

ELECTRONIC MEDIA, MEDIA CONTROL AND THE LEGISLATIVE PROCESS

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In May, a Bill placed before parliament to set up a Sri Lanka Broadcasting Authority was struck down by the Supreme Court as unconstitutional. This Bill, however, also ensured a vigorous debate on the question of the role of the state in regulating or controlling the electronic media. The unanimous verdict of the Supreme Court in finding the Bill *ultra vires* of the constitution was hailed in the press as a landmark judgement, setting up the parameters for future legislation on the media. Some extracts from this decision are reproduced in this issue.

Even though the Bill will not now become law, there remain a number of key issues that ought to be brought into the public debate. With that intention, this essay will examine the implications of the Bill in three areas: media culture in a changing world, democracy and freedom of expression, and the process of law making in Sri Lanka.

Before we discuss each of these themes in detail, let us examine the question why there is a need for a broadcasting authority at all. In a democracy which respects the fundamental right of freedom of expression and the cardinal democratic principle of valuing public opinion usually expressed through a plurality of media, the scope assigned to any state authority to regulate any branch of the media — print or electronic — should be carefully conceived. There is a special reason for this. Among civil society institutions, it is with the independent media that regimes usually tend to develop, with relative ease, relationships of hostility, enmity and conflict. It is precisely because of this reason that the media, however much one may feel resentful about its behaviour and conduct, needs to be safeguarded from arbitrary regime intervention, political abuse and official control.

In this regard, it is relevant to recall that the relationship developed between private television and radio stations, not to mention the newspapers, and the PA regime during the past three years has been a singularly hostile one. Despite efforts made by an exceedingly cautious Media Minister — Dharmasiri Senanayake, in this case — the President and a few of her key ministers have adopted a confrontational approach to the privately owned media, which has been often unkind and unjustly combative towards President Kumaratunga and her government. The net outcome, which is patently unfortunate, is the revival within the PA of the old argument that 'too much freedom' for the media was unwarranted and was likely to be abused.¹

This environment is fertile enough for the re-germination of old ideas of state control of the private media, stopping short of nationalizing them. In this age of free market economic reforms, nationalizing media enterprises is totally out of the question. With

nationalization thus ruled out, the alternative of setting up mechanisms for control and regulation through a state authority seems to have been chosen by the government's media policy makers.

A New Electronic Media Culture?

In the Sri Lankan context, almost all arguments for a Broadcasting Authority, as envisaged in the legislation proposed by the PA government, are primarily ideological ones. They are anchored in the erstwhile, and now totally outdated, belief that all good things for the benefit of society should emanate from the state. If the state cannot monopolize ownership of things, as the belief goes, it should control and regulate them so that the state's benevolent task of ensuring social good should remain undiminished. In a radio interview, one spokesperson for the Media Ministry presented this statist argument in a sophisticated form. He claimed that the Minister sought through this law to create a new electronic media culture in Sri Lanka.² Can a strictly regulatory media regime, as envisaged in this law, contribute towards a creative media culture?

When invoking the notion of a new media culture, the Minister's spokesperson may have been thinking of upgrading the quality of Sri Lanka's electronic media through state intervention. The standards of TV and radio, as spheres of cultural and aesthetic production and exchange, in this country are generally low. While there is no disputing the fact that private television and radio stations also embody the impoverished nature of our audio-visual culture in general, one can hardly affirm that state owned and controlled television and broadcasting institutions have contributed towards the enrichment of our media culture. These institutions, of course, represent and disseminate an official media culture, the wholemark of which is total banality with no vestige of dynamism, vigour or life.

Meanwhile, there is also a fairly strong argument in Sri Lanka, at least in Sinhalese society, that state intervention — in the form of policy direction, control and material assistance — is extremely important for the survival, if not the enrichment of various spheres of our culture. This position is not unconnected with the concept of Sri Lankan society as essentially Sinhala-Buddhist and the political agenda to keep it so.

An example of state intervention that has totally gone awry is provided by the State Film Corporation (SFC), set up in the 1970s by the United Front regime. It was largely the product of a mandate given to the United Front by sections of artists and intellectuals who saw Sri Lanka's cinematic culture as particularly backward and attributed this to the dominance of purely commercial considera-

tions. But its experience over the last 25 years offers nothing to support the argument that state control and assistance could promote Sri Lanka's cinematic culture. Rather, the SFC embodies all the negative consequences of statization of a cultural field — bureaucratization of artistic production and exchange, arbitrary political controls and worse, the subjection of the institution itself to competing interests of private rentier capital as well as of ambitious cliques of the artistic community.

