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Issues in broadcast licensing in Nigeria: An appraisal of the Enabling law-the National Broadcasting Commission Act No. 38 of 1992 as amended.

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Abstract: *A quarter of a century after the establishment of a regulatory authority for broadcasting in Nigeria, the nation is yet to experience full-scale professional excellence in the gathering, production and transmission of broadcast content. Amateurish reportage and dissemination of stale information, poor signals and hazy pictures as well as general disregard for broadcast rules, laws and ethics are still discernible. Are these deficiencies the handiwork of illegal broadcast stations or the result of poor supervision of legally licensed stations? To react to these posers, this paper undertakes a critical examination of the provisions of the National Broadcasting Commission Act No 38 of 1992 as amended and finds certain inherent defects in the enabling law for the regulation of broadcasting in the country. With the tenets of the Authoritarian Media Theory in mind, the paper opines that except such defects are redressed where they are found to exist, accruable public interest gains from broadcast regulation may never endure in Nigeria*

Keywords: *Issues, Broadcast licensing, Nigeria, Enabling law, Appraisal.*

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I. Introduction

Broadcasting was introduced to Nigeria in 1932 by the British. Since then, that is, well over eight decades; the subject has had a fluctuating status. It began as a federal matter with the colonial masters running a radio service in Lagos as a branch of the 'Empire Service' established in all British colonies. None of the regions had any broadcast station at the time. By virtue of the Lyttleton Constitution of 1954 which gave autonomy to the regions on a number of subjects including broadcasting, it became possible for a region to own a broadcast station; hence Chief Obafemi Awolowo, the then Premier of the Western Region established the Western Nigeria Broadcasting Service in Ibadan in 1959. From 1976 to 1979, broadcasting reverted to a federal matter under a centralized military government. This was altered again in 1979 when the new constitution of that year moved broadcasting from the exclusive to the concurrent legislative list. This made it easy for state governments to set up their own radio and television stations. Although the development increased the number of stations and broke the federal monopoly on the subject, ownership of broadcast stations remained essentially governmental albeit at different levels as individual participation was excluded. During the Second Republic, it became obvious that the federal government was still in a position to dominate the sector. This followed an incident in which the Ogun state government owned television; OGTV controlled by a political party different from the federal ruling party was jammed by the federally owned transmitter thereby depriving the citizens from enjoying the popular local content of the state station. This showed that an independent regulatory body needed to come on board to impartially regulate broadcasting.

Nothing happened until 1992, when the situation was liberalized during the administration of military President Ibrahim Babangida (1985-1993) with the enactment of Decree No. 38 of 1992 to among other things empower private individuals to also own broadcast stations. The same Decree also saw the need to establish a regulatory authority, known as the National Broadcasting Commission to organize the process of broadcast licensing as well as to monitor and direct all matters pertaining to broadcasting in Nigeria. Section 2 of the Act spelt out a long list of functions for the Commission with only licensing being the main concern of this study.

According to the said Decree 38 of 1992 which is now an Act of the National Assembly, it became the duty of the National Broadcasting Commission (hereafter simply referred to as the commission) to confirm that an applicant seeking a broadcast licence was qualified to be granted one. The advertised method of application for a licence to own, establish or operate a radio, sound, television, cable or satellite was for any interested party to send an application through a prescribed form addressed to the Director-General of the Commission. The Commission was expected to base its findings on verifiable evidence that the applicant:

i. is a body corporate registered under the Companies and Allied Matters Act or a station owned, established or operated by the Federal, State or local government;

ii. can demonstrate to the satisfaction of the Commission that he is not applying on behalf of any foreign interest;
iii. can comply with the objectives of the National Mass Communication Policy as is applicable to the electronic media, that is, radio and television;
iv. can give an undertaking that the licensed station shall be used to promote national interest, unity and cohesion and that it shall not be used to offend the religious sensibilities or promote ethnicity, sectionalism, hatred and disaffection among the peoples of Nigeria.

