

COMMENTS
ON
THE DRAFT BROADCASTING ACT
OF THE
REPUBLIC OF SERBIA
By
ARTICLE 19
Global Campaign for Free Expression

I. INTRODUCTION

These Comments are based on the Draft Broadcasting Act (the Draft Act) of the Republic of Serbia, received by ARTICLE 19 in April 2001 and prepared by the Group for Legal Issue, formed by the Media Center. ARTICLE 19 very much welcomes this move to place broadcast regulation in Serbia on a new, democratic footing, in line with international standards on the right to freedom of expression. At the same time, we believe that the Draft Act could be improved and, to that end, offer the following comments as an aid to discussion. These Comments provide an overview of some key areas for improvement followed by an analysis of the right to freedom of expression in international law and the Serbian Constitution. The main body of these Comments provide an in-depth analysis of certain provisions in the Draft Act, along with recommendations.

II. OVERVIEW

ARTICLE 19 notes that the Draft Act seeks to ensure that broadcast regulatory and governing bodies operate in an independent, open and transparent manner. This is reflected, for example, in the appointments process and the fact that the Serbian Broadcasting Council's (SBC) sessions are required to be open to the public. However, guarantees of the independence of the SBC could be further improved, in particular by removing the power of the Government and President to nominate members and by ensuring that the power to dismiss members is vested in the appointing body, the National Assembly, rather than the Council itself.

Of more serious concern is the lack of strong guarantees of independence in relation to a number of bodies with powers in relation to public service

broadcasting (referred to as PBS, to accord with the acronym used in the Draft Act). In particular, the “founder” plays an important role in many cases, even though it is unclear precisely who this is (for example, at the national level it is simply defined as the Republic of Serbia). Similarly, annual reports must be submitted to the founder, rather than specifically to Parliament. The Draft Act fails explicitly to guarantee editorial independence and, instead, appears to grant extensive powers over the content of broadcasts to Programme Boards, which include members of the legislature.

The process and criteria for the grant and revocation of broadcasting concessions and licences is also problematical. Broadcasters must go through two public tender processes, first to obtain a concession from the Serbian Broadcasting Council, and then to obtain a licence from the “body in charge of telecommunications”. There are no clear criteria for deciding between competing applications. In addition, the Draft Act contains a number of grounds for revocation of licences which are excessively onerous and open to potential abuse.

The Draft Act sets out a number of content restrictions for broadcasters which are vague and duplicate laws of general application, placing broadcasters under a double burden. In addition, the Draft Act provides for a public complaints process, but does not indicate what standards complaints should be judged against. Nor does it guarantee broadcasters minimum process standards in relation to complaints, for example to have an opportunity to present their point of view.

III. INTERNATIONAL STANDARDS

III.1 The Guarantee of Freedom of Expression

Article 19 of the Universal Declaration on Human Rights (UDHR), guarantees the right to freedom of expression in the following terms:

Everyone has the right to freedom of opinion and expression; this right includes the right to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.¹

The UDHR, as a declaration, was not intended to be binding on States. However, it is widely regarded as having acquired legal force since its adoption in 1948, as customary international law.

The International Covenant on Civil and Political Rights (ICCPR) is a treaty, ratified by over 145 States, which imposes formal legal obligations on States

¹ Article 19, UDHR, adopted by the UN General Assembly on 10 December 1948, Resolution 217A(III).

Parties to respect a number of the human rights set out in the UDHR.² Serbia is not yet party to this and other relevant human rights treaties and is therefore not formally bound by them. However, as a State in transition, Serbia should comply these international human rights standards. Article 19 of the ICCPR guarantees the right to freedom of opinion and expression in terms very similar to those found at Article 19 of the UDHR. Guarantees of freedom of expression are also found in all three major regional human rights systems, at Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms,³ Article 13 of the American Convention on Human Rights,⁴ and Article 9 of the African Charter on Human and Peoples' Rights.⁵

Freedom of expression is among the most important of the rights guaranteed by the ICCPR and other international human rights treaties, in particular because of its fundamental role in underpinning democracy. In its very first session in 1946 the United Nations General Assembly adopted Resolution 59(I) which stated, "Freedom of information is a fundamental human right and ... the touchstone of all the freedoms to which the United Nations is consecrated." The European Court of Human Rights has stated:

Freedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man ... it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of pluralism, tolerance and broadmindedness without which there is no 'democratic society'.⁶

III.2 Freedom of Expression and the Media

The guarantee of freedom of expression applies with particular force to the media, including the broadcast media and public service broadcasting organisations. The European Court of Human Rights has consistently emphasised the "the pre-eminent role of the press in a State governed by the rule of law."⁷ It has further stated that:

Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of their political leaders. In particular, it gives politicians the opportunity to reflect and comment on the preoccupations of public opinion; it thus enables everyone to participate in the free political debate which is at the very core of the concept of a democratic society.⁸

² UN General Assembly Resolution 2200A(XXI) of 16 December 1966, in force 23 March 1976.

