MEMORANDUM

on

Law of Mongolia on Public Radio and Television

by

ARTICLE 19

Global Campaign for Free Expression

London
May 2002

Introduction

The Mongolian authorities have produced a draft Law on Public Radio and Television with the goal of transforming the national broadcaster, Mongolian Radio and Television, currently a government-controlled broadcaster, into a public service broadcaster. The draft law, produced by the Ministry of Justice with the involvement of a range of individuals from civil society, was completed over a year ago but has not yet been formally submitted to the legislature.

The draft law is motivated in part by the need to implement Article 4 of the Law on Freedom of Media, which prohibits government institutions from having media under their control or jurisdiction. It contains a number of provisions designed to protect the independence of the national broadcaster, particularly in terms of programming. For example, Article 3.1 states that the public broadcaster shall serve only the public interest and Article 8.6 prohibits State institutions and authorities from participating in and influencing programme policy. Other provisions seek to protect the Representative Governing Board from interference, for example by protecting tenure and by excluding senior political figures from being members. The draft law thus represents an important improvement over the current situation and is, as a result, very welcome.

At the same time, ARTICLE 19 is of the view that the draft law could be improved in key respects. The process of appointing the Representative Governing Board is largely under the control of government and all of the shares of the broadcaster are vested in the government. Another concern is that the draft law contains insufficient detail regarding the role and mission of the public broadcaster. This is important both to ensure accountability and to protect the broadcaster against interference. Finally, the draft law contains a long list of potential sources of funding for the public broadcaster but does not guarantee access to particular public sources of funding or provide any detail as to how public funding would work in practice.

This Memorandum describes the key international standards in this area. It also sets out ARTICLE 19's main concerns with the draft law, along with recommendations on how address these concerns.

International and Constitutional Standards

The Guarantee of Freedom of Expression

The *Universal Declaration of Human Rights* (UDHR) is generally considered to be the flagship statement of international human rights, binding on all States as a matter of customary international law. It 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 *International Covenant on Civil and Political Rights* (ICCPR) is an international treaty, ratified by Mongolia in 1974, which imposes legally binding obligations on States Parties to

respect a number of the human rights set out in the UDHR. 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 9 of the African Charter on Human and Peoples' Rights, Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and Article 13 of the American Convention on Human Rights.

The Constitution of Mongolia also guarantees freedom of expression at Article 16.16 as follows:

> The citizens of Mongolia shall be guaranteed the following rights and freedoms:
>
> …
>
> 16) Freedom of thought, opinion, expression, speech, press and peaceful assembly. Procedures for organizing demonstrations and other assemblies shall be determined by law.

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. At 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'.

The guarantee of freedom of expression applies with particular force to the media, including the broadcast media and public service broadcasters. The Inter-American Court of Human Rights, for example, has stated: "It is the mass media that make the exercise of freedom of expression a reality." The European Court of Human Rights has referred to "the pre-eminent role of the press in a State governed by the rule of law." 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'."

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 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." 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."

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

A *Resolution of the Council and of the Representatives of the Governments of the Member States*, passed by the European Union, recognises the important role played by public service broadcasters in ensuring a flow of information from a variety of sources to the public. It notes that public service broadcasters are of direct relevance to democracy, and social and cultural needs, and the need to preserve media pluralism. As a result, funding by States to such broadcasters is exempted from the general provisions of the Treaty of Amsterdam. For the same reasons, the 1992 *Declaration of Alma Ata*, adopted under the auspices of UNESCO, calls on States to encourage the development of public service broadcasters.

Resolution No. 1: Future of Public Service Broadcasting of the 4th Council of Europe Ministerial Conference on Mass Media Policy, Prague, 1994, promotes very similar principles. This resolution notes the importance of public service broadcasting to human rights and democracy generally and the role of public service broadcasting in providing a forum for wide-ranging public debate, innovative programming not driven by market forces and promotion of local production. As a result of these vital roles, the resolution recommends that member States guarantee at least one comprehensive public service broadcaster which is accessible to all.