It is therefore logical to expect that anyone who met the above-named terms would not be unreasonably disallowed from obtaining a broadcast licence provided such an applicant was neither a religious body nor a political party which were *ab initio* disqualified by Section 10 of the Act. In addition, no applicant was to be allowed "to have controlling shares in more than two of each of the broadcast sectors of transmission." The regulatory authority was to actualize the intention of the Act to liberalize the process by ensuring that it distributes stations of successful applicants between urban, rural, commercial or other categorization**.** It was also permitted by law to regulate the structure of the shareholding in every station vis-a vis the number of shareholding of the same applicant in other stations.

The Commission was empowered to allocate frequencies to licensed stations; just as the location of a station, its call up sign - a unique series of letters and or numbers dedicated to the identification of a station was to be approved by the Commission. The scope of coverage, that is, the area to be served by each station was also made subject to the approval of the Commission. The latter was also empowered to regulate the technical specifications of equipment and standard of transmission; impose sanctions on breaches and prescribe an appropriate fee payable. Operatives of the Commission were free to enter into the premises of any station to inspect or examine any apparatus of operation in the station in order to ascertain their conformity with approved specification.

II Problem statement

The coming into being of a regulatory body in Nigeria in 1992 saw to the compilation of several guidelines spelling out the dos and the don'ts of the sector. In the last 25 years of its existence, the Commission has from time to time amended such guidelines in the light of several experiences. As a result, one would have thought that after a quarter of a century of such operational experimentations, the nation ought to have since begun to experience full-scale professional excellence in the gathering, production and transmission of broadcast content. But this has not been so as many of the guidelines were and are still observed more in the breach. Indeed, amateurish reportage and dissemination of obscenity and intemperate diction coupled with poor signals, hazy pictures and general disregard for broadcast rules, laws and ethics are still discernible. One of the objectives of this research is to contribute to the search for the factors encouraging the trend with a view to provoking their review. Whereas many scholars (Iwokwagh, 2005; Nyman-Metcalf, 2003) have persuasively pointed to the adverse impact of government influence and control of the media, not many seem to realize that the said control is hardly done illegally as the enabling laws often allowed for such powers of control. Consequently, this study seeks to isolate and illuminate for redress such observable defects in the legal framework for regulating broadcasting in Nigeria. The following research questions were formulated to aid the study.

a. Are there lapses or contradictions in the functions and powers of the regulatory authority?
b. Where there is a lapse, defect or lacuna in any of the relevant provisions, in what ways can it be best redressed?

III. Literature review

A broadcast licence is an invaluable asset to a station owner. This is understandable as a station owner can neither be allocated any frequency nor be able to operate without a licence. As paragraph 2.12.4 of the Nigeria Broadcasting Code (2012) clearly states, "no person shall operate a broadcast system which uses frequencies in the Federal Republic of Nigeria or operate any wireless equipment that uses broadcast frequencies unless authorised to do so through the assignment of a frequency or channel by the Commission." The power of the regulatory authority in Ghana – the National Communications Commission is similarly couched. According to Section 2(4) of the Electronic Communications Act, 2008, Act 775, "a person shall not operate a broadcasting system or provide a broadcasting service without a frequency authorisation by the Authority." Therefore, any person or entity in Ghana seeking to operate a system for the provision of broadcasting services has to obtain an authorisation from the regulatory authority. Whether or not such a provision breaches the fundamental rights of those whose requests for licences are denied, has been a subject of controversy for long. Freedom of expression as a human right can be described as universal considering the numerous similarly worded provisions on the subject across the globe. There is in earnest no substantial

difference between the provisions of Article 9 of the African Charter on Human and Peoples' Rights and that of Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms; as well as that of Article 13 of the American Convention on Human Rights. They all clearly stipulate that everyone has the right to freedom of opinion and expression; including the right to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

If so, it would appear that these provisions are undermined by the practice whereby broadcasters are constrained in exercising the right in view of the principle of licensing in which a person may be unable to obtain a licence to operate a broadcast station. For many years, the justification for licensing was based on the argument that because broadcasting uses spectrum which is a scarce public resource, it is virtually impossible to grant every request for a license without creating a chaotic broadcasting milieu. There is doubt if this argument is valid today as a result of the rise of what Thierer (2016) describes as countless unlicensed "new competitors and technologies, including: cable and satellite television; satellite radio; VCRs and DVDs; the Internet and the World Wide Web; blogging; social networking; podcasting; portable digital music and video; gaming platforms; and many other multimedia information and entertainment services." Earlier, a staff researcher at the Federal Communications Commission in the United States had similarly reasoned that the 'Scarcity Rationale' merely made the freedom which traditional broadcasters can enjoy from First Amendment rights less than those of providers of newspapers, books and magazines, movies, live performances, and cable and satellite broadcasters" (Berresford 2005, p7).

