



**ARTICLE 19**

GLOBAL CAMPAIGN FOR FREE EXPRESSION

## MEMORANDUM

on

### **the Indonesian Broadcasting Bill, 2002**

by

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**Global Campaign for Free Expression**

**London**

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### ***I. Introduction***

A draft Broadcasting Bill currently before the Indonesian parliament is expected to be passed into law shortly. This draft Bill is the culmination of some 3 years of work in the area of broadcast regulation which has involved a wide range of Indonesian actors including the now-defunct Ministry of Information, the national legislature (DPR) and the Ministry of Information and Telecommunications, as well as a large number of draft bills. The draft Bill, once passed, will replace the 1997 Broadcasting Act which formally came into effect in September 1999 but which has never been implemented in practice.

This Memorandum analyses the current draft Bill in light of constitutional and international standards on the guarantee of freedom of expression, setting out ARTICLE 19's main concerns. The Memorandum also sets out international and comparative standards relating to freedom of expression and specifically in relation to broadcasting. It is intended as a contribution to the debate on this Bill in Indonesia.

The draft Bill contains a number of positive features and represents a very significant improvement over the 1997 Broadcasting Act. It recognises the important role of the three tiers of broadcasters – public, commercial and community, as well as subscription broadcasting services – in ensuring the free flow of information and ideas to the Indonesian public. It also establishes an independent body, the KPI, with responsibility for regulating and providing recommendations in the area of broadcasting.

At the same time, ARTICLE 19 has a number of concerns with the draft Bill. Despite the fact that it establishes the KPI as an independent body, the draft Bill allocates important powers in this area to the government, contrary to clear international standards on this issue. The content controls it establishes go beyond what is generally recognised as necessary to safeguard public interest, and there are stringent and unnecessary restrictions on foreign broadcasters.

## **II. International and Comparative Standards**

### **II.1 International Guarantees of Freedom of Expression**

Article 19 of the *Universal Declaration on Human Rights* (UDHR),<sup>1</sup> a United Nations General Assembly resolution, 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.

The UDHR is not directly binding on States but parts of it, including Article 19, are widely regarded as having acquired legal force as customary international law since its adoption in 1948.<sup>2</sup>

The *International Covenant on Civil and Political Rights* (ICCPR),<sup>3</sup> a legally binding treaty, guarantees the right to freedom of opinion and expression in very similar terms to the UDHR, also in Article 19. These guarantees allow for some restrictions on freedom of expression and information but only where these are prescribed by law, pursue a legitimate aim and are necessary in a democratic society to protect that aim.

### **II.2 Constitutional Guarantees**

Article 28 of the 1945 Indonesian Constitution guarantees freedom of expression as follows:

Freedom of association and assembly, of expressing thoughts by speech and writing, and so on, shall be laid down by law.

The 2<sup>nd</sup> Amendment to the Indonesian Constitution, adopted on 18 August 2000, added a number of articles which strengthen Article 28. These include Article 28E, which provides, in part:

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<sup>1</sup> UN General Assembly Resolution 217A(III), adopted 10 December 1948.

<sup>2</sup> See, for example, *Filartiga v. Pena-Irala*, 630 F. 2d 876 (1980) (US Circuit Court of Appeals, 2<sup>nd</sup> Circuit).

<sup>3</sup> UN General Assembly Resolution 2200A(XXI), 16 December 1966, in force 23 March 1976.

- (2) Every person shall have the right to have freedom of belief, express his/her thoughts and attitudes, in accordance with his/her conscience.
- (3) Every person shall have the right of freedom to organize, to assemble, and to express opinions.

Article 28F, also added in the 2<sup>nd</sup> Amendment, provides:

Every person shall have the right to communicate and to obtain information to develop his/her personality and social environment, as well as the right to seek, to obtain, to possess, to keep, to process, and to convey information by utilizing all available kinds of channels.

## II.3 The Importance of Freedom of Expression

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

Freedom of information is a fundamental human right and ... the touchstone of all the freedoms to which the United Nations is consecrated.<sup>4</sup>

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 importance of freedom of expression in a democracy has been stressed by a number of international courts. For example, the UN Human Rights Committee has stated:

[T]he free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion. ... this implies that citizens, in particular through the media, should have wide access to information and the opportunity to disseminate information and opinions about the activities of elected bodies and their members.<sup>5</sup>

Similarly, the Inter-American Court of Human Rights has stated:

Freedom of expression is a cornerstone upon which the very existence of a democratic society rests. It is indispensable for the formation of public opinion. ... [I]t can be said that a society that is not well informed is not a society that is truly free.<sup>6</sup>

This has repeatedly been affirmed by both the African Commission on Human and Peoples' Rights and the European Court of Human Rights.

