ARTICLE 19

GLOBAL CAMPAIGN FOR FREE EXPRESSION

MEMORANDUM

on the

MALAWI COMMUNICATIONS ACT 1998

by

ARTICLE 19
Global Campaign for Free Expression

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I. Introduction

The Malawi Communications Act 1998 (the Act) was enacted by Parliament in November 1998, consolidating previous legislation,[1] establishing the Malawi Communications Regulatory Authority (MACRA) and providing for the reconstitution of the *Malawi Establishment Broadcasting Corporation* (MBC). MACRA was envisaged as an autonomous and independent regulatory body, taking over functions performed until then by the Malawi Telecommunications Corporation Limited, a former State company. The intention was to transform MBC from a State broadcaster, whose allegiances lay with the government of the day, into a public service broadcaster.

In the five years since entry into force of the Act, a number of concerns have been raised with regard to regulation of the communications sector. MACRA, in particular, has come under fire for its regular threats of harsh action against private stations and its perceived lenience with public stations. For example, in 2002, it threatened to withdraw the radio licence operated by the Malawi Institute of Journalism but backed down following public outcry.[2] One of MACRA's reasons for the threatened shutdown was that the MIJ station

[1] The Malawi Posts and Telecommunications Act, No. 29 of 1994; the Malawi Broadcasting Corporation Act, Cap. 20:01; and the Radio-communications Act, Cap. 68:02.
[2] 'Community radio station censored', MISA Alert 24 June 2002:

aired news bulletins instead of mere updates.[3] In June 2003, it threatened to ban community radio stations from airing news items, arguing that this was the role of MBC and *Television Malawi*.[4] As of September 2003, it had not carried out this threat, although later that month fresh controversy arose as it threatened to ban the privately-owned station *Capital Radio* on the grounds that it illegally operated mobile 'outside broadcasting' studios.[5] In relation to that controversy, commentators pointed to the fact that the Communications Act is silent on the issue of 'outside broadcasting' and that MBC had been allowed to use mobile equipment donated by the Malaysian government, in a deal struck by the Minister of Information.[6]

As a result of these and other actions, concerns have been raised over the independent status of MACRA. The controversy surrounding the airing of news programmes by community radio stations has also led to doubts about the constitutionality of parts of the Communications Act, which MACRA invoked in support of its ban.[7] Finally, MBC, in spite of its reconstitution as a public service broadcaster, is frequently accused of displaying a notable pro-government bias.[8] It has been granted a seven-year monopoly on television broadcasting. MACRA takes the view that it falls outside its regulatory remit, and given that MBC's Board is appointed by the President this means there is no effective independent regulatory body to hold MBC to account in cases of alleged political bias.

In light of these concerns, this Memorandum examines the manner in which the Malawi Communications Act 1998 regulates the broadcast sector against international standards on freedom of expression. It analyses the statutory constitution of MACRA, as well as the MBC, with particular attention to their independence from government. It also examines the various constraints and regulations that the Act imposes on broadcasters generally. Recommendations for reform are provided throughout. The analysis in this Memorandum relies on freedom of expression standards as developed under two international treaties that are binding on Malawi: the *International Covenant on Civil and Political Rights*,[9] to which Malawi acceded in 1993, and the *African Charter on Human and Peoples' Rights*,[10] ratified by Malawi in February 1990. In addition, this analysis draws on two instruments that elaborate the general freedom of expression guarantee included in those treaties: the *Declaration of Principles on Freedom of Expression in Africa*[11] (the African Declaration) and ARTICLE 19's *Access to the Airwaves: Principles on Freedom of*

<http://www.misa.org/oldsite/alerts/20020624.malawi.0.html>.

[3] IFEX Alert, 5 July 2002.

[4] IFEX alerts, 4 June 2003.

[5] IFEX Alert, 18 September 2003.

[6] Malawi TV gets OB van from Malaysian Government, Sithengi News: <http://www.sithengi.co.za/2003/services/tele01.html>.

[7] It relied on section 51(3)(c) of the Act, which will be discussed in further detail below.

[8] See, for example, the US Department of State's 2002 Human Rights Report on Malawi: <http://www.state.gov/g/drl/rls/hrrpt/2002/18213.htm>.

[9] UN General Assembly Resolution 2200A (XXI) of 16 December 1966, in force 23 March 1976.

[10] Adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), in force 21 October 1986.

[11] 32nd Session, 17-23 October 2002: Banjul, The Gambia.

Expression and Broadcast Regulation (the ARTICLE 19 Principles).[12] The former is a standard-setting document developed by the African Commission on Human and Peoples' Rights to elaborate on the guarantee of freedom of expression found in the African Charter while the latter takes into account wider international practice, including under United Nations mechanisms as well as comparative constitutional law and best practice in countries around the world.

II. International and Constitutional Obligations

II.1. The Guarantee of Freedom of Expression

The principal international instrument setting out the common standard of achievement in fundamental rights is the *Universal Declaration of Human Rights* (UDHR).[13] Although the UDHR was not primarily produced as a legally binding instrument, certain of its provisions are now widely regarded as having attained legal force as customary international law, including Article 19, which guarantees freedom of expression as follows:

> Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

The *International Covenant on Civil and Political Rights* (ICCPR),[14] a widely ratified international treaty, guarantees the right to freedom of expression in similar terms.

There are also a number of regional treaties and declarations that guarantee the enjoyment of human rights, including freedom of expression, in Africa. Significant amongst these are the *African Charter on Human and Peoples' Rights* (the African Charter),[15] Article 9 of which guarantees the right to freedom of expression, and the *Declaration of Principles on Freedom of Expression in Africa*,[16] based on Article 9 of the Charter and produced by the African Commission on Human and Peoples' Rights. Finally, the right to freedom of expression enjoys extensive protection under Malawi's 1994 Constitution, at Articles 34-37.

International bodies and courts have made it very clear that freedom of expression and information is one of the most important human rights. During its very first session in 1946, the United Nations General Assembly adopted Resolution 59(I),[17] which states:

> Freedom of information is a fundamental human right and ... the touchstone of all the freedoms to which the United Nations is consecrated.

[12] London, April 2002.
[13] UN General Assembly Resolution 217 A (III) of 10 December 1948.
[14] Note 9.
[15] Note 10.
[16] Note 11.
[17] 14 December 1946.

As this resolution notes, freedom of expression is both fundamentally important in its own right and also key to the fulfilment of all other rights. It is only in societies where the free flow of information and ideas is permitted that democracy can flourish. In addition, freedom of expression is essential if violations of human rights are to be exposed and challenged.

