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**Agenda Item 3a. Competition issues in the sale of audio-visual
rights for major sporting events**

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Competition Issues in the Sale of Audiovisual Rights for Cricket in Pakistan & India

*Dr. Joseph Wilson**

I. Introduction

The electronic media has gone through a revolutionary change globally and in Pakistan and India in particular. At present, from one public TV channel in the 1990s to over 125 channels are being available in Pakistan, and numerous in India. The liberalization of the electronic media market in Pakistan started in early 2000s, with the setting up of Pakistan Electronic Media Regulatory Authority (PEMRA) and granting of licenses for cable and satellite channels. Liberalization brought new choices, but also highlighted the complex interplay of rights of various actors when it came to the live broadcasting of important sports event, in particular, cricket. Cricket brought to the colonized India by the British, and soon it became the most favourite game in the sub-continent,¹ leaving behind field hockey in which the two countries jointly held 11 Olympic gold medals.²

Live transmission of sports event is a distinct relevant product, different from other TV programmes, as they appeal to the audience at the time they take place.³ The entertainment value

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¹ The precise origin of the game of cricket, though largely unknown, has been traced, at least, to late 15th Century England. With the expansion of British Empire the game of cricket travelled to different parts of the globe including India. See *Union of India v. Board for Control of Cricket in India*, (August 2017) available at <https://www.indianemployees.com/judgments/details/union-of-india-versus-board-of-control-for-cricket-in-india-ors>

² List of Olympic Medalists in Field Hockey, available at https://en.wikipedia.org/wiki/List_of_Olympic_medalists_in_field_hockey

³ *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Oklahoma*, 468 U.S. 85, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984) (college football broadcasts defined as a separate market. The Court found that intercollegiate football telecasts generate an audience uniquely attractive to advertisers and that competitors are unable to offer

of sport's event loses its value if the telecast is delayed. There is a public interest in viewing of live transmission of championship matches of the national team, with a corresponding service obligation on the national TV to broadcast such matches. This public interest element in watching live transmissions, which are carried over airwaves – a scarce natural resource and public property – comes in conflict with the pure commercial transaction of selling broadcasting rights exclusively to a highest bidder. The conflict between public interest and sanctity of commercial contract is ironed out through litigation in the Indian superior courts in a series of judgments spanning over a period of twenty-two years from 1995 to 2017. Pakistan is lagging behind in completely addressing the issue, but can learn from the experience of India and avoid the difficult path of setting public policy *ex post facto* through case law.

This paper canvases the history of liberalization of electronic media in Pakistan and India, and the competition issues posed by liberalization in the audiovisual broadcasting rights for the sport of cricket. Part II documents the broadcasting regime pertaining to live transmission of cricket matches in Pakistan, including the roles of Pakistan Television (PTV), and Pakistan Cricket Board (PCB), and the instances when Pakistani cricket-fans could not get live transmission of important cricket matches owing to conflicts posed by liberalization. Part III gives an overview of various developments that took place in India including the evolution of legal regime both legislative and case law, pertaining to live transmission of cricket matches. It focuses on and the concomitant case law with respect to live broadcasting of cricket matches. Part IV highlights the role of cricket boards in both countries in creating output restrictions. The paper concludes with some lessons for Pakistan, and developing countries in designing an optimal regime for the broadcast of live sports events of national importance.

II. Broadcasting Regime for Cricket Matches in Pakistan

A. Historic Overview

“This is Pakistan Broadcasting Service” – these were the first words ever broadcasted over the radio on 14 August 1947, when Pakistan got its independence from Britain.⁴ On 26 November 1964, Pakistan Television Corporation (PTV), the first television station, was established and the same day the first-ever news broadcast was done from Lahore.⁵ On 22nd December 1972, PTV for the first time did live transmission from Australia via satellite of a cricket match between Pakistan and Australia. Color transmission started from 20 December 1976. In 1983, PTV created its sports division to “keep the viewers abreast with the National and International sports

programming that can attract a similar audience); *International Boxing Club of New York, Inc. v. United States*, 358 U.S. 242, 79 S.Ct. 245, 3 L.Ed.2d 270 (1959) (championship boxing events are uniquely attractive to fans and hence constitute a market separate from that for non-championship events); *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 613, 73 S.Ct. 872, 883, 97 L.Ed. 1277 (1953) (telecasts of college football which rests on generic qualities differentiating viewers is a separate market).

⁴ http://www.pbs.gov.pk/sites/default/files/50_years_statistics/vol1/14.pdf

⁵ <http://www.ptv.com.pk/public/userView/ptvCorporate/Introduction>

event.”⁶ During the 1980s, as part of government policy, conservative ideas were promoted.⁷ PTV remained the sole provider of television services till the end of 1980s. On 15 July 1990, Pakistan's first private TV Channel, Peoples Television Network (PTN), started its transmission, which later became Network Television Marketing (NTM).

PTV enjoyed monopoly over the production and live transmission of cricket matches involving Pakistani team until 1993. It was in 1993, that the Pakistan Cricket Board (PCB) for the first time sold its TV rights to IMG/TWI, a New York based global sports and event management company.⁸

PTV now has grown into a network consisting of eight channels. PTV Sports, a satellite-based 24-hour sports channel, was launched on 11 January 2012.⁹ PTV Sports, however, earned the “status of a terrestrial, cable and Satellite channel” so that viewers having access to terrestrial network only can also view the transmission relayed on Satellite channel.¹⁰ Sports viewers can watch live transmission of PTV Sports on cable TV service, satellite service, IPTV and online live streaming links.¹¹

B. Liberalization of Electronic Media

On 1 March 2002, General Pervaiz Musharraf issued the Pakistan Electronic Media Regulatory Authority Ordinance, 2002 [PEMRA Ordinance] that ushered a new era in electronic media broadcasting services.

The PEMRA Ordinance was promulgated with the objectives to:

- (i) improve the standards of information, education and entertainment;
- (ii) enlarge the choice available to the people of Pakistan in the media for news, current affairs, religious knowledge, art, culture, science, technology, economic development, social sector concerns, music, sports, drama and other subjects of public and national interest;
- (iii) facilitate the devolution of responsibility and power to the grass-roots by improving the access of the people to mass media at the local and community level; and
- (iv) ensure accountability, transparency and good governance by optimizing the free flow of information;¹²

⁶ https://en.wikipedia.org/wiki/Pakistan_Television_Corporation

⁷ https://en.wikipedia.org/wiki/Pakistan_Television_Corporation.

⁸ Email on File from the Chairman of PCB, Mr. Najam Sethi. For more information in IMG/TWI see [https://en.wikipedia.org/wiki/IMG_\(company\)](https://en.wikipedia.org/wiki/IMG_(company)).

⁹ <http://www.ptv.com.pk/public/userView/ptvFamily>

¹⁰ Ikram Junaidi, Senate Committee Criticizes PTV's Decision to Abstain from Bidding, 10/5/13 Dawn (News.) 2013 WLNR 25078510: (PTV's former Managing Director, Yousaf Baig Mirza, told that “after a long struggle and court cases, PTV Sports has earned status of a terrestrial, cable and Satellite channel.”)

¹¹ <http://news.paktron.net/2012/01/pakistan-television-corporation.html>

¹² Preamble, Pakistan Electronic Media Regulatory Authority Ordinance, 2002 Ordinance No. XIII of 2002, as amended by PEMRA (Amendment) Act 2007 (Act No.II of2007).[hereinafter “PEMRA Ordinance”].

