IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 680 OF 2020
[WRIT PETITION (L) NO.116 OF 2020]

The Film and Television Producers Guild of India Ltd. & Another ... Petitioners
Vs
The Union of India & Another ... Respondents

WITH
WRIT PETITION (L) NO.117 OF 2020

Zee Entertainment Enterprises Ltd. & another ... Petitioners
Vs
Telecom Regulatory Authority of India ... Respondent

WITH
WRIT PETITION (L) NO.118 OF 2020

Sony Pictures Networks India Pvt. Ltd. ... Petitioner
Vs
Telecom Regulatory Authority of India ... Respondent

WITH
WRIT PETITION (L) NO.120 OF 2020

Indian Broadcasting Foundation & Others ... Petitioners
Vs
Telecom Regulatory Authority of India & Another ... Respondents

WITH
WRIT PETITION (L) NO.124 OF 2020

Shri S. Venkata Subramanian shareholder of Disney Board (India) Limited & Others ... Petitioners
Vs
Telecom Regulatory Authority of India & Another ... Respondents

WITH
WRIT PETITION (L) NO.125 OF 2020

Asianet Star Communications Pvt. Ltd. & Others ... Petitioners
Vs
Telecom Regulatory Authority of India & Another ... Respondents

WITH
WRIT PETITION (L) NO.126 OF 2020

Shruti Takulia Shareholder & Head of Production
of NGC Network India Private Limited & Another ... Petitioners
Vs
Telecom Regulatory Authority of India & Another ... Respondents

WITH
WRIT PETITION (L) NO.127 OF 2020

Shri Sankunni Krishnan Kutty,
Shareholder of Star India Private Limited
& Others ... Petitioners
Vs
Telecom Regulatory Authority of India & Another ... Respondents

WITH
WRIT PETITION (L) NO.147 OF 2020

TV 18 Broadcast Limited & Others ... Petitioners
Vs
Telecom Regulatory Authority of India ... Respondent

Mr. Harish Salve, Senior Counsel a/w. Mr. Sai Krishna Rajagopal, Ms. RubyAhuja, Mr. Sidharth Chopra, Mr. Rustam N. Mulla, Mr. Harshad Gada, Mr. Aditya N. Raut, Ms. Sneha Jain, Mr. Utsav Trivedi, Ms. Shilpa Gupta, Ms.Swikriti Singhania and Mr. Ranjit Singh Sandhu, Utkarsha Maria and Ms. Krittika Sachdeva and Mr. Vasu Singh i/b M/s. Desai Desai Carrimjee & Mulla for the Petitioners in WPL No.124/2020.

Mr. Mukul Rohatgi, Senior Counsel a/w Mr. Saikrishna Rajagopal,Ms. Ruby Ahuja, Mr. Sidharth Chopra, Mr. Rustam N. Mulla, Mr. Harshad Gada, Mr.

Aditya N. Raut, Ms. Sneha Jain, Mr. Utsav Trivedi, Ms. Shilpa Gupta, Ms. Swikriti Singhania, Mr. Ranjit Singh Sandhu, Utkarsha Maria and Ms. Krittika Sachdeva and Mr. Vasu Singh i/b M/s. Desai Desai Carrimjee & Mulla for Petitioners in WPL No. 127/2020.

Mr. Janak Dwarkadas, Sr. Counsel, Mr. Kunal Dwarkadas along with Mr. Ashwath Rau, Ms. Sonali Mathur, Ms. Anshika Misra, Mr. Harshit Jaiswal i/by AZB & Partners for Petitioners in WP No. 680/2020 (WPL No. 116/2020).

Mr. Navroz Seervai, Senior Counsel, a/w Mr. Kunal Tandon, Mr. Pradeep Bakhru,Mr. Shashank Shekar and Ms. Upasana Vasu i/b Wadia Ghandy & Co. for Petitioners in WPL No. 117/2020.

Mr. Ravi Kadam, Senior Counsel a/w. Mr. Shiraz Rustomjee, Senior Counsel a/w. Mr. Saikrishna Rajagopal with Ms. RubyAhuja, Mr. Sidharth Chopra, Mr. Rustam N. Mulla, Mr. Harshad Gada, Mr.Aditya N. Raut, Ms. Sneha Jain, Mr. Utsav Trivedi, Ms. Shilpa Gupta, Ms. Swikriti Singhania, Mr. Ranjit Singh Sandhu, Utkarsha Maria and Ms. Krittika Sachdeva, Mr. Vasu Singh i/b M/s. Desai Desai Carrimjee & Mulla for Petitioners in WPL No. 126/2020.

Mr. Gopal Jain, Sr. Advocate with Mr.Saikrishna Rajagopal, Mr.Abhishek Malhotra, Ms.Sapna Chaurasia, Ms.Sneha Herwade, Mr.Siddharth Chopra, Mr. Kanishk Kumar and Mr.Nitin Sharma i/by TMT Law Practice for Petitioners in WPL No. 120/2020.

Mr. Darius Khambatta, Senior Counsel with Mr. Sharan Jagtiani, Senior Counsel a/w.Mr. Saikrishna Rajagopal, Ms. Ruby Ahuja, Mr. Sidharth Chopra, Mr. Rustam N. Mulla, Mr. Harshad Gada, Mr. Aditya N. Raut, Ms. Sneha Jain, Mr. Utsav Trivedi, Ms. Shilpa Gupta,Ms. Swikriti Singhania and Mr. Ranjit Singh Sandhu, Utkarsha Maria and Ms. Krittika Sachdeva and Mr. Vasu Singh i/b M/s. Desai Desai Carrimjee & Mulla for Petitioners in WPL No. 125/2020.

Mr. Soli Cooper, Sr. Counsel with Mr. M. P. Bharucha, Ms. Sneha Jaisingh and Aniruddha Banerji i/by Bharucha & Partners for Petitioners in WPL No. 118/2020. Mr. Ashok Nambissan, Mr. Gururaja Rao & Mr. Rahul Bhasme for the representative of the Petitioner.

Mr. Harsh Kaushik a/w Mr. Sagar Ghogre, Mr. Abhay Chattopathayay, Ms. Nikita Chitale and Ms. Mrinalika Devarapalli, Advocates i/by Mr. Govind Solanke for Petitioners in WPL No. 147/2020.

Mr. Tushar Mehta, Solicitor General with Mr. Samsher Garud, Mrs.Bijal Gandhi, Ms.Bhavika Deora and Ms.Pooja Yadav and Juhi Valia i/by Jayakar & Partners for Respondents-UOI & TRAI in WPL No. 124/2020.

Mr. Anil Singh, Add'l Solicitor General with Mr. Aditya Thakkar, Mr. Ashish Mehta and Ms.Pranalee Pawar i/by Ethos Legal Alliance for Respondent-Union of India.

Mr. Venkatesh Dhond, Senior Advocate with Mr.Rohan Kelkar, Mr. Ashish Pyasi, Mr. Dinesh Jadhwani, Mr. Zaid Mansuri i/b Dhir and Dhir Associates for Respondent-TRAI in WPL No. 116/2020, WPL No. 120/2020 and WPL No. 127/2020.

Mr. Vineet Naik, Senior Advocate a/w Mr. Samsher Garud, Mr. Bijal Gandhi, Ms. Bhavika Devora and Ms. Pooja Yadav and Juhi Valia i/by Jaykar and Partners for Respondent -TRAI in WPL No. 126/2020.

Mr. Vineet Naik, Senior Advocate a/w. Mr. Ashish Pyasi, Mr. Dinesh Jadhwani, Mr. Zaid Mansuri, i/b M/s Dhir and Dhir Associates for Respondent-TRAI in WPL No. 118/2020.

Mr. Ashish Kamat with Mr.Samsher Garud, Mrs.Bijal Gandhi, Ms.BhavikaDeora and Ms.Pooja Yadav and Juhi Valia i/by Jayakar & Partners for Respondent-TRAI in WPL No. 117/2020.

Mr. Ashish Kamat a/w Mr. Ashish Pyasi, Mr. Dinesh Jadhwani, Mr. Zaid Mansuri i/b M/s. Dhir and Dhir Associates for Respondent-TRAI in WPL No. 125/2020, WPL No. 147/2020.

CORAM : A. A. SAYED &
ANUJA PRABHUDESSAI, JJ.
DATED : 30th June, 2021

ORDER: (per A.A. SAYED, J.)

1. All the above nine Writ Petitions challenge the constitutional validity of the provisions of **(i)** the Telecommunication (Broadcasting and Cable) Services Interconnections (Addressable Systems) (Second Amendment)

Regulations, 2020, **(ii)** Telecommunication (Broadcasting and Cable) Standard of Quality of Service and Consumer Protection (Addressable Systems) (Third Amendment) Regulations 2020 (hereinafter referred to as "**2020 Regulations Amendments**") and **(iii)** the Telecommunication (Broadcasting and Cable) Services (Eighth) (Addressable Systems) Tariff (Second Amendment) Order, 2020 (hereinafter referred to as "**2020 Tariff Order Amendment**") issued in exercise of powers under the Telecom Regulatory Authority of India Act, 1997 (hereinafter referred to as the TRAI Act). The impugned 2020 Regulations Amendments and impugned 2020 Tariff Order Amendment are hereinafter collectively referred to as the "**impugned 2020 Amendments"**.

1.1 Out of the nine Writ Petitions, five Writ Petitions, being Writ Petition (L) Nos.116, 124 to 127 of 2020 also challenge (i) the constitutional validity of the provisions of **(i)** the Telecommunication (Broadcasting and Cable) Services Interconnections (Addressable Systems) Regulations, 2017, **(ii)** Telecommunication (Broadcasting and Cable) Standard of Quality of Service and Consumer Protection (Addressable Systems) Regulations 2017 (hereinafter referred to as "**principal 2017 Regulations**") and **(iii)** the Telecommunication (Broadcasting and Cable) Services (Eighth) (Addressable Systems) Tariff Order, 2017 (hereinafter referred to as **"principal 2017 Tariff Order**"). The impugned principal 2017 Regulations and the impugned principal 2017 Tariff Order are hereinafter collectively referred to as the "**impugned principal 2017 provisions**".

1.2 Five Writ Petitions being Writ Petition (L) Nos. 124 to 127 of 2020 (filed by a common Advocate) and Writ Petition No. 120 of 2020 also challenge the constitutional validity of section 11 of the TRAI Act, so far as it relates to broadcasting services.

The reference to Petitioners in this judgment may be construed accordingly to mean the Petitioners in the respective Petitions.

2. The Writ Petitions [barring Writ Petition (L) No. 116 of 2020] are filed by broadcasters/association of broadcasters. Broadcasters obtain down-linking permission for its Television channels from Central Government to provide programming services. The broadcasters send signals to Multi System Operator (hereinafter referred to as “MSO”) who in turn send the signals to Local Cable Operators (hereinafter referred to as “LCO”) from which it is beamed to the ultimate consumer watching the Television programmes. The broadcasters pay distribution fee and carriage fee for transportation of such signals. Where Direct to Home (DTH) services are provided, instead of MSO, the signals are sent directly via satellite to the consumer (Tata Sky, for instance). Insofar as Writ Petition (L) No. 116 of 2020 is concerned, it is filed by the Film & Television Producers Guild of India Ltd., an association, whose members are producers, who also claim to be affected as their principal source of revenue of content/programmes is the revenue received from broadcasters for supply of content/programmes to such broadcasters and are stated to be essential constituents in the television broadcasting and distribution industry. Some of the broadcasters are stated to be producers also. Respondent No. 1 is the Union of India. Respondent No. 2 is the Telecom Regulatory Authority of India, which is an Authority established under the TRAI Act to exercise powers and functions under the said Act.

3. The issues raised in the Petitions are set out hereunder:

(i) Whether section 11 of the Telecom Regulatory Authority of India Act, 1997 violates the Petitioners’ fundamental rights under

Articles 19(1) (a), 19(1) (g), 14 and 21 of the Constitution of India and ought to be declared constitutionally invalid, so far as it relates to broadcasting services?

(ii) Whether the impugned principal 2017 Regulations and principal 2017 Tariff Order (i.e principal 2017 provisions) violate the Petitioners' fundamental rights under Articles 19(1) (a), 19(1)(g), 14 and 21 of the Constitution of India and ought to be declared constitutionally invalid?

(iii) Whether the impugned 2020 Regulations Amendments and 2020 Tariff Order Amendment (i.e 2020 Amendments) violate the Petitioners' fundamental rights under Articles 19(1) (a), 19(1)(g), 14 and 21 of the Constitution of India and ought to be declared constitutionally invalid?

Section 11 challenge

4. Section 11 of the TRAI Act, 1997 reads as under:

"11. Functions of Authority. (1) Notwithstanding anything contained in the Indian Telegraph Act, 1885 (13 of 1885), the functions of the Authority shall be to -
(a) make recommendations, either *suo motu* or on a request from the licensor, on the following matters, namely:--
(i) need and timing for introduction of new service provider;
(ii) terms and conditions of licence to a service provider;
(iii) revocation of licence for non-compliance of terms and conditions of license;
(iv) measures to facilitate competition and promote efficiency in the operation of telecommunication services so as to facilitate growth in such services;
(v) technological improvements in the services provided by the service providers;
(vi) type of equipment to be used by the service providers after inspection of equipment used in the network;

(vii) measures for the development of telecommunication technology and any other matter relatable to telecommunication industry in general;
(viii) efficient management of available spectrum;

(b) discharge the following functions, namely :-
(i) ensure compliance of terms and conditions of licence;
(ii) notwithstanding anything contained in the terms and conditions of the licence granted before the commencement of the Telecom Regulatory Authority of India (Amendment) Act, 2000 (2 of 2000), fix the terms and conditions of inter-connectivity between the service providers;
(iii) ensure technical compatibility and effective inter-connection between different service providers;
(iv) regulate arrangement amongst service providers of sharing their revenue derived from providing telecommunication services;
(v) lay-down the standards of quality of service to be provided by the service providers and ensure the quality of service and conduct the periodical survey of such service provided by the service providers so as to protect interest of the consumers of telecommunication service;
(vi) lay-down and ensure the time period for providing local and long distance circuits of telecommunication between different service providers;
(vii) maintain register of inter-connect agreements and of all such other matters as may be provided in the regulations;
(viii) keep register maintained under clause (vii) open for inspection to any member of public on payment of such fee and compliance of such other requirement as may be provided in the regulations;
(ix) ensure effective compliance of universal service obligations;
(c) levy fees and other charges at such rates and in respect of such services as may be determined by regulations;
(d) perform such other functions including such administrative and financial functions as may be entrusted to it by the Central Government or as may be necessary to carry out the provisions of this Act:

Provided that the recommendations of the Authority specified in clause (a) of this sub-section shall not be binding upon the Central Government:

Provided further that the Central Government shall seek the recommendations of the Authority in respect of matters specified in sub-clauses (i) and (ii) of clause (a) of this sub-section in respect of new licence to be issued to a service provider and the Authority shall forward its recommendations within a period of sixty days from the date on which that Government sought the recommendations:

Provided also that the Authority may request the Central Government to furnish such information or documents as may be necessary for the purpose of making recommendations under sub-clauses (i) and (ii) of clause (a) of this sub-section and that Government shall supply such information within a period of seven days from receipt of such request:

Provided also that the Central Government may issue a licence to a service provider if no recommendations are received from the Authority within the period specified in the second proviso or within such period as may be mutually agreed upon between the Central Government and the Authority:

Provided also that if the Central Government, having considered that recommendation of the Authority, comes to a *prima facie* conclusion that such recommendation cannot be accepted or needs modifications, it shall refer the recommendation back to the Authority for its reconsideration, and the Authority may, within fifteen days from the date of receipt of such reference, forward to the Central Government its recommendation after considering the reference made by that Government. After receipt of further recommendation if any, the Central Government shall take a final decision.

(2) Notwithstanding anything contained in the Indian Telegraph Act, 1885 (13 of 1885), the Authority may, from time to time, by order, notify in the Official Gazette the rates at which the telecommunication services within India and outside India shall be provided under this Act including the rates at which messages shall be transmitted to any country outside India:

Provided that the Authority may notify different rates for different persons or class of persons for similar telecommunication services and where different rates are fixed as aforesaid the Authority shall record the reasons therefor.

> (3) While discharging its functions under sub-section (1) or sub-section (2), the Authority shall not act against the interest of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality.
> (4) The Authority shall ensure transparency while exercising its powers and discharging its functions.
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> (emphasis supplied)

5. The gravamen of the Petitioners' challenge to section 11 of the TRAI Act is section 11(2). Section 11(2) empowers the Authority to fix rates of telecommunication services, which includes broadcasting services, with which we are concerned in the present case. The Petitioners have fundamentally premised their challenge to section 11(2) of the TRAI Act on the ground that it grants unlimited power to TRAI to curb the Petitioners' freedom of speech and expression under Article 19(1)(a) of the Constitution.

6. Article 19 of the Constitution reads as under:

> "19. Protection of certain rights regarding freedom of speech, etc. (1) All citizens shall have the right—
> (a) to freedom of speech and expression;
> …
> (g) to practise any profession, or to carry on any occupation, trade or business.
>
> …
>
> (2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.
>
> …

> (6) Nothing in sub-clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub-clause, and, in particular, nothing in the said sub-clause shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to
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> (i) the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, or
>
> (ii) the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise."
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> (emphasis supplied)

7. We have heard the learned Senior Counsel/Counsel for the Petitioners and the learned Solicitor General, Add'l Solicitor General and other learned Senior Counsel/Counsel for the Respondents.

8. The broad submissions of the learned Senior Counsel/Counsel for the Petitioners on the challenge to section 11 as being violative of their fundamental rights under Article 19(1)(a) are as follows:

i. The fixation of rates or price in the exercise of the right of speech and expression is by its very nature and character a limitation or restriction on the freedom of speech and expression protected under Article 19(1)(a) of the Constitution. Restrictions under Article 19(2) of the Constitution can only be confined to the eight specified grounds and no other. Interest of general public is not a ground available under Article 19(2). A law that infringes the right under Article 19(1)(a) cannot be saved with reference to consideration of public interest.

ii. Each right conferred on the citizens under Article 19(1) of the Constitution is a separate and independent right and the citizen is entitled to enjoy each of these rights - the only restriction on each being those contained in the corresponding sub-Article of 19 of the Constitution. It is not open for the State to sustain a legislation challenged under Article 19(1)(a) by a reference to restrictions contained in Article 19(6) of the Constitution i.e. on the ground of general interest of public, public good, etc.

iii. The freedom under 19(1)(a) includes the freedom of the broadcaster to charge more or less for subscription of its channels or give it for free or to package it with popular or unpopular channels.

iv. Being an individual right under Article 19(1)(a) of the Constitution, there is no question of balancing interests, which is permissible only under Article 19(1)(g) of the Constitution - it is not a societal right or a community right or a public right unlike price fixation which is a right in the interest of general public or consumer or society.

v. The intention and direct effect of impugned section 11 is to limit and interfere with various facets of the right guaranteed under Article 19(1)(a) including circulation.

vi. The scope of freedom of speech is both qualitative and quantitative i.e. it lies both in content and circulation. The freedom of speech and expression under Article 19(1)(a) of the Constitution of India includes within its scope, at least the following four aspects - (a) freedom to choose the content of the expression; (b) freedom to circulate and disseminate the expression to the widest extent possible; (c) freedom to choose the means of exercising the right; and (d) freedom to be

independent such that restrictions do not undermine its independence.

vii. The freedom to have complete command over and to choose any means to achieve wider dissemination of TV channels is also an integral facet of Article 19(1)(a) of the Constitution.

viii. Section 11 suffers from the vice of excessive delegation of power by the legislature in favour of TRAI and gives wide and unbridled power to regulate various aspects of broadcasting services, including packaging/offering of bouquet formations and pricing. There is lack of guidance or guidelines to TRAI which has resulted in TRAI arbitrarily and unreasonably restricting the reach/dissemination of content/programmes through television channels.

ix. It is lastly contended, in the alternative, that section 11 of the TRAI Act may be read down to say that fixation of rates is only restricted qua carriage/infrastructure/interconnection aspects of broadcasting services and does not encompass any fixation of rates and other commercial terms at which TV channels (which are expression of free speech) are offered.

9. The sheet anchor of the Petitioners' case is the judgment of the Constitution Bench of the Supreme Court in **Sakal Papers Ltd. vs. Union of India, (1962) 3 SCR 842** [which involved a challenge to the constitutionality of the Newspaper (Price and Page) Act, 1956 and the Daily Newspaper (Price and Page) Order, 1960 by the private newspaper that published daily and weekly editions], cited by all the learned Senior Counsel/Counsel on behalf of the Petitioners. Inviting our attention to

paragraphs 24, 25, 28, 31, 32, 33-38, it is contended that the judgment in **Sakal Papers** completely answers the case of the Petitioners.

10. It is submitted that the aforesaid judgment in **Sakal Papers** (supra) was followed by Constitution Bench of Supreme Court in **Bennett, Coleman Co. Ltd. vs. Union of India, (1972) 2 SCC 788** (which involved a challenge to the Newsprint Import Policy of the Government of India which imposed certain restrictions on the operations of newspaper companies). Our attention is invited to paragraphs 33, 34, 45 and 75. The judgment of Constitution Bench of the Supreme Court in **Express Newspaper (P) Ltd. vs. Union of India, 1959 SCR 12** has also been relied upon on behalf of the Petitioners [which raised a challenge to the vires of the Working Journalist (Conditions of Service) and Miscellaneous Provisions Act, 1955 and the decision of the Wage Board constituted thereunder]. Our attention is invited to paragraphs 122, 132,139-142. Reliance is also placed on the judgment of a three-judge Bench of the Supreme Court in **Ministry of Information and Broadcasting, Government of India vs. Cricket Association of Bengal, (1995) 2 SCC 161** (**MIB vs. CAB** for short). Our attention is invited to paragraphs 36, 43, 44, 47, 64, 78, 82, 174, 175.

11. Learned Senior Counsel/Counsel on behalf of the Petitioners have also placed reliance on the following judgments viz.- (1) Romesh Thappar v. State of Madras, 1950 SCR 954 (2) Chintamanrao Rao vs. State of MP, AIR 1951 SC 118 (3) State of Madras vs. V.G. Rao, AIR 1952 SC 196 (4) Seshadri R.M. vs. Dist. Magistrate, Tanjore, 1955 (1) SCR 686 (5) Lala Hari Chand Sarda Vs. Mizo District Council, 1967 1 SCR 1012 (6) Mohd. Faruk v. State of Madhya Pradesh & Ors,, (1969) 1 SCR 853 (7) Maneka Gandhi vs. Union of India, (1978) 1 SCC 248 (8) Minerva Mills vs Union of India,

(1980) 3 SCC 625 (9) Indian Express Newspapers (Bombay) P. Ltd. vs. Union of India, (1985) 1 SCC 641 (10) Odyssey Communication vs. Lokvidayan Sangathanan, (1988) 3 SCC 410 (11) S. Rangarajan vs. P. Jagjivan Ram, (1989) 2 SCC 574 (12) Tata Press Ltd. vs. Mahanagar Telephone Nigam Ltd., (1995) 5 SCC 139 (13) Union of India vs. Naveen Jindal, (2004) 2 SCC 510 (14) Directorate of Film Festivals vs. Gaurav Ashwin Jain (2007) 4 SCC 737 (15) State of Karnataka vs. Associated Management of English Medium Primary and Secondary Schools, (2014) 9 SCC 485 (16) Kirankumar Rameshbhai Devmani vs. State of Gujarat 2014 SCC Online Guj 1381 (Division Bench of Gujarat High Court) (17) Shreya Singhal vs. Union of India (2015) 5 SCC 1 and (18) Anuradha Bhasin vs. Union of India, (2020) 3 SCC 637 and other judgments contained in several Compilations.

12. Learned Solicitor General, Add'l Solicitor General, Senior Counsel/Counsels for the Respondents have strongly relied upon the judgment of the three-Judge Bench of the Supreme Court in **MIB Vs CAB,** on which the Senior Counsel/Counsel for Petitioners also rely. They have also placed reliance on some of the aforementioned judgments cited on behalf of the Petitioners as also several other judgments contained in several Compilations, most of which we have been referred to by us hereinafter.

13. Article 19(1)(a) of the Constitution secures to every citizen the right to freedom of speech and expression subject to reasonable restrictions under Article 19(2) Constitution. The Preamble of our Constitution also speaks of liberty of thought and expression. A three-Judge Bench of the Supreme Court in **TATA Press** (supra) has held that even advertising as a

'commercial speech' is a part of the freedom of speech and expression guaranteed under Article 19(1)(a) of the Constitution. It hardly needs any emphasis that the right to free speech and expression conferred by Article 19(1)(a) is a cherished and preferred right and needs to be zealously guarded by Courts and is perhaps the most precious of all the freedoms guaranteed in our Constitution, as held by the Supreme Court. Freedom of speech and expression is thus of paramount significance under our constitutional scheme. Television broadcasting, with which we are concerned in the present case, being a medium of expression, interalia for the citizens to express their views and creativity, is thus an integral part of Article 19(1)(a).

14. It would be necessary to firstly set out the background under which the TRAI Act came to be enacted. **Secy., Ministry of Information Broadcasting, Govt. of India vs. Cricket Association of Bengal, (1995) 2 SCC 161** (**MIB vs. CAB**), was the first case in which a three-Judge Bench of the Supreme Court had the occasion to consider the issue of fundamental right of freedom of speech and expression under Article 19(1)(a) of the Constitution in relation to broadcasting. The three-Judge Bench of the Supreme Court reviewed and analysed all the earlier judgments including **Sakal Papers**, **Bennett Coleman** and **Indian Express Newspapers**. The judgment is authored by His Lordship P.B. Sawant, J for himself and on behalf of His Lordship Mohan, J. A separate concurring judgment is written by His Lordship B. P. Jeevan Reddy, J. Since the judgment in **MIB vs. CAB** has been heavily relied upon by all the Counsel on either side, it would be necessary to set out the relevant extracts of both the judgments in ex-tenso which bring out the contours of the right to

freedom of speech and expression guaranteed under Article 19(1)(a) and more particularly in relation to broadcasting:

> P.B. SAWANT, J. (*for himself and Mohan, J.*)
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> 8. In *Romesh Thappar* v. *State of Madras*[1] the facts were that the Provincial Government in exercise of its powers under Section 9(1-A) of Madras Maintenance of Public Order Act, 1949, by an order, imposed a ban upon the entry and circulation of the petitioner's journal '*Cross Roads*'. The said order stated that it was being passed for the purpose of securing the public safety and the maintenance of public order. The petitioner approached this Court under Article 32 of the Constitution claiming that the order contravened the petitioner's fundamental right to freedom of speech and expression. He also challenged the validity of Section 9(1-A) of the impugned Act. The majority of the Court held that the freedom of speech and expression includes freedom of propagation of ideas and that freedom is ensured by the freedom of circulation. In support of this view, the Court referred to two decisions of the US Supreme Court, viz., (*i*) *Jackson, ex p*, and (*ii*) *Lovell* v. *City of Griffin* and quoted with approval the following passage therefrom:
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> "Liberty of circulation is as essential to that freedom as the liberty of publication. Indeed, without circulation the publication would be of little value."
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> Section 9(1-A) of the impugned Act authorised the Provincial Government "for the purpose of securing the public safety or the maintenance of public order, to prohibit or regulate the entry into or the circulation, sale or distribution in the Province of Madras or any part thereof or any document or class of documents". The question that the Court had to answer was whether the impugned Act insofar as it contained the aforesaid provision was a law relating to a matter which undermined the security of, or tended to overthrow the State. The Court held that "public order" is an expression of wide connotation and signifies that state of tranquillity which prevails amongst the members of a political society as a result of the internal regulations enforced by the Government which they have established**...** The Court then rejected the argument that the securing of the public safety or maintenance of public order would include the security of the State which was covered by Article 19(2) and held that where a law purports to authorise the imposition of restrictions on a fundamental right in language wide enough to cover restrictions both within and without the limits of constitutionally permissible legislative actions affecting such

right, it is not possible to uphold it even insofar as it may be applied within the constitutional limits as it is not severable. So long as the possibility of its being applied for purposes not sanctioned by the Constitution cannot be ruled out, it may be held to be wholly unconstitutional and void. In other words, clause (2) of Article 19 having allowed the imposition of restrictions on the freedom of speech and expression only in cases where danger to the State is involved, an enactment which is capable of being applied to cases where no such danger could arise, cannot be held to be constitutional and valid to any extent.

9. The above view taken by this Court was reiterated in *Brij Bhushan* v. *State of Delhi*[4] where Section 7(1)(*c*) of the East Punjab Public Safety Act, 1949 as extended to the Province of Delhi, providing that the Provincial Government or any authority authorised by it in this behalf, if satisfied that such action was necessary for preventing or combating any activity prejudicial to the public safety or the maintenance of public order, may pass an order that any matter relating to a particular subject or class of subjects shall before publication be submitted for scrutiny, was held as unconstitutional and void. The majority held that the said provision was violative of Article 19(1)(*a*) since it was not a law relating to a matter which undermined the security of, or tended to overthrow the State within the meaning of the then saving provision contained in Article 19(2). The Court further unanimously held that the imposition of pre-censorship of a journal was a restriction on the liberty of the press which was an essential part of the right to freedom of speech and expression declared by Article 19(1)(*a*).

10. In *Hamdard Dawakhana (Wakf), Lal Kuan* v. *Union of India* the Court held that the object of the Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954 was the prevention of self-medication and self-treatment by prohibiting instruments which may be used to advocate the same or which tended to spread the evil. Its object was not merely the stopping of advertisements offending against morality and decency. The Court further held that advertisement is no doubt a form of speech but its true character is reflected by the object for the promotion of which it is employed. It is only when an advertisement is concerned with the expression or propagation of ideas that it can be said to relate to freedom of speech but it cannot be said that the right to publish and distribute commercial advertisements advertising an individual's personal business is a part of the freedom of speech guaranteed by the Constitution. The provisions of the Act which prohibited advertisements commending the

efficacy, value and importance in the treatment of particular diseases of certain drugs and medicines did not fall under Article 19(1)(*a*) of the Constitution. The scope and object of the Act, its true nature and character was not interference with the right of freedom of speech but it dealt with trade and business. The provisions of the Act were in the interest of the general public and placed reasonable restrictions on the trade and business of the petitioner and were saved by Article 19(6). The Court further held that the first part of Section 8 of the impugned Act which empowered any person authorised by the State Government to seize and detain any document, article or thing which such person had reason to believe, contained any advertisement contravening the provisions of the Act imposed an unreasonable restriction on the fundamental rights of the petitioner and was unconstitutional …

11. In *Sakal Papers (P) Ltd.* v. *Union of India*-what fell for consideration was the Newspaper (Price and Page) Act, 1956 which empowered the Central Government to regulate the prices of newspapers in relation to their pages and size and also to regulate the allocation of space for advertising matters and the Central Government order made under the said Act, viz., the Daily Newspaper (Price and Page) Order, 1960 which fixed the maximum number of pages that might be published by the newspaper according to the price charged and prescribing the nature of supplements that could be issued. The Court held that the Act and the order were void being violative of Article 19(1)(*a*) of the Constitution. They were also not saved by Article 19(2). The Court asserted that the freedom of speech and expression guaranteed by Article 19(1)(*a*) included the freedom of press. For propagating his ideas a citizen had the right to publish them, to disseminate them and to circulate them, either by word of mouth or by writing. The right extended not merely to the matter which he was entitled to circulate but also to the volume of circulation. Although the impugned Act and the order placed restraints on the volume of circulation, their very object was directed against circulation. Thus both interfered with the freedom of speech and expression. The Court held that Article 19(2) did not permit the State to abridge the said right in the interest of general public. The Court also held that the State could not make a law which directly restricted one guaranteed freedom for securing the better enjoyment of another freedom. Freedom of speech could not be restricted for the purpose of regulating the commercial aspect of the activities of newspapers. In this connection, the following observations of the Court are relevant: (SCR pp. 866-68)

"Its object thus is to regulate something which, as already stated, is directly related to the circulation of a newspaper. Since circulation of a newspaper is a part of the right of freedom of speech the Act must be regarded as one directed against the freedom of speech. It has selected the fact or thing which is an essential and basic attribute of the conception of the freedom of speech, viz., the right to circulate one's views to all whom one can reach or care to reach for the imposition of a restriction. It seeks to achieve its object of enabling what are termed the smaller newspapers to secure larger circulation by provisions which without disguise are aimed at restricting the circulation of what are termed the larger papers with better financial strength. The impugned law far from being one, which merely interferes with the right of freedom of speech incidentally, does so directly though it seeks to achieve the end by purporting to regulate the business aspect of a newspaper. Such a course is not permissible and the courts must be ever vigilant in guarding perhaps the most precious of all the freedoms guaranteed by our Constitution. The reason for this is obvious. The freedom of speech and expression of opinion is of paramount importance under a democratic constitution which envisages changes in the composition of legislatures and governments and must be preserved. No doubt, the law in question was made upon the recommendation of the Press Commission but since its object is to affect directly the right of circulation of newspapers which would necessarily undermine their power to influence public opinion it cannot but be regarded as a dangerous weapon which is capable of being used against democracy itself.