Drawing from the experience of other countries, if Sri Lanka were to develop an electronic media culture of any social significance and utility, the best option for the government is to create an atmosphere conducive to community broadcasting, both in radio and television. In countries where community broadcasting constitutes an integral part of the media — in the USA, the Philippines, South Africa and Australia for example — a quality electronic media culture exists side by side with commercial broadcasting. There, community radio and TV stations are run by educational institutions like universities, civil society groups and even local government bodies. Community broadcasting fosters participatory communication, making the electronic media more democratic and community responsive.

Yet, in Sri Lanka, both politicians and bureaucrats do not seem to welcome the idea of independent community broadcasting. They entertain the fear that the extension of the electronic media to civil society groups would invariably endanger national security. It is this national security argument that has been repeatedly used by governments, including the present PA regime, to restrict the scope of news broadcasting in state controlled as well as privately owned radio and TV institutions. In the final analysis, it is this fear, among those who run the state, of the free flow of information that continues to inform the policy of establishing regulatory and controlling authorities.

Indeed, there is an actual and felt need in Sri Lanka's electronic media sector for the liberalization of state policy in the granting of licenses to radio and TV stations. The present policy lacks any transparent guidelines which the media ministry or its agencies could use in reviewing applications for a license in the spirit of media democracy and democratic pluralism. The principles which have guided the recent issue of a number of radio and television licenses are unknown to the public. The existing policy which empowers the state television and radio corporations to recommend or issue licenses, is absolutely outdated, and therefore the need is to rationalize the regime of frequency distribution in a context where not only private capital but also non-profit civic bodies can enter the market place of electronic broadcasting.

But the proposed law obviously reveals that there are some sections in our society who perceive the electronic media as a threat that requires rigid regulation and control. Ruling parties and career officials who serve politicians in power constitute this powerful coalition that has repeatedly flung itself into action against the electronic media. The fact that the Bill presented to parliament by the present PA government is essentially the one drafted by the politicians of the previous UNP regime and the officials who served it demonstrates the continuity of this coalition which is structurally embedded in the state.

The Proposed Regime for Control and Freedom of Expression

The Broadcasting Authority Bill was in totality an instrument designed to create an extreme, arbitrary and interventionist policy regime which would have brought the entire spectrum of electronic broadcasting under ruling party control. The Authority would have had eleven members six of whom are 'ex-officio' and five appointed. And four of the official members are Ministry secretaries (including the Ministry of Defence) and other two are Heads of the Treasury and the Film Corporation. In an institution with a majority of 'official' members in its governing body, it is extremely important that strong checks and balances are created to prevent such institution from becoming an instrument of the President and the Cabinet of Ministers. The Bill, on the contrary, provided further opportunities for regime control of broadcasting. The five unofficial members of the Authority were to be appointed by the Media Minister, and not by an independent body like the Constitutional Council. There is no nominating process for the selection of these unofficial members; neither is there a guarantee concerning significant representation of media personnel. These appointed members "may be removed from office by the Minister", presumably exercising his/her own free will. Sad will be the day when four Ministry Secretaries, the Treasury Secretary, the Chairman of the Film Corporation and five individuals politically accountable to the Media Minister and the regime begin to preside over the entire future of Sri Lanka's television and radio.

The functions of the Authority, on paper, seemed quite good. It hoped to create an environment conducive to an "efficient, competitive" and consumer-responsive broadcasting industry. It wanted "to encourage diversity" in TV and radio broadcasting. It wanted to "promote innovative and high quality" programmes and "encourage balanced coverage of matters of public interest." But the powers proposed for the Authority would have ensured that none of these "functions" would be fulfilled.

Among the most pernicious of powers envisaged for the authority was to issue conditional licenses to broadcasters. The Bill proposed that every broadcaster should renew his license after December 31 of each calendar year. Such renewal would have been subject to very stringent terms and conditions, as set out in the First Schedule of the Bill. Public morality, national sovereignty and security, proper balance in programmes, and impartiality and accuracy in news programs constituted the body of these terms and conditions. Three problems arise from these conditions. Firstly, all these are vague, imprecise and inexact formulations with no precise political, administrative or legal definition. Secondly, they can be used at will against any broadcaster whom the regime in power, or even a powerful President or a Prime Minister, would not tolerate. Thirdly, the schedule places drastic controls on the programme content of TV and radio broadcasting. When every broadcasting license is annually reviewed by an authority whose existence is unequivocally dependent on the political party in power, it expects total subservience of the electronic media to regime interests.