The s underlying objective of the Ordinance is to promote “freedom of speech” through the “optimization of free flow of information in the electronic media.”¹³ This was done by enlarging the choices available to the people of Pakistan in the subjects of public and national interest including sports. The Ordinance, however exempted national broadcasters, i.e., Pakistan Radio, and Pakistan Television Corporation (PTV) for its application.¹⁴

To ensure that liberalization does not result in unfair competition or undue concentration of media ownership. Section 23¹⁵ prevents monopolization by (i) annulling any exclusive arrangement between private broadcaster and the national broadcaster (PTV) with respect to airtime, programmes or advertising material which may give undue advantage to new media enterprises in establishing itself; (ii) by requiring PEMRA, in granting a licence, to ensure that no media enterprise get monopoly power in any given subject or geographical area, so that “diversity and plurality in content”¹⁶ may be achieved. Geographical areas are categorized as rural and urban, and the boundaries may not overlap, such that ‘area defined as rural should not be included in the urban area’ otherwise the distinction in category of licence on the basis of areas would be meaningless.¹⁷ Section 23 does not prohibit vertical integration, that is, broadcasting media enterprise may own or operate distribution services or vice versa.¹⁸

PEMRA issues licenses in the following categories:

1. FM Radio;
2. Satellite TV;
3. MMDS¹⁹
4. IP TV
5. Cable TV
6. DTH
7. Landing rights

¹³ *Independent Newspapers Corporation (Pvt) Ltd. v. Federation of Pakistan*, 2017 PLD 289, Lahore High Court, Lahore. The liberalization was also believed to help counter Indian media influence. Television in Pakistan – an Overview, available at <http://pas.org.pk/television-in-pakistan-an-overview/>

¹⁴ Section 37, PEMRA Ordinance.

¹⁵ 23. **Exclusion of monopolies.**- (1) No person shall be entitled to the benefit of any monopoly or exclusivity in the matter of broadcasting or the establishment and operation of broadcast media or distribution service or in the supply to or purchase from, a national broadcaster of air time, programmes or advertising material and all existing agreements and contracts to the extent of conferring a monopoly or containing an exclusivity clause are, to the extent of exclusivity, hereby declared to be inoperative and of no legal effect.

2. In granting a licence, the Authority shall ensure that open and **fair competition** is facilitated in the operation of more than one media enterprise in any given unit of area or subject and that **undue concentration of media ownership** is not created in any city, town or area and the country as a whole.

Provided that if a licensee owns, controls or operates more than one media enterprise, he shall not indulge in any practice which may impede fair competition and provision of level playing field.

¹⁶ *Independent Newspapers Corporation (Pvt) Ltd. v. Federation of Pakistan*, 2017 PLD 289, Lahore High Court, Lahore.

¹⁷ *Muhammad Ashraf v. PEMRA*, 2011 YLR 1578, Lahore High Court, Lahore.

¹⁸ *Id.*

¹⁹ "MMDS" means multi-channel multi-point distribution service to transmit audio-visual signals through wireless devices, to multiple subscribers, after receiving such signals from other channels of communication. Sec 2(la) PEMERA Ordinance

8. Temporary uplinking
9. Mobile TV (Video and Audio content).²⁰

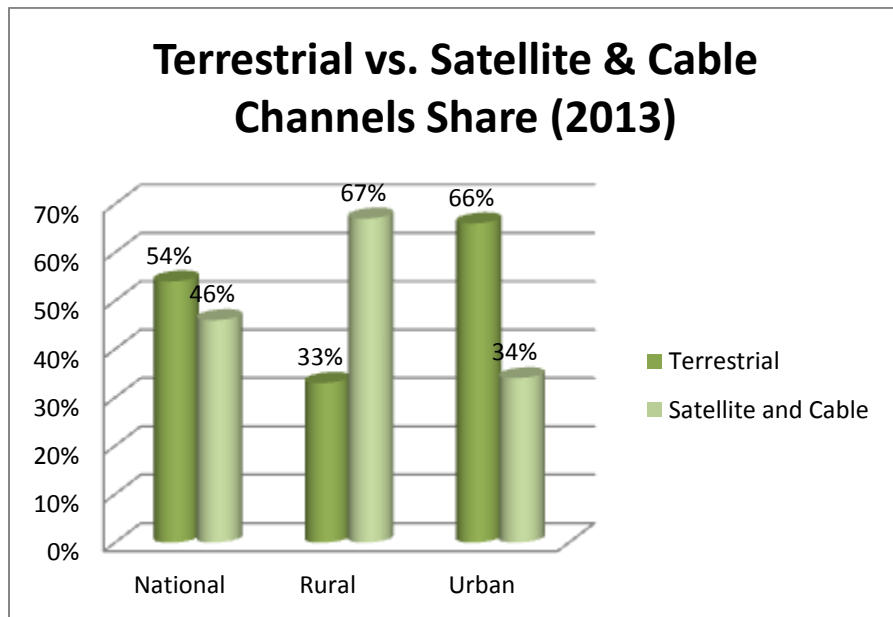
Since 2002, PEMRA has issued ninety one (91) licenses for satellite channels, out of which 88 are operational and 29 landing rights,²¹ which together makes 117 channels, excluding eight channels belonging to the PTV network. With PTV channels, it makes 125 channels. PEMRA has issued two licenses for IP-TV and four licenses for mobile TV.

1. Compulsory Broadcasting of PTV Channel by Cable Operators

Under Reg. 29 of the PEMRA Cable Television (Operation) Regulations, 2002, Cable TV operators are bound to relay and distribute compulsory programme channels as notified by the Government or by the PEMRA. Compulsory channels include two national TV broadcast channels, that is, those of PTV, and should be placed at priority serial order channels, at serial number 1 to 5.²²

2. Sports Channels Market Share as of 2013

Terrestrial TV broadcasting was and remains the domain of PTV, which covers 90% of the population, and is available for free.²³ As of end of 2013²⁴, terrestrial network had 54% share of national viewership compared to 46% held by Satellite and Cable Channels.



²⁰ Section 18, PEMRA Ordinance.

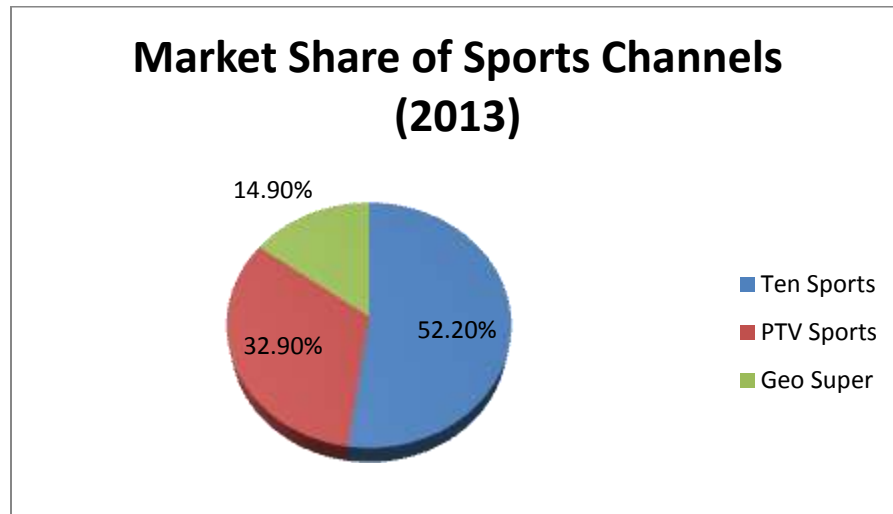
²¹ Zubair Qureshi, *At Threshold of DTH, PEMRA Urged to Grant Licences to New TV Channels*, 5/17/18 Pak. Observer, 2018 WLNR 15181073.

²² Reg. 29(2)-(4), PEMRA Cable Television (Operators) Regulations, 2002, available at <http://nasirlawsite.com/laws/pemcab02.htm>

²³ Television in Pakistan – an Overview, available at <http://pas.org.pk/television-in-pakistan-an-overview/>

²⁴ Latest Data on market share is not available in public domain, there the data of 2013 is used to give an estimate of how market has evolved and reflects current market condition with +/- 10 % difference. The number of sports channels has not changed either.

Market share of three sports channels as of 2013, with PTV enjoyed dominant position.