The African Commission on Human and Peoples' Rights has reaffirmed, "the fundamental importance of freedom of expression as an individual human right, as a cornerstone of democracy and as a means of ensuring respect for all human rights and freedoms … laws and customs that repress freedom of expression are a disservice to society."[18] Statements of this nature now abound in the case law of international courts and bodies. [19]

The right to freedom of expression is not absolute. Both international law and most national constitutions recognise that freedom of expression may be restricted. However, any limitations must remain within strictly defined parameters and be treated as an exception from the norm. As the African Commission has stated:

> [R]estriction of human rights is not a solution to national difficulties: the legitimate exercise of human rights does not pose dangers to a democratic state governed by the rule of law.[20]

Article 19(3) of the ICCPR lays down the parameters within which the right to freedom of expression may be limited:

> The exercise of the [right to freedom of expression] carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
> (a) For respect of the rights or reputations of others;
> (b) For the protection of national security or of public order (ordre public), or of public health or morals.

This has been interpreted as setting a strict three-part test, requiring any interference to be (1) prescribed by law, (2) pursue one of the legitimate aims listed and (3) be necessary in a democratic society.[21] International jurisprudence makes it clear that this test presents a high standard which any interference must overcome. The requirement that an interference be 'prescribed by law' will be fulfilled only where the law is accessible and "formulated with sufficient precision to enable the citizen to regulate his conduct."[22] Second, the interference must pursue a legitimate aim. These are the aims listed in Article 19(3) of the ICCPR. Third, the restriction must be necessary to secure one of those aims. The word "necessary" means that there must be a "pressing social need" for the

[18] Declaration of Principles on Freedom of Expression, note 11, preamble.
[19] See, for example, *Handyside v. the United Kingdom*, 7 December 1976, Application No. 5493/72, para. 49 (European Court of Human Rights).
[20] *Amnesty International and ors. v. Sudan*, Communication Nos. 48/90, 50/91, 52/91, and 89/93 (no para. number provided).
[21] See *Mukong v. Cameroon*, views adopted by the UN Human Rights Committee on 21 July 1994, No. 458/1991, para. 9.7.
[22] *The Sunday Times v. United Kingdom*, 26 April 1979, Application No.13166/87, para. 49 (European Court of Human Rights).

restriction. The reasons given by the State to justify the restriction must be "relevant and sufficient" and the restriction must be "proportionate to the aim pursued."[23] Finally, as the Malawi Constitution stresses, any restrictions should not "negate the essential content of the right."[24]

II.2. Broadcasting Freedom

The guarantee of freedom of expression applies with particular force to the media, including the broadcast media and the Internet. As the Inter-American Court of Human Rights has stated: "It is the mass media that make the exercise of freedom of expression a reality."[25]

Because of their pivotal role in informing the public, the media as a whole merit special protection. The European Court of Human Rights has long held:

> The press plays an essential role in a democratic society. Although it must not overstep certain bounds, in particular in respect of the reputation and rights of others and the need to prevent the disclosure of confidential information, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest [footnote deleted]. In addition, the court is mindful of the fact that journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation.[26]

This has been recognised by constitutional courts in countries around the world. For example, the Supreme Court of South Africa has held:

> The role of the press is in the front line of the battle to maintain democracy. It is the function of the press to ferret out corruption, dishonesty and graft wherever it may occur and to expose the perpetrators. The press must reveal dishonest, mal- and inept administration. It must also contribute to the exchange of ideas already alluded to. It must advance communication between the governed and those who govern. The press must act as the watchdog of the governed.[27]

The African Commission has similarly recognised, "the key role of the media and other means of communication in ensuring full respect for freedom of expression, in promoting the free flow of information and ideas, in assisting people to make informed decisions and in facilitating and strengthening democracy."[28] The Commission has stressed, furthermore, "the particular importance of the broadcast media in Africa, given its capacity to reach a

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[23] *Lingens v. Austria*, 8 July 1986, Application No.9815/82, paras. 39-40 (European Court of Human Rights).
[24] Article 44(3).
[25] *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85, 13 November 1985, Inter-American Court of Human Rights (Ser.A) No.5, para. 34.
[26] *Fressoz and Roire v. France*, 21 January 1999, Application No. 29183/95.
[27] *Government of the Republic of South Africa v. the Sunday Times*, [1995] 1 LRC 168 at 175-6 (Transvaal Provincial Division).
[28] African Declaration, note 11, Preamble.

wide audience due to the comparatively low cost of receiving transmissions and its ability to overcome barriers of illiteracy."[29]

None of this implies that the broadcast media should be left unregulated; it is generally recognised that an unregulated communications sector is detrimental to freedom of expression. However, three key principles apply to broadcast regulation. First, any bodies with regulatory powers in this area must be independent of government. Second, an important goal of regulation must be to promote diversity in the airwaves. The airwaves are a public resource and they must be used for the public benefit, an important part of which is the public's right to receive information and ideas from a variety of sources. Third, because of the special role that can be fulfilled by public service broadcasters, strict rules apply both to their governing structures – which should insulate them from political or economic interference – and to the content of broadcasts – which should be governed by a strict public service mandate. International and regional standards on all three issues are briefly set out below.

II.2.1. Regulatory Bodies

Any bodies which exercise regulatory or other powers over broadcasters, such as broadcast authorities or boards of publicly-funded broadcasters, must be independent. This principle has been explicitly endorsed in a number of international instruments, including both the African Declaration and the ARTICLE 19 Principles. Central to both is that regulatory bodies should be established in a manner which minimises the risk of interference in their operations, for example through an open appointments process designed to promote pluralism, and which includes guarantees against dismissal and rules on conflict of interest.[30]

Principle VII of the African Declaration states:

> 1. Any public authority that exercises powers in the areas of broadcast or telecommunications regulation should be independent and adequately protected against interference, particularly of a political or economic nature.
>
> 2. The appointments process for members of a regulatory body should be open and transparent, involve the participation of civil society, and shall not be controlled by any particular political party.
>
> 3. Any public authority that exercises powers in the areas of broadcast or telecommunications should be formally accountable to the public through a multi-party body.

Principle 10 of the ARTICLE 19 Principles notes a number of ways in which the independence of regulatory bodies should be protected:

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[29] *Ibid.*

[30] Articles 3-8 of the Recommendation of the Committee of Ministers of the Council of Europe on the guarantee of the independence of public service broadcasting, adopted 11 September 1996; Principle 13 of the ARTICLE 19 Principles, Note 12.