³ Adopted 4 November 1950, in force 3 September 1953.

⁴ Adopted 22 November 1969, in force 18 July 1978.

⁵ Adopted 26 June 1981, in force 21 October 1986.

⁶ *Handyside v. United Kingdom*, 7 December 1976, 1 EHRR 737, Para. 49. Statements of this nature abound in the jurisprudence of courts and other judicial bodies around the world.

⁷ *Thorgeir Thorgeirson v. Iceland*, 25 June 1992, 14 EHRR 843, para. 63.

⁸ *Castells v. Spain*, 24 April 1992, 14 EHRR 445, para. 43.

The Inter-American Court of Human Rights, has stated: “It is the mass media that make the exercise of freedom of expression a reality.”⁹ The media as a whole merit special protection under freedom of expression in part because of their role in making public,

information and ideas on matters of public interest. Not only does [the press] have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of ‘public watchdog’.¹⁰

The Court has furthermore stated that it is incumbent on the media to impart information and ideas in all areas of public interest. It has consistently stated that:

Whilst the press must not overstep the bounds set [for the protection of the interests set forth in Article 10(2)] ... it is nevertheless incumbent upon it to impart information and ideas of public interest. Not only does it have the task of imparting such information and ideas; the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of “public watchdog.”¹¹

The Court has also held that Article 10 applies not only to the content of expression, but also the means of transmission or reception.¹²

It may be noted that the obligation to respect freedom of expression lies with States, not with the media *per se*. However, these obligations do apply to state-funded broadcasters. Because of their link to the State, these broadcasters are directly bound by international guarantees of human rights. In addition, state-funded broadcasters are in a special position to satisfy the public’s right to know, and to guarantee pluralism and access, and it is therefore particularly important that they promote these rights.

III.3 Pluralism

Article 2 of the ICCPR places an obligation on States to “adopt such legislative or other measures as may be necessary to give effect to the rights recognised by the Covenant.” This means that States are required not only to refrain from interfering with rights, but that they must take positive steps to ensure that rights, including freedom of expression, are respected. In effect, governments are under an obligation to create an environment in which a diverse, independent media can flourish, thereby satisfying the public’s right to know.

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

⁹ *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85 of 13 November 1985, Series A, No. 5, para. 34.

¹⁰ European Court of Human Rights, *Thorgeirson*, note 7, para. 63.

¹¹ See *Castells v. Spain*, *op cit.*, para. 43; *The Observer and Guardian v. UK*, 26 November 1991, 14 EHRR 153, para. 59; and *The Sunday Times v. UK (II)*, 26 November 1991, 14 EHRR 229, para. 65.

¹² *Autronic AG v. Switzerland*, 22 May 1990, 12 EHRR 485, para. 47.

ensure equal access of all to, the media. As the European Court of Human Rights stated: “[Imparting] information and ideas of general interest ... cannot be successfully accomplished unless it is grounded in the principle of pluralism.”¹³ 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.”¹⁴

One of the rationales behind public service broadcasting organisations is that they make an important contribution to pluralism. For this reason, a number of international instruments stress the importance of public service broadcasting organisations 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.

III.4 Independence of Media Bodies

In order to protect the right to freedom of information, it is imperative that the media is permitted to operate in a manner which protects the free flow of ideas. This ensures the media’s role as public watchdog and that the public has access to a wide range of opinions especially on matters of public interest. This means that the media must be independent of State control.

Under international law, it is well established that bodies with regulatory or administrative powers over both public service and private broadcasters should be independent and free from political interference. For example, in a pre-ambular paragraph, the European Convention on Transfrontier Television states that Member States “[reaffirm] their commitment to the principles of the free flow of information and ideas and the independence of broadcasters”. The Council of Europe’s Committee of Ministers also considers the independence of regulatory authorities as fundamentally important. Its Recommendation on the Independence and Functions of Regulatory Authorities for the Broadcasting Sector,¹⁵ states in a pre-ambular paragraph that:

[T]o guarantee the existence of a wide range of independent and autonomous media in the broadcasting sector ... specially appointed independent regulatory authorities for the broadcasting sector, with expert knowledge in the area, have an important role to play within the framework of the law.

