, the accepting of the services of a physician, advising him of one's symptoms, and receiving aid from him.

3.84 P RAMANATHA AIYAR, in his LAW LEXICON, provides the following definition:[76]

Consultations always require two persons at least, deliberations may be carried on either with a man's self or with numbers; an individual may consult with one or many; assemblies commonly deliberate; advice and information are given and received in consultation; doubts, difficulties, and objection are stated and removed in deliberations. Those who have to co-operate must frequently consult together; those who have serious measures to decide upon must cooly deliberate.

3.85 In UK, the word came up for consideration in the case of *Fletcher* v. *Minister of Town*

---

[74] D. Greenberg ed., STROUD'S JUDICIAL DICTIONARY OF WORDS AND PHRASES, (7th edn., 2008) at 522.

[75] CORPUS JURIS SECUNDUM: COMPLETE RESTATEMENT OF THE ENTIRE AMERICAN LAW AS DEVELOPED BY ALL REPORTED CASES, Vol. 16A at 1243.

[76] P. Ramanatha Aiyar, THE LAW LEXICON: THE ENCYCCLOPAEDIC LAW DICTIONARY WITH LEGAL MAXIMS, LATIN TERMS, WORDS & PHRASES, (3rd edn., Gurgaon: LexisNexis Butterworths Wadhwa Nagpur 2012) at 334.

Planning.[77]

> *The word 'consultation' is one that is in general use and that is well understood. No useful purpose would, in my view, be served by formulating words of definition. Nor would it be appropriate to seek to lay down the manner in which the consultation must take place. The Act does not prescribe any particular form of consultation. If a complaint is made of failure to consult, it will be for the Court to examine the facts and circumstances of the particular case and to decide whether consultation was, in fact, held. Consultations may often be a somewhat continuous process and the happenings at one meeting may form the background of a later one.*

3.86 In India, the term has received varied definitions in different contexts. One of the earlier cases that deliberated upon the meaning of the term was in *R. Pushpam v. State of Madras*, wherein S.3 of the Madras District Municipalities Act, 1920, providing for the election of Councillors to a Municipal Council by the local government in consultation with the Municipal Council:[78]

> *The word 'consult' implies a conference of two or more persons or an impact of two or more minds in respect of a topic in order to enable them to evolve a correct, or at least, a satisfactory solution. Such a consultation may take place at a conference table or through correspondence. The form is not material but the substance is important. It is necessary that the consultation shall be directed to the essential points and to the core of the subject involved in the discussions. The consultation must enable the consulter to consider the pros and cons of the question before coming to a decision. A person consults another to be elucidated on the subject-matter of the consultation. A consultation may be between an uniformed person and an expert or between two experts. A patient consults a doctor, a client consults his lawyer; two lawyers or two doctors may hold consultations between them-selves. In either case the final decision is with the consulter, but he will not generally ignore the advice except for good reasons. So too in the case of a public authority. Many instances may be found in statutes when an authority entrusted with a duty is directed to perform the same in consultation with another authority which is qualified to give advice in respect of that duty. It is true that the final order is made and the ultimate responsibility rests with the former authority. But it will not, and cannot be, a performance of duty if no*

[77] *Fletcher* v. *Minister of Town Planning* (1947) 2 All E.R. 496.
[78] *R. Pushpam v. State of Madras* AIR 1953 Mad 392.

consultation is made, and even if made, is only in formal compliance with the provisions. In either case the order is not made in compliance with the provisions of the Act.

3.87 Again, in *Chandramouleshwar Prasad* v. *Patna High Court*,[79] 'consultation' in Art.233 was under deliberation:

Consultation with the High Court under Article 233 is not an empty formality. So far as promotion of officers to the cadre of District Judges is concerned the High Court is best fitted to adjudge the claims and merits of persons to be considered for promotion. The Government cannot discharge his function under Article 233 if he makes an appointment of a person without ascertaining the High Court's views in regard thereto. It was strenuously contended on behalf of the State of Bihar that the materials before the Court amply demonstrate that there had been consultation with the High Court before the issue of the notification of October 17, 1968. It was said that the High Court had given the Government its views in the matter; the Government was posted with all the facts and there was consultation sufficient for the purpose of Article 233. We cannot accept this. Consultation or deliberation is not complete or effective before the parties thereto make their respective points of view known to the other or other and discuss and examine the relative merits of their views. If one party makes a proposal to the other who has a counter proposal in his mind which is not communicated to the proposer the direction to give effect to the counter proposal without anything more, cannot be said to have been issued after consultation.

