VERDICT ON BROADCASTING AUTHORITY BILL

Fifteen petitions questioning the constitutionality of the Bill to establish a Broadcasting Authority gazetted by the government were filed in the Supreme Court. These were inquired into on the 28th and 29th of April by a Supreme Court bench comprising of Mr. G.P.S.De Silva, Chief Justice and Messrs. A.R.B.Amerasinghe and P.Ramanathan, Justices.

We publish below extracts from their judgement which found the bill unconstitutional.

The Sri Lanka Broadcasting Authority Bill establishes distinctions between the Sri Lanka Broadcasting Corporation and the Sri Lanka Rupavahini Corporation on the one hand and other broadcasters both with regard to expected standards of performance, as well as accountability for the maintenance of those standards. The distinction drawn between the Sri Lanka Broadcasting Corporation and the Sri Lanka Rupavahini Corporation and other broadcasters is invidious and offensively discriminating; what is the basis for differentiating between the requirements prescribed for broadcasters generally in the Third Schedule of the Bill and the requirements for the SLBC in section 3 (2) of the Ceylon Broadcasting Corporation Act and for the SLRC in section 7 (2) of the SLRC Act ? The Sri Lanka Broadcasting Corporation and the Sri Lanka Rupavahini Corporation are at liberty to conform to the prescribed norms "as far as practicable"; they are therefore required to do what is capable of being carried out in action in accordance with their obligations to the public in conformity with the principles applicable to responsible publication; other broadcasters, however, are treated grudgingly in the matter of conforming to standards: in terms of section 7 (7) of the proposed Act, the Authority may suspend or cancel a license issued to a broadcaster "if it is satisfied that the person to whom such license was issued has contravened or failed to comply with the conditions subject to which such license was issued....." If directions issued by the Authority aimed at securing compliance with the conditions of the license are not complied with, the licensee is in addition, in terms of Clause 17, guilty of an offence. The learned Additional Solicitor-General did say that Clause 17 should be deleted. However, as far as we are concerned it is a provision of the Bill before us. Even if Clause 17 were to be deleted, the differences in required standards and the question of accountability remain.

The learned Additional Solicitor-General submitted that the Sri Lanka Broadcasting Corporation and the SLBC were different and were not similarly circumstanced with other broadcasters. There is nothing intrinsically wrong with distinguishing between one class of persons and others; indeed, justice sometimes requires that distinctions should be made.

However, there must be some rational basis for doing so. The learned Additional Solicitor-General did not suggest any reason why the Sri Lanka Broadcasting Corporation or the Sri Lanka Rupavahini Corporation should be treated differently with regard to the expected standards and accountability.

In the circumstances, we have formed the opinion that there is no rational basis for treating the Sri Lanka Broadcasting Corporation and the Sri Lanka Rupavahini Corporation with special favor on those matters. There is no rational explanation why the law should only be benign in operation to those broadcasters, why the Authority should act generously in relation to those institutions, while looking upon others with "an evil eye" with regard to required standards governing the content of programmes, the manner of complying with those standards, and the consequences of failing to comply with those standards. The unjustified discrimination is manifest. There is a clear violation of the principles of equality. In the circumstances, we hold that clauses 4 (c), 4 (d), 4(e), 4 (g), 5(g), 7(1), 7(5), 7(7), 10, 11, 17, 19 (1), 19(2) (c) and the First Schedule of the Sri Lanka Broadcasting Authority Bill be read and construed together in their context, rather than as standing alone, which is the way an Act or other legislative instrument must be construed by a court, are inconsistent with Article 12 (1) of the Constitution and cannot become a part of the Law of Sri Lanka unless they are passed by a special majority in terms of Article 84 of the Constitution.

The learned Additional Solicitor-General, responding to an inquiry by the Court, stated that the proposed legislation did not apply to the Sri Lanka Broadcasting Corporation and the Sri Lanka Rupavahini Corporation. Attention is drawn to the views of ARTICLE 19-The International Center Against Censorship - that took its name and purpose from Article 19 of the Universal Declaration of Human Rights which provides that "Everyone has the right to freedom of opinion and expression: this right includes the freedom to hold opinions without interference and to seek,receive and impart information and ideas through any media regardless of frontiers".

