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Cross-Media Ownership: An Intersection of Competition Laws and Media Market Forces

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ABSTRACT:
The article aims to explore the theme of Cross-media ownership, in order to understand its impact on media pluralism within the Indian market. This would include analysing the detrimental impact of such ownership model on freedom of speech and expression, which intends to resolve the dispute between media pluralism as a facet of Article 19(1)(a) of the Indian against freedom of trade under Article 19(1)(g), and their reasonable restrictions, respectively. This would lead the readers to understand the constitutional possibility and scope of regulating the Cross-media ownership in India, which is already under scrutiny in foreign jurisdictions. Along with this, the article will also discover the justification of antitrust laws being ignorant of harm caused by media conglomeration leading to depressed variability in media pluralism.

KEYWORDS: Horizontal-vertical Ownership, TRAI, Media Pluralism, Cross Ownership of Media, Anti-trust Laws, Freedom of Trade, etc.

BACKGROUND OF THE STUDY:

Freedom to make opinions, exchange thoughts and ideas, conduct critical debates and maintenance of an informed citizenry are not only a part of fundamental rights in India, but a means to an end which is the organic growth of democracy. The reason why media can be called as the fourth pillar of democracy because it is the means of achieving the hereinabove stated rights which ultimately lead to thriving of democracy. Media pluralism is an ideology which allows transversion of views and ensures that the democracy is not being sidelined by imposition of solitary form of views. In simple words media pluralism refers to a concept which requires a diverse and versatile source of medium to be present for equal and just representation of people's views in order to make the people capable to using their cognitive abilities to generate their own thoughts and views. Theorists like Denis McQuail, James Curran and even UNESCO has been the source of propagation of media pluralist ideologies. Media Pluralism is necessary because the homogenization of media landscape could lead to manipulation of freedom of cognition and individual sovereignty related to opinion and decision making. Conversely, media pluralism leads to healthy competition, which acts as a marketplace of ideas offered to people which the right to open and free contestation should grant. With the notion of media pluralism being clear it is pertinent for us to understand its relation with the concept of Cross-Media ownership.

When it comes to discussion about healthy democracy, cross-media ownership plays the role of a challenger to media pluralism. By the literal meaning, cross-media ownership refers to a corporate entity controlling the multiple forms of media like newspaper, Websites, News Channels, etc. When the cross-media ownership blossoms without being checked or unregulated, it somehow leads to aligning of editorial

policies which somehow regulated production and publication of material adhering only to that solitary policy, which is evident in the cases of media conglomerates influencing the process of political participation. Many democracies have shown the intention and have also started regulating the functioning of cross-media ownership under the ambit of market competition related laws.

It is pertinent here to understand another aspect of the relation between hereinabove discussed two concepts which is relation of fundamental rights provided under the Indian Constitution. When it comes to Article 19(1)(a) of the Indian Constitution, it promotes media pluralism. Whereas, when it comes to a corporate entity, or a conglomerate trying to spread its business by propagating trading and ownership policies, it is protected vide Article 19(1)(g). And, one thing that is sure shot clear or established is that cross-media ownership is posing a threat to media pluralism, therefore, needs to be regulated or restricted, and the only means or grounds of restricting the former is through the reasonable restrictions mentioned under Article 19(6) which confers that any law restricting the right to trade should not be disturbed if it is made in the "interest of general public". Therefore, it is pertinent to understand and analyse the interpretation given by court in the cases like Sakal Papers Ltd.[1] by the Indian courts regarding the tussle between right to freedom of speech & expression and right to freedom of trade along with the ground "interest of general public".

Another aspect that is intermixed with the discussion hereinabove, is that of the Competition Act of 2002 (hereinafter referred to as "The Act"). It is important for us to study the Act to the extent of examining its regulatory powers related to cross-ownership in the media market. This is important because, the discussion in the further segments will reveal the true nature of the Act whether it protects freedom of speech also or only focuses on managing the economic aspects of trade like monopolies, anti-trust, market price concerns, etc. Hence, through analysing and reducing our discussion till now, it will could be contended unhindered for the discovery, as to whether the Act, is protected under the garb of Article 19(6) leading to its probable protection from judicial review for the regulations and laws against cross-media ownership. This research will also lead the discussion in direction of understating the requirement of a separate media regulation, through the analysis and discovery of loopholes in only law i.e., the competition act leading to the suggestions for the media specific regulations for conquering cross-media ownership.