The legitimacy of the result intended to be achieved does not necessarily imply that every means to achieve it is permissible; for even if the end is desirable and permissible, the means employed must not transgress the limits laid down by the Constitution, if they directly impinge on any of the fundamental rights guaranteed by the Constitution. It is no answer when the constitutionality of the measure is challenged that apart from the fundamental right infringed the provision is otherwise legal.

Finally it was said that one of its objects is to give some kind of protection to small or newly started newspapers and, therefore, the Act is good. Such an object may be desirable but for attaining it the State cannot make inroads on the right of other newspapers which Article 19(1)(*a*) guarantees to them. There may be other ways of helping them and it is for the State to search for them but the one they have chosen falls foul of the Constitution.

To repeat, the only restrictions which may be imposed on the rights of an individual under Article 19(1)(*a*) are those which clause (2) of Article 19 permits and no other".

12. In *Bennett Coleman & Co.* v. *Union of India*[7] the majority of the Constitution Bench held that newspapers should be left free to determine their pages, their circulation and their new edition within their quota which has been fixed fairly. It is an abridgement of freedom of expression to prevent a common ownership unit from starting a new edition or a new newspaper. A common ownership unit should be free to start a new edition out of their allotted quota and it would be logical to say that such a unit can use its allotted quota for changing its page structure and circulation of different editions of same paper. The compulsory reduction to ten pages offends Article 19(1)(*a*) and infringes the freedom of speech and expression. Fixation of page-limit will not only deprive the petitioners of their economic viability, but will also restrict the freedom of expression by reason of the compulsive reduction of page level entailing reduction of circulation and including the area of coverage for news and views. Loss of advertisements may not only entail the closing down, but will also affect the circulation and thereby impinge on freedom of speech and expression. The freedom of press entitles newspapers to achieve any volume of circulation. It was further held that the machinery of import control cannot be utilised to curb or control circulation or growth or freedom of newspapers. The newsprint control policy was in effect a newspaper control policy and a newspaper control policy is ultra vires the Import Control Act and the Import Control Order. The majority further held that by the freedom of press is meant the right of citizens to speak and publish and express their views. The freedom of the press embodies the right of the people to read and it is not antithetical to the right of the people to speak and express. The freedom of speech and expression is not only in the volume of circulation but also in the volume of news and views. The press has the right of free publication and their circulation without any obvious restraint on publication. If the law were to single out press for laying down prohibitive burdens on it that would restrict circulation, penalise freedom of choice as to personnel, prevent newspapers from being started and compel the press to Government aid. This would violate Article 19(1)(*a*) and would fall outside the protection afforded by Article 19(2). The First Amendment to the American Constitution contains no exception like our Article 19(2). Therefore, American decisions have evolved their own exceptions. The American decisions establish that a Government regulation is justified in America as an

important essential Government interest which is unrelated to the suppression of free expression. The true test is whether the effect of the impugned action is to take away or abridge fundamental rights. The object of the law or executive action is irrelevant when it is established that the petitioner's fundamental right is infringed.

13. In *Indian Express Newspapers (Bombay) (P) Ltd.* v. *Union of India*[8] the Court held that the expression "freedom of the press" has not been used in Article 19, but it is comprehended within Article 19(1)(*a*). This expression means a freedom from interference from authority which would have the effect of interference with the content and circulation of newspapers. There cannot be any interference with that freedom in the name of public interest. The purpose of the press is to advance the public interest by publishing facts and opinions without which democratic electorate cannot make responsible judgments. Freedom of the press is the heart of social and political intercourse. It is the primary duty of the courts to uphold the freedom of the press and invalidate all laws or administrative actions which interfere with it contrary to the constitutional mandate. The freedom of expression has four broad social purposes to serve: (*i*) it helps an individual to attain self-fulfilment, (*ii*) it assists in the discovery of truth, (*iii*) it strengthens the capacity of an individual in participating in decision-making, and (*iv*) it provides a mechanism by which it would be possible to establish a reasonable balance between stability and social change. All members of the society should be able to form their own beliefs and communicate them freely to others. In sum, the fundamental principle involved here is the people's right to know. Freedom of speech and expression should, therefore, receive generous support from all those who believe in the participation of people in the administration. It is on account of this special interest which society has in the freedom of speech and expression that the approach of the Government should be more cautious while levying taxes on matters concerning newspaper industry than while levying taxes on other matters. The courts are there always to strike down curtailment of freedom of press by unconstitutional means. The delicate task of determining when it crosses from the area of profession, occupation, trade, business or industry into the area of freedom of expression and interferes with that freedom is entrusted to the courts. In deciding the reasonableness of restrictions imposed on any fundamental right the court should take into consideration the nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the disproportion of the imposition and the prevailing conditions including

the social values whose needs are sought to be satisfied by means of the restrictions. The imposition of a tax like the customs duty on newsprint is an imposition of tax on knowledge and would virtually amount to a burden imposed on a man for being literate and for being conscious of his duty as a citizen to inform himself of the world around him. The pattern of the law imposing customs duty and the manner in which it is operated, to a certain extent, exposes the citizens who are liable to pay the customs duties to the vagaries of executive discretion.

14. In *Odyssey Communications (P) Ltd.* v. *Lokvidayan Sanghatana* it was held that the right of citizens to exhibit films on Doordarshan subject to the terms and conditions to be imposed by Doordarshan is a part of the fundamental right of freedom of expression guaranteed under Article 19(1)(*a*) which can be curtailed only under circumstances set out under Article 19(2). The right is similar to the right of a citizen to publish his views through any other media such as newspapers, magazines, advertisement hoardings, etc. subject to the terms and conditions of the owners of the media. The freedom of expression is a preferred right which is always very zealously guarded by the Supreme Court …

15. In *S. Rangarajan* v. *P. Jagjivan Ram*[10] it was held that the freedom of speech under Article 19(1)(*a*) means the right to express one's opinion by word of mouth, writing, printing, picture or in any other manner. It would thus include the freedom of communication and their right to propagate or publish opinion. The communication of ideas could be made through any medium — newspaper, magazine or movie. But this right is subject to reasonable restrictions in the larger interests of the community and the country set out in Article 19(2). These restrictions are intended to strike a proper balance between the liberty guaranteed and the social interests specified in Article 19(2). This is the difference between the First Amendment to the US Constitution and Article 19 of our Constitution. The decisions bearing on the First Amendment are, therefore, not useful to us except for the broad principle and purpose of the guarantee. The Court, in this connection referred to the US decisions in *Mutual Film Co.* v. *Industrial Commission of Ohio*[11], *Joseph Burstyn* v. *Lewis A. Wilson*[12] and *Schenck* v. *US*[13]. The Court further held that there should be a compromise between the interest of freedom of expression and social interests. The Court cannot simply balance the two interests as if they are of equal weight. The Court's commitment to freedom of expression demands that it cannot be suppressed unless the situations created by allowing the freedom are pressing and the community interest is

endangered. The anticipated danger should not be remote, conjectural or far-fetched. It should have **proximate and direct nexus** with the expression. The expression of thought should be intrinsically dangerous to the public interest. It should be inseparably locked up with the action contemplated like the equivalent of a "spark in a powder keg". Though a movie enjoys the guarantee under Article 19(1)(*a*), there is one significant difference between a movie and other modes of communication. Movie motivates thought and action and assures a high degree of attention and retention. In view of the scientific improvements in photography and production, the present movie is a powerful means of communication. It has a unique capacity to disturb and arouse feelings. It has much potential for evil as it has for good. With these qualities and since it caters for mass audience who are generally not selective about what they watch, a movie cannot be equated with other modes of communication. It cannot be allowed to function in a free market-place just as does the newspaper or magazines. Censorship by prior restraint is, therefore, not only desirable but also necessary …

37. The next question which is required to be answered is whether there is any distinction between the freedom of the print media and that of the electronic media such as radio and television, and if so, whether it necessitates more restrictions on the latter media.

43. We may now summarise the law on the freedom of speech and expression under Article 19(1)(*a*) as restricted by Article 19(2). The freedom of speech and expression includes right to acquire information and to disseminate it. Freedom of speech and expression is necessary, for self-expression which is an important means of free conscience and self-fulfilment. It enables people to contribute to debates on social and moral issues. It is the best way to find a truest model of anything, since it is only through it that the widest possible range of ideas can circulate. It is the only vehicle of political discourse so essential to democracy. Equally important is the role it plays in facilitating artistic and scholarly endeavours of all sorts. The right to communicate, therefore, includes right to communicate through any media that is available whether print or electronic or audio-visual such as advertisement, movie, article, speech etc. That is why freedom of speech and expression includes freedom of the press. The freedom of the press in terms includes right to circulate and also to determine the volume of such circulation. This freedom includes the freedom to communicate or circulate one's opinion without interference to as large a population in the country, as well as abroad, as is possible to reach.

44. This fundamental right can be limited only by reasonable restrictions under a law made for the purposes mentioned in Article 19(2) of the Constitution.

45. The burden is on the authority to justify the restrictions. Public order is not the same thing as public safety and hence no restrictions can be placed on the right to freedom of speech and expression on the ground that public safety is endangered. Unlike in the American Constitution, limitations on fundamental rights are specifically spelt out under Article 19(2) of our Constitution. Hence no restrictions can be placed on the right to freedom of speech and expression on grounds other than those specified under Article 19(2).

46**. What distinguishes the electronic media like the television from the print media or other media is that it has both audio and visual appeal and has a more pervasive presence**. It has a greater impact on the minds of the viewers and is also more readily accessible to all including children at home. **Unlike the print media, however, there is a built-in limitation on the use of electronic media because the airwaves are a public property and hence are owned or controlled by the Government or a central national authority or they are not available on account of the scarcity, costs and competition**.

75. It can hardly be denied that sport is an expression of self. In an athletic or individual event, the individual expresses himself through his individual feat. In a team event such as cricket, football, hockey etc., there is both individual and collective expression. It may be true that what is protected by Article 19(1)(*a*) is an expression of thought and feeling and not of the physical or intellectual prowess or skill. It is also true that a person desiring to telecast sports events when he is not himself a participant in the game, does not seek to exercise his right of self-expression. **However, the right to freedom of speech and expression also includes the right to educate, to inform and to entertain and also the right to be educated, informed and entertained. The former is the right of the telecaster and the latter that of the viewers.** The right to telecast sporting event will therefore also include the right to educate and inform the present and the prospective sportsmen interested in the particular game and also to inform and entertain the lovers of the game. Hence, when a telecaster desires to telecast a sporting event, it is incorrect to say that the free-speech element is absent from his right. The degree of the element will depend upon the character of the telecaster who claims the right...

78. **There is no doubt that since the airwaves/frequencies are a public property and are also limited, they have to be used in the best interest of the society** and this can be done either by a central authority by establishing its own broadcasting network or regulating the grant of licences to other agencies, including the private agencies. What is further, the electronic media is the most powerful media both because of its audio-visual impact and its widest reach covering the section of the society where the print media does not reach. **The right to use the airwaves and the content of the programmes, therefore, needs regulation for balancing it and as well as to prevent monopoly of information and views relayed, which is a potential danger flowing from the concentration of the right to broadcast/telecast in the hands either of a central agency or of few private affluent broadcasters**. That is why the need to have a central agency representative of all sections of the society free from control both of the Government and the dominant influential sections of the society. This is not disputed. But to contend that on that account the restrictions to be imposed on the right under Article 19(1)(*a*) should be in addition to those permissible under Article 19(2) and dictated by the use of public resources in the best interests of the society at large, is to misconceive both the content of the freedom of speech and expression and the problems posed by the element of public property in, and the alleged scarcity of, the frequencies as well as by the wider reach of the media. If the right to freedom of speech and expression includes the right to disseminate information to as wide a section of the population as is possible, the access which enables the right to be so exercised is also an integral part of the said right. The wider range of circulation of information or its greater impact cannot restrict the content of the right nor can it justify its denial. The virtues of the electronic media cannot become its enemies. It may warrant a greater regulation over licensing and control and vigilance on the content of the programme telecast. However, this control can only be exercised within the framework of Article 19(2) **and** the dictates of public interests. To plead for other grounds is to plead for unconstitutional measures. It is further difficult to appreciate such contention on the part of the Government in this country when they have a complete control over the frequencies and the content of the programme to be telecast. They control the sole agency of telecasting. They are also armed with the provisions of Article 19(2) and the powers of pre-censorship under the Cinematograph Act and Rules. The only limitation on the said right is, therefore, the limitation of resources and

the need to use them for the benefit of all. When, however, there are surplus or unlimited resources and the public interests so demand or in any case do not prevent telecasting, the validity of the argument based on limitation of resources disappears. It is true that to own a frequency for the purposes of broadcasting is a costly affair and even when there are surplus or unlimited frequencies, only the affluent few will own them and will be in a position to use it to subserve their own interest by manipulating news and views. That also poses a danger to the freedom of speech and expression of the have-nots by denying them the truthful information on all sides of an issue which is so necessary to form a sound view on any subject. That is why the doctrine of fairness has been evolved in the US in the context of the private broadcasters licensed to share the limited frequencies with the central agency like the FCC to regulate the programming. But this phenomenon occurs even in the case of the print media of all the countries. Hence the body like the Press Council of India which is empowered to enforce, however imperfectly, the right to reply. The print media further enjoys as in our country, freedom from pre-censorship unlike the electronic media.

120. The law on the subject discussed earlier makes it clear that the fundamental right to freedom of speech and expression includes the right to communicate effectively and to as large a population not only in this country but also abroad, as is feasible. There are no geographical barriers on communication. Hence every citizen has a right to use the best means available for the purpose. At present, electronic media, viz., TV and radio, is the most effective means of communication. The restrictions which the electronic media suffers in addition to those suffered by the print media, are that **(*i*) the airwaves are a public property and they have to be used for the benefit of the society at large, (*ii*) the frequencies are limited**, and (*iii*) media is subject to pre-censorship. The other limitation, viz., the reasonable restrictions imposed by law made for the purposes mentioned in Article 19(2) are common to all the media. In the present case, it was not and cannot be the case of the MIB that the telecasting of the cricket matches was not for the benefit of the society at large or not in the public interest and, therefore, not a proper use of the public property. It was not the case of the MIB that it was in violation of the provisions of Article 19(2). There was nothing to be pre-censored on the grounds mentioned in Article 19(2). As regards the limitation of resources, since DD was prepared to telecast the cricket matches, but only on its terms it could not plead that there was no frequency available for telecasting.

DD could also not have ignored the rights of the viewers which the High Court was at pains to emphasise while passing its orders and to which we have also made a reference. The CAB/BCCI being the organisers of the event had a right to sell the telecasting rights of its event to any agency. Assuming that DD had no frequency to spare for telecasting the matches, the CAB could certainly enter into a contract with any agency including a foreign agency to telecast the said matches through that agency's frequency for the viewers in this country (who could have access to those frequencies) as well as for the viewers abroad. The orders passed by the High Court in effect gave a right to DD to be the host broadcaster for telecasting in this country and for the TWI, for telecasting for the viewers outside this country as well as those viewers in this country who have an access to the TWI frequency. The order was eminently in the interests of the viewers whatever its merits on the other aspects of the matter.

122. We, therefore, hold as follows:

(*i*) The **airwaves** or frequencies are **a public property**. Their use has to be controlled and **regulated by a public authority in the interests of the public** and **to prevent the invasion of their rights.** Since the electronic media **involves the use of the airwaves, this factor creates an inbuilt restriction** on its use as in the case of any other public property.

(*ii*) The right to **impart** and **receive** information is a species of the right of freedom of speech and expression guaranteed by Article 19(1)(*a*) of the Constitution. A citizen has a **fundamental right to use the best means of imparting and receiving information and as such to have an access to telecasting for the purpose.** However, this right to have an access to telecasting has limitations on account of the use of the public property, viz., the airwaves, involved in the exercise of the right and can be controlled and regulated by the public authority. **This limitation** imposed by the **nature of the public property** involved in the use of the electronic media **is in addition to the restrictions imposed on the right to freedom of speech and expression under Article 19(2) of the Constitution.**

(*iii*) **The Central Government shall take immediate steps** to establish an independent autonomous public authority representative of all sections and interests in the society to control and **regulate the use of the airwaves.**

(*iv*) …

(*v*) …

B.P. JEEVAN REDDY, J. (*concurring*)

126**.** While I agree broadly with the conclusions arrived at by my learned Brother Sawant, J. in para 122 of his judgment, I propose to record my views and conclusions on the issues arising in these matters in view of their far-reaching importance.

173. We may now proceed to examine what does "Broadcasting freedom" mean and signify?

174. There is little doubt that broadcasting freedom is implicit in the freedom of speech and expression. The European Court of Human Rights also has taken the view that broadcasting like press is covered by Article 10 of the Convention guaranteeing the right to freedom of expression. But the question is what does broadcasting freedom mean? Broadly speaking, broadcasting freedom can be said to have four facets — (*a*) freedom of the broadcaster, (*b*) freedom of the listeners/viewers to a variety of view and plurality of opinion, (*c*) right of the citizens and groups of citizens to have access to the broadcasting media, and (*d*) the right to establish private Radio/TV stations…

185. It is true that with the advances in technology, the argument of few or limited number of frequencies has become weak. Now, it is claimed that an unlimited number of frequencies are available. We shall assume that it is so. Yet the fact remains that airwaves are public property that they are to be utilised to the greatest public good; that they cannot be allowed to be monopolised or hijacked by a few privileged persons or groups; that granting licence to everyone who asks for it would reduce the right to nothing and that such a licensing system would end up in creation of oligopolies as the experience in Italy has shown — where the limited experiment of permitting private broadcasting at the local level though not at the national level, has resulted in creation of giant media empires and media magnates, a development not conducive to free speech right of the citizens.

The nature of grounds specified in Article 19(2) of the Constitution

187. A look at the grounds in clause (2) of Article 19, in the interests of which a law can be made placing reasonable restrictions upon the freedom of speech and expression goes to show that they are all conceived in the national interest as well as in the interest of society. The first set of grounds, viz., the sovereignty and integrity of India, the security of the State, friendly relations with foreign States and public order are grounds referable to national interest whereas the second

set of grounds, viz., decency, morality, contempt of court, defamation and incitement to offence are conceived in the interest of society. The interconnection and the interdependence of freedom of speech and the stability of society is undeniable. They indeed contribute to and promote each other. Freedom of speech and expression in a democracy ensures that the change desired by the people, whether in political, economic or social sphere, is brought about peacefully and through law….

191. We must also bear in mind that the obligation of the State to ensure this right to all the citizens of the country (emphasised hereinbefore) creates an obligation upon it to ensure that the broadcasting media is not monopolised, dominated or hijacked by privileged, rich and powerful interests. Such monopolisation or domination cannot but be prejudicial to the freedom of speech and expression of the citizens in general — an aspect repeatedly stressed by the Supreme Court of United States and the Constitutional Courts of Germany and Italy.

192. *The importance and significance of television in the modern world* needs no emphasis. Most people obtain the bulk of their information on matters of contemporary interest from the broadcasting medium. The television is unique in the way in which it intrudes into our homes. The combination of picture and voice makes it an irresistibly attractive medium of presentation. Call it idiot box or by any other pejorative name, it has a tremendous appeal and influence over millions of people. Many of them are glued to it for hours on end each day. Television is shaping the food habits, cultural values, social mores and what not of the society in a manner no other medium has done so far. Younger generation is particularly addicted to it. It is a powerful instrument, which can be used for greater good as also for doing immense harm to the society. It depends upon how it is used. With the advance of technology, the number of channels available has grown enormously. National borders have become meaningless. The reach of some of the major networks is international; they are not confined to one country or one region. It is no longer possible for any government to control or manipulate the news, views and information available to its people. In a manner of speaking, *the technological revolution is forcing internationalism upon the world*. No nation can remain a fortress or an island in itself any longer. Without a doubt, this technological revolution is presenting new issues, complex in nature — in the words of Burger, C.J. “complex problems with many hard questions and few easy answers”. Broadcasting media by its very

nature is different from press. Airwaves are public property. The fact that a large number of frequencies/channels are available does not make them anytheless public property. It is the obligation of the State under our constitutional system to ensure that they are used for public good.

194. From the standpoint of Article 19(1)(*a*), what is paramount is the right of the listeners and viewers and not the right of the broadcaster — whether the broadcaster is the State, public corporation or a private individual or body. A monopoly over broadcasting, whether by Government or by anybody else, is inconsistent with the free speech right of the citizens. State control really means governmental control, which in turn means, control of the political party or parties in power for the time being. Such control is bound to colour the views, information and opinions conveyed by the media. The free speech right of the citizens is better served in keeping the broadcasting media under the control of public. Control by public means control by an independent public corporation or corporations, as the case may be, formed under a statute. As held by the Constitutional Court of Italy, broadcasting provides an essential service in a democratic society and could legitimately be reserved for a public institution, provided certain conditions are met. The corporation(s) must be constituted and composed in such a manner as to ensure its independence from Government and its impartiality on public issues. When presenting or discussing a public issue, it must be ensured that all aspects of it are presented in a balanced manner, without appearing to espouse any one point of view. This will also enhance the credibility of the media to a very large extent; a controlled media cannot command that level of credibility. For the purpose of ensuring the free speech rights of the citizens guaranteed by Article 19(1)(*a*), it is not *necessary* to have private broadcasting stations, as held by the Constitutional Courts of France and Italy. Allowing private broadcasting would be to open the door for powerful economic, commercial and political interests, which may not prove beneficial to free speech right of the citizens — and certainly so, if strict programme controls and other controls are not prescribed. The analogy with press is wholly inapt. Above all, airwaves constitute public property. While, the freedom guaranteed by Article 19(1)(*a*) does include the right to receive and impart information, no one can claim the fundamental right to do so by using or employing public property. Only where the statute permits him to use the public property, then only — and subject to such conditions and restrictions as the law may impose — he can use the public property, viz.,

airwaves. In other words, Article 19(1)(*a*) does not enable a citizen to impart his information, views and opinions by using the airwaves. He can do so without using the airwaves. It need not be emphasised that while broadcasting cannot be effected without using airwaves, receiving the broadcast does not involve any such use. Airwaves, being public property must be utilised to advance public good. Public good lies in ensuring plurality of opinions, views and ideas and that would scarcely be served by private broadcasters, who would be and who are bound to be actuated by profit motive… On account of historical factors, radio and television have remained in the hands of the State exclusively. Both the networks have been built up over the years with public funds. They represent the wealth and property of the nation. It may even be said that they represent the material resources of the community within the meaning of Article 39(*b*). They may also be said to be 'facilities' within the meaning of Article 38. They must be employed consistent with the above articles and consistent with the constitutional policy as adumbrated in the Preamble to the Constitution and Parts III and IV. We must reiterate that the press whose freedom is implicit in Article 19(1)(*a*) stands on a different footing. The petitioners — or the potential applicants for private broadcasting licences — cannot invoke the analogy of the press. To repeat, *airwaves are public property and better remain in public hands in the interest of the very freedom of speech and expression of the citizens of this country*.

200. Now, coming to the Indian Telegraph Act, 1885, a look at its scheme and provisions would disclose that it was meant for a different purpose altogether. When it was enacted, there was neither radio nor, of course, television, though it may be that radio or television fall within the definition of 'telegraph' in Section 3(1). Except Section 4 and the definition of the expression 'telegraph', no other provision of the Act appears to be relevant to broadcasting media. Since the validity of Section 4(1) has not been specifically challenged before us, we decline to express any opinion thereon. The situation is undoubtedly unsatisfactory. This is the result of the legislation in this country not keeping pace with the technological developments. While all the democracies in the world have enacted laws specifically governing the broadcasting media, this country has lagged behind, rooted in the Telegraph Act of 1885 which is wholly inadequate and unsuited to an important medium like radio and television, i.e., broadcasting media. It is absolutely essential, in the interests of public, in the interests of the freedom of speech and expression guaranteed by Article 19(1)(*a*) and

with a view to avoid confusion, uncertainty and consequent litigation that Parliament steps in soon to fill the void by enacting a law or laws, as the case may be, governing the broadcasting media, i.e., both radio and television media. The question whether to permit private broadcasting or not is a matter of policy for Parliament to decide. If it decides to permit it, it is for Parliament to decide, subject to what conditions and restrictions should it be permitted. (This aspect has been dealt with supra.) The fact remains that private broadcasting, even if allowed, should not be left to market forces, in the interest of ensuring that a wide variety of voices enjoy access to it.

201. …

1(*b*) Airwaves constitute public property and must be utilised for advancing public good. No individual has a right to utilise them at his choice and pleasure and for purposes of his choice including profit. The right of free speech guaranteed by Article 19(1)(*a*) does not include the *right* to use airwaves, which are public property. The airwaves can be used by a citizen for the purpose of broadcasting only when allowed to do so by a statute and in accordance with such statute. Airwaves being public property, it is the duty of the State to see that airwaves are so utilised as to advance the free speech right of the citizens which is served by ensuring plurality and diversity of views, opinions and ideas. This is imperative in every democracy where freedom of speech is assured. The free speech right guaranteed to every citizen of this country does not encompass the right to use these airwaves at his choosing. Conceding such a right would be detrimental to the free speech rights of the body of citizens inasmuch as only the privileged few — powerful economic, commercial and political interests — would come to dominate the media……It is also not possible to imply or infer a right from the guarantee of free speech which only a few can enjoy.

(*c*) Broadcasting media is inherently different from press or other means of communication/information. The analogy of press is misleading and inappropriate. This is also the view expressed by several constitutional courts including that of the United States of America.

….

(e) There is an inseparable interconnection between freedom of speech and the stability of the society, i.e. stability of a nation-State. They contribute to each other. …

> 3(b). The right of free speech and expression includes the right to receive and impart information…
>
> 4. The Indian Telegraph Act, 1885 is totally inadequate to govern an important medium like the radio and television, i.e., broadcasting media. The Act was intended for an altogether different purpose when it was enacted. This is the result of the law in this country not keeping pace with the technological advances in the field of information and communications. While all the leading democratic countries have enacted laws specifically governing the broadcasting media, the law in this country has stood still, rooted in the Telegraph Act of 1885. Except Section 4(1) and the definition of telegraph, no other provision of the Act is shown to have any relevance to broadcasting media. It is, therefore, imperative that Parliament makes a law placing the broadcasting media in the hands of a public/statutory corporate or the corporations, as the case may be. This is necessary to safeguard the interests of public and the interests of law as also to avoid uncertainty, confusion and consequent litigation.
>
> (emphasis supplied)

15. The aforesaid three-judge Bench decision of the Supreme Court **(MIB vs. CAB)** has thus distinguished the judgments in **Sakal Case Papers**, **Bennett Colemen** and **Indian Express News Papers** which dealt with print media, and has summarized the law on the freedom of speech and expression under Article 19(1)(*a*) as restricted by Article 19(2) in relation to broadcasting. The following propositions can be culled out from the judgment of P. B. Sawant J (for himself and on behalf of Mohan J):

> (i) The freedom of the **press** includes the right to circulate and also determine the volume of such circulation and this fundamental right can be limited only by reasonable restrictions under a law on the eight grounds specified in Article 19(2).
>
> **(ii) The right to impart and receive information is a species of the right of freedom and expression guaranteed under Article 19(1)(a) of the Constitution. A citizen has a fundamental right to use the best means of imparting and receiving information and as such to have access to telecasting for the purpose.**

> (iii) When it comes to broadcasting, a distinction has been made from print media. It has been held that electronic media in the most powerful media both because of the audio-visual impact and it widest reach covering section of society where the print media does not reach. It has been further held that since **airwaves are public property** and are scarce, the airwaves **have to be used for the benefit of the society at large** and they are **required to be regulated in the interest of public** and **to prevent invasion of their rights**. This **limitation imposed by the nature of the public property involved** in the use of broadcasting **is in addition to the restrictions imposed** on the right to freedom of speech and expression **under Article 19(2)** of the Constitution. In other words, when it comes to broadcasting, public interest would be an additional limitation/restriction apart from the eight specified restrictions in Article 19(2).
>
> (iv) The Central Government was directed to take immediate steps to establish an authority to control and regulate use of airwaves.
>
> (emphasis supplied)

16. Pursuant to the directions of the Supreme Court in the aforesaid judgment in **MIB vs. CAB**, the Government of India formulated a National Telcom Policy in the year 1994 and promulgated an Ordinance which ultimately led to the enactment of the TRAI Act [see paragraph 19 of the judgment of the Supreme Court in **Star India (P) Ltd. vs. Deptt. of Industrial Policy and Promotion, (2019) 2 SCC 104 (Star India vs. DIPP)**]. The Statement of Objects and Reasons (unamended) of the TRAI Act reads thus:

> "1. In the context of the National Telecom Policy, 1994, which amongst other things, stresses on achieving the universal service, bringing the quality of telecom services to world standards, provisions of wide range of services to meet the customers' demand at reasonable price, and participation of the companies registered in India in the area of basic as well as value added telecom services *as* also making arrangements for protection and promotion of consumer interest and ensuring fair competition**,** there is felt a need to separate regulatory functions from service providing functions

which will be in keeping with the general trend in the world. In the multi-operator situation arising out of opening of basic as well as value added services in which private operators will be competing with government operators, there is a pressing need for an independent telecom regulatory body for regulation of telecom services for orderly and healthy growth of telecommunication infrastructure apart from protection of consumer interest.

2**.** In view of above, it was proposed to set up an independent Telecom Regulatory Authority as a non-statutory body and for that purpose the Indian Telegraph (Amendment) Bill, 1995 was introduced and then passed by Lok Sabha on 6th August, 1995. At the time of consideration of the aforesaid Bill in Rajya Sabha, having regard to the sentiments expressed by the Members of Rajya Sabha and of the views of the Standing Committee on Communication which expressed a hope that steps will be taken to set up a statutory authority, it is proposed to set up the Telecom Regulatory Authority of India as a statutory authority.

3. The proposed Authority will consist of a Chairperson and minimum two and maximum four members. A person who is or has been a Judge of the Supreme Court or Chief Justice of a High Court will be eligible to be appointed as a Chairperson of the authority. A member shall be a person who has held as the post of Secretary or Additional Secretary to the Government of India or any equivalent post in the Central Government or the State Government for minimum period of three years.

4. The powers and functions of the Authority, inter alia, are—

(i) ensuring technical compatibility and effective inter-relationship between different service providers;

(ii) regulation of arrangement amongst service providers of sharing their revenue derived from providing telecommunication service;

(iii) ensuring compliance of licence conditions by all service providers;

(iv) protection of the interest of the consumers of telecommunication service;

(v) settlement of disputes between service providers;

(vi) fixation of rates for providing telecommunication service within India and outside India;

(vii) ensuring effective compliance of universal service obligations.