The Recommendation goes on to note that Member States should set up independent regulatory authorities. Its guidelines provide that Member States should devise a legislative framework to ensure the unimpeded functioning of

¹³ *Informationsverein Lentia and Others v. Austria*, 24 November 1993, 17 EHRR 93, para. 38.

¹⁴ *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, note 9, para. 34.

¹⁵ Recommendation (2000) 23, adopted by the Committee of Ministers on 20 December 2000.

regulatory authorities, which clearly affirms and protects their independence.¹⁶ The Recommendation further provides that this framework should guarantee that members of regulatory bodies are appointed in a democratic and transparent manner.

The Committee of Ministers' Recommendation on the Guarantees of the Independence of Public Sector Broadcasting,¹⁷ provides additional guidance on this issue. This Recommendation provides that members of the supervisory bodies should be appointed in an open and pluralistic manner¹⁸ and that the rules governing the supervisory bodies should be defined so as to ensure they are not at risk of political or other interference.

III.5 Restrictions on the Right to Freedom of Expression

The right to freedom of expression is not absolute. Both international law and the domestic laws of many countries recognise that freedom of expression may, in certain prescribed circumstances, be limited. For example, 10(2) of the European Convention on Human Rights provides:

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority or impartiality of the judiciary.

Article 19(3) of the ICCPR provides for restrictions in similar terms. It is a maxim of Convention jurisprudence that all restrictions must be given a narrow interpretation; this is especially true of Article 10 in view of its centrality in a democratic society. Accordingly, any restriction to the right to freedom of expression must meet a strict three-part test, as foreseen in paragraph 2 of Article 10.¹⁹ First, the interference with the right must be prescribed by law. The Court has stated that this requirement will be fulfilled only where the law is accessible and “formulated with sufficient precision to enable the citizen to regulate his conduct.”²⁰ Second, the interference must pursue one of the aims listed in paragraph 2 of Article 10; the list of aims is an exhaustive one and thus an interference which does not pursue one of those aims violates Article 10. Third, the interference must be necessary to secure one of those aims. The word “necessary” means that there must be a “pressing social need” for the interference. The reasons given by the State to justify the interference must be

¹⁶ Appendix to Recommendation (2000) 23, Guideline 1.

¹⁷ Recommendation No. R (96) 10, Adopted on 11 September 1996.

¹⁸ Appendix to Recommendation No. R (96) 10, para III, Supervisory Bodies of Public Broadcast Organisations.

¹⁹ *The Sunday Times v. United Kingdom*, 26 April 1979, 2 EHRR 245, para. 45.

²⁰ *Ibid.*, 26 April 1979, 2 EHRR 245, at para. 49.

“relevant and sufficient” and the State must further show that the interference is proportionate to the aim pursued.²¹

IV. CONSTITUTIONAL PROTECTION OF FREEDOM OF EXPRESSION

Articles 45 of the Constitution of the Republic of Serbia protects the right to freedom of expression and Article 46 accords a special status to the media in the exercise of this right, in the following terms:

The freedom of press and other public information media shall be guaranteed. Citizens shall have the right to express and make public their opinions in the public information media.

Publication of newspapers and dissemination of information by other means shall be accessible to everyone without seeking permission, subject to registration with the competent agency.

Radio and television broadcasting organizations shall be established in accordance with law.

....

The censorship of press and other public information media shall be prohibited

.....

The public information media which are financed from public funds shall be bound to provide the general public with timely and impartial information.

As with human rights treaties, the right of the media to freedom of expression is limited:

The right to correction of published incorrect information which violates someone's right or interest, as well as the right to compensation for any moral and property damage arising therefrom, shall be guaranteed.

No one may obstruct the distribution of the press and dissemination of other information, except when the competent court of law finds by its decision that they call for the forcible overthrow of the order established by the Constitution, violation of the territorial integrity and independence of the Republic of Serbia, violation of guaranteed freedoms and rights of man and citizen, or incite and foment national, racial or religious intolerance and hatred.

