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INTRODUCTION

The convergence in India has arrived faster than expected. The convergence would help in web casting, video on demand, Internet via cable. The much-awaited delivery of Internet through cable network has already started in Delhi Mumbai and Kolkata etc.

The optical fiber cable carries more bandwidth resulting in more signals being carried with superior clarity. The cable companies are expected to rule the roost due to investments made by them in the cable networks. The upgradation of cable network (optical fiber). The Mahanagar Telephone Nigam Limited (hereinafter referred as MTNL) poses tough competition for all the ISP’s. As it can pup the broadband network on its existing network at a very low cost.

The cable operators deliver the cable and satellite channels to the consumers. With more and more channels going pay to air, would open up subscription revenue for the broadcasters. In future it will emerge a major source of revenue and much larger than the advertisement revenue stream. The channel will be carried on two platforms - Direct to Operator (hereinafter referred as DTO) and Direct to Home (hereinafter referred as DTH). Both the services have user address ability in matter of convergence.

Direct To Operator

The DTO is a step, moving towards subscription channels. In DTO channels are digitized and encrypted by the broadcaster. It operates using C band\(^2\). The signals are downloaded by the cable operator by using the integrated receiver decoder (hereinafter referred as IRD) and distributed to cable homes.

\(^2\) below 4800 Mhz
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The DTO transmission helps in saving of the cost, tracking the subscription revenue but calls for additional investment for the decoders for down linking of signal.

It is capitalizing on price sensitiveness of consumers of India, who would not be willing to subscribe to the high cost DTH services. The subscription of the convergence is expected to the Rs 250 per month per subscriber in India.

Direct To Home

It offers an alternative to the DTO service addressing superior reception with advance level of multi channel subscription revenue for broadcaster. The digitized channels are broadcast using the Ku band\(^3\). The consumers have the option to receive more than one signal, which are down linked by the consumer directly by using dish antenna at their home.

DTH can broadcast more than 100 channels using IRD, which ensures conditional access on payment of subscription. The investment of dish antenna and other hardware is borne by the consumer. The installation cost of DTH is high enough to deter price sensitive consumer of India and it is estimated that subscription of 2 million consumers would be needed to make the service profitable.

DTH can be broadcast using C band or Ku Band. The transmission at C band needs dish antenna of 3-4 meters. This C band preposition does not seem to be possible in metros where the potential consumer of the DTH would reside.

The Ku band, which requires antenna of 60-75 cm, would attract the attention of consumers. The government currently, does not permit the transmission of signals at Ku band in India.

\(^3\) above 4800 Mhz
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The growth of Cable and Satellite has opened a new vista for the Indian media sector. In a short span of two years, more than 60 (national, regional and foreign) channels are broadcasting in India. It is expected that more than 30 new channels would be launched in the next three years.

The popularity and growth of channels would be driven by originality and quality content (five to six hour a day of Original Programming). The entertainment has found its roots in the regional market also. The growth of regional channels would come on the expense of falling advertising revenue of the regional print media.

The US experience suggests that while the average TV homes were able to receive 57 channels in 1998, the number of channels actually viewed were 13 - the term 'viewed' is defined as 10 or more continuous minute's content and delivery for loyal audience. The current mushrooming of channel suggests that shakeout in the industry is inevitable.

The total advertising on the C&S TV was Rs 27912 million for 2000. Since majorities of the channels are free to air and subscription market is yet not developed, we have made our assumption on the basis of free to air channels. Although the subscription market is larger than the advertising market it will add substantial revenue to the broadcasters.

Content has emerged as king in the fierce battle of television channels. The success of channel is dependent on the quality of content, which attracts the attention of an audience. The content would drive the success of the channel. With more than 40 (national and regional) channels on air and 30 more lined up in the next two years. Demand for content is expected to grow by 40 percent for three years.

The television software industry is valued at Rs. 5840 million. Content has high recyclable value, no storage cost and can be exported. A successful and good quality content has high recyclable value and can also be delivered
through various delivery mechanisms such as Compact Disc, and Web Casting.

Current original programming is 5 hour per day per channel and with the competition intensifying it could be increased to seven hours/day/channel. This would translate into substantial opportunity of the content providers. As the industry experience suggests, the average production by a content producer is six to eight hour a week. This translates into an opportunity for 35 producers in the current demand scenario and more to join the fray.

The content is shown either on terrestrial or C&S Network. The popularity of content depends upon the understanding of the audience and making the right genre of program for the target audience. The availability of intellect and low manpower cost has made the Indian content popular world over and an export of content has opened a new revenue stream for the content provider.

A good quality content has a recyclable value, can be exported and can add to the revenue stream of the IPR holder. The content producers working with Delhi Doordarshan (hereinafter referred as DD) have built up a substantial library of content and are exploring the same.

The merger between telecommunications, computer and broadcasting is going to change the way people will work, play and live. The 'convergence' of these technologies has given birth to the prospect of multimedia services, which will offer interactive computer based applications that will combine text, graphics, audio and animation features into a media experience for users.

The increasingly competitive environment in the multimedia industry promises tremendous user benefits through increased savings in time, greater choice, and an explosion of innovative services and products. This is the promise, to date, truly interactive services allowing the viewer to descend through a series of levels of information are still at the experimental stage.
The development of multimedia services will not replace judgment value that is provided by the traditional media. Hence, the traditional media will still have a large role to play in the new multimedia world.

Multimedia has the potential to vastly increase the range of services available, and offer its users a larger choice of applications but new technology alone will not ensure success; it is the people who use it who will decide the future of multimedia. The users' wants and needs; how they will manage the flood of options; and, above all, whether or not they will pay for the freedom of choice are what counts.