3.88 The 1981 Supreme Court decision of *SP Gupta* v. *President of India* was decided in the context of Art.217 of the Constitution, which relates to the appointment of a Judge of the High Court.[80] It provides that the judges of the High Court are to be appointed by the President after *consultation* with the Chief Justice of India. Here, it was held that 'consultation' for the purpose of Art.217 means full and effective consultation, in which both parties who are required to confer must have the same materials before them, and both must faithfully exchange the information available with each other.

"*There must be careful and intelligent deliberation on the part of each of them on full and identical facts. Each must make known to the other its point of view and they must*

[79] *Chandramouleshwar Prasad* v. *Patna High Court* [1970] 2 SCR 666.
[80] *SP Gupta* v. *President of India* AIR 1982 SC 149.

discuss and examine the relevant merits of the views."[81]

3.89 The issue of the scope and nature of 'consultation' referred to in Art.217 came up before the Supreme Court again in 1993 in the case of *Supreme Court Advocates-on-Record Association* v. *Union of India*.[82] In that case, the Supreme Court referred to various sources, including statutes, case law, and dictionaries to examine the meaning of the term 'consultation'. The Hon'ble Supreme Court held that consultation implies a '*participatory consultative process*', in which the opinion of both the parties carries equal weight.

3.90 In the 2001 Allahabad High Court decision of *Moreshwar Savey*, the meaning of the term 'consultation' in Ss.11(1) and 228 of the Code of Criminal Procedure was discussed.[83] The case referred to *State of Jammu and Kashmir* v. *A.R. Zakki*, wherein it was held that:[84]

> *Though 'consultation' does not mean 'concurrence', it postulates an effective consultation which involves exchange of mutual viewpoints of each other and examination of the relative merits of the other point of view. Consultation or deliberation is not complete or effective before the parties thereto make their respective points of view known to the other or others and discuss and examine the relative merits of their views.*

3.91 Similarly, in *Pruthvisinh Amarsinh Chauhan* v. *KD Rawat*,[85] it was held that:

> *The term used is consultation and not concurrence or consent which are not synonyms to each other, and operate differently. For an important* (sic) *that the consultation has to be meaningful and not formal.*

3.92 Evidently, all these propositions place the opinion of the consultee on a broad scale in terms of its authority and binding nature. While on the one hand, opinion states that consultation does not equal concurrence, on the other hand, cases state that the opinion should be deviated from only in exceptional circumstances. The consequences of both will obviously be different. By referring to the self-regulatory *mechanism*, and not the *bodies*, the Rule seems to suggest one of two things. As per the *Supreme Court*

---

[81] *SP Gupta* v. *President of India* AIR 1982 SC 149.
[82] *Supreme Court Advocates-on-Record Association* v. *Union of India* AIR 1994 SC 268.
[83] *Moreshwar Savey v State of UP* 2001 CriLJ 1765.
[84] *State of Jammu and Kashmir* v. *A.R. Zakki* 1992 Supp (1) SCC 548
[85] *Pruthvisinh Amarsinh Chauhan* v. *KD Rawat* AIR 2004 Guj 343.

Advocates-on-Record Association case,[86] the self-regulatory norms will be *binding* on the MIB, which will have the effect of an informal set of rules being implemented formally through the authority of law. Alternatively, as per the *Pruthvisinh Amarsinh Chauhan* interpretation,[87] which leaves scope for difference, the self-regulatory mechanisms will need to be only referred to.