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<sup>4</sup> 14 December 1946.

<sup>5</sup> *Gauthier v. Canada*, 7 April 1999, Communication No. 633/1995, para. 13.4.

<sup>6</sup> *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85, 13 November 1985, Series A, No. 5, para. 70.

The fact that the right to freedom of expression exists to protect controversial expression as well as conventional statements is well established. For example, in a recent case the European Court of Human Rights stated:

According to the Court's well-established case-law, freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2 of Article 10, 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. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society".<sup>7</sup>

These statements emphasise that freedom of expression is both a fundamental human right and also key to democracy, which can flourish only in societies where information and ideas flow freely.

## II.4 Broadcasting Freedom

The guarantee of freedom of expression applies with particular force to the media, including the broadcast media. 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."<sup>8</sup>

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

[I]t is ... incumbent on [the press] to impart information and ideas on matters 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'.<sup>9</sup>

This applies particularly to information which, although critical, relates to matters of public interest:

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 omitted]. In addition, the court is mindful of the fact that journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation.<sup>10</sup>

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<sup>7</sup> *Nilsen and Johnsen v. Norway*, 25 November 1999, Application No. 23118/93, para. 43.

<sup>8</sup> *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, op cit.*, para. 34.

<sup>9</sup> *Thorgeirson v. Iceland*, 25 June 1992, Application No. 13778/88, para. 63.

<sup>10</sup> *Fressoz and Roire v. France*, 21 January 1999, Application No. 29183/95 (European Court of Human Rights).

It is recognised that at least some regulation of broadcasting is necessary, if only to ensure that broadcasting frequencies are allocated in a fair manner which avoids interference. Two key principles apply to broadcast regulation. First, it is now very well established that 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. These 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.

The ARTICLE 19 publication, *Access to the Airwaves: Principles on Freedom of Expression and Broadcast Regulation*, encapsulates a wide range of standards relevant to broadcasting, including both of the principles noted above.<sup>11</sup>

The principle that bodies with regulatory powers in the area of broadcasting must be independent has been set out clearly by both national courts and international bodies. One of the clearest statements of the principle comes from a case decided by the Supreme Court of Sri Lanka, challenging the constitutionality of a draft broadcasting bill. The Court held that the bill was incompatible with the constitutional guarantee of freedom of expression, mainly because the draft bill gave the Minister 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.”<sup>12</sup>

Clear statements on this principle have been made by official UN bodies as well as all three regional systems for the protection of human rights. The UN Human Rights Committee has expressed concern about restrictions on private broadcasting and lack of independence of regulatory authorities on a number of occasions in recent years. Perhaps the clearest statement was in its Concluding Observations on Lebanon's Second Periodic Report, where it expressed concern over a media law as follows:

355. The Committee therefore recommends that the State party review and amend the Media Law of November 1994, as well as its implementing decree, with a view to bringing it into conformity with article 19 of the Covenant. It recommends that the State party establish an **independent** broadcasting licensing authority, with the power to examine broadcasting applications and to grant licences in accordance with reasonable and objective criteria.<sup>13</sup> [emphasis added]

The UN Special Rapporteur on Freedom of Opinion and Expression has also stressed the need for independent regulation of broadcasting, stating:

16. There are several fundamental principles [relating to broadcasting] which, if promoted and respected, enhance the right to seek, receive and impart information. These principles are...laws governing the registration of media and the allocation of broadcasting frequencies must be clear and balanced; any regulatory mechanism, whether for electronic or print media,

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<sup>11</sup> ARTICLE 19 (London: March, 2002). See Principle 3 and Section 4.

<sup>12</sup> *Athokorale and Ors. v. Attorney-General*, 5 May 1997, Supreme Court, S.D. No. 1/97-15/97.

<sup>13</sup> *Annual Report of the UN Human Rights Committee*, 21 September 1997, UN Doc. A/52/40.

should be independent of all political parties and function at an arms-length relationship to Government....<sup>14</sup>

The *African Charter on Broadcasting 2001* was adopted by a UNESCO/MISA-sponsored conference, “Ten Years On: Assessment, Challenges and Prospects”, celebrating the 10<sup>th</sup> anniversary of the Declaration of Windhoek on Promoting an Independent and Pluralistic African Press. The Charter states, under the heading General Regulatory Issues:

1. The legal framework for broadcasting should include a clear statement of the principles underpinning broadcast regulation, including promoting respect for freedom of expression, diversity, and the free flow of information and ideas, as well as a three-tier system for broadcasting: public service, commercial and community.
2. All formal powers in the areas of broadcast and telecommunications regulation should be exercised by public authorities which are protected against interference, particularly of a political or economic nature, by, among other things, an appointments process for members which is open, transparent, involves the participation of civil society and is not controlled by any particular political party....
5. Licensing processes for the allocation of specific frequencies to individual broadcasters should be fair and transparent, and based on clear criteria which include promoting media diversity in ownership and content.