The scope of these restrictions are further widened by the powers granted to the Minister of Media. Section 11 (1) stipulates that "the Minister may from time to time issue to the Authority such general or special directions in writing as to the exercise, discharge and performance by the Authority of its powers, functions and duties." One should not be misled by the construction "may" in this clause; in practice, it is most likely to be understood and practiced as "shall."

Therefore, a crucial issue was the proposed Broadcasting Authority's devastating impact on the right to free expression. No broadcaster, whose license is subject to renewal at the political will of the party in power, will dare to make any contribution to a vibrant electronic media culture through news programmes, documentaries, discussions etc., on matters of public interest. Either TV and radio stations will have to be docile and subservient to regime interests or they will have to abandon any innovative programmes.

The implication is that the proposed authority would have functioned as the pre-eminent agency to ensure that electronic broadcasting in Sri Lanka remains as backward as ever. It will not only institutionalize the present under-developed and backward status of the electronic media, but also kill whatever little efforts that are being made in terms of innovation and experiment. Scared of experimentation, we will have radio and TV stations broadcasting only entertainment programmes interspersed with sub-standard advertisements and regime propaganda. At a time when the ATN and Raj TV entertainment channels are already used so freely by all private television stations, this Bill will make it compulsory for our TV stations to re-run low-cost and risk-free Indian pop and film music programs. The reason for this scenario is quite obvious; no profit-seeking broadcaster will want to run the risk of losing the license when big money has been invested.

It is a matter of great regret that the PA government's policy towards the media represents the dominance of a particularly backward dimension of the political culture it inherited from its SLFP and Left past. State control of the media was indeed one of the defining features of the SLFP and its allies in the sixties and seventies; the PA still remains a prisoner of this straightjacket thinking of the past. Neither the rhetoric that the SLFP used when in opposition from 1997 to 1994 nor the declarations made in its 1994 Election Manifesto concerning media appear to have liberated the PA from its past, retrogressive and backward thinking. Aably supported by a docile and intellectually backward media bureaucracy, the PA government relies on its own poverty of thinking on the question of the media and free expression.

Legislative Process

The Broadcasting Authority Bill also demonstrated a particularly pernicious aspect of law making in Sri Lanka, namely the total exclusion of the public in determining and shaping new legislation. An anachronistic legacy of the venerable Westminster tradition of parliamentary democracy, this legislative process enables a small elite in power to exercise exclusive monopoly of legislative initiation and drafting. According to this practice, the

idea of a new law may emanate from either the President, a Minister or a powerful official serving the government. While the policy objectives of the proposed legislation are determined by politicians — theoretically the cabinet —, the drafting of the law is done at the legal draftsman's department. The public, and even the majority of the lawmakers themselves, can know about the actually proposed law only after it is gazetted in conjunction with the first presentation in parliament.

The drawback of this process is that at no stage of the preparation of the law is there an opportunity for the public to make representations about the law through a mechanism built in to the legislative process itself. The only opportunity that a citizen has of influencing any proposed law is to challenge it before the Supreme Court on the grounds of unconstitutionality once the bill has been presented to Parliament. The limited scope of judicial review of a proposed law apart, there is absolutely no institutional or procedural mechanism for public consultation in law making. Even when a Bill is challenged before the Supreme Court, the arguments will essentially revolve around the constitutionality of the draft law, often with regard to the Fundamental Rights chapter of the Constitution, and not concerned with the larger policy issues at stake in a particular piece of intended legislation under judicial scrutiny.

In another recent experience of law making, the crucial issue of the absence of a mechanism for public policy inputs became starkly clear; yet the government, or even the constitutional reformers, do not seem to have sensitive to it. This occasion was March 1996 when the Bill for the establishment of a Human Rights Commission was presented to parliament. When the Minister of Justice presented the Bill to parliament — which was, just like the Broadcasting Authority Bill, a slightly modified version of a law drafted by the previous UNP regime — some of the inputs made to the Minister by the human rights community, on an informal basis, had been disregarded. The Minister's reluctance to change the draft law by paying heed to the human rights lobby was perfectly understandable, because the draft law had already been passed by the formal bodies involved in the pre-parliament legislative process — the Cabinet, the Attorney General and the Legal Draftsman. Then, a totally unexpected development ensued in parliament. While the Minister expected the Bill presented by him to be passed by the entire legislature unanimously, the Opposition moved a series of amendments, many of which were similar to the proposals earlier made to the Minister by the human rights groups. Only then could the Minister could, without any hesitation, agree that the Bill would be revised through the legislative committee process. The final Bill that was subsequently passed by parliament is thus a much improved version of the first.