This rather persuasive argument notwithstanding, Salomon (2008) confirms that the old order of regulating broadcasting across the globe subsists on a three-sided power made up of :

a) the administration of the broadcasting sector through the award and issuance of broadcasting licences;
b) the general supervision and monitoring of stations; and,
c) the determination of the guidelines in the form of code of practice.

The regulatory agency or body by whatever nomenclature it is known usually has the power to grant licenses to applicants. In the United States, it is called the Federal Communications Commission FCC. It is called Office of Communication Ofcom, in the United Kingdom and known as the Tanzania Communications Regulatory Authority in Tanzania. They all have enormous powers to regulate all broadcast stations in their different jurisdictions. In South Africa, the Independent Communications Authority of South Africa (ICASA) is empowered to issue broadcast licences; ensure service and access; monitor the industry and deal with disputes; as well as control and manage the frequency spectrum; and protect consumers from unfair business practices. All regulators are however not equally empowered; many are fully authorized to make the awards while others such as the regulator in Nigeria can only make recommendations to the government on the subject. But they all seem to have the power to revoke a licence which means that they ought to be composed of impartial members, otherwise government officials may use the regulatory bodies against political opponents and adversaries.

It might be difficult to avert such a situation going by the allegation by Nyman-Metcalf (2003, p25) that in many African countries, there is a lack of transparency of the regulators, which makes it very difficult to understand on what basis or why decisions are taken. The United Nations Scientific and Cultural Organization UNESCO may have had this in mind when in its proposed guidelines on licensing, it drew attention to two issues; the first is the need to ensure that licensing procedures are empirical and transparent while the second is the expedience of selecting only members of regulatory authorities that "can function free from any interference or pressure from political or economic forces." This is achievable if among other things, the duties and responsibilities of an independent regulatory authority are set out in law, with its decisions subject to judicial review. As Salomon (2009) has argued, an independent regulator is likely to bring forth independent broadcast stations which are particularly important in democracies, where the availability of an independent media is vital for a functioning, informed electorate. Perhaps because government is formed by a particular political party, many people may not have faith in government appointed regulators but how the UK, Germany and South Africa have handled theirs appears worthy of emulation

In the UK, the practice is for vacancies on regulatory bodies to be advertised for anybody to apply while selection is organized by an independent public appointments agency. In Germany, some notable interest groups such as trade unions, religious and professional bodies have the right to nominate candidates. In South Africa, the law requires the members of its Independent Communications Authority to have suitable qualifications, expertise and experience in certain fields among them broadcasting, telecommunications, journalism, engineering etc. In other parts of Africa, the licensing process is rather suspect. Ayedun-Aluma (2017, p2) specifically alleges that "the processing of licensing does not promote the transparency of media ownership." The framework for broadcast licensing n Nigeria needs to change from its present colouration of members of the regulatory body who by virtue of their political appointment and lack of independence from government cannot but be partisan. Perhaps this explains the suggestion by Nyman-Metcalf (2003) that new

regulations should focus on increased transparency and accessibility of the activities of regulatory bodies. This, according to the scholar must be properly organized so that the issue of licensing is sufficiently de-mystified for the public to clearly understand why someone gets a frequency while another person is denied.

Except this position is adopted in Nigeria, it would be difficult to control the stations as whatever the regulator does to any operator would be criticised against what she does to a government broadcast station. In addition; there is little the Commission can do to stations run by government and big time commercial elites. In an official statement in 2012, a former Director-General of the Commission, Yomi Bolarinwa admitted this much when he voiced his frustrations in dealing with recalcitrant . "public stations that were operating largely as the mouth piece of government instead of representing the whole society while the private stations operate as the mouth piece of the rich and powerful with the common man abandoned by both."