This has found support in the recent adoption by the African Commission on Human and Peoples’ Rights of a *Declaration of Principles on Freedom of Expression in Africa*. Paragraph 2 of Principle V, entitled Private Broadcasting, states:

- The broadcast regulatory system shall encourage private and community broadcasting in accordance with the following principles:
- 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.

Within Europe, the need for independent broadcast regulators finds strong support in a recommendation adopted recently by the Committee of Ministers of the Council of Europe, *Recommendation on the Independence and Functions of Regulatory Authorities for the Broadcasting Sector*.<sup>15</sup> The Recommendation includes a set of Guidelines regarding broadcast regulatory bodies, including the following statement:

1. Member States should ensure the establishment and unimpeded functioning of regulatory authorities for the broadcasting sector by devising an appropriate legislative framework for this purpose. The rules and procedures governing or

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<sup>14</sup> Annual Report of the Special Rapporteur to the UN Commission on Human Rights, 29 January 1999, UN Doc. E/CN.4/1999/64. See also Annual Report of the Special Rapporteur to the UN Commission on Human Rights, 28 January 1998, UN Doc. E/CN.4/1998/40, para. 20, where the Special Rapporteur noted the need for independent regulatory frameworks for private broadcasters.

<sup>15</sup> Recommendation (2000) 23, adopted 20 December 2000.

affecting the functioning of regulatory authorities should clearly affirm and protect their independence.

3. The rules governing regulatory authorities for the broadcasting sector, especially their membership, are a key element of their independence. Therefore, they should be defined so as to protect them against any interference, in particular by political forces or economic interests.

Similar statements have been made within the context of the Organisation of American States.<sup>16</sup>

It is now well established that international and constitutional guarantees of freedom of expression include the idea that it is only through a diverse and pluralistic media that the public's right to seek and receive information and ideas can be secured. 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.<sup>17</sup> 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.

It is submitted that these obligations are of particular importance in light of the trend towards globalisation, including in the broadcasting sector. It is only through the development of a strong, free and pluralistic local media that Indonesian voices can be preserved in broadcasting against the growing dominance of multi-national media companies. The threat of international domination in this area is a particular threat in developing countries.

There is strong international support for the principle of pluralism in the media. The European Court of Human Rights has held in a series of judgments, starting with *Informationsverein Lentia v. Austria*,<sup>18</sup> that State broadcasting monopolies are an unjustifiable restriction on freedom of expression. State broadcasting monopolies have also been held by national courts to breach the guarantee of freedom of expression.<sup>19</sup> The underlying reason for this, as the European Court 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 is especially valid in relation to audio-visual media, whose programmes are often broadcast very widely.<sup>20</sup>

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<sup>16</sup> See Principles 12 and 13 of the Inter-American *Declaration of Principles on Freedom of Expression*, adopted at the 108<sup>th</sup> regular session, October 2000. See also, *Access to the Airwaves, op cit.*, Principle 10.

<sup>17</sup> See *Access to the Airwaves, op cit.*, Principle 3.

<sup>18</sup> 24 November 1993, Application Nos. 13914/88, 15041/89, 15717/89, 15779/89, 17207/90.

<sup>19</sup> See, for example, *Capital Radio (Private) Limited v. The Minister of Information, Posts and Telecommunications*, Judgment No. S.C. 99/2000, Const. Application No. 130/00 (Supreme Court of Zimbabwe).

<sup>20</sup> Note 18, para. 38.

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.<sup>21</sup>

The *African Charter on Broadcasting 2001* includes a number of provisions stressing the importance of pluralism in broadcasting in Part I: General Regulatory Issues, including the following:

1. The legal framework for broadcasting should include a clear statement of the principles underpinning broadcast regulation, including promoting respect for freedom of expression, diversity, and the free flow of information and ideas, as well as a three-tier system for broadcasting: public service, commercial and community....
5. Licensing processes for the allocation of specific frequencies to individual broadcasters should be fair and transparent, and based on clear criteria which include promoting media diversity in ownership and content....
7. States should promote an economic environment that facilitates the development of independent production and diversity in broadcasting.<sup>22</sup>

Pluralism necessarily involves broadcasting by different entities and international and comparative statements on this clearly reflect the idea that open, if regulated, competition in the broadcasting sector, as in the print sector, should be the primary means of ensuring diversity.