Source: Gallup Pakistan – Media CyberLetter²⁵

C. PCB and Broadcasting Rights for Cricket

Soon after Independence in 1947, professional and amateur cricket started in Pakistan. Cricket matches were organized informally until 1 May, 1949, when the Board of Control for Cricket in Pakistan (BCCP) was established.²⁶ In 1994, BCCP was reorganized and constituted as a statutory body established under Section 3 of the Sports (Development and Control) Ordinance, 1962 with a new name, Pakistan Cricket Board (PCB).²⁷ PCB got its new Constitution in 2014. Article 4 of the Constitution of PCB, lays down the objects, powers and functions of the Board.²⁸ The main functions of the PCB are “to promote, develop, supervise, and maintain general control on all forms of domestic and international cricket” and regulate all formats of cricket; to promote activities with respect to cricket by holding and organizing of tournaments and national and international matches within Pakistan or abroad²⁹; and “establish sports based television channels, web portals or any other presence on the web or in cyber space, print or electronic media to achieve the objects of the Board.”³⁰

Prior to 1993, Pakistan Television (PTV) being the State Corporation was responsible for the production and broadcasting of Cricket matches. However, it was in 1993 that the PCB started selling audiovisual rights for cricket. PCB auctions TV broadcasting rights (without bifurcating

²⁵ <http://gallup.com.pk/gallup-pakistans-media-cyberletter-jan-dec-2013/>

²⁶ https://en.wikipedia.org/wiki/Pakistan_Cricket_Board; Some Dates in Pakistan Cricket History, <http://www.espnricinfo.com/wisdenalmanack/content/story/152363.html>

²⁷ Ordinance No. XVI of 1962, available at [http://www.punjabcode.punjab.gov.pk/public/dr/THE%20SPORTS%20\(DEVELOPMENT%20AND%20CONTROL\)%20ORDINANCE,%201962.doc.pdf](http://www.punjabcode.punjab.gov.pk/public/dr/THE%20SPORTS%20(DEVELOPMENT%20AND%20CONTROL)%20ORDINANCE,%201962.doc.pdf)

²⁸ Constitution of the Pakistan Cricket Boards, S.R.O.43(KE)/2014, available at <http://www.pcb.com.pk/downloads/PCB-Constitution-Complete-2014.pdf>

²⁹ Art 4(vii), id.

³⁰ Art. 4(xx). Id.

terrestrial and cable & satellite rights); global radio broadcasting rights; wireless mobile telephony and SMS rights; and media rights (which includes TV, radio, mobile TV, etc) on tournament/event basis as well for specified period of time, and on territorial basis, i.e., one license for Pakistan and one for other regions excluding Pakistan.³¹ Presently, the broadcasting rights for international matches, for the period 2015 to 2020 are with PTV and Ten Sports, who made a joint bid for a sum of \$150.³²

D. Liberalization and Viewers' Sufferings

With the opening up of market and entry of new channels, the cricket-loving viewers suffered with the paradigm shift in broadcasting sports event of national interest as a “public good” to a commercial transaction. The first problem emerged right after the PEMRA Ordinance came into effect.

In 2003, PCB sold the TV broadcasting rights, after a competitive bidding, for a five-match series between Pakistan and New Zealand to Geo TV Network. PTV alleged that the bidding process was not proper, and a dispute brewed between PTV and PCB over broadcasting rights. PEMRA weighed in favour of PTV and refused to give uplinking³³ permission to Geo, and therefore the first one-day match played in Lahore was not televised. This was the first time since 1967 that an international cricket match, with Pakistan on one side, was not aired in Pakistan.³⁴ Angry fans flooded the PCB's offices with calls. The matter was resolved by the intervention of the then-president of Pakistan, Pervez Musharraf, intervened and the parties agreed for a joint broadcast of the remaining matches, with PTV televising the matches for viewers in Pakistan and Geo TV transmitting the signal abroad.³⁵

Terrestrial viewers suffered time and again. In 2007, PTV did not broadcast Twenty20 World Cup; in 2009 PTV did not buy the rights for Pakistan –Australia test series played in UAE as it was not a profitable commercial venture;³⁶ in 2013 PTV again did not bid for the TV rights of Pakistan's cricket series against Sri Lanka and South Africa played in UAE for lack of funds- for

³¹ See Tender advertisements: PSL 2016-2018 Media Rights for Pakistan Region or one or more regions excluding Pakistan <http://www.pcb.com.pk/images/news_images/fdb2a0c35f90.jpg>; Domestic Cricket Season (2014-15), Television Broadcasting Rights <http://www.pcb.com.pk/downloads/tv_rights_domestic_2014_15.jpg> ; Pakistan/Australia- New Zealand Oct-Dec. 2014, Global Radio Broadcasting Rights (Excluding AM radio in Pakistan) and Audio streaming rights and/or wireless mobile telephony and SMS rights <http://www.pcb.com.pk/downloads/bid_pak_nz_pak_au.jpg>

³² PCB sells broadcasting rights for \$150m, 4/2/15 Media & Ent. Monitor Worldwide; 2015 WLNR 9750044

³³ “Uplinking” means transmission of audio-video signal from ground transmission facility to a satellite, in order to transmit any programme within or outside Pakistan. Section 2(w), PEMRA Ordinance.

³⁴ Cricket – Lahore match hit by television rights row; Nov. 29, 2003 <<https://www.hindustantimes.com/india/lahore-match-hit-by-television-rights-row/story-i0rwOUv2jLmcivsaE9HGJ.html>>

³⁵ Geo Super got ‘fair deal’ on TV rights - Channel head <<http://www.espnricinfo.com/pakistan/content/story/669399.html>>

³⁶ To save Rs 32m PTV failed to show Pak-Australia series available at <http://www.worldofcricket.net/phpBB3/viewtopic.php?f=3&t=3171&p=55200#p55200> (Mr. Arshad Khan, Managing Director, defended his decision not to bid, as it was not commercially viable).

which the Senate Committee on Information and Broadcasting took notice and expressed displeasure over PTV's decision of not participating in the bidding.³⁷

The move to a competitive environment worked against the viewers (cricket fans) who have access only to PTV's terrestrial network. The result of liberalization took away the only option from more than 50% of viewers instead of enhancing the choices available to them.

Recognizing PTV's long-standing role in broadcasting cricket matches, PCB requires the licensees to "share the feed with the terrestrial network (PTV) at a price."³⁸ PCB, however, could bifurcate the broadcasting rights, based on terrestrial broadcasting and Cable & satellite-based broadcasting, as is done by International Cricket Council (ICC),³⁹ and sell (or give for free) the terrestrial rights to PTV itself. However, by doing so, PCB would not be giving private broadcaster's exclusive rights and therefore will not be able to fetch high revenues for broadcasting rights.

In 2010, Pakistan amended its Constitution and added Article 19A in the Chapter that contains Fundamental Rights. Art 19A reads as follows:

19A Right to information:

Every citizen shall have the right to have access to information in all matters of public importance subject to regulation and reasonable restrictions imposed by law.⁴⁰

In *Dr. Shahid Masood v. Federation of Pakistan*, the Petitioner filed a suit against cable operators who allegedly discontinued the transmission of ARY and Geo channels. The Supreme Court of Pakistan whilst declaring the actions by cable operators illegal, noted that every citizen has a right "to have access to information in all matters of public importance as guaranteed by the ... provisions of Article 19-A of the constitution."⁴¹ In *Pakistan Broadcasters Association (PBA)* case, the broadcasters challenged a PEMRA regulation that limits the duration and frequencies of commercials/advertisements during prime time (19:00 hrs to 22:00 hrs). PBA argued that the freedom of expression of the media secured and guaranteed under Art. 19 of the Constitution of Pakistan, 1973⁴² could not be subject to restrictions and constraints other than as specifically provided under the Article. The Supreme Court noted that:

³⁷ Senate Committee Criticizes PTV's Decision to Abstain from Bidding, 10/5//13 Dawn (News); 2013 WLNR 25078510.