Independence and Funding

The State's obligation to promote pluralism and the free flow of information and ideas to the public, including through the media, does not permit it to interfere with broadcasters' freedom of expression, including publicly-funded broadcasters. This follows from a case before the European Court of Human Rights which decided that any restriction on freedom of expression through licensing was subject to the strict test for such restrictions established under international law. In particular, any restrictions must be shown to serve one of a small number of legitimate interests and, in addition, be necessary to protect that interest. Similarly, in the preamble to the European Convention on Transfrontier Television, States: "[Reaffirm] their commitment to the principles of the free flow of information and ideas and the independence of broadcasters."

An important implication of these guarantees is that bodies which exercise regulatory or other powers over broadcasters, such as broadcast authorities or boards of publicly-funded broadcasters, must be independent. This principle has been explicitly endorsed in a number of international instruments.

Perhaps the most important of these is Recommendation No. R(96)10 on the *Guarantee of the Independence of Public Service Broadcasting*, passed by the Committee of Ministers of the Council of Europe. The very name of this Recommendation clearly illustrates the importance to be attached to the independence of public service broadcasters. The Recommendation notes that the powers of supervisory or governing bodies should be clearly set out in the legislation and these bodies should not have the right to interfere with programming matters. Governing bodies should be established in a manner which minimises the risk of interference in their operations, for example through an open appointments process designed to promote pluralism, guarantees against dismissal and rules on conflict of interest.

Several Declarations adopted under the auspices of UNESCO also note the importance of independent public service broadcasters. The 1996 *Declaration of Sana'a* calls on the international community to provide assistance to publicly-funded broadcasters only where they are independent and calls on individual States to guarantee such independence. The 1997 *Declaration of Sofia* notes the need for state-owned broadcasters to be transformed into proper public service broadcasters with guaranteed editorial independence and independent supervisory bodies.

Resolution No. 1: Future of Public Service Broadcasting of the 4th Council of Europe Ministerial Conference on Mass Media Policy, noted above, reiterates these principles, including the need for independent governing bodies, and for editorial independence and adequate funding. These recommendations, particularly the requirement of effective independence from government – including financial independence – are reiterated in a number of resolutions and recommendations of the Parliamentary Assembly and other Ministerial Conferences on mass media policy of the Council of Europe.

ARTICLE 19 has adopted a set of principles drawn from international law and practice relating to broadcasting, entitled, *Access to the Airwaves: Principles on Freedom of Expression and Broadcast Regulation*. Principle 34 notes the need to transform government or state broadcasters into public service broadcasters, while Principle 35 notes the need to protect the independence of these organisations. Article 35.1 specifies a number of ways of ensuring that public broadcasters are independent including that they should be overseen by an independent body, such as a Board of Governors. The institutional autonomy and independence of this body should be guaranteed and protected by law in the following ways:

1. specifically and explicitly in the legislation which establishes the body and, if possible, also in the constitution;
2. by a clear legislative statement of goals, powers and responsibilities;
3. through the rules relating to appointment of members;
4. through formal accountability to the public through a multi-party body;
5. by respect for editorial independence; and
6. in funding arrangements.

These same principles are also reflected in a number of cases decided by national courts. For example, a case decided by the Supreme Court of Sri Lanka held that a draft broadcasting bill was incompatible with the constitutional guarantee of freedom of expression. Under the draft bill, the Minister had substantial power over appointments to the Board of Directors of the regulatory authority. The Court noted: "[T]he authority lacks the independence required of a body entrusted with the regulation of the electronic media which, it is acknowledged on all hands, is the most potent means of influencing thought."

Similarly, the Supreme Court of Ghana noted: "[T]he state-owned media are national assets: they belong to the entire community, not to the abstraction known as the state; nor to the government in office, or to its party. If such national assets were to become the mouth-piece of any one or combination of the parties vying for power, democracy would be no more than a sham."

Many of the standards set out above reflect both the idea of independence of governing bodies and the related but slightly different idea that the editorial independence of public service broadcasters should be guaranteed, both in law and in practice. This is reflected, for example, in Principle 35.3 of the ARTICLE 19 *Principles*, which states: "The independent governing body should not interfere in day-to-day decision-making, particularly in relation to broadcast content, should respect the principle of editorial independence and should never impose prior censorship." The governing body may set directions and policy but should not, except perhaps in very extreme situations, interfere with a particular programming decision.