Similarly, a *Declaration on Freedom of Expression and Information* adopted by the Committee of Ministers of the Council of Europe states:

[S]tates have the duty to guard against infringements of the freedom of expression and information and should adopt policies designed to foster as much as possible a variety of media and a plurality of information sources, thereby allowing a plurality of ideas and opinions.<sup>23</sup>

The US Supreme Court has referred to the need for free and open competition in broadcasting, quoting the Federal Radio Commission:

[The] public interest requires ample play for the free and fair competition of opposing views.<sup>24</sup>

Furthermore:

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<sup>21</sup> UN Doc. E/CN.4/1999/64, 29 January 1999, para. 16.

<sup>22</sup> See also the ARTICLE 19 Measures, Recommendation 9.

<sup>23</sup> Committee of Ministers, Declaration on the Freedom of Expression and Information, 29 April 1982, reprinted in Council of Europe DH-MM (91) 1.

<sup>24</sup> *Red Lion Broadcasting Co., Inc., etc., v. Federal Communications Commission (No. 2)*, 395 US 367 (1969), p. 377.

It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolisation of that market, whether it be by the Government itself or a private licensee.<sup>25</sup>

Both the German and French Constitutional Courts 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 the 1986 law, found that the principle of pluralism of information was of constitutional significance.<sup>26</sup> Similarly, the German Constitutional Court has consistently held that broadcasting must be structured in such a way as to ensure the transmission of a wide range of views and opinions.<sup>27</sup>

## II.5 Restrictions on Freedom of Expression

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. Article 19(3) of the International Covenant on Civil and Political Rights lays down the benchmark, stating:

The exercise of the rights provided for in paragraph 2 of this article 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.

It is a maxim of human rights jurisprudence that restrictions on rights must always be construed narrowly; this is especially true of the right to freedom of expression in light of its importance in democratic society. Accordingly, any restriction on this right must meet a strict three-part test, approved by both the Human Rights Committee<sup>28</sup> and the European Court of Human Rights.<sup>29</sup> This test requires that any restriction must a) be provided by law; b) be for the purpose of safeguarding a legitimate public interest; and c) be necessary to secure that interest.

The third part of this test means that even measures which seek to protect a legitimate interest must meet the requisite standard established by the term “necessity”. Although absolute necessity is not required, a “pressing social need” must be demonstrated, the restriction must be proportionate to the legitimate aim pursued, and the reasons given to justify the restriction must be relevant and sufficient.<sup>30</sup> In other words, the government, in protecting legitimate interests, must restrict freedom of expression as little as possible.

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<sup>25</sup> *Ibid.*, p. 390.

<sup>26</sup> Decision 86-217 of 18 September 1986, Debbasch, 245.

<sup>27</sup> See the *First Television* case, 12 BverfGE 205 (1961).

<sup>28</sup> See, for example, *Mukong v. Cameroon*, 21 July 1994, Communication No. 458/1991, para. 9.7.

<sup>29</sup> See, for example, *Goodwin v. United Kingdom*, 27 March 1996, Application No. 17488/90, paras. 28-37.

<sup>30</sup> *Sunday Times v. United Kingdom*, 26 April 1979, Application No. 6538/74, para. 62 (European Court of Human Rights). These standards have been reiterated in a large number of cases.

Vague or broadly defined restrictions, even if they satisfy the “provided by law” criterion, will generally be unacceptable because they go beyond what is strictly required to protect the legitimate interest.

### **III. Key Problems with the draft Bill**

#### **III.1 Guarantees of the Independence of the Broadcast Regulator**

The draft Bill establishes an independent regulatory body, the Indonesian Broadcasting Commission (Komisi Penyiaran Indonesia or KPI), comprised of national and regional bodies, with important powers over broadcasting (Articles 6 and 7). Pursuant to Article 10, members of the two types of bodies are nominated, respectively, by the People’s Representative Council (DPR) and Regional People’s Representative Council (DPRD), after public input and based on a fit and proper test. Members are formally appointed, respectively, by the President and Provincial Governors. Members must meet a number of formal conditions, including not having interests in the mass media and not being politically linked. Members may be removed by a Presidential Decree, upon the suggestion of the DPR (with an analogous process for regional members).