³⁸ Geo Super got 'fair deal' on TV rights - channel head
<<http://www.espnricinfo.com/pakistan/content/story/669399.html> >

³⁹ Independent Music Group SMC (PVT) Ltd. v. Federation of Pakistan, C.P. No. 3 of 2011, available at http://www.supremecourt.gov.pk/web/user_files/File/Const.P.3%20OF%202011.pdf; (Independent Music had the rights to broadcast ICC cricket event in Pakistan on cable and Satellite broadcast platforms; whereas PTV secured terrestrial broadcasting rights for the same events, for Pakistan from ICC).

⁴⁰ Art. 19A, (inserted by 18th Amendment) Constitution of Pakistan, 1973.

⁴¹ *Dr. Shahid Masood v. Federation of Pakistan*, para 11, 2010 SCMR 1849

⁴² 19. Freedom of speech, etc.

TV channels for their transmission had to use air waves which constituted public property, whereas the right guaranteed by Art.19 of the Constitution though secured right to receive and disseminate information but did not guarantee use of public property, which could be availed only if the law permitted and to the extent and in the manner prescribed thereby. Since there is a paucity of air waves/frequencies, it is imperative for the State to ensure that the same were used in the best public interest, and the interest of the viewers/listeners being paramount, had precedence over the interest of broadcasters.⁴³

The PBA further argued that PTV being a national broadcaster did not come under the ambit of PEMRA and was free to run commercials without restrictions, and PTV was financed and funded through the Television fee charged by the Government, but no such support was extended to them. The Court, rejecting the argument of broadcasters observed that “PTV is a national strategic organization with its own dynamics and no parallel, in the present context, can be drawn between it and the [broadcasters].”⁴⁴

E. Current State of Broadcasting Regime

From the above discussion and cases, the important points are summarized below, which may be relevant when designing a framework to avoid blackout of broadcasting of important cricket matches in future.

1. PTV has to compete with private broadcaster to get audiovisual rights of cricket matches from PCB.
2. PCB, when auctioning rights, did not separate them on technology basis, i.e., terrestrial and cable & satellite (and now mobile TV and online streaming).
3. PCB requires private broadcasters, who won the right, to share the terrestrial feed with PTV on a mutually agreed fee.
4. PEMRA require all cable television operators to relay and distribute PTV1 and PTV-World channels on their cable networks.
5. That every citizen has a right to have access to information in all matters of public importance
6. Airwaves are public property
7. Airwaves should be used in the best public interest
8. That the interest of the viewers/listeners being paramount, had precedence over the interest of broadcasters;
9. Viewing of sports is a matter of a public and national interest (PEMRA Ordinance).

Every citizen shall have the right to freedom of speech and expression, and there shall be freedom of the press, subject to any reasonable restrictions imposed by law in the interest of the glory of Islam or the integrity, security or defence of Pakistan or any part thereof, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, commission of or incitement to an offence.

⁴³*Pakistan Broadcasters Association v. Pakistan Electronic Media Regulatory Authority*, para 29, 2016 PLD 692 (Supreme Court).

⁴⁴Id. (PBA Case)

It is pertinent to study the legal regime pertaining to the broadcasting of live cricket matches in India, which shares the history and enthusiasm for cricket with Pakistan.

III. Broadcasting Regime for Cricket Matches in India

A. Historic Overview

India and Pakistan share common inheritance of cricket and their legal regimes from Britain. In India, Prasar Bharati, established under the Prasar Bharati (Broadcasting Corporation of India) Act (1990), is the national broadcasting corporation responsible for organizing and conducting public broadcasting services, with the aim to inform, educate and entertain the public. Prasar Bharati offers its public broadcasting services through Doordarshan,(television) and All India Radio (AIR).⁴⁵

Before Prasar Bharati was established, Doordashan (DD) was directly operated by the Ministry of Information and Broadcasting (MIB). For broadcasting sports events, DD would require the organizers of the events to bear the cost of production of content, and also pay DD for broadcasting the event, whilst retaining all revenues generated through advertisements during the broadcast. India liberalized the electronic media market in early 1990s, and Trans World International (TWI), WorldTel and Star TV, were among the first private broadcasters which entered the Indian market.

B. BCCI and Broadcasting Rights for Cricket

The Board of Control for Cricket in India (“BCCI”) is the governing body for cricket in India. BCCI is a society registered under the Tamil Nadu Societies Registration Act, 1975 as a private society. It is an autonomous body, with private administration, not linked with any governmental authority including the Government of India. BCCI is not expressly recognized by GOI as a regulator of cricket in India.⁴⁶ Despite the absence of official blessing, BCCI acts as a *de facto* regulator and have the following object clauses in its Memorandum of Association.

Clause 2(a): To control the game of cricket in India and give its decision on all matters including women’s cricket which may be referred to it by any member association in India.

Clause 2(d): To arrange, control, regulate and finance visits of an Indian Cricket Team to tour countries that are members of ICC or elsewhere in conjunction with the bodies governing cricket in the countries to be visited’.

Clause 2(s): To select teams to represent India in Test Matches, One Day Internationals and Twenty/20 matches played in India or abroad, and to select such other teams as the Board may decide from time to time.

⁴⁵ The Prasar Bharati (Broadcasting Corporation of India) Act (1990) available at: <http://prasarbharati.gov.in/Corporate/pb%20act/Pages/default.aspx>

⁴⁶ Para 8.13, CCI Case No. 61/2010, dated 08/02/2013
https://www.cci.gov.in/sites/default/files/612010_0.pdf?download=1

Clause 2(v): To appoint India's representative or representatives on the ICC and other Conferences, Seminars, connected with the game of cricket.⁴⁷

Commenting on this anomalous status of BCCI, the Competition Commission of India noted:

[T]hat the historical evolution of BCCI has enabled it to attain a monopoly status in the organization of cricket events in India. BCCI assumes the role of de facto regulator of cricket in India on account of the pyramid structure of sports governance and endorsement from ICC as the national body for cricket in India. ICC declares its members like BCCI as the 'custodian' of cricket in the concerned territory and vests them the right of deciding on any matter relating to the said sport.⁴⁸

In early 1993, just like in Pakistan, BCCI sold for the first television rights for an India-England series to TWI. DD, who would get fee to broadcast and fee from advertisers, had to pay \$1 million to TWI to buy the rights for broadcasting of matches in India.⁴⁹

C. Government Monopoly in Broadcasting was Shattered (S.C., 1995)

In 1993, the Cricket Association of Bengal (the "CAB") organized a six team international ODI cricket tournament as part of its diamond jubilee celebrations to be held in November 1993. The event, named the Hero Cup, was the first tournament held in India to be broadcast live on a satellite channel. The CAB had, after protracted negotiations, rejected DD demand to pay technical charges/production fee of INR 500,000 per match for broadcasting the matches, and instead gave the broadcasting rights to TWI. At this juncture, the Ministry of Information and Broadcasting stepped in and announced on 5th November 1993 that "*according to law [Indian Telegraph Act of 1885], no agency other than that belonging to or appointed by the Government of India has a right to telecast any event live by uplinking signals from Indian soil.*" CAB at this point (8 November 1993) was constrained to file a writ petition in the Calcutta High Court praying that the respondent, Government of India, may be directed to provide requisite permissions and facilitate in telecasting and broadcasting of matches by TWI. The High Court passed an interim order directing the Government not to obstruct existing arrangements between CAB and TWI. DD blocked uplink facility and the first match between South Africa and West Indies played on 14 November 1993 was blocked out. Compelled by the situation, CAB approached the Supreme Court on 15 November 1993, which passed an interim order sitting 'in

⁴⁷ Para 8.14. id.

⁴⁸ Para 35, <https://www.cci.gov.in/sites/default/files/61%20of%202010.pdf>

⁴⁹ *How Cricket was Sold in India*, 14 April 2012, <http://www.openthemagazine.com/article/sports/how-cricket-was-sold-in-india>

judgment at 11:30 p.m. on a government holiday' directing, *inter alia*, the Government to provide TWI with uplink facility.⁵⁰

The final judgment in the *Ministry of Information and Broadcasting v. Cricket Ass'n of Bengal*, was delivered on 9 February 1995.⁵¹ A three member bench of the Supreme Court of India made the following important observations:

- (i) that airwaves are a public property;
- (ii) that a monopoly in broadcasting and telecasting is not permissible;
- (iii) that the fundamental right to speech and expression under Article 19 of the Constitution includes the right to be educated, informed and entertained, and that includes viewing the game of cricket ; and
- (iv) that the rights of viewers, the public at large, are paramount.⁵²

This was a seminal judgment that laid the foundations for later progressive opinions by High and Supreme Courts.