Technological and institutional 'Convergence ' has become a cliche of the information age. In its current usage it refers to two distinct though related phenomena. The way that all transmission media become bit-carriers so that different 'network platforms' can carry similar kinds of services and the tendency of the previously separate worlds of broadcasting, film, telecommunication, publishing and computing to become involved in each other's business.

Recent examples of new, convergent services include: Services delivered to TV sets via systems like Web TV; E-mail and World Wide Web access via digital TV decoders and mobile telephones; Using the internet for voice telephony.

[A] New Regulation for the convergence sector

The Information Technology Act, 2000 (hereinafter referred as ITA, 2000) has regulations that define what is right or wrong as to the one aspect of the content delivery namely the "Obscenity". The range of powers that the Act provides for the "Controller" has already raised alarms in the industry. Lack of checks and balances for the operations of the Adjudicating Officer and the CRAT (hereinafter referred as Cyber Regulation Appellate Tribunal) has also been brought to the public notice.
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Even before the ink has dried on the notification of the ITA-2000 Rules, there appears on the horizon a new regulation of momentous importance to the Netizen community of India. This is coming in the form of the "Regulation of the Convergence sector".

Securities and Exchange Board of India (hereinafter referred as SEBI) is contemplating regulation of "Content Relating to Investments" SEBI may also step into the area of "Regulating Content on Corporate Web sites". SEBI is already regulating the "Financing of DotCom Companies" through an exclusive attention. Reserve Bank of India (hereinafter referred as RBI) is contemplating regulation of "E-Commerce initiatives of Non Banking Finance Companies and Banks". These regulations may fall in the purview of the Finance ministry.

Until the Cable Internet takes off, telephone remains the critical last mile connectivity device for all Netizens. Today, telephone costs are around 75% of connectivity costs in paid services and are the only costs of connectivity in respect of "Free Internet Access Services". Poor quality of connectivity is a factor, which makes this cost higher than what it seems to be. Netizens who are concerned about their rights are therefore extremely unhappy with the services of the Telecom sector and are living in the hope that after the privatization of the DOT, there could be an improvement in its services and pricing policies.

Now we have also to watch out for the new "Regulator for the Convergence Sector" that is CCI proposed in the CCB to be set up. This regulation would cover Internet, Broadcasting, and Telecom sectors. A huge part of the Cyber society would be affected by any legislation in this regard.

[B] Convergence Bill 2001: Critical Analysis

Technological developments are posing a huge challenge to the lawmakers. The unprecedented growth in Internet as a medium for Commerce has already
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necessitated the passage of the ITA 2000, which has given Legal recognition for Electronic Documents and Digital Signatures\(^4\); Definition of various kinds of Cyber Crimes\(^5\) and a justice dispensation mechanism\(^6\) for handling these Crimes.

Close on the heels of this landmark legislation, the continued developments in the technology that drives the Internet has now brought us to the threshold of another significant piece of legislation in the form of the CCB.

The need for this legislation has been forced on the society because the present laws that govern the areas of Telecom, Broadcasting and information technology have been found insufficient to meet the needs of the present day requirements. They had been framed when each of the communication mediums such as the Telephones, Radio, and Television had evolved independently over a long period and were governed by different sets of laws.

Gradually, the wired network of the Telephony and the Wireless network of the Audio broadcasting started exploiting the satellite communication facility along with the Television broadcasting. Thus resources such as “Satellite Communication Bandwidth” became common to the different media. Thus the concept of “Convergence of the Media” emerged.

Today, Technology has brought Internet, Broadcasting and Telephony on a single platform of distribution. In the consumer’s perspective the Personal Computer today is a Communication device, which can also be used for Telephony as well as receiving audio and video, broadcasts. Similarly, the Web TV can be used for surfing the Internet and for sending E-Mails. The WAP has converted the mobile phone into an E-Commerce tool. In the business perspective, the infrastructure available for meeting the needs of one of the media can be more effectively utilized if applied to other media as well.

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\(^4\) IT Act, 2000 Sec 14-16
\(^5\) Ibid. Sec 65-78, 80
\(^6\) Ibid. Sec 48-64
Thus an ISP thinks of “Internet telephony” and the “TV broadcaster” thinks of “Internet delivery of TV Content”, as a natural business strategy.

The historic legal framework which had not envisioned this convergence, naturally failed to fulfill the aspirations of the society since they placed artificial barriers of “licensing” on various service providers as well as the consumers. This led to flouting of law by many individuals as well as service providers.

Recognizing the changing needs of the society, Indian Government has now decided to revise the legal framework applicable to the Broadcast and Telecom sectors so that the benefits of technology can be harnessed. This appreciation of the need for ‘Convergence Laws” has been brought out in the objects of the Bill which states as follows:

“One of the basic objectives of this Act is to provide for a regulatory mechanism, which facilitates convergence and therefore, remains valid over a period of time. Convergence in this context means convergence of mediums or technologies facilitating provision of all services by using a given facility or network and vice versa. It also means convergence of services at the provider’s end as well as the consumer’s end, meaning, thereby, a service provider should be able to provide a whole range of technologically feasible services and a consumer should be able to receive all services through a given terminal at any time and place of his choice.”

In order to remove the hurdles arising out of past legislations, the Bill will repeal many of the earlier legislations7.

The licensees who are operating under the provisions of these laws will now be required to make a fresh application for license within 6 months of the Bill coming into force with the appropriate authority under the new Bill.