This approach is reflected in Article 1 of Recommendation No. R(96)10 of the Council of Europe, which notes that the legal framework governing public service broadcasters should guarantee editorial independence and institutional autonomy as regards programme schedules, programmes, news and a number of other matters. The Recommendation goes on to state that management should be solely responsible for day-to-day operations and should be protected against political interference, for example by restricting its lines of accountability to the supervisory body and the courts. In a related vein, Articles 20-22 of the same Recommendation note that news programmes should present the facts fairly and encourage the free formation of opinions. Public service broadcasters should be compelled to broadcast messages only in very exceptional circumstances.

Similarly, true independence is only possible if funding is secure from arbitrary government control and many of the international standards noted above reflect this idea. In addition, public service broadcasters can only fulfil their mandates if they are guaranteed sufficient funds for that task. Articles 17-19 of Recommendation No. R (96) 10 of the Council of Europe note that funding for public service broadcasters should be appropriate to their tasks, and be secure and transparent. Funding arrangements should not render public broadcasters susceptible to interference, for example with editorial independence or institutional autonomy.

ARTICLE 19’s Principle 36 deals with funding, stating: "Public broadcasters should be adequately funded, taking into account their remit, by a means that protects them from arbitrary interference with their budgets". Similarly, the Italian Constitutional Court has held that the constitutional guarantee of freedom of expression obliges the government to ensure that sufficient resources are available to enable the public broadcaster to discharge its functions.

Specific Concerns

Independence

As noted above, the draft Law of Mongolia on Public Radio and Television does include a number of provisions designed to protect the independence of the national broadcaster. Article 3.1 states that it has a duty to serve only public interests and Article 3.3 provides that its activities should be based on independence. The draft law provides for a Representative

Governing Board with extensive governing powers and Article 4.4 allows government to veto the decisions of this body only in exceptional circumstances.

Structure

Independence is, however, undermined in a number of ways. A key problem is that the very structure of public radio and television places it under substantial government control. Article 4.2 provides that the founder shall be the State and that the government shall take the decision to establish it. It is not clear whether this power extends to abolishing the public broadcaster as well, but this is normally a corollary of the power to establish. Pursuant to Article 4.3, the government has the right to adopt the statutes. Furthermore, the government holds 100% of the shares (Article 6.2). Finally, Article 18.3 refers to a Supervision Commission to control the implementation of the Representative Governing Board's decisions. It is unclear what this body is, what, precisely, its role is, and why it is necessary.

In many countries, the public broadcaster is a public company, an entity which is public in nature but which does not need to be under direct State, or certainly government, control or ownership. The public broadcaster clearly needs to have a legal structure that is grounded in Mongolian law but, at the same time, this structure must be able to ensure independence. It is clearly inappropriate for the government to hold the shares which should, at the very least, be vested in some other public entity. In terms of statutes, a common model is for the governing board to adopt the statues, in some cases with key provisions, for example, relating to quorum and calling meetings, set out in the primary legislation.

Recommendations:

- A different legal form should be sought for the public broadcaster which ensures greater independence from government. In particular, the government should not be the founder, be able to establish the broadcaster and should not hold all of the shares.
- The law should provide for the adoption of the statutes by the Representative Governing Board, not the government. Key provisions relating to meetings should be set out directly in the law.
- The oversight role of the Supervision Commission should either be abolished outright or the law should clearly define the nature and role of this body.

Appointments to the Representative Governing Board

A serious problem with the draft Law on Public Radio and Television is the system for appointing members to the governing board. Article 12 provides for the establishment of an independent Representative Governing Board. Pursuant to Article 13.3, nine members will be appointed to this body by the Prime Minister, three having been nominated respectively by each of the Parliament, the President and the government. Although this does involve various different State organs in the appointments process, it will often be the case, as at present in Mongolia and many other countries, that all of these are dominated by one party. Furthermore, no provision is made for openness of the process, or for the involvement of civil society.

The Recommendation of the Committee of Ministers makes a detailed statement of policy regarding appointment of members to governing boards, stating that the law should ensure that they:

- are appointed in an open and pluralistic manner;

- represent collectively the interests of society in general;

- may not receive any mandate or take any instructions from any person or body other than the one which appointed them, subject to any contrary provisions prescribed by law in exceptional cases;

- may not be dismissed, suspended or replaced during their term of office by any person or body other than the one which appointed them, except where the supervisory body has duly certified that they are incapable of or have been prevented from exercising their functions;

- may not, directly or indirectly, exercise functions, receive payment or hold interests in enterprises or other organisations in media or media-related sectors where this would lead to a conflict of interest with their functions within the supervisory body.