The restrictions allowed under the Constitution are broader than those under international law and therefore permit greater interference with the right to freedom of expression. In particular, there is no requirement of “necessity” in the application of a restriction and there is no requirement that the restrictions be prescribed by law. For example, the reference to “violation of guaranteed

²¹ *Lingens v. Austria*, 8 July 1986, 8 EHRR 407, paras. 39-40.

freedoms and rights of man and citizen” in Article 46 appears to permit restrictions upon the dissemination of information whenever the rights of others are at stake, without the need to engage in the act of weighing up the relevant interests. This represents a serious gap in constitutional protection of the right to freedom of expression.

Recommendation

- Articles 45 and 46 of the Constitution should require all restrictions on freedom of expression to meet the tests of prescribed by law and necessary in a democratic society

V. ANALYSIS OF THE DRAFT LAW

V.1 Independence of Regulatory and Supervisory Bodies

V.1.1 Serbian Broadcasting Council

The Draft Act does provide for a democratic process of for electing the Serbian Broadcasting Council, in Article 15. However, there are three key problems with the approach taken. First, both the Government and the President can nominate members to the SBC, nominations that are likely to be politically motivated thereby undermining the idea of independence. Second, the Draft Act provides for between 3 and 6 nominations for each position. Such a large number of nominations will not only lead to confusion, but also give the Assembly too large a measure of discretion in selecting candidates, thereby politicising the process. The idea of ranking candidates is also unsatisfactory, since it automatically raises an issue in each case where the Assembly does not select the first candidate. It would be better if only 2 candidates were to be nominated for each position. Third, a number of members are required to be nominated by numerous groups, such as NGOs and even a mixture of public and private bodies (e.g. in the case of member 6, from those protecting national minorities). It is unclear whether this is in practice going to lead to consensus nominations and the means of resolving potential problems of this sort – by forwarding nominees with the support of the largest number of groups – is clearly problematical.

It might be appropriate to include broadcasting experts and/or media professionals among the list of experts that may be appointed to the SBC pursuant to Article 14. It seems unreasonable to require proposers, as Article 16 does, to establish by evidence that their nominees do not belong to any of the

prohibited categories. Rather, this should be established by the National Assembly, in consultation with the individuals.

As a practical matter, it may be noted that the Draft Act provides for a complete turn-over in membership of the SBC every 6 years (see Articles 18 and 19). This is administratively problematical and also undermines continuity in the activities of the SBC. A staggered approach to appointments to the SBC, whereby a third of the membership was renewed every two years (and initial appointments were made for 2, 4 and 6 years, respectively), would avoid these problems.

Another concern regarding the SBC is the procedure adopted for the dismissal of members. Rules governing dismissals should be precisely defined so as to avoid political pressure being brought to bear,²² and the Draft Act achieves this. However, the provisions contained in Articles 21-24 provide for dismissal by the SBC itself, rather than by the appointing body, the National Assembly. This is highly irregular and may lead to political or other pressures being used to dismiss a member.

Article 35 sets out the competences of the SBC. Some consideration should be given to including the overall objectives of broadcast regulation, set out at Article 5, to those now listed in Article 35, or to adding a new article ensuring that the SBC was bound, in its work, to promote those objectives. For example, Article 35 does not even mention promoting pluralism, despite the importance attached by international standards to promoting pluralism through the media.

Article 29 limits SBC funding to 30% of the licence fee. This seems unduly rigid and would be unable to accommodate changes in the overall licence fee receipts or changes in the workload of the SBC. Rather, the National Assembly should annually approve a yearly budget for the SBC, and the requisite amount then be drawn from licence fee receipts. Article 28 provides that the SBC may raise by loan any shortfall in funding from the licence fees paid by broadcasters. It seems unlikely that, except for particular projects, the SBC would be able to raise money by loan where the licence fees were otherwise inadequate to cover its expenses (unless, perhaps, there was a clear indication that the licence fees would increase in future). Other shortfall sources of funding should be set out in the Draft Act.

Recommendations

- The list of experts in Article 14 should be amended to include broadcasting experts and/or media professionals
- Neither the President nor the Government should have the power to nominate members to the SBC

²² See Appendix to Recommendation (2000) 23.