3.93 Even in the latter case, it is unclear what the contents and stage of the consultation process should be. There are two possibilities. *First*, either the self-regulatory *bodies* are referred to at a foundational stage to frame a formal Code of Conduct, having formal, legal effect, under the authority of the MIB, which would subsequently be enforced by the MIB itself. The conduct of broadcasters would be measured against this Code. However, the Rule does not provide room for reference to a Code thus formulated, since it speaks only of the conditions of permission of license, including the Programme Code and the Advertising Code, unless such Code is included within the scope of the abovementioned conditions. The *second* possibility is a consultation with the self-regulatory mechanisms on a case-to-case basis, to determine the degree and extent of the violation by the broadcaster. It is also possible for the self-regulatory bodies be referred to for their advice/opinion in the matter. This approach pays obeisance to the autonomy and ethics of these bodies, and prevents unwarranted intervention by the government.

RECOMMENDATION

3.94 It is recommended that, in striking a balance between the requirement of the state to exercise minimal control, and the autonomy of the self-regulatory bodies, the consultation with these self-regulatory mechanisms be intensive, and not merely cursory. The opinions of both entities should be accorded due weight. Further, this must be factored it on *each* case of violation, such that the involvement of the bodies is ensured throughout implementation as well, and that they do not withdraw immediately after formulation of the Code.

3.95 In keeping with this objective, it is recommended that:

1. An independent Adjudicatory Body should be formulated to adjudicate on violations that take place through the license period.

[86] *Supreme Court Advocates-on-Record Association* v. *Union of India* AIR 1994 SC 268.
[87] *Pruthvisinh Amarsinh Chauhan* v. *KD Rawat*

2. This Adjudicatory Body should decide on whether there is a violation, and if one is found, what consequence it warrants.

3. The decision of the Adjudicatory Body should be in consultation with the relevant self-regulatory bodies on a case-to-case basis, to determine the degree and extent of the violation by the broadcaster.

4. While undertaking the effective consultation with the self-regulatory bodies, it must be noted that general content related violations (including promotions) in relation to entertainment channels is within the jurisdiction of the BCCC; general content related violations (including promotions) in relation to news channels is within the jurisdiction of the NBSA; and purely commercial advertising related violations is within the jurisdiction of the ASCI.

Retrospectivity?

3.96 There are two ways in which the nature of the Clause 10.2 (and also Clause 8) can be seen.

3.97 First, it can be seen as a condition that broadcasters are expected to abide by for continuance of and/or grant of permission for renewal of a *license*. On this interpretation, all *licenses* henceforth granted or revived will be required to account for this condition in Clauses 8.2 and 10.2. In this manner, the effect of the provision will not be entirely prospective, in that it will attach to permissions for renewal of *licenses* in the future and not future *violations*. While it will apply to all future renewals, it will be founded on violations having occurred in the past. In this manner, the provision will apply on violations that have *already* taken place, even though the mechanism/authority to determine the relevant violation was not in existence at the time that the violation took place. Therefore, this provision will operate *retrospectively*.

3.98 In the case of *D.G. Gose and Co. (Agents) Pvt. Ltd.* v. *State of Kerala*,[88] the Hon'ble Supreme Court, citing Craies on Statute Law, 'retrospective' was defined as follows:

> *A statute is to be deemed to be retrospective, which takes away or impairs any vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect of transactions or considerations already past. But a statute is not properly called a retrospective statute because a part of the requisites for its action is drawn from a time antecedent to its passing.*

[88] *D.G. Gose and Co. (Agents) Pvt. Ltd.* v. *State of Kerala* AIR 1980 SC 271.

3.99 Similarly, *Darshan Singh* v. *Ram Pal Singh*,[89] while citing Halsbury's Laws of England, held that:

> *It has been said that 'retrospective' is somewhat ambiguous and that a good deal of confusion has been caused by the fact that it is used in more senses than one. In general, however, the courts regard as retrospective any statute which operates on cases or facts coming into existence before its commencement in the sense that it affects, even if for the future only, the character or consequences of transactions previously entered into or of other past conduct. Thus a statute is not retrospective merely because it affects existing rights; nor is it retrospective merely because a part of the requisites for its action is drawn from a time antecedent to its passing.*

3.100 Evidently, this interpretation falls within the scope of "*attach[ing] a new disability in respect of transactions or considerations already past*". Attaching a new disability for a transaction which has already occurred does not give a fair warning to the broadcasters to invite obedience to the rule, and therefore, reeks of arbitrariness and unfairness.