IV. Research premise

The main concern of this study is Nigeria where broadcast licensing is alleged to be shrouded in secrecy to cover-up official control of what should otherwise be an independent regulatory authority. For this reason the Authoritarian Media Theory upon which the study is anchored appears apt. The theory which was propounded in 1956 by F. S. Siebert, T. B. Peterson and W. Schramm is old but its long standing explanations of events and practices in many countries are still valid for today. It specifically throws light on situations in which all forms of communications are under the control of the elite, be they political authorities or high-ranking bureaucrats. Under the system as revealed by Anaeto, Onabajo and Osifeso (2008) media censorship is justifiable and any medium which violates the official policies against licensing would have its licence revoked. To the undiscerning, the deregulation of broadcasting in Nigeria in 1992 may have been done to actualize the constitutional provisions on freedom of expression as enshrined in Section 36 of the country's 1979 Constitution and reproduced in section 39 of the 1999 Constitution. However, authoritarianism is ably, even if surreptitiously, preserved in the country hence Section 39(2) of the same constitution ensures that individual ownership of any medium is subject to permit by government. The process of obtaining such a permit is then selectively applied to disentitle opponents and critics while relying on an enabling law. The result of this in the words of Hall (1975) cited in Oso (2017, p33) is that "the notion then that we are all 'free and equal' members of the communicative structures, with equal competence of 'speech' and 'equal right' is a mystification." The theory thus throws light on how broadcast licensing in Nigeria is a discriminatory tool that is designed to preserve the interest of a section of the elite political class.

V. Methodology

The study employed a multidisciplinary research methodology using a combination of socio/legal methods to obtain the contextual data. To start with, the study identified and examined in a doctrinal sense, the primary source of law which in this case; is the Act governing the regulation of broadcasting in Nigeria - the National Broadcasting Commission Act No. 38 of 1992 along with amendments made to it since its enactment. A comparative study of broadcast regulatory laws in other jurisdictions was also undertaken to throw light on global realities on the subject. In addition, selected pertinent judicial decisions in Law Reports and Journals were reviewed to find the influence of case law on broadcast licensing. The study also critically examined non-legal sources for investigative or supporting information. Among the technical documents reviewed were: The Constitution of the Federal Republic of Nigeria 1999; The National Broadcasting Commission Act No. 38 of 1992 and all its amendments; Law Reports from 'Selected cases of the National Broadcasting Commission (2014); The Nigeria Broadcasting Code (2012); Enabling laws, statutes and instruments related to broadcast licensing of Ghana Tanzania, South Africa, the United States and Britain.

VI. Law Review: National Broadcasting Commission Act No. 38 of 1992 as amended.

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To answer the two research questions formulated to aid this study, it is expedient to undertake an appraisal of relevant laws particularly, the main legal instrument- the National Broadcasting Commission Act No. 38 of 1992 as amended.

Research question 1: Are there lapses or contradictions in the functions and powers of the regulatory authority?

What appears germane here is the identification of contradictions in the functions and powers of the regulatory authority, covering validity, scope of the law, uniformity of procedures and processes, actors' discretion and initiatives.

a. **Validity of the enabling law**

In a democracy, a military decree is an aberration. Consequently, the National Broadcasting Commission Decree No 38 of 1992 cannot be described as a valid law. Lawyers are agreed that a valid law should neither be targeted at individuals nor should it have retrospective effects. The valid rule of law as popularized by the 19th century British jurist, A. V. Dicey presupposes that law can only be amended through due process. In contrast, a military Decree is subject to a dictator's temperament; it can be cancelled at will amended and reinstated severally. On this ground, the National Broadcasting Commission Decree No 38 of 1992 which purported to have legally enabled the deregulation of broadcasting in Nigeria cannot ordinarily be described as a valid law. The same is true of the setting up by the Decree of the National Broadcasting Commission as a government agency to regulate and control the broadcast industry in Nigeria. However, whatever defects the military decree had would appear to have been redressed through the adoption and integration of the provisions of the military instrument, into the Nigerian legal system as an Act of the legislature in a democratic Nigeria. Therefore it is now a valid law that is formally known as the National Broadcasting Commission Act, Cap. NII, laws of the Federation, 2004.