D. The Cable Television Networks (Regulation) Act, 1995

In the early 1990s, the growth of satellite networks in the West, and the availability of those networks signals through satellite communications in India, (and Pakistan), led to a new market of cable television networks and operators. At that time there was no regime in place for licensing the cable operators, and to regulate their conduct. Therefore, in 1995, the Cable Television Network (Regulation) Act (“CTNA”)⁵³ was promulgated with the objective to set out the responsibilities and obligation of cable operators with respect to quality of service, protection of copyrighted material, and protection of subscribers from obscene and anti-national content. Section 8, of the CTNA requires compulsory transmission of two channels of Doordarshan, as notified by the Central Government in the Official Gazette, to be carried by the cable operators in their cable service, and re-transmitted without any deletion or alteration of any programme transmitted on such channel.⁵⁴

E. Sharing of Terrestrial Feed for a Fee: Citizen v. PB (Madras H.C., 2004)

Another major development concerning cricket broadcasting rights in India took place in March 2004, when India was to tour Pakistan for a series of three Test matches, and five One-day International matches. The global broadcasting rights were sold by PCB to Ten Sports, and

⁵⁰ *How Cricket was Sold in India*, 14 April 2012, <http://www.openthemagazine.com/article/sports/how-cricket-was-sold-in-india>

⁵¹ *Ministry of Information and Broadcasting v. Cricket Association of Bengal*, AIR 1995 SC 1236.

⁵² *Id.*

⁵³ Act No. 7 of 1995.

⁵⁴ Originally, it was the cable operator who was given the choice to “re-transmit at least two Doordarshan channels of his choice through the cable service.” Section 8, The Cable Television Networks (Regulation) Act 1995 (original). Section 8, CTNA was amended in 2000, wherein section 8(3) stated the “Prasar Bharati may by notification in the official Gazette specify the number and name of every Doordarshan channel.” CTNA was later amended in 2002, 2007 and 2011.

Doordashan was unable to secure terrestrial broadcasting rights from Ten Sports. When cricket fans realized that they may not be able to watch cricket series on their TV sets, a citizen's rights group filed a petition, titled *Citizen, Consumer and Civic Action Group v. Prasar Bharati* in Madras High Court, praying that their fundamental right to speech and expression under Article 19(1)(a) of the Indian Constitution will be violated if the cricket series was not telecast on terrestrial network.

The Court noted that the case presents “a rare piquant situation where citizens of India as a whole as also the Government which rules them are looking at the intervention of the court,”⁵⁵ and required the Court to strike a balance between the larger public interest of fundamental right of the television viewers in India and the commercial rights of Ten Sports and its assignees. The Court directed Ten Sports “to transmit the Indo-Pak cricket series scheduled from 13.3.2004, through Indian Doordarshan” along with Ten Sports’ logo, and whilst honoring all its advertisement contracts. Doordarshan was ordered to pay a reasonable fee, to be worked out between the parties, to Ten Sports for the terrestrial feed.⁵⁶

F. Cabinet Directive for Compulsory Sharing of Terrestrial Feed and Blackouts

Getting cue from the opinion in *Citizen Case*, the Indian Government, on 11 November 2005, issued *Policy Guidelines for Downlinking of Television Channels*. Although it was called Guidelines, in fact it was a directive covering all sports and which required sports channels/sports rights management companies having TV broadcasting rights to share, with immediate effect, “their feed with Prasar Bharati for national and international sporting events of national importance, held in India or abroad, for terrestrial transmission and DTH broadcasting.”⁵⁷ The Guidelines were applicable on existing contracts, and the rights holders were “obliged to share the feed for all matches featuring India and finals of international competitions.”⁵⁸

Ten Sports, which had broadcasting rights for Pakistan cricket and India-West Indies Test and ODI series, challenged the *vires* of the Guidelines in the High Court of Bombay,⁵⁹ and ESPN-Star sports, which had rights for Australia and England, challenged the Guidelines in the High Court of Delhi.⁶⁰ The Bombay High Court did not allow the petition of Ten Sports, who challenged the order before the appellate bench of the Bombay High Court. The appeal was later transferred to Supreme Court bench headed by Justice Ashok Bhan, which restrained the Ministry of Broadcasting and Prasar Bharati from enforcing the Guidelines against Ten Sports or

⁵⁵ Para 3, *Citizen, Consumer and Civic Action Group v. Prasar Bharati et al.* decided on 12 March, 2004, (2006) 5 CompLJ 74 Mad. (Madras High Court). Available at <https://indiankanoon.org/doc/797070/>

⁵⁶ *Id.* paras 5 & 6.

⁵⁷ Para 5.3., Policy Guidelines for Downlinking of Television Channels, F.No.13/2/2002–BP&L/BC-IV Government of India Ministry of Information and Broadcasting Broadcasting Wing New Delhi. Dated: 11th November, 2005, available at <http://cablequest.org/pdfs/broadcaters/DOWNLINKING-GUIDELINES.pdf>.

⁵⁸ *Id.* para 5.2.2.

⁵⁹ *Taj Television (India) Private Limited v Union of India*, Writ Petition 2975/2005, Bombay High Court.

⁶⁰ *ESPN Star Sports v Union of India*, Writ Petition 23832/2005, Delhi High Court. *See also*, Richard Sydenham, *Cricket-ICC and Broadcasters Oppose India TV Order*, December 22, 2005, Reuters

ESPN-Star Sports.⁶¹ As a result, Doordarshan was not able to telecast live India-Pakistan series held in Pakistan from 7 January to 19 February 2006, and was only able to show ninety minutes of highlights each day.⁶² Again, Doordarshan was not able to telecast India-West Indies series held in West Indies in May 2006.⁶³

In January 2007, West Indies team visited India. Nimbus held telecast rights and required DD to either encrypt the signal if the latter wished to get live feed, or DD could get a 15 minute delayed feed. Nimbus and DD could not reach an agreement, and thus the first ODI between India and West Indies held in Nagpur on 21 January 2007 could not be telecast on DD's terrestrial network, depriving millions of cricket-fans from entertainment. However, the Delhi High Court came to the rescue of fans, and ordered that the DD could telecast the remaining ODI between India and West Indies and one ODI match of a Series between India and Sri Lanka scheduled for February 2007, as seven-minute delayed feed. However, All India Radio, was allowed to broadcast the matches live.⁶⁴

G. Mandatory Sharing of Terrestrial Feed: The Sports Ordinance/Act, 2007

Perturbed by the refusal of Nimbus to share terrestrial feed with DD, the Indian Cabinet on February 1, 2007 approved the Sports Broadcasting Signals (Mandatory Sharing with Prasar Bharati) Ordinance, 2007,⁶⁵ which got the President's assent on 2 February 2007 prior to India's series against Sri Lanka that started on February 8, 2007.⁶⁶ The Ordinance, a temporary legislation, was aimed at giving legal cover to the 2005 Downlinking Guidelines by giving it retroactive effect from November 11, 2005, when the government notified the Guidelines. The Ordinance made it mandatory for private broadcasters to share live broadcasting feed of all sports events of national importance with Prasar Bharati. With respect to cricket, sports events of national importance meant "all one-day internationals played in India and abroad [by Indian team], and Test matches played at home."⁶⁷

Nimbus challenged the Ordinance in the Delhi High Court, which in an interim order directed Nimbus to share live telecast feed for the India and Sri Lanka's final ODI played on 17 January

⁶¹ Doordarshan Denied Telecast of West Indies Tour, May 9, 2006;

<http://www.espnricinfo.com/wivind/content/story/246573.html>.