- The number of nominations for each position on the SBC should be reduced to two
- The manner in which certain positions receive nominations, in particular those which require multiple groups to co-operate, should be reconsidered
- The power to dismiss members of the SBC should vest in the National Assembly, not the SBC
- Proposers should not be required to provide evidence to prove that their nominees to the SBC do not fall into any of the prohibited categories
- Article 20 should be replaced with a system of staggered appointments to the SBC
- The SBC should be required in its work to promote the overall objectives of broadcast regulation, either in Article 35 or in a new article specifically on this
- The 30% limit on SBC funding from the licence fee should be deleted; instead, the SBC should have its budget approved annually by the National Assembly and, to the extent possible, this budget should be covered from the licence fee
- An alternative to loans should be provided for to enable the SBC to cover any shortfalls in funding from the licence fee

V.1.2 Public Service Broadcasting

The Draft Act provides for a number of governing bodies in relation to PBS, including a Supervisory Board, a Managing Board, a Programme Board and a Director General. In most cases, the founder (e.g. the Republic of Serbia) plays a significant role in appointments, sometimes almost without constraint. Given the lack of clarity about who, precisely, the founder is (e.g. would the President play this role for the Republic of Serbia?), this concept should be replaced with a specific individual or body, preferably a multi-party body such as the National Assembly. In addition, the appointment processes all lack public input, in contrast to that for the SBC, and there is no guarantee of transparency. Furthermore, rather curiously, there are no provisions at all concerning the appointments to some of these bodies below the level of the Republic.

Altogether, this proliferation of different bodies with powers over PBS is not only confusing, but probably has a tendency to multiply the opportunities for political interference, rather than protect against it. A more common, and proven model, is to establish an overall governing body, which can serve to protect against interference, to ensure accountability and to provide a mechanism for ensuring that programming reflects the needs and interests of citizens.

There is a particularly problem with the Programme Boards, which Article 88 appears to provide for at each level of PBS (republic, autonomous region, etc), though this is not entirely clear from the English translation. Programme Boards are to consist of 6 deputies from the Assembly (it is unclear whether this is just the national one, as appears likely, or all Programme Boards) and 12 appointed

by the founder, upon the proposal of various groups. The role of these groups in relation to each of the 12 members is unclear, in contrast to the system envisaged for appointments to the SBC. More seriously, the presence of deputies on a body which plays a direct role over programme content is clearly unacceptable and inherently politicises the work of the Programme Board. In addition, an alternative suggestion is that employees of PBSs may sit on the Programme Board. This is not appropriate both because as a public service there is no reason why employees should have particular input into its governance and because this would place employees in a clear conflict of interest situation.

For public service broadcasters, an important aspect of independence is that decision-making in relation to the content of specific programmes should be left up to programme makers and editors, free from interference by governing bodies.²³ This ensures another layer of protection against political interference. Instead of protecting editorial independence, the Draft Act, at Article 95, gives the Programme Board extensive power over the content of programmes, including in relation to individual complaints. It should be clear that any powers of the Programme Boards apply not to specific programmes but rather to programming as a whole. In addition, any powers over complaints should be restricted to the SBC.

Article 83 provides two options for financing PBS, either TV subscription fees or a tax via the electricity meter. Despite recent problems with this in Serbia, experience in other countries in the region and around the world shows that a tax via the electricity meter is more reliable and cheaper to collect, and hence more efficient. Also, Article 83 lists advertising as a source of income but does not establish limits on advertising on PBS. It is advisable to establish such limits as too high a percentage of advertising both would undermine the goals of PBS by making commercial considerations drive its programming and is inappropriate because for PBS, which receives public funding, should not be allowed to absorb too great a proportion of the whole advertising market.

Recommendations

- Consideration should be given to reducing the number of bodies with governing powers over PBSs
- The founder should play no role in appointments to PBS governing bodies; rather the law should provide for multi-party bodies to make appointments to all bodies, and at all levels of PBS
- Appointment process for all bodies and at all levels of PBS should be clear, transparent and should include mechanisms for public input
- Neither political figures, including Assembly deputies, nor employees should not sit on PBS governing bodies, including the Programme Board

²³ See Appendix to Recommendation No. R (96) 10.