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7 The Indian Telegraph Act, 1885; The Indian Wireless Telegraphy Act, 1933; Telegraph Wire Unlawful Possession Act, 1950; Cable Television Networks (Regulation) Act, 1995 and The Telecom Regulatory Authority of India Act, 1997.
India is said to be only the second country in the Asian region to bring a separate Bill for the Convergence Industry and we need to appreciate the futuristic thinking, which is behind this bold initiative.

1. **Objective of the Convergence Bill**

The basic objectives as stated are to facilitate convergence of Communication both at the provider's level as well as the user's level. It recognizes that the technology makes it possible to provide and receive different services from common facilities or equipments.

Is this convergence carried through the other features of the regulations? Let's look at the detailed provisions to check whether the lofty objectives are addressed optimally in the provisions.

The main control centre for the Convergence legislation lies with the CCI as defined in Chapter III. This will be a body corporate with perpetual succession with power to hold and dispose property. The Commission will

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8 First in Malaysia, Malaysian Communications and Multimedia Act, 1998; Act No. 588, 589.
9 Appendix I as well as Chapter IV of the draft CCB. The Communications Commission of India while exercising its functions shall be guided by the following principles: (i) that the communication sector is developed in a competitive environment and in consumer interest; (ii) that communication services are made available at affordable cost to all especially uncovered areas including the rural, remote, hilly and tribal areas; (iii) that there is increasing access to information for greater empowerment of citizens and towards economic development; (iv) that quality, plurality, diversity and choice of services are promoted; (v) that a modern and effective communication infrastructure is established taking into account the convergence of information technology, media, telecom and consumer electronics; (vi) that defence and security interests of the country are fully protected; (vii) that introduction of new technologies, investment in services and infrastructure, and maximisation of communications facilities and services (including telephone density) are encouraged; (viii) that equitable, non-discriminatory interconnection across various networks are promoted; (ix) that licensing criteria are transparent and made known to the public; (x) that an open licensing policy allowing any number of new entrants (except in specific cases constrained by limited resources such as the spectrum) is promoted; and (xi) that the principle of a level playing field for all operators serving consumer interest, including existing operators on the date of commencement of the Act, is promoted.
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consist of 9 members including the Chairman and ex-officio member namely the Spectrum Manager.

The Chairperson and not less than 5 members of the commission will be permanent members. The members would be appointed by Central Government, by notification from amongst persons from various specialized fields such as broadcasting, telecommunications, information technology, finance, management and law. A person who is in Government has to retire or resign to take up this appointment and shall not have any financial or other interests as is likely to affect prejudicially his functions.

The permanent members will hold office for 5 years. A member (Other than the Chairman) who doesn't attend three consecutive meetings shall be deemed to have vacated his office.

The above provisions provide for representation of different specialists, reasonably insulates them from Government influence so that the Commission can be administered impartially.

It is only in case of Spectrum management that the Government has retained direct control since the Spectrum Management Committee will have a cabinet secretary as its Chairman. The Spectrum Manager who will be a member secretary of the Commission will be appointed by the Government and nothing prevents a “Professional of Impeccable International Standing “ being appointed for the purpose.

Considering the importance of regulating the spectrum allocation as a part of international understanding, one cannot disagree with the need for a “Spectrum Management Committee “ in addition to the Commission.

This committee will probably have “Technical Experts” while the Commission may have Judicial and Business Management Experts.
A lot of criticism has already been made on this part of the draft bill stating that the “Commission” will be a puppet in the hands of the Government.\(^\text{10}\)

In exercising its licensing and regulatory functions\(^\text{11}\) the Commission shall follow such policy directives as may be communicated to it in writing by the Central Government from time to time. Such directives may include the

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\(^\text{10}\) **Power to make recommendation in certain cases.** The Commission may at any time make appropriate recommendations to the Central Government with regard to any particular practice or practices that impinge upon or adversely affect the interest of the sovereignty and integrity of India, security of the state, friendly relations with foreign countries or State, public order, decency or morality.

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\(^\text{11}\) **Codes and Standards.** The Commission shall by regulations from time to time specify programme codes and standards which may include inter alia practices – (i) to ensure that nothing is contained in any programme which is prejudicial to the interests of the sovereignty and integrity of India, the security of State, friendly relations with foreign States, public order or which may constitute contempt of court, defamation or incitement to an offence. (ii) to ensure fairness and impartiality in presentation of news and other programmes. (iii) to ensure emphasis on promotion of Indian culture, values of national integration, religious and communal harmony, and a scientific temper. (iv) to ensure in all programmes decency in portrayal of women, and restraint in portrayal of violence and sexual conduct; (v) to enhance general standards of good taste, decency and morality. (vi) to ensure avoidance of offence to religious views and belief; and (vii) to be followed in connection with the prevention of unjust and unfair treatment in any programme, and unwarranted infringement of privacy in, or in connection with, obtaining of material included in such programme.

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\(^\text{21}\) **Hearing of complaints and resolution of disputes by the Commission.** (1.) The Commission shall - (a) decide any dispute or matter – (i) between two or more service providers on issues relating to spectrum interference, interconnectivity, denial of fair access and practices restrictive of fair competition; and (ii) between a service provider and a group of consumers. (iii) arising out of enforcement of any provision of this Act; (b) hear and determine any complaint from any person regarding contravention of the provisions the Act, rules, regulations or orders made thereunder including contraventions relating to any formulated codes and technical standards, and of other terms and conditions subject to which any license or registration was granted; and if necessary refer the matter for adjudication under Chapter X. (2.) For purposes of sub section (1) the Commission shall pass such orders and issue such directions as it deems fit. (3.) The Commission shall endeavour to decide disputes and complaints referred to in sub-section (1) as expeditiously as possible.