LITERATURE REVIEW:

Cross-media ownership being an attempt to monopolise the policy of publication and circulation of content can still be protected under the fundamental right to trade, but it stands against the freedom of speech and expression. The hereinbefore stated observation could be confirmed as per the judgement of Sakal Papers Ltd. case, when a law although aiming to restrict the right of trade, but ends up directly disturbing the right to freedom of speech and expression, cannot sustain the constitutionality just because of being a part of the ground of reasonable restriction to fundamental right of trade like "interest of general public". The judgement, although establishes the prominence of freedom of speech and expression, fails to take into cognisance the issue of cross-media ownership in the case of newspaper circulation. Justice Madhulkar conferred in the judgment that achieving the goal of just competition by restricting the trade activities cannot stand the test of constitutionality, until it chooses the path which restricts freedom of speech and expression. Restriction of trade activities "in the interest of general public" can be valid if it takes a path which does not affect any other freedom like Article 19(1)(a) which is prominent for the thriving

[1] Sakal Papers (P) Ltd., And Others vs The Union of India, AIR 1962 SC 305

democracy. The limitations to cross-media ownership can be prima facie found under Article 19(6), the grounds of which have been left absolutely untouched by the judgement for establishing its scope. The Supreme Court emphasized upon Article 19(1)(a) being superior than Article 19(1)(g) because of being imperative for a thriving democracy. However, the same bench failed to acknowledge the notion of cross-media ownership which is impacting the right to freedom of speech and expression of newcomers in the field of democracy, and failed to lay down the groundwork for anti-trust laws in favour of Article 19(1)(a), even though the same issue being raised in its defence by the state against the petitioner company.

According to P. Agarwal[2], cross media ownership has the direct impact of monopolising the media market forces as well as a threat to the right of person for receiving information from diverse sources, as recognised by several international instruments. However, the justification for such a linkage between cross media ownership being a threat to freedom of speech, expression and press have not been left to the readers to analyse. The main aim of the Article is to deduce the means and methods of measuring the media pluralism in a market either recognised because of geographical location, or due to product usage. The author has sought to bring in light on an already established linkage in the Sakal Papers Ltd. case, conferring that, though cross-media ownership needs to be regulated, but that regulation should not affect the freedom of speech and expression. The author has sought to use the reference of Competition law and the Companies Act 2013 (which explaining and differentiating control from ownership), by expressing the lacunas in these legislations to recognise and acknowledge the inability to measure media control, necessary to measure the degree of cross-media ownership. However, the author has failed to acknowledge that the aim of the paper which was to analyse the Telecom Regulatory Authority of India (hereinafter referred to as TRAI) Regulations and the competition law are to destruct monopolising tendencies in the market, and failed to deduce the reasons how Competition Law i.e., the Act cannot cater to the needs of media pluralism. The paper somehow failed to analyse the durability of TRAI regulations as well, there to curb the cross-media ownership.

As per the observations of S. Ojha[3], when ownership of certain external players in media outlets turn into a medium of controlling the decision makers regarding the choice of content to be published and circulated, that is where the large business acquisition in the media houses has led to emergence of controversy regarding violation of fundamental rights over years in the post-independence era. The author in the Article lays more emphasis on importance of versatility and diversity of opinions for a thriving democracy, rather than focusing and exploring the legal edges to control the unregulated survival of cross-media ownership. The Author has used several real-life examples like that of Sahara Group not airing the news of Subrata Roy's arrest in 20,000 crores scam, in order to showcase the fact of misleads suffered by media when non-media entities acquire an interest in it, with other commercial goals rather than circulation of news. According to the article, there are two ways of keeping the interest of owners separate from ideas to be circulated in the public sphere. Firstly, a fair competition of trade and secondly, by limiting the rights of ownership status specifically when it comes to media outlets. An important finding of the author is that, while regulating the media markets for separating equity from editorial aspects, it is pertinent to have a separate and stricter regulation for already established media outlets, as compared to the newcomers. This is so because, placing the same cap of funding on novel media outlets will lead to a blanket regulation of media plurality, which could be unjust for the newcomers. And, large media outlets do need stricter regulations because of having a large audience base, with high probability of being influenced by the

[2] P. Agarwal, Cross-Media Ownership- A Hazard to the Efficient Functioning of Media. 2 CMET (2015) 29
[3] S. Ojha, Regulation of Concentrated Media Ownership: An Essential Step to Preserve Free Speech, 3 CMET (2016) 19

content circulated. However, the criteria for separating a small business from a large media outlet have not been explored, which could have been done using the references from the Competition Act, 2002 and the Companies Act, 2013.