In its publication entitled ..."Broadcasting Freedom-International Standards and Guidelines", the importance of uniform standards for public and private broadcasting, administered by an independent, single authority, is underlined. It is stated at p. 13 as follows:

> The body that allocates licenses must be independent of government. The body may be the one which manages public broadcasting or a separate authority. However, a single authority with jurisdiction over public and private broadcasting is recommended because it facilitates the development and implementation of broadcasting policy, including a coordinated strategy to ensure that pluralism is achieved in broadcasting as a whole.

> The independent licensing body should also have responsibility for the allocation of frequencies and other technical aspects of broadcasting.

The emphasis by ARTICLE XIX on the need to achieve "pluralism" for the sake of promoting freedom of thought, and the need for an independent authority to regulate broadcasting acquires special significance in the light of the following observations of the U.S. Supreme Court in *Grosjean v s American Press Co, 297 U.S. 233, 56 S.Ct. 444, 80 L. ed. 660.*

> Judge Cooley has laid down the test to be applied-"The evils to be prevented were not the censorship of the press merely, but any action of government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens". 2 Cooley's Constitutional Limitations, 6th ed., p. 886.
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> ... The predominant purpose of the grant of immunity here invoked was to preserve an untrammeled press as a vital source of public information. The newspapers, magazines and other journals of the country, it is safe to say, have shed and continue to shed, more light on the public and business affairs to the nation than any other instrumentality of publicity; and since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern..... A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves.

Private broadcasting is a relatively new phenomenon even in the most developed countries. State-owned organizations had been the exclusive means of broadcasting because of several reasons, including (1) the major capital investment required in building transmitters; (2) the limited number of available frequencies and the national and international need to make rational and orderly use of the spectrum; (3) political concerns that required broadcasting, on account of its great impact on public opinion, to be the preserve of the State. Technological progress, including microwave transmission and the appearance of cable transmissions, the willingness of private entrepreneurs to invest in the business of broadcasting, and more liberal attitudes on the part of States have resulted in an increase in the number of private broadcasters.

However, although advances in technology have led to more efficient utilization of the frequency spectrum, uses for that spectrum have also grown apace. As the U.S. Supreme Court observed in *Red Lion Broadcasting Co. v s F.C.C. 395 U.S. 367, 89 S.C. 1794, 23 L. Ed 371 (1969):*

> Portions of the spectrum must be reserved for vital uses unconnected with human communication, such as radio-navigational aids used by aircraft and vessels. Conflicts have emerged between such vital functions as defense preparedness and experimentation in methods of averting midair collisions through radio warning devices. `Land mobile services" such as police, ambulance, fire department, public utility and other communications systems have been occupying an increasingly crowded portion of the frequency spectrum...

Scarcity is not entirely a thing of the past, and therefore States have a continuing and compelling need to regulate the use of the frequency spectrum. The U.S. Senate (S Rep. N 562, 86th Cong. 1st Sess. 8-9 (1959). U.S. Code Cong. & Adm News p. 2571) said that "broadcast frequencies are limited and, therefore, they have been necessarily considered a public trust." That observation was cited with approval by the U.S. Supreme Court in Red Lion Broadcasting Co. (supra). The Supreme Court of India too has endorsed the view that airwaves/frequencies are limited and must be regarded as "a public property" with regard to which the State must exercise control so that they will be used for the public good: See Secretary Ministry of Information and Broadcasting v Cricket Association of Bengal (1995) 2 SCC 161 esp. paras. 78, 185, 192, 194. It is recognized that States" have a right and a duty to ensure the orderly regulation of communications, and this can only be achieved by a licensing system": Per Judge Bernhardt in Groppera Radio AG and others v Switzerland, (1990) 12 E.h.R.R. 321 at 350. Because of the public property nature of frequencies, licenses to broadcast do not confer ownership of designated frequencies, but only the temporary privilege of using them during a specified time: See Red Lion Broadcasting Co (supra).

Radio and television, because of their pervasive and wide reach and influence on members of the public, constitute a most important means of mass communication. In order to play its role in advancing freedom of speech, the State, because of the limited availability of frequencies, must endeavor to ensure that the medium continues to be effective. Because of the limited availability of frequencies, chaos would ensue if the spectrum is uncontrolled and the usefulness of radio and television as a means of communication would soon come to an end, with unfortunate consequences for the right of free speech and independent thought. If there is to be effective communication, only a few can be licensed and the rest must be barred from the airwaves.....