b. **Covering the field**

Before 1992, there were legally established broadcasting stations in Nigeria both at the federal and state levels by virtue of the 1979 constitution which placed broadcasting on the concurrent legislative list. Notable stations then, were the two federal government network stations namely; the Federal Radio Corporation of Nigeria (FRCN) and the Nigerian Television Authority (NTA) and some state government owned stations. Such stations had their own enabling laws and were thus full-fletched legal entities which did not require fresh authorization in the form of a licence to operate. At that time, private individuals and groups could not operate broadcast stations. Thus, when the National Broadcasting law was enacted in 1992 to regulate newly licensed private stations, both FRCN and NTA and state government stations were seemingly exempted from the arrangement, yet the mandate of the National Broadcasting Commission was to regulate and control the nation's broadcasting industry. To normalize the situation by ensuring uniformity in broadcast regulation across the nation, the 1992 Decree was amended in 1995 to subordinate all broadcasting stations in the country including those that had been in existence before 1992 to the authority of the Broadcasting Commission. This was effected through the instrumentality of a new law, the National Broadcasting Commission Amendment Decree No. 55 of 1995. The latter provided that any broadcast station transmitting from Nigeria was deemed to have been licensed under the Act and became subjected to the provisions of the Act. Consequently, the 1995 law repealed Sections 7 (1) and 6(1) of the laws setting up the Nigerian Television Authority and the Federal Radio Corporation of Nigeria respectively. The power under the Wireless Telegraph Act and regulations made thereunder in so far as they relate to broadcasting were similarly vested in the Broadcasting Commission thereby effectively covering the field. Based on this, all broadcasting stations in Nigeria irrespective of owner and date of establishment are now controlled by the Commission.

c. **Powers of the Commission**

Section 39 of the Nigerian Constitution 1999 explicitly grants every person the right to freedom of expression including the freedom to hold opinions and to receive and impart ideas without interference. Whether this freedom is not breached when an applicant is denied a broadcast licence has remained contentious. There have been few cases revolving around the legality of the guidelines made by the Commission pursuant to its enabling Act to regulate the industry. But none of the cases have been successful which have tended to show that the powers of the Commission assigned to it by law have been further strengthened by judicial decisions. In Rita Dibia V National Broadcasting Commission: Suit No. FHC/L/ CS/492/2004, the plaintiff unsuccessfully questioned the right of the defendant to ban the show of miracle telecast on Nigerian television stations for allegedly being in contravention of the constitutionally guaranteed rights under the freedom of expression provisions in Sections 38 and 39 of the Nigerian Constitution. The case of Obafemi Oladele and David Alase V National Broadcasting Commission: Suit No. FHC/L/CS/387/04 on similar facts also failed. Another case; Suit No.FHC/ABJ/M/197/2004 (Ukaegbu V National Broadcasting Commission and 3 ors) on whether it is not illegal to ban direct relay of foreign news into Nigeria suffered the same fate. The above is a sharp departure

from the situation in places like South Africa where the courts have overturned some decisions of the regulatory authority to deny the grant of a licence or its renewal.

d. **Availability of broadcast frequencies**

The provision of the law is that the grant of a licence by the Commission under the Act shall be subject to availability of broadcast frequencies. As explicit as this provision is, it is submitted that it is defective. The rationale is that the Commission does not have a right to grant a licence. What it has powers to do, is to recommend to government any applicant it deems qualified for a licence. Not many understand why the law is asking the Commission to revoke a licence it cannot grant. Incidentally, the law forgot to give the President who is the granting authority, the power to delegate the function. As for scarcity of frequencies, the argument of Thierer (2004) that the scarcity rationale was and is still illogical is what exploring because it appears unreasonable to suggest that a licensing requirement in an industry is enough to allow the taking away of the fundamental rights of freedom of expression of practitioners in such an industry. Comparing the print and electronic media, Thierer explains that newsprint is actually scarcer than electromagnetic spectrum and wondered why similar content controls have not been applied to newspapers or magazines. These points are as weighty as the assumption that in developing societies where democracy is yet to be stabilized, regulators under the control of government are likely to be directed to use unavailability of frequencies' to reject licensing requests from members of opposition political parties. Critics are therefore left to imagine that the phrase 'subject to availability of broadcast frequencies is a ready-made alibi.