⁶² Doordarshan not to Telecast India-Pakistan Series Live, Jan. 10, 2006,

<http://www.espnricinfo.com/india/content/story/232255.html>.

⁶³ DD Barred from Airing WI Series, <https://www.hindustantimes.com/india/dd-barred-from-airing-wi-series/story-YFYhIV4BUREX20WQuS90gN.html>.

⁶⁴ Doordarshan to Telecast Next Four ODIs, Jan. 23, 2007,

<http://www.espnricinfo.com/india/content/story/277319.html>

⁶⁵ Ord. No. 4 of 2007.

⁶⁶ Article 123 of the Constitution empowers the President to promulgate Ordinances during recess of Parliament. An Ordinance promulgated under article 123 have the same force and effect as an Act of Parliament, and must be placed before both Houses of Parliament and shall cease to operate at the expiration of six weeks from the reassembly of Parliament.

⁶⁷ NIMBUS FORCED TO SHARE LIVE FEED WITH DOORDARSHAN: Cabinet Approves Ordinance on 'Sporting Events of National Importance,' Feb. 1, 2007, <http://www.espnricinfo.com/india/content/story/278448.html>

2007.⁶⁸ On 8th March, 2007 the Ordinance/Bill was placed before the parliament, and was adopted by it on the same day.⁶⁹

On 19th March 2007, the Sports Broadcasting Signals (Mandatory Sharing with Prasar Bharati) Act, 2007⁷⁰ [the “Sports Act”] came into effect. The Sports Act aims “to provide access to the largest number of listeners and viewers, on a free to air basis, of sporting events of national importance through mandatory sharing of sports broadcasting signals with Prasar Bharati.”⁷¹

Section 3 of the Sports Act requires mandatory sharing by all content rights owners/holders of certain sports broadcasting signals, free of their advertisements, with Prasar Bharati for retransmission of the same on its terrestrial networks and Direct-to-home networks. Section 3(2) provides that the advertisement revenue sharing between the content rights owner/holder and the Prasar Bharati shall be in the ratio of not less than 75:25 in case of television coverage and 50:50 in case of radio coverage. And the revenue so earned by Prasar Bharati shall be used by it for broadcasting other sporting events.⁷² Section 3 became the center of litigation that ensued.

1. Feed Clear of Advertisements (Star Sports India v. Prasar Baharati, S.C., May 2016)

ESPN Software India Pvt. Ltd. (the predecessor of Star Sports) had broadcasting rights from International Cricket Council (ICC) for India. ESPN received the feed from the organizer of the event, ICC, and shared the same with Prasar Bharati pursuant to Section 3 of the Sports Act. Prasar Bharati demanded that under section 3, ESPN was to share feed “without its advertisement.” Relevant part of Section 3 is reproduced below for ease of reference.

3. Mandatory sharing of certain sports broadcasting signals.-

(1) No content rights owner or holder and no television or radio broadcasting service provider shall carry a live television broadcast on any cable or Direct-to-Home network or radio commentary broadcast in India of sporting events of national importance, unless it simultaneously shares the live broadcasting signal, without its advertisements, with the Prasar Bharati to enable them to re-transmit the same on its terrestrial networks and Direct-to-Home networks in such manner and on such terms and conditions as may be specified. (Emphasis supplied).

ESPN filed a petition in the Delhi Court seeking a declaration that its obligation of sharing live broadcast signals of sporting events of national importance with Prasar Bharati stand discharged by sharing the live broadcast signal as received (with commercial advertisements) from the

⁶⁸ NIMBUS FORCED TO SHARE LIVE FEED: Doordarshan to Telecast Fourth ODI live, February 15, 2007, <http://www.espnricinfo.com/indvsl/content/story/280449.html>

⁶⁹ Lok Sabha Debates, Combined Discussion On Statutory Resolution Regarding Disapproval ... on 8 March, 2007, <https://indiankanoon.org/doc/462890/>

⁷⁰ Act No. 11 of 2007, 19th March, 2007. Available at <http://legislative.gov.in/sites/default/files/A2007-11.pdf> [“The Sports Act, 2007”].

⁷¹ Preamble, the Sports Act, 2007.

⁷² Section 3, *Id.*

organizer of the sporting event.⁷³ ESPN had the following contentions: (i) that its obligation under the law was to share the live broadcast signal as it was received by it from the copyright owner of the broadcast i.e., the sporting event organizer; (ii) that the expression 'its advertisements' in Section 3 of Sports Act, 2007 referred to the advertisements of the broadcaster in India and not the advertisements of the event owner. (iii) that any modification in the feed received from ICC would be a breach of ESPN contractual obligations with the ICC; and (iv) that the demand of Prasar Bharati that a clean feed be provided to it would be an act impossible of being performed by ESPN.

The Delhi High Court whilst dismissing the petition noted that the Sports Act, 2007 "is not an expropriatory legislation."⁷⁴ Airwaves and spectrums "are public property held in trust by the Government for the benefit of public good."⁷⁵ Whosoever uses the airwaves would have to pay for the use thereof. "Revenue sharing of the gains made as a result of the broadcast. . . is akin to a joint venture where the owner of the spectrum or the airwaves joins hand with the owner of the broadcast."⁷⁶ The Court further noted that the language of Section 3 is clear, and the words "without its advertisements" is a condition on "live broadcasting signal" shared by content owner, or content holder, or television or radio broadcasting service provider, that is, live broadcast signals have to be without any advertisements.⁷⁷ The Delhi High Court thus dismissed the petition.

Star Sports filed an appeal before the Supreme Court of India. The Supreme Court upheld the decision of the Delhi Court. In doing so, it concurred with the interpretation of Section 3(1) of the Sports Act done by the Delhi High Court that the live broadcasting signal to be shared by content owner/holder, or television/radio broadcasting service provider should be free of any advertisement.⁷⁸ Section 3 did not make any distinction between advertisements inserted by a broadcaster or an event organiser. It is thus immaterial, the Court noted, whether advertisements were shown because of an arrangement between the event organiser and the sponsors or as a result of an arrangement between the broadcaster and the sponsors.

The Supreme Court also gave economic rationale by delving in the interpretation of Section 3(2) of the Sports Act, reproduced below:

(2) The terms and conditions under sub-section (1) shall also provide that the advertisement revenue sharing between the content rights owner or holder and the Prasar Bharati shall be in the ratio of not less than 75:25 in case of television coverage and 50:50 in case of radio coverage.

Expounding on the rationale of Section 3(2), the Court noted that:

⁷³ *Espn Software India Pvt. Ltd. vs Prasar Bharati et al.*, W.P.(C) 3611/2013, Delhi High Court (Division Bench) Judgment dated 3 October, 2013, available at: < <https://indiankanoon.org/doc/89243549/>>

⁷⁴ Para 23

⁷⁵ Para 24.

⁷⁶ Para 24.

⁷⁷ Para 26.

⁷⁸ *Star Sports India Pvt Ltd vs Prasar Bharati et al.* Supreme Court, Judgment dated 27 May, 2016, available at <https://indiankanoon.org/doc/132735496/>

[I]nsofar as income that is generated from advertisements is concerned, which are shown on television or broadcasted on radio, the revenue thereof is to be shared between the Broadcaster and Prasar Bharati. The purpose is obvious. It is the broadcasting service provider who is supposed to share the live broadcasting signal with Prasar Bharati, [and the former] has the arrangements with the advertisers and, thus, takes money from those who book their advertisements to be broadcasted on television or radio. However, when the signals are shared with Prasar Bharati enabling it to simultaneously retransmit the same on its terrestrial networks or DTH networks, the viewership/ audience gets multiplied as the reach is to much larger section of citizenry through Prasar Bharati. Therefore, Section 3(1), in the first instance, mandates that the sharing of live broadcasting signals with Prasar Bharati has to be 'without its advertisements'. Exception is, however, made in sub-section (2) of Section 3 which enables the broadcasting service provider to even share the contents along with advertisements, but subject to the condition that there has to be a sharing of revenue in the proportion prescribed in sub-section (2) of Section 3. As aforesaid, when live broadcasting signal is shared containing advertisements, those advertisements have much larger viewership because of its telecast/broadcast on Prasar Bharati. The benefit of advertisement in such a case would accrue to those who have booked the advertisements and the service provider, in such an eventuality would definitely be in a position to charge much more from the advertisers. It is a matter of common knowledge that rates of advertisement go up when circulation thereof is enhanced.⁷⁹

Section 3(2) thus prevent free-riding by broadcasters through sharing live transmission laced with advertisements with Prasar Bharati and reaching its viewership, which "is far more reaching insofar as Indian population is concerned as it reaches almost every nook and corner of the country."⁸⁰ The Supreme Court thus found no merit in the appeal and dismissed it with costs.