3.101 It is also an accepted principle of statutory interpretation that a holding of retrospectivity should not be done lightly.[90] Such an interpretation would also lead to absurd consequences, since if a channel has three or more "violations", not only would its licence not be eligible for renewal, under Clause 8, its existing licence would also be suspended.

3.102 There is a better way to interpret this provision. It can be perceived as a measure to target relevant *violations* that the MIB is required to account for in granting renewal of licenses. As per this interpretation, the provision is to operate prospectively on future *violations*.

RECOMMENDATION

3.103 The provisions in Clauses 8.2 and 10.2 should be made applicable only for violations that occur in the future, and not in respect of *licenses* that are already granted or coming up for renewal at a future date.

[89] *Darshan Singh* v. *Ram Pal Singh* AIR 1991 SC 1654.
[90] GP SINGH, *Principles of Statutory Interpretation* (12th edn, 2010) at p 524.

4. SUMMARY OF ALL RECOMMENDATIONS WITH RESPECT TO THE SUBSTANCE OF THE PROVISIONS

4.1 There should be a gradation of "violations", ranging from mild to severe;

4.2 As a general practice, sanctions imposed should be in the nature of fines and directions for correction;

4.3 Fines should be substantial in case of serious violations, and not merely token fines;

4.4 Sanctions under Clause 8.2 and Clause 10.2 that attract the consequences of these provisions should be imposed only in cases of repeated and extremely severe violations;

4.5 Factors that should be accounted for to determine the severity of the violation include:

a. the degree of breach- this refers to the extent and the severity of the breach

Eg., the telecast of a 2 second obscene scene in a movie is less severe than the telecast of an entire pornographic movie during prime time.

b. the duration of the breach- the time period for which the breach was alive

Eg., as per Rule 5.3 of the Guidelines, the company is required to keep a record of the content uplinked for a duration of 90 days. Failing to keep such record for a period of 2 days is less severe than for a period of 7 days.

c. the harm caused as a result of the breach- whether, and to what extent, has any injury been caused to the objectives of the restrictions

Eg., airing material in contravention of Rule 6(b) of the Programme Code, which contains a criticism of friendly countries, leads to a strain on the diplomatic relations between India and that country is a strenuous harm arising out of the violation of the broadcaster.

d. the reversibility of the harm- whether the harm can be corrected through any measures

Eg., the harm arising out of airing defamatory material on television can be conveniently reversed by issuing an apology and corrections.

e. measures taken for correction of the breach, etc.- whether the broadcaster has actually taken any measures for the correction of the breach

Eg., if the telecaster inadvertently broadcasts offensive material, and immediately takes the same off air, and also issues an apology simultaneously, the same must

be accounted for as relevant measures taken to correct the breach.

4.6 Suspension and revocation of license must be resorted to in exceptional circumstances, and only in cases of repeated and extremely severe violations;

4.7 Additionally, while passing the relevant order of sanction, the deciding authority in "effective consultation" with the self-regulatory bodies, should also factor if the self-regulatory bodies have already taken cognizance of the violation and whether any penalty has been imposed thereby, before arriving at their decision.

4.8 The decision of the relevant Adjudicatory Body pertaining to the imposition of fines, issuance of directions, suspension and/or revocation of the license, should be made appealable.

4.9 An independent Adjudicatory Body should be formulated to adjudicate on violations that take place through the license period.

4.10 This Adjudicatory Body should decide on whether there is a violation, and if one is found, what consequence it warrants.

4.11 The decision of the Adjudicatory Body should be in consultation with the relevant self-regulatory bodies on a case-to-case basis, to determine the degree and extent of the violation by the broadcaster.

4.12 While undertaking the effective consultation with the self-regulatory bodies, it must be noted that general content related violations (including promotions) in relation to entertainment channels is within the jurisdiction of the BCCC; general content related violations (including promotions) in relation to news channels is within the jurisdiction of the NBSA; and purely commercial advertising related violations is within the jurisdiction of the ASCI.

4.13 The provisions in Clauses 8.2 and 10.2 should be made applicable only for *violations* that occur in the future.

4.14 The aforesaid recommendations should also be extended to 'Policy Guidelines for Downlinking of Television Channels in India' since similar penalty provisions exist in these Guidelines as well.