There are both positive and negative side to the media consolidation in a fewer corporate entity. Dr. B. Singh[4] has clearly conferred the concern that though media conglomeration might lead to a higher degree of exposure for people to international marketing and consumerism, but the detrimental impact on media pluralism cannot be if gainsaid. The author has used empirical as well as theoretical studies in order to comprehend and support the fact regarding impact on concentrated ownership in media marketing on democracy as a whole. An interesting distinction between media consolidation and monopoly has been brought into light by the author, where the former focuses on ownership and the later focuses on the control of editorial decision making in a corporate entity, respectively. It is pertinent to note here that, unlike other authors as previously discussed who have ignored the economic aspects related to competition law, those aspects, though vividly, but have been covered in the Article. The author has specifically mentioned the impact of consolidation like anti-competitive practices prevailing in the market leading to reduction in consumers diversity. The Article also discusses the negative impact on startups and new business venturing in the field of media markets, due to the priority of the dominant players in maintaining the status quo for reducing the competition when they could use the fund for introducing new technological advancements through experimenting with these novel entrepreneurial ventures. Although, the author discusses about the need of regulatory measures for constructing the legal rules related to competition law for restricting the unethical consolidation leading to monopolising the control of editorial decisions in media market, he also aims at balancing this against the need to support investment for new entrepreneurial ventures aiming to help in thriving media pluralism in the society. However, these observations of the researcher are very generally stated, and does not lead the reader on any path towards the study of existing competition law and its impact on the media market, and intersectional lacuna existing in the field of law. In order to analyse the impact of cross-media ownership on the media market, that too with respect to economic aspects, it is important to analyse the current legal framework, the powers vested with existing regulatory bodies, restrictions on media pluralism in its absolute sense, and the standards exercised by judicial authorities with respect to economic versus media interest of the society and state.

STATEMENT OF PROBLEM:

The necessity of media Pluralism for sustenance of a thriving democracy cannot be taken for granted. The only way of curbing cross-media ownership from monopolising the editorial policies is by the restriction under the ground of "in interest of general public" as stated under Article 19(6) of the Constitution of India. Although the ground has been acknowledged in famous judgments, but its scope in favour of media pluralism is yet to be laid down. Along with this, the groundwork for cross-ownership being against Article 19(1)(a) and the laws related to anti-trust mechanisms being a part of reasonable restrictions to trade have not been laid down. So, whether the provisions against monopoly are a part of reasonable restrictions to trade is yet to be discovered. The discovery will aid the policy makers and judicial officers to lay a strong foundation against economic monopolisation of media markets. Another aspect of issues related to restricting the tendency of markets harming the pluralism of media, is the economic aspect of competition law. So, in order to find out the impact of competition law and TRAI regulation on media markets, we

[4] Dr. Singh, B., & Sandipan G.K., The Economic Impact of Media Consolidation and Monopoly, International Journal for Innovative Engineering and Management Research, Vol 2 Issue 12, Dec 2023

need to study the provisions in order to determine whether the current legal frameworks satisfy only fiscal policies only, or is meant to cater the needs of a thriving democracy as well.

Article 14 of the Indian Constitution provides for equality among equals, which is also known as substantive equality. Therefore, blindly applying trade restrictions in favour of anti-trust laws against established as well debutants in the media market and entrepreneurial ventures would be unjust and detrimental to the notion of media pluralism. However, the policy for making such a reasonable classification and the ground rules for the same are yet to be laid down and analysed. This is so because of the lacuna in the literature for some intersectional study of anti-trust laws and fundamental rights i.e., media pluralism, to be specific for the purpose of the research. This will aid in responding to the tussle between trade rights and the right to freedom of speech and expressions, in order to draw a line of balance between the two prominent fundamental rights as well as their reasonable restrictions. Therefore, the study and understanding of the significance of market forces in impacting the control over the editorial decisions is the main theme of this research, where the elements of media market forces would study in accordance with the constitutional as well as statutory provisions, rules and regulations, in order to understand the status of regulation in favour or against the notion of media pluralism.