These provisions provide substantial protection against political or commercial interference in the work of the KPI but, at the same time, they could still be further improved. The provision on public input is vague and it is not clear how, precisely, the public will be able to provide this input. It would be preferable if the draft Bill provided more detail on this important point. For example, the right of the public to nominate individuals for consideration by the DPR could be considered. Or the public could specifically be guaranteed the right to make representations concerning individuals being considered for appointment.

Most countries provide for a mechanism for removal of members of regulatory bodies where these members are failing to do their job, as does the draft Bill, in Article 10(4)(e). It would be preferable, however, if the draft Bill set out clearly the limited grounds upon which members could be removed. These could include a breach of the formal conditions on membership, noted above, a serious violation of responsibilities or clear inability to perform duties effectively.

#### **Recommendations:**

- The draft Bill should clarify more precisely how the public may provide input to the appointment of members to the KPI.
- Clear limits on the power to remove members should be set out in the draft Bill.

#### **III.2 Role of the Government**

A far more serious problem than the guarantees of independence for the KPI, however, is the provision in the draft Bill for significant government powers over broadcasting, often jointly with the KPI. Pursuant to Article 32(4), the State, not the

KPI, shall allocate broadcasting licenses, albeit upon recommendation and after agreement with the KPI.

ARTICLE 19 recognises that an attempt has been made to limit the role of the State in these provisions on issuing licences but, at the same time, we strongly recommend that the State, which in practice presumably means a ministry under the control of a senior politician, have no role whatsoever in issuing licenses, consistent with international law in this area, as outlined above.

The draft Bill also provides in a number of articles for various regulatory matters to be developed jointly by the KPI and the government. Examples include the following:

- rules on undue media concentration and cross-ownership (Article 17(4));
- the procedure for obtaining a subscription broadcasting license (Article 28(2));
- issues relating to the activities of foreign broadcasters (Article 29(3));
- provisions concerning the networking of stations (Article 30(4));
- the procedure for obtaining a general broadcasting license (Article 32(8)); and
- regulations on the procedures for imposing administrative sanctions (Article 54(3)).

The problems with allocating powers to governments in this area have already been highlighted. The primary problem is that governments may abuse these powers to limit critical or independent media reporting on their activities. Not all of the powers noted above are necessarily susceptible to this form of abuse. For example, it is common for governments to set rules on media ownership. Many of these powers, however, and particularly the ones relating to licensing procedures and sanctions, may be abused for political purposes and should, for that reason, be allocated to an independent body, such as the KPI, and not to government. Indeed, to some extent these powers undermine the efforts made in Article 32 to limit the role of the State in issuing broadcasting licences.

**Recommendations:**

- The State should play no role in issuing licences to broadcasters, including in determining licence application procedures, other than to the extent that these procedures are specified directly in the law.
- The provisions requiring joint KPI-government cooperation should be reconsidered; in most cases, KPI should be free to determine these matters by itself while in the few remaining cases, the government should set the rules but be required to consult KPI.

### **III.3 Public Service Broadcasting**

The current draft Bill, like its predecessors, contains only two provisions on public service broadcasting, in Part Four. Article 13 establishes a very general mandate for public broadcasters, states that the directors and boards are determined by the President upon the recommendation of the DPR (or Governor and DPRD for provincial public broadcasters) and states that these bodies are responsible to the respective House of Representatives. Article 14 lists a wide range of possible funding options for public broadcasters and requires them to submit annual financial reports.

The main problem with this Part is that it is simply too brief to deal with this complex topic. It fails to define the objectives of public service broadcasting, to make it clear that these provisions apply to TVRI and RRI, to ensure the Board of Directors and Board of Advisors are independent and to set out clearly their functions, to detail precisely the manner of funding or to set out clearly what should be included in the annual report. The brief provision for the appointment of the directors and boards may be contrasted with the far more detailed treatment this topic receives in relation to the KPI.

Public broadcasting is a complex matter and should be provided for in a law specifically for that purpose, consistent with the practice in most countries. Alternatively, the law should include far more detailed provisions on this important subject. The draft Bill purports to deal with the topic but fails to provide adequate rules for public broadcasters.

**Recommendations:**

- The provisions on public service broadcasting should either be removed from the draft Bill and left for future, comprehensive, consideration in a law specifically on this topic or be substantially expanded so as to provide a proper, detailed legal framework for public broadcasting.