The proposed appointments process clearly fails to meet these standards.

It would be preferable if appointments were made by a multi-party body, such as the legislature, rather than by an individual, such as the Prime Minister. Furthermore, the power of nomination should not be given exclusively to political actors such as the government and president. Civil society organisations might also be given the power to nominate members, subject to acceptance by the legislature. The law should also require the appointments process to be open, so that members of the public are aware of the steps being taken. Indeed, explicit provision for public involvement should be made. This could involve the publication of a shortlist of candidates, with an opportunity for public comment, or some other mechanism.

A good example of a law which meets international standards in this area is the South African Broadcasting Act of 1999, which provides for appointments to the governing board as follows:

13. Members of Board

1) The twelve non-executive members of the Board must be appointed by the President on the advice of the National Assembly.

(2) The non-executive members of the Board must be appointed in a manner ensuring--

(a) participation by the public in a nomination process;

(b) transparency and openness; and

(c) that a shortlist of candidates for appointment is published, taking into account the objects and principles of this Act.

The draft law provides for a Program Policy Commission to advise on the formulation of programme policy (Article 8.2). Pursuant to Article 8.2, the Program Policy Commission's role is only advisory, but Article 8.4 provides that the Representative Governing Board must accept its recommendations. This needs to be clarified. The provision for a separate body to address programme issues does mitigate to some extent the problem of lack of independence of the Representative Governing Board but it is still essential to protect this key body from political interference.

Articles 13.4 and 13.5 set out a number of conditions that an individual must meet before being eligible for appointment to the Representative Governing Board, including having relevant

experience, not having been convicted, not being an elected or party representative and not working for another broadcaster. These "rules of incompatibility" are very positive. Consideration should be given to adding to these rules of incompatibility provisions on conflict of interest. This would prevent individuals holding significant interests in broadcasting or telecommunications from being appointed. Similarly, Article 13.6, protecting members from removal except in case of poor health or commission of a crime, is also an important means of protecting independence. Consideration should be given to extending the grounds for dismissal to including anyone who falls into breach of the rules of incompatibility set out in Article 13.5.

Recommendations:

- Appointments to the Representative Governing Board should be made by the legislature, not an individual such as the Prime Minister.
- The right to make nominations should not vest exclusively in political organs of government. Civil society organisations should also have a right to nominate members for consideration by the appointing body.
- The process of appointment should be required to be open and should ensure that the public have an opportunity to make representations regarding candidates.
- The role of the Program Policy Commission should be clarified.
- The rules of incompatibility should also include provisions on conflict of interest.
- The power to remove should also apply to an individual who no longer meets the rules of incompatibility.

"Must Carry" Requirements

Article 10 requires the national broadcaster to carry urgent news on prevention of natural and public disasters, as well as statements by the President, Prime Minister or Parliamentary Speaker on emergencies.

While the rationale for these rules is understandable, they are both unnecessary and open to abuse. They are unnecessary because any responsible public broadcaster will carry information of public importance without a specific requirement to do so. Experience in countries all over the world shows that both public and private broadcasters provide ample coverage of emergencies and natural disasters, even in the absence of formal obligations to do so, which are rare in other countries. Should the public broadcaster fail in this regard, it is up to the Representative Governing Board to require it to address the problem.

Such provisions are open to abuse because officials may use them in circumstances for which they were not intended. Emergencies are not defined in the draft law and may be claimed to exist in a relatively broad range of circumstances. In fact, real emergencies are very rare. Furthermore, what is important is that the public get the information they need regarding the emergency, not that they hear statements made by senior politicians.

Recommendation:

- Article 10 should be removed from the draft law.

Funding

Article 17 of the draft law provides that the public broadcaster may get funding from the State budget, the license fee, advertising, donations, renting equipment, charging for programmes and other legal sources. Article 19 restricts advertising, placing an overall cap on advertising of 5% of the total daily programming time.

To ensure independence and their ability to fulfil their mandates, public service broadcasters should be adequately funded by a means that protects them from arbitrary cuts with their budgets. The Committee of Ministers Recommendation states:

> The rules governing the funding of public service broadcasting organisations should be based on the principle that member states undertake to maintain, and where necessary, establish an appropriate, secure and transparent funding framework which guarantees public service broadcasting organisations the means necessary to accomplish their missions.

