



COMMENT

on the

Draft Media Legislation, Southern Sudan

June 2008

ARTICLE 19 · 6-8 Amwell Street · London EC1R 1UQ · United Kingdom
Tel +44 20 7278 9292 · Fax +44 20 7278 7660 · info@article19.org · <http://www.article19.org>

1. Introduction

This Comment reviews the package of draft Media Bills presented by the Ministry of Information and Broadcasting of the Government of Southern Sudan in May 2008, namely the draft Ministry of Information and Broadcasting Bill, the Southern Sudan Public Service Broadcasting Bill (referred to as the Southern Sudan Public Broadcasting Corporation Bill in the invitation email from the Minister of Information and Broadcasting to stakeholders on 12 May 2008), the draft Independent Broadcasting Authority Bill and the draft Right to Information Bill. The Comment was prepared as part of ARTICLE 19's input into the "Developing Media Legislation for Southern Sudan, A Consultative Workshop for Media Sector Stakeholders" held in Juba, 26 – 28 May 2008.

This Comment is based on international human rights law and best practice standards as reflected in key ARTICLE 19 publications, namely *A Model Public Service Broadcasting Law* (ARTICLE 19: London, June 2005), *Access to the Airwaves: Principles of Freedom of Expression and Broadcast Regulation* (ARTICLE 19: London, June 2005), *A Model Freedom of Information Law* (ARTICLE 19: London, July 2001) and *The Public's Right to Know: Principles on Freedom of Information Legislation* (ARTICLE 19: London, June 1999).

We welcome the Government of Southern Sudan's decision to move forward with the drafting and process of consultations around them, including the May stakeholders meeting. This Comment aims to provide our feedback in the hope of making the draft bills even more compliant with international best practice.

2. Draft Ministry of Information and Broadcasting Organisation Bill

We welcome the reference to international best practices standards in Section 15(2) of the Bill, which signals a positive intention to promote freedom of expression.

At the same time, we believe that there are serious problems with the draft Ministry of Information and Broadcasting Organisation Bill, which may undermine the right to freedom of expression and the right to information as guaranteed by international law and regional instruments to which Sudan is party. This draft Bill occupies a central place within the package of proposed legislation and we are concerned that the problems that we have identified might have a consequential negative impact on the other draft Bills in the package. We have the following specific concerns with the draft Bill.

1. There is no preamble statement committing the Ministry to promoting the right to freedom of expression, including the right to information. The right to freedom of expression includes both the right of broadcasters to be free of State, political and commercial interference, and the right of the public to maximum diversity of information and ideas in broadcasting. A preamble should refer these principles should and situate the draft legislation within the broader framework of international human rights law. It could also refer to the *International Covenant on Civil and Political Rights*,¹ the *African Charter on Human and Peoples' Rights*² and the *Declaration of Principles on Freedom of Expression in Africa*.³
2. Section 3 indicates that the purpose of the Bill is to provide for “the establishment and governance of the Southern Sudan Ministry ... as a means to promote the general welfare, economic growth, stability, and security of Southern Sudan, through provision of *direction* in the areas of information and broadcasting ... consistent with those *and other national objectives, and any other issues related thereto*”. [emphasis added] Under international law, it is clear that regulation of the media must be undertaken by an independent body, not a ministry, although responsibility for setting policy remains with government. This provision suggests that the Ministry will retain significant power to direct and possibly control access to information and broadcasting, and in line with an undefined and open set of national goals, contrary to international standards.
3. Section 8 of the draft Bill places an obligation on the Ministry to observe “freedom of the press” in performing its duties is welcome. However, section 8(a) states that it is “Government policy to guarantee freedom of the press” suggesting that this government policy might shift over time with a change in administration or political climate. The right to freedom of expression and the right to information are of a fundamental, constitutional value and are not subject to change. Section 7, on the functions and powers of the Ministry, makes no reference to international standards on the right to freedom of expression and the right to information, even though these should be a fundamental underpinning of Ministry activities.

