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THE LIMITS TO GOVERNMENT REGULATION

By

JANADASA PEIRIS

Paper No. 23
THE LIMITS TO GOVERNMENT REGULATIONS

By Janadasa Peiris, Chairman/Director-General
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In our individual situations, the regulating bodies for broadcasting may take different forms and compositions. In some cases regulating comes entirely under the statutory framework, while in others the regulating body may be functioning fully independent of the Government.

Whichever the case may be, it is my belief that, in any approach to broadcasting regulation, public interest has to be viewed as a crucial factor. Accordingly, it would perhaps be most appropriate to begin this presentation with a close look at the public interest framework for broadcasting regulation.

Regulation of broadcasting needs to be functional in the context of identified national goals of democracy, development and nation-building. While these goals overlap considerably, they emphasize different aspects of society and its needs. The national goal of democracy provides a political focus; development focuses on economic challenges, while nation-building is primarily concerned with cultural issues. It is important that broadcasters, collectively, address and play an appropriate role in furthering these national goals within the context of a healthy and vibrant industry.

The national goals provide a framework for the development of a regulatory policy which recognizes the influence of broadcasting in society.
In relation to democracy, the media play a crucial role in providing the public with information to make informed choices. About 70% of the total Sri Lankan population live in the rural countryside, the majority of whom belongs to the low-income group. The role of broadcasting, especially radio, is extremely important in providing information so that people can participate in the processes of development and decision-making. In relation to development it ranges from the provision of human rights, housing, public health and literacy to formal education, economic and financial analysis. In nation-building, the role of broadcasting is to nurture a common sense of citizenship, ethnic and religious harmony, while reflecting the cultural, religious and regional diversity of the Sri Lankan population.

Together with broadcasting regulators in many parts of the world, we in Sri Lanka too find ourselves having to come to grips with inevitable global, technological and economic developments which signal the end of monopolistic privilege for national broadcasters as a means of securing the public good. The dilemma in democratic societies often focuses on how to reconcile the pressures that seek to make information merely a commodity, with the need to retain its value as a public good. In some countries the pursuit of a deregulated, competitive broadcasting environment has often meant that such values as information, diversity and full and equal access to services have been jettisoned. However, an alternative direction in broadcasting policy in other countries has ensured that the emerging information regime is imbued with a strong sense of public interest.

Arising from these developments are questions about what means can legitimately be used to advance public interest objectives and values. These may consist either of positive acts such as subsidies, monopoly or other privileges or
concessions or negative sanctions such as rules and regulations designed to oblige media, whether in private or in public hands, to serve legitimate public ends.

Although the meaning and emphasis given to public interest in relation to broadcasting have varied over time and place, a comparative review of broadcasting systems operating within democratic contexts, reveals a number of recurring principles. While Canada is concerned with national identity, integration and cultural integrity, the US seeks to create access and community participation. Britain is concerned with universality, independence and quality; Australia with national identity and cultural diversity and Namibia with reconciliation and development. Despite the variations in their form and priority, the concepts of access, diversity, equality, independence and unity are pervasive.

Though in principle these concepts complement each other, in practice they may involve inherent tensions. These competing public interest values have to be weighed carefully in deciding regulatory issues. In conceptualizing public interest, some of the values that need to be taken into account are:

(i) Access or availability of broadcasting services to all citizens;
(ii) Diversity of choice for audiences
(iii) Equality to all citizens
(iv) the right to receive information
and (v) the right of expression.

In such a context, regulatory mechanisms may play a role of assuring that all broadcasters are obliged to protect the public interest.
Next, we shall take a look at the statutory framework for broadcasting regulation in Sri Lanka, and also at some of the current implications of media regulation in the country.

Radio broadcasting in Sri Lanka is governed by the Ceylon Broadcasting Corporation Act No. 37 of 1966. However, as a point of interest, it may be mentioned here that unlike in some other countries, the Ceylon Broadcasting Corporation Act does not exercise any control over the broadcasting frequency spectrum. Regulation of frequencies in Sri Lanka comes under the purview of the Telecommunication Act.

The Sri Lanka Broadcasting Corporation maintained a monopoly on the country’s radio broadcasting until the latter part of 1993. However, the government has since issued a number of licenses for the establishment and maintenance of private radio and television stations.

Firstly, the 1966 Act does not carry any clauses for control of cross-media ownership. Nor is there any other regulatory mechanism governing cross-media ownership at present. As concentration of ownership is potentially harmful to plurality of opinion and increases the potential risk that news may be distorted, the local broadcasting industry may benefit by the introduction of a regulatory mechanism for cross-media ownership.

Secondly, there are no voluntary bodies at present to provide mechanisms of broadcasting self-regulation in the country.
The next question is, how do we define government's role in regulating programming? An answer, may perhaps be found in the observations of the Supreme Court of India, in Secretary, Ministry of Information v Cricket Association of Bengal, (1995) 2 sec. 161, 292. I quote:

"Broadcasting media by its very nature is different from press. Airwaves are public property .... it is the obligation of the State .... to ensure that they are used for public good".