> 5. The Authority shall have an inbuilt dispute settlement mechanism including procedure to be followed in this regard as well as a scheme of punishment in the event of non-compliance of its order.
>
> 6. The Authority will have to maintain transparency while exercising its powers and functions. The powers and functions would enable the Authority to perform a role of watchdog for the telecom sector in an effective manner.
>
> 7. In order that the Authority functions in a truly independent manner and discharges its assigned responsibilities effectively, it is proposed to vest the Authority with a statutory status.
>
> 8. As Parliament was not in session, the President promulgated the Telecom Regulatory Authority of India Ordinance, 1996 on 27-1-1996 for the aforesaid purpose.
>
> 9. The Bill seeks to replace the said Ordinance."
>
> (emphasis supplied)

17. The TRAI Act was amended by Act 2 of 2000. The amended Preamble of the TRAI Act reads thus:

> "An Act to provide for the establishment of the Telecom Regulatory Authority of India and the Telecom Disputes Settlement and Appellate Tribunal to regulate the telecommunication services, adjudicate disputes, dispose of appeals *and* to protect the interests of service providers and consumers of the telecom sector, to promote and ensure orderly growth of the telecom sector and for matters connected therewith or incidental thereto."
>
> (emphasis supplied)

18. The Amendment Act, 2000 added a proviso to the definition of "telecommunication service" under Section 2(1)(*k*), empowering the Central Government to notify other services to be telecommunication services including *broadcasting services*.

Section 2(1)(k) is extracted hereunder:

> 2(1)(*k*) "**telecommunication service**" means service of any description (including electronic mail, voice mail, data services, audio tax services, video tax services, radio paging and cellular mobile telephone services) which is made available to users by means of any transmission or reception of signs, signals, writing,

images and sounds or intelligence of any nature, by wire, radio, visual or other electromagnetic means but shall not include broadcasting services.

Provided that the Central Government may notify other service to be telecommunication service including broadcasting services.

Section 36 of the TRAI Act is also relevant and reproduced hereunder:

36. ***Power to make regulations***.—(1) The Authority may, by notification, make regulations consistent with this Act and the rules made thereunder to carry out the purposes of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such regulations may provide for all or any of the following matters, namely—

(*a*) the times and places of meetings of the Authority and the procedure to be followed at such meetings under sub-section (1) of Section 8, including quorum necessary for the transaction of business;

(*b*) the transaction of business at the meetings of the Authority under sub-section (4) of Section 8;

(*c*) [* * *]

(*d*) matters in respect of which register is to be maintained by the Authority under sub-clause (*vii*) of clause (*b*) of sub-section (1) of Section 11;

(*e*) levy of fee and lay down such other requirements on fulfilment of which a copy of register may be obtained under sub-clause (*viii*) of clause (*b*) of sub-section (1) of Section 11;

(*f*) levy of fees and other charges under clause (*c*) of sub-section (1) of Section 11."

19. Acting under Section 2(1)(*k*) and 11(1)(d) the Central Government issued two Notifications on 9-1-2004 viz:-

"S.O. 44(E).—In exercise of the powers conferred by the proviso to clause (*k*) of sub-section (1) of Section 2 of the Telecom Regulatory Authority of India Act, 1997 (24 of 1997), the Central Government hereby notifies the broadcasting services and cable services to be telecommunication service.

> "S.O. 45(E).—In exercise of the powers conferred by clause (*d*) of sub-clause (1) of Section 11 of the Telecom Regulatory Authority of India Act, 1997 (24 of 1997) (hereinafter referred to as "the Act"), the Central Government hereby entrusts the following additional functions to the Telecom Regulatory Authority of India, established under sub-section (1) of Section 3 of the Act, in respect of broadcasting services and cable services, namely—
>
> (1) Without prejudice to the provisions contained in clause (*a*) of sub-section (1) of Section 11 of the Act, to make recommendation regarding—
>
> (*a*) the terms and conditions on which the "addressable systems" shall be provided to customers.
>
> *Explanation*.—For the purposes of this clause, "addressable system" with its grammatical variation, means an electronic device or more than one electronic devices put in an integrated system through which signals of cable television network can be sent in encrypted or unencrypted form, which can be decoded by the device or devices at the premises of the subscriber within the limits of authorisation made, on the choice and request of such subscriber, by the cable operator for that purpose to the subscriber.
>
> (*b*) the parameters for regulating maximum time for advertisements in pay channels as well as other channels.
>
> (2) Without prejudice to the provisions of sub-section (2) of Section 11 of the Act, also to specify standard norms for, and periodicity of, revision of rates of pay channels, including interim measures.

It is in the aforesaid circumstances that the TRAI Act came to be enacted and broadcasting services brought under the purview of the TRAI Act interalia to promote high quality telecommunication services in the country at reasonable prices and to safeguard the interest of the stakeholders i.e. service providers and consumers of the telecom sector.

20. In **BSNL v. TRAI, (2014) 3 SCC 222,** a three-Judge Bench of Supreme Court, on a reference, while dealing with the powers of TRAI under the TRAI Act has held that the powers of TRAI to make Regulations

under section 36 is legislative in nature and that the said power is wide and pervasive. The relevant portions of the said judgment are extracted hereunder:

> *88*. It is thus evident that the term "regulate" is elastic enough to include the power to issue directions or to make regulations ….
>
> "89. We may now advert to Section 36. Under sub-section (1) thereof TRAI can make regulations to carry out the purposes of the TRAI Act specified in various provisions of the TRAI Act including Sections 11, 12 and 13. The exercise of power under Section 36(1) is hedged with the condition that the regulations must be consistent with the TRAI Act and the rules made thereunder. There is no other restriction on the power of TRAI to make regulations. In terms of Section 37, the regulations are required to be laid before Parliament which can either approve, modify or annul the same. Section 36(2), which begins with the words "without prejudice to the generality of the power under sub-section (1)" specifies various topics on which regulations can be made by TRAI. Three of these topics relate to meetings of TRAI, the procedure to be followed at such meetings, the transaction of business at the meetings and the register to be maintained by TRAI. The remaining two topics specified in clauses (*e*) and (*f*) of Section 36(2) are directly referable to Sections 11(1)(*b*)(*viii*) and 11(1)(*c*). These are substantive functions of TRAI. However, there is nothing in the language of Section 36(2) from which it can be inferred that the provisions contained therein control the exercise of power by TRAI under Section 36(1) or that Section 36(2) restricts the scope of Section 36(1).
>
> 90. It is settled law that if power is conferred upon an authority/body to make subordinate legislature in general terms, the particularisation of topics is merely illustrative and does not limit the scope of general power…
>
> 99. Before parting with this aspect of the matter, we may notice Sections 33 and 37. A reading of the plain language of Section 33 makes it clear that TRAI can, by general or special order, delegate to any member or officer of TRAI or any other person such of its powers and functions under the TRAI Act except the power to settle disputes under Chapter IV or make regulations under Section 36. This means that the power to make regulations under Section 36 is non-delegable. The reason for excluding Section 36 from the purview of Section 33 is simple. The power under Section 36 is legislative as opposed to administrative. By virtue of Section 37, the regulations made under the TRAI Act are

placed on a par with the rules which can be framed by the Central Government under Section 35 and being in the nature of subordinate legislations, the rules and regulations have to be laid before both the Houses of Parliament which can annul or modify the same. Thus, the regulations framed by TRAI can be made ineffective or modified by Parliament and by no other body.

100. In view of the above discussion and the propositions laid down in the judgments referred to in the preceding paragraphs, we hold that the power vested in TRAI under Section 36(1) to make regulations is wide and pervasive. The exercise of this power is only subject to the provisions of the TRAI Act and the rules framed under Section 35 thereof. There is no other limitation on the exercise of power by TRAI under Section 36(1). It is not controlled or limited by Section 36(2) or Sections 11, 12 and 13".

(emphasis supplied)

21. In **Star India vs. DIPP** (supra), the aforesaid judgment of the three-judge Bench in **BSNL vs. TRAI** has been followed by the Supreme Court. In paragraph 26 of the said judgment it has been stressed that a restrictive meaning cannot be given to the words "regulation" or "regulate" as otherwise the very object of the TRAI Act would be stultified.

22. In **Hotel & Restaurant Assn. v. Star India (P) Ltd., (2006) 13 SCC 753**, the Supreme Court has held:

55. TRAI exercises a broad jurisdiction. Its jurisdiction is not only to fix tariff but also laying down terms and conditions for providing services. Prima facie, it can fix norms and the mode and manner in which a consumer would get the services.

56. The role of a regulator may be varied. A regulation may provide for cost, supply of service on non-discriminatory basis, the mode and manner of supply making provisions for fair competition providing for a level playing field, protection of consumers' interest, prevention of monopoly. The services to be provided for through the cable operators are also recognised. While making the regulations, several factors are, thus required to be taken into account. The interest of one of the players in the field would not be taken into consideration throwing the interest of

others to the wind."

(emphasis supplied)

Thus the primary goal of the Authority is to regulate the telecommunication services and to protect the interests of service providers and consumers of the telecom sector, to promote and ensure orderly growth of the telecom sector and for matters connected therewith or incidental thereto as can be discerned from the Preamble of the TRAI Act. It can therefore hardly be disputed that price fixation of Television channels is a concomitant of the regulatory powers of TRAI and is conceived in public interest.

23. Undisputedly, the broadcasters have a fundamental right to freedom of speech and expression, but the said right is not absolute. Telecasting by satellite involves the use airwaves which is the public property. The judgment of the three-Judge Bench of Supreme Court in **MIB vs. CAB**, has distinguished the decisions in **Sakal Papers**, **Bennett Coleman** and **Indian Express Newspapers** which concerned print media, and holds that since broadcasting involves use of airwaves which is public property, public interest is an inbuilt restriction apart from the restrictions in Article 19(2) and that airwaves are required to be controlled and regulated in public interest and have to be used for the benefit of the society at large. Regulation of telecom services in controlling the airwaves and protecting the interest of public who own the airwaves may thus involve imposition of reasonable restrictions, apart from the eight specified restrictions mentioned in Article 19(2). To accept the contention of the Petitioners that broadcasting services cannot be regulated as that would infringe their right to free speech and expression under Article 19(1)(a) and that the interest of public ought to be disregarded, would be plainly contrary to what is held in the

judgment of the three-Judge Bench of the Supreme Court in **MIB vs. CAB.** In the teeth of the said three-Judge Bench of the Supreme Court in **MIB vs. CAB** we do not see how it is really open for the Petitioners to contend that public interest cannot be taken into consideration in imposing any restrictions to the Petitioners' right to freedom of speech and expression under Article 19(1)(a) of the Constitution or that broadcasting services cannot be regulated or that there can be no fixation of rates of broadcasting services under the section 11(2) or for that matter any stipulations under section 11(1)(b)(iv) of the TRAI Act which regulates sharing of revenue amongst service providers.

24. It is sought to be argued on behalf of the Petitioners that the judgment of His Lordship P. B. Sawant J (for self and on behalf of Mohan J) supports the case of the Petitioners and that the judgment of His Lordship B. P. Jeevan Reddy, J. is a dissenting view. We, however, do not find any substance in the contention. In paragraph 126 of the judgment, His Lordship B.P. Jeevan Reddy, J. has categorically stated - "I agree broadly with the conclusions arrived at by my learned Brother Sawant, J in paragraph 122 of his judgment". Much has been made out of one stray sentence in paragraph 78 of the judgment of His Lordship Sawant J (for self and on behalf of Mohan J) starting with the words "But to contend that on that count restrictions to be imposed on the right under Article 19(1)(a)…", to assert that the said observation supports the case of the Petitioners and that save and except the eight specified restrictions mentioned in Article 19(2), no restrictions can be imposed in public interest. We, however, find that in the said paragraph 78 it is clearly stated that 'airwaves/frequencies are a public property and are also limited and have to be used in the best interest of the society'. Moreover, it is reiterated in the said paragraph 78

that 'this control can be only exercised within the framework of Article 19(2) **and** the dictates of public interest'. Cherry-picking of some stray observations in a judgment is not how a judgment ought to be read. It is the ratio decendi which is required to be seen. Both the judgments need to be read as whole and we have no hesitation in holding that both the judgments have clearly held that airwaves are public property and a distinction has been made between print media and broadcasting media.

25. On behalf of the Petitioners, our attention is invited to the observations in the judgment in **Bennett Coleman** that the scarce nature of newsprint will stop with allotment of quota. It is argued on behalf of the Petitioners that once downlinking permission is granted by the Central Government, the scarce nature of airwaves cannot be a factor that can be taken into account. This argument however overlooks the fact that, unlike the case of **Bennett Coleman** which concerned print media, in the present case we are dealing with airwaves which are public property. It is nobody's case that the airwaves are not public property or are infinite. None of the judgments cited on behalf of the Petitioners including the subsequent judgments in **Shreya Singhal** and **Anuradha Bhasin**, on which strong reliance is also placed on behalf of the Petitioners, have doubted the decision of the three-Judge Bench in **MIB vs. CIB**. As a matter of fact, the Constitution Bench of Supreme Court in **Sahara India Real Estate Corpn. Ltd. v. SEBI, (2012) 10 SCC 603,** has cited the judgment of **MIB vs. CAB** with approval and noted that **MIB vs. CAB** was an instance in which the Supreme Court has read Article 19(2) of the Constitution 'broadly'. We may extract the relevant portions of the judgment of the Constitution Bench:

> "37. Before examining the provisions of Article 19(1)(*a*) and Article 21, it may be reiterated, that, the right to freedom of speech and

> expression is absolute under the First Amendment in the US Constitution unlike Canada and India where we have the *test of justification* in the societal interest which saves the law despite infringement of the rights under Article 19(1)(*a*). In India, we have the test of "reasonable restriction" in Article 19(2). In *Ministry of Information & Broadcasting* v. *Cricket Assn. of Bengal* it has been held that it is true that Article 19(2) does not use the words "national interest", "interest of society" or "public interest" but the several grounds mentioned in Article 19(2) for imposition of restrictions such as security of the State, public order, law in relation to contempt of court, defamation, etc. are ultimately referable to *societal interest* which is another name for public interest (SCC para 189). It has been further held that, "the said grounds in Article 19(2) are conceived in the interest of ensuring and maintaining conditions in which the said right can meaningfully be exercised by the citizens of this country" (para 151).
>
> 39. The question before us is whether such "postponement orders" constitute restrictions under Article 19(2) as read **broadly** by this Court in *Cricket Assn. of Bengal*?
>
> 42. … In our view, keeping the above parameters, if the High Court/Supreme Court (being courts of record) pass postponement orders under their inherent jurisdictions, such orders would fall within "reasonable restrictions" under Article 19(2) and **which would be in conformity with societal interests, as held in *Cricket Assn. of Bengal***…." (emphasis supplied)

26. In **Shreya Singhal** cited on behalf of the Petitioners, the primary challenge was to the constitutional validity of section 66-A (which came into force by virtue of Amendment Act, 2009) of the Information Technology Act, 2000 which provided for punishment of imprisonment for a term which could be extended to three years and with fine, for offensive messages/information through internet on the ground that it infringes the fundamental right to free speech and expression. The Supreme Court noted that so far as internet is concerned, the same requires very less or no payment and that there was an intelligible differentia between internet on

one hand and that of other mediums. The Supreme Court was thus dealing with free speech in relation to the medium of internet and not broadcasting. Similarly, in **Anuradha Bhasin** cited on behalf of the Petitioners, the three-Judge Bench of the Supreme Court was interalia dealing with free speech in relation to medium of internet services and internet as a tool; not broadcasting services. The challenge there was to the temporary suspension of internet service and telecommunication services in the States of Jammu & Kashmir and the order u/s 144 of Cr.P.C imposing restrictions on movement. The Supreme Court in both the said cases was essentially considering the rights of the public in respect of the use of internet and there was no issue involved with regard to the rights of service providers. The Supreme Court was not dealing with the issue of balancing of competing rights of service providers vis-à-vis the rights of public. Both these judgments, as stated earlier, have not doubted the findings of the three-judge Bench judgment in **MIB vs. CAB** which has been referred to and considered.

27. Since airwaves are publicly owned resource and are finite, akin to other resources such as water, minerals, forests, national parks, etc., the broadcasters are obligated to use this valuable resource to serve the interest of public, not just their own interest – commercial, creative or otherwise. Article 39(b) under Part IV of the Constitution which deals with Directive Principles of State Policy, states that ownership and control of material resources of the community should be so distributed so as to best sub-serve the common good. Television is indeed the most important source of information and entertainment and has the widest reach. It is pointed out that there are around 197 million TV households in our country (Report of March 2019 of FICCI EY India's Media & Entertainment sector

referred to in the Consultation Paper dated 25 September 2019 on issues related to Interconnect Regulation). It is required to be noted that in the downlinking permission of TV channels for providing programming services as per the guidelines framed by the Central Government, one of the conditions is that the channel shall adhere to the norms, rules and regulations prescribed by the Authority to regulate and monitor broadcasting services. As airwaves are public property, TRAI acts in a fiduciary capacity to ensure that the rights of consumers are also protected and to balance the rights of the consumers with the rights of the service providers/broadcasters and to ensure orderly growth of the telecom sector as stated in the Preamble of the TRAI Act. Once it is held that the airwaves used by the broadcasters are owned by public, public interest would perforce kick in and cannot be kept out of the consideration. The broadcasters therefore would necessarily be required to be regulated in public interest and to prevent the invasion of the rights of public to freedom to be educated, informed and entertained as held in **MIB vs CAB**. In our view, broadcasters cannot be heard to say that they will use airwaves which are public property but the interest of public be disregarded. Hence, the entire edifice upon which the case of the Petitioners is founded i.e. the restrictions can be confined only to the eight grounds specified in the Article 19(2) of the Constitution would be effaced. The only aspect which can really be examined is whether in exercising the powers under section 11(2) of the TRAI, the stipulations made vide the impugned Regulations/Tariff Orders would constitute ‘reasonable restrictions’ [which is the expression used in Articles 19(2)] and/or are manifestly arbitrary/arbitrary and therefore violate the fundamental rights of the Petitioners, which aspect we have dealt with in the latter part of this judgment while dealing with the challenge

to the impugned principal 2017 provisions and impugned 2020 Amendments.

28. Since much has been said about circulation, we need to clear the air in that regard. It is contended on behalf of the Petitioners that since any fixation of rates of channels under section 11(2) or stipulations on formation of bouquets by Petitioners which are means of enhancing circulation would have the tendency to curtail circulation and thereby narrow the scope of dissemination of information, it would be an infringement of the Petitioners' fundamental rights under Article 19(1)(a) of the Constitution. As indicated earlier, the judgments of the Supreme Court in **Sakal Papers**, **Bennett Coleman** and **Indian Express Newspapers** which interalia dealt with circulation in relation to print media, have been specifically distinguished in **MIB vs. CAB.** Undoubtedly, fixation of rates of channels may impact circulation and ordinarily, circulation would be inversely proportional to the price of the channel. In other words, the higher the price, the lower would be the circulation and vice versa (this has been recognized in **Sakal Papers** also). In our view, however, even if price fixation or reasonable stipulations are prescribed by the Authority may affect circulation to some degree, that by itself would not be an infringement of the broadcasters' rights to freedom of speech and expression and the right of the broadcasters would be required to be **"balanced"** with the rights the citizens to access television channels at reasonable rates.

29. It has been interalia held in **MIB Vs CAB** that the right to receive information also is a species of right of freedom of speech and expression guaranteed under Article 19(1)(a) of the Constitution and airwaves are required to be regulated to prevent invasion of the rights of public. In **Tata**

Press (supra), the Supreme Court has held that the public at large has a right to receive 'commercial speech'. Article 19(1)(*a*) not only guarantees freedom of speech and expression, it also protects the rights of an individual to listen, read and receive the said speech (see paragraph 24). In **Union of India v. Naveen Jindal, (2004) 2 SCC 510,** the Supreme Court has held that the right to impart and receive information by airwaves and otherwise is a species of the right of freedom of speech and expression guaranteed by 19(1)(a) of the Constitution (see paragraph 61). **In Namit Sharma v. Union of India, (2013) 1 SCC 745**, the Supreme Court has held that it is a settled proposition that the right to freedom of speech and expression enshrined under Article 19(1)(a) of the Constitution of India encompasses the right to impart and receive information (see paragraph 2). In **Indian Soaps & Toiletries Makers Assn. v. Ozair Husain, (2013) 3 SCC 641,** the Supreme Court has held that a citizen has the right to expression and receive information under Article 19(1)(*a*) of the Constitution. That right is derived from freedom of speech and expression comprised in the article. The freedom of speech and expression includes the right to receive information (see paragraph 28). In **Swapnil Tripathi v. Supreme Court of India, (2018) 10 SCC 639,** the Supreme Court has stated that the right to know and receive information, it is by now well settled, is a facet of Article 19(1)(a) of the Constitution (see paragraph 3). In **Central Public Information Officer Vs. Subhash Chandra Agarwal, (2020) 5 SCC 481,** the Constitution Bench of Supreme Court has held that an inherent component of the right to disseminate speech freely is the corresponding right of the audience to receive speech freely. The right to receive information disseminated has also been recognized as a facet of the freedom of expression protected by Article 19(1)(*a*) of the Constitution (see paragraph 266). In **Sahara India Real Estate Corpn. Vs SEBI**

(supra), the Constitution Bench of the Supreme Court has held that the freedom of expression also includes the right to receive information and ideas of all kinds from different sources. In essence, the freedom of expression embodies the right to know. It was further observed that the Supreme Court is not only the sentinel of the fundamental rights but also a balancing wheel between the rights, subject to social control (see paragraph 25). In **Reliance Petrochemicals Vs. Indian Express Newspapers (P) Ltd**., the Supreme Court has held that the right to know is a fundamental right under Article 21 of the Constitution (see paragraph 34).

30. From the exposition of law in the aforesaid judgments, it would follow that on one hand the broadcasters have the right to freedom of speech and expression to educate, informed and entertain and on the other hand a citizen has a corresponding right to be educated, informed and entertained which is also a species of right to freedom of speech and expression under Article 19(1)(a) of the Constitution. Moreover, in **MIB vs CAB** it has been held that a citizen has a right which flows from the nature of property involved i.e. airwaves, which belong to public and there would be a ‘limitation’ on the broadcasters’ rights to freedom of speech and expression. There is, therefore, in our view, a need to strike a balance between the competing rights of broadcasters and the rights of the citizens to access the television channels at reasonable rates as discussed hereinbelow.

31. The principle of balancing of competing rights has been now well settled by several judgments of the Supreme Court.

31.1 In **Mazdoor Kisan Shakti Sangathan v. Union of India, (2018) 17 SCC 324,** alluding to the judgment in **Asha Ranjan vs. State of Bihar (2017) 4 SCC 397,** the Supreme Court held that balancing would mean curtailing one right of one class to some extent so that the right of the other class is also protected (see paragraph 61).

31.2 **In Sahara India Real Estate Corpn. Ltd. v. SEBI** (supra) the Constitution Bench of the Supreme Court has held:

> 25. …..Underlying our constitutional system are a number of important values, all of which help to guarantee our liberties, but in ways which sometimes conflict. Under our Constitution, probably, no values are absolute. All important values, therefore, must be qualified and balanced against other important, and often competing, values. **This process of definition, qualification and balancing is as much required with respect to the value of freedom of expression as it is for other values**. Consequently, free speech, in appropriate cases, has got to correlate with fair trial. It also follows that in an appropriate case one right (say freedom of expression) may have to yield to the other right like right to a fair trial…

31.3 **In Subramanian Swamy v. Union of India, (2016) 7 SCC 221** the Supreme Court has held:

> 136. To appreciate what we have posed hereinabove, it is necessary to dwell upon balancing the fundamental rights. It has been argued by the learned counsel for the petitioners that the right conferred under Article 19(1)(*a*) has to be kept at a different pedestal than the individual reputation which has been recognised as an aspect of Article 21 of the Constitution. In fact the submission is that right to freedom of speech and expression which includes freedom of press should be given higher status and the individual's right to have his/her reputation should yield to the said right. In this regard a passage from *Sakal Papers (P) Ltd.*[87] has been commended to us. It says: (AIR pp. 313-14, para 36)
>
> "36. … Freedom of speech can be restricted only in the

> interests of the security of the State, friendly relations with foreign State, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence. It cannot, like the freedom to carry on business, be curtailed in the interest of the general public. If a law directly affecting it is challenged, it is no answer that the restrictions enacted by it are justifiable under clauses (3) to (6). For, the scheme of Article 19 is to enumerate different freedoms separately and then to specify the extent of restrictions to which they may be subjected and the objects for securing which this could be done. A citizen is entitled to enjoy each and every one of the freedoms together and clause (1) does not prefer one freedom to another. That is the plain meaning of this clause. It follows from this that the State cannot make a law which directly restricts one freedom even for securing the better enjoyment of another freedom."

137. Having bestowed our anxious consideration on the said passage, we are disposed to think that the above passage is of no assistance to the petitioners, for the issue herein is sustenance and balancing of the separate rights, one under Article 19(1)(a) and the other, under Article 21. Hence, the concept of equipoise and counterweighing fundamental rights of one with other person. It is not a case of mere better enjoyment of another freedom. In Acharya Maharajshri Narendra Prasadji Anandprasadji Maharaj v. State of Gujarat[130], it has been observed that a particular fundamental right cannot exist in isolation in a watertight compartment. One fundamental right of a person may have to coexist in harmony with the exercise of another fundamental right by others and also with reasonable and valid exercise of power by the State in the light of the directive principles in the interests of social welfare as a whole. The Court's duty is to strike a balance between competing claims of different interests. In DTC v. Mazdoor Congress[131] the Court has ruled that articles relating to fundamental rights are all parts of an integrated scheme in the Constitution and their waters must mix to constitute that grand flow of unimpeded and impartial justice; social, economic and political, and of equality of status and opportunity which imply absence of unreasonable or unfair discrimination between individuals or groups or classes. In St. Stephen's College v. University of Delhi[132] this Court while emphasising the need for balancing the fundamental rights

observed that: (SCC p. 612, para 96)

> "96. … It is necessary to mediate between Article 29(2) and Article 30(1), between letter and spirit of these articles, between traditions of the past and the convenience of the present, between society's need for stability and its need for change."

138. In Mr 'X' v. Hospital 'Z'[133] this Court stated that: (SCC pp. 309-10, para 44)

> "44. … where there is a clash of two fundamental rights … the right to privacy as part of right to life and Ms Y's right to lead a healthy life which is her fundamental right under Article 21, the right which would advance the public morality or public interest, would alone be enforced through the process of court, for the reason that moral considerations cannot be kept at bay and the Judges are not expected to sit as mute structures of clay in the hall known as the courtroom, but have to be sensitive, 'in the sense that they must keep their fingers firmly upon the pulse of the accepted morality of the day'. (See Allen: Legal Duties)."
>
> That apart, we would also add that there has to be emphasis on advancement of public or social interest.

139. In Post Graduate Institute of Medical Education & Research v. Faculty Assn.[134] while emphasising the need to balance the fundamental rights, this Court held that: (SCC p. 22, para 32)

> "32. … It is to be appreciated that Article 15(4) is an enabling provision like Article 16(4) and the reservation under either provision should not exceed legitimate limits. In making reservations for the backward classes, the State cannot ignore the fundamental rights of the rest of the citizens. The special provision under Article 15(4) [sic 16(4)] must therefore strike a balance between several relevant considerations and proceed objectively."

140. In Ram Jethmalani v. Union of India[135] it has been held (SCC p. 36, para 84) that the rights of citizens, to effectively seek the protection of fundamental rights have to be balanced against the rights of citizens and persons under Article 21. The latter cannot be sacrificed on the anvil of fervid desire to find instantaneous solutions to systemic problems through defamation speech, for it would lead to dangerous circumstances and anarchy may become the order of the day.

142. In Maneka Gandhi[113], it has been held: (SCC p. 280, para 5)

> "5. … We may point out even at the cost of repetition that this Court has said in so many terms in R.C. Cooper case[114] that each freedom has different dimensions and there may be overlapping between different fundamental rights and therefore it is not a valid argument to say that the expression "personal liberty" in Article 21 must be so interpreted as to avoid overlapping between that article and Article 19(1)."

143**.** In Mohd. Arif v. Supreme Court of India[136], wherein the majority in the Constitution Bench has observed that the fundamental right to life among all fundamental rights is the most precious to all human beings.

144. The aforementioned authorities clearly state that balancing of fundamental rights is a constitutional necessity. It is the duty of the Court to strike a balance so that the values are sustained. … In the name of freedom of speech and expression, the right of another cannot be jeopardized ….

It may be noted here that in paragraph no. 137 of the above judgment, the Supreme Court has repelled the contention that in view of the findings in **Sakal Papers** that the citizen is entitled to enjoy each and every one of the freedoms together and that the State cannot make a law which directly restricts once freedom even for securing better enjoyment of another freedom, on the ground that the findings would not apply when it comes to balancing of separate rights.

31.4 In **K. S. Puthaswamy (Aadhaar – 5 J) vs. Union of India (2019) 1 SCC 1,** the Constitution Bench of the Supreme Court has reiterated the need for balance between fundamental rights when the fundamental rights are in conflict.

31.5 **In Modern Dental College & Research Centre v. State of M.P., (2016) 7 SCC 353**, the Supreme Court has observed:

> 54**.** It is now almost accepted that there are no absolute constitutional rights and all such rights are related.

31.6 In **Anuradha Bhasin v. Union of India, (2020) 3 SCC 637,** the Supreme Court has held:

> 41. The second prong of the test, wherein this Court is required to find whether the imposed restriction/prohibition was least intrusive, brings us to the question of balancing and proportionality. These concepts are not a new formulation under the Constitution. In various parts of the Constitution, this Court has taken a balancing approach to harmonise two competing rights. In *Minerva Mills Ltd.* v. *Union of India*[28] and *Sanjeev Coke Mfg. Co.* v. *Bharat Coking Coal Ltd.*[29], this Court has already applied the balancing approach with respect to fundamental rights and the directive principles of State policy.
>
> 57. The proportionality principle, can be easily summarised by Lord Diplock's aphorism "*you must not use a steam hammer to crack a nut, if a nutcracker would do?*" [refer to *R.* v. *Goldstein*[40], WLR at p. 155 (Diplock, J.)]. In other words, proportionality is all about means and ends.
>
> 62. Recently, this Court in Modern Dental College & Research Centre vs. State of M.P. has held that no constitutional right can be claimed to be absolute in a realm where rights are interconnected to each other, and limiting some rights in public interest might therefore be justified…
>
> 69. Thereafter, a comprehensive doctrine of proportionality in line with the German approach was propounded by this Court in *Modern Dental College case*[52] wherein the Court held that: (SCC pp. 414-15, paras 63-64)
>
> > "*63.* In this direction, the next question that arises is as to what criteria is to be adopted for a proper balance between the two facets viz. the rights and limitations imposed upon it by a statute. *Here comes the concept of "*proportionality*", which is a proper criterion. To put it pithily, when a law limits a constitutional right, such a limitation is constitutional if it is proportional*. The law imposing restrictions will be treated as proportional if it is meant to achieve a proper purpose, and if

> the measures taken to achieve such a purpose are rationally connected to the purpose, and such measures are necessary.…
>
> *64.* The exercise which, therefore, is to be taken is to find out as to whether the limitation of constitutional rights is for a purpose that is reasonable and necessary in a democratic society and such an exercise involves the weighing up of competitive values, and ultimately an assessment based on proportionality i.e. balancing of different interests."

32. Having regard to the principle of law laid in the aforesaid judgments, in our view, the fundamental rights of the broadcasters cannot be considered in isolation and a balance has to be stuck between the competing rights of the broadcasters vis-à-vis the rights of the citizens. In balancing such rights, the fact that there may be some curtailment of the rights of the Petitioners and/or a drop in the circulation/viewership to some degree, would not be seen as an infringement of the fundamental rights of the Petitioners so long as the stipulations prescribed in such balancing are not unreasonable and are in the interest of public. A fortiori, the contention of the Petitioners that the intention and direct effect of impugned section 11 is to interfere with various facets of the right guaranteed under Article 19(1)(a) including circulation, would be insubstantial. Ordinarily, the fundamental rights of the broadcasters would have to yield to public interest. However, the Parliament in its wisdom, keeping in view the need for promotion and orderly growth of the telecom sector, has enacted the TRAI Act not only to protect the interests of the consumers, but the service providers as well, as can be discerned from the Preamble of the TRAI Act. Thus, a level playing field would be required to be maintained between the rights of the broadcasters and that of public. The contention of the Petitioners that being an individual right under Article 19(1)(a) of the

Constitution, there is no question of balancing interests, cannot be countenanced and is rejected.