¹ UN General Assembly Resolution 2200A (XXI), 16 December 1966, entered into force 3 January 1976.

² Adopted at Nairobi, Kenya, 26 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986.

³ Adopted by the African Commission on Human and Peoples' Rights at its 32nd Session, 17-23 October 2002.

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4. Under Section 9(1), the Minister has the “*power to investigate any existing or potential breach of media and access to information laws ... or any order of the Minister*” (emphasis added). Furthermore, under Section 9(4), the Minister is empowered to “take appropriate action, reasonable necessary to compel compliance with this Bill, through the levying of fines in accordance with a public schedule or similar sanction.” These powers should vest in an independent and impartial body not the Ministry.
5. Section 9(6) provides that, following an investigation, the Minister “may have the reports published for public use”. This leaves excessive discretion in the hand of the Minister as to whether to issue this report. At a minimum, the law should provide clear guidelines for the exercise of this discretion.
6. Section 15 indicates that the “Minister shall be responsible for identifying the need and appropriateness of establishing autonomous agencies to achieve the policies and principles of the Ministry”. The Minister is thus responsible for deciding whether or not to establish the autonomous agencies. As noted, under international law, only autonomous agencies should undertake regulation of the media. As a result, the Minister should not have any discretion to refuse to establish them.

3. General comments on the Draft Southern Sudan Public Service Broadcasting Bill, the draft Independent Broadcasting Authority Bill and the draft Right to Information Bill

Overall, the three other Bills – namely the Southern Sudan Public Service Broadcasting Bill, the Independent Broadcasting Authority Bill and the Right to Information Bill – largely conform to international standards. At the same time, we have some general concerns with these Bills, as well as some more specific concerns (as set out in the following sections).

1. The Bills do not contain a preamble setting out the legislative context and their overriding goals. Such a preamble should situate the Bills within the broader framework of international human rights law and should refer to the international standards noted above. The preamble should also set out the overriding goals of the legislation in as much specificity as possible.
2. There should be greater clarity as to the meaning of Section 2 of each of the drafts on “Repeal and Saving”. The provision should more simply state that the legislation will override any inconsistent or contradictory primary or secondary legislation, and that other legislation will remain in force until it is repealed or amended.
3. The purposes of each of the draft Bills should be more specifically stated and should be framed in line with international standards. This is important among other things because it can be relied upon as an interpretive tool to help resolve any ambiguity in favour of an expansive concept of the right to freedom of expression and the right to information.
4. It is important that the draft Bills expressly recognise key principles relevant to the appointment of members of the Board of the Southern Sudan Broadcasting Corporation and the Board of Directors of the Independent Broadcasting Authority.

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These are as follows: there shall be an open nominations process and transparent public parliamentary hearings; all nominations shall be published in advance and the public shall be given an opportunity to make representations concerning these candidates; and, membership of the Board as a whole shall, to the extent that this is reasonably possible, represent a broad cross-section of Southern Sudanese society.

5. It is important that the draft bills provide that the South Sudan Broadcasting Corporation and the Independent Broadcasting Authority should be adequately funded (see further comments below).
6. The draft Bills do not set a time frame for their entry into force and the establishment of the bodies which they establish. For example, the Independent Broadcasting Authority Bill does not set a time frame for the establishment of the Authority once it has come into force. This is a potentially serious omission. A set timeframe, for example of six months after the Bill comes into force would be appropriate.