### **III.4 Content Restrictions**

Several provisions in the draft Bill impose restrictions on the content of what may be broadcast. Article 34 provides that broadcasting content must be in line with Articles 2-5, which set out bases for broadcasting, fundamentals, objectives, functions and directions. As long as these are understood as general goals rather than specific prescriptions for broadcasters, this may not be too problematical. But if they are understood as formal requirements, they are oppressive. Article 5(i), for example, requires broadcasters to provide information that is correct. Even the very best journalists make mistakes in their endeavours to publish information of public interest in a timely fashion. To penalise them for making such mistakes would have a serious chilling effect on freedom of expression and lead to a situation where broadcasters were unwilling to broadcast anything unless they were absolutely sure it was correct, undermining the public interest in timely and comprehensive news.

Article 35 sets out a number of content restrictions. Articles 35(1) and (3) set out a number of very general and vague goals to which broadcasters are required to aspire, such as promoting morality, national endurance and unity, and protecting and empowering the public. As with Article 34, these become very problematical if understood as specific prescriptions for broadcasters. Would it be possible, for example, pursuant to these articles, to sanction a music radio station because it did not promote national endurance?

Article 35(2) requires all broadcasters to carry 60% domestic programming. There are a number of problems with this provision. First, this is an extremely high proportion, and may make it impossible for some broadcasters to become or remain operational. The European Convention on Transfrontier Television, for example, sets a

requirement of 50% European production for States Parties.<sup>31</sup> Furthermore, there are problems with setting rigid standards to which all broadcasters must conform. Certain broadcasters may focus on special niche markets, such as sports programming, where the public has a significant, legitimate interest in foreign programming, for example in the areas of golf, football and formula racing. Rather than set a rigid limit for all broadcasters, it would be preferable to allow the Indonesian Broadcasting Commission to set different categories for different types of broadcasters. Finally, existing broadcasters should be given time to bring their practice into line with these standards; they cannot be expected to conform to whatever standard is imposed in this regard immediately.

Article 35(5) refers to a number of prohibitions, including slander, gambling, drug abuse and hate speech. Inasmuch as these are set out in laws of general application, there is no need to repeat them in a media-specific law. Article 35(6) includes a number of vague and overbroad prohibitions, such as neglecting the prestige of the Indonesian people and violating “the international relationship”. It is not clear, for example, what the latter means but, inasmuch as it prohibits criticism directed at a legitimate target, that is other States and Indonesia’s relationship with them, it is unjustifiable.

Article 36 provides that the main language of broadcasting is Bahasa Indonesia, while Article 37 refers to the use of other languages, allowing local dialects where necessary for local content or to support a programme and foreign languages as required by the programme. These rules are extremely unclear. Broadcasters should be allowed to broadcast in local and foreign languages subject only to local content requirements and their programming schedules.

It may be noted that the draft Bill provides, in Chapter V, for general content regulation by the KPI through the development of a Code of Broadcasting Attitudes. Such a Code is the appropriate way to deal with content issues in relation to broadcasting and avoids the problems of direct legal regulation, such as excessive rigidity and sanctions, and lack of sensitivity to the specific context of broadcasting. Inasmuch as content issues are, therefore, addressed in this more appropriate manner, it is unnecessary for the law to provide for the direct restrictions found in Articles 34-37, even if they would otherwise be legitimate.

Article 46 allows the showing of films only after they have been censored by the appointed institute. Prior censorship of this sort is regarded by international human rights courts with the greatest suspicion and is outlawed altogether in some regional systems, except as necessary for the protection of children.<sup>32</sup> It is legitimate to require films to carry a classification, so as to assist viewers to decide whether or not they wish to view them, but prior censorship of this nature is unnecessary.

**Recommendations:**

- The prohibitions in Articles 34-37 should be reviewed and deleted to the extent that they will already be addressed through the Code of Broadcasting Attitudes or in laws of general application, such as the Penal Code.

<sup>31</sup> E.T.S. 132, in force 1 May 1993, Article 10(1).

<sup>32</sup> See, for example, Article 13(2).

- It should be clear that the requirement in Article 34 is to be interpreted as setting general goals for broadcasters rather than imposing specific content requirements.
- Article 35 should be reviewed and amended in accordance with the comments above.
- Articles 36 and 37 should be deleted.
- Article 46 should be amended to require, simply, that films carry a classification.

### **III.5 Broadcasting Scope**

The draft Bill provides, at Articles 30(1) and (3), that broadcasters can either be local or networked. This appears to rule out the possibility of a national broadcaster, although the term networked is not defined. This is supported by Article 6(3), which also refers only to network and local stations. Further provisions on this are to be worked out by the government and KPI jointly (Article 30(4)).