Their institutional autonomy and independence should be guaranteed and protected by law, including in the following ways:

- specifically and explicitly in the legislation which establishes the body and, if possible, also in the constitution;
- by a clear legislative statement of overall broadcast policy, as well as of the powers and responsibilities of the regulatory body;
- through the rules relating to membership;
- by formal accountability to the public through a multi-party body; and
- in funding arrangements.

These same principles are also reflected in a number of cases decided by national courts. For example, a case decided by the Supreme Court of Sri Lanka held that a draft broadcasting bill was incompatible with the constitutional guarantee of freedom of expression. Under the draft bill, the Minister had substantial power over appointments to the Board of Directors of the regulatory authority. The Court noted: "[T]he 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."[31]

II.2.2. Pluralism

An important aspect of States' positive obligations to promote freedom of expression and of the media is the need to promote pluralism within, and to ensure equal access of all to, the media. As the European Court of Human Rights has stated: "[Imparting] information and ideas of general interest … cannot be successfully accomplished unless it is grounded in the principle of pluralism."[32] The Inter-American Court has held that freedom of expression requires that "the communication media are potentially open to all without discrimination or, more precisely, that there be no individuals or groups that are excluded from access to such media."[33] This implies that the airwaves should be open to a range of different broadcasters and that the State should take measures to prevent monopolisation of the airwaves by one or two players. However, these measures should be carefully designed so that they do not unnecessarily limit the overall growth and development of the broadcasting sector.

The same approach is reflected in the national policies and laws of countries around the world. Both German and French constitutional courts, for example, have held that the State is under an obligation, when designing a regulatory framework for broadcasting, to promote pluralism. The French Conseil Constitutionnel, assessing the legitimacy of a 1986 law on communications, found that the principle of pluralism of information was of constitutional significance.[34] Similarly, the German Constitutional Court has consistently held that broadcasting must be structured in such a way as to ensure the transmission of a

[31] *Athukorale and Ors. v. Attorney-General*, 5 May 1997, Supreme Court, S.D. No. 1/97-15/97, (1997) 2 BHRC 610.
[32] *Informationsverein Lentia and Others v. Austria*, 24 November 1993, Application Nos. 13914/88, 15041/89, 15717/89, 15779/89, 17207/90, para. 38.
[33] *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism,* note 25, para. 34.
[34] Decision 86-217 of 18 September 1986, Debbasch, 245.

wide range of views and opinions.[35] The South African Broadcasting Act includes among its aims the promotion of pluralism and diversity in broadcasting, including in ownership.[36]

The obligation to promote media pluralism incorporates both freedom from unnecessary interference by the State, as well as the need for the State to take positive steps to promote pluralism.[37] Thus, States may not impose restrictions which have the effect of unduly limiting or restricting the development of the broadcasting sector and, at the same time, States should put in place systems to ensure the healthy development of the broadcasting sector, and that this development takes place in a manner that promotes diversity and pluralism.

Generally, pluralism in the private sector is to be encouraged in accordance with the following principles, elaborated at Principle V.2 of the African Declaration:

- there shall be equitable allocation of frequencies between private broadcasting uses, both commercial and community;
- an independent regulatory body shall be responsible for issuing broadcasting licences and for ensuring observance of licence conditions;
- licensing processes shall be fair and transparent, and shall seek to promote diversity in broadcasting; and
- community broadcasting shall be promoted given its potential to broaden access by poor and rural communities to the airwaves.

II.2.3. Public service broadcasting

Public service broadcasting can make a key contribution to pluralism. The German Federal Constitutional Court, for example, has held that promoting pluralism is a constitutional obligation for public service broadcasters.[38] For this reason, a number of international instruments stress the importance of public service broadcasters and their contribution to promoting diversity and pluralism. Although not all of these instruments are formally binding as a matter of law, they do provide valuable insight into the implications of freedom of expression and democracy for public service broadcasting.

The 1992 *Declaration of Alma Ata*, adopted under the auspices of UNESCO, calls on States to encourage the development of public service broadcasters.[39] A *Resolution of the Council and of the Representatives of the Governments of the Member States*, passed by the European Union, recognises the important role played by public service broadcasters in ensuring a flow of information from a variety of sources to the public. It notes that public service broadcasters are of direct relevance to democracy, and social and cultural

[35] See, for example, the *First Television* case, 12 BverfGE 205 (1961).
[36] Broadcasting Act, No. 4 of 1999.
[37] See Principle 3 of the ARTICLE 19 Principles, note 12.
[38] See *Fourth Television* case, 87 BverfGE 181 (1992). In Barendt, E., *Broadcasting Law: A Comparative Survey* (1995, Oxford, Clarendon Press), p. 58.
[39] 9 October 1992, Clause 5. This was endorsed by the General Conference of UNESCO at its 28th session in 1995.

needs, and the need to preserve media pluralism. As a result, funding by States to such broadcasters is exempted from the general provisions of the Treaty of Amsterdam.[40]

The African Declaration lays down a number of fundamental rules in relation to public service broadcasting. It states, in Principle VI:

> State and government controlled broadcasters should be transformed into public service broadcasters, accountable to the public through the legislature rather than the government, in accordance with the following principles:
>
> - public broadcasters should be governed by a board which is protected against interference, particularly of a political or economic nature;
> - the editorial independence of public service broadcasters should be guaranteed;
> - public broadcasters should be adequately funded in a manner that protects them from arbitrary interference with their budgets;
> - public broadcasters should strive to ensure that their transmission system covers the whole territory of the country; and
> - the public service ambit of public broadcasters should be clearly defined and include an obligation to ensure that the public receive adequate, politically balanced information, particularly during election periods.

III. Analysis of the Malawi Communications Act 1998

The Malawi Communications Act 1998 regulates the telecommunications, post and broadcasting sectors, including public service broadcasting. It establishes the Malawi Communications Regulatory Authority as the pivotal body to perform all regulatory functions and provides for the reconstitution of the existing State broadcaster, the Malawi Establishment Broadcasting Corporation, as a public service broadcaster.

This part of the Memorandum analyses the Act against the standards on freedom of expression outlined above and provides recommendations for reform of the Act in order to bring it into line with international standards on freedom of expression. In light of the concerns over the status of MACRA and MBC, outlined in the introduction, it will concentrate primarily on those parts of the Act that deal with broadcast regulation.[41] It will also examine the governing structure of MBC and the extent which it is shielded from undue political interference.

III.1. The Malawi Communications Regulatory Authority

MACRA is the pivotal regulatory body in the Malawi communications sector. Under sections 3 and 4 of the Act, it is established as a body corporate with the general function of ensuring that there shall be "provided throughout Malawi reliable and affordable communication services sufficient to meet the demand for them." It should protect the

[40] Official Journal C 030, 5 February 1999, clause 1. See also EU Council Resolution of 21 January 2002 on the development of the audiovisual sector, OJ C32, 5 February 2002, p. 4.