RESEARCH OBJECTIVES:

1. Analysing the cross-ownership of media on thriving democracy, and the need of a regulated market for cross-media markets.
2. To understand if the grounds mentioned under Article 19(6) of the Constitution of India, for regulating the trade of cross-media markets are suitable or not.
3. To resolve the tussle between Article 19(1)(a) and Article 19(1)(g), as the former accounts for media pluralism and the later protects trade, and in a way cross-ownership of media. In addition to this, to analyse the ambit of restrictions provided under Article 19(2) and 19(6) in order to find, if they would be helpful in regulating the unregulated cross-ownership of media markets.
4. To understand the status of anti-trust laws in India, if it caters to only economic interests of market, or does it treat media as a public commodity, distinct from other materialistic products.

CROSS-OWNERSHIP VIS-À-VIS THE COMPETITION ACT, 2002:

The study of concentration of media markets i.e., media economics came into highlight with the advent of liberalization policies in the 1990s, because the private ownership blossomed in that era. In order to understand the contemporary dynamics of media economics, it is pertinent for us to understand it through the lens of competition law. According to competition law, there are generally two forms of agreements i.e., horizontal and vertical. The horizontal agreements of ownership related to conglomeration of same types of business under one head. This although leads to reduction of cost, ultimately is beneficial for the equity stakeholders. However, the business conglomeration is definitely harmful for the plurality in content to be circulated, because the same content could be circulated by each entity over whom the ownership is exceeded. However, this form of detrimental impact of media pluralism does not hinder or blocks the path for new entrants. This form of hinderance is known as structural blocks, that are either an in-built benefits to the owners, or barriers that somehow makes it difficult for the newcomers to enter into the entrepreneurial media market. Structural blocks are very easily found in vertical form of media ownership, because in this format, a conglomerate extends ownership over the whole chain through which the content is process and manufactured to be circulated. Therefore, even if a new media entity wants to

establish itself in the market, it needs support of the chain, which is ultimately owned by another already establish corporate entity. These two types of ownership are covered under the traditional notion of competition law. However, what is not covered under the scope of competition law is the notion of cross-ownership of media. This form of media ownership lies somewhere outside the two traditional ownership structures, because it aims at extending the ownership to several media segments (like television channel and newspapers) that somehow cater to the same audience, in order to dominate the single media market and influence the people accordingly. Basically, cross-ownership of media could be defined as "strategic acquisition, alliance and information partnership between companies in order to improve access to consumers […]."[5] Usually, in cross media ownership a single market is targeted in order to establish the dominance and monopoly over a single regional or national media interests, which is easier to establish as compared to focusing on more than one domain. The reason why cross-ownership of media is not regulated by Competition Law in India, is because the Competition commission doesn't consider it to be a threat for a particular market. The Competition Commission of India (hereinafter referred to as (CCI), confers each type of media as a separate domain for regulation, because each domain is regulated by their own laws and regulations. This could be conferred form the fact that the term "relevant market" has been defined under section 2(r) and of the Act, and Regulation 36 of the CCI (Combination) Regulations, 2011. These provisions consider Telecom, Print, etc. as a separate market domain in itself, and the CCI deals with every market domain separately, but through general anti-trust laws for all the markets. This means that for CCI to proceed with interrogation into a matter of market dominance or monopoly, it first has to identify the relevant market in which the issues of competition are going on.[6] However, this doesn't mean that the competition commission focus specifically on each industry, but it lays down a general anti-trust policy for all the markets, and somehow overlooks the wider picture of media merger amongst several segments of the various markets. Therefore, a corporate entity spreading its ownership diversely over other markets is not a threat accordingly. And, that is why there was never felt a need for restricting or regulating cross-ownership of media.

However, another doubt that touches the heart of cross-ownership of media being ignored by the competition law in India is that, why can't an intersection or mixture of two media markets (like print and television) can be considered as relevant market? Or, the question can be put in another way, that, whether different medias, always constitute separate relevant markets? The answer to the issue, would be a yes, but not absolutely affirmatory. The decision of considering a media sector as relevant market depends of several factors differentiating them form each other by audience loyalty for not substituting one media by another, the model of advertisement and the way medium is being consumed. This could be supported by the observations in the judgement of HT Media case.[7] In this case, the HT media house was a prominent radio house, whereas the opponent i.e., T-series was a huge and impactful player in the music industry. According to the informant i.e., HT Media House, the opponent was using its dominant position in the market to keep exponentially high prices for the licence of the music owned by the opponent. There were two issues related to relevant markets. Firstly, whether radio could be treated as separate market, as HT media house was a cross-owner company of both radio and print media market? Secondly, whether the market for music consumers was the relevant market, or the market for music licencing was the relevant market in the case present before the CCI. Accordingly, the first issue was answered in affirmation. And