e. **Contradictory authorizations**

In one part of its enabling law, Section 2(1b), the power of the Commission is limited to "recommending applications through the Minister to the President, for the grant of radio and television licences." Elsewhere in the same law, Section 9 is illogically titled 'powers of the commission to grant licences.' Section 9(2) says "the grant of a licence by the Commission under this Act shall be subject to availability of broadcast frequencies." In Section 10, it is provided that "the Commission shall not grant a licence to (i) a religious organization; or (ii) a political party." Paragraph 4 of the Third Schedule suggests that the Commission may decide not to renew a licence. The combined effect of these provisions is that although the Commission is empowered to merely recommend the grant of a licence to higher authorities, the same Commission is described as a grantor of licences thereby equating the regulator with the President or at best confusing the subject as to who does what in the business. This perhaps explains the power which the Commission arrogated to itself in paragraph 2.0.2 of the Nigeria Broadcasting Code where it stated that "it shall be illegal for any person to operate or use apparatus or premises for transmission of sound or vision by cable television, radio or satellite or other medium of broadcast from anywhere in Nigeria unless LICENSED by the Commission." It is submitted that the Commission cannot legally grant a broadcast licence to anyone whatsoever and that the power it derives from paragraph 4 of the Third Schedule to its enabling Act to renew a licence is *ultra vires* - a technical description for invalid excess of authority or power

Research question 2: Where there is a lapse, defect or lacuna in any of the relevant provisions, in what ways can it be best redressed?

It has already been established that the enabling law of Nigeria's broadcast regulatory authority is valid but that although it covers the field, it accommodates contradictory authorizations which ought to be redressed. This therefore calls for suggested reforms that are capable of improving the capacity of the law to achieve the policy objectives which informed its enactment. A review of the exercise of the powers of the Commission has revealed that apart from applicants seeking to reverse their exclusion from broadcast licensing, not much has come before the judiciary for resolution on the supervisory roles of the Commission. How stations are monitored and where necessary sanctioned, is yet to be truly tested leaving open the broad issue of uniformity of procedures and processes, as well as actors' discretion and initiatives.

The classical case of Adaba radio is however a signal that the Commission's invalid excess of authority or power would not be condoned. In 2009, the judiciary saved Adaba FM 88.5 Radio, an Akure based station from the claws of the regulatory body. According to Sowole (2009), the decision of the NBC to shut the station was reversed by a Federal High Court which upheld the plea of the station that the NBC breached its constitutional right to fair hearing, freedom against discrimination and freedom of expression.

What this implies is that any lapse, defect or lacuna in any of the relevant provisions of the enabling law of the regulatory authority can be appropriately redressed by, among other things, judicial review of the Commission's activities. In addition, it is necessary to reiterate the points made earlier concerning the expedience of institutionalizing broadcast licensing in Nigeria through the establishment of a truly independent and impartial regulatory authority. If this is done, it is more likely that the nation would be better positioned to evolve and implement a set of standardized and determinable operating rules and guidelines derivable from an ascertainable legal framework.

VII. Conclusion and Recommendations

This study has established that the challenges of broadcasting in Nigeria are largely attributable to the inherent defects in the enabling law of the nation's broadcast regulator. The logical consequence of a politicised regulator with unascertainable functions and largely indeterminable powers is that the sector can hardly be professionally organized. The decision of government to empower the regulator to revoke licences which it cannot grant is no doubt part of the general trend by which public officials particularly in the developing world are empowered to appropriate all powers to state authorities in line with the Authoritarian Media Theory. But the point made in this study is that several broadcasting deficiencies such as amateurish reportage and dissemination of stale information, poor signals and hazy pictures as well as general disregard for broadcast rules, laws and ethics cannot be redressed by a watch dog which is itself under partisan influence.

Accordingly, for public interest gains from broadcast regulation to endure in Nigeria, the relevant agency-the National Broadcasting Commission needs to be better organized. The Commission should be an independent entity whose activities must be transparent and credible. The law setting it up should be amended and all areas of duplicated authority expunged. It should indeed operate like other regulators such as those of South Africa and Tanzania with powers to issue, renew and cancel licenses. The process of broadcast licensing in Nigeria should also be liberalized because as canvassed in this study, the best way to control a scarce resource is pricing and not governmental control that is often politically motivated.

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