[41] This Memorandum will not discuss the regulation of postal services or general telecommunications regulatory issues provided in the Act.

interests of consumers, purchasers and other users of communication services in respect of the prices charged and variety of services provided, promote open access to information, efficiency and competition between the different actors in the market, and encourage the introduction of new services, amongst other things. The specific functions of MACRA are spelled out in section 5 and include licensing and regulating broadcasters, monitoring the activities of broadcast licence holders and drawing up a frequency plan.

Section 4(3) provides: "The Authority shall be independent in the performance of its functions." With regard to its functions in the broadcast sector, however, MACRA may, where it considers this necessary and within the remit of its general regulatory duties, "seek the general direction of the Minister as to the manner in which it is to carry out its duties". Similarly, in the telecommunications sector, section 16 states that MACRA may "seek the general direction of the Minister as to the manner in which it is to carry out its duties", while section 19 states that it may refuse licence applications if so directed by the President in the interests of national security. In relation to general spectrum management issues, section 33 states that MACRA "shall comply with any general directions given to it in writing by the minister", even if MACRA has not sought such instructions. Section 38 requires MACRA to seek the approval of the Minister before issuing a tender for exclusive use of a radio frequency, while the Minister has final responsibility for the conduct of such a tender. In the postal sector, finally, section 59 provides that the Minister may give policy directions to MACRA in relation to the performance of its functions, "after consultation with MACRA", while under section 61 the Minister has to approve all licences issues for the provision of postal services.

The composition of the MACRA Board is provided for in section 6, which states that MACRA shall consist of a Chair and six members together with two ex officio members: the Secretary to the President and the Cabinet, and the Secretary for Information. Board members are appointed by the President, who also selects the Chair. The Act requires members of MACRA to serve part-time and to possess qualifications in a relevant field. Ministers and MPs are excluded from serving as members, as is anyone who is a member of a committee of a political party at district, regional or national level. Members serve four-year terms and, in order to provide continuity, the Act requires that at least half the board members are reappointed for a new term of office.[42] A Board member may be removed if, among other things, he or she fails to declare a conflict of interests (see below) or becomes bankrupt, or if any circumstances arise that would disqualify him or her from membership (such as becoming an MP). New members are appointed by the President from a list of at least three but no more than five candidates submitted by the Parliamentary Public Appointments Committee.[43]

MACRA shall have a dedicated secretariat and staff. Section 9 provides that a Director General, who shall have overall responsibility for the body, shall be appointed by the Minister of Information. A Deputy Director General shall be appointed by MACRA with the approval of the minister.

[42] Section 7(4) of the Act; also Schedule 1.
[43] Schedule 1.

Under section 11 of the Act, whenever a matter is under discussion in which a member of MACRA or an immediate family member has an interest, that member shall disclose that interest and not take any part in the consideration or any vote on the matter. Similarly, the Director General must disclose any conflicts of interest that arise in the course of business and not attend any meetings in which such matters are discussed, while other staff are required to make full disclosure to the Director General of any interest, leaving it up to the Director General to take appropriate action.

Under section 12, MACRA shall be financed from fees and other moneys payable to MACRA in respect of licences issued, fines, grants or donations, such moneys as are from time to time appropriated to MACRA by Parliament and the proceeds from the sale by MACRA of any assets or equipment to which it has title. Under Section 12(2), MACRA may borrow additional amounts of money, as necessary for the performance of its functions, with the approval of the Minister of Finance. Members shall be paid "from the funds of MACRA such remuneration, allowances or other benefits as the Minister may, on the recommendation of MACRA, from time to time approve."[44] Section 12(5) provides: "All moneys of MACRA which, in the opinion of the Minister of Finance, are in excess of its budgetary requirements shall be paid into the Consolidated Fund…." MACRA is required to submit an annual financial report to the Minister of Finance. The accounts of MACRA are accounted annually by an independent auditor approved by the Minister.

Within six months of the end of each financial year, MACRA is required to submit a full report on its activities to the Minister. Under section 14, this report shall be in such form and contain such information "as the Minister shall require."

Analysis

Our overriding concern is that MACRA's independent status, although formally guaranteed through section 4(3), is fatally undermined by a host of other provisions in the Act concerning the appointment of members and its functioning. As a result, we do not consider that MACRA can be considered an 'independent regulatory body.' We outline our concerns in detail below.

First, the manner in which the independence of the body is articulated is unsatisfactory when compared to international standards. The ARTICLE 19 Principles require a robust statutory guarantee of independence, including freedom from governmental, political, economic or any other form of interference. This guarantee should extend to members and staff of the regulatory body. Wording along the lines of the following is recommended:

> The [name of body] shall enjoy operational and administrative autonomy from any other person or entity, including the government and any of its agencies. This autonomy shall be respected at all times and no person or entity shall seek to influence the members or staff of the [name of body] in the discharge of their duties, or to interfere with the activities of the [name of body], except as specifically provided for by law.

[44] Schedule 2, Paragraph 1.

This contrasts with the phraseology employed in section 4(3), which provides for a guarantee of independence in terms that are too general, allowing it to be undermined in subsequent provisions, while failing to extend it MACRA's Board members and staff.

Second, independence must be guaranteed through the appointments procedure of the members of the regulatory body. International standards as crystallised in, for example, the African Declaration, require that Members should be appointed in an open and transparent process by a multi-party body, such as Parliament, and that rules should be in place to prevent any conflicts of interests.[45] The constitution of MACRA as provided under the Act does not comply with these principles. Two of MACRA's nine board members are top civil servants, required by convention and contractual duty to serve the interests of the government of the day, while the remaining seven are appointed by the President. The requirement that the President appoints from a list of candidates submitted by a Parliamentary Committee does very little to guarantee the independence of the candidate eventually appointed. The internationally recognised requirement that membership of the regulatory body should be representative of society as a whole finds no resonance in the Act.

Similarly, international guarantees require that there should be no governmental interference with the appointment of MACRA's staff.[46] This stands in contrast with section 9 of the act, pursuant to which the Minister appoints MACRA's Director General and has a veto over the appointment of the Deputy Director General.