Article 17 does not specify clearly the framework for public sources of funding for the public broadcaster. It would be preferable, for example, if Article 17 guaranteed the broadcaster revenues from the license fee, the best source of funding in terms of maintaining independence. Funding from the State budget is notoriously susceptible to political interference, although in the absence of sufficient funds from the license fee and advertising, it may be necessary. Before a decisions to continue direct State support is made, however, consideration should be given to other forms of funding. One possibility is giving the public broadcaster a share of the fee other broadcasters pay for a license to operate and occupy a frequency(ies). Alternatively, the law should restrict the use that can be made of any direct public subsidy, in particular allowing for it to be applied only to non-programming costs, such as maintaining the transmission system. This approach, applied in a number of transitional democracies, helps to limit the potential for political control through direct funding.

The 5% limit on advertising is very stringent. Almost all public broadcasters around the world today operate on mixed funding, including advertising, and few are subjected to such stringent limits. The proportion of funding from advertising should not be so great as to undermine the public service role of the public broadcaster but at the same time it should not be so strict as to undermine its viability. The European Convention on Transfrontier Television, for example, places a 20% limit on advertising for all broadcasters and public broadcasters are commonly allowed to reach at least one-half of that limit.

Recommendations:

- Article 17 should provide a clearer framework regarding the public sources of funding for the public broadcaster and should, in particular, guarantee it continuing revenues from the license fee.
- Consideration should be given to alternative sources of funding than a direct State subsidy. Alternatively, restrictions should be placed on the use of any direct subsidy so that it is not used to support programme production.
- The 5% limit on advertising time in Article 19 should be reconsidered in favour of a higher limit, which would enhance the viability of the public broadcaster.

Accountability Mechanisms

The draft law requires the public broadcaster to submit an annual report (Article 12.2) and to have its financial report audited by an independent auditor (Article 18). These provisions could

be enhanced by providing a detailed list of contents of the annual report, thereby restricting the discretion of the Representative Governing Board.

The draft law sets out programme responsibilities in Article 9 and to some extent in Article 3. The former, for example, requires programmes to be objective, professional, esteem social safety, provide pluralism, not pervert facts, respect editorial independence, promote national traditions and not include material prohibited by law. While these are useful, a more detailed statement of positive programme responsibilities would serve a number of functions. It would provide both the public and the Representative Governing Board with a clearer sense of what the public broadcaster should be doing, as well as allowing the legislature to set overall programme policy.

The ARTICLE 19 *Principles* provide a list of possible programme responsibilities for public broadcasters in Principle 37 as follows:

> The remit of public broadcasters is closely linked to their public funding and should be defined clearly in law. Public broadcasters should be required to promote diversity in broadcasting in the overall public interest by providing a wide range of informational, educational, cultural and entertainment programming. Their remit should include, among other things, providing a service that:
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> - provides quality, independent programming that contributes to a plurality of opinions and an informed public;
> - includes comprehensive news and current affairs programming, which is impartial, accurate and balanced;
> - provides a wide range of broadcast material that strikes a balance between programming of wide appeal and specialised programmes that serve the needs of different audiences;
> - is universally accessible and serves all the people and regions of the country, including minority groups;
> - provides educational programmes and programmes directed towards children; and
> - promotes local programme production, including through minimum quotas for original productions and material produced by independent producers.

In addition, consideration should be given to including two other public accountability mechanisms in the law. First, consideration should be given to requiring the public broadcaster to establish an internal complaints mechanism. This should be in addition to any general system for complaints, including self-regulatory systems, which apply to broadcasters or the media as a whole. Individuals who felt that programmes were inappropriate or unfair could lodge complaints and, where appropriate, receive an apology or correction. Second, the public broadcaster could be required to keep itself under continuous public review. Such obligations have been imposed, for example, on the BBC in Britain, which fulfils this requirement through public meetings, surveys and the like.

Recommendations:

- The law should set out in some detail the topics that must be covered in the annual report.
- The law should set out in more detail the precise programme responsibilities of the public broadcaster.
- Consideration should be given to adding two further accountability mechanisms, namely an internal complaints procedure and a requirement of on-going public review.