33. In **A. Suresh v. State of T.N., (1997) 1 SCC 319**, the Supreme Court has held:

> "9. For a proper appreciation of the appellants' contentions, it is necessary to examine the nature of the activity carried on by the appellants. The appellants are carrying on the business of providing entertainment. Their main activity is to show films and other material using the video cassette or disc with the help of a VCR, disc player or a similar apparatus. By means of cables, the TV sets in the homes of the subscribers are linked to their apparatus with a view to enable the subscribers to receive the programmes relayed by the appellants. For this service, each subscriber is charged a particular amount every month. This is their business. It may be true that providing entertainment is a form of exercise of freedom of speech and expression. It is quite likely that they also relay the programmes broadcast by Doordarshan and other TV networks and some of them may be informative in nature or educational in character but the fact remains that their activity is a combination of two rights i.e., business and speech — sub-clauses (*g*) and (*a*) of clause (1) of Article 19. There is no reason why the business part of it cannot be taxed. If tax can be levied upon entertainment provided by cinemas, if taxes can be levied upon the Press, it is ununderstandable why the appellants' activity cannot be taxed. Certainly, the appellants cannot claim that their activity is of more significance to society than that of the Press. Where the freedom of speech gets intertwined with business it undergoes a fundamental change and its exercise has to be balanced against societal interests. In *Secy., Ministry of Information and Broadcasting, Govt. of India* v. *Cricket Assn. of Bengal*[1] one of us (B.P. Jeevan Reddy, J.) stated the proposition, flowing from the decided cases, in the following words: (SCC p. 297, para 201)
>
> "Providing entertainment is implied in freedom of speech and expression guaranteed by Article 19(1)(*a*) of the Constitution subject to this rider that where speech and conduct are joined in a single course of action, the free speech values must be balanced against competing societal interests."

(emphasis supplied)

34. Evidently, the Petitioners have not challenged the amendment to the TRAI Act inserting a proviso to section 2(1)(k) in the year 2000 which provided that the Central Government may notify other service to be telecommunication service including 'broadcasting services'. Nor have the Petitioners challenged the Notification dated 09-01-2004 which brought 'broadcasting services' under the ambit and purview of the TRAI Act. Once broadcasting services are brought under the purview of the TRAI Act, keeping in mind the object of the TRAI Act as can be discerned from the Preamble, the interest of consumers perforce has to be considered and cannot be ignored. If the contentions of the Petitioners that there can be no price fixation or other stipulations including stipulations on formation of bouquets as that would affect circulation is accepted, the entire purport and object for which the TRAI Act was enacted would be defeated.

35. For the aforesaid reasons, we are unable to accept the contention of the Petitioners that section 11 (so far as it relates to broadcasting services) violates their fundamental right to freedom of speech and expression under Article 19(1)(a) of the Constitution.

36. Out of the entire section 11, the challenge in the Petitions centres on 11(2). None of arguments on behalf of the Petitioners truly implicate section 11(1)(b)(iv), (which deals with commercial aspect of sharing revenue amongst service providers only) and the focus of the Petitioners' ire is only section 11(2). Except for a mention of challenge to section 11(1)(b)(iv) in one of the written submissions, no arguments have been advanced before us on the challenge to the said section. The other service providers referred

to in section 11(1)(b)(iv) with whom the Petitioners share revenue and who would be affected have not even been impleaded as party Respondent. It is now well settled that there is a presumption of constitutionality of the statute. A plain reading of the text of section 11(2) of the TRAI Act would indicate that it is merely an enabling or empowering provision whereby certain powers are conferred to the Authority. The exercise of these powers as per law is a different issue altogether. The exercise of such power even if it is wrongful, would not affect the validity of section 11(2). In **Pannalal Binjraj & Anr. v. Union of India & Ors. AIR 1957 SC 395,** the Constitution Bench of the Supreme Court has held – "legislation - especially primary legislation may not be invalidated merely on account of a possibility of its abuse. Even where an abuse occurs, what will be struck down will not be the provision but the abuse itself". In **Government of Andhra Pradesh and ors. v/s. P. Laxmi Devi , 2008 (4) SCC 720,** the Supreme Court has held **- "**There is always a difference between a statute and the action taken under a statute. The statute may be valid and constitutional, but the action taken under it may not be valid. Hence, merely because it is possible that the order of the registering authority under the proviso to section 47-A is arbitrary and illegal, that does not mean that the proviso to section 47-A is also unconstitutional. We must always keep this in mind when adjudicating on the constitutionality of a statute".

37. The TRAI Act is a beneficial piece of legislation and must be interpreted as such. TRAI has been regulating broadcasting services and cable services sector and protecting the interest of the service providers and consumers by issuing Regulations, Tariff Orders, directions and making recommendations to the Government since the year 2004. Section 11 has been on the statute book since 1997 and the Notification which

brought ‘broadcasting services’ under the ambit and purview of the TRAI Act is dated 09-01-2004. The Petitioners have acted upon the earlier Regulations and Tariff Orders. The present Petitions have been filed belated only in the year 2020 (so far as the challenge to section 11 is concerned). It is pointed out on behalf of the Respondents that in the event the challenge to section 11(2) of the Petitioners is upheld, every single instance of tariff fixation by the TRAI for the last 17 years shall be liable to be struck down. It does appear that the present Petitions have been filed only after the impugned 2020 Amendments were to come into force by incorporating a challenge also to section 11, only as an afterthought.

38. Insofar as the challenge to section 11 (in relation to broadcasting services) on the ground of violation of the Petitioners’ rights under Articles 19(1)(g), 14 and 21 of the Constitution is concerned, it is contended on behalf of the Petitioners that the broadcasters have a right under Article 19(1)(g) to manage their affairs in a profitable manner subject to reasonable restrictions provided under Article 19(6). It is contended that section 11(2) allows commercial restrictions/constraints on TV channels which results in onerous obligation and would have a crippling effect on the business of the Petitioners, which would be violation of the Petitioners’ right under Article 19(1)(g). It is further contended that considering the wide, untrammeled and unguided powers under section 11(2), the section suffers from the vice of excessive delegation and arbitrariness under Article 14 of the Constitution. It is contended that the actions of TRAI would lead to a non-level playing field. Insofar as violation of Article 21 is concerned, it is contended that the section violates the right to livelihood of the Petitioners which is an important facet of Article 21.

39. Article 19(1)(g) guarantees right to the citizens to carry on any occupation, trade or business. However, this right is not absolute and is subject to reasonable restrictions under Article 19(6). It is required to be noted that section 11 and section 2(1)(k) of the TRAI Act were subject matter of challenge before the Division Bench of Delhi High Court in **Star India P. Ltd. v. TRAI, 2007 SCC OnLine Del 951**, on the ground of violation of Articles 19(1)(a), 19(1)(g) and 14 of the Constitution, which challenge has been repelled by the Delhi High Court. The Petitioners therein had also challenged the Notification for inclusion of broadcasting services within the ambit of telecommunication services under the TRAI Act. The Division Bench of the Delhi High Court in paragraph 41 and 46 held thus:

> "41….We are unable to agree with learned Senior Counsel for the Petitioners that if the tariff of pay channels is regulated by the Authority the inexorable and inevitable effect would be that the Petitioners will be run out of business. The Petitioners have not been forthright in presenting even the breakup between advertisement earnings and collection from subscriptions. In this respect they are playing fast and loose by alternating stating in different proceedings that 70 per cent of their receipts are from subscriptions and 30 per cent from advertisements and vice-versa. We would believe that advertisement revenue constitutes 70 per cent of broadcasters earning with the logical consequence that any increase in viewership leads to a corresponding increase in advertising rates. As has already been observed by the Supreme Court, measures of the Governments or Authorities should not result in diminution of readership or viewership, as the case may be, since this will be a classic and obvious infraction of the fundamental freedom guaranteed and preserved by Article 19(1)(a). The Petitioners have not placed before us their Accounts or Balance-sheets or for that matter any material which would illustrate and disclose that the fixation of a top limit of tariff for a pay channel has resulted in unremunerative earnings and collections by the Petitioners. Learned Counsel for the Petitioners were in fact candid enough to state that they did not have sufficient time to collect material and data in this

> regard. If this is so it only lends credence to the contention of learned Counsel for the Respondents that the Petitioners have rushed to this Court in an irresponsible manner without really assessing the actual repercussions of the fixation of impugned tariffs by the Authority. In Indian Express Newspapers as well as in a Suresh v. State of Tamil Nadu, (1997) 1 SCC 319, the Supreme Court has opined that only if the restrictions are onerous and confiscatory would a violation of Article 19(1)(a) of the Constitution occur. We are ever mindful that every person exercising his freedom of speech and expression is entitled to make profits from his efforts. If an author of fiction or literature can earn handsome profits so can a broadcaster. There is no stigma attached to profits. The fundamental question is the extent of profits which can be earned by a person claiming freedom of speech and expression as his fundamental right. In our view, the moment the interests of the viewer or recipient becomes irrelevant or even incidental the activity metamorphoses into a trade or business which is always subject to restrictions that are perceived by the State or any Authority to be in the interest of the general public. In the present petitions beyond a bare ipse dixit that no material has been placed before us by way of substantiation of Petitioners plea that the impugned tariff has illegally impacted their freedom of speech and expression. The position is in fact to the contrary since the lower the subscription rates the larger will be the viewership. We cannot appreciate the argument made on behalf of the Petitioners that free market forces must be allowed so that ultimately the market can express itself.
>
> 46. We are satisfied that the TRAI articulate the parameters and ethos within which the authority must function. The assailed provisions do not suffer from the vice of excessive delegation of power."

Aggrieved by the aforesaid decision, an SLP was filed before the Supreme Court. The said SLP was dismissed as having 'no merit'."

40. In **Chintaman Rao v. State of M.P., AIR 1951 SC 118** while dealing with the test of reasonable restrictions imposed on the fundamental right enshrined in Article 19(1)(g), the Constitution Bench of the Supreme Court has held:

> "6. The phrase "reasonable restriction" connotes that the limitation imposed on a person in enjoyment of the right should not be arbitrary or of an excessive nature, beyond what is required in the interests of the public. The word "reasonable" implies intelligent care and deliberation, that is, the choice of a course which reason dictates. Legislation which arbitrarily or excessively invades the right cannot be said to contain the quality of reasonableness and unless it strikes a proper balance between the freedom guaranteed in Article 19(1)(*g*) and the social control permitted by clause (6) of Article 19, it must be held to be wanting in that quality".

41. In **State of Madras v. V. G. Rao, AIR (1952) SC 196**, the Constitution Bench of the Supreme Court has held:

> "It is important in this context to bear in mind that the test of reasonableness, wherever prescribed, should be applied to each individual statute impugned, and no abstract standard, or general pattern of reasonableness can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict."

42. In **Shree Meenakshi Mills Ltd. v. Union of India, (1974) 1 SCC 468,** the Constitution Bench of the Supreme Court has held**:**

> 65. <u>If fair price is to be fixed leaving a reasonable margin of profit, there is never any question of infringement of fundamental right to carry on business by imposing reasonable restrictions.</u> The question of fair price to the consumer with reference to the dominant, object and purpose of the legislation claiming equitable distribution and availability at fair price is completely lost sight of if profit and the producer's return are kept in the forefront.
>
> 66. <u>In determining the reasonableness of a restriction imposed by law in the field of industry, trade or commerce, it has to be remembered that the mere fact that some of those who are engaged in these are alleging loss after the imposition of law will not render the law unreasonable.</u> By its very nature, industry or trade or commerce goes

through periods of prosperity and adversity on account of economic and sometimes social and political factors…

43. In **R. K. Garg Vs. UOI (1981) 4 SCC 675**, the Constitution Bench of the Supreme Court has held:

> **"7.** Now while considering the constitutional validity of a statute said to be violative of Article 14, it is necessary to bear in mind certain well established principles which have been evolved by the courts as rules of guidance in discharge of its constitutional function of judicial review. The first rule is that there is always a presumption in favour of the constitutionality of a statute and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles. This rule is based on the assumption, judicially recognised and accepted, that the legislature understands and correctly appreciates the needs of its own people, its laws are directed to problems made manifest by experience and its discrimination are based on adequate grounds.
>
> 8. Another rule of equal importance is that laws relating to economic activities should be viewed with greater latitude than laws touching civil rights such as freedom of speech, religion etc. It has been said by no less a person than Holmes, J., that the legislature should be allowed some play in the joints, because it has to deal with complex problems which do not admit of solution through any doctrinaire or strait-jacket formula and this is particularly true in case of legislation dealing with economic matters, where, having regard to the nature of the problems required to be dealt with, greater play in the joints has to be allowed to the legislature. The court should feel more inclined to give judicial deference to legislative judgment in the field of economic regulation than in other areas where fundamental human rights are involved. Nowhere has this admonition been more felicitously expressed than in *Morey* v. *Doud* [351 US 457 : 1 L Ed 2d 1485 (1957)] where Frankfurter, J., said in his inimitable style:
>
> "In the utilities, tax and economic regulation cases, there are good reasons for judicial self-restraint if not judicial deference to legislative judgment.…
>
> The Court must always remember that "legislation is directed to practical problems, that the economic mechanism is highly sensitive and complex, that many problems are singular and contingent, that laws are not abstract propositions and do not relate to abstract units

> and are not to be measured by abstract symmetry"; "that exact wisdom and nice adaption of remedy are not always possible" and that "judgment is largely a prophecy based on meagre and uninterpreted experience". Every legislation particularly in economic matters is essentially empiric and it is based on experimentation or what one may call trial and error method and therefore it cannot provide for all possible situations or anticipate all possible abuses. There may be crudities and inequities in complicated experimental economic legislation but on that account alone it cannot be struck down as invalid. The courts cannot, as pointed out by the United States Supreme Court in *Secretary of Agriculture* v. *Central Roig Refining Company* [94 L Ed 381 : 338 US 604 (1950)] be converted into tribunals for relief from such crudities and inequities. There may even be possibilities of abuse, but that too cannot of itself be a ground for invalidating the legislation, because it is not possible for any legislature to anticipate as if by some divine prescience, distortions and abuses of its legislation which may be made by those subject to its provisions and to provide against such distortions and abuses. Indeed, howsoever great may be the care bestowed on its framing, it is difficult to conceive of a legislation which is not capable of being abused by perverted human ingenuity. The Court must therefore adjudge the constitutionality of such legislation by the generality of its provisions and not by its crudities or inequities or by the possibilities of abuse of any of its provisions. If any crudities, inequities or possibilities of abuse come to light, the legislature can always step in and enact suitable amendatory legislation. That is the essence of pragmatic approach which must guide and inspire the legislature in dealing with complex economic issues.
>
> (emphasis supplied)

44. Keeping in mind the law expounded in the aforesaid judgments coupled with the findings in the judgment of the three-judge Bench of the Supreme Court **MIB vs CAB** which interalia holds that airwaves are public property and are required to be regulated in public interest, as also the principle of balancing of rights as discussed by us above, and on a plain reading of the text of the section 11 (in relation to broadcasting services) we are of the view that challenge to section 11(2) and 11(1)(b)(iv) on the

grounds of violation of Articles 14, 19(1)(g) and 21 lacks merit and cannot be accepted. The Division Bench of the Delhi High Court in **Star India v. TRAI,** has repelled the challenge to section 11 of the TRAI Act on the ground of violation of Articles 14,19(1)(a) and 19(1)(g) of the Constitution, as stated by us earlier. There are safeguards provided in the TRAI Act, in that, an Appellate Tribunal (TDSAT) is established to hear and dispose of Appeal against any direction, decision or order of the Authority under section 14-A(2) of the TRAI Act. Moreover, section 11(4) of the TRAI Act mandates that the Authority shall ensure transparency while exercising its powers and discharging its functions. The Authority, prior to the issuance of any Regulations/Tariff Orders publishes draft Regulations/Tariff Orders or Consultation Papers and invites comments from all stake holders and only after considering the comments and counter comments and applying its mind, issues the Regulations/Tariff Orders.

45. There is nothing in the text of section 11(2) per se, which can be said to be violative of the Petitioners' rights under Article 14 or 21 of the Constitution. Nor does the text of section 11(2), on a plain reading, impose any restriction on the Petitioners' fundamental right to carry on trade or business enshrined in Article 19(1)(*g*) of the Constitution. Section 11(2) only seeks to regulate and there is no prohibition on trade or business of the Petitioners. Public interest demands that the rates of the TV channels are fixed by the Authority in a manner that enables the consumers to access the TV channels at reasonable prices. As pointed out earlier, it has been held by the Supreme Court in **Hotel & Restaurant Association vs Star India** (supra) that TRAI exercise broad jurisdiction and its jurisdiction is not only to fix tariff but laying down terms and conditions for providing services. Public interest would override the business interest of an individual or

section of Society and the Courts would be reluctant in granting protection to a citizen claiming fundamental right using natural resources which are public property, disregarding public interest. As pointed out earlier, the Preamble of the TRAI Act itself speaks of protection of interest of the consumers as also of service providers and for the promotion and orderly growth of telecom sector, and a level playing field would be required to be maintained by balancing the rights of the consumers and that of the broadcasters as held by us. We reiterate that section 11(2) is an enabling section and cannot be invalidated only on account of a possibility of its abuse. Where there is an abuse, what will be struck down is the abuse itself and not the provision.

46. It is contended that section 11(2) of the TRAI Act suffers from the vice of excessive delegation. Price fixation of TV channels under section 11(2) may require monitoring and periodic revision. Prices may be dynamic and may fluctuate depending on market forces and other factors. Price fixation demands considerable amount of expertise. It may require prompt action so as to ensure that the interests of the service providers and consumers are protected so that a level playing field is maintained. It is therefore imperative that an expert Regulatory body (TRAI in the present case), exercises this function and plays the role of a market regulator for the telecom sector in an effective manner. In **St. Johns Teachers Training Institute v. Regional Director, NCTE, (2003) 3 SCC 321,** the Supreme Court has held **:**

> The need for delegated legislation is that they are framed with care and minuteness when the statutory authority making the rule, after coming into force of the Act, is in a better position to adapt the Act to special circumstances. Delegated legislation permits utilisation of experience and consultation with interests affected by the practical

> operation of statutes. Rules and regulations made by reason of the specific power conferred by the statutes to make rules and regulations establish the pattern of conduct to be followed. Regulations are in aid of enforcement of the provisions of the statute. The process of legislation by departmental regulations saves time and is intended to deal with local variations and the power to legislate by statutory instrument in the form of rules and regulations is conferred by Parliament. The main justification for delegated legislation is that the legislature being overburdened and the needs of the modern-day society being complex, it cannot possibly foresee every administrative difficulty that may arise after the statute has begun to operate. Delegated legislation fills those needs. The regulations made under power conferred by the statute are supporting legislation and have the force and effect, if validly made, as an Act passed by the competent legislature. (See *Sukhdev Singh* v. *Bhagatram Sardar Singh Raghuvanshi*.)

47. In **Internet & Mobile Association of India Vs. Reserve Bank of India (2020) 10 SCC 274**, the Supreme Court has held:

> "150. Law is well settled that when RBI exercises the powers conferred upon it, both to frame a policy and to issue directions for its enforcement, such directives become supplemental to the Act itself…"

48. As indicated earlier, there are safeguards provided in the TRAI Act, in that, an Appellate Tribunal (TDSAT) is established to hear and dispose of Appeal against any direction, decision or order of the Authority under section 14-A(2) (barring Regulations which can be challenged only by filling appropriate proceedings before the High Court as TDSAT would have no jurisdiction to entertain such challenge as held by the three-Judge Bench of Supreme Court in **BSNL vs. TRAI**). Moreover, under section 11(4), the Authority is required to ensure transparency while exercising its powers and discharging its functions. The Authority, prior to the issuance of any Regulations/Tariff Orders publishes draft Regulations/Tariff Orders or

Consultation Papers and invites comments from all stakeholders and only after considering the comments and counter comments and applying its mind, issues the Regulations/Tariff Orders. Under section 37 of the TRAI Act, the Regulations that are framed by the Authority are required to be placed before the Parliament. It is the Petitioners' own case that the Regulations and Tariff Orders are intrinsically linked and are issued simultaneously. Under Regulation 7 of the principal 2017 Regulations, the broadcasters are required to publish, on its website, its reference interconnection offer in conformance with the Regulations and the Tariff Orders as notified. Tariff Order are therefore integral part of the Regulations and are interdependent for its implementation. The contention on behalf of the Petitioners that Section 11 suffers from the vice of excessive legislation has been repelled by the Delhi High Court in the case of **Star India Vs. TRAI** (supra). It has been held by the Supreme Court in **BSNL vs. TRAI** (supra) that the powers of TRAI to make Regulations under section 36 is legislative in nature and that the said power is wide and pervasive. Whether such Regulations impose 'reasonable restrictions' is a different issue altogether. The Supreme Court in **Star India vs. DIPP** has already held that the principal 2017 provisions are intra vires the TRAI Act. The Supreme Court has stressed that a restrictive meaning cannot be given to the words "regulation" or "regulate" as otherwise the very object of the TRAI Act would be stultified. It is held that no constricted meaning can be given to the provisions of the TRAI Act. It has been further held that the provisions of the TRAI Act have to be viewed in the light of protection of the rights of both, service providers and consumers. It has been held by the Supreme Court in **Union of India and anr v/s. Cynamide India Ltd. and anr, (1987) 2 SCC 720,** that price fixation is more a legislative activity than any other.

We are therefore unable to agree that section 11 (so far as it relates to broadcasting services) suffers from the vice of excessive delegation.

49. Once we have upheld the validity of section 11 (so far as it relates to broadcasting services) of the TRAI Act, there is no question of reading down the said provision.

50. In light of the above discussion, we find no merit in the contention of the Petitioners that section 11 (so far as it relates to broadcasting services) of the TRAI Act impinges their fundamental rights guaranteed under Articles 14, 19(1)(a), 19(1)(g), and 21 of the Constitution. The challenge to validity of section 11 of the TRAI Act, therefore, fails.

Challenge to the principal 2017 Regulations and principal 2017 Tariff Order

51. Regulation of broadcasting and cable TV services was entrusted to TRAI in the year 2004. The first Tariff Order for cable TV services was issued on 15 January 2004. The technology and ecosystem of the industry evolved from analogue in the year 2004 to ‘digital mode’ over a period of time. The quality of analogue transmission was poor. Considering the issues faced by the broadcasters and the inferior services being provided to consumers, it was in 2012 that TRAI issued mandate for implementation of Digital Addressable System (DAS) in various phases. Today all subscribers of T.V. channels receive signals in Digital Addressable Mode. It was the new tariff policy of TRAI which rescued the broadcasters from the receiving end to the paying end. Earlier the distributors or even the local cable

distributors used to collect payments from customers and used to accordingly pay the broadcasters, thus causing the broadcasters to be mostly dependent upon advertisement remuneration. However, the new regime was introduced by TRAI with an intent to simplify the complicated and intermingled relationship amongst MSO, DPO, LCO and broadcasters by providing them with transparent functioning and independent revenue streams. While the evolution of technology paved the way for digitization and addressability of cable services, it became a taxing in the hands of consumers as their out of hand cost increased considerably. It was observed that the tactical advantage was being taken by a few stakeholders at the cost of consumers by perverse pricing of bouquets. Hence, after initiating a comprehensive review of the then prevailing regulatory framework and with a view to implement Digital Addressable Systems (DAS), TRAI, after a consultation process, published 'a new regulatory framework' for digital addressable systems and accordingly notified the impugned principal 2017 Regulations and impugned principal 2017 Tariff Order.

52. The Petitioners contend that the impugned principal 2017 Regulations and impugned principal 2017 Tariff Order violate their fundamental rights under Article 14, 19(1)(a), 19(g) and 21 of the Constitution.

53. The provisions of the principal 2017 Regulations and principal 2017 Tariff Order were subject matter of challenge before the Madras High Court. The Division Bench of the Madras High Court comprising of Ld. Chief Justice Ms. Indira Banerjee (as Her Ladyship then was) and M. Sundar J

differed in their findings. M. Sundar J held that the impugned principal 2017 Regulations and impugned 2017 Tariff Order are bad in law and liable to be struck down as they were not in conformity with the TRAI Act. Differing from M. Sundar J, Ld. Chief Justice concluded that the impugned principal 2017 Regulations and impugned 2017 Tariff Order are intra vires the TRAI Act and not liable to be struck down. Ld. Chief Justice further held that the clause putting the cap of the 15% discount on the bouquets is arbitrary. In view of the divergent opinions, the matter was referred to the 3rd Judge, M. M. Sundresh J, who agreed with the view of Ld. Chief Justice. Aggrieved by the majority decision of the Madras High Court, an SLP was preferred before the Supreme Court. The Supreme Court rendered its judgment on 30 October 2018 authored by his Lordship Justice Nariman on behalf of the Bench which is reported in **Star India Private Ltd. vs. Departmental Industrial Policy and Promotion and Ors., (2019) 2 SCC 104** (**Star India vs. DIPP**). We may set out the relevant excerpts from the said judgment:

> "The present civil appeals raise a challenge to certain clauses of the Telecommunication (Broadcasting and Cable) Services Interconnection (Addressable Systems) Regulations, 2017 (hereinafter referred to as "the Regulations") notified on 3-3-2017 and the Telecommunication (Broadcasting and Cable) Services (Eighth) (Addressable Systems) Tariff Order, 2017 (hereinafter referred to as "the Tariff Order") dated 3-3-2017 made under the Telecom Regulatory Authority of India Act, 1997 (hereinafter referred to as "the TRAI Act"). Since Regulations made under the TRAI Act were under challenge, a writ petition was filed before the Madras High Court in which the main issues that arose before the Division Bench were as follows:
>
> 1.1. Whether the Telecom Regulatory Authority of India (hereinafter referred to as "TRAI") has the power to regulate only the "means of transmission", viz. the "carriage" aspect of broadcasting, and does not have the power to regulate the "content" of the broadcast (i.e. the channel and/or its constituent programmes)?

1.2. Whether the impugned clauses, in fact, and in effect, regulate the content of the broadcast (i.e. the channel and/or its constituent programmes)?

1.3. Whether the impugned clauses have a direct effect on the pricing and marketing of a television channel by the broadcaster and hence is an illegal interference with the content of the broadcast (i.e. the channel and/or its constituent programmes)?

2. The appellants have contended that the impugned clauses have the effect of regulating programmes and television channels, their pricing and their marketing and **manner of offering/bundling** in the following illustrative manner, which is beyond the scope of TRAI's jurisdiction of regulating "means of transmission":

2.1. TRAI has effectively fixed a uniform maximum retail price for each TV channel at INR 19/-;

2.2. TRAI has stipulated that a television channel, which is individually priced at more than INR 19/- cannot be included in a collection of television channels (commonly referred to as a "bouquet") and can only be offered on an individual/ à-la-carte /stand-alone basis;

2.3. TRAI has stipulated that the price of a bouquet of television channels shall not be less than 85% of the sum of à-la-carte prices of television channels comprised in the bouquet;

2.4. TRAI has stipulated that the sum of discount on television channels and the distribution fee paid by broadcasters to a distributor of television channels, cannot exceed 35% of the maximum retail price of the television channel;

2.5. Television channels cannot be priced differently for different distribution platforms;

2.6. Channels of one broadcaster cannot be offered by another broadcaster in their bouquet of television channels, even after obtaining due authorisation;

2.7. Promotional schemes (*i*) can only be offered on à-la-carte prices for offering television channels and not on bouquet prices, (*ii*) cannot exceed 90 days at a time, and (*iii*) can be offered only twice in a year;

2.8. High definition and standard definition channels cannot be in the same bouquet of television channels;

2.9. Pay channels and free to air channels cannot be in the same bouquet.

25. In the judgment of Sundar, J., in the Division Bench of the Madras High Court, a useful table is set out which not only states the

provisions that have been challenged, but the specific ground on which they have been challenged. We, therefore, reproduce this table in our judgment: [Star India (P) Ltd. case2, SCC OnLine Mad para 6]

"Provisions of the Interconnection regulation which regulate content:

Sl. No.	Provision	Ground
1	6(1) All channels (pay channels and free-to-air channels) to be offered on à-la-carte basis.	Impinges upon broadcaster's ability to package a TV channel. No such restriction on broadcaster under the Copyright Act.
2	Second proviso to 6(1) — Bouquet of pay channels shall not have free-to-air channels. — HD and SD variant of same channel cannot be in same bouquet	Impinges upon broadcaster's ability to package a TV channel. No such restriction on broadcaster under the Copyright Act.
3	Proviso to 7(2) - Bundling of third party channels prohibited	Impinges upon broadcaster's ability to package a TV channel. No such restriction on broadcaster under the Copyright Act.
4	7(4) — Broadcaster can offer discounts to distributor not exceeding 15% of MRP.	Directly regulates the pricing of a TV channel, thereby also regulating pricing of individual programmes.
5	First proviso to 7(4) — Sum of discount under 7(4) and distribution fee under 7(3) shall not exceed 35% of MRP.	Directly regulates the pricing of a TV channel, thereby also regulating pricing of individual programmes.
6	10(3) r/w 6(1) — Mandatory to enter into agreement with DPO on an à-la-carte basis for pay channels.	Impinges upon broadcaster's freedom to offer pay channels only as a part of bouquet and not as à la carte. No such restriction on broadcaster under the Copyright Act.
7	11(2) — Deemed extension of geographical territory.	Directly impinges the broadcaster's right under 19(2) to designate the geographical

		territory of exploitation.

Provisions of the Tariff Order which regulate content:

Sl. No.	Provision	Ground
1	3(1) — All channels to be offered on à la carte basis.	Impinges upon broadcaster's ability to package a TV channel. No such restriction on broadcaster under the Copyright Act.
2	3(2)(b) — Declaration of MRP of à la carte channel.	Impinges upon broadcaster's freedom to offer pay channels only as a part of bouquet and not as à la carte. No such restriction on broadcaster under the Copyright Act.
3	Second proviso to 3(2)(b) — MRP of all pay channels to be uniform across distribution platforms.	Under Section 33-A read with Rule 56 of the Copyright Rules, 2013, broadcaster has the right to decide separate MRP for different category of audience.
4	First proviso to 3(3) — Bundling of third-party channels prohibited.	Impinges upon broadcaster's ability to package a TV channel. For example, third-party channels cannot be part of the same bouquet. No such restriction on broadcaster under the Copyright Act.
5	Second proviso to 3(3) — MRP of pay channel in bouquet not to exceed INR 19	Directly regulates the pricing of a TV channel, thereby also regulating pricing of individual programmes.
6	Third proviso to 3(3) — Bouquet price shall not be less than 85% of the sum of à la carte prices of individual channels in the bouquets	Directly regulates the pricing of a TV channel, thereby also regulating pricing of individual programmes.
7	Fourth proviso to 3(3) — MRP of all bouquets to be uniform across distribution platforms.	Under Rule 56 of the Copyright Rules, 2013, broadcaster has the right to decide separate MRP for different category of audience.

8	Fifth proviso to 3(3) — Bouquet of pay channels shall not have free-to-air channels.	Impinges upon broadcaster's ability to package a TV channel. No such restriction on broadcaster under the Copyright Act.
9	Sixth proviso to 3(3) — HD and SD variant of same channel cannot be in same bouquets	Impinges upon broadcaster's ability to package a TV channel. No such restriction on broadcaster under the Copyright Act.
10	3(4) — Restriction on promotion of bouquets, restriction on time, restriction on frequency	All these restrictions impinge upon broadcaster's ability to commercially monetise his content.
11	4(2) — Distributor to offer all channels on à la carte basis	Indirectly impinges upon the broadcaster's right to offer his channels to the customers only as a bouquet and not as à-la-carte."