Now, both experiences of the HRC Bill and the Broadcasting Authority Bill offer some valuable lessons about the exercise of law making in today's context. Unlike in the past when law making was not much of a public concern, Sri Lankan society today is acutely alert to laws made and unmade by the legislature. What it means is that although the government in power has the constitutional prerogative of proposing legislation and parliament of passing legislation, society considers that it too has a stake at the laws made,

repealed or amended. One specific feature of today's society is that it consists of civic groups that specialize in public policy and legislation. They are also alert to global trends in policy as well as to social needs and realities. Therefore, society today is not a passive recipient of policy adopted by governments and laws passed by legislatures through majority vote. Their inputs can certainly enrich the legislative and public policy goals.

Similarly, law making today is much more than setting out new prohibitions, punishments etc.³ It is an exercise in political and social engineering. Therefore, law making should be not prohibitive, but enabling. Such a fresh approach to law making will make consultations with social groups infinitely rewarding for Ministers and parliamentarians in the discharge of their constitutional duties of initiating, drafting, refining and approving legislation.

The Question of Regulation.

If we take the arguments for regulation of the media seriously, issues of public decency, fairness, balanced reporting etc., need to be also addressed. Those who favour regulation of the electronic media, particularly the TV, point to the possibility of private TV airing programmes with pornographic content. They also point out that when private television and radio stations are owned by families with close links to political parties, balance and fair reporting of political issues would be compromised. In sum, the argument is that expansion of the private electronic media, without a regulatory framework, would be undesirable and risky.

These concerns, of course, need not be dismissed out of hand. They can be addressed in two ways. Firstly, any issue concerning public decency, hate speech, national security etc., can be dealt with through the existing body of ordinary law. Even such executive action should be subject to judicial review within the broader framework of the fundamental rights chapter of the Constitution.

Secondly, there is an approach which can promote self-regulation of the electronic media, instead of sole state regulation. The alternative policy option available here is to re-conceptualize the idea of a Broadcasting Authority, making it a body representative of state and private sectors of the media and civil society constituencies with a commitment to both free expression and the growth of an electronic media culture. Such a body, accountable not only to the state but also to the the public, need not be a body answerable to the media minister. The directorate of such an authority should not be crowded with Ministry secretaries at all. The option here is to de-link the Authority and the Minister and make it independent. When owners of private media institutions are also in the Authority, with powers to define broad media guidelines, it would be extremely difficult for the media private sector to shun the responsibility dimension of the media business. That would perhaps be the best alternative way of addressing the issues of decency, fairness and balanced reporting.⁴

Conclusion

Legislative efforts concerning the media in Sri Lanka still remains a singularly backward area of public policy. The

entire discourse is obsolete, blind to two most significant developments in Sri Lankan society: firstly, the growth of social and professional movements committed to free media; secondly, the vast strides made by the Sri Lankan judiciary in expanding the scope and application of freedom of expression as a fundamental right.⁵

Notes.

1. President Kumaratunga, on more than one occasion, used the metaphor of the wild ass to denounce what she saw as irresponsible exercise of freedom of the press. Her Minister of Post and Telecommunications, Mangala Samaraweera, made several combative statements in parliament regarding the privately-owned English press and private television stations which have always been projecting the opposition UNP point of view often in a crude manner. Bitter and thoroughly acrimonious debates between the ruling party and the opposition press has been a major trend in the politics in Sri Lanka since the early 1990s.

2. As was revealed during the controversy on the Broadcasting Authority Bill, Media Minister Senanayake should not perhaps be blamed for the proposed law, although he took the official responsibility for it. Although the actual authorship of the Bill remains a mystery, it is possible that the general policy framework was conceived at the highest level of the PA administration.

3. It is such a splendid anachronism that no law is yet conceived without specifying transgressions, offenses and punishments. This reflects the medieval notion of state power, grounded on the assumption that the will of the state should be imposed on society by means of prohibitions, threats and coercive obedience of the citizen.

4. Incidentally, one really curious aspect of the statist attitude to electronic media in Sri Lanka is the belief that the private sector has no legitimate place in the electronic media world. The Broadcasting Authority Bill, to a great extent, reveals this negative attitude. The proposal made in this paper to totally re-conceptualize the idea of the Broadcasting Authority is in a way meant to change this thinking as well. So long as the private sector is excluded from the sphere of legitimacy of the electronic media — treating it as illegitimate and predatory business —, it is also not quite correct to expect a responsible private electronic media sector.

5. It makes absolutely no political sense for the PA government to propose a broadcasting law, as it did, severely restricting the freedom of expression as well as freedom of association and promoting selective discrimination against private media enterprises at a time when the regime itself is engaged in a constitutional reform exercise in which the fundamental rights chapter of the new constitution is spoken of as a major breakthrough in human rights jurisprudence of the country.