4. The Southern Sudan Public Service Broadcasting Bill

1. The purposes of the SSBC Bill should include the promotion and guarantee of the independence of the public service broadcaster from political or commercial interference within a framework of accountability to the public and stable financial provision for the public service broadcaster. It is important that the public service broadcaster is non-partisan and that it address issues of voice poverty, diversity and plurality.
2. Section 6(2) should state that the SSBC is independent of “any other person or entity, including the government and any of its agencies”. SSBC’s independence should be emphasised through a statement “that no person or entity shall seek to influence the members or staff of SSBC in the discharge of their duties, or interfere with the activities of SBBC, except as specifically provided for by law”.
3. In relation to Section 7(4) it is important to confirm that 25% is an appropriate figure for independent producers based in Southern Sudan. This figure should be based on a number of factors, including the development of the independent production sector and the number of available channels. Moreover, it is important that the Bill indicates the time-frame within which this figure will be achieved.
4. Section 13(3) should provide that the amount of the sitting allowance and other expenses of members of the Board shall be determined by the South Sudanese Legislative Assembly, instead of the Council of Ministers.
5. Section 15 should be more specific as to how the Managing Director is appointed. It should state that the Board shall, as soon as is practical after its establishment and by a vote of at least two-thirds of its members present and voting, appoint the Managing Director. Section 15 should contain a provision stating that the appointment procedure for the Managing Director shall be transparent and provide an opportunity for member of the public to make representations. It should also state that the Managing Director shall have the right to appeal to the courts if he or she is removed from office.

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6. Part V of the SSBC Bill sets out the funding arrangements for the SSBC. The level of the public subsidy should be secured for a reasonable period, for example for five years, rather than being reassessed on an annual basis. The level of public subsidy should be determined by the Assembly and not by the Executive, and it should be adjusted annually for inflation.

5. The Independent Broadcasting Authority Bill

1. The purpose of the Independent Broadcasting Bill should include establishing an authority that is not only autonomous but “which shall function wholly independently of State, governmental and party political influences and free from political or other bias or interference”, as well as promoting “pluralistic” broadcasting in the public interest.
2. Section 7(2) of the Bill should include a statement to the effect that the Authority enjoys operational and administrative autonomy “from any other person or entity, including the government and any of its agencies, and no person or entity shall seek to influence the members or staff of the Authority in the discharge of their duties, or to interfere with the activities of the Authority, except as specifically provided for by law”.
3. Section 10, on Tenure and Removal, provides that the President may remove a member from the Authority where that individual fails without valid excuse to attend meetings of the Authority for a period of more than three months. This is an unduly harsh sanction which cannot be justified on the basis that it is required to ensure that Board members attend meetings. It would be more appropriate to set a time limit of six months for removal for non-attendance at meetings.
4. Section 20, on Limitation of Liability, should state that no proceedings, civil or criminal, shall lie against the Authority, officer or employee of the Authority for an act or omission committed in the exercise or performance of his or her functions, provided that such acts or omissions are committed in good faith.
5. Section 21(2), on sources of funding, should be broader and should encompass “grants from government”, “loans”, “moneys received from other sources” and profit-making activities (such as sale of videos from programming), in addition to license fees, fines collected by the Authority and grants from local or foreign bodies. Section 21(3) should indicate that the Authority shall submit a budget for the Assembly’s approval a reasonable period *before* the beginning of the following financial year, say three months. Also, the provision should indicate that the budget statement shall be deemed to have been approved thirty days after having been placed before the Assembly, unless the Assembly specifically decides otherwise. Furthermore, there should also be a provision stating that the Authority shall not be liable to pay income tax on any property held or received or on any income earned and that the Authority is exempted from the payment of such tax.
6. Section 25(4), on New License Tenders, states that any tender application shall provide “evidence of establishment as a legal entity”. However, it should only state that a competitive tender shall require applicants to provide information as to the “the

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ownership structure”. There should be no blanket rules against issuing broadcasting licences to applicants based on their legal form.