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\(^\text{22}\) **Directives by the Central Government.**

(1.) In exercising its licensing and regulatory functions the Commission shall follow such policy directives as may be communicated to it in writing by the Central Government from time to time. Such directives may include the route and the mode in which any services are to be licensed, whether by way of auction or in any other form. (2.) In framing the policy directives the Central Government shall take into account the objectives and guiding principles governing the administration of the Act. (3.) The decision of the Central Government whether a question is one of policy or not shall be final. (4.) The Commission may request the Central Government by means of a written communication for a review of any policy directive, and if any such request is made the Central Government will respond in writing to such request with all expeditious dispatch.
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The above provisions have to be read together with the powers of Judiciary conferred on the Commission\(^{12}\) protecting the members from arbitrary dismissal and harassment from the Government.

If therefore the Commission consists of “Men of Steel” “Who do not crawl when asked to bend”, the Commission can work independently of the Government influence. On the other hand, there may be ugly situations when

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\(^{12}\) Sec. 14. (1) The Commission shall have, for the purposes of discharging its functions under this Act, the same powers as are vested in a civil court under the Code of Civil Procedure, 1908, while trying a suit, in respect of the following matters, namely:-(a) summoning and enforcing the attendance of any person and examining him on oath; (b) requiring the discovery and production of documents; (c) receiving evidence on affidavits; (d) issuing commissions for the examination of witnesses or documents; (e) subject to the provisions of section 123 and 124 of the Indian Evidence Act, 1972, requisitioning any public record or document or a copy of such record or document, from any office; (f) dismissing an application for default or deciding it, ex-parte; (g) setting aside any order of dismissal of any application for default or any order passed by it, ex-parte; and (h) reviewing its decisions; (i) granting interim relief; and (j) any other matter which may be prescribed. (2) Every proceeding before the Commission shall be deemed to be judicial proceeding within the meaning of sections 193 and 228, and for the purposes of section 196, of the Indian Penal Code and the Commission shall be deemed to be a civil court for the purposes of sections 195 and Chapter XXVI of the Code of Criminal Procedure, 1973. (3) The Commission shall not be bound by the procedure laid down by the Code of Civil Procedure, 1908, but shall be guided by the principles of natural justice and, subject to the other provisions of this Act and of any rules, the Commission shall have powers to regulate its own procedure, including the fixing of places and times of business.
the Commission\textsuperscript{13} may try to assume for itself arrogatory powers and take up a confrontationist attitude with the Government. The experience of Telephone Regulatory Authority of India (hereinafter referred as TRAI) may be behind the framers who drafted this clause.

It may be noted that the Powers of the Government over the Commission is restricted to “Policy” matters and not operational matters. The first option to determine what is a “Policy Matter” of course lies with the Government but is subject to judicial review if required. Hence this may be treated as an “Enabling Provision” and not an attempt at “Backdoor Control of the Media”.

It must be admitted however that at this point of time we are commenting on the provisions of the draft Bill without imputing any prejudice to the Government in its future actions. We may not rule out the possibility of some members of the Commission towing the political line of the Government and the Commission not being “Citizen Centric”. We feel that this should be criticized at the appropriate time when and if it happens rather than pulling down the proposed legislation on a speculative fear.

Even though in respect of the formation of the “Cyber Regulations Committee”, and in defining the powers for the “Adjudicating officer” under the Information Technology Act, the Government did disappoint the Citizens,

\textsuperscript{13} 16. (1) The Commission shall set up a Panel from amongst Members appointed under subsection (2) of section 7 to deal with matters in relation to the content in content application services, and the Chairperson shall preside over the meetings of the Panel: Provided that wherever necessary the Chairperson may place before the Commission any issue relating to the matters referred to in this section. (2) Except for the power to make regulations, the Commission may, by general or special order, make provisions for the distribution of its business amongst Members as may be considered appropriate and necessary. (3) For the discharge of its functions under this act, the Commission may, if it considers necessary, set up bureaus or divisional organizations on the basis of its principal workload operations and subject to the provisions of section 53, such bureaus or divisional organizations shall be provided with such officers and other employees as are necessary to perform their functions. (4) The Commission may, by order in writing, authorize any District Magistrate or Sub-Divisional Magistrate in any area or any other officer of the Central Government or State Government or Union territory Administration to implement and ensure compliance of its directions and orders; and when so directed or authorized, such Magistrate or officer shall be bound to implement and carry out such directions and orders.
and a similar approach to the CCB cannot be ruled out, it would still be a speculation and hence we need to moderate our criticism if any.

One reason for us to be more optimistic this time is the fact that one of the problems that had been pointed out with reference to the Information Technology Act namely the need to have a “Multi Member Appellate Tribunal” has been implemented in this Bill showing some responsiveness to public opinion. Let’s hope that such wisdom will continue in the appointment of persons to the Commission.

In the mean time, experts in the industry can start identifying persons whom they would like to see in the Commission. Even after the formation of the Commission, the society can form a “Shadow Commission” with a private initiative to act as a pressure group on policy matters regulations”.

It is such voluntary Citizen watchdogs that are necessary to prevent misuse of the provisions of the Bill. Such bodies can also take the responsibility for representing Consumer interest if required.

Otherwise the provisions of the draft bill regarding the Composition of the Communication Commission appear to be reasonable and do not require major modifications.

The CCB will operate a regulatory mechanism that will revolve around the following functions:

2. **Convergence bill 2001: The regulatory framework**

In the proposed CCB the CCI may regulate the following.

Provide and monitor of Licenses to four categories namely: Network Infrastructure Facilities; Network Services; Application Services and Content Application Services.