In addition to our concerns in relation to the appointments procedure and the inadequate guarantees of independence, the overall level of control retained by the government over MACRA's work and functioning is unacceptable. The main concern here is that in all aspects of its work, MACRA is required to comply with directions issued by the Minister. This is likely to result in extensive governmental interference and in itself would suffice fatally to undermine MACRA's independence. In the scheme of the Act as currently drafted, it serves to accentuate MACRA's functioning as a tool of the government of the day – a function which, incidentally, both MACRA and the Ministry of Information acknowledge in their own literature.[47]

Governmental control over MACRA's work is also ensured through the arrangement of its finances. Although we welcome the fact that licence fees will provide a prime source of income for MACRA, we are concerned that other aspects of the funding approach leave considerable scope for political interference. In particular, we are concerned that the Minister of Finance can order MACRA to pay any 'excess funds' – as determined by the Minister – into the Consolidated Budget. This implies that the Minister will be closely monitoring MACRA's accounts and can 'cream off' monies virtually at will. It would be

[45] See Principle VII of the African Declaration and Principle 10 of the ARTICLE 19 Principles
[46] *Ibid.*
[47] See, for example, the 1998 Policy Direction issued by the Minister of Information <http://www.maform.com/policy/reform.htm> and the Ministry of Information 2001-2004 Strategic Plan <http://www.maform.com/maform.htm>.

preferable if MACRA's budget was set by a dedicated Parliamentary Committee, on the proposal of MACRA itself. This, together with a requirement annually to report to Parliament, as proposed below in preference to the existence structure, would also serve to ensure a regular opportunity for public debate around MACRA's functioning.

The status of MACRA as a tool of government is further cemented through arrangement of the formal lines of accountability. Section 14 of the Act requires MACRA to submit an annual activities report to the Minister, reporting on such matters as the Minister may require. This is in contrast with the principle that the regulatory body should be formally accountable to a multi-party body such as Parliament.[48] In any event, the Act needs to spell out in far greater detail the matters that MACRA is required to report on. In addition to the financial matters already mentioned, this should include, at a minimum, the number of licence applications received and details of those granted, complaints received and adjudicated upon, any regulatory action taken and other activities undertaken in pursuance of its statutory duties. In addition to being sent to Parliament, this report should be disseminated widely using all appropriate means, including the Internet.

Although we appreciate the need for continuity on the MACRA Board, we do not consider that the solution employed under the Act, whereby half the Board Members are automatically re-appointed – but failing to specify which half – is appropriate. This arrangement may lead to favouritism on the side of the President, allowing him to remove members he considers, for whatever reasons, to be awkward. It would be far preferable if the initial batch of Board members had served staggered terms of service, with some serving two years, others three and a final set four years, as determined by lot. Thereafter, all members can serve four-year terms and the goal of continuity would still be adequate served.

Finally, we are concerned that the rules governing conflicts of interest are inadequate the guarantee the independent functioning of MACRA. As drafted, the rules operate on an *ad hoc* basis, expecting members to declare a business or financial interest as and when a potentially conflicting policy matter arises. In addition to this *ad hoc* arrangement, the Act should also posit absolute barriers to membership for those with significant interests in the areas being regulated, including broadcasting, along the lines of the exclusions presently found at section 6(4).[49]

Recommendations:

- The independence of MACRA, its members and its staff should be robustly protected from all forms of political, economic and any other interference in the exercise of their statutory duties. The Minister of Information should have no formal powers to direct any aspect of MACRA's work.
- Members of MACRA should be appointed through an open, consultative process by a multi-party body. Membership of MACRA should be reflective of the make-up of society overall. No civil servants should serve on the Board.
- MACRA should not be allowed to seek or be required to follow directions issued by

[48] See Principle 15 of the ARTICLE 19 Principles,
[49] See Principle 13 of the ARTICLE 19 Principles.

the Minister.

- The Minister should not have the power to order MACRA to pay excess monies into the Consolidated budget.
- MACRA should submit to Parliament and disseminate widely a detailed annual report on activities undertaken in pursuance of its statutory duties.
- The current rule that half of MACRA's Board members are automatically appointed for a new term should be discarded in favour of a round of appointments with variable terms of service, as determined by lot.
- The rules on conflicts of interest should be enhanced to include barriers to membership for individuals with significant in interests in the areas under regulation.

III.2. Licensing Policy and Procedures

Although MACRA is required to draw up a detailed frequency plan, it plays no role in the determination of the national broadcast or licensing policies. Under section 105, this is the exclusive task of the Minister of Information. The Act does not require any consultation or involvement of MACRA, broadcasters or civil society generally. The latest National Broadcast Policy was issued by the Minister of Information in 1998 and updated in 2000.[50]

Within the bounds set by the National Broadcast Policy and relevant international agreements, MACRA is required to regulate the broadcast sector in such a manner as is "best suited (a) to meet demand for broadcasting services; (b) to ensure the provision of regular news services and programmes on matters of public interest in Malawi; (c) to provide for the broadcast of programmes in support of the democratic process through civic education; (d) to promote the provision of a diverse range of broadcasting services on a national and local level; (e) to promote the integrity and viability of public broadcasting services; and (f) to ensure equitable treatment of political parties and election candidates by all broadcasting licencees during any election period."[51] Section 47 provides that broadcast licences are issued in three separate categories: public, private and community broadcasting. MACRA is under an obligation to "issue broadcasting licences in sufficient numbers to meet the public demand for broadcasting services."[52] As discussed above, MACRA is under a strict obligation to follow all government 'guidance' in relation to licensing policy.[53]

Under section 48, once MACRA decides to make a frequency available for broadcasting, it will issue a public tender. The tender includes details of the kind of broadcasting service to be provided, the proposed coverage area, technical information with regard to the frequency and the application procedure, including what information applicants should be provide and the criteria by which applications will be assessed. Within 28 days, MACRA then publishes a notice summarising all applications received and inviting representations. Applicants are provided an opportunity to respond to any representations

[50] It can be found on the Ministry website: <http://www.maform.com/policy/index.htm>.
[51] Section 45.
[52] Section 48.
[53] Section 45(2).

made, after which MACRA will select the successful applicant on the criteria as published in the tender notice.

With regard to licences for public broadcasting services, section 49 provides that these shall not be put out to tender until a study has been conducted to assess the need for the proposed service and the likely effect on existing broadcasting services, and the approval of the Minister of Information has been obtained.

Licences may not be issued to political parties or organisations,[54] and no person may control or hold more than one national licence or more than two local licences.[55] MACRA may also take steps to limit foreign ownership to no more than 40% of any broadcaster.[56]

The Act does not allow for a specific avenue of appeal against licensing decisions by MACRA or a ministerial refusal to approve a tender for public broadcasting services.