54. Alluding to the judgment of the Supreme Court in COAI vs. TRAI (supra), the Supreme Court further said:

> 29**.** What is important to note from this judgment is that the balance that was sought to be maintained between protecting the interest of service providers and consumers was destroyed by the impugned Regulations. What is important from our point of view, however, is that under Section 36 of the TRAI Act, the Authority is empowered to carry out the purposes of the said Act as can be discerned from the Preamble to the Act. What is clear from the amended Preamble to the Act is that the interests of service providers and consumers are of paramount importance, both of which have a role to play when Regulations are framed under Section 36.
>
> 36. We are of the view that the provisions of the TRAI Act have to be viewed in the light of protection of the interests of both service providers and consumers. This being so, it is clear that no constricted meaning can be given to the provisions of this Act. It is important to remember that under Section 11(1)(*a*)(*iv*), one of the functions of the

Authority, though recommendatory, is to facilitate competition and promote efficiency in the operation of telecommunication services (which includes broadcasting services) so as to facilitate growth in such services. What is also clear from Section 11(1)(*b*), is that terms and conditions of interconnectivity between different service providers have to be fixed, which necessarily includes terms that relate not only to carriage simpliciter as submitted by Dr Singhvi, but to all terms and conditions of interconnectivity between broadcaster, MSO, cable TV operator and the ultimate consumer, so as to ensure that the object of the Act is carried out, namely, that both broadcasters and consumers get a fair deal. Towards this end, Section 11(2) makes it clear that the Authority may, from time to time, notify the rates at which telecommunication services, including broadcasting services, within India and outside India, shall be provided under this Act. Dr Singhvi argued that the literal language of this sub-section, which would undoubtedly bring in rates laid down in the Tariff Order, would have to be constricted by the language of the last part of the provision viz. "including the rates at which messages shall be transmitted to any country outside India". We are afraid that this is against the basic canons of construction, as the expression "including" would only refer to a part of what precedes the expression and cannot therefore constrict the part that has gone before. **The plain literal language of Section 11(2) makes it clear that rates at which broadcasting services are offered within and outside India can be fixed by TRAI. It is clear therefore that when rates are fixed after several rounds of consultations between various service providers and consumers, looking to the interest of each, it is impossible to say that any broadcaster's rights have been impinged upon. Shri Dwivedi is absolutely right in saying that at no stage is content of a TV channel sought to be regulated, and that pricing relating to TV channels laid down in the Regulation and Tariff Order is a balancing act between the rights of broadcasters and the interests of consumers, which we may hasten to add has not been impugned on the ground that any right or fundamental right is violated, but only on the ground that the Regulations as well as the Tariff Order are outside the "jurisdiction" of TRAI. Dr Singhvi's argument on this score must therefore fail.**

45. It can thus be seen that both the Regulations as well as the Tariff Order have been the subject-matter of extensive discussions between TRAI, all stake-holders and consumers, pursuant to which most of the

suggestions given by the broadcasters themselves have been accepted and incorporated into the Regulations and the Tariff Order. The Explanatory Memorandum shows that the focus of the Authority has always been the provision of a level playing field to both the broadcaster and the subscriber. For example, when high discounts are offered for bouquets that are offered by the broadcasters, the effect is that subscribers are forced to take bouquets only, as the à-la-carte rates of the pay channels that are found in these bouquets are much higher. This results in perverse pricing of bouquets vis-à-vis individual pay channels. In the process, the public ends up paying for unwanted channels, thereby blocking newer and better TV channels and restricting subscribers' choice. It is for this reason that discounts are capped. While doing so, however, full flexibility has been given to broadcasters to declare the prices of their pay channels on an à-la-carte basis.

46. The Authority has shown that it does not encroach upon the freedom of broadcasters to arrange their business as they choose. Also, when such discounts are limited, a subscriber can then be free to choose à-la-carte channels of his choice. Thus, the flexibility of formation of a bouquet i.e. the choice of channels to be included in the bouquet together with the content of such channels, is not touched by the Authority. It is only efforts aimed at thwarting competition and reducing à-la-carte choice that are, therefore, being interfered with. Equally, when a ceiling of INR 19 on the maximum retail price of pay channels which can be provided as a part of a bouquet is fixed by the Authority, the Authority's focus is to be fair to both the subscribers as well as the broadcasters. INR 19 is an improvement over the erstwhile ceiling of INR 15.12 fixed by the earlier Regulation which nobody has challenged. To maintain the balance between the subscribers' interests and broadcasters' interests, again the Authority makes it clear that broadcasters have complete freedom to price channels which do not form part of any bouquet and are offered only on an à-la-carte basis. As market regulator, the Authority states that the impugned Regulations and Tariff Order are not written in stone but will be reviewed keeping a watch on the developments in the market. We are, therefore, clearly of the view that the Regulations and the Tariff Order have been made keeping the interests of the stakeholders and the consumers in mind and are intra vires the regulation power contained in Section 36 of the TRAI Act. Consequently, we agree with the conclusion of the learned Chief Justice and the third learned Judge

of the Madras High Court that these writ petitions deserve to be dismissed.

74. The picture that, therefore, emerges is that copyright is meant to protect the proprietary interest of the owner, which in the present case is a broadcaster, in the “work” i.e. the original work, its broadcast and/or its re-broadcast by him. The interest of the end user or consumer is not the focus of the Copyright Act at all. On the other hand, the TRAI Act has to focus on broadcasting services provided by the broadcaster that impact the ultimate consumer. The focus, therefore, of TRAI is that of a regulatory authority, which looks to the interest of both broadcaster and subscriber so as to provide a level playing field for both in which regulations can be laid down which affect the manner and carriage of broadcast to the ultimate consumers. Once the relative scope of both the enactments is understood as above, there can be no difficulty in stating that the two Acts operate in different fields. We do not find on a reading of the impugned Regulations as well as the Tariff Order made that TRAI has transgressed into copyright land. This is for the reason, as has been stated hereinabove, that regulations which allegedly impact packaging TV channels, pricing of TV channels and the broadcaster’s right to arrange his business as he pleases, all have to be viewed with the lens of a regulatory authority, which is to provide a level playing field between broadcaster and subscriber. We have also noted how the broadcaster is free to provide whatever content he chooses for the TV channels that he chooses to transmit to the ultimate consumer. We have also noted how the broadcaster is free to arrange pricing of his TV channels so long as they are non-discriminatory and do not otherwise have the effect of unreasonably restricting the choice of a subscriber to choose bouquet or à-la-carte channels as has been held hereinabove. We are satisfied that the impugned Regulations and Tariff Order have been passed by a regulatory authority after applying its mind to the objections of the various stakeholders involved after which the Regulations and Tariff Order have been laid down which have, by and large, been initially acceded to by the broadcasters themselves. In this view of the matter, we are of the view that the Copyright Act will operate within its own sphere, the broadcaster being given full flexibility to either individually or in the form of a society charge royalty or compensation for the three kinds of copyright mentioned hereinabove. TRAI, while exercising its regulatory functions under the TRAI Act, does not at all, in substance, impinge upon any of

these rights, but merely acts, as has been stated hereinabove, as a regulator, in the public interest, of broadcasting services provided by broadcasters and availed of by the ultimate consumer.

76**.** Since the Telegraph Authority, acting under the Telegraph Act and the Wireless Telegraphy Act, is required to act in public interest, the jurisdiction of the said Authority is left untrammelled by the provisions of the TRAI Act. It can thus be seen that TRAI and the Telegraph Authority both act in public interest. The TRAI Act, the Telegraph Act and the Wireless Telegraphy Act, being statutes in pari materia, form a Code, insofar as wireless telegraphy and broadcasting is concerned.

77**.** We are, therefore, clearly of the view that if in exercise of its regulatory power under the TRAI Act, TRAI were to impinge upon compensation payable for copyright, the best way in which both statutes can be harmonised is to state that, the TRAI Act, being a statute conceived in public interest, which is to serve the interest of both broadcasters and consumers, must prevail, to the extent of any inconsistency, over the Copyright Act which is an Act which protects the property rights of broadcasters. We are, therefore, of the view that, to the extent royalties/compensation payable to the broadcasters under the Copyright Act are regulated in public interest by TRAI under the TRAI Act, the former shall give way to the latter. As there is no merit in these appeals, the same are, therefore, dismissed.

55. The findings of the Supreme Court in the aforesaid judgment of **Star India vs. DIPP** while dealing the challenge to that impugned principal 2017 Regulations and impugned principal 2017 Tariff Order can be culled out as under:

i. Under Section 36 of the TRAI Act, the Authority is empowered to carry out the purposes of the said Act as can be discerned from the Preamble to the Act. What is clear from the amended Preamble to the Act is that the interests of service providers and consumers are of paramount importance, both of which have a role to play when Regulations are framed under Section 36.

ii. The TRAI Act has to be viewed in light of the protection of the interests of both service providers and consumers. No constricted meaning can be given to the provisions of TRAI Act.

iii. When rates are fixed after several rounds of consultations between various service providers and consumers, looking to the interest of each, it is impossible to say that any broadcaster's rights have been impinged upon.

iv. At no stage is content of a TV channel sought to be regulated.

v. Pricing relating to TV channels laid down in the Regulation and Tariff Order is a balancing act between the rights of broadcasters and the interests of consumers.

vi. Both the Regulations as well as the Tariff Order have been the subject-matter of extensive discussions between TRAI, all stake-holders and consumers, pursuant to which most of the suggestions given by the broadcasters themselves have been accepted and incorporated into the Regulations and the Tariff Order.

vii. The Explanatory Memorandum shows that the focus of the Authority has always been the provision of a level playing field to both the broadcaster and the subscriber.

viii. When high discounts are offered for bouquets that are offered by the broadcasters, the effect is that subscribers are forced to take bouquets only, as the à-la-carte rates of the pay channels that are found in these bouquets are much higher. This results in perverse pricing of bouquets vis-à-vis individual pay channels and in the process, the public ends up paying for unwanted channels, thereby blocking newer and better TV channels and restricting subscribers' choice and it is for this reason that discounts are capped. While doing so, however, full flexibility has been given to broadcasters to declare the prices of their pay channels on an à-la-carte basis.

ix. The Authority has shown that it does not encroach upon the freedom of broadcasters to arrange their business as they choose. Also, when such discounts are limited, a subscriber can then be free to choose à-la-carte channels of his choice. Thus, the flexibility of formation of a bouquet i.e. the choice of channels to be included in the bouquet together with the content of such channels, is not touched by the Authority. It is only efforts aimed at thwarting competition and reducing à-la-carte choice that are, therefore, being interfered with.

x. When a ceiling of INR 19 on the maximum retail price of pay channels which can be provided as a part of a bouquet is fixed by the

Authority, the Authority's focus is to be fair to both the subscribers as well as the broadcasters. INR 19 is an improvement over the erstwhile ceiling of INR 15.12 fixed by the earlier Regulation which nobody has challenged. To maintain the balance between the subscribers' interests and broadcasters' interests, again the Authority makes it clear that broadcasters have complete freedom to price channels which do not form part of any bouquet and are offered only on an à-la-carte basis. As market regulator, the Authority states that the impugned Regulations and Tariff Order are not written in stone but will be reviewed keeping a watch on the developments in the market.

xi. The Regulations and the Tariff Order have been made keeping the interests of the stakeholders and the consumers in mind and are intra vires the regulation power contained in Section 36 of the TRAI Act.

xii. The broadcaster is free to provide whatever content he chooses for the TV channels that he chooses to transmit to the ultimate consumer. The broadcaster is free to arrange pricing of his TV channels so long as they are non-discriminatory and do not otherwise have the effect of unreasonably restricting the choice of a subscriber to choose bouquet or à-la-carte channels.

xiii. The Supreme Court was satisfied that the impugned Regulations and Tariff Order have been passed by a regulatory authority after applying its mind to the objections of the various stakeholders involved after which the Regulations and Tariff Order have been laid down which have, by and large, been initially acceded to by the broadcasters themselves.

xiv. TRAI, while exercising its regulatory functions under the TRAI Act, does not at all, in substance, impinge upon any of these rights, but merely acts as a regulator, in the public interest, of broadcasting services provided by broadcasters and availed of by the ultimate consumer.

xv. The TRAI Act, being a statute conceived in public interest, which is to serve the interest of both broadcasters and consumers, must prevail, to the extent of any inconsistency, over the Copyright Act which is an Act which protects the property rights of broadcasters.

(emphasis supplied)

56. In our view, the aforesaid judgment of the Supreme Court says it all and to a large extent forecloses the case of the Petitioners except the ground of violation of fundamental right of free speech and expression under Article 19(1)(a). In light of aforesaid findings of the Supreme Court extracted above, it impossible to accept the contentions on behalf of the Petitioners that the stipulations in the impugned principal 2017 Regulations and impugned 2017 Tariff Order are unreasonable or manifestly arbitrary and that the Petitioners' fundamental rights under Article 14 and 19(1)(g) and 21 of the Constitution are infringed. The stipulations prescribed are reasonable restrictions within the meaning of Article 19(6) of the Constitution. It is required to be noted that the Petitioners have not placed on record their Financial Statements to demonstrate in what manner their revenues have been impacted/affected after the impugned 2017 provisions were implemented. The Petitioners are still very much in business notwithstanding implementation of the impugned 2017 provisions.

57. Insofar as the contention that the impugned principal 2017 Regulations and impugned principal 2017 Tariff Order infringe the Petitioners' fundamental rights under Article 19(1)(a) on account of drop in circulations thereby narrowing the dissemination of information is concerned, the submissions urged before us are on the same lines as are set out in the paragraph 8(i) to (vii) of this judgment while challenging the constitutional validity of Section 11 of the TRAI Act. The judgments on which reliance are placed are the very same judgments. Our attention is invited to the averments in WPL/124/2020 wherein it is asserted that the channels have suffered a precipitous drop in viewership/circulation after the impugned principal 2017 Regulations and impugned principal 2017 Tariff Order have come into force post the judgment of Supreme Court in Star

India vs DIPP delivered on 30th October, 2018. Referring the Table in paragraph 36 in the said Writ Petition, it is contended that the data set out in the said Table demonstrates that there is a direct effect of impugned 2017 provisions on the circulation/viewership of the channels.

58. We have dealt with the aforesaid contention of infringement of fundamental rights of the Petitioners under Article 19(a) of the Constitution on account of drop in circulation while dealing with the challenge to constitutional validity of section 11 of the TRAI Act in the earlier part this judgment. We have interalia held that in balancing the rights of the broadcasters with the rights of public, the fact that there may be some curtailment of the rights of the broadcasters and/or drop in the circulation/viewership to some degree would not be seen as an infringement of the fundamental rights of the broadcasters so long as the stipulations are not unreasonable and are in the interest of public. The drop in the circulation as claimed by the Petitioners on account of the stipulations prescribed including the stipulations on bundling of channels/formation of bouquets by the impugned principal 2017 Regulations and impugned principal 2017 Tariff Order are, in our view, within the zone of reasonableness and the stipulations prescribed are part of the regulatory exercise by the Authority of balancing the interest of the consumers with that of the broadcasters and to achieve a level playing field. The stipulations in respect of the bundling of channels/formation of bouquets was a subject matter of the challenge before the Supreme Court in **Star India vs DIPP** on the ground that it was ultra vires the TRAI Act, which challenge has been repelled by the Supreme Court.

59. For the reasons mentioned above and the reasons mentioned in the earlier part of this judgment while dealing challenge to section 11 of the TRAI Act, we are unable to accept the contentions of the Petitioners that their fundamental rights under Article 19(1)(a) of the Constitution are infringed by the impugned principal 2017 Regulations and principal 2017 Tariff Order. In our view, the stipulations prescribed by the impugned principal 2017 Regulations and impugned principal 2017 Tariff Order are reasonable restrictions within the meaning of Article 19(2) of the Constitution. The Authority has maintained a level playing field between the broadcasters and consumers, as held by the Supreme Court in **Star India vs. DIPP** while dealing with the challenge to the provisions of the impugned principal 2017 Regulations and impugned Principal 2017 Tariff Order.

60. We note that the aforesaid judgment of the Supreme Court in **Star India vs. DIPP** was delivered on 30 October 2018. We find that it is only when the impugned 2020 Regulations and impugned 2020 Tariff Order were issued and were to come into force on 1 March 2020, taking a cue from one sentence from paragraph 36 of the said judgment viz.- *"…pricing relating to TV channels laid down in the Regulation and Tariff Order is a balancing act between the rights of broadcasters and the interests of consumers, which we may hasten to add has not been impugned on the ground that any right or fundamental right is violated, but only on the ground that the Regulations as well as the Tariff Order are outside the "jurisdiction" of TRAI* - that the Petitioners, while challenging the impugned 2020 Amendments, have now also belatedly and as an afterthought laid a challenge to the very 2017 principal Regulations and 2017 principal Tariff Order, this time, on the ground that it infringes their fundamental rights under Article 19(1)(a), 19(1)(g), 14 and 21 of the Constitution. All

broadcasters including the Petitioners have since acted upon the impugned principal 2017 provisions (except to the extent of stipulation of 15% discount on bouquets which has been held to be arbitrary and unenforceable by the Madras High Court and which finding has not been interfered by the Supreme Court). In the light of the findings of the Supreme Court in **Star India vs. DIPP**, barring the issue of violation of the Petitioners fundamental rights under Article 19(1)(a) on account of drop in circulation thereby narrowing the dissemination of information, the Petitioners have advisedly made little submissions on the challenge to the principal 2017 provisions and the focus of the arguments are essentially on the challenge to the 2020 Amendments with which we shall presently deal with.

61. In the circumstances, it is not possible to accept the contention of the Petitioners that their fundamental rights under Article 19(1)(a) are infringed by the impugned principal 2017 Regulations and impugned Principal 2017 Tariff Order. We have discussed the parameters of judicial review while dealing with the challenge to the 2020 Amendments and have rejected the contention of the Petitioners that Tariff Order is only an administrative order and not “law” within the meaning of Articles 19(2) and 19(6) of the Constitution. We find that though in a couple of written submissions on behalf of the Petitioners it is stated that their fundamental rights are also infringed by the clauses in the principal 2017 Regulations (interconnection) relating to restrictions on HD & SD channels and pay and free-to-air channels being part of the same bouquet, no oral submissions on the same are advanced before us and have therefore not been dealt with even in the written submissions on behalf of the Respondents. We find that the said clauses in the principal 2017 provisions were subject matter of challenge before the Madras High Court and the Supreme Court in **Star India vs.**

DIPP and the said challenge has been repelled. Even otherwise, for the reasons mentioned, we are steadfast in our view that the aforesaid clauses also are reasonable and do not impinge upon any of the fundamental rights of the Petitioners.

62. In light of the aforesaid discussions, the challenge to the validity of the principal 2017 Regulations and principal 2017 Tariff Order on the ground that they violate the Petitioners' fundamental rights under Article 14, 19(1)(a), 19(1)(g) and 21 of the Constitution, also fails.

Challenge to the 2020 Regulations Amendment and 2020 Tariff Order Amendment:

63. Post the decision of the Supreme Court in **Star India vs. DIPP** on 30 October 2018 (which laid a challenge to the principal 2017 Regulations and principal 2017 Tariff Order and which were not implemented on account of the stay which operated), the Authority felt the need to review the situation. On 16 August 2019, TRAI issued Consultation Paper on Tariff related issues for broadcasting and cable services, and on 25 September 2019 issued Consultation Paper on issues related to Principal 2017 Regulation (Interconnection) inviting written comments from the stakeholders. Pursuant to the consultative process, on 01-01-2020 TRAI issued the 2020 Regulations Amendments and 2020 Tariff Order Amendment which were to come into force on 1 March 2020. The Petitioners then approached this Court by filing the above Petitions sometime in February, 2020.

64. The Petitioners in all the Petitions have impugned the 2020 Regulations Amendments and 2020 Tariff Order Amendment (impugned

2020 Amendments) on the ground that they infringe their fundament rights under Article 19(1)(a), 19(1)(g), 14 and 21 of the Constitution.

65. We note that after the decision of the Supreme Court in **Star India vs. DIPP** on 30 October 2018 whereby the challenge to the provisions principal 2017 Regulations and principal 2017 Tariff Order failed, the Petitioners and other broadcasters have acted upon the same (except to the extent of stipulation of 15% discounts on bouquets which has been held to be arbitrary and unenforceable by the Madras High Court and not interfered by the Supreme Court in **MIB Vs CAB**). It is only when the impugned 2020 Amendments were to be rolled out that the Petitioners have filed the present Writ Petitions in February, 2020, seeking not only challenge the validity of the 2020 Amendments, but also validity of Section 11 as well as the principal 2017 provisions. The Petitioners therefore are primarily aggrieved by the 2020 Amendments. Though the prayers in the Petitions lay a challenge to the 2020 Regulations Amendments and 2020 Tariff Order Amendment, the arguments canvassed before us on behalf of the Petitioners are confined to Clause 3 of impugned 2020 Tariff Order Amendment (which amends sub-clause (3) of clause 3 of the principal 2017 Tariff Order). It is the Petitioners' own case that the 2020 Tariff Order Amendment and the 2020 Regulation Amendment are intrinsically connected. The Petitioners contend that Clause 3 of the 2020 Tariff Order Amendment violates their fundamental rights under Article 14, 19(1)(a), 19(1)(g) and 21 of the Constitution.

66. To get the drift of clause 3 of the impugned 2020 Tariff Order Amendment (which amends sub-clause (3) of Clause 3 of the Principal 2017 Tariff Order), it would be firstly necessary to set out the original clause

3 of the principal 2017 Tariff Order. Clause 3 of the principal 2017 Tariff Order reads as follows:

> "*3. Manner of offering of channels by broadcasters - (1) Every broadcaster shall offer all its channels on à-la-carte basis to all distributors of television channels.*
>
> *(2) Every broadcaster shall declare - (a) the nature of each of its channel either as 'free-to-air' or 'pay'; and*
>
> *(b) the maximum retail price, per month, payable by a subscriber for each of its pay channel offered on à-la-carte basis:*
>
> *Provided that the maximum retail price of a pay channel shall be more than 'zero':*
>
> *Provided further that the maximum retail price of a channel shall be uniform for all distribution platforms.*
>
> *(3) It shall be permissible for a broadcaster to offer its pay channels in the form of bouquet(s) and declare the maximum retail price(s), per month, of such bouquet(s) payable by a subscriber:*
>
> *Provided that, while making a bouquet of pay channels, it shall be permissible for a broadcaster to combine pay channels of its subsidiary company or holding company or subsidiary company of the holding company, which has obtained, in its name, the downlinking permission for its television channels, from the Central Government, after written authorization by them, and declare maximum retail price, per month, for such bouquet of pay channels payable by a subscriber:*
>
> *Provided that such bouquet shall not contain any pay channel for which maximum retail price per month is more than* ***rupees nineteen****:*
>
> *Provided further that the maximum retail price per month of such bouquet of pay channels shall not be less than* ***eighty five percent*** *of the sum of maximum retail prices per month of the à-la-carte pay channels forming part of that bouquet:*
>
> *Provided further that the maximum retail price per month of such bouquet of pay channels shall be uniform for all distribution platforms:*
>
> *Provided further that such bouquet shall not contain any free-to-air channel:*

Provided also that such bouquet shall not contain both HD and SD variants of the same channel.

Explanation: For the purpose of this Order, the definition of "subsidiary company" and "holding company" shall be the same as assigned to them in the Companies Act, 2013 (18 of 2013).

(4) It shall be permissible for a broadcaster to offer promotional schems on maximum retail price (s) per month of its à-la-carte pay channel (s)

Provided that period of any such scheme shall not exceed ninety days at a time;

Provided further that the frequency of any such scheme by the broadcaster shall not exceed twice in a calendar year;

Provided further that the price(s) of à-la-carte pay channel(s) offered under any such promotional scheme shall be considered a maximum retail price(s) during the period of such promotional scheme;

Provided also that the provisions of Regulations and Tariff Orders notified by the Authority shall be applicable on the price(s) of à-la-carte pay channel(s) offered under any such promotional scheme.

(5) Every broadcaster, before making any change in the nature of channel or in the maximum retail price of a pay channel or in the maximum retail price of a bouquet of pay channels or in the composition of a bouquet of pay channels, as the case may be, shall follow the provisions of all the applicable Regulations and orders notified by the Authority including but not limited to the publication of Reference Interconnection Offer. ."

(emphasis supplied)

67. Clause 3 of the impugned 2020 Tariff Order which amends the aforementioned sub-clause (3) of clause 3 of the principal 2017 Tariff Order reads as follows:

"*3. In clause 3 of the principal Tariff Order, in sub-clause (3) -*
(a) in the second proviso, for the words ***"rupees nineteen"*** *the words* ***"rupees twelve"*** *shall be substituted;*
(b) for the third proviso, the following proviso shall be ***substituted****, namely -*

"*Provided further that maximum retail price per month of such bouquet and maximum retail price per month of à-la-carte pay channels forming part of that bouquet shall be subject to following conditions, namely:-*

1. *the sum of maximum retail prices per month of the à-la-carte pay channels forming part of a bouquet shall in no case exceed* ***one and half times*** *of the maximum retail price per month of such bouquet; and*
2. *the maximum retail price per month of any à-la-carte pay channel, forming part of such a bouquet, shall in no case exceed* ***three times*** *the average maximum retail price per month of a pay channel of that bouquet;*

Explanation: *For the purpose of this order if the maximum retail price of a bouquet is Rs.'X' per month per subscriber and there are 'Y' number of pay channels in that bouquet, then the average maximum retail price per month of a pay channel of the bouquet shall be Rs. 'X' divided by 'Y'.*

(c) after the fifth proviso, the following provisos shall be inserted, namely: -

"*Provided further that maximum retail price, per month, of a pay channel shall, in no case, exceed the maximum retail price, per month, of the bouquet containing that pay channel;*

Provided further that the number of bouquets of pay channels being offered by such broadcaster shall not be more than the number of à-la-carte pay channels offered by such broadcaster;

Provided further that on the request of a broadcaster, the Authority may, in view of larger consumer interests, permit the broadcaster to offer number of bouquets more than the number of à-la-carte channels being offered by such broadcaster

(emphasis supplied)

68. The two conditions viz. 1 and 2 in the proviso to sub-clause (b) of Clause 3 of the impugned 2020 Tariff Order Amendment are what the parties describe as the "**twin conditions**". An illustration would be useful for a better understanding of the "**twin conditions":**

1. If the sum total of the MRPs of all channels forming part of a bouquet is Rs. 45, the MRP of the bouquet cannot be less than Rs. 30/- (Aggregate Test - 1st twin condition).

2. If there are 15 channels forming part of the said bouquet, the average MRP for a single channel will be Rs. 3 (Rs. 45/15). Thus, the MRP of any channel cannot be more than Rs. 9 (ie. 3 X 3) for it to continue to be part of the bouquet (Average Test- 2nd twin condition).

69. The Petitioners assail the underlined portion of Clause 3 of the 2020 Tariff Order Amendment reproduced above, and the arguments advanced before us are on the following 4 Issues:

Issue I If the à-la-carte price of a channel is more than Rs.12/- (which was earlier Rs 19/-), the channel could not be included in a bouquet;

Issue II The sum of maximum retail prices per month of the à-la-carte channels forming part of bouquet shall in no case exceed one and half times of the maximum retail price per month of such bouquet (i.e "**Aggregate Test" - 2nd twin condition** - in mathematical terms, this means bouquets can be priced at a maximum of 33.33% discount qua the sum of à-la-carte prices of channels in the bouquet);

Issue III The maximum retail price per month of any one à-la-carte pay channel forming part of such a bouquet, shall in no case exceed three times the average maximum price per month of a pay channel of that bouquet (i.e "**Average Test**" - **2nd twin condition**).

Issue IV The number of bouquets of pay channels being offered by a broadcaster shall not be more than the number of à-la-carte pay channels offered by such broadcaster.

Issues II and III are 'the twin conditions'.

70. We may now note the submissions made by learned Senior Counsel/Counsel on behalf of the Petitioners:

(i) While Regulations may be delegated legislation, Tariff Order is only an administrative order and does not enjoy protection under the law like a delegated legislation.

(ii) The restrictions under Articles 19(2) and 19(6) of the Constitution can be imposed only under an existing "law" or making of any "law". Inasmuch as the impugned Tariff Order is only an administrative order, it is not "law" within the meaning of Articles 19(2) and 19(6) of the Constitution of India. Hence no restrictions can be imposed by Tariff Order which affect the fundamental rights of the Petitioners under Article 19(1)(a) and 19(1)(g). Reliance is placed on the judgments of Supreme Court in i) **State of Madhya Pradesh and Another vs. Thakur Bharat Singh, AIR 1967 SC 1170** ii) **State of Bihar vs. Project Uchcha Vidya Sikshak Sangh and Ors. (2006) 2 SCC 545**; **and iii) Union of India vs. Naveen Jindal, 2004 (2) SCC 410.**

(iii) The impugned 2020 Amendments violate the Petitioners' fundamental rights under Articles 14, 19(1)(a) & 19(1)(g) and 21 of the Constitution.

(iv) The reduction in the price cap on maximum retail price of pay channels from Rs.19/- to Rs.12/- for being eligible for inclusion in broadcasters' bouquets is manifestly arbitrary and unreasonable.

(v) The introduction of 1.5x (Aggregate Test) and 3x (Average Test) price stipulation (twin conditions) in respect of pricing of à-la-carte pay channels of bouquet comprising such channels are manifestly arbitrary and unreasonable.

(vi) The introduction of limit on the number of bouquets offered is manifestly arbitrary and unreasonable.

(vii) The price cap and the twin conditions were not proposed in the consultative papers and no reasons were provided for introducing the said stipulation. The twin conditions have, through the back-door, reintroduced the cap on discounts on bouquets and restricted such discounts to 33.33%. The twin conditions existed in the pre-2017 regime and only existed at the wholesale level. There is no rationale for introducing the twin condition.

(viii) The twin conditions were reintroduced despite the fact that it was abandoned by 2017 Regulations. The twin conditions were introduced despite there being no change in the market conditions and ignoring the fact that overwhelming preference by consumers is for bouquets over à-la-carte channels. The Explanatory Memorandum in paragraph 38.8(a) itself states that the subscription of most popular channels on à-la-carte basis is less than 10% compared to bouquet-based subscription.

(ix) The reduction in price cap on MRP of pay channels for inclusion in bouquet from Rs.19/- to Rs.12/- was done without any study/empirical exercise. No explanation or reasons are given for arriving at cap of Rs.12/-. The price cap for inclusion in bouquets from Rs.19/- to Rs.12/- is a reduction of about 37% and it is a regressive step without considering the market inflation. There is no rationale for reducing the price cap from Rs.19 to Rs.12.

(x) The Supreme Court noted in **Star India V/s DIPP** that the price of Rs. 19/- was an enhancement of earlier price of Rs. 15.12/- and that price was not objected by any of the party. The Supreme Court therefore did not examine the issue whether price of Rs.19 was reasonable or not. In the present case, by the impugned principal 2017 Regulations and impugned principal 2017 Tariff Order, the price of Rs.15.12 in 2015 was increased to a cap of Rs.19/- (inter alia taking into account content, inflation and the distribution fee) has now been reduced to Rs.12/- without any basis whatsoever and without allowing inflationary pressures and cost escalation. Rs. 12/- cap is based on suggestion of only 5 out of the 309 stakeholders.

(xi) In **Star India Vs. DIPP**, the Madras High Court has declared that cap of 15% on the discount on MRP of bouquet proposed by TRAI is arbitrary and was stuck down. On this specific issue TRAI preferred an Appeal to the Supreme Court by way of an SLP challenging the decision of the Madras High Court dated 23.05.2018 after the judgment of the Supreme Court in **Star India Vs. DIPP**. However, the said SLP/Appeal filed by the TRAI

was dismissed as withdrawn, thereby making caps on discounts unenforceable and permitting broadcasters to give such discounts on their bouquets.