CCI may also regulate the following:
Determine appropriate tariffs and rates for services; manage “Frequency Spectrum Usage”; lay down advertising codes for content; protect consumer interest; lay down commercial and technical standards for the service; adjudicate and enforce penalties on violation of provisions through an adjudicating officer; hear appeals against such awards at the communications appellate tribunal; monitor the system for anti national activities and intercept communication when required; take over communication facilities in times of emergency such as war or national calamity.

In order to administer the regulations the proposed “Communication Commission of India” will have a head office in New Delhi and regional offices in Mumbai, Calcutta, and Chennai.

The Four categories of licenses that will be regulated are defined as under:

1) **Network infrastructure facilities include all of the following network facilities:** Earth stations; fixed links and cables; public pay phone facilities; radio communication transmitters and links; satellite hubs or; towers, poles, ducts and pits used in conjunction with other network facilities.

2) **Network Services may include all of the following network services:** Bandwidth Services; broadcasting distribution services; cellular mobile Services; customer access services or mobile satellite services

3) **Application Services include all of the following Application Services:** PSTN Telephony: Public Cellular Telephony Services; IP Telephony; public pay phone service; public switched data service.

4) **Content Applications Services may include all the following Content Application Services:** Satellite broadcasting; subscription broadcasting; terrestrial free to air TV broadcasting; terrestrial radio broadcasting.
3. The communication Convergence bill and freedom of speech and expression

A close examination of the proposed CCB provides that the bill is "Indirect Censorship" of the private sector broadcast media and infringes on the "Freedom of Speech and Expression" guaranteed in the constitution.¹⁴

There are some points, which are agitating the mind and require further action.

It is to be accepted that all "Legislations" by definition represent some curbs on the freedom of some members of the society. The purpose of law is to ensure that there is an equitable distribution of scarce resources in the society. If legislation does not "Regulate", there will not be "Freedom for All" but only "Freedom for the Privileged". It is one of the fundamental duties of any Government that society needs to be regulated if it has to remain "Civilized".

The Indian private sector TV media has shown in the past that they are politically as partisan as a Government media could be in respect of a ruling party. Channels such as Fashion TV and Star World are obscene, as an Indian average citizen would view.

Before the advent of private sector TV broadcasters in India, Indian common man relied more on British Broadcasting Corporation (hereinafter referred as BBC) Radio for authentic information about controversial happenings in India. However, in recent days, BBC TV's coverage of Kashmir, particularly its coverage on a non-existent military excess using clipping from Chechnya has proved that BBC is also a partisan media.

In fact the Indian TV viewer is today aware that the truth always lies in between two rival media reports. Public know that due to Political or

¹⁴ Article 19(1) (a) of the Indian Constitution.
Commercial considerations, there is rarely a media that can not be manipulated and is not manipulated. There are many non-partisan reporters and journalists but they are often used by the media owners to project one particular viewpoint only. After all, we all know what happened during the emergency in 1975 in India when barring a few publications such as “Indian Express” the others “Crawled when they were asked to bend”.

In such a scenario, the visually powerful media such as the TV Broadcasting cannot escape being brought under some kind of regulation. Hence the question of not having regulations has no place for discussion.

What is relevant however is that the regulation has to be “Fair”, “Reasonable” and “Safe guarded against possible misuse”. One way by which the “Safety Catch” can be built into legislation is to make the administrators accountable to public. But such an effort will work only if “Judiciary” is itself “Fair” and “Efficient”. For the time being, we can accept that the judiciary in India is by far “Fair”. However no body can vouch for its efficiency.

In view of what is stated above, in any legislation what we need to look forward are those aspects of a proposed legislation that try to make it “Fair”, “Reasonable” and "Amendable for Accessing."

We also need to see if the legislation is “Citizen Centric” or “Regulator Centric” or “Business Centric”. Any legislation exists for the “People” and therefore every legislation has to be “Citizen Centric”.

4. Convergence Bill and the spectrum management

One of the important provisions of the CCB refers to the policies regarding Frequency Spectrum Management¹⁵, which refers to the

¹⁵ Chapter VI : Frequency Spectrum Management Spectrum Management Committee 23. (1) The Central Government shall be responsible for coordination with international agencies in respect of matters relating to Spectrum Management and also for allocation of available spectrum for strategic and non-strategic or commercial purposes. (2) For the purposes of discharging the responsibility under sub-section (1), the Central Government shall establish, by notification, a Spectrum Management Committee with the Cabinet Secretary as its Chairman and consisting of
management of the "Radio Frequency Band" and is the combination of administrative and technical procedures necessary to ensure the efficient operation of radio communication services. Radio Frequency Spectrum and satellite orbits including geo-stationary satellite orbits are scarce natural resource, susceptible to harmful interference and is international in character since radio waves cannot be confined to national boundaries. Like any other natural resource it cannot be owned but shared amongst various countries, services, users, technologies, etc. Assignment of frequencies is governed by international treaty formulated under the aegis of International Telecommunication Union (hereinafter referred as ITU). In accordance with international treaty all frequency bands are shared by all countries for different types of radio communication services and there are no exclusive frequency allocations for a particular service, country, user or organisation.