Having regard to the limited availability of frequencies, and taking account of the fact that only a limited number of persons can be permitted to use the frequencies, it is essential that there should be a grip on the dynamic aspects of broadcasting to prevent monopolistic domination of the field either by the Government or by a few, if the competing interests of the various sections of the public are to be adequately served. If the fundamental rights of freedom of thought and expression are to be fostered, there must be an adequate coverage of public issues and an ample play for the free and fair competition of opposing views. The imposition of conditions on licensees to ensure that these criteria should be observed do not transgress the right of freedom of speech, but they rather advance it by giving listeners and viewers the opportunity of considering different points of view, of thinking for themselves, and making personal choices...

In Secretary Ministry of Information & Broadcasting vs Cricket Association of Bengal, (ibid.), Sawant, J said:

> There is no doubt that since the airwaves/frequencies are a public property and are also limited, they have to be used in the best interest of society..... further, the electronic media is the most powerful media both because of its audiovisual impact and its wide reach covering the section of the society where the print media does not reach. The right to use the airwaves and the content of the programmes, therefore, needs regulation for balancing it and as well as to prevent monopoly of information and views relayed, which is a potential danger flowing from the concentration of the right to broadcast/ telecast in the hands either of a central agency or a few private affluent broadcasters. That is why the need to have a *central agency representative of all sections of the society free from control both of the Government and the dominant influential sections of the society.*

While a regulatory authority is, for the reasons explained, necessary, it is imperative that such an authority should be independent... As we have seen, ARTICLE XIX stated that "the body that allocates licenses must be independent of government". The ultimate guarantor that the limited airwaves/frequencies shall be utilized for the benefit of the public is the State. This does not mean that the regulation and control of airwaves/frequencies should be placed in the hands of a government in office for the time being. The airways/ frequencies, as we have seen, are universally regarded as public property. In this area, a government is a trustee for the public: its right and duty is to provide an independent statutory authority to safeguard the interests of the people in the exercise of their fundamental rights: no more and no less. Otherwise the freedoms of thought and speech, including the right to information will be placed in jeopardy.

Clause 3 of the Sri Lanka Broadcasting Authority Bill States that the administration, management and control of the Authority shall be vested in a Board of Directors consisting of *six ex officio* and five other members appointed by the Minister. Five of the *ex officio* members are Secretaries to Ministries or their representatives: (A Secretary to a Ministry is appointed by the President and is subject to the direction and control of his Minister: Article 52 (1) and (2) of the Constitution); The sixth *ex officio* member is the chairman of the National Film Corporation of Sri Lanka. (He is appointed by the Minister: See section 19 of the National Film Corporation of Sri Lanka Act No 47 of 1971). Of the five members appointed by the Minister, "at least two" "shall be persons who have had experience in the field of broadcasting". No other criterion for selecting the appointed members is laid down. Clause 3 (4) states that "An appointed member of the Board may be removed from office by the Minister, by Order published in the Gazette....." Clause 3 (11) states that "The Minister may remove the Chairman by Order published in the Gazette". Clause 11 states: (1) 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 of the Authority its powers, functions and duties under this Act; (2) it shall be the duty of the Authority [to] give effect to any direction issued to it under subsection (1)".

The Minister is empowered by clause 19 to make regulations, inter alia, prescribing "the guidelines to be followed by persons licensed under this Act in the presentation of programmes including commercial advertisements". Contrary to the usual practice- e.g. see section 46 of the Ceylon Broadcasting Corporation Act and section 31 of the Sri Lanka Rupavahini Corporation Act- the Minister is neither required to publish the regulations in the Gazette nor is he required to bring the regulations to Parliament for approval.

The Authority is empowered by clause 5 (g) to issue directions to license holders. Clause 7 (7) empowers the Authority to suspend or cancel any license issued to a license holder who fails to comply with directions issued by it. Clause 17 makes it an offence for a person to fail to comply with the directions given by the Authority.

Having regard to the composition of the Board of Directors of the Authority, the lack of security of tenure in office either of the Chairman or of the appointed members, and having regard to the power of the Minister to give directions which the Authority is obliged to follow, the Authority, it was said by learned counsel for one of the petitioners is "no more than an arm of the Government". We agree that the Authority lacks the independence required of a body entrusted with the regulation of the electronic media which, it is acknowledged on all hands, is the most potent means of influencing thought.