(xii) The impugned 2020 Amendments are a product of premature and hasty exercise. The Explanatory Memorandum of the principal 2017 Tariff Order stated that the Authority will keep watch on the developments in the market on account of new regulating regime for a period of 2 years before undertaking any review. However, instead of waiting for 2 years to lapse since the implementation/enforcement of the new regulatory regime of 2017 (i.e. in April, 2019) before rolling out any new regime, the impugned 2020 Amendments were proposed. Hence, there was legitimate expectation that only after a passage of 2 years would any change be brought in the 2017 regime.

(xiii) There were a total 309 comments and counter comments to the Consultation Paper dated 16.08.2019 and total 31 comments and counter comments to the Consultation Paper dated 25.09.2019. Such mechanical publications of comments and counter comments is not in consonance with the judgment of the Supreme Court in **COAI vs. TRAI, (2016) 7 SCC 703.**

(xiv) TRAI has repeatedly sought to cast advertisement revenue in a negative light and has contended that the pursuit of such revenue has resulted in the purported bouquets mischief. However, this is clearly erroneous as advertisement revenue is a vital part of the broadcasting industry. It is an admitted position that approximately 2/3rd of the broadcasters' revenues comes from the advertisement. That is the reason why the subscriber

rates in India are amongst the cheapest globally. In the present highly competitive market if the broadcasters are not able to increase the prices of the channels to make up the loss on revenue, it would result in compromising the quality.

(xv) If the bouquets are curtailed in the manner proposed by the TRAI, a cross subsidization of channels will not be possible and the broadcasters will be forced to depend to a large extent on subscription revenue thereby increasing the burden on the consumers.

(xvi) The Statement of Objects and Reasons of the TRAI Act makes it clear that the Respondents must cater to the orderly and healthy growth of telecom sector apart from the protection of consumer interest. The action of the TRAI runs contrary to its duty to ensure a level playing field.

(xvii) Section 11(4) of the TRAI Act requires that the process of exercise of Regulatory jurisdiction by the TRAI should be transparent. This phrase “transparent” over a period of time has been interpreted to mean that there should be a consultation process and that it should be transparent. The Supreme Court in **COAI Vs. TRAI** has accepted that transparency requires the Authority to –

(i) hold due consultations with all stakeholders;

(ii) by allowing all stakeholders to make their submissions to the authority;

(iii) by making all decisions of the authority fully documented and explained.

The introduction of twin conditions by TRAI without conducting the mandatory exercise of consultation process exhibit lack of transparency.

(xviii) The TRAI is attempting to micro-manage the affairs of the broadcasters which is in contrast to the continued emphasis of the Government of India on Ease of Doing Business. Reliance is placed on the judgment of the Supreme Court in **Reliance Energy Ltd. Vs MSRDC, (2007) 8 SCC 1.**

(xix) TRAI has not considered all the stakeholders' comments and has not provided the reasons in the Explanatory Memorandum when disagreeing with the stakeholders. Transparency mandates disclosure of sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and intelligent response. It should take into account what they have said and the reasons for agreeing or disagreeing with them. Reliance is placed on the judgments of the Supreme Court in **COAI vs. DIPP** and Delhi High Court in **Syniverse Technologies (India) Pvt. Ltd vs. Telecom Regulatory Authority of India & Anr., 2019 SCC OnLine Del 7491.**

(xx) The observations of TRAI in paragraph 55 of the Explanatory Memorandum to the 2020 Tariff Order that-

a. Rs. 19/- as ceiling on MRP for a channel to be part of a bouquet did not work well as Rs. 19/- was the maximum price of any SD channel in the previous regime;
b. Rs. 19/- should be considered as the price for 'niche / premium' channels;
c. Such 'niche / premium' channels should not be part of a bouquet;

d. Bouquets should comprise of channels which are affordable and similarly priced; and
e. 'Niche / premium' channels must be subscribed independently so that consumers are not compelled to subscribe to niche channels through a bouquet,

are manifestly arbitrary and without application of mind and contrary to the decision of the Supreme Court **in Star India vs. DIPP** in which it was specifically observed - "Thus, the flexibility of formation of a bouquet i.e. the choice of channels to be included in the bouquet together with the content of such channels, is not touched by the Authority".

(xxi) The observations of TRAI in paragraph 57 of the Explanatory Memorandum to the 2020 Tariff Order that-

a. Niche / premium channels are watched by a limited number of subscribers;
b. General Entertainment Channels ("GEC") channels are generally popular and watched by most of the families in the country;
c. GEC channels were priced at Rs. 12/- prior to 2017 Tariff Order; and
d Therefore, a cap of Rs. 12/- on channels which can be included in a bouquet is the more logical ceiling price,

are incorrect and manifestly arbitrary.

(xxii) In Paragraph 30 and 31 of the Explanatory Memorandum to the 2020 Tariff Order it is conceded by the Authority that the complexity of factors involved are such that, it is extremely difficult, if not impossible to arrive at an ideal number as cap on discounts on bouquets offered by the broadcasters. It is observed by TRAI that none of the stakeholders, including those who supported a cap, could suggest a scientific method

to arrive at that single figure, so as to ward off or to stand the test of a legal challenge, on the ground of arbitrariness.

(xxiii) The test of manifest arbitrariness has been set out in detail in paragraphs 43 to 52 of the judgment of Supreme Court in **COAI vs. TRAI** and the expression arbitrary has been held to mean-"in an unreasonable manner, as fixed or done capriciously or at pleasure, without adequate determining principle, not founded in the nature of things, non-rational, not done or acting according to reason or judgment, depending on the will alone."

(xxiv) DPO is the face between the broadcaster and the customer. Virtually 95% of subscribers avail of bouquets offered by DPOs as opposed to just 5% who avail of broadcaster bouquets. Yet, TRAI has applied the twin conditions only to bouquets offered by broadcasters and not to bouquets of DPOs. This manifest fallacy in the 2020 Tariff Order and Regulations does not achieve the alleged objective of TRAI since consumers will not get benefit of these twin conditions on bouquets offered by DPOs.

71. Learned Solicitor General, Add'l Solicitor General and other Senior Counsel/Counsel on behalf of the Respondents, on the other hand, have made the following submissions:

(i) The scope of judicial review of delegated legislation and/or decision taken by experts statutory bodies is very narrow. TRAI is an expert body and the Court ought to exercise judicial restraint as price is neither the function nor forte of the Court.

(ii) The 2020 Regulations Amendment and 2020 Tariff Order Amendment are both in the nature of delegated legislation and not administrative.

(iii) The mere fact that the price fixation would hurt the business interest or revenue of a party would not justify invalidating it. Reliance is placed on the judgments of Supreme Court in **Ugar Sugar Works Ltd. v/s. State (NCT of Delhi), (2001) 3 SCC 635, Shri Sitaram Sugar Co.Ltd. v/s. UOI, (1990) 3 SCC 223**, **Shree Minakshi Mills Ltd. Vs UOI, (1974) 1 SCC 468;**

(iv) It is the Petitioners' own case that the Regulations and the Tariff Order are inextricably interlinked to each other and notified on the same date and are inter-dependent for the purpose of implementation.

(v) The Tariff Order answers the description of tests laid down for legislative action. Price fixation is a legislative exercise and character and enjoys presumption of validity equally as that of the Regulations.

(vi) Private rights need to be regulated in public interest as held by the seven-Judge Constitution Bench of Supreme Court in **Prag Ice & Oil Mills v. Union of India, (1978) 3 SCC 459.**

(vii) There is no cap on the price of the standalone/à-la-carte channels and the Petitioners are free to fix the price of the standalone / à-la-carte channels as they so desire.

(viii) In the case of **BSNL v/s. TRAI**, the three-Judge Bench of the Supreme Court has held that the powers of the TRAI under section 36(1) to make Regulations is wide and pervasive.

(ix) The impugned 2020 Tariff Order Amendment merely makes minor amendments in the principal 2017 Tariff Order.

(x) The bouquets are being misused by the broadcasters and was therefore required to be regulated. The Supreme Court in the case of **Star India v/s. DIPP** has recognized this bouquets mischief by the broadcasters and has recognized the need for caps on discount.

(xi) 2/3rd of the revenue of broadcasters is from advertising and 1/3rd revenue is from subscription. The broadcaster bouquet is not to give consumers a choice of varied content at an affordable price, but only created to increase the broadcaster advertising revenue. The higher subscription, the higher the advertisement revenue that will be generated. Therefore, broadcasters want not so popular channels also to be in a position to claim subscription. The popular Driver Channels are bundled with those channels in which the consumers/viewers have otherwise no interest. Since the consumer/viewer may otherwise say no to taking this bundle channels and opt for a channel of their choice on à-la-carte basis. This strategy of perverse pricing is employed, namely, artificially increase the à-la-carte price of the popular/driver channel and then offer a bouquet containing that driver/popular channel at a very significant discount. The consumer/viewer is then driven to opt for a bouquet. The bouquet is not taken out of choice, but out of compulsion stemming from perverse pricing. In a large number of cases, bouquet prices are the same as the à-la-carte price of the popular/driver channel. In many cases, the bouquet price is cheaper than the popular/driver channel. Far from being in the consumer

interest the bouquets deprive consumers of choice by resorting to perverse pricing.

(xii) The 2017 regime introduced significant, far reaching and wide-ranging changes in the environment then prevailing. The principal 2017 Regulations and principal 2017 Tariff Order were challenged before the Madras High Court. There was a split decision of the Division Bench and the matter was referred to the decision of the third Judge. Aggrieved by the decision of the Madras High Court, the broadcasters filed an SLP before the Supreme Court. By decision dated 30-10-2018 in **Star India v/s. DIPP**, the Supreme Court rejected the broadcasters' challenge. Thus, a failed challenge delayed the implementation of the 2017 regime and which ultimately came into force only much after 30.10.2018**.** Despite the failed challenge, the broadcasters once again have challenged the 2017 regime on the ground that it violates the broadcasters' fundamental rights.

(xiii) The decision of the Supreme Court in **Star India v/s. DIPP** is a law declared by the Supreme Court under Article 141 and merely because the TRAI had filed a Petition for Special Leave against the decision of the Madras High Court, which held that any cap on broadcasters' ability to offer discount would be arbitrary and unreasonable and since the SLP was dismissed as withdrawn, would have no bearing. There is no estoppel against the law and that too based on a party's alleged understanding of the law declared.

(xiv) The Madras High Court has held it was not for this Court under Article 226 to decide whether price fixation under the impugned Tariff Order is commensurate with the cost incurred by the broadcasters

and it is not for the Court to consider the correctness of the fixation, which finding was not interfered by the Supreme Court in **Star India v/s. DIPP**.

(xv) The TRAI is a regulator. It monitors the broadcasting space and the activities and interest of all stakeholders. TRAI has been continuously regulating this segment/sector from 2004 onwards. A transparent process has been adopted by TRAI before 2020 regime was promulgated. This process spanned more than four and half months. TRAI issued a separate Consultation Papers for 2020 Regulations Amendments and 2020 Tariff Order Amendment and invited comments and counter comments from the stakeholders. The Consultation Papers run into 95 pages. The twin conditions are mentioned in this Consultation Papers and it was notified that comments and counters comments would be posted on the website of TRAI. All stakeholders offered their responses and counter responses. There was complete transparency. Suggestions and counter suggestions were made available to public. On 18-10-2019 and 20-11-2019, workshop/open house discussions were held, which were attended by all stakeholders.

(xvi) After considering all the comments and counter-comments, the Authority came out with 2020 regime changes. Both 2020 Regulations Amendments and 2020 Tariff Order Amendment have Explanatory Memorandum and the rationale behind the Tariff Order in the 2020 regime is contained in the Explanatory Statement. TRAI has given reasons while disagreeing with the responses in the Explanatory Memorandum. The ultimate decisions were taken only

after taking into consideration the comments and counter comments of the stakeholders.

(xvii) Both the twin conditions and the price cap were very much a part of the consultation process.

(xviii) The consultation process was with a view to find out a solution after due deliberation with all stakeholders. The argument that twin conditions ought to have been made known, as being the solution or chosen option first and the consultation process begun, is flawed. Reliance is placed on the decision of the Division Bench of Delhi High Court in **Vodafone India Ltd. Vs. TRAI dated 20.09.2017 in LPA No. 592 of 2017.**

(xix) In **Hotel & Restaurant Association v/s. Star India (P) Ltd., (2006) 13 SCC 753**, the Supreme Court held that TRAI exercises a broad jurisdiction, it's jurisdiction is not only to fix tariff but also laying down terms and conditions for providing services. It can fix norms and the mode and manner in which a consumer would get the services, while doing so it is required to required to be taken into account several factors, the interest of one of the players in the field would not be taken into consideration throwing the interest of others to the wind. Reliance is also placed on the judgment of the Supreme Court in **Deepak Theatre vs. State of Punjab (1992) 1 SCC 162**.

(xx) TRAI regulates the entire telecommunication services sector. It protects the interest of all stakeholders, not just broadcasters like the Petitioners, but the entire panoply of players and participants in the sector including MSOs, DPOs, LCOs and consumers as also the interest and needs of several individual channels.

(xxi) As stated in the Preamble, the TRAI Act is an Act interalia to regulate the telecommunication services and to protect the interests of service providers and consumers of the telecom sector and to promote and ensure orderly growth of the telecom sector and for matters connected therewith or incidental thereto.

(xxii) The impugned framework complies with the transparency requirements under Article 11(4) of the TRAI Act. The process followed by TRAI fully meets test of transparency as the law laid down in **COAI v. TRAI.** The judgment of the Division Bench of Delhi High Court in **Syniverse Technologies (India) Pvt. Ltd. vs. TRAI & Anr., 2019 SCC OnLine Del 7491** is completely distinguishable on facts.

(xxiii) The Authority need not address every single comment received as that would not be possible given the number of responses and counter responses.

(xxiv) The decision in **Star India v/s. DIPP** covers all issues raised by the Petitioners.

(xxv) Post the 2017 regime, the broadcasters were observed in several cases to have increased the prices of GEC channels by more than 200%, which was misuse of flexibility given to the broadcasters and created a pressing need to review the ceiling price of channels for inclusion in broadcaster bouquets.

(xxvi) The contention of the broadcasters that though TRAI has imposed restriction of (1) twin condition & (2) Rs.12/- per channel only on broadcasters and no such restrictions have been imposed on DPOs, is misconceived. Clause 4(3) of the principal 2017 Tariff Order makes its mandatory for DPOs to make available to consumers all such

offerings of all broadcasters with whom a Reference Interconnect Offer (RIO) has been signed without any alternation in its composition. Clause 4(4) provides, inter alia, the following additional restrictions:

(a) No DPO bouquet can contain the pay channel whose MRP is more than Rs.12/- (just as for broadcasters, this was reduced from Rs.19/- by the 2020 Tariff Order Amendment).

(b) The DRP of DPO bouquet cannot be less than 85% of the sum of all its components viz. à-la-carte channels or broadcaster bouquets. This is a far more stringent requirement than 33.33% in the case of broadcasters.

This means that there is 15% cap on discount, which DPO can offer. Thus, 15% cap comes into play only after the direct “trickle down” effect of the twin condition has done it job.

(xxvii) The broadcasters whilst contending that 94.6% of consumer viewership is DPO bouquets, are silent on the fact that the bulk of DPO bouquets which the consumers subscribe to include broadcaster bouquets. TRAI monitors subscription preference on monthly basis. Perusal of the Table (shown by way of illustrationat Tab 11 of the Written Submissions) shows that the broadcaster bouquets themselves form the bulk of distributor bouquets and the broadcaster bouquets (either as a part of distributor bouquets or independent thereof) constitute overwhelming part of consumer viewership. There is very little scope left for DPO to form truly customized DPO bouquets.

(xxviii) The flexibility of formation of a bouquet i.e. the choice of channels to be included the bouquet together with the content of such channels, is not touched by the Authority.

(xxix) There are around 900 TV Channels and having no restrictions on number of bouquets encourages broadcasters to form more and more bouquets which makes the choice of consumers difficult and causes burden on the IT and billing system of the DPOs. In any case, the 3rd proviso to Clause 3(c) of the 2020 Tariff Order Amendment, provides that on the request of a broadcaster, the Authority may, in view of the larger consumer interests permit the broadcaster to offer number of bouquets more than the number of à-la-carte channels being offered by such broadcasters. Thus, where there is genuine need for relaxation, it can be granted. There is no absolute cap on the number of bouquets.

72. We have considered the rival contentions of the learned Senior Counsel/Counsel for the parties.

73. It would be firstly necessary to discuss the parameters of judicial review and deal with the contention of the Petitioners that a Tariff Order is only an administrative order and not “law” within the meaning of Articles 19(2) & 19(6) of the Constitution and consequently no restrictions can be imposed on the exercise of the fundamental rights guaranteed by Articles 19(1)(a) & 19(1)(g) of the Constitution.

73.1. In a seven-Judge Constitution Bench of the Supreme Court in **Prag Ice & Oil Mills v. Union of India, (1978) 3 SCC 459**, while adverting

to the decision of the Constitution Bench of the Supreme Court in **Shree Minakshi Mills Ltd. Vs UOI, (1974) 1 SCC 468**, His Lordship C.J., Chandrachud, on behalf of himself, Bhagwati, Fazal Ali, Shinghal and Jaswant Singh, JJ. said -

> 64. This discussion will not be complete without reference to the decision of a Constitution Bench of this Court in *Shree Meenakshi Mills Ltd.* v. *Union of India*[17]. The question which arose in that case was as regards the validity of a notification fixing fair prices of cotton yarn. It was contended on behalf of the petitioners therein that the price fixed was arbitrary because the fluctuation in the price of cotton was not taken into consideration, the price of raw materials, the liability for wages and the necessity for ensuring reasonable profit to the trader are not taken into accounts; and above everything else, the industry was not ensured a reasonable return on its investment. These contentions were rejected by this Court on the ground that, just as the industry cannot complain of rise and fall of prices due to economic factors in an open market, it cannot similarly complain of some increase in or reduction of prices as a result of a notification issued under Section 3(1) of the Essential Commodities Act because, such increase or reduction is also based on economic factors. Dealing with the contention that a reasonable profit must be assured to the manufacturers, the Court held that ensuring a fair price to the consumer was the dominant object and purpose of the Essential Commodities Act and that object would be completely lost sight of, if the producer's profit was kept in the forefront. Ray, C.J., speaking for the Court, observed: (SCC p. 490, para 66)
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> "In determining the reasonableness of a restriction imposed by law in the field of industry, trade or commerce, it has to be remembered that the mere fact that some of those who are engaged in these are alleging loss after the imposition of law will not render the law unreasonable. By its very nature, industry or trade or commerce goes through periods of prosperity and adversity on account of economic and sometimes social and political factors. In a largely free economy when controls have to be introduced to ensure availability of consumer goods like foodstuff, cloth and the like at a fair price, it is an impracticable proposition to require the Government to go through the exercise like that of a Commission to fix the prices."

In the words of Justice Roberts who delivered the opinion of the Court in *Leo Nebbia:*

"The Constitution does not secure to any one liberty to confront his business in such fashion as to inflict injury upon the public at large, or upon any substantial group of the people. Price control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty."

71. To sum up, it seems to us impossible to accept the contention of the petitioners that the impugned Price Control Order is an act of hostile discrimination against them or that it violates their right to property or their right to do trade or business. The petitioners have taken us into the minutest details of the mechanism of their trade operations and they have attempted to demonstrate in relation thereto that a factor here or a factor there which ought to have been taken into account while fixing the price of mustard oil has been ignored. Dealing with a similar argument it was observed in *Metropolis Theatre Company* v. *City of Chicago*[26] that to be able to find fault with a law is not to demonstrate its invalidity:

"It may seem unjust and oppressive, yet be free from judicial interference. The problems of government are practical ones and may justify, if they do not require, rough accommodations, illogical, it may be, and unscientific. But even such criticism should not be hastily expressed. What is best is not always discernible; the wisdom of any choice may be disputed or condemned. Mere errors of the Government are not subject to our judicial review. It is only its palpably arbitrary exercises which can be declared void...."

Parliament having entrusted the fixation of prices to the expert judgment of the Government, it would be wrong for this Court, as was done by common consent in *Premier Automobiles* to examine each and every minute detail pertaining to the Governmental decision. The Government, as was said in *Permian Basin Area Rate cases*, is entitled to make pragmatic adjustments which may be called for by particular circumstances and the price control can be declared unconstitutional only if it is patently arbitrary, discriminatory or demonstrably irrelevant to the policy which the legislature is free to adopt. The interest of the producer and the investor is only one of the variables in the "constitutional calculus of reasonableness" and courts ought not to interfere so long as the exercise of

Governmental power to fix fair prices is broadly within a "zone of reasonableness". If we were to embark upon an examination of the disparate contentions raised before us on behalf of the contending parties, we have no doubt that we shall have exceeded our narrow and circumscribed authority.

73.2. In **Union of India and anr. v/s. Cynamide India Ltd. and anr. (1987) 2 SCC 720,** the Supreme Cout has held:

4. We start with the observation, "Price fixation is neither the function nor the forte of the court". We concern ourselves neither with the policy nor with the rates. But we do not totally deny ourselves the jurisdiction to enquire into the question, in appropriate proceedings, whether relevant considerations have gone in and irrelevant considerations kept out of the determination of the price. For example, if the legislature has decreed the pricing policy and prescribed the factors which should guide the determination of the price, we will, if necessary, enquire into the question whether the policy and the factors are present to the mind of the authorities specifying the price. But our examination will stop there. We will go no further. We will not deluge ourselves with more facts and figures. The assembling of the raw materials and the mechanics of price fixation are the concern of the executive and we leave it to them. And, we will not re-evaluate the considerations even if the prices are demonstrably injurious to some manufacturers or producers. The court will, of course, examine if there is any hostile discrimination. That is a different "cup of tea" altogether.

7. The third observation we wish to make is, price fixation is more in the nature of a legislative activity than any other. It is true that, with the proliferation of delegated legislation, there is a tendency for the line between legislation and administration to vanish into an illusion. Administrative, quasi-judicial decisions tend to merge in legislative activity and, conversely, legislative activity tends to fade into and present an appearance of an administrative or quasi-judicial activity. Any attempt to draw a distinct line between legislative and administrative functions, it has been said, is "difficult in theory and impossible in practice". Though difficult, it is necessary that the line must sometimes be drawn as different legal rights and consequences may ensue. The distinction between the two has usually been expressed as "one between the general and the

particular". ……. The object of the rule, the reach of its application, the rights and obligations arising out of it, its intended effect on past, present and future events, its form, the manner of its promulgation are some factors which may help in drawing the line between legislative and non-legislative acts. A price fixation measure does not concern itself with the interests of an individual manufacturer or producer. It is generally in relation to a particular commodity or class of commodities or transactions. It is a direction of a general character, not directed against a particular situation. It is intended to operate in the future. It is conceived in the interests of the general consumer public. The right of the citizen to obtain essential articles at fair prices and the duty of the State to so provide them are transformed into the power of the State to fix prices and the obligation of the producer to charge no more than the price fixed. Viewed from whatever angle, the angle of general application, the prospectiveness of its effect, the public interest served, and the rights and obligations flowing therefrom, there can be no question that price fixation is ordinarily a legislative activity. Price fixation may occasionally assume an administrative or quasi-judicial character when it relates to acquisition or requisition of goods or property from individuals and it becomes necessary to fix the price separately in relation to such individuals. …….. We also wish to clear a misapprehension which appears to prevail in certain circles that price fixation affects the manufacturer or producer primarily and therefore fairness requires that he be given an opportunity and that fair opportunity to the manufacturer or producer must be read into the procedure for price fixation. We do not agree with the basic premise that price fixation primarily affects manufacturers and producers. Those who are most vitally affected are the consumer public. It is for their protection that price fixation is resorted to and any increase in price affects them as seriously as any decrease does a manufacturer, if not more.

73.3**.** In ***Shri Sitaram Sugar Co. Ltd. v. Union of India, (1990) 3 SCC 223*****,** the Constitution Bench of the Supreme Court has held -

45**.** Price fixation is in the nature of a legislative action even when it is based on objective criteria founded on relevant material. No rule of natural justice is applicable to any such order. It is nevertheless imperative that the action of the authority should be inspired by

reason: *Saraswati Industrial Syndicate Ltd*. [9] [at SCR pp. 961, 962; SCC p. 636, para 13]. The government cannot fix any arbitrary price. It cannot fix prices on extraneous considerations: *Renusagar*.

49**.** Where a question of law is at issue, the court may determine the rightness of the impugned decision on its own independent judgment. If the decision of the authority does not agree with that which the court considers to be the right one, the finding of law by the authority is liable to be upset. Where it is a finding of fact, the court examines only the reasonableness of the finding. When that finding is found to be rational and reasonably based on evidence, in the sense that all relevant material has been taken into account and no irrelevant material has influenced the decision, and the decision is one which any reasonably minded person, acting on such evidence, would have come to, then judicial review is exhausted even though the finding may not necessarily be what the court would have come to as a trier of fact. Whether an order is characterised as legislative or administrative or quasi-judicial, or, whether it is a determination of law or fact, the judgment of the expert body, entrusted with power, is generally treated as final and the judicial function is exhausted when it is found to have "warrant in the record" and a rational basis in law: See *Rochester Tel. Corp.* v. *United States*[36]. See also *Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corporation*[-]

56**.** The court has neither the means nor the knowledge to re-evaluate the factual basis of the impugned orders. The court, in exercise of judicial review, is not concerned with the correctness of the findings of fact on the basis of which the orders are made so long as those findings are reasonably supported by evidence.

57**.** Judicial review is not concerned with matters of economic policy. The court does not substitute its judgment for that of the legislature or its agents as to matters within the province of either. The court does not supplant the "feel of the expert" by its own views. When the legislature acts within the sphere of its authority and delegates power to an agent, it may empower the agent to make findings of fact which are conclusive provided such findings satisfy the test of reasonableness. In all such cases, judicial inquiry is confined to the question whether the findings of fact are reasonably based on evidence and whether such findings are consistent with the laws of the land. As stated by Jagannatha Shetty, J. in *Gupta Sugar Works*[43]: (SCC p. 479, para 4)

> "... the court does not act like a chartered accountant nor acts like an income tax officer. The court is not concerned with any individual case or any particular problem. The court only examines whether the price determined was with due regard to considerations provided by the statute. And whether extraneous matters have been excluded from determination."
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> 58**.** Price fixation is not within the province of the courts. Judicial function in respect of such matters is exhausted when there is found to be a rational basis for the conclusions reached by the concerned authority. As stated by Justice Cardozo in *Mississippi Valley Barge Line Company* v. *United States of America*[45]:
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> "The structure of a rate schedule calls in peculiar measure for the use of that enlightened judgment which the Commission by training and experience is qualified to form.... It is not the province of a court to absorb this function to itself.... The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body."

73.4. In ***St. Johns Teachers Training Institute v. Regional Director, NCTE, (2003) 3 SCC 321*****,** the Supreme Court has held **:**

> 10**.** A regulation is a rule or order prescribed by a superior for the management of some business and implies a rule for general course of action. Rules and regulations are all comprised in delegated legislations. The power to make subordinate legislation is derived from the enabling Act and it is fundamental that the delegate on whom such a power is conferred has to act within the limits of authority conferred by the Act. Rules cannot be made to supplant the provisions of the enabling Act but to supplement it. What is permitted is the delegation of ancillary or subordinate legislative functions, or, what is fictionally called, a power to fill up details. The legislature may, after laying down the legislative policy confer discretion on an administrative agency as to the execution of the policy and leave it to the agency to work out the details within the framework of policy. The need for delegated legislation is that they are framed with care and minuteness when the statutory authority making the rule, after coming into force of the Act, is in a better position to adapt the Act to special circumstances. Delegated legislation permits utilisation of experience and consultation with interests affected by the practical operation of statutes. Rules and regulations made by reason of the

specific power conferred by the statutes to make rules and regulations establish the pattern of conduct to be followed. Regulations are in aid of enforcement of the provisions of the statute. The process of legislation by departmental regulations saves time and is intended to deal with local variations and the power to legislate by statutory instrument in the form of rules and regulations is conferred by Parliament. The main justification for delegated legislation is that the legislature being overburdened and the needs of the modern-day society being complex, it cannot possibly foresee every administrative difficulty that may arise after the statute has begun to operate. Delegated legislation fills those needs. The regulations made under power conferred by the statute are supporting legislation and have the force and effect, if validly made, as an Act passed by the competent legislature. (See *Sukhdev Singh* v. *Bhagatram Sardar Singh Raghuvanshi*.)

will be useful to reproduce here a passage from Administrative Law by Wade & Forsyth (8th Edn., 2000, at p. 839):

"Administrative legislation is traditionally looked upon as a necessary evil, an unfortunate but inevitable infringement of the separation of powers. But in reality it is no more difficult to justify it in theory than it is possible to do without it in practice. There is only a hazy borderline between legislation and administration, and the assumption that they are two fundamentally different forms of power is misleading. There are some obvious general differences. But the idea that a clean division can be made (as it can be more readily in the case of the judicial power) is a legacy from an older era of political theory. It is easy to see that legislative power is the power to lay down the law for people in general, whereas administrative power is the power to lay down the law for them, or apply the law to them, in some particular situation."

73.5. **U.P. Power Corpn. Ltd. v. NTPC Ltd., (2011) 12 SCC 400,** the Supreme Court has held:

12**.** Looking to the observations made by this Court to the effect that the Central Commission constituted under Section 3 of the Act is an expert body which has been entrusted with the task of determination of tariff and as determination of tariff involves highly technical procedure requiring not only working knowledge of law but also of engineering, finance, commerce, economics and management, this

Court was firmly of the view that the issues with regard to determination of tariff should be left to the said expert body and ordinarily the High Court and even this Court should not interfere with the determination of tariff.

73.6. In **Natural Resources Allocation, In re, Special Reference No. 1 of 2012, (2012) 10 SCC 1**, the Supreme Court has held**:**

> **142.** In *BALCO*, the Court took notice of the judgment in *Peerless General Finance and Investment Co. Ltd.* v. *RBI* and observed that some matters like price fixation are based on such uncertainties and dynamics that even experts face difficulty in making correct projections, making it all the more necessary for this Court to exercise non-interference: (*Peerless General Finance case*[72], SCC p. 375, para 31)
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> "*31*. The function of the court is to see that lawful authority is not abused but not to appropriate to itself the task entrusted to that authority. It is well settled that a public body invested with statutory powers must take care not to exceed or abuse its power. It must keep within the limits of the authority committed to it. It must act in good faith and it must act reasonably. Courts are not to interfere with economic policy which is the function of experts. It is not the function of the courts to sit in judgment over matters of economic policy and it must necessarily be left to the expert bodies. In such matters even experts can seriously and doubtlessly differ. Courts cannot be expected to decide them without even the aid of experts." (*BALCO case*[71], SCC p. 358, para 38)

73.7. **Cellular Operators Association of India vs TRAI**, **(2016) 7 SCC 703** was the case in relation to the TRAI Act. Speaking for the Bench of the Supreme Court, His Lordship Justice Nariman said -

> "34**.** In *State of T.N.* v. *P. Krishnamurthy*, this Court after adverting to the relevant case law on the subject, laid down the parameters of judicial review of subordinate legislation generally thus: (SCC pp. 528-29, paras 15-16)
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> "*15*. There is a presumption in favour of constitutionality or validity of a subordinate legislation and the burden is upon him who attacks it to

show that it is invalid. It is also well recognised that a subordinate legislation can be challenged under any of the following grounds:

(*a*) Lack of legislative competence to make the subordinate legislation.

(*b*) Violation of fundamental rights guaranteed under the Constitution of India.

(*c*) Violation of any provision of the Constitution of India.

(*d*) Failure to conform to the statute under which it is made or exceeding the limits of authority conferred by the enabling Act.

(*e*) Repugnancy to the laws of the land, that is, any enactment.