- Governing bodies should be required to respect editorial independence and should be prohibited from interfering with individual programmes
- The law should establish only one official individual complaints mechanism, presumably through the SBC; a PBS or any other broadcaster may, of course, establish internal, self-regulatory systems
- Funding for PBS should include a tax on the electricity meter and limits should be established for advertising on PBS

V.2 Broadcasting Concessions and Licenses

The Draft Act sets out a number of provisions governing tendering for, and revocation of, both concessions and licences for private sector broadcasters. Applicants must first apply for a concession from the SBC and then for a licence from the “body in charge of telecommunications”, presumably a government ministry. There is a certain amount of confusion in the Draft as to the precise lines of responsibility between the SBC and the telecommunications body (e.g. the SBC is responsible for issuing tenders for both concessions and licenses, and both bodies share the power to revoke licences) and even as to the precise differences between concessions and licences (e.g. the title of the chapter dealing with licences refers to concessions). For purposes of the following analysis, we assume that the concession is the permit to undertake broadcasting, whereas the licence is the permit to use a frequency. This should, in any case, be clarified in the Draft Act.

A two-stage procedure for broadcasting authorisation is unnecessarily cumbersome and burdensome for applicants, and may even lead to situations where broadcasters got one form of permission but were denied the other. We recommend collapsing them into one application process, preferably overseen by the SBC itself. If the telecommunications body is indeed a ministry, any power it has over licensing raises the possibility of political interference with broadcasting.

Licensing is based on the frequency allotment plan and the frequency assignment plan. Presumably the former is the overall division of the radio spectrum between various uses (broadcasting, mobile phones, etc.) while the latter relates to the division of the broadcasting portion of the overall spectrum between various broadcasting uses (radio, television, national, local, community, etc.) This should be clarified and the law should provide that both must be based on broad consultation. In addition, the assignment plan should be developed by the SBC, in consultation with various stakeholders.

Article 50 of the Draft Act makes provision for an annual public tender for licences; this is unnecessarily rigid and would both prevent the SBC from issuing tenders more than once a year and require the SBC to issue a tender even if there were no available frequencies. Tenders should be issued as necessary when frequencies become available, not on a fixed timeframe.

Pursuant to Article 51, an applicant must show proof of registration. Presumably this refers to a concession; if so, the language should be consistent. In addition, applicants must make both a deposit payment and an administrative tax payment. A deposit may be burdensome to an applicant and it is unclear why these must be paid in advance in addition to the administrative fee.

Of perhaps greater concern is the fact that there are no criteria for determining between competing tenders. Among other things, it is recommended that the Draft Act require the SBC to take into account the contribution that a particular broadcaster will make to guaranteeing the public's right to know, and to enhancing programme diversity and pluralism. The Draft Act should also provide explicitly that the procedure for considering applications for concessions be fair and non-discriminatory, that hearings for the grant of concessions be public and that reasons be given for refusal of applications.

Article 51 requires applicants to submit a variety of information, including a conceptual and technical study for the given area. This seems an onerous condition and it is not clear why the applicant, rather than the SBC or body in charge of telecommunications, should be required to undertake general studies of this sort. Article 51(3) requires users to submit a programme concept. This sort of material should only be relevant to the concession and not the licence; a government ministry should not exercise any control over the content of broadcasts.

Two different Articles, 54 and 65, deal with technical acceptance of the licensee. It is unclear precisely why there is a need for different provisions. The former refers to temporary licences, but in our view these are not necessary and in any case, the provisions of the Draft Act on temporary licences are insufficient. The two Articles differ, including in relation to various conditions, which seems unfair (e.g. as regards the time given to remove deficiencies). In any case, in many broadcasting systems, technical matters are taken into account during the licensing process, and monitored on a regular basis thereafter. This avoids the need for a special "technical audit" along the lines in the Draft Act. Furthermore, the time limits for compliance with any technical breaches in Article 54, namely between 8 and 30 days, are too short (these are effectively doubled in Article 65).

The conditions for granting or refusing a licence extension, in Article 58, in particular, the "conduct of the radio frequency user in the past period" and "programme transparency", are excessively vague. Licensed broadcasters would normally expect their licences to be renewed, and although there is no reason why the law may not provide for non-renewal, this should be based on clear criteria.

Article 59 refers to cessation of licence validity. In accordance with the above, it is recommended that this process be overseen by the SBC alone. In any case,

there are serious problems with a government body exercising control over content, as envisaged by some of the bullets in this Article. Other problems with the bullets are: 15 days is too short a time period to be required to commence broadcasting; the provision on failure to observe technical conditions should be applicable only to serious failures and after repeated warnings; and users should be given a warning and an opportunity to rectify the fault before being sanctioned for even drastic unauthorised changes to the programme schedule. In case of licence revocation, users should have the right to apply in an expedited manner to the courts for review.