To prohibit national broadcasters would not only be contrary to international law and undermine diversity, but also contradict the prevailing situation in Indonesia which is characterised by a number of national broadcasters. In practice, it is now clear that only national broadcasters can provide certain types of services, such as comprehensive and detailed news programmes, as well as an alternative for viewers all over the country to the public broadcaster. Furthermore, national broadcasters can help ensure that people in all parts of the country have some choice in broadcasting. To prohibit national broadcasters by law, therefore, undermines the principle of diversity, an element of the guarantee of freedom of expression, as noted above. In any case, it is excessively rigid to include a rule of this sort directly in a law; decisions of this nature should be left to the KPI to make through the licensing process.

#### **Recommendations:**

- The draft bill should make it clear that national, as well as local and networked broadcasters, may be licensed and then left to KPI to decide in any particular case whether or not it is in the public interest to issue a national licence.

### **III.6 Foreigners and Broadcasting**

The draft Bill takes a very controlling approach towards the participation of foreigners in broadcasting and the carrying of foreign broadcasting. Article 29, which has been widely criticised both within Indonesia and outside, bans foreign broadcasters from being established in Indonesia and provides that the government and KPI will work out further procedures on the activities of foreign broadcasters in the country. Article 39(2) provides that regular rebroadcasting of either local or foreign programmes is limited, while Article 39(3) stresses this in particular for foreign programmes.

At present a number of local broadcasters regularly relay foreign programmes, particularly news programmes, and this provides listeners and viewers in Indonesia with an important additional source of information. It is unclear what, precisely, the impact of Article 39 will be on this programming, but there is no warrant for limiting it, subject only to rules about domestic programming and the programming schedules

which the KPI approves as part of the licensing process. International guarantees of freedom of expression apply regardless of frontiers and, while this does not prohibit some rules in favour of local broadcasters, it does mean that access to foreign material should not be unjustifiably limited.

Article 16 prohibits foreigners from taking part in the establishment of a commercial broadcaster and limits total foreign ownership to 20%, which must in turn be divided between two shareholders. Many countries impose some sort of restriction on foreign ownership over broadcasting, and this can help ensure diversity in broadcasting in the public interest. The restrictions in the draft Bill, however, are excessively limiting. Prohibiting foreigners from taking part in establishing broadcasters may deprive aspirant broadcasters of important capital and also expertise, as well as access to varied content. This may have the reverse effect from that intended, undermining the strength of the Indonesian broadcasting sector as a whole and making it more vulnerable to foreign competition. Furthermore, requiring the 20% foreign capital limit to be split between two shareholders is unclear. It could, for example, effectively be a 10% limit for any one foreign shareholder or a requirement that more than one foreigner participate. This effectively imposes a partnership requirement on foreign investment and may have an unwanted deterrent effect on this type of investment.

Article 26 imposes a number of very strict conditions on subscription satellite services. They must have control stations in Indonesia, have transmitting stations in Indonesia and also use satellites that have landing rights in Indonesia. These restrictions are unnecessary and unduly fetter the dynamic growth of satellite broadcasting. They may promote the Indonesian satellite business, but promoting local businesses is not recognised as a legitimate ground for restricting freedom of expression.

**Recommendations:**

- Articles 39(2) and 39(3), limiting rebroadcasting of both local and foreign programmes, should be deleted.
- Article 16 should be amended to allow for foreign participation in a new broadcaster and to allow one shareholder to hold all of the foreign shares.
- The local requirements for subscription satellite services, in Article 26, should be relaxed.

### **III.7 Penalties**

Administrative penalties are set out in Article 54 and include a range of sanctions from an oral warning to revocation of the licence. Although these sanctions are in principle legitimate, the draft Bill should set out a graduated regime of sanctions and make it clear that the more serious sanctions, such as licence suspension and revocation, may be imposed only in case of gross and repeated abuse of the law.

Articles 56(c) and (d) provide for the criminal sanction of imprisonment for breach of Article 35(6), prohibiting content that neglects religious values, the prestige of the Indonesian people or international relations. Problems with these provisions have already been noted. In any case, the law should not impose criminal penalties specifically on broadcasters for content-related matters; these should, to the extent

that they are legitimate, be included in laws of general application, such as the criminal code.

**Recommendations:**

- Article 54 should be amended to make it clear that the sanctions envisaged are to be applied in a strictly graduated fashion and that the more serious sanctions, particularly licence suspension or revocation, are to be applied only in case of gross and repeated breach of the law and after other, less intrusive penalties, have failed to redress the problem.
- Articles 56(c) and (d) should be repealed.