(*f*) Manifest arbitrariness/unreasonableness (to an extent where the court might well say that the legislature never intended to give authority to make such rules).

16. The court considering the validity of a subordinate legislation, will have to consider the nature, object and scheme of the enabling Act, and also the area over which power has been delegated under the Act and then decide whether the subordinate legislation conforms to the parent statute. Where a rule is directly inconsistent with a mandatory provision of the statute, then, of course, the task of the court is simple and easy. But where the contention is that the inconsistency or non-conformity of the rule is not with reference to any specific provision of the enabling Act, but with the object and scheme of the parent Act, the court should proceed with caution before declaring invalidity."

Ultra vires

36. The power to make the impugned Regulation is traceable to Section 36(1) of the Telecom Regulatory Authority of India Act, 1997. This Court in *BSNL* v. *Telecom Regulatory Authority of India*[2], after analysing the aforesaid provision in the backdrop of the Act held as follows: (SCC pp. 283-84 & 289-90, paras 89 & 99-100)

42. We have already seen that one of the tests for challenging the constitutionality of subordinate legislation is that subordinate legislation should not be manifestly arbitrary. Also, it is settled law that subordinate legislation can be challenged on any of the grounds available for challenge against plenary legislation. (See *Indian Express Newspapers (Bombay) (P) Ltd.* v. *Union of India*[4], SCC at p. 689, para 75.)

43**.** The test of "manifest arbitrariness" is well explained in two judgments of this Court. In *Khoday Distilleries Ltd.* v. *State of Karnataka*[5], this Court held: (SCC p. 314, para 13)

"*13*. It is next submitted before us that the amended Rules are arbitrary, unreasonable and cause undue hardship and, therefore, violate Article 14 of the Constitution. Although the protection of Article 19(1)(*g*) may not be available to the appellants, the Rules must, undoubtedly, satisfy the test of Article 14, which is a guarantee against arbitrary action. However, one must bear in mind that what is being challenged here under Article 14 is not executive action but delegated legislation. *The tests of arbitrary action which apply to executive actions do not necessarily apply to delegated legislation. In order that delegated legislation can be struck down, such legislation must be manifestly arbitrary; a law which could not be reasonably expected to emanate from an authority delegated with the law-making power*. In *Indian Express Newspapers (Bombay) (P) Ltd.* v. *Union of India*[4], this Court said that a piece of subordinate legislation does not carry the same degree of immunity which is enjoyed by a statute passed by a competent legislature. *A subordinate legislation may be questioned under Article 14 on the ground that it is unreasonable; 'unreasonable not in the sense of not being reasonable, but in the sense that it is manifestly arbitrary'*. Drawing a comparison between the law in England and in India, the Court further observed that in England the Judges would say, 'Parliament never intended the authority to make such Rules; they are unreasonable and ultra vires'. *In India, arbitrariness is not a separate ground since it will come within the embargo of Article 14 of the Constitution. But subordinate legislation must be so arbitrary that it could not be said to be in conformity with the statute or that it offends Article 14 of the Constitution*."

44**.** Also, in *Sharma Transport* v. *State of A.P.*[6], this Court held: (SCC pp. 203-04, para 25)

"*25*. … The tests of arbitrary action applicable to executive action do not necessarily apply to delegated legislation. In order to strike down a delegated legislation as arbitrary it has to be established that there is manifest arbitrariness. In order to be described as arbitrary, it must be shown that it was not reasonable and manifestly arbitrary. The expression "arbitrarily" means: in an unreasonable manner, as fixed or done capriciously or at pleasure, without adequate determining principle, not founded in the nature of things, non-rational, not done or acting according to reason or judgment, depending on the will alone."

In the aforesaid case, the Supreme Court has also dealt with the aspect of transparency under Section 11(4) of the TRAI Act, which we have referred to and discussed in the latter part of the this judgment.

73.8. In **Swiss Ribbons (P) Ltd. v. Union of India, (2019) 4 SCC 17,** on behalf of the Bench of the Supreme Court, His Lordship Justice Nariman observed:

> 21. In this country, this Court in *R.K. Garg* v. *Union of India*[27] has held: (SCC pp. 690-91 & 705-06, paras 8 & 19)
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> "*8*. Another rule of equal importance is that laws relating to economic activities should be viewed with greater latitude than laws touching civil rights such as freedom of speech, religion, etc. It has been said by no less a person than Holmes, J., that the legislature should be allowed some play in the joints, because it has to deal with complex problems which do not admit of solution through any doctrinaire or straitjacket formula and this is particularly true in case of legislation dealing with economic matters, where, having regard to the nature of the problems required to be dealt with, greater play in the joints has to be allowed to the legislature. The court should feel more inclined to give judicial deference to legislative judgment in the field of economic regulation than in other areas where fundamental human rights are involved. Nowhere has this admonition been more felicitously expressed than in *Morey* v. *Doud*[28] where Frankfurter, J., said in his inimitable style:
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> 'In the utilities, tax and economic regulation cases, there are good reasons for judicial self-restraint if not judicial deference to legislative judgment. The legislature after all has the affirmative responsibility. The courts have only the power to destroy, not to reconstruct. When these are added to the complexity of economic regulation, the uncertainty, the liability to error, the bewildering conflict of the experts, and the number of times the Judges have been overruled by events — self-limitation can be seen to be the path to judicial wisdom and institutional prestige and stability.'
>
> The Court must always remember that "legislation is directed to

practical problems, that the economic mechanism is highly sensitive and complex, that many problems are singular and contingent, that laws are not abstract propositions and do not relate to abstract units and are not to be measured by abstract symmetry"; 'that exact wisdom and nice adaption of remedy are not always possible' and that 'judgment is largely a prophecy based on meagre and uninterpreted experience'. *Every legislation, particularly in economic matters is essentially empiric and it is based on experimentation or what one may call trial and error method and therefore it cannot provide for all possible situations or anticipate all possible abuses. There may be crudities and inequities in complicated experimental economic legislation but on that account alone it cannot be struck down as invalid*. The courts cannot, as pointed out by the United States Supreme Court in *Secy. of Agriculture* v. *Central Roig Refining Co.*[29] be converted into tribunals for relief from such crudities and inequities. There may even be possibilities of abuse, but that too cannot of itself be a ground for invalidating the legislation, because it is not possible for any legislature to anticipate as if by some divine prescience, distortions and abuses of its legislation which may be made by those subject to its provisions and to provide against such distortions and abuses. Indeed, howsoever great may be the care bestowed on its framing, it is difficult to conceive of a legislation which is not capable of being abused by perverted human ingenuity. *The Court must therefore adjudge the constitutionality of such legislation by the generality of its provisions and not by its crudities or inequities or by the possibilities of abuse of any of its provisions*. If any crudities, inequities or possibilities of abuse come to light, the legislature can always step in and enact suitable amendatory legislation. That is the essence of pragmatic approach which must guide and inspire the legislature in dealing with complex economic issues.

19. It is true that certain immunities and exemptions are granted to persons investing their unaccounted money in purchase of Special Bearer Bonds but that is an inducement which has to be offered for unearthing black money. Those who have successfully evaded taxation and concealed their income or wealth despite the stringent tax laws and the efforts of the Tax Department, are not likely to disclose their unaccounted money without some inducement by way of immunities and exemptions and it must necessarily be left to the legislature to decide what immunities and exemptions would be sufficient for the purpose. It would be outside the province of the

Court to consider if any particular immunity or exemption is necessary or not for the purpose of inducing disclosure of black money. That would depend upon diverse fiscal and economic considerations based on practical necessity and administrative expediency and would also involve a certain amount of experimentation on which the Court would be least fitted to pronounce. The Court would not have the necessary competence and expertise to adjudicate upon such an economic issue. The Court cannot possibly assess or evaluate what would be the impact of a particular immunity or exemption and whether it would serve the purpose in view or not. There are so many imponderables that would enter into the determination that it would be wise for the Court not to hazard an opinion where even economists may differ. The Court must while examining the constitutional validity of a legislation of this kind, "be resilient, not rigid, forward looking, not static, liberal, not verbal" and the Court must always bear in mind the constitutional proposition enunciated by the Supreme Court of the United States in *Munn* v. *Illinois*[30], namely, 'that courts do not substitute their social and economic beliefs for the judgment of legislative bodies'. *The Court must defer to legislative judgment in matters relating to social and economic policies and must not interfere, unless the exercise of legislative judgment appears to be palpably arbitrary*. **The Court should constantly remind itself of what the Supreme Court of the United States said in *Metropolis Theater Co.* v. *City of Chicago*[31]**: (SCC OnLine US SC para 12)

12. … The problems of government are practical ones and may justify, if they do not require, rough accommodations, illogical it may be, and unscientific. But even such criticism should not be hastily expressed. What is best is not always discernible, the wisdom of any choice may be disputed or condemned. Mere error of Government are not subject to our judicial review.

It is true that one or the other of the immunities or exemptions granted under the provisions of the Act may be taken advantage of by resourceful persons by adopting ingenious methods and devices with a view to avoiding or saving tax. But that cannot be helped because human ingenuity is so great when it comes to tax avoidance that it would be almost impossible to frame tax legislation which cannot be abused. Moreover, as already pointed out above, the trial and error method is inherent in every legislative effort to deal with an obstinate social or economic issue and if it is found that any immunity or exemption granted under the Act is being utilised for tax evasion or

avoidance not intended by the legislature, the Act can always be amended and the abuse terminated. We are accordingly of the view that none of the provisions of the Act is violative of Article 14 and its constitutional validity must be upheld."

23. In Directorate General of Foreign Trade v. Kanak Exports[33], this Court has held: (SCC p. 293, para 109)

"*109*. Therefore, it cannot be denied that the Government has a right to amend, modify or even rescind a particular scheme. It is well settled that in complex economic matters every decision is necessarily empiric and it is based on experimentation or what one may call trial and error method and therefore, its validity cannot be tested on any rigid prior considerations or on the application of any straitjacket formula. In *BALCO Employees' Union* v. *Union of India*[34], the Supreme Court held that laws, including executive action relating to economic activities should be viewed with greater latitude than laws touching civil rights such as freedom of speech, religion, etc. that the legislature should be allowed some play in the joints because it has to deal with complex problems which do not admit of solution through any doctrine or straitjacket formula and this is particularly true in case of legislation dealing with economic matters, where having regard to the nature of the problems greater latitude require to be allowed to the legislature."

73.9 In **Internet & Mobile Assn. of India v. Reserve Bank of India, (2020) 10 SCC 274,** the three-Judge Bench of the Supreme Court has said:

149. On the effect and force of delegated legislation, this Court held in *St. Johns Teachers Training Institute* v. *NCTE*[78]: (SCC p. 332, para 10)

"*10*. … The regulations made under power conferred by the statute are supporting legislation and have the force and effect, if validly made, as an Act passed by the competent legislature."

Similar views were expressed in *Udai Singh Dagar* v. *Union of India*[79], when the Court held: (SCC p. 335, para 75)

"*75*. … a legislative Act must be read with the regulations framed. A subordinate legislation, as is well known, when validly framed, becomes a part of the Act."

150. Law is well settled that when RBI exercises the powers conferred upon it, both to frame a policy and to issue directions for its

enforcement, such directions become supplemental to the Act itself. In *Peerless General Finance & Investment Co. Ltd.* v. *RBI*[80], this Court followed the decisions in *State of U.P.* v. *Babu Ram Upadhya*[81] and *D.K.V. Prasada Rao* v. *State of A.P.*[82] to hold that Rules made under a statute must be treated as if they were contained in the Act and that therefore they must be governed by the same principles as the statute itself. Useful reference can also be made in this regard to the following observations in *ICICI Bank Ltd.* v. *Official Liquidator*[83]: (SCC p. 25, para 40)

"*40*. When a delegate is empowered by Parliament to enact a policy and to issue directions which have a statutory force and when the delegatee (RBI) issues such guidelines (policy) having statutory force, *such guidelines have got to be read as supplement to the provisions of the BR Act, 1949*. The "banking policy" is enunciated by RBI. Such policy cannot be said to be ultra vires the Act."

151. In his treatise on *Administrative Law*, Durga Das Basu[84] states:

The scope of judicial review is narrowed down when a statute confers discretionary power upon an executive authority to make such rules or regulations or orders "as appear to him to be necessary" or "expedient", for carrying out the purposes of the statute or any other specified purpose. *In such a case, the check of ultra vires vanishes for all practical purposes inasmuch as the determination of the necessity or expediency is taken out of the hands of the courts and the only ground upon which courts may interfere is that the authority acted mala fide or never applied his mind to the matter, or applied an irrelevant principle in making a statutory order*.

152. In *Jayantilal Amratlal Shodhan* v. *F.N. Rana*[85], the majority pointed out that there can be no assumption that the legislative functions are exclusively performed by the legislature, executive functions by the executive and judicial functions by the judiciary alone. The Court indicated that the Constitution has not made an absolute or rigid division of functions between the three agencies of the State and that at times the exercise of legislative or judicial functions are entrusted to the executive. A very important observation made by the Constitution Bench in *Jayantilal*[85] was as follows: (AIR pp. 655-56, para 11)

"*11*. … In addition to these quasi-judicial and quasi-legislative functions, the executive has also been empowered by statute to exercise functions which are legislative and judicial in character and in

certain instances, powers are exercised which appear to partake at the same moment of legislative, executive and judicial characteristics."

74. Applying the tests laid down by the aforesaid judgments in the present case, it is not possible to accept the contention on behalf of the Petitioners that a Tariff Order, which is essentially a price-fixation and a regulatory exercise by the Authority, is only an administrative order. As stated in the Preamble, TRAI Act has been enacted interalia to provide for establishment of TRAI to regulate telecommunication services. Under section 3, TRAI has been established as the Authority to carry out the purposes of the TRAI Act. The Authority has been entrusted with the powers and functions set out in section 11. The Authority thus acts as a delegatee of the Parliament to carry out the purposes of the Act. Section 11(2) of the TRAI Act states that the Authority may, from time to time, by order notify in the Official Gazette, the rates at which telecommunication services shall be provided under the Act. It is the Petitioners' own case that the Regulations and Tariff Order are intrinsically linked and are issued simultaneously. They are interdependent for the purpose of implementation. Under Regulation 7(1) of the Principal 2017 Regulations (Interconnection), the broadcasters are required to publish, on its website, its reference interconnection offer in conformance with the Regulations **and** the Tariff **Orders** as notified. Under section 37 of the TRAI Act, the Regulations framed by the Authority are required to be placed before the Parliament. In **BSNL vs. TRAI**, the three-Judge Bench of the Supreme Court has held that the powers of TRAI to make Regulations under section 36 is legislative in nature and that the said power is wide and pervasive. In **Star India vs. DIPP,** the Supreme Court has held that the principal 2017 Regulations and **2017 Tariff Order** are intravires to the regulatory power contained in

Section 36 of the TRAI Act. A Tariff Order which is issued after a consultation process thus falls within the regulatory power contained in section 36 of the TRAI Act. Tariff Order is thus more of a legislative character, even assuming it may partake the character of an administrative order in certain instances [see paragraph 11 of the majority judgment of the Constitution Bench of the Supreme Court in **Jayantilal Amratlal Shodhan v. F.N. Rana**,(1964) 5 SCR 294, referred to in **Internet & Mobile Assn. of India vs. RBI** above]. We may reiterate what is held by a three-Judge Bench of the Supreme Court in **Internet & Mobile Association of India Vs. Reserve Bank of India (supra)**, while considering the challenge to a Statement and Circular issued by RBI in exercises of powers conferred under the provisions of Banking Regulation Act, 1949, Reserve Bank of India Act, 1934 and Payment and Settlement Systems Act, 2007 -

> "150. Law is well settled that when RBI exercises the powers conferred upon it, both to frame a policy and to issue directions for its enforcement, such directives become supplemental to the Act itself…"

In view of the above, the contention of the Petitioners that a Tariff Order is not law within meaning of Article 19(2) and 19(6) of the Constitution and therefore no restrictions can be imposed by a Tariff Order which affect the fundamental rights of the Petitioners under Article 19(1)(a) and 19(1)(g) cannot be accepted and is accordingly rejected.

75. As stated earlier, the arguments canvassed before us are on Four Issues (viz - Issues I to IV) which we have reproduced in paragraph 69 above**.** We have dealt with the said Issues hereinbelow. So far as Issue III is concerned we have dealt with it separately later and held the 2nd Twin Condition (Average Test) is arbitrary and contrary to section 11(4) of TRAI

Act and thereby infringes the Petitioners' fundamental rights under Article 14 of the Constitution.

Issue I – Cap of Rs.12/- on any channel to be included in a bouquet, (which was Rs.19/- in the Principal 2017 Tariff Order):

76. By the Consultation Paper dated 16th October, 2019 of the impugned 2020 Tariff Order Amendment, the stakeholders were invited to offer their comments on whether the ceiling price of Rs.19/- on MRP to be part of bouquet needs to be reviewed and if so, what should be the ceiling for the same and why? The Authority has dealt with this Issue under the head "Ceiling price of channels for inclusion in bouquet" in paragraph 43 to 58 of the Explanatory Memorandum. In paragraph 44 to 48 the Authority has recorded the responses of the stakeholders. The Authority has noted that the broadcasters in general are not in favour of the review on ceiling of Rs.19/- on MRP on à-la-carte channels as part of bouquet. The Authority has stated that some stakeholders mostly DPOs are in favour of review of the ceiling of Rs.19/- and have suggested ceiling of maximum of Rs.10/-. The Authority has noted that some stakeholders have suggested that the ceiling be reduced to Rs.12/- while some others have suggested a ceiling of Rs.15/-. The Authority has, while setting out Tables 1 and 2 in the Explanatory Memorandum, noted that allowing Rs.19/- as ceiling on MRP for a channel to be part of a bouquet did not work well, as Rs.19/- (Rs.15.12* to 1.25) was the maximum price of any SD channel in the previous regime. The Authority has noted that Rs.19/- should be considered as a price of niche/premium channels and should not be allowed to be part of any bouquet and it is the consumers' choice that should be taken for

subscription of such channels. The Authority has stated that the bouquet should be formed by bundling channels which are affordable and are in similar price brackets, and if high value channels are allowed to be part of the bouquets, the basic objective of the framework that the niche channel should only be given to the consumer on his free will, will be defeated. The Authority noted that as all top 4-5 broadcasters have priced their niche channels at Rs.19/-, the consumers are compelled to subscribe to either the bouquet or the niche channels, resulting in more payout from consumers in either case. The Authority had pointed out that many channels which were FTA in the earlier framework have been converted into pay channels and priced at token amounts for the simple reason that under the regulatory framework of 2017, FTA channels are not allowed to be part of a bouquet of pay channels. Examples of such channels are given in Table 2 of paragraph 56 of the Explanatory Memorandum. The Authority has noted that unfair pricing strategy of the broadcasters has lent credibility to a view point that Rs.19/-, should be brought down to control the unfair market behaviour in order to protect the interest of consumers. The Authority has stated that it is a fact that niche channels are watched by a limited number of subscribers, while GEC channels are generally popular and watched by most of the families in the country along with other channels. The Authority noted that Rs.12/- was ceiling price for GEC channels in the previous regime and therefore the Authority found merit that Rs.12/- would be a more logical ceiling to be part of any bouquet. The Authority further noted that if a channel is carrying premium program, it can be priced higher by the broadcasters, and leave it to the discretion of the customers to opt for it or not. The Authority has given example of sports channels, and has said that sports channels, which are generally priced high, have a very different class of viewership and viewing patterns and are generally episodic and event

specific. The Authority has stated that clubbing of such channels with GEC, coupled with pricing flexibility given in the Principal 2017 Tariff Order, gives manipulative edge to the broadcasters to influence customers choice against their interests. The Authority has stated that to protect the interests of consumers, it has decided that (a) the ceiling on the MRP of any channel to be part of a bouquet should be Rs.12/-, and (b) the freedom of broadcasters to declare MRP of their channel should continue.

77. On perusal of paragraphs 43 to 58 of the Explanatory Memorandum, it would be seen that the Authority has analyzed the data and considered the comments of the stakeholders and has applied its mind and given cogent reasons. Merely because the cap has been reduced from Rs.19/- to Rs.12/- for a channel to form part of a bouquet would by itself not mean that the decision is unreasonable or arbitrary. The cap of Rs.12/- is the interest of the consumers. We are of the prima facie view that if the Petitioners choose to reduce the MRP of their popular à-la-carte channels to Rs. 12/- from Rs. 19/-, to include such channels in a bouquet, the demand for bouquets may only increase. In any case, the broadcasters have not produced before us their Financial Statements to demonstrate how their revenues would be affected and/or their business would be unviable if the 2020 Amendments are implemented. Undeniably, the Authority has still left it to the choice of the broadcasters whether they want to adhere to the price of their more popular à-la-carte channels at Rs. 19/- or even increase it to more than Rs. 19/- or to reduce it to Rs. 12/- or less (for it to be included in the bouquets). That is a business decision the broadcasters have to take based on their perception of the market. When it comes to price-fixation, even assuming that there may be some loss in the revenue of broadcasters would not make the cap of Rs.12/- for any channel to form part of bouquet

unreasonable or arbitrary. There simply cannot be any mathematical precision on what would be the ideal cap for a channel to form part of a bouquet and enough elbow room or play in the joints is required to be given to the Authority in price-fixation and the Court cannot substitute its opinion with that of an expert body like TRAI. It needs to be emphasized that the cap of Rs.12/- is only on a channel that forms part of bouquet and the Authority has chosen not to place any cap on the MRP of à-la-carte channels which do not form part of a bouquet. Thus, the reduction in the ceiling from Rs.19/- to Rs.12/-, for a channel to be included in a bouquet, in our view, cannot be said to be arbitrary or unreasonable. The Madras High Court in **Star India vs. DIPP** has held that it is not for the Court to examine the price fixation, which finding has not been interfered by the Supreme Court.

Issue II - 1st twin condition (Aggregate test) – cap on discount of 33.33% on the sum of à-la-carte prices of channels which can be offered on bouquets

78. By the Consultation Paper, the stakeholders were invited to offer their comments on whether some broadcasters by indulging in heavy discounting of bouquets by taking advantage of non-implementation of 15% cap on discount (i.e 1st twin condition – Aggregate Test) have created a non-level field vis-a-vis other broadcasters and whether is there a need to reintroduce a cap on discount on sum of à-la-carte channels forming part of bouquets while forming bouquets by broadcasters, and if so, what should be appropriate methodology to work out the permissible discount, and what should be the value of such discount.

79. The rationale behind the introduction/re-introduction of the 1st twin condition (Aggregate Test) is discussed by the Authority in paragraph no. 5 to 42 under the head “Discount Structure on bouquets pricing” of the Explanatory Memorandum to the impugned 2020 Tariff Order Amendment. In paragraph nos. 12 to 16 the Authority has recorded the main arguments put forward by the stakeholders. The Authority has analyzed the data submitted by the service providers and the data of viewership obtained from Broadcast Audience Research Council (BARC) and has noted that only few popular channels in bouquets of the broadcasters are being viewed by the subscribers and other channels have insignificant viewership in comparison and that the formation of bouquets by broadcasters is generally not based on consumer demands/choice. The Authority found that the popular channels are priced at MRP of Rs.19/- to qualify be part of a bouquet and then bundled with mostly low priced and less demanded channels, and by adopting this business model, the broadcasters gain in maximizing their reach even for not so popular channels, which increases their subscription revenues. The consumers end up subscribing to channels not of their own choice, but as a compulsion and even paying for those channels which they are not inclined to watch, which in effect, results in increase in their monthly payment for subscription of TV channels, apart from losing out on choice with free will. The Authority has noted that some of the small broadcasters had expressed their concern that the broadcasters offering large number of channels use the power of their popular channels and resort to heavy discounts to push their not so popular channels as a part of bouquets to subscribers, resulting in a non-level playing field. This is forcing small broadcasters either to exit from the market or convert their pay channels to FTA channels for survival. The Authority has displayed figures in the form of table and charts to demonstrate that the broadcasters are tactfully

forming their bouquets which comprise many low priced but less popular channels and very few high priced but popular channels. Thus channels having wide variation in their à-la-carte prices are being clubbed together in a bouquet resulting in illusory pricing of pay channels to subscribers. The Authority has acknowledged that bundling of services and products, if done in a fair manner, can create economic efficiencies, reduce operational expenses, provide consumers with wider choice and access to products and services. However, on analyzing the present scenario the Authority concluded that the offering of bouquet by broadcasters, as is being done, is generally depriving the consumers of their basic right to choose channels and have been designed to better serve the commercial interest of the broadcasters. The Authority has pointed out that though the argument by broadcasters that discounts offered by them on bouquets are in the interest of consumers looks appealing on the face of it, the data relating to pricing of channels establishes that the leading broadcasters have inflated à-la-carte prices of their popular channels first and then the so called discounts are offered in bouquets on these inflated prices, as a larger business strategy to maximize their revenues which belies facts and market reality. The Authority has observed that the consumers' right to choose is paramount and TRAI as a body mandated by statute, cannot allow a situation where a business practice takes precedence over that right. The Authority has noted that for addressing the consumer concern, the possible option could be - (i) to regulate or cap à-la-carte prices of channels; or (ii) to place reasonable restriction on the formation of bouquets, without affecting the flexibility of the market players, either on the pricing of channels or packaging of channels in bouquets. The Authority has candidly stated that it agrees with the views expressed by stakeholders including broadcasters about the need for having regulatory stability, allowing flexibility in pricing, wider

choice of channels for consumers etc; secondly, that so are the complexity of factors involved, it is extremely difficult, if not impossible, to arrive at an ideal number on discounts on bouquets offered by broadcasters and that none of the stakeholders, including those who supported a cap, could suggest a scientific method to arrive at that single figure, so to as to ward off or to stand the test of a legal challenge on the ground of arbitrariness. The Authority has taken note of the fact that in some cases, the price of a bouquet is less than the price of a single channel in that bouquet and that no subscriber will opt to subscribe a channel on à-la-carte basis when a bouquet inclusive of that channel is on offer at a price below the MRP of that single channel. This clearly indicates that the price of single channel has been fixed higher to manipulate choice of such channels on à-la-carte basis. The Authority has stated that it would keep a close watch on the formation of bouquets and its impact on the market and will take suitable measures, if the situation so warrants.

80. On perusal of paragraphs 5 to 42 of the Explanatory Memorandum, we find that the Authority has analyzed the data and considered the comments of the stakeholders and has applied its mind and given cogent reasons. Having found misuse of bouquets and manipulation in pricing of the bouquets vis-à-vis individual pay channels by the broadcasters, the Authority has only sought to remedy the mischief of perverse pricing of the bouquets by the broadcasters by capping the discount at 33.33% qua the sum of à-la-carte prices of the channels in the bouquet (1st twin condition with 33.33% discount). It is required to be noted that this cap of 33.33% discount is less stringent than the 15% discount which was introduced by the principal 2017 Tariff Order (1st twin condition with 15% discount) and which was held to be arbitrary by the Madras High Court. Though the

Supreme Court in **Star India Vs. DIPP,** while dealing with the challenge to the principal 2017 provisions has not interfered with the said finding of the Madras High Court, it has recognized the issue of perverse pricing by the broadcasters and capping of discounts in **Star India vs. DIPP**. In paragraph 45 the Supreme Court has observed thus:

> "45. …The Explanatory Memorandum shows that the focus of the Authority has always been the provision of a level playing field to both the broadcaster and the subscriber. For example, when high discounts are offered for bouquets that are offered by the broadcasters, the effect is that subscribers are forced to take bouquets only, as the à-la-carte rates of the pay channels that are found in these bouquets are much higher. This results in perverse pricing of bouquets vis-à-vis individual pay channels. In the process, the public ends up paying for unwanted channels, thereby blocking newer and better TV channels and restricting subscribers' choice. It is for this reason that discounts are capped. While doing so, however, full flexibility has been given to broadcasters to declare the prices of their pay channels on an à-la-carte basis."

81. It is true, as pointed out on behalf of the Petitioners, that the Madras High Court in dealing with the challenge to the principal 2017 Regulations and principal 2017 Tariff Order had struck down the clause of putting a cap of 15% discount (1st twin condition with 15% discount) as arbitrary, and which was not challenged by TRAI in the first instance. It is however not possible for us to overlook the aforesaid findings of the Supreme Court even assuming it may not law within the meaning of Article 141 of the Constitution as contended by the Petitioners [according to the Petitioners, the 1st twin condition (Aggregate Test) was not a subject matter of challenge before the Supreme Court]. Even otherwise, we are of the firm view that the broadcasters by manipulating the price of à-la-carte channels by marginally increasing the price of some unwanted channels and adding them in the bouquet, and by offering such huge discounts on bouquets (the

average discount of major broadcasters range from 40 to 54 per cent as shown in figure 1 of the Explanatory Memorandum), deprive the consumers of making an informed choice and the consumers end up subscribing to channels not out of his choice but out of compulsion and paying for those channels which they are not inclined to watch. This is nothing but perverse pricing due to the skewed and unfair pricing strategy adopted by the Petitioners. The Authority has sought to correct the non-level playing field having found that some of the small broadcasters were being forced to either exit the market or convert their pay channels to FTA channels for survival as a result of the broadcasters using the power of their popular channels and resorting to heavy discounts and pushing their not so popular channels as a part of bouquets to subscribers. The learned Senior Counsel/Counsel for the Respondents have explained the perverse pricing by the broadcasters in the following terms:

> “The higher subscription, the higher the advertisement revenue that will be generated. Therefore, broadcasters want not so popular channels also to be in a position to claim subscription. The popular Driver Channels are bundled with those channels in which the consumers/viewers have otherwise no interest. Since the consumer/viewer may otherwise say no to taking this bundle channels and opt for a channel of their choice on à-la-carte basis. This strategy of perverse pricing is employed, namely, artificially increase the à-la-carte price of the popular/driver channel and then offer a bouquet containing that driver/popular channel at a very significant discount. The consumer/viewer is then driven to opt for a bouquet. The bouquet is not taken out of choice, but out of compulsion stemming from perverse pricing. In a large number of

cases, bouquet prices are the same as the à-la-carte price of the popular/driver channel. In many cases, the bouquet price is cheaper than the popular/driver channel. Far from being in the consumer interest the bouquets deprive consumers of choice by resorting to perverse pricing."

82. In any case, the Madras High Court was dealing with the principal 2017 Tariff Order which capped the discount of 15%. In the present case, we are concerned with 2020 Tariff Order Amendment which has capped the discount at 33.33%, which is less stringent. The fact that TRAI had filed its own SLP after the judgment of the Supreme Court in **Star India vs. DIPP,** challenging the finding of Madras High Court that the capping of discounts of 15% is arbitrary and that the said SLP was withdrawn, cannot be a factor which can held against TRAI in the challenge to the 2020 Amendments. It is well settled that there cannot be any estoppel against law on a party's purported reading of the law. Moreover, the withdrawal of the SLP cannot be considered as an expression on merits of the case by the Supreme Court. The fact that MA No. 552 of 2019 filed by 3rd party before the Supreme Court seeking clarification on clause 3(3) of principal 2017 Tariff Order came to be dismissed as without merit by the Supreme Court would be of no consequence. We reiterate and independently find that the manner in which bouquets are being pushed by manipulating the prices of the à-la-carte channels results in perverse pricing and deprive the subscribers of making an informed and real choice. The Authority has only stipulated the maximum discount that can be given by the broadcasters qua the sum of the a-la-carte prices of the channels in a bouquets. The autonomy of the broadcasters has not been taken away and the Authority has only sought to protect the interest of the consumers. Hence, it cannot

be said that the cap on discount of 33.33% on sum of à-la-carte prices of channels that form a bouquet (1st twin condition - Aggregate Test) is unreasonable or arbitrary.

Issue IV – Cap on the number of bouquets not exceeding the number of à-la-carte channels being offered by the broadcasters.