Analysis

There are a number of problems with the licensing policies and applications process as outlined in the Act. First, as outlined above, the general powers granted to the Minister of Information to issue 'guidance' to MACRA, additional to the National Broadcast Policy, are highly problematic and leave MACRA with very little autonomy. It is illogical, given MACRA's role as a broadcast regulatory, that it is not even required to be consulted regarding the determination of the National Broadcast Policy, which is drawn up by the Minister of Information. It would also be preferable if the Policy was required to be formally adopted by Parliament.

The second problem concerns a ministerial directive issued as part of the 1998 National Broadcasting Policy, which is still in force. In section 2.3.4, this states: "While radio broadcasting will be liberalised immediately, MBC will be allowed a period of exclusivity for seven years for terrestrial Television Broadcasting, to permit a return on capital investment." The former State broadcaster's monopoly until 2005 runs counter to the statutory requirement of pluralism and diversity in the airwaves and is incompatible with the right to freedom of expression, including the public's right to receive information from a variety of sources. Both national and international courts have found such monopolies to be illegitimate.[57] The underlying reason for this, as the European Court of Human Rights noted in the *Lentia* case, is that:

> [Imparting] information and ideas of general interest, which the public is moreover entitled to receive…cannot be successfully accomplished unless it is grounded in the principle of pluralism, of which the State is the ultimate guarantor. This observation

[54] Section 48(7).
[55] Section 50.
[56] Section 51(3)(h).
[57] See, for example, *Capital Radio (Private) Limited v. The Minister of Information, Posts and Telecommunications*, Judgment No. S.C. 99/2000, Constit. Application No. 130/00 (Supreme Court of Zimbabwe); *Informationsverein Lentia v. Austria*, 24 November 1993, Application Nos. 13914/88, 15041/89, 15717/89, 15779/89, 17207/90 (European Court of Human Rights).

> is especially valid in relation to audio-visual media, whose programmes are often broadcast very widely.[58]

The UN Special Rapporteur on Freedom of Opinion and Expression, in his 1999 Report to the UN Commission on Human Rights, stated:

> There are several fundamental principles which, if promoted and respected, enhance the right to seek, receive and impart information…a monopoly or excessive concentration of ownership of media in the hands of a few is to be avoided in the interest of developing a plurality of viewpoints and voices… access to technology, newsprint, printing facilities and distribution points should only be regulated by the supply and demand of the free market.[59]

And the African Declaration states:

> A State monopoly over broadcasting is not compatible with the right to freedom of expression.[60]

It follows that the State television broadcasting monopoly should be removed immediately.

Apparently, MBC's seven-year television monopoly has led MACRA to consider that it does not need to be licensed. This is a dubious interpretation of the National Broadcasting Policy, which is at odds with sections 46 and 100 of the Act, under which it is an offence to broadcast without a licence. By allowing MBC a virtually free role, MACRA also allows it to slip outside the regulatory framework, making it much more difficult to take enforcement action should any be necessary.

To the extent that it is able to pursue an autonomous licensing policy, MACRA is required under the Act to regulate the sector in such a way as to promote diversity in broadcasting, nationally and locally, and to promote a number of other goals, such as to ensure the provision of regular news services. We welcome these requirements, which go some way to ensure that MACRA has a mandate to act in the public interest. Nevertheless, its mandate should be further strengthened by requiring that all policies relevant to broadcasting should promote "respect for freedom of expression, diversity, accuracy and impartiality, and the free flow of information and ideas."[61] Similarly, both the National Broadcasting Policy and MACRA's frequency plan should elaborate what the statutory requirement of 'diversity' means in practice, including its implications in regard to the licensing policies and allocation of frequencies between public, private and community broadcasting. As the ARTICLE 19 Principles note" "Diversity implies pluralism of broadcasting organisations, of ownership of those organisations, and of voices, viewpoints and languages within broadcast programming as a whole. In particular, diversity implies the existence of a wide range of independent broadcasters and programming that represents and reflects society as a whole … The frequency plan

[58] Note 57, para. 38.
[59] UN Doc. E/CN.4/1999/64, 29 January 1999, para. 16.
[60] Note 11, Principle V.
[61] ARTICLE 19 Principles, note 12, Principle 12.

should ensure that the broadcasting frequencies are shared equitably and in the public interest among the three tiers of broadcasting (public, commercial and community), the two types of broadcasters (radio and television) and broadcasters of different geographic reach (national, regional and local)."[62] All bodies with regulatory powers in the sector should be required to implement these aims, including both the Minister of Information and MACRA.

Fourth, the Act is wholly silent on the criteria by which licence applications may be judged. Section 48 provides that these must be published together with a tender, but fails to lay down the parameters within which they should fall.[63] This leaves MACRA excessive discretion in determining licence criteria, contrary to the general principle that these should be clear, foreseeable and related to broadcasting.[64] The Act also fails to require MACRA to provide written reasons for the refusal of licence applications. This will seriously hinder an applicant whose licence application has been refused in any attempt to appeal the refusal or obtain judicial review.[65]

Recommendations:

- MACRA should be able to act fully autonomously in all aspects of its work.
- MACRA should be required to be consulted in the development of national broadcasting policy, along with all other concerned parties, and the Policy should be formally adopted by Parliament.
- MBC's monopoly in the terrestrial television broadcasting sector should be abolished immediately.
- MBC should no longer be allowed to broadcast without a licence.
- MACRA should be required to promote respect for freedom of expression, diversity, accuracy and impartiality, and the free flow of information and ideas. The National Broadcasting Policy should be amended to provide more detail on the implications of this, including with regard to the equitable distribution of licences across the three tiers of broadcasting.
- The criteria on which licence applications should be judged should be clearly set out in the Act or in the broadcasting policy.
- Any refusal to issue a licence should be accompanied by written reasons and should be subject to judicial review.

III.3. Licence Conditions and Code of Conduct

Under section 51(3), all licences except for those issued for community broadcasting may contain terms and conditions relating to balanced reporting during elections, the provision of party political broadcasts, the broadcasting of news services and factual programmes

[62] ARTICLE 19 Principles, note 12, Principles 3 and 9.
[63] Section 48(2)(d)(ii).
[64] ARTICLE 19 Principles, note 12, Principle 21.
[65] It is striking that whilst the avenue of judicial review to the High Court is explicitly provided for in provisions of the Act relating to non-broadcast radio equipment and telecommunications, there is no mention of any appeal against MACRA decisions in the part of the Act dealing with broadcast regulation. Although we assume that, like any other administrative body, MACRA's decisions are amenable to judicial review, it would be better if this were stated explicitly.

and programmes in support of the democratic process, and the preservation of broadcast material. In addition, MACRA may issue regulations regarding the amount of advertising and the provision of financial information through licensed broadcasting services.