Recommendations

- The two-stage process for gaining permission to broadcast should be collapsed into a single application process, overseen by the SBC
- The differences between the two types of frequency plans should be clarified, public consultations should be required for both and any decisions relating to these plans that relate to individual broadcasters should be the responsibility of the SBC alone
- The annual tender process for licences should be replaced by a requirement to issue tenders as necessary when frequencies become available
- Applicants should not be required to pay in advance both a deposit and an administrative tax
- The Draft Law should include clear criteria for determining between competing applications and these criteria should include the contribution the applicant proposes to make to diversity in programming
- The procedure for granting licences should be fair and non-discriminatory, hearings should be open to the public and any refusals should be accompanied by written reasons
- Applicants should not be required to submit with their applications general information about the area they propose to broadcast in
- Article 54 should be deleted in favour of Article 65
- The Draft Act should set out clear and preferably narrow grounds for refusing to grant extensions to licences
- Article 59 should be amended so as to ensure that the SBC has sole authority over issues of content, that the problems noted above are remedies, and that broadcasters are given a fair opportunity to contest licence revocation in the courts

V.3 Regulation of Content

Article 35 of the Draft Law places a number of restrictions on the content of what may be broadcast, in particular in relation to children and programmes which incite hatred or violence. Such restrictions, like all restrictions on freedom of

expression, should be imposed only where they meet the three-part test noted above.²⁴ Each content restriction must meet this test and, in particular, must be shown to be necessary to protect a legitimate interest. The provisions contained in Article 35 are matters which are normally covered in laws of general application, in particular, the criminal law. It is not only unnecessary to repeat them in a broadcasting law, but it also serves to give broadcasters a double “warning” about what is illegal. Such a warning may have a chilling effect on media freedom. The prohibition relating to minors is excessively vague and fails to give broadcasters sufficient notice of exactly what is prohibited.

In most countries, regulatory bodies may receive and act upon complaints from the public regarding broadcasters but these powers are strictly limited to ensure an appropriate balance between maintaining broadcasting standards and respecting freedom of expression. In particular, in many countries, Codes of Conduct setting out broadcasting standards have been elaborated in consultation with broadcasters and other stakeholders, so as to provide both citizens and broadcasters a clear indication of what is prohibited and to assist regulatory bodies in deciding upon complaints. Indeed, it is hard to see how Article 42 of the Draft Act, which provides that citizens are entitled to submit complaints to the SBC concerning programmes, could be applied in the absence of clear standards, such as an established Code of Conduct. However, the Draft Act does not provide for a Code of Conduct. Another option would be to allow broadcasters themselves to establish a self-regulatory complaints system.

Furthermore, the Draft Act lacks a clear process for dealing with complaints. Minimum process rights for broadcasters and complainants, such as the right to receive copies of the text of any complaint and the right to present a full defence, are not found in the Draft Act.

Recommendations

- The content restrictions in Article 35 should be deleted
- The complaints process should be improved by making provision for the development of a Code of Conduct; as an alternative, broadcasters should be free to develop their own self-regulatory complaints processes
- In case the Draft Act does provide for a complaints system and Code of Conduct, it should also incorporate clear complaints procedures with minimum due process guarantees

V.4 Miscellaneous Matters

²⁴ See section on International Standards.

Article 5 – Maximum persons to be listed in concessions

It is not clear why the law should limit the number of persons allowed to share a concession to three. In any case, this provision could easily be avoided by multiple users simply joining together under one corporate structure.

Article 11

This Article does not mention community broadcasters, although they are mentioned later in the Draft Act. It might be helpful to note here that there is no minimum audience for community broadcasters.

Articles 68-80 – Fees

These provisions are excessively complex and probably establish a system which is unworkably rigid. It is probably more realistic to give the SBC a greater measure of discretion to reduce fees as appropriate.

Article 109

The figures for advertisement duration in this Article do not correspond (10% would be 6 not 9 minutes per hour and 15% would be 9, not 12 minutes per hour).

Recommendations

- The provision in Article 5 limiting the number of persons who may share a frequency should be deleted
- A section should be added to Article 11 to make it clear that community broadcasters are not required to reach any minimum audience
- The fee structure provided for in Articles 68-80 should be considerably simplified and, instead of elaborate rules, the SBC should be given greater latitude to reduce fees
- Article 109 should be amended so that the figures correspond