Since, in terms of clause 5 (e), it is a power of the Authority "to determine as to whether the programmes and activities of the license holders for television and radio broadcasts are detrimental to the development of the local film industry and take appropriate corrective measures", the participation of the Chairman of the National Film Corporation of Sri Lanka as an ex officio member of the Board of the Authority might - a Petitioner who is a viewer of television, complained - give rise to a conflict of interests that was likely to adversely affect the rights of viewers. Learned counsel for that petitioner emphasized the fact that the Authority had the power not only to determine whether programmes were detrimental to the local film industry but also to determine whether the activities of the license holders were detrimental. Therefore, even the acquisition of suitable materials for broadcasting by a license holder could be prevented: it opened the door to interference that would be incompatible with the effective and efficient exercise of a licensee's right of publication in the public interest and would jeopardize the right of the public to balanced programmes taking account of the diverse nature and interests of our population...

The minister, with his unbridled power to make regulations, is placed in a position where he might, through "guidelines", interfere with the presentation of programmes and thereby undermine the principle of fairness, which is at the heart of responsible broadcasting. Similarly, the minister may interfere with commercial advertisements and thereby infringe the right of the public to have information to enable them to make independent judgments on what they may choose, and also on a legally unacceptable discriminatory basis, deprive certain broadcasters of income from sponsorship that

might adversely affect the viability or economic feasibility of their enterprises. Having regard to the fact that interference with a broadcaster by the Minister through the Authority is a real and not a merely speculative possibility or likelihood, the submission of several learned counsel that the proposed Sri Lanka Broadcasting Authority is not an independent body, is not without merit. In the circumstances, a licensee may be unable to discharge the duty of impartiality referred to in paragraph 3 of the First Schedule of the Bill.

Licenses may be suspended or cancelled for failure to comply with the terms of the license or for failure to comply with the directions of the Authority. Attention should also be drawn to the fact that clause 7 (5) makes a license renewable on an annual basis. The chilling effect of provisions of that kind is obvious. On the other hand, for the reasons explained, license holders have the responsibility of meeting the requirements imposed on them to ensure that the interests of the public at large may be safeguarded. Perhaps the period of one year may inhibit the investment of large amounts of money in establishing stations. Yet, as we have seen, a license to broadcast is a temporary privilege and while in issuing a license the authority must, among other things, consider the needs of competing communities and the programmes offered by competing stations to meet those needs, the authority must have the right, where the public interest requires it, to alter allocations of frequencies, to reflect changing needs and circumstances. However, decisions of that kind aught, for the reasons explained, be made by an independent Authority. Our attention was drawn to the Prasar Bharati (Broadcasting Corporation of India) Act 1990 and the Public Broadcasting Services Bill 1995, of the Republic of South Africa and to the composition and manner of operation of the Federal Communications Commission in the United States to illustrate what might be regarded as an "independent" regulatory body and how it should operate. The differences between the Sri Lanka Broadcasting Authority and those bodies are substantial and significant.....

Since the proposed Authority, for the reasons explained, lacks independence and is susceptible to interference by the Minister, both the right of freedom of speech and freedom of thought are placed in jeopardy by clause 3 (1), read, as it must be, with clause 3 (4), clause 5 (g), clause 7 (7) clause 10, clause 11, clause 17 and clause 19. We are therefore of the opinion that clause 3 (1) read with clause 3 (4), clause 5 (g), clause 7 (7), clause 10, clause 11, clause 17 and clause 19 are inconsistent with Article 10 and Article 14 (1) (a) of the Constitution and in terms of Article 83 of the Constitution requires to be passed by a special majority of Parliament and approved by the People at a Referendum.

While we do not accept the view that licensing must be confined to regulating the technical aspects of broadcasting, and do concede that, in the matter of licensing the State is permitted a margin of appreciation, we are of the view that "the principle of pluralism, of which the State is the ultimate guarantor", as the European Court of Human rights said in Lentia (supra), must be safeguarded in order to ensure that freedom of thought and expression may not only survive but thrive and flourish vigorously. Article 4 (d) of the Constitution states that "the fundamental rights which are by the Constitution declared and recognized shall be respected, secured and advanced by all organs of government, and shall not be abridged, restricted or denied save in the manner and to the extent hereinafter provided". We have explained why the regulation of broadcasting is not inconsistent with the freedom of thought and speech: and why such regulation secures, promotes, and advances these rights.

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