2. Free Feed for Transmission to Terrestrial Network Only: (Union of India v. BCCI, S.C., 2017)

Soon after the Sports Act was enforced, BCCI and Nimbus filed suits in the Delhi High Court for striking down, *inter alia*, Section 3 of the Sports Act, to the extent it related to cricket test matches and also declaring as null and void Notification dated September 13, 2000, issued by the Central Government notifying DD1 (National) channel and DD (News) channel as mandatory channels to be carried compulsorily by the Cable Operators. The main contention was the re-telecast of the signals shared by Nimbus --and other broadcasters who became party to the litigation as they became rights holder-- with Prasar Bharati under Section 3 of the Sports Act, by Cable Operators under Section 8 of the Cable Television Networks (Regulation) Act, 1995 which require Cable Operators to mandatorily carry in their cable service such Doordarshan channels that may be notified by the Central Government under the said Section 8 of the Cable Act.

⁷⁹ Id.

⁸⁰ Id.

Whilst the single bench of the Delhi High Court dismissed the petition, a Division Bench allowed the appeal. The Court noted that the retelecast by cable operators put private broadcasters at an unduly disadvantaged position, first, by reduced advertisement revenue and the second by reduced subscription revenue. Those homes which were connected via cable networks would have paid for receiving the live broadcast signals had Prasar Bharati through Doordarshan compulsory channels not provided the same free of cost to the cable operators. The Court further noted that although by virtue of section 3(2) of the Sports Act, the advertisement revenue received by Doordarshan in respect of the shared content was also to be shared in the ratio of not less than 75:25, it still would not cater to the loss of subscription revenue, and the advertisement revenue, which private broadcaster would have made on its own, would not be matched by Prasar Bharati and, therefore, the provision of Section 3(2) of the said Act was no consolation for providing the feed free to the cable operators.⁸¹

The Division Bench thus held that on interpreting the provisions of Section 3 of the Sports Act, and Section 8 of the Cable Act, 1995 the signals received by Prasar Bharati from the private broadcasters should not be placed in the designated Doordarshan channels, which were to be compulsorily carried by the Cable Operators under Section 8 of the Cable Act, 1995.

Aggrieved by the order of the Division Bench of the Delhi High Court, the Union of India, Prasar Bharati, and others preferred an appeal before the Supreme Court of India.

The Supreme Court noted that the objective of the Sports Act is to provide access to the largest number of listeners and viewers, on a free to air basis, of sporting events of national importance through mandatory sharing of sports broadcasting signals with Prasar Bharati, and Section 3 of the Sports Act is a significant provision to further the objective. The Court did not find in the provisions of Section 3 of the Sports Act any recognition of the requirement stipulated in Section 8 of the Cable Act, 1995. The plain language of the Section 3 of the Sports Act, made it clear that the obligation to share cast on the content rights owner or holder, etc. with Prasar Bharati is to enable Prasar Bharati to transmit the same on “its terrestrial and DTH networks,” and not to Cable Operators so as to enable the Cable TV operators to reach such consumers who have already subscribed to a cable network.⁸²

The judgment drew a balance between the rights of the broadcasters and the consumers' (public) interest in viewing sports events of national importance. Broadcasters are protected from free-riding by cable operators, and thus saved the broadcasters from the loss of revenue from subscription and reduced advertisement revenues. And viewers, who only have access to the free to air terrestrial network or free DTH networks of Doordarshan, are provided with live transmission of cricket matches.

3. Effect of Supreme Court's Judgments

⁸¹ *Board of Control for Cricket in India vs Prasar Bharati Broadcasting and others*, Division Bench, Delhi High Court decision dated 4 February, 2015, available at <https://indiankanoon.org/doc/15530881/>

⁸²⁸² *Union of India et al. v. Board of Control for Cricket in India et al.* (Supreme Court of India, August, 2017) available at <https://indiankanoon.org/doc/39373148/>

The net effect of the two judgments is consumer welfare enhancing, and removing distortions to market conditions. The 2016 judgment ensured that Prasar Bharati receives live feed without any advertisements either from the broadcaster or from the content owner (event organizer), whereas the 2017 judgment ensured that the feed which private broadcasters share with Prasar Bharati would not get relayed on Doordarshan channels, which are compulsorily carried by cable operators.

The two judgment acting in tandem would neutralize the harm or benefit, if any, imposed on a private broadcaster by compulsorily sharing live feed with Prasar Bharati. The possibility of undue benefit, which a broadcaster or content owner could get by sharing live transmission with advertisements with Prasar Bharati and thereby reach a larger audience, and could sell such possibility with advertisers to get higher fee is eliminated by the 2016 Judgment. The possibility that a broadcaster will suffer a loss from reduced subscription revenues in the event that viewers who are on a cable network would free-ride by watching important sports event on Doordarshan channels carried by their cable operator is eliminated by the 2017 judgment. The broadcaster would not suffer any advertising or subscription loss by sharing life feed with Prasar Bharati, as the relevant market in which Prasar Bharati is operating is different, *i.e.*, viewers having access to only free-to- air terrestrial network or free DTH network , and the market for which a broadcaster would get rights from the event organizer remain unchanged, *i.e.*, cable and satellite channels.

Majority of the population in India still does not have access to cable or satellite channels would get guaranteed broadcasting of sports event of national importance. Overall all stakeholders having interest in the live transmission of important sporting event gets a fair deal – a win-win for all!

IV. Cricket Boards and Antitrust

A. BCCI and Broadcaster's Prohibited Agreement: IPL Case (CCI, 2017).

On November 30, 2007, Board for Control of Cricket in India (BCCI) issued an international tender for the Indian Premier League (IPL) media rights for a period of 10 years commencing 2008 and ending 2017 on a worldwide basis. The contract was awarded to a joint-bid by World Sports Group and Sony, for an offer of USD 1.026 billion. The media rights agreement contained a non-compete clause, Clause 9.1(c)(i), which reads as follows:

BCCI represents and warrants that it shall not organize, sanction, recognize, or support during the Rights period another professional domestic Indian T20 competition that is competitive to the league.⁸³

⁸³ Board for Control of Cricket in India, Case No. 61/2010, decision dated 08/02/2013 available at https://www.cci.gov.in/sites/default/files/612010_0.pdf?download=1

The matter was reported to the Competition Commission of India, which took cognizance of the case and found that the BCCI has dominance in the relevant market for 'organization of professional domestic cricket leagues/events in India.'⁸⁴

BCCI enjoyed dominance position in the relevant market owing to its market share, size, resources and economic power, dependence of consumers and high entry barriers.⁸⁵ Moreover, Section 32 of the International Cricket Council (ICC) Manual stipulates that only BCCI has the exclusive authority to sanction/ approve cricket events in India. Any match or tournament not approved by BCCI would be regarded as 'disapproved cricket' in India.⁸⁶

In support of the restrictive clause, BCCI argued that it was inserted at the behest of the bidder, as (i) the market for IPL was nascent; (ii) broadcast of IPL was for a limited time resulting in limited time for recouping investment; and (iii) inherent constraints in the broadcasting market.⁸⁷ The Commission whilst rejecting the arguments adduced by BCCI noted that BCCI was not "able to show how the impugned restriction serves the legitimate interest of cricket in the country and the consumers in the relevant market."⁸⁸ The restrictive Clause, "clearly reflects the intent of BCCI to foreclose competition."⁸⁹

The commission imposed a fine of INR 520 million rupees (\$8 million) on BCCI for abusing its dominant position, by restricting and foreclosing competition in the relevant market organization of professional domestic cricket leagues/events in India.⁹⁰

B. Broadcasting Revenues and Output Restrictions

One of the roles of cricket boards is to organize tournaments and national and international matches within country or abroad. Tournaments are important for promoting the sport, and the players, and provide a source of entertainment for viewer, and a source of revenues for the organizers. Although, earning revenue by selling broadcasting rights should be a byproduct of organizing a tournament, but when greed takes precedence over the objective of promoting the sport, revenues from the sale of broadcasting rights become the primary objective of organizing a tournament or a series of matches.