Under section 52, all broadcasters are required to adhere to the Code of Conduct contained in Schedule III to the Act. The Code includes a prohibition on the broadcast of indecent, obscene or offensive materials (including abusive or insulting language), the prohibition of any broadcast likely to prejudice public order and tranquillity, a requirement of balance and accuracy in news reporting, respect for privacy and, during election periods, equitable treatment of political parties, election candidates and electoral issues.

MACRA proactively monitors compliance with licence conditions and the Code of Conduct, and is required to organise regular hearings on any matter relating to this task. It may also receive written complaints, which MACRA shall forward to the broadcaster concerned before concluding its investigations. If following its investigations, if MACRA concludes that a broadcaster is in breach of either the Code or of a licence condition, it notifies the broadcaster in writing. The broadcaster concerned can make representations to MACRA, including in a hearing, following which MACRA shall publish its findings. A variety of initial sanctions is available to MACRA, taking into account the gravity of the violation, ranging from a direction to desist from non-compliance to a fine. If the broadcaster fails to comply with an order issued to it, MACRA may suspend the licence for an initial period of thirty days, or an indefinite period thereafter.[66]

No avenue for appeal is provided.

Analysis

Although the various potential licence conditions provided in section 51(3) are in themselves unobjectionable, they have reportedly been interpreted to mean that community broadcasters are banned from broadcasting any news. The MACRA Director General is alleged to have stated, at a two-day international workshop on community broadcasting in June 2003: "News is supposed to be for the general public and not a particular community. By broadcasting news, the community radio stations are hijacking the role of public broadcasters, such as the Malawi Broadcasting Corporation and Television Malawi."[67]

ARTICLE 19 does not consider that section 51(3) or any other provision in the Act should be read as limiting the amount of news coverage that may be carried by community broadcasters.[68] On the contrary, the Act requires MACRA "to ensure the provision of regular news services and programmes on matters of public interest in Malawi [and] to promote the provision of a diverse range of broadcasting services on a

[66] Sections 54 and 55.
[67] MISA Alert, 4 June 2003, archived at <http://www.ifex.org/en/content/view/full/50451>.
[68] If it could, it would be in violation of the constitutional and international guarantee of the right to freedom of expression.

national and local level."[69] To the extent that MACRA continues to pursue a policy to limit news coverage by community broadcasters, it is probably in breach of the law and certainly of the guarantee of freedom of expression.

Second, Paragraph 2 of the Code of Conduct set out in the Third Schedule to the Act is highly problematic. It requires that broadcasters shall not broadcast any material that is "offensive to the religious morals of any section of the population or likely to prejudice … public order and tranquillity." Broadcasting is one of the most important means of mass communication in Malawi, and there must be space for strident critical programming, which may include criticism of religious ideas. It is unavoidable that certain members of the public may find programming that challenges their convictions offensive, but this cannot be invoked as grounds for restricting such broadcasts altogether. The South African Constitutional Court recently struck out a very similar provision on the grounds that it was incompatible with freedom of expression. It held:

> The prohibition is so widely phrased and so far-reaching that it would be difficult to know beforehand what is really prohibited or permitted. No intelligible standard has been provided to assist in the determination of the scope of the prohibition. It would deny both broadcasters and their audiences the right to hear, form and freely express and disseminate their opinions and views on a wide range of subjects … There is no doubt that the inroads on the right to freedom of expression made by the prohibition on which the complaint is based are far too extensive.[70]

The Court recommended that the impugned provision be declared null and void except insofar as it banned "(i) propaganda for war; (ii) incitement of imminent violence; or (iii) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm."

Finally, although no avenue for appeal is specifically provided for, we assume that MACRA's decisions are amenable to judicial review. If this is not the case, the Act should be amended to provide for appeal to a court of law.[71]

Recommendations:

- Community broadcasters should not be banned from carrying news.
- Paragraph 2(a) of the Code of Conduct should be redrafted so that is does not prohibit merely offensive material but only material which can be shown to be harmful, such as propaganda for war, incitement of imminent violence or incitement to hatred based on race, ethnicity, gender or religion.

III.4. Reconstitution of MBC

Under Part IX of the Act, MBC was reconstituted as a public service broadcaster with a mandate to "educate, entertain and inform; [encourage the formation of] free and informed opinion on all matters of public interest; … reflect the wide diversity of

[69] Section 45.
[70] *Islamic Unity Convention v. Independent Broadcasting Authority*, 2002 (4) SA 294 (CC); 2002 (5) BCLR 433 (CC).
[71] See our earlier comments: note 65.

Malawi's cultural life; and [be based on] respect for human rights, the rule of law and the Constitution…"[72] MBC is required to "(a) function without any political bias and independently of any person or body of persons; (b) support the democratic process; (c) refrain from broadcasting any matter expressing its opinion or the opinion of its Board or management on current affairs or on matters of public policy, other than broadcasting matters; (d) provide balanced coverage of any elections; and (e) have regard to the public interest."[73]

MBC is governed by a Board of Directors who have final responsibility for overall issues of policy and direction. The Director General is in its charge of MBC's day-to-day operations and heads a large professional staff. The Board consists of eight members. Seven members are appointed by the President, in consultation with the Parliamentary Public Appointments Committee; the Secretary of Information (the top civil servant in the Ministry of Information) sits *ex officio* as the eighth member.[74] Section 90 of the Act requires all Board members to have Malawian citizenship and be qualified in a relevant field, such as broadcasting, education, engineering, law, business, finance, public administration or public affairs. A number of rules of incompatibility are set out, excluding from membership of the Board individuals who have in the last three years served a prison term of more than three months for an offence involving fraud or dishonesty, who are undischarged bankrupts or who are MPs, ministers or party-political activists. Section 91 further excludes from membership all persons who have a professional or business interest in a body that holds a broadcasting licence, and requires members to declare any other potentially conflicting interests as and when they arise. Members serve two year-terms, renewable, and are paid a remuneration set by the Minister of Information, on the recommendation of the Board.

Under section 94, MBC may derive its funding from a number of sources, including such monies as are made available to it by Parliament, a licence fee that may be charged to all TV set owners, grants, advertising and proceeds of the sale of property.

Analysis

The African Declaration and the ARTICLE 19 Principles require that the independence of the public service broadcaster should be guaranteed robustly, both explicitly and through the appointments process to the Board. The African Declaration states:

> - public broadcasters should be governed by a board which is protected against interference, particularly of a political or economic nature;
> - the editorial independence of public service broadcasters should be guaranteed;
> - public broadcasters should be adequately funded in a manner that protects them from arbitrary interference with their budgets; [and]
> - the public service ambit of public broadcasters should be clearly defined and include an obligation to ensure that the public receive adequate, politically balanced information, particularly during election periods.[75]

[72] Section 87(1).
[73] Section 87(2).
[74] Sections 89 and 90.
[75] Note 11, Principle VI.