[5] DANIEL CHANDLER & ROD MUNDAY, A DICTIONARY OF MEDIA AND COMMUNICATION 99 (2011).
[6] MCX Stock Exchange Ltd. & Ors v. National Stock Exchange of India: Case No_13/2009
[7] M/S HT Media Ltd. v. Super Cassettes Industries Ltd., **2014 SCC OnLine CCI 120**

for the second issue, the media market for licencing the music was conferred as the relevant market, because the dominance was upon the licencing powers by the opponent and not the consumerism of radio. This confers and establishes the basic notion that until the mode or particular type of media is non-substitutable, that is a separate, and hence, could be considered as a relevant market for deciding the relevant issues at hand related to fair competition as against the issue of monopoly and unjust dominance.

MEDIA REGULATORY BODIES AND THE NEED OF TRAI RECOMMENDATIONS:

In order to understand the background of intersection of content market in India, and before delving into the core recommendations, it is pertinent for us to understand the nature and functions of TRAI and compare it with other existing regulatory bodies. With respect to print and television media, there are total five regulatory bodies, out of which three regulated the content, which are, Press Council of India (PCI), News Broadcasting and Standards Authority (NBSA) and Broadcasting Content Complaints Council (BCCC). On the other hand, the remaining two bodies i.e., TRAI and CCI are the non-content or technical regulatory bodies that look into the fiscal interests and anti-trust issues in the market, respectively. TRAI specifically, being a statutory establishment[8], deals with the issues of licensing and tariffs related to content to be shown on television. Out of these five, the two bodies which are self-regulatory in nature are NBSA and BCCC, out of which the former regulates the content related to news matters and the ethics with which news channel broadcasters should operate, and the latter one deals with the type non-news content like television series, shows, etc., to be shown on television in accordance with the ethical standards. It is pertinent to note here that, since these two bodies i.e. BCC and NBSA are self-regulatory in nature they can make only the parties who are member to it liable to follow the ethical standards established by it. On the other hand, when it comes to print media, the content and ethical standards for the publishers as well as journalists are controlled by PCI, which is a statutory body established under the Press Council Act of 1978[9]. From observing the roles and function of the several regulatory bodies with respect to TRAI, it could be conferred that there is no statutory body with respect to regulation of new and non-news content in the television Industry. Even though NBSA and BCCC for television are there, they seemingly don't cover the issue related to threat against media pluralism due to anti-competitive strategies. However, when it comes to print media, the PCI promotes impartial narratives, it therefore, could be inferred to be in favour of media pluralism against anti-competitive acts in the interest of public.[10] This regulatory standard does seem strict enough to curb the detrimental impact of anti-competitive benefits being taken by strong and established players in the market, in spite of competition law not being the main theme of functioning of these regulators. However, the whether such an initiative by PCI has been imposed against the cross-ownership of media, or even any form of ownership, either horizontal or vertical trying to create a monopoly, will depend upon the precedential construction of law, which is somehow yet to be established. According to the cases like K.K. Birla v. PCI, one thing that could be conferred that PCI does hold the jurisdiction to look into the matters related to freedom of press sought to be distorted by the members in the proprietor position as against the impartial exercise of discretion by the editorial board for content regulation. However, it is pertinent to note that there are minimal or almost no penalty provided under the Press Council Act, except for the power to censure, against the defaulting party, thus, making it a toothless tiger. Additionally, when we discuss about the Competition Commission of India, which is also a statutory

[8] Telecom Regulatory Authority of India Act, No. 24 of 1997, $ 3, Acts of Parliament, 1997.
[9] Press Council Act, No. 37 of 1978, $ 4, Acts of Parliament, 1978.
[10] Press Council Act, No. 37 of 1978, $ 13(2)(i), Acts of Parliament, 1978.