That some form of regulatory mechanism is necessary to ensure that the airwaves are used for public good is implicit. It is when deciding how best it could be achieved that the question arises as to what extent, if at all, the government should be exercising control over programming and other major aspects of broadcasting. Is regulation by government an effective means to this end, or is self-regulation a more effective way? In our own different situations, it is up to the media practitioners themselves to find out.
What, then, should the limits to government regulation be? It is clear that substantial legal and institutional reforms must be implemented, and are urgently needed, if media freedom is to thrive, and truly independent public service broadcasting to emerge. Without such reform, it will be all too easy for the
government, or sections of it, to exert pressure on the media whenever it may be politically expedient to do so.

Broadcasting may have been conceived for commercial purposes, but public broadcasting was introduced for purposes of cultural development and democratization. By creating appropriate institutions and developing public policy accordingly, there is no reason why this cannot be done in Sri Lanka today.

For this to occur, every jurisdiction first of all needs to have clear public policy objectives for broadcasting. Next, authorities need to recognize the necessity of independence for broadcasting organizations. Broadcasters, in exchange, need to accept accountability mechanisms which ensure the responsible exercise of their mandates. Finally, the broadcasting environment needs to be organized and structured in such a way as to maximize the use that can be made of all resources flowing through the system.

Public broadcasting is broadcasting with a purpose: to enhance the quality of public life, empowering individuals and social groups to participate more fully and equitably. Profit-motivated broadcasting is only interested in large audiences. Policy-motivated broadcasting is interested in reaching the largest possible audience most effectively in the light of the specific objective of the programme concerned. Public broadcasting aims to touch people, to move them, to change them. It is towards achieving this end that we have to define appropriate regulatory mechanisms as well as their limitations.

Now let's examine the various steps taken by the Government towards fostering a tradition of broadcasting that is sensitive to the needs of the public.
Let us now examine some implications of media regulation and media reform in Sri Lanka, in the light of balancing the rights to media freedom and access to information against other social and individual interests. I shall also be making occasional references to some developments in the fields of civil, political and human rights internationally, in an effort to assess their impact on media law and practice in Sri Lanka.
On 01 November, 1994, the present PA (People's Alliance) government of Sri Lanka issued a Cabinet Paper on "Statement on the PA Government's Media Policy". The statement specifies, inter alia, three major steps to be taken to ensure media democracy:

(i) Freeing the existing media from government political control,
(ii) Creating new institutions, aimed at guaranteeing media freedom as well as raising the quality and standards of free media, both print and electronic,
and (iii) Promoting a new democratic media culture, through new practices.

On ensuring freedom of expression, the statement outlined five specific measures in detail. Other main items on the statement included broadbasing the ownership of the Associated Newspapers of Ceylon Limited (ANCL), the setting up of a National Media Institute to cater to the professional needs of journalists, non-use of fiscal policies of the government as an instrument of suppressing or controlling the media, distribution of government advertisements among all media organizations without any favour or discrimination, introduction of new salary and remuneration structures for regular journalists and initiation of training programmes for journalists.
First of all, broadcasting, or mediated communications are an integral part of the social discourse and broader legislative and constitutional reform will undoubtedly effect the regulatory process. In the proposed constitutional reforms that have been formulated through an all party consultative process will undoubtedly open up new possibilities for deregulation in the field of broadcasting. The constitutional proposals include a chapter on human rights that recognizes the right to information.

The government has ratified the (first) optional protocol to the ICCPR. This enables individuals who claim that their rights have been violated and who have exhausted local remedies, to appeal to the Human Rights Committee of the United Nations, and Independent International Tribunals established under the convent to monitor its implementations.

The judiciary in Sri Lanka has always functioned as an instrument of check and balance regarding state regulation of the broadcast media system. A number of cases pertaining to broadcast regulation and operation have been entertained and decided by the Supreme Court.

More recently (in 1997) the Parliamentary Privileges Act, introduced in 1953 was abolished. This Act enabled Parliament to try and punish journalist who were guilty of contempt of Parliament.

The government also has allowed radio and television operates to broadcast foreign news without censorship.
The problem how to deregulate in a responsible manner is a very complex one and the answer to it could be found out only through a consultative process that would bring about diverse opinion to a mutual understanding. In order to achieve this a Parliamentary Select Committee to look into the legislative and regulatory framework relating media has been set up. All parties sitting in the Parliament are represented in this Committee. The public as well as journalists and journalist organizations have been given the opportunity to testify before this committee. Among other matters this committee will look into:

(a) The establishment of an Authority to facilitate the development of a broadcasting industry in Sri Lanka which is efficient, competitive and responsive to consumer needs and to ensure that pluralism is achieved in broadcasting as a whole to provide for

(i) The composition of such an Authority which is independent in character

(ii) The regulatory and licensing powers that may be conferred on such an Authority and powers to ensure that there is no racial or political bias in operations.

The above exercise could be described as an attempt taken by a third world democracy to come up with realistic and meaningful answers to hard questions imposed by the global trends, technical and political to herald deregulate and ensure the independence of the broadcast media.