

# Briefing note

## **Powers of the Election Commission to Regulate Privately-Owned Media during Elections in Sri Lanka**

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**T**he regulation of the media during an election period to ensure free and fair elections has a reasonably long history in Sri Lanka. The Election Commission of Sri Lanka is constitutionally empowered to regulate the media by issuing media guidelines.<sup>1</sup> The present discourse on media regulation during elections focuses on how these guidelines have been used to regulate state-owned media. This brief analysis examines how the Election Commission is also constitutionally empowered to regulate privately-owned media during an election period.

## The Constitution on regulating privately-owned media

Article 104B(5)(a) of the Constitution states that the Commission '*shall have the power to issue from time to time, in respect of the holding of any election or the conduct of a Referendum, such guidelines as the Commission may consider appropriate, to any broadcasting or telecasting operator or any proprietor or publisher of a newspaper, as the case may be, as the Commission may consider necessary to ensure a free and fair election.*'

According to article 104B(5)(a), the Election Commission is constitutionally empowered to regulate *all* media during an election period. The Commission's powers are not restricted to state-owned media but all media, which includes privately-owned media.<sup>2</sup>

## The scope of 2019 media guidelines

On 21 September 2019, in accordance with the Constitution, the Election Commission issued media guidelines to ensure a free and fair presidential election.<sup>3</sup> These guidelines were issued under article 104B(5)(a) which was introduced through the 17<sup>th</sup> amendment to the Constitution.<sup>4</sup>

The guidelines encompass a wide range of responsibilities and duties that the media has with respect to maintaining neutrality and impartiality during an election time period. These obligations are applicable to all media regardless of (1) ownership, i.e. state-owned or privately-owned, and (2) the type of media, i.e. the guidelines are applicable to telecasting, broadcasting, print and social media. For instance, the guidelines require every telecasting, broadcasting and print media to be

<sup>1</sup> See Extraordinary Gazettes No. 2008/28 dated 3 March 2017, No. 2048/1 dated 4 December 2017, No.1955/19 dated 25 February 2016 for past media guidelines.

<sup>2</sup> In the past, the Supreme Court has held that broadcast media have a 'greater obligation to be sensitive to the rights and interests of the public'. See *Fernando v. The Sri Lanka Broadcasting Corporation* 1996 (1) SLR at p.157. The Supreme Court further held that '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.'

<sup>3</sup> 'Media Guidelines under Article 104B(5)(a) of the Constitution of the Democratic Socialist Republic of Sri Lanka', Election Commission, Extraordinary Gazette No. 2141/87 dated 21 September 2019. The Commission subsequently issued additional guidelines through Extraordinary Gazette No. 2146/39 dated 27 October 2019. The latter dealt with photographing polling stations, publishing unofficial results and publishing photographs or declarations of public officers who do not have political rights or members of Armed Force or police.

<sup>4</sup> In 2001, the 17<sup>th</sup> Amendment to the Constitution introduced Chapter XIVA on the Election Commission. It empowered the Election Commission through article 104B (5) to issue guidelines to regulate all media and the in cases of non-compliance by Sri Lanka Broadcasting Corporation and Sri Lanka Rupavahini Corporation, the appointment of a Competent Authority to ensure free and fair elections. In 2015, the 19<sup>th</sup> Amendment amended article 104B (5) and expanded the category of state-owned media institutions to include the 'Independent Television Network and every other broadcasting or telecasting enterprise owned or controlled by the State'. The amendment also removed the office of a Competent Authority and introduced Article 104GG which makes non-compliance with directions issued by the Election Commission an offence.

neutral and impartial in their reporting of matters relating to an election, and not act in a manner that discriminates against any contesting political party, independent group, or candidate. The guidelines also stipulate that no special benefit should be given to any political party, independent group or candidate when allocating airtime on radio or television and allotting space in the newspapers.<sup>5</sup> In addition to the above, the guidelines enumerate specific duties and responsibilities for the presenters, and announcers of television and radio channels.<sup>6</sup> It also mandates written disclosure of involvement in political activities by the chairperson, board members, directors and journalists of any electronic or print media institution, where their known political affiliations may cause a conflict of interest in maintaining neutrality and impartiality.<sup>7</sup> Furthermore, proprietors of media institutions, and administrators and users of social media are held responsible for adhering to the guidelines.<sup>8</sup>