body[11], it has been observed that the CCI has been extremely ignorant towards securing media pluralism, by just treating it as a commodity, and not a right and a source of thriving democracy in itself. This could be observed by a very lenient attitude towards vertical and horizontal mergers and ownership, which paying heed to its impact on media pluralism, and focusing solely on the competition aspect of it treating media and hence, democracy as any other tradable commodity.[12] This could be observed from the cases of Reliance overtaking the Network 18 media house, which owns and controls a large number of media outlets all across the India, and the CCI simply conferred that such merger does not impact fair competition at all[13], without referring to its impact on media diversity and democracy. Therefore, since TRAI deals only with the technical and fiscal aspect of media content regulation for the telecom sector, the suppression of freedom of press and freedom of speech and expression remains unaddressed. Along with this, the PCI, though tends to protect freedom of press, against proprietary control, it remains a ceremonial body, rather than the one with substantial power to punish for the default. Hence, it is now pertinent to look into how TRAI's recommendations could fill the gaps related to unregulated ownership.

REVIEWING TRAI'S ATTEMPT TO CURB CROSS-MEDIA OWNERSHIP:

The Telecom Regulatory Authority of India (hereinafter referred to as TRAI), being a government body set up in 1997 by the TRAI Act of the same year. The body was established to regulate telecom and later on the television and cable channel industries in order to maintain a balance of fair competition in the media industry. The print media is especially excluded from the frame of TRAI because of it being regulated by the Press Council of India under the Press Council Act of 1978. However, while TRAI was forming recommendations and guidelines for restricting the free hand expansion of cross-media ownership, it was pertinent for TRAI to include within its ambit the newspaper and print sector, in order to serve the larger purpose of protecting media pluralism as well, and to curb media conglomeration as a whole. Therefore, it could be conferred from this step of TRAI that the void in the Act regarding cross-ownership of media is somehow being sought to be filled by these recommendations to be discussed further. The recommendations[14] intends to document the plurality of media in order to determine the success of thriving democracy in our society. And, in order to do so, TRAI intends to identify the main entities who controls the plurality of content circulation amongst viewers. The object sough to be achieved by recommendation through identification of such entities is not to curb ownership, but to restrict the control these entities tend to exercise either directly or indirectly by virtue of ownership. In order to do so, TRAI seeks some form of disclosures[15] from the media entities regarding the equity stakes in the ownership structure, the information related to contract and loans related agreements, the information regarding board members, its sources of income, etc. However, these disclosures reveal only the financial stakes, composition of executives, and the advertising relationships rather than finding the brain controlling the content circulation. What is pertinent for TRAI is to examine the probability of senior editors aligning with the stake holders in the company, for which the disclosure of editorial policies needs to be scrutinized in line with the ownership structures, through a strict audit mechanism. The Herfindahl-

[11] The Competition Act, No. 12 of 2003, $ 7, Acts of Parliament, 2003.
[12] Eli Noam, Media Ownership and Concentration in America 413 (2009).
[13] In the matter of Reliance and Network 18, Combination Registration No. C-2012/03/47, ¶ 42.
[14] TELECOM REGULATORY AUTHORITY OF INDIA, Recommendations on Issues Relating to Media Ownership, August 12, 2014.
[15] TRAI Recommendations, supra note 14, 82, ¶ 6.13.

Hirschman Index's (hereinafter referred to as HHI) use suggested by the recommendations[16], would be appropriate to measure the degree of market concentration. According to this index, the percentage of market share every media entity of a particular or a relevant market, will be multiplied by itself, and every such share will be added. If the outcome which is the arithmetic calculation comes out to be less than 1000, then the conclusion of fair competition in the market would be adopted. If the number is more than 1000 and less than 1800, then it would be assumed that there is some level of concentration in media market ownership. However, if the ownership is more than 1800, then there is high probability of a few entities dominating the competition. Again, the arithmetical and exact measure of media ownership sounds a very lucrative idea, but the main object of TRAI recommendations i.e., to curb the monopolising control of the editorial policies is till not catered the way it should be. Along with, that the HHI index can measure the concentration for only a relevant or a single media market at a time, and therefore the issue of identification of concentration of media market in a diagonal manner has to be resolved by TRAI, for which it has provided a form of solution in its recommendations. According to TRAI, if a corporate entity single handedly hits more than 1000 on the HHI scale of a particular media market, then it is not allowed to do the same in the another media markets[17], and if such a situation exists where a corporate entity already has an existing share of more than 1000 HHI points for two consecutive years in two separate media markets then the entity has to reduce the its share in one of the markets. However, the catch here is that, a corporate entity can still maintain the dominance even by staying in the legal limits of HHI index, because of the threshold being so high. Thereafter, the most important recommendation was that regarding creation of an independent regulatory and monitoring[18] body for the purpose of tracking the cross-media ownership for television and print media amongst several media markets along with some vested punitive powers as well, which has not been specified in the recommendations. It is pertinent to mention here that the independence conferred by the recommendation is only with respect to one of the government controls[19] and, the control of editorial policies by other unethical mode of private ownership have not been mentioned.