83. By the Consultation Paper comments were also invited on whether the number of bouquets being offered by the broadcasters and DPOs to subscribers is too large and if so, what should the limit of the number of bouquets be prescribed on the basis of the methodology to limit the number of bouquets which can be offered by the broadcasters and DPOs. This Issue has been dealt with by the Authority under the head “Number of Bouquets offered by the Broadcasters/Distributors” in paragraphs 62 to 71 of the Explanatory Memorandum. The Authority has recorded the responses of the stakeholders in paragraph nos. 62 to 64. The Authority has set out Figure 3 which shows the number of à-la-carte pay channels and bouquets of channels being offered by major broadcasters including their group companies. The Authority has noted that the major broadcasters have declared 97, 86, 26, 93 and 29 bouquets while number of pay channels offered by them are 57, 59, 33, 74 and 29 respectively. The Authority has stated that it would be evident from these figures that the number of bouquets offered by broadcasters is very large and such offerings are bound to create confusion in the mind of consumers and it will be difficult for any consumer to make an informed and prudent choice from amongst such large number of bouquets and à-la-carte channels. The Authority has noted that there are already around 900 à-la-carte channels.

It has noted that the large number of bouquets cause unnecessary burden on IT and billing systems of the DPOs. The Authority has stated that it would create complications and make consumers choice extremely difficult and therefore found that there is a need to have some reasonable restrictions on number of bouquets that can be formed by the broadcasters without taking away their flexibility to offer customized packages catering to needs of all sections of the Society. The Authority has noted that formation of bouquet is nothing but bundling of a number of channels together and offering value for money for the consumers and therefore, it does not make much sense if number of bouquets of pay channels offered by the broadcaster exceeds the number of pay channels offered by a broadcaster. The Authority has also provided a window that in case any broadcaster desires to offer higher number of bouquets, they may approach the Authority with detailed proposal giving reasons for the same and the Authority will consider it on case to case basis keeping in view the consumer interests.

84. On perusal of paragraphs 62 to 71 of the Explanatory Memorandum, it is noted that the Authority has analyzed the data and considered the comments of the stakeholders and has applied its mind and given cogent reasons. We find that the Authority has prescribed the cap on the number of bouquets in the interest of the consumers and to avoid creating confusion in their minds in making a choice from large number of bouquets and to avoid unnecessary burden on the IT and billing system of the DPO. It is required to be noted that the cap prescribed is on the number of ‘bouquets’ only. We are of the view that the capping the number of bouquets by the Authority cannot be said to be unreasonable or arbitrary.

85. Thus, the heart of the matter is 'bouquets' formed by the broadcasters. The stipulations prescribed vide the aforesaid three Issues viz. Issues I, II and IV are reasonable and cannot be said to be arbitrary, as indicated by us above. While holding so, we have noted the following aspects – Firstly, the impugned 2020 Tariff Order Amendment only amends the Principal 2017 Tariff Order, which has already been held to be intra vires the TRAI Act by the Supreme Court in **Star India vs. DIPP** and the challenge to which on the ground of violation of the Petitioners' fundamental rights has also been turned down by us in the earlier part of this judgment. Secondly, the amendments vide the 2020 Tariff Order Amendment only pertain to the formation of bouquets. The broadcasters choice of fixing the MRP of the à-la-carte channels has not been taken away by the Authority. In other words, there is no cap or ceiling on the pricing of the à-la-carte channels by the broadcasters. Thirdly, in **Star India Vs DIPP**, while dealing with the challenge to the principal 2017 provisions, the Supreme Court has held that the content of the TV channels is not sought to be regulated – the impugned 2020 Tariff Order Amendment does not alter this position. Fourthly, in **Star India Vs. DIPP**, the Supreme Court, while dealing with the challenge to the principal 2017 provisions, has held that the flexibility of the formation of the bouquets i.e the choice of channels be included in the bouquets has not been touched upon by the Authority – the impugned 2020 Tariff Order also does not alter this position. So long as the à-la-carte channel is priced Rs.12/- or less (which was Rs.19/- earlier), it is the choice of the broadcaster to make any channel part of a bouquet.

86. It needs to be borne in mind that we are examining the challenge to the 2020 Amendments only on the touchstone of the violation of the

fundamental rights of the Petitioners and the parameters of judicial review as discussed earlier. There cannot be any two opinions that given the complexity of the matter, it is difficult even for an expert body to predict what precisely would be the impact the impugned 2020 Tariff Order Amendment. The impugned 2020 Amendments seek to remedy the bouquet mischief and are in the interest of the consumers and are yet to be implemented by the Petitioners and the market forces would ultimately determine how the impugned 2020 Amendments would play out. So long as stipulation in the impugned 2020 Tariff Order Amendment are in zone of reasonableness, it is not for this Court to sit in Appeal over the decision of the TRAI, which is an expert body and to substitute the said decision. Reasonableness has to be examined also from the standpoint of interest of the public so as to carry out the object and purposes of the TRAI Act. We are satisfied that the stipulation prescribed by the impugned 2020 Amendments are only to balance the interest of public with that of the broadcasters and maintain a level playing field which the Authority as a Regulator is duty bound to do. We are satisfied that the Authority has applied its mind after following the consultation process and it cannot be said that the decision of the Authority is based on irrelevant consideration or that Authority has not considered the relevant material or that the Authority has exceeded its jurisdiction or the decision of the Authority is irrational and not founded on the nature of things and depending on will alone. We do not find that the stipulations prescribed are excessive and beyond what are required in public interest. The Authority has stated in the consultation papers that survival of small broadcaster is also an issue because of the clogging of channels and thereby depriving the entry of new channels. Except for some illustrations, there is no material placed before us on behalf of the Petitioners in what manner or on what basis the Petitioners

claim that the impugned 2020 Amendments, which are yet to be implemented by them, would be unreasonable. Such illustrations are shown to us on behalf of the Respondents also to contend how the broadcasters have misused the facility of bouquets against the interest of public. We have not been shown any Reports on behalf of the Petitioners which can be said to be relevant and which supports the case of the Petitioners. It appears that the Reports to which reference is made only in the written submission speak generally about public preference for bouquets vis-à-vis à-la-carte channels. The impugned 2020 Amendments do not prohibit the formation of bouquets. We note that the Authority in the Explanatory Memorandum has stated that it would keep a close watch on the formation of bouquets and its impact on the market and will take suitable measures if the situation so warrants.

87. In **Prag Ice & Oil Mills vs. Union of India** (supra), the seven-Bench Judge of the Supreme Court has observed – 'If we were to embark upon an examination of the disparate contentions raised before us on behalf of the contending parties, we have no doubt that we shall have exceeded our narrow and circumscribed authority'. It has been held by the Supreme Court in **BSNL vs. TRAI** (supra) that the powers of TRAI to make Regulations under section 36 is wide and pervasive. In **Star India vs. TRAI** the Supreme Court has stressed that a restrictive meaning cannot be given to the words "regulation" or "regulate" as otherwise the very object of the TRAI Act would be stultified. It is held that no constricted meaning can be given to the provisions of the TRAI Act. It has been further held that the provisions of the TRAI Act have to be viewed in the light of protection of the rights of both, service providers and consumers. In **Hotel & Restaurant Assn. v. Star India (P) Ltd., (2006) 13 SCC 753**, the Supreme Court has

held that TRAI exercises a broad jurisdiction and that its jurisdiction is not only to fix tariff but also laying down terms and conditions for providing services. It is the Petitioners' own case that the 2020 Tariff Order Amendment is intrinsically linked to the 2020 Regulations Amendments. The Authority in our view has only sought to protect the interest of the consumers and remedy the mischief of perverse pricing of bouquets by the broadcasters and it's endeavour is only to create a level playing field by balancing the interests of the consumers with that of the service providers. In the Report of March 2019 of FICCI EY India's Media & Entertainment sector to which a reference is made in the Consultation Paper dated 25 September 2019 on issues related to Interconnect Regulation, it is stated that the total revenue of TV industry is around INR 740 billion. In absence of Financial Statements and demonstrating before us how the Petitioners' revenues would be affected by the impugned 2020 Amendments, it is not possible to accept the contention of the Petitioners that if the 2020 Amendments are implemented their business would be unviable.

88. The Consultation process spanned more than four and half months. TRAI issued a separate Consultation Papers for 2020 Regulations Amendments and 2020 Tariff Order Amendment and invited comments and counter comments from the stakeholders. The Consultation Papers run into 95 pages. It was notified that comments and counters comments would be posted on the website of TRAI. On 18-10-2019 and 20-11-2019, workshop/open house discussions were held, which were attended by the stakeholders. There were a total 309 comments and counter comments to the Consultation Paper dated 16.08.2019 which were made available to public. After considering all the comments and counter-comments, the Authority came out with 2020 regime changes. The 2020 Tariff Order

Amendment has an Explanatory Memorandum and the rationale behind the 2020 Tariff Order Amendment is contained in the said Explanatory Memorandum. TRAI has broadly recorded the comments and the ultimate decision of rolling out the 2020 regime changes was made after taking into consideration the comments and counter comments of the stakeholders. Given the number of comments and counter-comments it cannot be expected of the Authority to deal with all of such comments and counter comments and it would suffice if the Authority broadly considers the comments and counter comments in the consultation process. It has been rightly pointed out on behalf of the Respondents that TRAI regulates the entire telecommunication services sector. It protects the interest of all stakeholders, not just broadcasters, but the entire panoply of players and participants in the sector including MSOs, DPOs, LCOs and consumers as also the interest and needs of several individual channels.

89. In **COAI vs. TRAI** (call drop case) relied upon on behalf of the Petitioners the challenge was to the validity of the Telecom Consumer Protection (Ninth Amendment) Regulation, 2015. The Supreme found that TRAI in its own technical papers admitted that call drops are caused in many ways, most of which are not attributable to the service providers. The Supreme Court, on facts, held the impugned Regulation lays down a penal consequence to a service provider for a call drop taking place without the consumer being able to prove that he is not himself responsible for such call drop and without proof of any actual monetary loss. The Supreme Court held that strict penal liability was laid down on the erroneous basis that the fault is entirely with the service provider. The Supreme Court found that there was no intelligent care and deliberation in framing the impugned Regulation by the Authority, rendering the impugned Regulation manifestly

arbitrary and unreasonable. In the present case, in so far as Issues I, II and IV are concerned, we have held that the Authority has analyzed the data, considered the comments of the stakeholders and has applied its mind and given cogent reasons The said judgment would therefore be of no assistance to the Petitioners insofar as Issues I, II and IV are concerned.

90. In **Syniverse Technologies (India) Pvt. Ltd. vs. TRAI, 2019 SCC Online Del 7491** of the Division of the Delhi High Court relied upon by the Petitioners, the challenge was to the validity of the Telecommunication Mobile Number Portability Per Port Transaction Charge and Dipping Charge [Amendment] Regulations, 2018. The proposed changes were stated in Draft Amendment Regulations and the consultation process was on Draft Regulations. The final Regulations were set aside by the Delhi High Court as the Draft Regulations did not provide for limiting portability charges to “successful porting” alone and this concept of “successful porting” was introduced in the final Regulation which was a change of fundamental nature between what was proposed and what was actually enacted. The Division Bench found that no opportunity for the stakeholders to comment on this aspect of the proposed amendment and that they ought to have been consulted prior to making this new amendment during the consultative process. The Court further held that the Explanatory Memorandum of the impugned Amendment Regulations does not reveal adequate consideration of the comments offered by the MNP service providers. The Division Bench observed that the validity of the impugned Amendment Regulation is to be assessed without going into the prohibited territory of a review on the merits of the matter. The Division Bench held that impugned Amendment Regulations are illegal and unsustainable on the following grounds:

a. Lack of transparency, inasmuch as, the consultation paper issued by TRAI did not indicate that porting charges would be payable only for successful transactions.
b. The Explanatory Memorandum to the impugned Amendment Regulations does not reveal adequate consideration of the comments submitted by the MNP service providers in response to the consultation paper.
c. Limiting the entitlement of the MNP service providers to situations of successful porting is not only contrary to the statutory scheme, but also penalizes them for failures which may not be attributable to them at all.
d. The impugned Amendment is also ex facie arbitrary and unreasonable as the per-port transaction charge of Rs. 4/- has been computed on the basis of the number of porting requests received but the same charge has ultimately been granted only for "each successful porting".

The aforesaid case is distinguishable on facts and does assist the Petitioners, in so far as Issue I, II and IV above are concerned.

91. In light of the aforesaid discussion it is not possible to accept the case of the Petitioners that the impugned 2020 Amendments violate the Petitioners' fundamental rights guaranteed under Articles 14, 19(1)(g) and 21 of the Constitution. The stipulations prescribed by the aforesaid three Issues viz. Issues I, II and IV would constitute reasonable restrictions within the meaning of Article 19(6) and cannot be said to be arbitrary.

92. We now come to the contention of the Petitioners that the 2020 Tariff Order Amendment violates their fundamental rights of free speech and expression under section 19(1)(a) of the Constitution. It is submitted that the implementation of the impugned 2020 Amendments would result in drop in circulation/viewership of channels thereby narrow the dissemination of information and infringe their fundamental right u/s. 19(1)(a). First and foremost, it needs to be noted that the 2020 Amendments are yet to be

implemented by the Petitioners and one cannot entirely rule out the possibility of increase in circulation/viewership and more so if the Petitioners choose to price their popular à-la-carte channels at Rs. 12/- (or less), which was hitherto Rs. 19/- to include such channel in a bouquet. Moreover, the 2020 Amendments essentially relate to formation of bouquets only. The submissions on the ground of infringement of Article 19(1)(a) urged before us are on the same lines as are set out in the paragraph 8(i) to (vii) of this judgment while challenging the constitutional validity of section 11 of the TRAI Act and the judgments on which reliance is placed are also the same. We have extensively dealt with the aforesaid issue of infringement of fundamental rights of the Petitioners under Article 19(1)(a) of the Constitution on account of drop in circulation while dealing with the challenge to constitutional validity of section 11 of the TRAI Act in the earlier part this judgment. We have interalia held that in balancing the rights of the broadcasters with the rights of public, the fact that there may be some curtailment of the rights of the broadcasters and/or drop in the circulation/viewership to some degree would not be seen as an infringement of the fundamental rights of the broadcasters so long as the stipulations prescribed are not unreasonable and are in the interest of public. Even assuming there is some drop in the circulation apprehended by the Petitioners on account of the stipulations prescribed in the impugned 2020 Tariff Order including the stipulations on bundling of channels/formation of bouquets, the said stipulations are, in our view, in the interest of public and seek to remedy the bouquets mischief and cannot be said to be unreasonable or arbitrary. The stipulations prescribed are part of the regulatory exercise by the Authority of balancing the interest of the consumers with that of the broadcasters and to achieve a level playing field. It is required to be noted that the stipulations in respect of the ‘bundling of

channels/formation of bouquets' was a subject matter of the challenge before the Supreme Court in **Star India vs DIPP** on the ground that it was ultra vires the TRAI Act, which challenge has been repelled by the Supreme Court.

93. For the reasons mentioned above and the reasons mentioned in the earlier part of this judgment while dealing challenge to section 11 of the TRAI Act, we are unable to accept the contention of the Petitioners that their fundamental rights under Article 19(1)(a) of the Constitution are infringed. In our view, the stipulations prescribed by the impugned 2020 Tariff Order Amendment would constitute reasonable restrictions within the meaning of Article 19(2) of the Constitution.

94. We reiterate that the aforesaid discussion only relates to Issues I, II and IV. So far as Issue III is concerned, we have dealt with the same hereinbelow.

Issue III – (2nd twin condition - Average test) - Cap on the price of channel that can be offered in a bouquet with reference to average price of the other pay channels included in the bouquet.

95. Clause 11(4) of the TRAI Act states – "The Authority shall ensure transparency while exercising the power and discharging its functions". The Supreme Court in **COAI vs. TRAI** (supra) while dealing with transparency under clause 11(4) of the TRAI Act has held in paragraphs 80, 81 and 92 as under:

"Transparency

80. Section 11(4) of the Act requires that the Authority shall ensure transparency while exercising its powers and discharging its functions. “Transparency” has not been defined anywhere in the Act. However, we find, in a later parliamentary enactment, namely, the Airports Economic Regulatory Authority of India Act, 2008, that Section 13 deals with the functions of the Airports Economic Regulatory Authority (which is an Authority which has legislative and administrative functions). “Transparency” is defined, by sub-section (4), as follows:

The Airports Economic Regulatory Authority of India Act, 2008

“13. Functions of Authority.—(1)-(3) * * *

(4) The Authority shall ensure transparency while exercising its powers and discharging its functions, inter alia—

(*a*) by holding due consultations with all stakeholders with the airport;

(*b*) by allowing all stakeholders to make their submissions to the authority; and

(*c*) by making all decisions of the authority fully documented and explained.”

81. This definition of “transparency” provides a good working test of “transparency” referred to in Section 11(4) of the TRAI Act.

92. We find that, subject to certain well-defined exceptions, it would be a healthy functioning of our democracy if all subordinate legislation were to be “transparent” in the manner pointed out above. Since it is beyond the scope of this judgment to deal with subordinate legislation generally, and in particular with statutes which provide for rule making and regulation making without any added requirement of transparency, we would exhort Parliament to take up this issue and frame a legislation along the lines of the US Administrative Procedure Act (with certain well-defined exceptions) by which all subordinate legislation is subject to a transparent process by which due consultations with all stakeholders are held, and the rule or regulation-making power is exercised after due consideration of all stakeholders’ submissions, together with an explanatory memorandum which broadly takes into account what they have said and the reasons for agreeing or disagreeing with them. Not only would such legislation reduce arbitrariness in subordinate legislation-making, but it would also conduce to openness in governance. It would also ensure the redressal, partial or otherwise, of grievances of the stakeholders concerned *prior* to the making of subordinate legislation. This would obviate, in many cases, the need for persons

> to approach courts to strike down subordinate legislation on the ground of such legislation being manifestly arbitrary or unreasonable."

The Supreme Court in the aforesaid case has further held that consultation is facet of transparency.

96. Having perused the Consultation Paper dated 16 August 2019 for the 2020 Tariff Order Amendment, we find that the aforesaid Issue III i.e the 2nd twin condition (Average Test) did not form part of the Consultation Paper and fails the test of transparency. Only the 1st twin condition (Average Test with 33.33% cap on discount) formed part of the Consultation Paper. It is required to be noted that even in the Consultation Paper for the principal 2017 Tariff Order, out of the twin conditions, only the 1st twin condition (Aggregate Test with 15% cap on discount) was proposed for consultation. The 2nd twin condition (Average Test) was not proposed for consultation for the principal 2017 Tariff Order and was non-existent in the Principal 2017 Tariff Order. This is an admitted position. The 1st twin condition (Aggregate Test with 15% discount) in the principal 2017 Tariff Order was however held to be arbitrary and unenforceable by the Madras High Court and the Supreme Court in **Star India vs. DIPP** did not interfere with that finding. The Authority, in the Consultation Paper of the 2020 Tariff Order Amendment, however, 'reintroduced' only the 1st twin condition (Aggregate Test) and sought responses also on the quantum of percentage on the cap of discount which was being proposed. While doing so it has posed the following questions in the Consultation Paper:

> "Q2. Do you feel that some broadcasters by indulging in heavy discounting of bouquets by taking advantage of non-implementation

of 15% cap on discount, have created a non-level field vis-a-vis other broadcasters?

Q3. Is there a need to **reintroduce** a cap on discount on sum of à-la-carte channels forming part of bouquets while forming bouquets by broadcasters? If so, what should be appropriate methodology to work out the permissible discount? What should be value of such discount?

97. Thus, while eliciting comments on the cap on discount on the sum of à-la-carte channels forming part of bouquet i.e. the 1st twin condition (Aggregate Test) which was proposed for consultation, the Authority has categorically used the expression "whether there is a need to reintroduce…". However, we find that there is no question posted in the Consultation Paper for the 2020 Tariff Order Amendment seeking comments on the 2nd twin condition (Average Test). The twin conditions were not something new. As a matter of fact the "twin conditions'' find a mention in Chapter-2 of the Consultation Paper itself under the title "Evolution of Tariff Orders for Broadcasting and Cable services" which gives the brief history of how the Tariff Orders for Broadcasting and Cable services had evolved. If the Authority wanted to introduce the 2nd twin condition (Average Test), in our view, it ought to have been candid and ought to have posed the question whether there was a need to "introduce" or "reintroduce" the 2nd twin condition (Average Test) at the retail level i.e. whether there was a need to "introduce" or "reintroduce" a cap on the average price per month of an à-la-carte pay channel which forms part of a bouquet and how many times should that average be fixed. It needs to borne in mind that the impugned 2020 Tariff Order was only an amendment to the principal 2017 Tariff Order and the questions posed for consultation

in the Consultation Paper therefore ought to have more intelligible to elicit proper responses and in that sense the consultation must be an effective and meaningful consultation.

98. Though it was sought to be initially argued that the twin conditions formed part of the Consultation Papers, when it was pointed out to the learned Senior Counsel for the Respondents that the words ”twin conditions’’ were mentioned only in Chapter-2 of the Consultation Paper under the title “Evolution of Tariff Orders for Broadcasting and Cable services” which gives the brief history of how the Tariff Orders for Broadcasting and Cable services had evolved, and that even in the questions posted in the Consultation Paper at Chapter V titled “Summary of Issues for Consultation’’, there was nothing to suggest that there was any consultation proposed on the 2nd twin condition (Average Test), it was sought to be argued that the 2nd twin condition (Average Test) would be covered in Question No. 5 (See Written Submissions on behalf of the UOI). Question No. 5 reads thus – “Q5. What other measures may be taken to ensure that unwanted channels are not pushed to the consumer?”. Such a question, in our view, could never have elicited any comments on the 2nd twin condition (Aggregate Test). We may have understood if some new measures were to be explored. We have perused paragraphs 3.1 to 3.25 of Chapter III of the Consultation Paper which is the discussion before posing Q5 (and alongwith Q1 to Q4). The entire focus of the Authority in the said paragraphs 3.1 to 3.25 is on discounts which is in relation to the 1st twin condition (Aggregate Test) alone. There is not a whisper in the said paragraphs of any discussion in relation to the 2nd twin condition (Average Test). As a matter of fact even some of the DPOs have not understood Q5

and have in their response stated - “the words ‘unwanted channels’ is not defined by the Authority and the same is questionable”.

99. The judgment of the Supreme Court in **COAI vs. TRAI** discussed in paragraph 89 above, supports the case of the Petitioners on the issue of transparency. So far as the judgment of the Delhi High Court in **Syniverse Technologies (India) Pvt. Ltd. vs. TRAI** (supra) discussed in paragraph 90 above is concerned, though this was a case of draft Regulations, it supports the case of the Petitioners on the issue of transparency since in the present case also, the 2nd twin condition (Average Test) was not proposed for eliciting responses for consultation in the Consultation Paper for the impugned 2020 Tariff Order Amendment. **Vodafone India Ltd. Vs. TRAI dated 20.09.2017 in LPA No. 592 of 2017,** of the Division Bench of Delhi High Court relied upon by the Respondents was a case where the Petition was filed seeking direction to the TRAI to make certain disclosures on the Regulation proposed to be framed in order to present its comments. The Division Bench of the Delhi High Court held that the TRAI’s inaction to exceed the Vodafone’s demand or refusal to share the models demanded of it would not be a violation of the transparency mandate of section 11 (4) of the TRAI Act. The said case before the Delhi High Court was in relation to a Draft Regulation and the Petitioners had sought disclosures from the Authority after the draft Regulation was notified and before the final Regulations were to be notified. The said judgment is in the context of a stakeholder seeking disclosures despite issuance of a Draft Regulation and is distinguishable on facts and does not support the case of the Respondents on the test of transparency insofar as it relates to Issue III.

100. We therefore hold that 2nd twin condition (Average Test) contained in the proviso to clause (3)(b) of the 2020 Tariff Order Amendment viz- the maximum retail price per month of any à-la-carte pay channel, forming part of such a bouquet, shall in no case exceed three times the average maximum price per month of a pay channel of that bouquet - is manifestly arbitrary and infringes the Petitioners' fundamental rights under Article 14 of the Constitution. The 2nd twin condition (Average Test) is contrary to clause 11(4) of the TRAI Act which mandates the Authority to ensure transparency, and is liable to be set aside and accordingly set aside. The fact that the said 2nd twin condition (Average Test) was not proposed by the Authority even in the principal 2017 Tariff Order shows that the 2nd twin condition (Average Test) is severable from the rest of the provisions of the impugned 2020 Tariff Order Amendment.

101. For the forgoing reasons, we hold that the 2020 Amendments do not violate the Petitioners' fundamental rights under Article 14, 19(1)(a), 19(1)(g) and 21 of the Constitution except to the extent that the 2nd Twin Condition (Average Test) contained in the proviso to Clause (3)(b) of the impugned 2020 Tariff Order Amendment which is arbitrary being contrary to the mandate of section 11(4) of the TRAI Act of ensuring transparency and violates the Petitioners' fundamental rights under Articles 14 of the Constitution

Whether the DPOs are not being regulated in forming their own bouquets?

102. It is contended on behalf of the Petitioners that the restrictions of 'twin conditions' and of Rs. 12/- on broadcasters are imposed only on the broadcasters and no such restrictions are imposed on the DPOs who can form their own bouquet and the DPOs are left unregulated. It is submitted that since 94.6% of the consumer viewership is DPO bouquets the consumers does not benefit from the twin conditions on bouquets offered by DPOs and this is discriminatory. We are afraid, it is not possible to accept this contention. First and foremost, we find that though the Consultation Paper sought comments from all stakeholders on the issues between the broadcasters and the DPOs also, we are not shown anything to demonstrate that this issue has been raised by the Petitioners in the consultation process before the Authority or that such issue was raised and the reasoning given for the decision on such issue by the Authority was arbitrary. We find that some questions in the "Summary of Issues for Consultation" set out in Chapter V of the Consultation Paper were in relation to the offerings of bouquet by DPOs where such issue could have been raised by the Petitioners. Be that as it may, before we deal with this issue on merits, it would be necessary to bring out the relationship between the broadcasters-DPOs-consumers.

103. Broadcasters supply feed to DPOs and DPOs, in turn provide the infrastructure to carry the feed to consumer. For providing such infrastructure, the DPO is paid by consumers, a Network capacity fee which is regulated by TRAI. The DPO also gets a Distribution Fee from broadcasters, which is also regulated by TRAI. The offering by the broadcasters to DPOs is of two types - (I) à-la-carte channels, and (ii) broadcaster bouquets (this is the "MRP"). The DPOs have no role in fixing the MRP. The DPOs are mandated to make available all broadcaster

offering (whether à-la-carte channel or broadcaster bouquets) in respect of all broadcasters with whom a Reference Interconnect Offering (RIO) has been signed. The DPOs cannot make these available above the broadcaster-declared MRP, as mandated by the proviso to clause 4(3) of the principal 2017 Tariff Order. The DPOs can make their own bouquets which are called DPO bouquets and their price is the 'DRP' (Distributor Retail Price). The building blocks for DPO bouquets are (i) à-la-carte channel of one or more broadcasters, and (ii) broadcaster bouquets of one or more broadcasters. The DPO may decide what composition of the DPO bouquet should be based on consumer preference.

104. When the DPOs make their own bouquets, the pricing of such bouquets (DPO Bouquets) is also regulated by TRAI, which imposes on them the following two conditions [see proviso to clause 4(4) of the principal 2017 Tariff Order]:

> (a) The bouquet will not consist of a channel whose MRP is more than Rs.12/-. (This is a same condition which is applicable to broadcaster bouquets under the 2020 Tariff Order Amendment); and
>
> (b) The DRP of the DPO bouquet cannot be less than 85% of the total of DRPs of its constituents. In other words, the DPO cannot offer discount of more than 15%. This is far more stringent requirement than 33.33% (as in the case of broadcasters). The 15% cap on the discount comes into play only after the trickle down effect of the conditions imposed on the broadcasters.

Though it is contended by the broadcasters that 94.6% of the consumer viewership is DPO bouquets, they have not disclosed that the bulk of the

DPO bouquets that the consumers subscribe to include broadcaster bouquets.

105. Learned Senior Counsel for the TRAI has pointed out a Table annexed as Tab 11 to the Written Submissions on behalf of TRAI which is an illustrative data giving detailed break-up for November 2019 of top ten pay channels, which shows that the bulk of the DPO bouquets include the broadcaster bouquets and constitute overwhelming part of consumer viewership e.g. Serial no.1 of the Table shows in the case of Star India Pvt. Ltd., while the percentage of DPO bouquets made from broadcasters bouquets was 83.90%, the percentage of DPO bouquets made de-hors broadcaster bouquets was only 0.36%. It is pointed out on behalf of the Respondents that in addition, 14.30% consumers opted for broadcaster bouquets directly and this would show that there is very little scope left for DPO to form truly customized DPO bouquets. Thus clause 4(3) and clause 4(4) of the principal 2017 Tariff Order impose sufficient conditions on the DPOs offerings of bouquets and it cannot be said that the DPOs offerings of bouquets are left unregulated and there is any discrimination between the broadcasters bouquets and DPO bouquets. Pertinently, the Petitioners have not argued or placed anything on record to counter the aforesaid facts and submissions. The discussion above has also to be viewed in the backdrop that have already held that the 2nd twin condition (Average Test) of the 2020 Tariff Order is arbitrary and have set aside the said condition, which would not be enforceable against the broadcasters. In the circumstances, the contention that the DPOs are left unregulated and that the broadcasters are being discriminated cannot be accepted.

106. Between the impugned principal 2017 provisions and the impugned 2020 Amendments, there was an interlude of about 3 years. Moreover, section 11(2) of TRAI Act provides that the Authority may from time to time, by order, notify in the Official Gazette the rates at which the telecommunication services shall be provided. The contention therefore that without waiting for 2 years, as stated in the Explanatory Memorandum, the impugned 2020 Amendments were rolled out and the impugned 2020 Amendments are a product of premature and hasty exercise cannot be countenanced. The Authority as Regulator is expected keep a watch on the market and act whenever the situation so warrants. In absence of any pleadings and Financial Statements, we refrain to comment on the alleged impact of the present Covid-19 pandemic on the Petitioners' revenues and their ability to impart quality content/programmes on television.

106. The upshot of the above discussion is as under:

1. The challenge to the constitutional validity of section 11 of the Telecom Regulatory Authority of India Act, 1997 (so far as it relates to broadcasting services), fails.
2. The challenge to the constitutional validity of the Telecommunication (Broadcasting and Cable) Services Interconnections (Addressable Systems) Regulations, 2017, Telecommunication (Broadcasting and Cable) Standard of Quality of Service and Consumer Protection (Addressable Systems) Regulations 2017 (hereinafter referred to as "**principal 2017 Regulations**") and the Telecommunication (Broadcasting and Cable) Services (Eighth) (Addressable Systems) Tariff Order, 2017, fails.

3. The challenge to the constitutional validity of the Telecommunication (Broadcasting and Cable) Services Interconnections (Addressable Systems) (Second Amendment) Regulations, 2020, Telecommunication (Broadcasting and Cable) Standard of Quality of Service and Consumer Protection (Addressable Systems) (Third Amendment) Regulations 2020 and the Telecommunication (Broadcasting and Cable) Services (Eighth) (Addressable Systems) Tariff (Second Amendment) Order, 2020, fails, except to the extent stated hereinafter. It is held that 2nd twin condition (Average Test) contained in the proviso to clause (3)(b) of The Telecommunication (Broadcasting and Cable) Services (Eighth) (Addressable Systems) Tariff (Second Amendment) Order, 2020 is arbitrary being contrary to the mandate of section 11(4) of the TRAI Act of ensuring transparency and violates the Petitioners' fundamental rights under Articles 14 of the Constitution.

4. We take the statement of the Authority on record as mentioned in the Explanatory Memorandum to the 2020 Tariff Order that it would keep a close watch on the formation of bouquets and its impact on the market and will take suitable measures, if the situation so warrants.

5. The Writ Petitions are disposed of in the aforesaid terms. Rule to stand disposed of accordingly.

(ANUJA PRABHUDESSAI J.) **(A. A. SAYED, J)**