### **III.8 Miscellaneous Issues**

#### ***Shares for Employees***

Article 16(3) requires commercial broadcasters to provide their employees with shares. While this has a commendable purpose, it is probably unrealistic in practice and may impose an unreasonable burden on private broadcasters trying to survive in an increasingly competitive international market.

#### ***Cross Ownership Rules***

The cross ownership rules set out in Article 17(2) prohibit any cross ownership between a broadcaster and any other broadcaster or print media outlet. This is extremely rigid and fails to take into account the very wide range of such outlets. The influence of a major television broadcaster cannot be compared with that of a small radio broadcaster and the same cross ownership rules should not apply to both. For example, the threat of the latter also owning a small local newspaper is quite different from the former also owning a national radio station. These rules, as well as those on undue media concentration, should focus on the threat – market dominance – and not just impose technical restrictions.

#### ***Community Broadcasting***

It is welcome that the draft Bill recognises community broadcasting but Article 22 imposes unrealistically severe funding restrictions on these broadcasters. Pursuant to that article, they may not receive start-up funds from foreign sources and cannot run commercials other than public service announcements. Both of these sources of funding are likely to be crucial to the development of community broadcasting and these restrictions cannot be justified. If any such restrictions are to be maintained, they should focus on influence and focus, for example by requiring any foreign funding to be freedom of conditions affecting programme content, rather than imposing complete bans.

#### ***Trial Periods***

Article 33(3) provides for a trial period of 6 months for radio broadcasters and 1 year for television broadcasters. Pursuant to Article 33(5)(a), the licence can be revoked if the broadcaster “fails” their trial period. No definition for failing is provided and no criteria are set out. This effectively gives the licensing body, in practice the government, an unfettered discretion to ban a station during this period. Such trial periods are not imposed in other countries. It is, instead, the responsibility of the

licensing body to ensure through the licensing process that only competent bodies receive licenses.

### ***Power to Stop Broadcasts***

Pursuant to Article 55(2)(e), civilian investigators, as well as the police, may temporarily interrupt broadcasting. No conditions on the use of this power are specified in the law, although an investigation under Article 55(2) needs to be in accordance with the provisions of the Book on the Procedure of Criminal Laws.

There are several problems with this section. First, it is unclear why special civilian investigators need to be added to the police for purposes of investigations under this law. It is to be assumed that criminal activity through broadcasting will, as in the past, be extremely rare, so additional investigators are unnecessary. Second, as noted above, the imposition of criminal responsibility through this law, apart from for breach of its special provisions (for example, on the need to have a licence to broadcast), is not legitimate. Granting broad powers of this sort to civilian and police investigators compounds this problem. Third, although it is normal for police to have the power to prevent an imminent breach of the criminal law, or to stop an ongoing breach, this power seems unlikely to have any place in respect of broadcasting. Situations where an ongoing or imminent broadcast need to be stopped to prevent irrevocable harm will be extremely rare; it will almost always be possible to get a court order for this purpose.

This provision is open to serious abuse. It could be used to harass independent outlets which broadcast reports critical of government, or to prevent and ongoing broadcast which the authorities sought to suppress.

### ***Ethics***

Article 41 provides that broadcast journalists must comply with existing laws and the journalist Code of Ethics. There is no need to repeat here the requirement that journalists must abide by the law. If the Code of Ethics here is the same one referred to in the Press Law, there is again no need to repeat it here. Otherwise, ethics are by definition a matter for self-regulation and not something to be imposed by law.

### ***Corrections***

Article 43(1) requires broadcasters to make corrections if, among other things, there are protests against the content of their programmes. This is far too broad a ground for requiring a correction, which should be available only for factually false material. This provision may easily be abused, for example by anyone who has been criticised in the media.

### ***Archives***

Article 44(1) requires broadcasters to keep all material archived for 1 year after it has been broadcast. This is far too long and would impose a heavy economic burden on broadcasters. A period of one month is more reasonable.

### **Recommendations:**

- Article 16(3) should be deleted.
- The cross ownership provisions in Article 17(2) should be reconsidered in favour of an approach based on market share.

- Article 22 should be deleted.
- The trial period provided for in Article 33(3) should be deleted.
- Article 55(2)(e) should be deleted.
- Article 41 should be deleted.
- The right of correction in Article 43(1) should be limited to cases where false facts have been broadcast.
- Article 44(1) should be amended so that the period of mandatory archiving for all broadcasting material is more limited, for example to one month.