The statutory constitution of MBC under the current Act fails to meet these standards.

First, there is no mention in the Act that it is intended to constitute MBC as an independent broadcaster, and its editorial independence has not explicitly been guaranteed.

Second, the process for appointments to the Board is flawed and likely to be influenced by political considerations. Seven out of MBC's eight Board members are presidential appointees, with the eighth one being a civil servant who is duty-bound to serve the interests of the government of the day. It cannot be excluded that in the course of their duty, presidential appointees may display an unwitting but undue loyalty to the government of the day rather than to MBC's formal public service mandate. This danger is particularly apparent in light of MBC's very recent historical role, until only five years ago, as the State broadcaster and ruling party mouthpiece.

These concerns are not theoretical. There is evidence of MBC's continuing political bias towards the governing party. Most notably, during the 1999 elections – which followed the entry into force of the Act and MBC's reconstitution from the State broadcaster to a public service broadcaster – MBC granted vastly disproportionate amounts of airtime to ruling party candidates. At the conclusion of a monitoring exercise of the Malawi media during the election period conducted by ARTICLE 19, we found that MBC had clearly favoured the UDF (the ruling party of the time) both quantitatively and qualitatively.[76] Not only did UDF enjoy more coverage than any other party, but even relatively junior UDF officials had a voice on air while it was rare to hear even senior figures from the opposition parties. The then-Director General of the MBC, Sam Gunde, defended MBC's stance, saying that "wherever you go, the national broadcasting station is always the mouthpiece of the ruling party". His successor took the same view, even to the extent of censoring opposition political advertisements.[77]

Third, although MBC's public service remit as set out includes many positive elements, certain of its provisions are open to abuse. We are concerned that the provision banning MBC from expressing an opinion on matter of current public policy be interpreted excessively broadly.[78] In particular, it should be restricted in scope to MBC expressing its own opinions about such matters, and it should not be interpreted to mean that MBC is banned from providing wide coverage of matters of current public policy, including in-depth reporting and presenting the wide range of viewpoints and opinions that may exist within the country on a given issue.

Fourth, MBC's funding is not set out with sufficient clarity. Although the Act provides that MBC 'may' derive its funding from a variety of sources, it does not spell out where

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[76] *At the Crossroads: Freedom of Expression in Malawi*, The Final Report of the 1999 ARTICLE 19 Malawi Election Media Monitoring Project, March 2000, available at http://www.article19.org/docimages/456.htm.

[77] As quoted in the summary of *At the Crossroads*, note 76.

[78] A similar provision can be found in the BBC Agreement, clause 5(1)(c).

the funding will come from and through what procedures. This leaves the funding process open to (political) interference, allowing it to be used to pressure MBC.[79] Similarly, remuneration of individual board members is open to political interference as it, too, will be determined by the Minister for Information.

Fifth, as currently provided, MBC is under a responsibility to submit its annual report to the Minister of Information. The Minister has the power to direct MBC as to the issues that it should report on, and there is no mention in the Act of it being discussed in Parliament or in another multi-party forum. The resulting line of accountability is clearly a party-political one, requiring MBC to report on its functioning to the relevant minister rather than Parliament as a whole and failing to require a wider public debate to take place. This provides yet another opportunity for undue political interference with MBC's functioning.

We also note that the Act does not provide for any mechanism for MBC to consult with the public at large, keeping it in close touch with public opinion. Some countries ensure that the public broadcaster is directly accountable to the public through public reviews. In the UK, for example, the BBC is under a statutory obligation to hold periodic public meetings and to conduct surveys. A similar mechanism would contribute to MBC's accountability and help ensure that its broadcasting policies reflect the programming needs of the public.

Finally, we note that the entire statutory basis for MBC consists of ten provisions in the Act, together with a brief Schedule (consisting of four paragraphs). This is a severely curtailed statutory basis for a public service broadcaster and as a result, the Act fails to deal properly or at all with a range of issues. Some of these – primarily those dealing with MBC's independence – are outlined above; others include the appointment of senior management, detail on various different radio, television and other services to be provided by MBC (including cable, satellite and digital), election broadcasting, MBC's archives and potential commercial activities. It is outside the scope of the present Memorandum to discuss these matters in detail but they should be included in any future review of the Act.

Recommendations:

- The Act should be redrafted to enhance MBC's independence along the following lines:
  - MBC's independence should be formally guaranteed;
  - MBC's Board should be appointed by Parliament in an open, transparent and consultative process; and
  - MBC should be required to submit a detailed annual activities report to Parliament.
- MBC's public service remit should be strengthened to make it clear that it is expected to report widely on matters of current public policy, reflecting a variety of viewpoints and opinions.

[79] See the ARTICLE 19 Principles, note 12, Principle 36.

- The Act should be thoroughly reviewed to lay down rules and provide guidance on matters such as the appointment of senior staff, the provision of different programming services, election broadcasting and MBC's commercial activities.

III.5. 'Must carry' Provisions

Section 43 of the Act states: "The President may, on the occurrence of a public emergency and after consulting with MACRA make an order directing MACRA to (a) require the operator of any radio station to transmit a message relating to the emergency or in the interests of public safety or tranquillity; and (b) take over a radio station specified in the order and any associated equipment and premises necessary for the proper working and maintenance of the radio station and to make the same available to an officer or authority of the Government." The term "radio station" should be understood as any equipment suitable for telecommunications using radio frequencies; this includes telecommunications operators as well as all television and radio broadcasters.[80]

The scope of this authorisation is extremely broad. The phrase 'public emergency' is left undefined and could be interpreted to be applicable in a wide variety of situations, ranging from natural disasters to large nation-wide anti-government demonstrations. In such situations, the President would be able to take over any communications equipment, the only check on his power being that he needs to 'consult' with MACRA (the members of which are either civil servants or presidential appointees). This is clearly illegitimate under the international guarantee of freedom of expression and open to significant abuse.

While it is certainly important that the public broadcaster should carry information on genuine public emergencies, including messages by the authorities, experience in countries all over the world shows that both public and private broadcasters will provide ample coverage even in the absence of formal obligations to do so. There is therefore no need even for a narrowly-defined power to take over radio and television stations.

Recommendation:

- The President should not have the power to take over communications equipment.

[80] Section 2 of the Act.