such other members as may be notified by it from time to time. (3) The Central Government shall notify Wireless Advisor to the Government of India as Spectrum Manager, Government of India, to act as Member-Secretary of the Spectrum Management Committee. (4) Subject to general supervision and control of the Spectrum Management Committee, the Spectrum Manager shall, inter-alia, perform the following functions, namely: (i) to co-ordinate with international agencies, matters relating to overall spectrum planning, use and its management; (ii) to carry out spectrum planning, and assign frequencies to the Central Government and to State Governments to meet their vital needs, including those of defence, national security and of the public service broadcaster. (iii) to allocate frequencies or band of frequencies including frequencies which are to be assigned by the Commission; and reassignment of frequencies from time to time. (iv) to review constantly and make available as much spectrum as possible for assignment by the Commission, in particular by optimising usages, and. (v) monitoring as appropriate, in consultation with the Commission, the efficiency of the utilisation of the spectrum by all users including investigation and resolution of spectrum interference; and (vi) after meeting the requirements of the Central Government and of State Governments for fulfilling their vital needs including those of defence, national security and public service broadcaster, the Spectrum Manager shall make the spectrum available, to the maximum extent possible, for assignment by the Commission, both in the shared as well as in the exclusive bands. (5) Subject to the general supervision and control of the Spectrum Management Committee, the Spectrum Manager shall assign frequencies on payment of such fee as may be prescribed. Assignment of spectrum 24. (1) The Commission shall be responsible for assignment of the non-strategic and commercial spectrum to various users: Provided that the Commission shall assign such frequencies in case these are not exclusively allocated to it, only with the prior approval of the Spectrum Management Committee. (2) Whenever the Commission seeks allocation of additional spectrum for assignment, including in the shared bands, a process for mutual consultation between the Commission and the Spectrum Manager shall be initiated in such manner and within time frame as may be prescribed. Commission to notify schemes for assignment of spectrum 25. (1) Before assigning any part of spectrum, the Commission shall prepare and notify from time to time one or more schemes or plans for such assignment, after such public hearing as it may consider appropriate. (2) The Central Government may, by notification, determine the class or classes of persons or services for preferential assignment of any frequency or spectrum by the Commission.
Accordingly, the frequencies are shared by various organisations like Defense, Police, Intelligence and other Security agencies, Public Telecommunications, Broadcasting, Railways, Public Utility Organizations, Oil and Electricity Grids, Atomic Energy, Mining and Steel, Shipping and Airlines, and so on, for variety of applications including aeronautical and maritime safety communications, radars, seismic surveys, rocket and satellite launching, earth exploration, natural calamities forecasting etc. A frequency, which is being used in one place by private operator, may be used by a Government agency for some other purpose in another place leading to the frequency reuse on spatial basis.

With the proliferation of new technologies being inducted in to the country, the demand on spectrum by users has increased manifold. Modern telecommunication technologies rely heavily on radio communications. Newer and newer radio communication services, technologies and applications are emerging on the horizon with tremendous speed, further exponentially increasing the demands on the already congested radio frequency spectrum.

Thus, spectrum is the most fundamental, but at the same time, a highly scarce resource, which is essential for development of all radio, based telecommunication services. Therefore, efficient spectrum management needs to be the art and science of carefully planning spectrum allocation in a coordinated manner without compromising national interests and then speedily and efficiently assigning frequencies for the benefit of users at large and with minimum scope of harmful interference.

All the North Atlantic Treaty Organisation (hereinafter referred as NATO) countries and several NATO allies have adopted the 'NATO Band' for their defense requirements of the spectrum. The non-'NATO Band' therefore accommodates most of the commercial / public service telecom in those countries. Several countries, including India, have not adopted the 'NATO Band' for their defense spectrum requirements. In view of this, the cost-effective commercial equipment bought by India from these countries fall in
the non-'NATO Band', a good part of which overlaps the Indian Defense Spectrum bands. It is this important factor, which has resulted in major contentions of the commercial public telecom services with the already occupied defense spectrum bands.

Added to this, is the fact that Indian defense also buys a sizeable part of this telecom/radar and avionics equipment requirements from both NATO countries and non-NATO countries. These factors have resulted in major spectral constraints, in the bands allotted to defense.

Also, there are applications where, in effect, 'fences' can be built around electro-magnetic 'spaces'. By so controlling the performance characteristics and placement/operation of radio equipment, the concept of the spectrum, as an economic resource, can be conceived similar to real estate. It is occupied, but not consumed or depleted by its users. Scarcity results from the occupation of a channel/band/window by one operator by preventing others from using the same channel/band/window at the same time. As in real estates, the usable quantity of the resources can be expanded with additional capital investment like sky-scrappers creating more space on a given part of the land - through such methods as channel splitting, innovative modulation techniques, spread spectrum, etc. Viewed in terms of this limited analogy, equipment standards are analogous to architecture and separation rules with power limits are analogous to 'fences' separating the parts of the land.

The CCB envisages that the Spectrum Management Responsibilities would be entrusted to a "Spectrum Management Committee" with the cabinet secretary as its Chairman and consisting of such other members as may be notified from time to time. The Central Government will also notify one of its officers as the "Spectrum Manager, Government of India" to act as Member Secretary to the Spectrum Management Committee: to co-ordinate with international agencies; carry out spectrum planning and allocate frequencies; monitor, review and re allocate frequencies.
Additionally, the Spectrum Management Committee may have to decide on "Pricing" of the Spectrum including allocation of "Free Spectrum" for some public utilities, the manner of allocation including: Auctioning" etc. The Committee will also have to consider the security aspects and policies to ensure protection of national interests. It may also be necessary for the Committee to lay down policies on Standards, Specifications, and equipment authorisation.

5. **Deficiencies inherent in the Bill**

The maximum penalties provided under the Act in various sections range from Rs 5 Crore to Rs 50 crore. Even though they represent only the upper limit of the penalties, they serve as an indication of the likely level of punishment for any violation. If the amount is too small, it may encourage the violators to take chance. If the penalties are stiff they could serve the purpose of being a deterrent against violation. However they place too large a discretion in the hands of the Adjudicating Officer and can be misused. The indicated levels of penalties could be a source of corruption in the dispensation of justice. It must be remembered that in respect of the Convergence law, the offender can be a multi national with Billions of dollars of assets or a neighborhood cable operator or an individual. The damages caused and the required penalty for a similar offence may be therefore varies from a few millions of dollars to a few hundred rupees. However the adjudicating officer could use his discretion to impose any penalty higher than what is reasonable.