However, primarily it is pertinent to note that the notion for forming another body for such regulation is because of TRAI realising the inadequacy of the current regulatory bodies, for managing the contemporary media market, not just because they are made focusing on single media market, but because of the compositional, responsibility division, lack of oriented goals and voluntary nature of these regulatory bodies. In order to demonstrate the argument made hereinbefore, we could use the example of PCI. Although PCI is headed by retired supreme court judges and composes of a bunch of journalists, publishers, editors, eminent persons and experts from their respected fields which represent the diversity in the managerial as well as editorial boards. However, when it comes to division of duties and responsibilities, there are no guidelines or prescriptions as to who shall or should be eligible to hold which position. This could be illustrated by the scenario when in 2010 when PCI constituted a sub-committee for investigating the alleged scenarios and cases of 'paid news', when although the report was submitted to the council, it voted against its publication. This happened because of two major reasons, firstly because of conflict of interest in the council, because of many media persons present in the board from the same media outlets alleged of 'paid news'. Secondly, the reason for such conflict of interest is non-division of

[16] TRAI Recommendations, supra note 14, 81, ¶ 6.9.
[17] TRAI Recommendations, supra note 14, 81, ¶ 6.10.
[18] TRAI Recommendations, supra note 14, 84, ¶ 6.22.
[19] TRAI Recommendations, supra note 14, 76, ¶ 5.81 (a).

authorities amongst the members of the authority. To be specific, the PCI does not have any independent sub-division to look into the matter whether transparency is maintained, or reports are published in an unbiased manner or not, which is so in the case of other regulatory bodies.[20]

RESTRICTION ON ARTICLE 19(1)(A) AGAINST TRADE REGULATION:

This section deals with determining the scope of reasonable restrictions aimed to regulate the freedom of speech and expression which is affected by the laws and policy which somehow intends to regulate the equal distribution of opportunities. In the case of Bennett Coleman & Co.[21], the Petitioners challenged the constitutional vires of Import Newsprint Policy of the year 1972-73, on the ground of the impugned policy violating the right to freedom granted under Article 19(1)(a). In order to understand the purpose of this policy, it pertinent for us to observe the era of 1970s when India was suffering from foreign exchange constraints. During that period, India did not have much establish domestic media and press markets for generation and circulation of newspapers, and therefore, it used to import the newsprint companies from outside in order to maintain a balance of media pluralism and democracy. This foreign exchange constraint simply means that India was running low of finance to import and depend upon commodities from foreign lands and businesses. And, at the same time new Indian print media business were trying to come up and establish themselves, but were failing to do so because of already established foreign press corporates. Therefore, the government of India thought of regulating the press market where as per the policy introduced, the publishers were allowed to print newspapers with certain restricted number of pages with a particular type of page. This somehow restricted the content related to news as well as advertisement, to be published by the news outlets (both Indian and foreign), out of which one Indian news outlet was of the Petitioner. Therefore, this is a classic case where although the law wanted to regulate the competition in favour of the domestic entities, but ended up inflicting harm to Article 19(1)(a) of the Indian Constitution. The court emphasized that though the purpose of the policy was to regulate the business and impose qualitative restriction, the administration ultimately crosses the boundary of reasonable restrictions against freedom of speech and expression, hampering the qualitative aspect of the press as well. The Supreme Court also reiterated that freedom to press, although not explicitly mentioned but still is a part of Article 19(1)(a). The case of Bennett Coleman, somehow again forgets to deal with the issue of determine the scope of Article 19(2), and for that sake 19(6) as well. It is pertinent here to note that the constitutional vires of the policy was challenged on the grounds of violation of Article 19(1)(a), 19(1)(g) and Article 14. However, freedom to speech and expression were given primacy over the trade aspect of fundamental rights. By drawing an analogy from the Sakal papers case[22], the reasoning allotted for this stance could be that the freedom of trade in media/press market is an incidental right to main branch of speech and expression. This implies that, if trade is sought to be restricted then it has to stand the test of both Article 19(6) and Article 19(2) to satisfy the test that it is not restricting the freedom of speech and expression unreasonably, especially when it comes to discussing media as a commodity. The first time