Given the above guidelines, the Commission's current approach towards media regulation reveals the following concerns;

*i. Inadequate use of constitutional powers to regulate privately-owned media*

The guidelines state that non-compliance is a punishable offence under the Sri Lankan Constitution.<sup>9</sup> However, the guidelines do not provide more details on what the consequences of non-compliance are. It is noted that article 104GG of the Constitution provides that non-compliance with such media guidelines entails a punishment of a fine up to Rs. 100,000 or imprisonment for a maximum of three years or both. However, that particular constitutional provision applies only to a public official, employee of a public corporation, business or other undertaking vested in the government, or a company in which the government owns fifty percent or more of the

shares. Therefore, the penalties listed in article 104GG would apply in the case of non-compliance by state-owned media.

Although the guidelines contain mandatory directions to both state-owned and privately-owned media, the Commission has restricted its own authority to enforce the guidelines by failing to define the consequences of non-compliance by privately-owned media.

The absence of clear provisions within the guidelines to ensure enforcement of the guidelines on privately-owned media is a significant gap in the guidelines. Despite the wide powers granted through article 104B(5)(a), the Commission has effectively restricted itself in terms of its ability to execute the full scope of its constitutionally vested powers through the guidelines. The failure to specify the specific measures that it would take if privately-owned media violate the guidelines remains a serious weakness. Therefore, it is important for the Election Commission to stipulate the consequences of non-compliance applicable to privately-owned media.

*ii. Weak proactive action*

The Commission does not have legislative authority to stipulate criminal sanctions outside the scope of article 104GG of the Constitution. However, the Commission could still specify that it would take action to enforce the guidelines on privately-owned media. It could for instance issue regular monitoring reports naming privately-owned media institutions that violate its guidelines. It could also formally communicate with media regulatory authorities, such as the Telecommunications Regulatory Commission, when violations occur. It is noted that the Election Commission of India engages several regulatory and self-regulatory authorities, such as a Press Council of India, News Broadcasters Association, Mobile

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<sup>5</sup> Ibid., Media Guideline 2.

<sup>6</sup> Ibid., Media Guidelines 3 & 4.

<sup>7</sup> Ibid., Media Guideline 15.

<sup>8</sup> Ibid., Media Guideline 31.

<sup>9</sup> Ibid., Media Guideline 33.

Association of India and Social Media platforms, to monitor and report cases of violations by the media during an election time period.<sup>10</sup> By contrast, Sri Lanka's Election Commission's action in enforcing the 2019 media guidelines on privately-owned media does not appear to be proactive.<sup>11</sup>

Therefore, the Commission has not adequately exercised the powers granted to it through the Constitution. In this context, the Commission has the opportunity to issue additional guidelines specifying its powers of enforcement over both state-owned and privately-owned media.

## Conclusion

The foregoing discussion reveals that the Commission has issued broad guidelines to ensure free and fair presidential elections by detailing the duties and responsibilities of the media. However, the Commission continues to remain conservative when enforcing these guidelines on privately-owned media. The Commission can still take action to remedy this gap by specifying the measures it will take when privately-owned media fail to comply with the guidelines, and by proactively engaging regulatory entities.

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<sup>10</sup> Election Commission of India, *General Election to the 17<sup>th</sup> Lok Sabha 2019: Handbook for Media* (2019), at <https://eci.gov.in/files/file/9785-handbook-for-media/> (last accessed 4 November 2019).

<sup>11</sup> 'Election Commission bans ITN from conducting political programs' *News First*, 2 November 2019, at <https://www.newsfirst.lk/2019/11/02/elections-commission-bans-itn-from-conducting-political-programs/> (last accessed 4 November 2019).