The case in point was a series of three Tests, five ODIs and two T20s which was to be played in December 2015 in UAE between Pakistan and India, pursuant to an MOU signed in 2014 between the PCB and the BCCI for six series to be played between the two countries over a period of eight years from 2015 to 2023. The broadcasting rights for series organized by PCB

⁸⁴ Para 5.1 Board for Control of Cricket in India, Case No. 61/2010, decision dated 29/11/2017 available at <https://www.cci.gov.in/sites/default/files/61%20of%202010.pdf>

⁸⁵ Para 5.2, id.

⁸⁶ Para 35. Id.

⁸⁷ Para 45, Id

⁸⁸ Para 48, Id.

⁸⁹ Para 48. Id.

⁹⁰ The Commission's first decision came on Feb. 08, 2013, which was appealed and the Court remanded the case to the Commission to reconsider. On reconsideration, the Commission again came to the same conclusion and imposed the same penalty. The second decision of the Commission was issued on Nov. 29, 2017.

were with Ten Sports, and BCCI was not willing to negotiate with Ten Sports for broadcasting rights for India.

It was reported in the Press that BCCI had proposed that the series be organised in India. However, PCB did not agree to the proposal as that would mean “sharing a part of the moolah raised through broadcast rights with BCCI.”⁹¹ A senior PCB member was quoted as saying: “Why should we do that? We all know that India-Pakistan matches are the most lucrative of all the cricket matches. As it is, the Indian board is quite rich. Why should we compromise with our opportunity to make some money.”⁹²

The 2015 series did not happen, nor did any other series agreed upon take place. PCB threatens BCCI for taking a legal action for not honoring the MoU, and for losses suffered by not earning “millions of estimated revenues.”⁹³

The two boards driven by the urge to make money took precedence over the primary objective of promoting the sport, and thus engaged collectively in the conduct of restricting output in the most important *market of cricket matches between Pakistan and India*.

C. Auctioning and Monopolization of Broadcasting Rights

Both PCB and BCCI sell broadcasting/media rights through competitive bidding. Co-incidentally, at present the broadcasting rights for international and domestic cricket matches are held by a single broadcaster or a joint venture of broadcasters, both in Pakistan and India.

In Pakistan, the broadcasting rights for international matches, for the period 2015 to 2020, and for Pakistan Super League (PSL) for 2016 to 2018⁹⁴ are with PTV and Ten Sports.⁹⁵ Similarly, the Indian market for broadcasting of cricket matches is presently monopolized by Star India, which has rights to broadcast on TV and digital platform all international and domestic cricket matches, *i.e.*, Indian Premier League rights (for 2018-2023); Indian cricket (for 2018-2023), and ICC tournaments (from 2015-2023).⁹⁶

All different formats of cricket (Test matches, one day matches, and T20) may constitute different relevant product markets. The most popular formats are T20 and one-day matches as the result becomes clear in short span of 5 hours or in a day, compared to a Test match with takes

⁹¹ *TEN-sion Rising over India vs Pakistan Broadcast Rights Issue*, Indian Express, May 12, 2015, available at <http://indianexpress.com/article/sports/cricket/ten-sion-rising-over-india-vs-pakistan-broadcast-rights-issue/>.

⁹² *Id.* See also What's Coming in the Way of Indo-Pak Cricket is not Politics but Television, May 14, 2015, <https://scroll.in/field/727241/what-s-coming-in-the-way-of-indo-pak-cricket-is-not-politics-but-television>.

⁹³ Hansraj Ahir, India-Pakistan Cricket Series in Dubai May Not Happen, March 29, 2017, <https://www.news18.com/cricketnext/news/india-pakistan-cricket-series-in-dubai-may-not-happen-hansraj-ahir-1365560.html>.

⁹⁴ *Franchise, Sponsorship, Broadcast Deals Finalized*, <http://www.pcb.com.pk/press-release-detail/pakistan-super-league-marches-on.html>; LHC Dismisses Appeals against Aamir, PSL Rights, Jan. 5, 2016, *The Nation* (Pakistan), 2016 WLNR 315970.

⁹⁵ PCB sells broadcasting rights for \$150m, 4/2/15 *Media & Ent. Monitor Worldwide*; 2015 WLNR 9750044

⁹⁶ *Total Control*, *Times of India*, 4/6/18 *Times India*; 2018 WLNR 10320221; see also ICC Broadcast Partners, <https://www.icc-cricket.com/about/partners/broadcasters/icc-broadcast-partners>

five days and often a day off during the match. Even if all tournaments constitute different relevant product markets, the concentration of broadcasting rights with one firm creates monopoly power in the market for advertising during live cricket matches. The acquisition of broadcasting rights through competitive bidding leading to creation of a dominant position can be avoided by requiring pre-bidding clearance, similar to a merger clearance, from the Competition Commissions. Pre-bidding clearance is regularly required by the Privatization Commission of Pakistan, when selling state-owned firms to avoid competition concerns post-bidding.⁹⁷

V. Conclusion

This paper has traversed the developments in the sale of audiovisual rights for live transmission of cricket matches in Pakistan and India. The liberalization of media markets in Pakistan and India highlighted the clash of economic competition and public interest, and auctioning of broadcasting rights presents a complex interplay of different interest and players. India has ironed out issues arising from public interest and commercial interest through expensive and expansive litigation. The take-aways from the Indian experience are:

- (i) that a monopoly in broadcasting and telecasting is not permissible;
- (ii) that airwaves are a public property;
- (iii) that the fundamental right to speech and expression includes viewing the game of cricket ;
- (iv) that the rights of viewers, the public at large, are paramount;
- (v) Since broadcasting is carried over airwaves, it must be shared with the owner of airwaves, *i.e.*, the public at large, and the national broadcaster is the representative of the public.
- (vi) the national broadcaster must re-telecast the live feed on its terrestrial and DTH networks, so that people who are connected to cable network should not get a free ride.
- (vii) the live feed shared with the national broadcaster should be free of advertisements from the broadcaster or content owner – this way: (i) private broadcaster will not be able to expand its viewership to that of terrestrial network and gain unjust enrichment through higher advertisement revenues; (ii) national broadcaster will have the opportunity to enter into advertisement agreements for its viewership and raise revenues for discharging its public obligation of broadcasting sports events of national interest.
- (viii) the requirements on private broadcaster to share live feed free of advertisements, and on national broadcaster to relay such live feed on its terrestrial and DTH networks, will even out any benefit or harm the private broadcaster may suffer from the obligation to share live feed with the national broadcaster.

⁹⁷ See for example, [http://cc.gov.pk/images/Downloads/enquiry_reports/Enquiry%20Report%20Siemens%20Ijin%20\[Final%206%20October%202008\].pdf](http://cc.gov.pk/images/Downloads/enquiry_reports/Enquiry%20Report%20Siemens%20Ijin%20[Final%206%20October%202008].pdf).

Pakistan could gain from the Indian experience and avoid blackouts of important cricket matches for the majority of viewers having access only to PTV's terrestrial network, by making it mandatory for private broadcasters to share live feed free of advertisement with PTV for transmission on its terrestrial network only.