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42. (1) Any penalty imposed under this Chapter shall not exceed fifty crore rupees. (2) The Adjudicating Officer shall, while adjudging the quantum of civil liability, under this Chapter, the Adjudicating Officer, have due regard to the provisions of this Act, and also to the following factors, namely:- (a) the amount of revenue loss to the Government; (b) the amount of disproportionate gain or unfair advantage, wherever quantifiable, made as a result of the default; (c) the amount of loss caused to any person as a result of the default; (d) the repetitive nature of the default; and (e) that the amount adjudged shall be such as may act as a deterrent even though no financial loss has been caused by such contravention.
It is therefore suggested that all reference to any rupee value of the penalties in Chapter X are removed and replaced with “Such penalties as may be considered reasonable with reference to the circumstances of the case”.

A similar argument can be extended to the suggested fines and maximum term of imprisonment suggested under Chapter XV. Even though the indication of the maximum levels of punishments is in the interest of the public, at the levels of punishments used they can only act detrimental to the interest of the public.

A new trend in legislation may therefore be started by introducing one limiting clause for the entire Chapter XV stating that- “Any fine imposed under the Act would not exceed Rs 1 Crore and any imprisonment ordered would not exceed 5 Years.”

A license\(^{18}\) would be required for any “Wireless equipment”. In order to avoid confusion, the consumer equipments such as Mobile phones, Cordless telephones, Radio sets, and Television sets, and infrared remote operating devices etc should be specifically exempted.

Under Sec. 18 (2) (iii), CCB the powers of the commission can fix the tariff for various services. In as much as these services are of commercial nature, there should be no interference in the activities of the private operator. The Commission can however use its discretion to provide more licenses if any operator is overcharging the consumers or retain the powers to interfere only when the operator is charging a “usurious” rate for the services.

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\(^{18}\) Section 5, CCB. 5. (1) No person shall possess any wireless equipment without obtaining a license in accordance with the provisions of this Act: The draft Notification has to be issued simultaneously with the Act otherwise the Commission will be inundated with a large number of applications for licences for services and facility which are currently in wide spread use. Provided that the Central Government may by notification exempt in public interest any person or of persons or any wireless equipment or categories of wireless equipment from the provisions of this section. (2) Nothing contained in sub-section (1) shall apply to any person or equipment, already licensed under section 4.
If the pricing of the services is to be determined by the Commission, financial closures for projects cannot be achieved without the clearance of the price structure. It will also be difficult for the operators to introduce new services in tune with the market demand without the delays that would accompany the prior clearance of the product pricing.

The Clause 18 (2) (iii) may therefore be deleted.

The Commission\(^{19}\) can regulate the content of programmes for various purposes such as “in the interest of the sovereignty and integrity of the nation”. This section can be abused and used for “Censorship” of the media. This is the most contentious clause in the opinion of the media owners.

In order to provide a mechanism for checking abuse of this provision, an additional “Citizen’s Programme Code Committee” should be formed which can hear appeals from the aggrieved persons and provide its views.

18. (1) It shall be the duty of the Commission to facilitate and regulate all matters relating to carriage and content of communications. (2) Without prejudice to the generality of the provisions contained in subsection (1), the Commission shall— (i) Carry out management, planning and monitoring of the spectrum for non-strategic/commercial usages subject to the provision of section 24A; (ii) grant licenses for purposes of the Act, and determine and enforce license conditions and determine fees (including fees for usage of spectrum) wherever required; (iii) determine appropriate tariffs and rates for licensed services, wherever considered necessary and keeping in view the objectives and guiding principles in the Act; (iv) ensure that the grant of licenses will not result in eliminating competition or in one or more service providers becoming dominant to the detriment of other service providers or consumers; (v) promote competition and efficiency in the operation of communication services and network infrastructure facilities; (vi) formulate and determine conditions for fair, equitable and nondiscriminatory access to a network infrastructure facility or network service such other related matters in respect thereof; (vii) take measures to protect consumer interests and promote and enforce universal service obligations; (viii) formulate and lay down programme and advertising codes in respect of content application services; (ix) formulate and lay down commercial codes in respect of communication services and network infrastructure facilities (including equipment); (xii) carry out any study and publish findings on matters of importance to the consumers, service providers and the communications industry; (xiii) institutionalise appropriate mechanisms and interact on a continual basis with all sectors of industry and consumers, so as to facilitate and promote the basic objectives of the Act; to encourage self regulatory codes and standards; (x) report and make recommendations on such matters as may be referred to it by the Central Government; (xii) report and make recommendations either suo moto or on such matters as may be referred to by the Central Government in the matter prescribed (xv) perform all or any functions in furtherance of the objects of this Act, or such as may be prescribed. (3) The commission shall ensure transferancy whilst exercising its powers and discharging its functions.
If the decision of the committee is not acceptable, the aggrieved parties can resort to the legal remedy available through the Appellate tribunal. This will provide for a Citizen’s group to sit in judgment of subjective issues such as “Indian Culture”, “Allowable degree of Violence”, “Decency in portrayal of Women” etc for which legal remedies are not always the right answer.