7. The Independent Broadcasting Authority Bill should provide that applications for a broadcast license will be published on the Authority’s official website and the official gazette at least 60 days prior to the public hearing at which they are to be assessed, provided that sensitive commercial or other information provided by the applicant will be removed.
8. Section 34, on license fees, should provide that the proposed schedule of applicable license fees shall be placed before the Southern Sudan Legislative Assembly for a period of at least 30 days and, unless the Legislative Assembly decides otherwise, shall come into force at the end of this period. The schedule should then be published in the official gazette and on the website of the IBA. The Authority should also be able to adopt regulations setting out general license terms and conditions by notification in the official gazette and on the website.
9. Section 47(2) should state that, in cases of repeated breach of licence conditions, the Authority may order a licensee to pay a fine not exceeding 2% of the licensee’s total revenues for the previous year, instead of a fixed fine at 100,000 SDG, as this is a fairer method for assessing the level of fines.

6. The Right to Information Bill

1. Section 3 of the Right to Information Bill, on Purpose, should clarify that its aim is to provide: (1) a right of access to information held by public bodies in accordance with the principles that such information should be available to the public, that necessary exceptions to the right of access should be limited and specific, and that decisions on the disclosure of such information should be reviewed independently of government; and (2) a right of access to information held by private bodies where this is necessary for the exercise or protection of any right, subject only to limited and specific exceptions.
2. Pursuant to the proposed Section 35(1), the appointment of the Information Commissioner will be by a simple majority of the Assembly rather than by a two-third majority vote as proposed in the ARTICLE 19 draft bill. The disadvantage of the lower threshold is that the position would not necessarily have the backing of a significant cross-party majority of Assembly members and might not have the confidence and sense of public ownership that such support would bring to the office.
3. Section 48(1), on Good Faith Disclosures, appears to protect individuals who expose information on wrongdoing, often referred to as “whistleblowers”. The Right to Information Bill should also include a more general provision on good faith disclosures which protects individuals against “civil or criminal action, or any employment detriment, for anything done in good faith in the exercise, performance or purported performance of any power or duty of this [Bill], as long as they acted reasonably and in good faith.”

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Recommendations:

- Each of the draft Bills should include a preamble setting out the guiding principles of the legislation, along with a commitment to respect the relevant international and regional human rights instruments.
- The purposes of each of the draft Bills should be set out more clearly and should be framed in line with international human rights law.
- Section 3 of the draft Ministry of Information and Broadcasting Bill should be revised. The Ministry should not exercise regulatory powers over broadcasting.
- Section 9(1) of the draft Ministry of Information and Broadcasting Bill should be revised so that the power to investigate any existing or potential breach of media and access to information laws vests in an independent and impartial body.
- Section 4 of all of the draft Bills (with the exception of the Ministry of Information and Broadcasting Bill) should refer to the international and regional human rights instruments to which Sudan is party.
- The draft Bills should provide that the appointment of members of the Boards of the Southern Sudan Broadcasting Corporation and the Independent Broadcasting Authority shall be undertaken in an transparent. All nominations shall be published in advance and the public shall be given an opportunity to make representations concerning these candidates. Membership of the Boards as a whole should represent a broad cross-section of South Sudanese society.
- The draft Bills should ensure that the South Sudan Broadcasting Corporation and the Independent Broadcasting Authority are adequately funded.
- The draft Bills should stipulate a time frame for their entry into force and for the establishment of the bodies which they establish.

About the ARTICLE 19 Law Programme

The ARTICLE 19 Law Programme advocates for the development of progressive standards on freedom of expression and access to information at the international level, and their implementation in domestic legal systems. The Law Programme has produced a number of standard-setting publications which outline international and comparative law and best practice in areas such as defamation law, access to information and broadcast regulation. These publications are available on the ARTICLE 19 website:
<http://www.article19.org/publications/law/standard-setting.html>.

On the basis of these publications and ARTICLE 19's overall legal expertise, the Law Programme's operates the Media Law Analysis Unit which publishes around 50 legal analyses each year, commenting on legislative proposals as well as existing laws that affect the right to freedom of expression. The Unit was established in 1998 as a means of supporting positive legal reform efforts worldwide, and our legal analyses frequently lead to substantial improvements in proposed or existing domestic legislation. All of our analyses are available online at <http://www.article19.org/publications/law/legal-analyses.html>.

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