[20] SEBI, CCI & TRAI have statutory requirement under $4A and $11 of the SEBI Act of 1992, $ 36 of the Competition Act of 2002 and $ 11(4) of the TRAI Act of 1997, respectively. These statutory requirements provide for mandatory disclosures and ensure transparency for which a designated Public Information Officer under the RTI Act of 2005 has been appointed. As these requirements are not stated under the PCI Act of 1978, the council also have not considered it necessary to make appointments in furtherance of such goals of transparency.

[21] Bennett Coleman & Co. & Ors. v. Union of India & Ors, AIR 1973 SC 106

[22] Sakal Papers, supra note 1.

where Article 19(2) properly came under the radar of constitutionality was in the case of Romesh Thapar[23], wherein the supreme court conferred that the broad grounds of restrictions like 'public order' has to be construed narrowly in order to successfully restrict the fundamental right. If the ground used is framed in such a broad manner that it can even or might fall outside the ambit of reasonable restrictions then, the constitutional validity of such law cannot be upheld. Another, thing which could be conferred when its fundamental rights of press and media is that they have two fundamental rights i.e., right to free speech and expression and right to trade freely which somehow intersects because of the dual nature of media outlets.[24] Therefore, when an act of state affects trade, then along with analysing the scope of the act with respect to article 19(6), it is also important to check whether the act in impacting Article 19(1)(a), and if yes, whether it falls under the reasonable restrictions under Article 19(2) of the Constitution of India or not.

SCOPE AND AMBIT OF ARTICLE 19(6) CONCERNS:

Structural regulation of trade in order to achieve the end of media pluralism, has to satisfy the that it is a part of reasonable restrictions under Article 19(6) and specifically under the ground of "in the interest of general public". For the purpose if testing the act of sovereign against freedom to trade, the extent and purpose of the remedy has to be analysed and determined.[25] The purpose to be examined should be done in a way that when it is implemented as a reasonable restriction, in favour or for the benefit of the general public[26] and the not the trade partners or trade members only. From this argument, and the argument posed regarding intersection of Article 19(1)(a) and 19(1)(g), the thing that could be conferred is that media pluralism is in the interest of public as it protects and propagates the object of Article 19(a) of the Indian Constitution. Therefore, although "in the interest of general public" is a part of Article 19(6), but its ambit is construed to be so wide that speech, information, and media pluralism is also construed to be a part of reasonable restrictions to trade.[27]

CONCLUSION & SUGGESTIONS:

Cross-ownership of media although was not considered a threat to media pluralism in the traditional objectives of the antitrust laws in India, however, have now started impacting the media markets by impacting the free speech in a with a much heavier degree than horizontal and vertical ownership structures and the market being open to private entities. In India it was assumed that due to linguistic plurality, cross-ownership would or have far probability of impacting media pluralism at a time. However, recent trends have shown that only a few companies are regulating all the kinds of media markets and the linguistic diversity is also threatened by it. Therefore, it should be incumbent upon CCI to coordinate with PCI and MIB 9Mininstry of Information and Broadcasting) for strict regulation of cross-media markets in India.

However, the TRAI recommendations are somehow obsolete when it comes to contemporary media dominance, and the role internet is playing in information dissemination cannot be left out from being regulated. TRAI has also somehow failed to take into account the loopholes of HHI index which is unable

[23] Romesh Thapar v. State of Madras, AIR 1950 SC 124
[24] Indian Express Newspapers (Bombay) Pvt. Ltd. & Ors. v. Union of India & Ors., (1985) 1 SCC 641, Para. 43.
[25] Krishnan Kakkanth v. State of Kerela, (1997) 9 SCC 495
[26] Information & Broadcasting, Govt. of India v. Cricket Assn. of Bengal, (1995) 2 SCC 161
[27] Tata Press Limited vs Mahanagar Telephone-Nigam Limited, 1995 AIR 2438

to take into account the diversity playing a dominant role in the relevant market. There are many alternate indices which could have been taken into account. Another concern that should be catered to is that there should be independent regulatory body, but only comprising of market, economy and media professionals with certain academic and market experience and qualifications and not the eminent personalities, just because of high influence.