An applicant before the Tribunal can appear himself or authorize one or more Chartered Accountant, Company Secretary, Cost Accountant or a Legal Practitioner and proceeds to present his or its case before the tribunal. This restriction of representation to certain categories of professionals only is unnecessary and discriminatory. It is suggested that the appellant can authorize one or more persons of his choice to represent him without the need for such a person to be a Chartered Accountant etc. In such a case a Telecom Consultant can also represent the appellant.

Even though the objectives of the Bill provide that the Commission is duty bound to take care of consumer interest also, there is no evidence of how this can be achieved. It must also be accepted that “Consumer Interest”, “Business Interest” and “National Interest” will be conflicting in many areas and the Commission will be subjected to pressures from different sides. The national interest will be taken care by the Government and the Business interests will be taken care by the “Public Relation Managers”. The Consumer will have to however organize himself through voluntary organizations. The Bill can at least take note of the need for such organizations and if possible provide some support.

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20 An applicant or appellant may either appear in person or authorize one or more chartered accountants, or company secretaries, cost accountants or legal practitioners, or any of his or its accredited officers to present his or its case before the Appellate Tribunal. Explanation: For the purpose of this section— (a)”Chartered accountant” means a chartered accountant as defined in clause (b) of sub-section (1) of section 2 of the Chartered Accountants Act, 1949 and who has obtained a certificate of practice under sub-section (1) of Section 6 of that Act; (b)”company secretary” means a company secretary as defined in clause (c) of sub-section (1) of section 2 of the Company Secretaries Act, 1980 and who has obtained a certificate of practice under sub- section (1) of Section 6 of that Act; (c)”cost accountant” means a cost accountant as defined in clause (b) of sub - section (1) of section 2 of the Cost and Works Accountants Act, 1959 and who has
Provisions of Section 66 and Section 70 overlap with corresponding provisions in Information technology Act 2000 and provide for different penalties/punishments. This will create unnecessary confusion.

Whoever attempts to commit\(^2\) or abets commission of an offence\(^2\) will be deemed to have committed the offence. This is a dangerous provision and can be misapplied by the Police to harass innocent individuals. This totally removes the concept of “Need for a Guilty Mind” for any offence and will bring all erroneous and unintentional violations under punishable offences. One simple example could be a “Wrong tuning of a Radio equipment to a frequency other than the intended frequency”.

This Sec. 71 of CCB should therefore be deleted. Alternatively, it may be replaced if necessary by a provision which may state “Whoever willfully attempts to commit or abets the Commission of any offence, under the Act shall be punishable with such punishment as may be deemed reasonable under the circumstances of the case and any such punishment shall not exceed

\[\text{Provision:}\]

obtained a certificate of practice under sub-section (1) of section 6 of that Act; (d) “legal practitioner” means an advocate, vakil or an attorney of any High Court, and includes a pleader.

\(^2\) 71. Whoever attempts to commit or abets the commission of any offence, under sub-section (3) or sub-sections (4) of section 66 under this Chapter shall be punished with the punishment provided for that offence.

\(^2\) 66.(1) Subject to the prescribed safeguard, the Central Government or a State Government or any officer specially authorized in this behalf by the Central Government or a State Government, on the occurrence of any public emergency or in the interests of the security, sovereignty and integrity of India, friendly relations with foreign States or public order or for preventing incitement to the commission of an offence, may direct: (i) any agency of that Government to intercept any communication on any network facilities or services; (ii) any service provider that any content brought for communication by or communicated or received by, him shall not be communicated or shall be intercepted or detained or shall be disclosed to that Government or its agency authorized in this behalf; (2) The service provider shall, when called upon by any agency, which has been directed to carry out interception under sub-section (1), extend all facilities and technical assistance for interception of the content of communication. (3) Any service provider who fails to assist the agency referred to in sub-section (2) shall be punished with imprisonment for a term, which may extend to seven years. (4) Save as otherwise provided under this section, any person, who intercepts any communication or causes any communication to be intercepted or discloses to any person, any content shall be punishable with imprisonment which may extend to five years or with fine which may extend up to ten lakh rupees, and, for a second and subsequent offence, with imprisonment which may extend to five years and with fine which may extend up to fifty lakh rupees. Explanation: For the purposes of this section, “interception” means the aural or other acquisition of the content through the use of such devices or means as may be necessary for such acquisition.
half of the maximum punishment that could have been levied if the offence had been committed willfully”.

RECAPITULATION

With respect to convergence of telecommunications, broadcasting and information technologies, the main questions in the chapter are to what extent different communication infrastructures can be regulated in the same manner and to what extent infrastructure and content can be regulated by one common set of regulations. The general trend around the world is to move towards common infrastructure regulation encompassing formerly more separate infrastructures, e.g. fixed telecom, mobile communications, cable and possibly terrestrial broadcasting. However, there are also some inchoate tendencies towards institutions with responsibility for joint infrastructure and content regulation. Indeed, the answers will be different in different countries. There is no one formula that can be used in all countries. Yet, countries will have to approach the issues of convergence in a forward looking manner not only for determining new rules for interconnection, universal access and access to scarce resources, but also for building a regulatory framework for increasing the growth potentials in a networked economy.

ICT and media convergence issues are primarily about improving the efficiency of market economies, and how changes in regulation can facilitate this process. It is likely to be of primary interest for countries that already have an established effective independent telecom regulator. Multi-sector regulation issues are primarily about establishing the efficiency and effectiveness of regulation so it can be a catalyst for network and economic development. It is likely to be of primary interest to countries that have not yet established effective telecom regulation. Each regulatory option arises from an initial diagnose of different problems, and represents different priorities and pathways to achieving a very similar set of development objectives.
Our submission is that, there is a need to adopt a flexible method of regulation in India while a new comprehensive law is being drafted so that regulation of communications should sustain changes in a converging environment.